NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Statement for the Record

Before the

Senate Committee on Veterans' Affairs

Concerning Pending Legislation

To include S. 1024, Veterans Appeals Improvement and Modernization Act of 2017

May 17, 2017

Chairman Isakson, Ranking Member Tester, and members of the Committee, the National Organization of Veterans' Advocates (NOVA) would like to thank you for the opportunity to offer our views on pending legislation, to include S. 1024, Veterans Appeals Improvement and Modernization Act of 2017. Our statement will focus on this bill.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 500 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

Attorneys and agents handle a considerable volume of appeals at BVA. In FY 2015, for example, attorneys and agents handled 14.9% of appeals before BVA. This number was fourth only behind Disabled American Veterans (28.1%), State Service Officers (16.5%), and American Legion (15%). U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2015* at 27. So far in FY 2017, attorneys and agents have represented appellants in 16.8% of appeals decided, third only to Disabled American Veterans (31.2%) and American Legion (19.8%). *Board of Veterans' Appeals – VACOLS – Representation in Appeals Cases* (October 1, 2016 through April 30, 2017).

NOVA members have been responsible for significant precedential decisions at the CAVC and Federal Circuit. In addition, as an organization, NOVA has advanced important cases and filed amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011)(amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013)(addressing VA's failure to honor its commitment to stop applying an invalid rule); *Robinson v. McDonald*, No. 15-0715 (July 14, 2016)(CAVC amicus).

NOVA does not oppose the bill if the effective date protection extended to court proceedings remains in the legislation. In addition, as detailed below, because of VA's inconsistent inclusion of NOVA as a stakeholder in this process, we ask the Committee to include NOVA (as well as the original participants in VA's 2016 summit) as stakeholders considered "appropriate" under the statute for purposes of the collaboration necessary to certify the program is ready to implement.

BACKGROUND

In March 2016, NOVA was invited to participate with a group of stakeholders in a three-day summit, and at occasional meetings thereafter at VA's convenience, to discuss VA's appeals reform proposal. The framework provided by VA, and modified during the course of these meetings, became the basis of legislation considered in 2016. NOVA testified before this Committee in May 2016 on such appeals reform legislation. National Organization of Veterans' Advocates, Inc., *Statement of Diane Boyd Rauber, Esq., Executive Director, Before the Senate Committee on Veterans' Affairs Concerning Pending Legislation* (May 24, 2016). Because NOVA expressed disagreement with some of the proposal's features, VA repeatedly excluded NOVA from continuing discussions and important dialogue amongst the summit participants.

NOVA thanks the Committee for its time and effort to address the concerns expressed by NOVA and other stakeholders, as well as the General Accountability Office (GAO), in S. 1024. These improvements include, among others, the extension of effective date protection to decisions of the U.S. Court of Appeals for Veterans Claims, reversion to the current standard for filing a notice of disagreement, and robust reporting requirements for VA. We detail additional considerations below that should be addressed to ensure preservation of the veteran-friendly benefits process developed and preserved by Congress for many decades.

APPEALS REFORM STATUTORY FRAMEWORK

EFFECTIVE DATE PROTECTION

As NOVA noted in the 114th Congress, this new framework removes many procedural and due process protections for veterans. To offset the removal of some of these protections and eliminate "effective date traps," VA proposed the primary benefit conferred to veterans under its original proposal: the ability to preserve the effective date of a claim denied in a BVA decision by filing a "supplemental claim" within a year of that denial (with no limit to the number of times the veteran can avail himself of this option).

NOVA testified last year that it was inconsistent to limit effective date protection solely to decisions of the agency of original jurisdiction and BVA, and fail to provide that same one-year period after a final CAVC decision. Such a limitation could result in far fewer veterans exercising their hard-fought right of judicial review because of concerns over losing effective date protection. For example, if BVA declines to find VA failed to fulfill its duty to assist by obtaining an adequate examination for a veteran, that veteran may feel required to obtain a costly private opinion to preserve an effective date rather than seeking judicial review to enforce what VA was required to do all along.

Judicial oversight is critical in the implementation of a new process, especially given the shrinking reach of the duty to assist. NOVA applauds the inclusion of effective date protection for veterans after a court decision and urges the Committee to retain this language in spite of VA's opposition to it.

Recommendations: This legislation codifies an existing effective date protection under 38 C.F.R. § 3.156(b), which treats new and material evidence submitted "prior to the expiration of the appeal period or prior to the appellate decision if a timely appeal has been filed" as if it had been filed at the beginning of the appeal period. NOVA recommends the provisions of 38 C.F.R. § 3.156(c) also be codified in the statute as an important protection for the effective dates of claims for veterans who find additional service records after an original claim.

NEW AND RELEVANT EVIDENCE STANDARD

During the course of the appeals summit meetings, the stakeholders generally agreed the "new and material" standard should be eliminated. There was significant discussion on this topic, with the stakeholders generally agreeing the standard should be "new" evidence only. Instead of following this consensus, VA inserted the term "relevant" to replace "material."

First, NOVA maintains merely trading "relevant" for "material" will not significantly reduce the adjudication burden on VA. VA's proposed standard maintains the current two-step analysis to reopen a claim – first, whether the evidence is new and, second, whether that new evidence is relevant. Removing "relevant" would allow VA to simply adjudicate the merits every time and eliminate the need to make a threshold determination, which in the current system results in remands and additional delay.

Second, the definition of relevant evidence – "evidence that tends to prove or disprove a matter in issue" – on its face is more stringent than the current definition of "material" evidence – "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." Furthermore, what effect the "relevant" evidence standard would have on veterans is completely unknown, whereas extensive case law exists concerning the "material" evidence standard. If VA truly intends to create an evidentiary burden easier to meet than "material" evidence (which NOVA supports), the best way to ensure that is to simply require "new" evidence.

Recommendations: The words "and relevant" should be deleted from 38 U.S.C. § 5108 and the definition of "relevant" found at 38 U.S.C. § 101(35), both as proposed in this bill, should be stricken. In the alternative, the standard should remain as it is currently – "new and material." If the "relevant" standard is retained, we request Congress make an

unambiguous statement of its intent that this standard be interpreted as a lower burden than current law.

SUBMISSION OF EVIDENCE ON APPEAL

Regarding evidence in the non-hearing docket, section 7113(b)(2)(B) puts a burden on veterans at the time an NOD is filed by requiring the veteran to submit evidence with the NOD or within 90 days, and make an election for a hearing. Given that veterans often are unrepresented until after the filing of an NOD, there is no reason to require that irreversible legal decisions be made at that exact moment. This provision is too restrictive; if the case is waiting to be reviewed by BVA, it is more veteran friendly (and does not unduly burden BVA) for that period to be open until the decision is made.

Recommendations: The veteran should be permitted to submit evidence or request a BVA hearing up until the date of BVA's decision, or until another reasonable period prior to a decision being made.

DOCKET MANAGEMENT

NOVA maintains that a veteran who only wants to submit additional evidence to BVA should not be required to go into the hearing docket. BVA currently has an enormous backlog of hearing requests – approximately five to six years – and discussion of implementation generally has not included VA's plans for reducing that backlog. It is not veteran friendly to force an appellant to wait for significant periods of time if he is not interested in a hearing but would like to submit evidence.

NOVA appreciates the inclusion of a requirement in section 7107 that the Secretary provide a report describing the docket "for cases in which no hearing before the Board of Veterans' Appeals is requested in the notice of disagreement but the appellant requests, in the notice of disagreement, an opportunity to submit additional evidence." NOVA urges the Committee to require such a docket.

Recommendations: It should be made clear that a veteran can move into the non-hearing docket without penalty – with the same or more favorable docket number – if he determines he no longer wants a hearing after the initial request.

DUTY TO ASSIST

As noted above, veterans gain effective date protection in a new system. In exchange, BVA is relieved of an aspect of its duty to assist the veteran, as amended in 5103A(e): "The Secretary's duty to assist under this section shall apply only to a claim, or supplemental claim, for a benefit under a law administered by the Secretary until the time

that a claimant is provided notice of the agency of original jurisdiction's decision with respect to such a claim, or supplemental claim, under section 5104 of this title." The understood purpose behind this provision is to relieve BVA of the obligation to remand for additional development due to a duty to assist triggered by evidence submitted after the agency's decision.

Recommendations: This provision should be clarified to ensure the restriction on the duty to assist at BVA is limited to a duty triggered by evidence submitted after the agency's decision and does not apply to affirmative duties required to be performed by BVA in the conduct of its adjudication process.

ABILITY TO CHANGE "LANES"

NOVA appreciates the added language of section 5104C(2)(A), (B), (C), and (D) that provides guidance regarding a veteran's right to take various actions permitted by the statute at different times and to take different actions on different claims.

Recommendations: Section 5104C(2) should make clear the time period is tolled while the veteran is in a particular lane, so that if he chooses to withdraw from a lane after the expiration of the original one-year period and seek relief in a different lane, his original effective date is preserved.

NOTICE OF DISAGREEMENT

NOVA appreciates inclusion of a more reasonable standard for veterans when filing the notice of disagreement (NOD) by reverting back to the requirement that a veteran "shall identify the specific determination with which the claimant disagrees."

Recommendations: A provision should be added requiring VA to provide the claimant with notice of and an opportunity to cure the defect before BVA dismisses an appeal due to the veteran's failure to specify the determination with which she disagrees.

IMPLEMENTATION ISSUES

Successful implementation of this legislation will be key if it is truly to be the positive change veterans deserve and VA promises. Successful execution of VA's proposed process hinges on its ability to **consistently meet its goals** of adjudicating and issuing decisions in the 125-day window identified in its "middle lane" and deciding appeals within the one-year period before BVA. As demonstrated with the prior backlog of original claims and scheduling of medical appointments, VA often struggles to meet its own internal goals to the detriment of veterans.

GAO recently described its concerns with VA's ability to implement a new process while resolving legacy appeals. U.S. Government Accountability Office, *VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions* (GAO-17-234)(March 2017)(hereinafter GAO Report). GAO's concerns have been shared by some stakeholders.

Therefore, the extensive reporting requirements and requirement that the Secretary certify VA's readiness to implement the new system are critical. These requirements must remain in the legislation. Because VA stated it cannot pilot this system as recommended by GAO, congressional oversight is necessary. The legislation has far-reaching implications; many of them likely unforeseen until the system is implemented.

Recommendations: As noted above, NOVA has been included as a stakeholder when it has been convenient for VA. Bringing the major organizations together initially allowed VA to state there was full consensus on the framework. However, when NOVA disagreed with some features of last session's bills, VA declined to include NOVA in much of the ongoing discussion and negotiations with the organizations that participated in the original summit. As noted above, given the high percentage of involvement by attorneys and agents at BVA and the CAVC, we ask the Committee to include NOVA as a stakeholder (along with the other original summit participants) considered "appropriate" under the statute for purposes of the collaboration necessary to certify the program is ready to implement.

Furthermore, because this system is predicated on veterans making significant choices in relatively short periods of time, VA must commit to providing attorneys and agents, and their professional staff members, with consistent electronic access to claimants' files. To its credit, VA agreed to provide attorneys and agents with remote access last fall. However, to allow veterans to fully access their right to representation and make an informed choice as to how to proceed when faced with a denial, access must be expanded and improved.

NOVA urges Congress to fully fund VA's information technology budget requests, especially innovations needed for VBMS and modernization of BVA systems. Modern IT systems, to include electronic case filing systems common in other venues, are necessary tools that benefit veterans, their advocates, and VA employees.

ADDITIONAL CONCERNS

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

VA often cites the veteran's submission of evidence as triggering the need for additional development. *But see* GAO Report at 25 ("VA lacks data to inform and confirm its understanding of the root causes of lengthy time frames. For example, VA lacks complete historical data on the extent to which submission of new evidence and multiple decisions and appeals occur, and thus cannot determine the impact of its current, open-ended process on appeals decision timeliness."). The reality is VA has consistently demonstrated difficulty fulfilling its fundamental obligation to provide veterans with adequate medical examinations and opinions in the first instance. Without substantive reform to this process, to include consideration of a greater role for private and treating physician evidence, it is unlikely procedural reform alone can solve systemic problems.

CONCLUSION

NOVA shares the concerns of VA and the Committee that veterans wait too long for a final and fair decision on appeal. NOVA welcomes the opportunity to work with VA and this Committee to ensure a fair and comprehensive reform of the system. NOVA further recommends adoption of the revisions outlined in our testimony. Thank you for allowing us to present our views on this legislation.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important legislation. For questions regarding this testimony or if you would like to request additional information, please feel free to contact:

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