Federal Bar Association

Veterans & Military Law Section

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May 18, 2016

Hon. John Hardy Isaakson
Chair
Senate Committee on Veterans Affairs

Hon. Richard Blumenthal
Ranking Member
Senate Committee on Veterans Affairs

Dear Senators Isaakson and Blumenthal:

The Veterans and Military Law Section (V&MLS) of the Federal Bar Association is pleased to submit comments on the proposed legislation regarding amendment of the claims appeals process within the Veterans Benefit Administration. The opinions herein asserted are those of the Veterans and Military Law Section and not necessarily those of the entire Federal Bar Association.

As a general matter, review of this proposed legislation clearly demonstrates that the Secretary desires a more traditional adjudicatory process. However, if that is the legislative intent, then there must be a concomitant acceptance of the traditional role of paid counsel within that system. The claims system within the Department of Veterans Affairs is the only system within the Executive branch of government in which the right to paid representation is precluded until the initial record is complete. This legislation is indicative of an increasingly adversarial process in which it is critical that there should accrue to the veteran / claimant a corresponding increased right to representation qualified to litigate in the adversarial environment created by this legislation.

There are general issues which significantly affect the process as well, all of which may not be subject to address in this legislation, but of which the Committee should, in the opinion of V&MLS be aware, as they significantly affect the quality and the efficiency of the claim and appeal process, i.e. the environment within which this legislation will operate.

1. Jurisdiction of the CAVC and the Federal Circuit: The CAVC is the only Article I court without the judicial authority to provide the litigants before it with a final resolution in any case that comes before it. The only relief it may grant an appellant is to either reverse/remand or affirm, and even with grounds in the record for reversal, remand is the only possible ultimate resolution at the Court. While historically this may have been politically justifiable at the inception of the Court, that justification no longer exists. Granting the CAVC the judicial authority to issue dispositive rulings that terminate the potential for repeated remands of appeals on the same issues would have an ameliorative effect on backlogs. Similarly the restriction of the Federal Circuit's jurisdiction to regulatory and legislative interpretation is an artificial limitation on the traditional jurisdiction of a U.S. Circuit Court of Appeal and in a sense limits the recourse of the veteran population to a full and fair hearing of the issues raised.

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2. Qualifications of Board hearing examiners: The abysmal performance of the "Veterans Law Judges" as reflected in the 2015 Annual Report from the CAVC demands at a minimum the identification and decertification of those whose decisions are consistently overturned by the Court. The more prudent approach, in order to deconstruct the existing culture at the Board is to require that all hearing examiners at the Board meet Title V Administrative Law Judge standards of qualification. The statistics cited below for the reversal / remand rate for those Board decisions that are appealed to the Court are not unique at all to 2015. They have been in those ranges since at least 2002. While transition to Title V ALJs may require considerable initial expense, the reduction in necessary remands and improvement in quality and consistency of decisions will reduce the number of remands and the number of trips around the "hamster wheel" by the individual veteran, his/her survivor or dependent. This will ultimately more than pay for the transition.

3. Training Issues: There is no transparency regarding the sources or resources utilized by the Agency to train its rating personnel. Nor is there any discussion of the minimal qualifications for employment as a rater or as a trainee. It is the position of V&MLS that at a minimum applicants for these positions should be required to have an Associate Arts degree from a community college with required courses in biology, physiology and preferred health care related subjects. Most preferred would be a 4 year college degree with courses similarly relevant to the nature of subject matter of claims and health care within the VA environment.

   The most egregious deficiencies are in the training of Board personnel. The 2015 Annual Report issued by the CAVC shows that of the 4,030 dispositions of appeals made by the CAVC in 2015, only 445 (11%) were affirmances of Board decisions. 77% (rounded from 76.6%) of the dispositions of appeals were reversed or remanded on at least one ground. There is no excuse for this level of performance on the part of any government entity supported by the American taxpayer. There were 2873 EAJA petitions granted by the Court during this time; a rate of 50% of the remands & reversals, indicating that the Agency was substantially in error at least 50% of the time. This is indicative of substantial deficiencies in the education of Board personnel. Congress has never addressed this issue. It is time to do so.

4. Leadership Issues: Disposition statistics of this nature are indicative of first, an insular culture with a mindset resistant to the developing CAVC case law by which its decision-making processes by law are to be governed. Who or what is providing the instructional leadership and how is the curriculum developed? Secondly it is clear that the

administrative leadership is non-existent. There has been an “acting” Board chairperson for far too long. It is time to insist that a qualified Board Chairman be appointed and confirmed and given the authority to decline to recertify those hearing examiners (euphemistically characterized as “Veterans Law Judges”) whose decisions result in excessive remands and reversals at the CAVC. Too many appeals are at the Court for the second, third and fourth time as a result of the failure of the hearing examiners to follow clear instructions given by the Court.

Discussion of proposed legislation

Definitions: The initial proposals to redefine the process by modernizing the definitions under Sect. 101 of Title 38 seeks to remove any barriers perceived to exist to the adjudication of claims through reassignment from the Regional Office with geographical jurisdiction over the veteran’s claim to “specialty offices” often far removed from the veteran. While there may be some value in doing that in the instances regarding subject matter, codification provides too much incentive to remove the matter from any reach by a veteran requesting a review within the Agency of Original Jurisdiction (AOJ).

Similarly , removing the word “material” in lieu of “relevant” in the consideration of a readjudicated or “supplemental” claim requires the claimant to “prove” the claim through the evidence submitted, a legal standard to which the veteran may not be held. Similarly, replacing the terms “re-opened claim” and “increase in benefits” with “supplemental claim” alters the landscape by cluttering the process with collateral litigation. The definition proposed does not discriminate the objection to the initial rating benefit granted from a later claim for increase in benefits. What is clear is that the bar for re-opening a previously denied or insufficiently adjudicated claim would be much higher, and if filed within a year of the original decision, no notification would be required. These provisions contribute to the Agency’s increasing view of the claims system as an adversarial environment.

As matters stand, the claimant veteran, widow or dependent may only retain counsel prior to the promulgation of a rating decision on a pro bono basis. The basis for this limitation was the premise that the benefits claims system is non-adversarial. The national VSOs were deemed more than capable of assisting the veteran in pursuit of compensation. Since the passage of the VJRA there has been a gradual shift in the nature of the claims system from non-adversarial to a system increasingly governed by an escalating body of decisional law which is entirely inconsistent with the concept of non-adversarial. The proposals in this Bill advance the adversarial elements further than ever before. It is, in the opinion of the V&MLS time to revisit the denial of paid representation at the initiation of the claim.

Duty to Assist: "(c) Section 5103A(f)" underscores the raising of the evidentiary bar to re-adjudication of disallowed claims to a standard that requires that new evidence "prove" the claim rather than be simply "material."

Any doubt as to the shift to an adversarial environment is removed with the proposed addition of Sect. 5103B removing the obligation of the duty to assist from any stage above the initial rating decision. It would, under the provisions of (a), (b) and (c) of this amendment exist only within the original rating process and after the issuance of a "notice" of the rating decision apply neither to any "higher review within the AOJ" nor to any obligation on the part of the Board. Further, the correction of a duty to assist error during a "higher level review" within the AOJ [(1)] is dependent upon the "identification" of said error by the reviewer. There is no duty imposed upon the reviewer to search for or identify a violation of the duty to assist. Remand for correction is required if the claim cannot be granted in full.

Identification of a duty to assist error at the Board [(2)], if the failure occurred prior to the "notice" of the original rating decision, triggers remand for correction if the claim cannot be granted in full. This provision also includes a provision that allows the Board to order an advisory medical opinion as part of the correction. Flaws in the original rating decision are in most instances the result of reliance on an inadequate medical exam, followed by failure to obtain critical records and failure to appropriately consider lay evidence. Current litigation and Agency investigations indicate that this aspect of the claims system is far more troubled than was previously considered with the revelation that an estimated 25,000 veterans may have had improperly conducted exams for TBIs by unqualified examiners. V&MLS is concerned that it is essential that opportunity for paid representation and the opportunity to present additional evidence with or subsequent to the NOD is essential to improving the cost effectiveness of the system, enhancing the perception of fairness.

Ancillary to this concern is that of the lack of any discovery in either the initial AOJ rating process or in the review process. Credentials of examining personnel and often the identities of examiners and rating personnel are barred from discovery procedures available in similar proceedings in other agencies that are in those jurisdictions considered elementary administrative due process. Transparency in this aspect of the system would conserve agency resources In the long run and diminish the lengthy appeals and litigation surrounding the issue of adequacy of examinations.

The Duty to Assist is a cornerstone concept of Veterans Law. It is the creature of a paternalistic, veterans-first adjudicatory philosophy inherent in the claims system. It is the concept upon which the entire structure of that system rests. It is also the rationale by which paid representation has been limited to the appellate stages of the claims process. The imposition of the Duty to Assist at every stage of the claims process from the initial processing of the claim through the hearing and the consideration before the Board is also the cornerstone of nearly every decision by the CAVC. The limitation of the duty to assist as proposed by this legislation poses a significant impediment to administrative due process on the part of the impaired or pro se

veteran before the Agency at any stage of the proceedings. V&MLS strongly opposes any limitation of the duty to assist requirement anywhere in either initial claim or the review of denial of the claim.

Sect. 5104A: V&MLS has no issue with this provision. Any favorable finding should be, as a matter of the law of the case binding on further adjudicatory action.

Sect. 5104B: The provision, under (b) of this Section requires that a request for review by the AOJ be specific as to which office of the AOJ is requested. This requires more precise language. It appears to allow for review by a different set of eyes in another office, i.e. more independent review. ***If*** this is the case, V&MLS is not opposed, and continues to urge that the duty to assist be continued, especially for the impaired or pro se claimant.

(a) V&MLS does not disagree with the concept of permitting a request for higher level review within the AOJ. This appears to retain the process of the Decision Review Officer. When this process was allowed to function as it was designed to function it was/is beneficial to efficiency of time and resources and eliminated the need for appeals to the Board by resolving the issues at the AOJ. V&MLS approves of this provision.

(b) V&MLS approves of retaining the one year time allocation for filing a Notice of Disagreement (NOD). However, V&MLS has significant reservations about prescribing overly restrictive provisions governing the form such disagreement must take. The forms "prescribed by the Secretary" are, in their current versions, very narrowly worded and spaced. They are clearly designed to limit the scope of the disagreement and are antithetical to allowing the veteran/claimant any freedom of expression. They are also contrary to existing case law regarding the definition of a NOD. V&MLS urges the Committee to provide guidelines for content of the NOD but to phrase it in the permissive "should" rather than exclusionary mandatory language and to require that the "form prescribed by the Secretary" include sufficient space for addressing the claimant's concerns.

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(c) V&MLS urges language added to this provision that requires that copies of Notices under this provision be supplied to both the claimant and any representative, either VSO or counsel. V&MLS recommends that all communication relating notices of decisions or decisions be sent by certified mail. V&MLS further urges the Committee to provide for pre-decisional consultation with any representative of record for the purpose of resolving evidentiary and legal issues that may have arisen in the course of investigating and developing the claim. The purpose for this is to avoid unnecessary higher level review and permitting early resolution of issues presented. V&MLS notes that "previewing" decisional action is common procedure between rating personnel and VSOs who are often co-located in ROs. This should be standard procedure for all representatives, as it is conducive to filling in evidentiary gaps, clarification and administrative best practices.

(d) Evidentiary Record: The added Section 5104B also seeks to close the evidentiary record at the issuance of the initial rating decision. While there are provisions in later elements of this Bill for the submission of further evidence at the Board level, to the average pro se veteran, this shuts the door to submission of further evidence. Under this modification of existing law, either a VSO or an attorney retained subsequent to the Notice of Disagreement would be ethically bound to seek by motion to modify the notice of disagreement to provide for utilizing the "hearing option" track at the Board in order to fill in the evidentiary gaps left by either inadequate representation or by the omissions of the pro se veteran.

The unrepresented veteran who fails to ask for the "hearing option " docket in the notice of disagreement and fails to comprehend the consequences of failing to do so loses any opportunity to submit additional evidence in this forum short of filing a supplemental claim, in which the evidentiary bar is much higher. Entry into the appellate stage by either paid or lay representation, under this provision, would require a motion to amend the notice of disagreement to request a "hearing option" docket or higher AOJ review in order to fill in the evidentiary gaps or argue evidence that is relevant but otherwise not of record.

V&MLS categorically disagrees with this provision as it constitutes as a denial of procedural due process and is utterly contrary to the concept of a "veteran-centric VA," unless provision is made for notice of this limitation prominently articulated within the body of the rating decision. Such notice should also advise the claimant that selection of the "hearing option" docket in an appeal to the Board will permit the submission of further evidence.

The fact remains that the combined effect of limitation of submission of further evidence, limitation of the duty to assist and raising the evidentiary bar for supplemental claims / readjudication leaves very little that is non-adversarial within the system. While amending Sect. 5904 to allow the veteran paid representation subsequent to the notice of decision by the AOJ is somewhat ameliorative it fails to permit the veteran access to paid representation in order to better ensure that the AOJ adequately develops the record from the beginning. It should be noted that doing so accords the veteran the Sixth Amendment right to representation by counsel enjoyed by every claimant before every other Administrative agency.

(e) V&MLS agrees that any review by any entity within the Agency at any level should be DE NOVO

Sect. 5104(b): The enumeration of required contents of any notice of denial of benefits is certainly useful, but the language of this amendment appears to codify that which has previously appeared as "Statement of the Case." Limitations should be included which preclude the utilization of endless "explanations" which yield no aids to comprehension and serve only to obfuscate the obvious. The inclusion of the requirement that the content state simply and precisely the basis for the decision in terms readily understood by an unrepresented claimant. V&MLS would then be supportive of this provision.

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Proposed Sect. 5104(b) requires, within the enumeration of elements of a denial, (if applicable), identification of criteria that must be satisfied in order to grant (the benefit sought). Yet, any higher review must be done on the basis of evidence considered in the initial development. This is utterly inconsistent and will engender substantial numbers of "supplemental" claims. It makes no sense to require the Agency to advise the claimant of what evidence is missing and at the same time preclude the introduction during the Higher Review of evidence that will satisfy the missing elements. lThis is not an issue of legal sufficiency or insufficiency; it is a matter of common sense.

Sect. 5108 Supplemental Claims—This amendment of Sect. 5108 replaces "reopened claims" with "supplemental claims:" Under this provision "new and relevant" evidence is required for the adjudication of a supplemental claim. This once again raises the adjudicatory bar much further than does the language of the existing provision. Whereas "material" requires only that the evidence tend to influence the trier of fact because of its logical connection to the issue, "relevant" would raise the bar to evidence that relates to or bears directly on point or fact in issue; proves or has tendency to prove a pertinent theory in the case. This is a technical, legal requirement imposed on a process that is required to be veteran-centric. This language is a trap for the pro se claimant, inviting a quick denial. V&MLS urges the Committee to recognize that this is once again a further shift to an adversarial process in which paid representation should be a recognized right accruing to the claimant.

Sect. 5109 is given a new subsection under which the Board may remand a claim to the AOJ for procurement of an advisory medical opinion to correct an error by the AOJ to satisfy its duties under 5103A ***when*** the error occurred prior the AOJ decision on appeal. This adds an unnecessary step to the review process – requiring the matter to be remanded yet again. Nor does it specify whether this applies to errors on the part of a "higher-level reviewing authority" within the AOJ. As a significant number of duty to assist errors are incident to inadequacies of medical exams, this should be clarified.

Sect. 5904 Amendment: The proposed amendment of (c)1 and (c)2 appears to move the point at which paid representation becomes available to the veteran to the point of the issuance of the decision on the initial claim by the AOJ; "notice of the Agency of Original Jurisdiction's initial decision under Section 5104 of this Title." Under the existing statutory provisions paid representation is not available to a veteran / claimant until the point at which the Notice of Disagreement is filed.

Given the existing political climate, the ban on the availability to the veteran of paid representation at the initial submission of a claim may be unlikely to be lifted. However, it should be noted that Congress has, within the last decade, recognized the advisability of allowing paid representation before the Agency. Merely providing an opportunity for paid representation prior to submission of the notice of disagreement is a benefit without practical application; there is no mechanism for repairing a deficient record prior to filing the Notice of Disagreement before the door to submission of additional evidence is closed. The pro se veteran, especially an

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impaired pro se veteran is out in the cold. In view of the proposed significant restriction of the opportunities for introduction of additional evidence, it is critical that these provisions be as broad as possible. V&MLS supports this provision with significant reservations as stated above.

Sect. 7105 Amendments:

V&MLS is supportive of the proposed amendment (b)(1), establishing the time for the filing of the notice of disagreement within one year of the mailing of the notice of the Agency of Original Jurisdiction's decision.

The proposed amendment of (b)(2) establishes legal, technical requirements of allegation of specific errors of law or fact to be inscribed on the Secretary's specific form. Once again, the process shifts further toward an adversarial process in which the unrepresented claimant is presumed to have an unrealistic level of knowledge or expertise. While the opportunities for representation are broadened, the fact is that significant numbers of claimants / appellants before the Board and the Court are unrepresented (27% of appellants at the Court were pro se at filing the NOA in 2015). It is critical to the veteran-centric intent of the claims process that there are provisions for liberal interpretation of what constitutes conformity with the requirement of this provision as proposed. V&MLS urges careful attention to language in this provision as proposed and implementing regulations to avoid adverse impact on the pro se claimant.

V&MLS is supportive of the proposed amendment (b)(3) in that it establishes a three track option for appealing the decisions of the Agency of Original Jurisdiction to the Board. We do, however, suggest that the language more clearly identify the tracks by enumeration.

V&MLS is similarly supportive of the proposed language of Sect. 7105(c), maintaining the jurisdictional finality of Agency of Original Jurisdiction decisions that remain unappealed after one year.

The provisions of 7105 (d) as amended eliminate the Statement of the Case and the laborious process it entailed. V&MLS agrees with this provision with the proviso that in order to maintain the veteran-centric character of the claims process that the language also provide that submissions by pro se claimants be read liberally for allegations of error of law and fact. The unschooled or impaired pro se claimant must not be penalized by technical legalistic requirements he/she is incapable of meeting.

Sect. 7106; V&MLS supports the deletion of Sect. 7106.

Sect. 7107; V&MLS supports the amendment of Sect. 7107(a), (b) and (c) as proposed. V&MLS does, however, urge that sub-section (f) be amended to require that the Board screen those cases in which the claimant is pro se for adequacy of the record and undertake such further development as may be necessary to satisfy the duty to assist. In this regard V&MLS re-iterates our strong disagreement with the elimination of the duty to assist after the initial rating decision.

Sect. 7113; V&MLS supports the provisions of this Section with the caveat that the due process requirements of the duty to assist be afforded the pro se appellant, particularly if review of the record demonstrates that the appellant is impaired. This additional provision is consistent with V&MLS position regarding the proposed restrictions on duty to assist, submission of evidence and the impact of these measures on the pro se and impaired claimant.

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Revision of Evidentiary Threshold for Medical Examinations and Opinions.

V&MLS strongly opposes this proposal. It constitutes an effort to overturn the longstanding precedential decision of the Court of Appeals for Veterans Claims in *McLendon v Nicholson, 22 Vet. App 79 (2004).* This decision rested on the determination by CAVC that VA's failure to order a C&P exam was arbitrary and capricious and a violation of the Duty to Assist. It was determined by the Court that the provisions of Sect. 5103(d) established a very low threshold for the requirement for medical examinations. In writing this decision, Judge Kasold iterated several examples of the linkage that this provision is designed to establish information, (*inter alia* – exposure to artillery fire indicative later development of hearing loss) that assists in informing the rater of another piece of the nexus picture to ensure that the rater has all of the information necessary to reach an informed and fair decision.

The language of the proposed revision imposes on the claimant the requirement of "objective evidence". This raises the evidentiary bar to the level of proof, rather than "indication." It appears that the proponent of this provision would require that the three elements articulated in (A) be met in order to reach the point that a C&P exam is required. Judge Kasold emphasized in the opinion that "Although the claimant may and should assist in processing a claim, it is the Secretary who has the affirmative, statutory duty to assist the veteran in making his case (Cit. omitted). It is the Secretary who is required to provide the medical examination when the first three elements of section 5103(d)(2) are satisfied, and the evidence of record otherwise lacks a competent medical opinion regarding the likelihood of medical nexus between the in-service event and a current disability. The Board is not competent to provide that opinion." *McLendon, supra, at 86* V&MLS cannot support this provision. Given the pending legislation before this Committee which proposes elimination of the duty to assist beyond the original decision by the AOJ, this is an unacceptable attempt to shift the burden entirely onto the claimant.

It should also be noted that implementation of a treating physician rule, wherein the VA treating physician (as well as the private physician when appropriate) are consulted on issues of nexus would improve the quality of medical evaluations and go a long way in relieving the stress of physician availability in VHA. The rationale that treating physicians will have too much sympathy for the patient to provide an unbiased opinion is specious at best as well as demeaning to the professional integrity of the treating physician. At a time when VHA is suffering from an

acute shortage of medical personnel the continued duplication of effort in this regard is a waste of taxpayer dollars.

S. 2487:

V&MLS supports this Bill with one qualification. We respectfully request that a provision be added in which VA is required to coordinate with Indian Health Service (IHS) to develop culturally competent suicide prevention programs for Indian women veterans. There are at this time no culturally competent mental health programs for Indian veterans at all. Indian women veterans, particularly those with MST / PTSD are at a very high risk because of the cultural consequences of their experiences. This bill needs to address that issue.

S. 2679:

V&MLS supports this Bill without reservation. The results of toxic exposure in Vietnam have yet to be fully counted. The generational effects have been largely ignored or swept under the rug of bureaucratic accountability. The children of the Vietnam veterans are now those in SW Asia; exposed to the toxins of the burn pits, burning oil fields, unidentified ordinance; we cannot afford to repeat the errors of yesterwar. This legislation is badly needed. We urge Congress to establish this Center for Excellence and monitor its progress annually.

S. 2888:

V&MLS supports this Bill without reservation. The residuals of long-term exposure to contaminated water at Camp LeJeune are, again, not fully measured. Of particular concern are the families who lived on-post and raised children there. We urge that this legislation include substantial outreach to those veterans and families in order to study and address the down-range effects of this extensive contamination. It should be considered as well that many military families from outside Camp LeJeune accessed base medical, commissary and exchange facilities. This is commendable legislation that is needed to provide oversight and guidance to enssure VA's address of these issues within VBA.

S. 2919; S. 2896; S. 2883; S. 2520; S. 2049:

V&MLS is supportive of all of these measures as each provides for an area in which either VA has demonstrated a need for guidance or the circumstances of service have resulted in a separate need, as is demonstrated with the introduction of S. 2919.

Respectfully submitted,
The Veterans & Military Law Section
Federal Bar Association

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