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September 28, 2020

The Honorable Robert Wilkie
Secretary of Veterans Affairs
810 Vermont Ave NW
Washington, DC 20420

Dear Secretary Wilkie:

I am writing to follow-up on my April 15, 2020, letter regarding the Department of Veterans Affairs' (VA) decision to eliminate the 48-hour review by veterans' representatives that occurs during the claims process. Recent conversations with Montana veterans have reinforced my belief that this decision severely degrades the integrity of the claims process and is an example of VA's propensity to favor timeliness over quality. The negative effects of this decision have already been realized as multiple Veteran Service Organizations (VSOs) have reported an increase in avoidable errors leading to incorrect rating decisions for veterans.

The 48-hour review rule has been in place since the 1950s. It allows a fresh set of eyes to review a claims decision before the final rating decision. This process is beneficial to all parties – the veteran, their representatives, and VA – as it promotes efficiency, mitigates potential errors, and reduces the need for appeals. In *Rosinski v. Wilkie*, 31 Vet. App. 1 (2019), a case brought by a veteran's attorney trying to utilize the 48-hour review, the Court of Appeals for Veterans Claims (CAVC) ruled the Secretary must issue a final decision on whether accredited attorneys and claims agents must be given the same access to the 48-hour review as VSOs. In *Rosinski*, VA argued the 48-hour review was a "historical special relationship" between the VA and VSOs and should be maintained. However, when the CAVC ruled the Secretary must issue a final decision, VA reversed course and chose to scrap the 48-hour review period completely rather than find a solution that benefitted all veterans. This is unacceptable. And the veterans in Montana and across the country who have voiced opposition to this decision deserve to be treated better by VA.

As you know, VA has claimed that removing the 48-hour review will increase efficiency. However, a letter dated July 1, 2020, from the National Association of Attorneys General, points out that VA's internal procedures manual describes the purpose of the VSO review is to identify any clear errors or matters of discussion *before* a decision is made; and that correcting errors *after* a decision is made is time-consuming and adds additional work to an already overburdened appeals system. On average, veterans nationwide wait 93.4 days for a decision on their claims—challenging any notion that removing the review period would lead to a more efficient process. In a white paper in support of the 48-hour review, the Veterans of Foreign Wars (VFW) argues that the 48-hour review allows them to complete a final quality check for their clients that results in a correct rating decision. VFW consistently finds errors in 5-7 percent of all claims reviewed each year – proving that the 48-hour review period is beneficial to veterans and VA. Resolving errors in a claim can take months, with the Higher Level Review Processes and Board of

Veterans Appeals both having long wait times. Veterans should not have to wait for months for benefits they are entitled to receive.

A matter reviewed in a recent VA Office of Inspector General (OIG) report is an example of why the 48-hour review period is so important. On April 6, 2020, the Veterans Benefits Administration (VBA) issued guidance that changed the date of receipt for a claim from the date it was received at a VA facility to the postmarked date. The assignment of an effective date is a critical part of the decision-making process. In the case of mail with no postmarked date, the new VBA guidance instructed staff to consider the date of receipt as received no later than February 29, 2020. The OIG report released on September 17, 2020, titled, *Date of Receipt of Claims and Mail Processing during the COVID-19 National State of Emergency*, found that VBA staff failed to properly apply and implement the new policy for 98 percent of claims (or approximately 3,200 cases) during OIG's two-week review period in April. In their report, the OIG found that VBA staff failed to use the postmark date as the date of receipt, as well as failed to use a date of receipt of February 29, 2020, when a postmark date was unavailable. These findings confirm how valuable it would be for a 48-hour review process to be in place so that accredited VSOs, attorneys, and claims agents could catch this glaring error before a final decision is made. A nearly 100 percent failure rate for our nation's veterans is unacceptable, not to mention the delays from ongoing appeals to correct benefits that were lost or missed due to VA's oversight.

The bottom line is VA's role is to make it easier – not harder – for veterans to access earned benefits in a process that should be non-adversarial. Given that we are in the midst of the COVID-19 pandemic and veterans are relying on their benefits more than ever, it makes no sense to implement a policy change of this significance. The negative effects of this decision fall directly on the veteran, and I strongly urge VA to reconsider this decision. Veterans and their representatives deserve a voice during the claims process, and the removal of the 48-hour review severely reduces it.

Sincerely,

A handwritten signature in blue ink that reads "Jon Tester". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jon Tester
Ranking Member
Senate Committee on Veterans' Affairs