

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Prepared Statement**

**Kenneth M. Carpenter, Founding Member of NOVA**

**Before the**

**Committee on Veterans' Affairs**

**United States Senate**

**21<sup>st</sup> Century Veterans Benefits Delivery Act; Senate Bill 270; Senate Bill 681;  
and Discussion Draft of Legislation Calling for a  
Pilot Program on Treatment of Certain Applications for Dependency and  
Indemnity Compensation as Fully Developed Claims**

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On behalf of the National Organization of Veterans' Advocates, Inc. (NOVA), I would like to thank Chairman Isakson and Ranking Member Blumenthal for the opportunity to provide written testimony for the record during a legislative hearing of the Senate Veterans' Affairs Committee on May 13, 2015.

The National Organization of Veterans' Advocates, Inc. (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 to obtain benefits from the Department of Veterans Affairs (VA). NOVA members represent Veterans before all levels of the VA's disability claims process. In 2000, the United States Court of Appeals for Veterans Claims recognized NOVA's work on behalf of Veterans with the Hart T. Mankin Distinguished Service Award. NOVA currently operates a full-time office in Washington, D.C.

Our written testimony will address the "21st Century Veterans Benefits Delivery Act"; Senate Bill 270; Senate Bill 681; and the discussion draft of a bill calling for a pilot program on the treatment of certain applications for dependency and indemnity compensation as fully developed claims.

#### **THE "21ST CENTURY VETERANS BENEFITS DELIVERY ACT"**

NOVA fully supports the intent of this bill to improve the processing of claims for benefits by the Department of Veterans Affairs (VA). In its present form, NOVA does not believe that this intent will be realized. The bill's focus on the continued study of VA, while both necessary and laudable, does not provide the clear direction needed from Congress to make the structural change in the processing of claims and appeals. It is NOVA's position that the current claims and appeals procedures result in unacceptable delays for veterans and their families. NOVA believes that it is in the interests of all of the stakeholders in VA to reform the VA's claims and appeals process. To that end, NOVA would offer the following recommendations for statutory reform of the VA claims and appeal process.

An underdeveloped claim obviously results in the denial of a claim. It is also apparent that it is the development of evidence which allows VA to award benefits to claimants. Congress has made clear its unambiguous expectation that VA shall fully and sympathetically develop evidence to support a claim before making a decision on the merits. This expectation is not being accomplished by VA for a variety of reasons. However, regardless of the reasons, it is the lack of development of evidence which make appeals necessary. Claims are awarded after years of appeal because the evidence necessary to award benefits was not submitted or identified until after the VA's initial decision.

In NOVA's view, the challenge under the present statutory scheme for VA is the continuing need to make decisions based on evidence submitted after the appeal has been initiated and before the Board of Veterans' Appeals (the Board) makes its decision on the pending appeal. NOVA believes the notion of "closing of the record" to the submission of evidence on appeal is antithetical to a non-adversarial appeal process. NOVA acknowledges that there is a legitimate need for certain statutory adjustments to manage the evidence

consideration on appeal. With considered change, this can be accomplished without altering the pro-veteran nature of the claims and appeal process. The “21st Century Veterans Benefits Delivery Act” needs to incorporate these ideas in order to realize the goal to bring about meaningful change in the 21<sup>st</sup> Century delivery of benefits to veterans.

Therefore, NOVA would suggest that the “21st Century Veterans Benefits Delivery Act” be amended to require by statute that there be three discrete periods for the submission and consideration of evidence in support of a claim and during an appeal.

Period One would be in the initial stage of the claim where VA is responsible to fully and sympathetically develop evidence to support a claim before making a decision on the merits.

Period Two would be in the one year following the VA’s first decision. In this period, the veteran or claimant, after receiving the VA’s first decision on a claim, would be given one year during which additional evidence may be submitted for a *de novo* decision by a decision review officer (DRO) or to file a notice of disagreement and request a hearing before a DRO. If a notice of disagreement is filed, the DRO will decide whether the evidence submitted is sufficient to allow an award or whether further development is required.

Period Three would permit the veteran to submit evidence to the Agency of Original Jurisdiction (AOJ) for consideration by the Board. In addition, the Board would be authorized to develop evidence deemed necessary to award the benefit sought.

NOVA believes that these statutory changes will eliminate the need for multiple decisions by the AOJ when VA receives evidence after the AOJ’s first decision on a claim or claims. These statutory changes would create discrete periods for the receipt and consideration of evidence. VA could change its decision in whole or in part after its initial decision. However, an appellant who remains dissatisfied would be entitled to submit additional evidence to the Board. But only for consideration by the Board where the final administrative appellate decision would be made based on evidence submitted by the claimant or developed by the Board.

NOVA offers the following statutory reforms:

1. Amend the provisions of 38 U.S.C. § 7105 to eliminate the statement of the case and the VA-9.
  - A. This would make the filing of a notice of disagreement the only requirement for appealing an adverse VA decision.
  - B. This would significantly reduce the time for the certification of an appeal to the Board.

2. Additional amendments to 38 U.S.C. § 7105.
  - A. Require that when VA denies a claim, the VA's notice of denial shall include the following:
    - (1) A summary of the evidence in the case pertinent to each claim denied.
    - (2) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.
    - (3) A summary of the reasons for each denial.
    - (4) A binding concession of the facts found by VA to have been established by the evidence.
  - B. Allow for the submission of evidence in support of the claim for one year following the VA's decision to deny with or without the filing of a notice of disagreement.
  - C. Codify the VA's current regulatory provisions for *de novo* review by a decision review officer with express authority for the DRO to direct additional evidentiary development as deemed appropriate and necessary.
  - D. To provide for a second decision by VA based on evidence provided by the claimant in the one year following the VA's initial decision or as a result of evidence developed at the direction of the DRO.
  - E. To provide that after one year from the VA's initial decision or following the DRO *de novo* review, the A OJ will not be required to make any further decisions based on additional evidence submitted by the veteran or claimant. Any later evidence submitted will be subject to review and consideration by the Board.
  - F. Direct the A OJ to certify the appeal to the Board within 60 days after their second and final administrative decision based on the VA's receipt of a timely notice of disagreement.
  - G. To provide that the appellant will be permitted to submit additional evidence for consideration by the Board as part of its *de novo* review of the decision of the Secretary under 38 U.S.C. § 7104(a). All evidence submitted to the AOJ after the VA's second decision or evidence developed by the Board must be considered by Board in its decision.
  - H. Direct that the Board provide notice to the appellant and the appellant's representative that the appeal has been docketed by the Board and inform the

appellant of the deadline for the submission of additional evidence and argument.

- I. The Board will be given the authority to order the development of additional evidence deemed necessary for the award of a benefit sought on appeal. Before the Board develops any evidence, the Board shall inform the appellant and the appellant's representative what evidence the Board intends to develop and why.
  - J. No remands by the Board will be permitted to the AOJ for further development of evidence.
  - K. The Board would be given the authority to order the development of evidence by employees of the Veterans Benefits Administration as well as the Veterans Health Administration.
- 3. These reforms will not be effective without appropriate staffing and funding to the Board to properly implement these newly imposed duties.
  - 4. Congress shall mandate that all accredited representatives are entitled to electronic access to all records of the veteran or claimant.

### **Summary**

The above recommendations for statutory change to the claims and appeal process will permit VA to eliminate the backlog and develop an effective 21st Century benefits delivery system. The current statutory scheme does not provide an effective delivery of the benefits to which veterans and their families are entitled under law. Claimants need an appeal process which ensures a faster resolution of their appeals while ensuring that the right to submit evidence is not forfeited for the sake of efficiency.

### **SENATE BILL 270 - THE "CHARLIE MORGAN MILITARY SPOUSES EQUAL TREATMENT ACT OF 2015"**

NOVA fully supports this bill and urges in the strongest terms its enactment into law.

### **SENATE BILL 681 - THE "BLUE WATER NAVY VIETNAM VETERANS ACT OF 2015"**

NOVA also fully supports this bill and urges in the strongest terms its enactment into law. This bill represents an acknowledgment that all veterans involved in the conflict in Vietnam are entitled to the benefit of the presumption of exposure to Agent Orange for compensation purposes.

## **DISCUSSION DRAFT OF LEGISLATION - Calling for a pilot program on the treatment of certain applications for dependency and indemnity compensation as fully developed claims**

NOVA will offer its views on Title Two Compensation Matters, involving SEC. 201 dealing with medical examination and opinion for disability compensation claims based on military sexual trauma; SEC. 202 dealing with a report on standard of proof for service connection of mental health conditions related to military sexual trauma; SEC. 203 dealing with reports on claims for disabilities incurred or aggravated by military sexual trauma; SEC. 204 dealing with a proposed pilot program on treatment of certain applications for dependency and indemnity compensation as fully developed claims; SEC. 205 dealing with the review of determination of certain service in the Philippines during World War II; and SEC. 206 dealing with reports on department disability medical examinations and prevention of unnecessary medical examinations.

### **Sec. 201: Medical examination and opinion for disability compensation claims based on military sexual trauma.**

NOVA fully supports this portion of the bill as proposed. The proposed statutory changes will enhance and improve the adjudication of claims made based on military sexual trauma.

### **Sec. 202: Report on standard of proof for service connection of mental health conditions related to military sexual trauma.**

NOVA endorses the need for such a proposed report. In particular, NOVA believes that the current standard of proof provided under the provisions of 38 C.F.R. § 3.304(f) is too high. NOVA is especially supportive of this proposed bill's recognition that the mental health conditions related to military sexual trauma are not limited to post traumatic stress disorder. Additionally, NOVA appreciates that this bill recognizes the need to include sexual harassment as a military sexual trauma which warrants service connected compensation for a resulting disability from such psychological injury. The VA's adjudication of claims for compensation based on military sexual trauma will be improved by a statutory burden of proof for establishing entitlement for claims based on military sexual trauma.

### **Sec. 203: Reports on claims for disabilities incurred or aggravated by military sexual trauma.**

NOVA cannot express in strongest enough terms how important this proposed bill is to the victims of military sexual trauma. Mandating that VA report on the numbers of victims is long overdue. Victims need to know that they are not alone and that they are not the only ones. NOVA commends and recommends the creation of this bill and its ultimate passage.

### **Sec. 204: A proposed pilot program on treatment of certain applications for dependency and indemnity compensation as fully developed claims.**

NOVA has some concerns about a proposed pilot program on treatment of certain applications for dependency and indemnity compensation as fully developed claims. NOVA

believes that the notion of fully developed claims is inconsistent with the VA's duty to assist. More importantly, NOVA is concerned that all applicants and their representatives for compensation, whether under chapter 11 or chapter 13, believe that they have presented a fully developed claim. Claims for dependency and indemnity compensation for a service connected death can be complex when dealing with questions of whether there was a material contribution by a service connected disability to the veteran's cause of death. It is NOVA's view that expediting the treatment of a covered dependency and indemnity compensation claim will more often than not lead to a denial of benefits. However, if the claim were truly fully developed it would lead to an award of benefits. The problem with expediting these claims is the reality that claimants and too often their representatives do not understand the evidentiary requirements for such awards.

**Sec. 205: Review of determination of certain service in the Philippines during World War II.**

NOVA fully endorses these reviews. Too often, claimants entitled to benefits for their disabilities resulting from service in the Philippines during World War II are denied because of poor record keeping. NOVA believes that this proposed review is needed and should be approved by the Congress.

**Sec. 206: Reports on department disability medical examinations and prevention of unnecessary medical examinations.**

NOVA wholeheartedly supports this inquiry. It is NOVA's view that medical examinations are misused when competent medical evidence from treating medical professionals exists and is devalued based on VA medical examinations. NOVA would urge the Senate to consider the codification of the treating physician rule. NOVA is concerned that VA has become disproportionately dependent on VA examinations and uses VA examinations when the veteran's file already contains competent medical evidence from VA as well as non-VA medical professionals. Reliance on existing medical evidence is being circumvented because of the VA's dependency on its own examinations when the record includes existing competent evidence from VA as well as non-VA medical professionals. This would result in significant savings by obtaining information from the medical professionals who are actually providing treatment to the veteran.

Presently, Social Security claimants under the provisions of 42 C.F.R. § 404.1527 receive the benefit from what is known as the treating physician rule. Under this rule, medical opinions are statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of impairment(s), including symptoms, diagnosis and prognosis, what one can still do despite impairment(s), and physical or mental restrictions. *See* 42 C.F.R. § 404.1527(a)(2). Also, under this rule, a treating source's opinion is given controlling weight based upon certain specified factors. *See* 42 C.F.R. § 404.1527(c).

NOVA believes that there should not be two different standards for disability claimants. VA has not adopted this rule. NOVA submits that this rule should be codified by Congress for the benefit of veterans. Because this rule is not currently available to veterans, it is NOVA's

view that too often VA gives greater probative weight to the opinions of VA compensation and pension examiners over the evidence from treating professionals. NOVA believes that the treating physician's rule as used by Social Security will result in fewer denials and fewer appeals and represents a consistent public policy in this uniquely pro-veteran scheme.

We hope these suggestions will be of assistance to this Committee and to Congress.

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 NOVA Executive Director David Hobson by calling our D.C. office at (202) 587-5708 or by emailing David directly at [dhobson@vetadvocates.org](mailto:dhobson@vetadvocates.org).



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KENNETH M. CARPENTER received a B.A. in History & Political Science and B.A. in Philosophy & Religion, Southwestern College, Winfield, Kansas in June 1970. He received a J.D. from Washburn University, Law School, Topeka, Kansas in 1972; Masters in Adult & Community Counseling from Kansas State University, Manhattan, Kansas in March 1983.

He has been engaged in the private practice of law in Topeka, Kansas since 1973. Admitted to the following courts: Kansas Supreme Court, 1973; Federal District Court for the District of Kansas, 1973; 10th Circuit Court of Appeals, 1984; U. S. Court of Federal Claims, 1987; Federal Circuit Court of Appeals, 1989; Court of Appeals for Veterans Claims, 1990; United States Supreme Court, 1990. The practice of Veterans Law is the exclusive area of practiced by Carpenter, Chartered. He is a founding member of the National Organization of Veterans Advocates.

He is the President of Carpenter Chartered, a professional legal corporation. Carpenter Chartered began doing pro bono representation of disabled veterans in 1983. The primary focus of the firm's representation is with the psychiatrically disabled veteran, predominantly veterans with post traumatic stress disorder. The firm also specializes in cases involving total disability ratings and earlier effective dates. The firm also does requests for revisions based on allegations of clear and unmistakable error and survivor claims for dependents of veterans.