

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement of
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Before the

Senate Committee on Veterans' Affairs

Concerning

Pending Legislation

April 26, 2023

Chairman Tester, Ranking Member Moran, and members of the Committee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on pending legislation.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 800 attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans and families seeking to obtain their earned benefits from the Department of Veterans Affairs (VA). NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits.

NOVA members represent veterans before VA, the Board of Veterans' Appeals (BVA), the U.S. Court of Appeals for Veterans Claims (CAVC), the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. As an organization, NOVA advances important cases and files 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); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *Buffington v. McDonough*, No. 21-972 (February 7, 2022) (amicus in support of petition for writ of certiorari before U.S. Supreme Court).

The most important facet of NOVA's mission is the education of accredited advocates. NOVA currently conducts two conferences per year, each of which provide approximately 15 hours of continuing legal education (CLE) credit for attendees. NOVA sustaining members must participate in at least one conference every 24 months to maintain eligibility to appear in our public-facing advocate directory. Experts from within and outside the membership present and train on the latest developments and best practices in veterans law and policy. In addition to conferences, NOVA offers webinars, online support, and other guidance to its members to enhance their skills.

Our statement will focus on the following bills: (1) S. 414, Caring for Survivors Act; (2) S. 740, GUARD VA Benefits Act; (3) S. 897, Expedited Veterans Appeals Act; and (4) S. ___, Love Lives On Act.

S. 414, Caring for Survivors Act

NOVA supports S. 414. This bill makes important changes that will provide better support to surviving spouses. The current dependency and indemnity (DIC) benefit is

\$1,562, which is only approximately 40 percent of what a 100-percent service-connected veteran receives. Benefits for survivors of federal civil service retirees are calculated as a percentage of the retiree's benefits, up to 55 percent. S. 414 would increase the DIC rate to 55 percent of what a totally disabled veteran receives and this increase ensures equity for surviving spouses.

In addition, S. 414 would amend the 10-year rule. Currently, if a veteran is 100-percent service connected for 10 years before his or her death, the surviving spouse is eligible for DIC even if the death is not service connected. This bill would provide a partial DIC benefit for the surviving spouse if the veteran dies five years after being rated totally disabled, with full entitlement at 10 years.

S. 897, Expedited Veterans Appeals Act

NOVA supports S. 897. Many NOVA members represent veterans before the CAVC, and serve or have served on CAVC committees or as part of the CAVC Bar Association leadership. When Congress passed the Veterans Judicial Review Act in 1988, veterans finally gained the long-denied right to judicial review of final BVA decisions. It is important that Congress continue to ensure the court has the necessary resources to timely administer justice for our nation's veterans.

Between FY 2017 and FY 2020, BVA nearly doubled the number of issued decisions, from 52,661 to 102,663. Department of Veterans Affairs, Board of Veterans' Appeals, *Annual Report* 40 (2020), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf. In 2020, the CAVC received 8,954 appeals, an all-time high. United States Court of Appeals for Veterans Claims, *Annual Report* 1 (2020), <http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf>. While BVA production has slipped and the corresponding number of CAVC appeals has slightly dropped since FY 2020, the August 2022 passage of the PACT Act is resulting in increased claims and an expectation of increased appeals to BVA and, in turn, the CAVC. The PACT Act also created funding for more positions within the Veterans Benefits Administration, BVA, and VA's Office of General Counsel, which is anticipated to result in increased productivity and, ultimately, more appeals to the CAVC.

Congress has already appropriated the funds necessary to expand the CAVC to 11 judges, i.e., expanding by two permanent positions and retaining two temporary ones. Pub. L. No. 117-328, Dec. 29, 2022, 136 Stat. 4459, 4971. With these funds in place, Congress should move quickly to authorize additional judges and ensure veterans continue to have prompt access to justice as decisions and appeals increase in the years ahead.

S. 740, GUARD VA Benefits Act

NOVA supports S. 740. As requested by VA and accredited advocates for the past two Congresses, penalties must be reinstated so VA can seek action against unaccredited claims consultants who illegally charge veterans to file claims, in violation of 38 U.S.C. § 5904.

I. Congress and VA rely on accreditation and regulation to protect veterans against fraud.

Congress has long recognized that, to prepare, present, and prosecute claims on behalf of veterans, VA can require a demonstration of competence. *See, e.g.*, Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238 (“[t]he Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and are otherwise competent to assist claimants in presenting claims”). Likewise, Congress empowered VA to discipline those who fail to meet these standards. *Id.* at 72 Stat. 1238-1239 (“[t]he Administrator . . . may suspend or exclude from further practice . . . any agent or attorney recognized under this section if he finds that such agent or attorney – (1) has engaged in any unlawful, unprofessional, or dishonest practice; (2) has been guilty of disreputable conduct; (3) is incompetent; (4) has violated or refused to comply with any of the laws administered by the Veterans’ Administration, or with any of the regulations governing practice before the Veterans’ Administration; or (5) has in any manner deceived, misled, or threatened any actual or prospective claimant”).

As amended and expanded, these standards currently reside in 38 U.S.C. § 5904, and VA has promulgated regulations at 38 C.F.R. § 14.632 governing the conduct of accredited attorneys and agents. Veterans can file complaints about accredited representatives directly with VA and VA will investigate those complaints. *See* VA Office of General Counsel, Accreditation, Discipline, and Fee Program, <https://www.va.gov/ogc/accreditation.asp>. Upon a determination that an accredited representative violates the standard of conduct, VA “may suspend or cancel your accreditation. VA is authorized to report the suspension or cancellation to any bar association, court, or agency to which you are admitted. In addition, VA may collaborate with State and Federal enforcement authorities if it is suspected that your actions may have implications under State or other Federal laws.” VA Accreditation Program: Standards of Conduct for VA-Accredited Attorneys, Claims Agents, and VSO Representatives, <https://www.va.gov/OGC/docs/Accred/StandardsofConduct.pdf>; *see also* 38 C.F.R. § 14.633.

Attorneys and agents are accredited on an individual basis, not through their firm or organization. An attorney seeking accreditation must complete the VA Form 21a and

provide a current certificate of good standing from any state bars, courts, or agencies to which he or she is admitted to practice. Within the first year of accreditation, the attorney must complete three hours of qualifying CLEs and an additional three hours no later than three years after initial accreditation and every two years thereafter. VA Accreditation Program: How to Apply for VA Accreditation as an Attorney or Claims Agent, <https://www.va.gov/OGC/docs/Accred/HowtoApplyforAccreditation.pdf>.

Similarly, agent candidates must submit the VA Form 21a, complete the CLE requirements, and submit any certificates of good standing if available. Prior to granting accreditation, however, VA conducts a background check and requires the applicant to pass a test demonstrating knowledge of relevant VA statutes and regulations. Claims Agent Examination, <https://www.va.gov/ogc/accreditation.asp>.

II. Congress has always regulated the fees that accredited attorneys and agents can charge.

Before 1988, Congress permitted attorneys and agents to represent veterans before the Veterans' Administration, but they could not charge more than \$10.00 for such representation. *See, e.g.*, Pub. L. 85-857, § 3404, Sept. 2, 1958, 72 Stat. 1238 (“[t]he Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees – (1) shall be determined and paid as prescribed by the Administrator; (2) shall not exceed \$10 with respect to any one claim; and (3) shall be deducted from monetary benefits claimed and allowed”). When Congress created the CAVC in 1988, which for the first time allowed veterans to seek judicial review of claims denied by VA, attorneys and agents were permitted to charge more than \$10.00 for representation. Veterans' Judicial Review Act, Pub. L. 100-687, § 104, Nov. 18, 1988, 102 Stat. 4108 (fee permitted when attorney or agent retained within one year of date when Board of Veterans' Appeals made a final decision; limited to 20 percent of past-due benefits). In 2006, Congress updated the statute to allow an attorney or agent to charge a fee for representation after filing a notice of disagreement with a VA decision. Pub. L. 109-461, title 1, § 101(c)(1), Dec. 22, 2006, 120 Stat. 3407.

With the passage of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Congress again amended the statute to allow attorneys and agents to charge a fee for representation earlier in the process, *i.e.*, when the claimant “is provided notice of the agency of original jurisdiction's initial decision.” Pub. L. 115-55, § 2(n), August 13, 2017, 131 Stat. 1110. This amendment reflects the new choices permitted under the AMA for a claimant when faced with an adverse decision, *i.e.*, filing a higher-level review, supplemental claim, or appeal to BVA. In other words, after an initial denial by the Regional Office, a claimant can hire an agent or attorney to represent them and determine the best course of action to contest the denial. VA recognized the importance of this

change when it issued the final rules implementing the AMA “to allow paid representation with respect to the claimant’s expanded options for seeking review of an initial decision on a claim.” Department of Veterans Affairs, VA Claims and Appeals Modernization, Final Rule, 84 FR 138, 150 (Jan. 18, 2019).

Congress has also provided a statutory scheme for how fees are charged and VA has promulgated regulations and policies that govern the process. *See* 38 U.S.C. § 5904; 38 C.F.R. § 14.636. While fixed fees and hourly rates are allowed, the statutory scheme generally favors a contingency model, consistent with legal practice in many other areas of disability or personal injury law. Under this model, an attorney or agent will only recover if he or she prevails for his or her client and accepts payment from past-due benefits, not out of future, recurring disability payments.

Attorneys and agents can enter into a “withholding” contract with a client and VA will hold back 20 percent (a presumed reasonable fee) from the past-due benefits recovered. 38 C.F.R. § 14.636(h). The attorney or agent must submit the fee agreement to the Regional Office within 30 days of its execution. *Id.* at (h)(4). In the alternative, attorneys and agents can enter into a “nonwithholding” contract with a client, charge at a higher rate but no more than 33 1/3 percent, and be paid directly from the client. These contracts must be filed with VA’s Office of General Counsel for a reasonableness review. 38 C.F.R. § 14.636(f).

VA regulations provide multiple safeguards to ensure fees are reasonable and claimants have due process if they believe they have been unfairly charged. *See, e.g.*, 38 C.F.R. § 14.636(i) (OGC may review a fee agreement between a claimant or appellant and an agent or attorney upon its own motion or upon the motion of the claimant or appellant and order a reduction); How to Challenge a Fee, <https://www.va.gov/OGC/docs/Accred/HowtoChallengeaFee.pdf>.

III. Congress and VA have historically recognized that veterans should not be charged to file an initial claim.

Under current law, the **only time** an accredited advocate **cannot** enter into a fee agreement with a veteran is for assistance with filing an **initial claim** for benefits. *Military-Veterans Advocacy v. Secretary of Veterans Affairs*, 7 F.4th 1110, 1135-1136 (Fed. Cir. 2021) (discussing the history of paid representation in the VA appeal process and recognizing the intent to “preserve the non-adversarial initial benefits process”).

This policy reflects Congress’s recognition of the initial claims process as nonadversarial and VA’s position that it “must have an opportunity to decide a matter before paid representation is available.” Department of Veterans Affairs, VA Claims and Appeals Modernization, Final Rule, 84 FR 138, 150 (Jan. 18, 2019) (citing 73 FR 29852, 29868

(May 22, 2008)). The veterans benefits disability scheme is unique among all federal benefits. When a veteran submits a claim, VA is required to assist the veteran by developing it, e.g., obtaining missing service records or ordering medical examinations as needed. The standard of proof is “at least as likely as not” and the benefit of the doubt is to be resolved in the veteran’s favor.

This policy also reflects the long-standing recognition of the role of VSOs, at the national, state, and county level, who are available in large numbers to assist veterans with initial claims. In addition, attorneys who work for legal services and legal aid organizations, as well as law school veterans clinics, provide free assistance with filing initial claims. Private attorneys and agents may also provide such assistance. For example, many NOVA members routinely provide pro bono assistance to a surviving spouse for filing an initial DIC claim after representing the veteran for many years prior to his or her death.

Congress made significant changes to the VA adjudication process in 1988, 2006, and again in 2017 – and has consistently sought to preserve the claimant-friendly, nonadversarial initial claims process by limiting paid representation to the appeal stage. Allowing unaccredited claims “consultants” to charge veterans exorbitant fees for simply filing initial claims defeats this long-standing Congressional intent and turns the nonadversarial process into a battle . . . right from the start.

IV. Unaccredited claims consultants exploit veterans, violate existing law, and interfere with existing power of attorney relationships between veterans and accredited representatives.

Over the past several years, there has been a proliferation of predatory companies offering “consulting” services for veterans seeking VA benefits. While the terms of the contracts vary from company to company, there are common elements among many of them. These companies aggressively pursue clients through online advertising with promises of faster processing or guaranteed results. These companies consist of employees who are not accredited by VA, who work with veterans to gather information (including medical opinions frequently prepared by affiliate companies) in support of an initial claim or a claim for an increased rating. The veteran is “coached” to submit the claim or, in some circumstances, the claim is submitted by an employee using the veteran’s own private eBenefits log-in information on VA’s website. Sometimes, veterans are advised to drop existing appeals in favor of a “faster” decision on a new claim for an increased rating. (While this action may, indeed, result in a faster decision, the veteran is unknowingly forfeiting months or years’ worth of retroactive benefits because generally the effective date of any award of benefits is the date VA receives the claim.) VA states it has no ability to oversee these individuals and veterans have no due process rights when working with these companies.

Unaccredited employees of these firms prepare claims. While many of these companies insist that they do not prepare, present, or prosecute claims, their activities clearly rise to, at the very least, preparation of claims. Merriam-Webster defines “prepare” as “to make ready beforehand for some purpose, use, or activity,” clearly encompassing the activity described above.

VA agrees with this analysis, stating in its FAQ guidance for applicants: “You must be accredited to aid in the preparation, presentation, or prosecution of a VA benefit claim. **Advising a claimant on a specific benefit claim or directing the claimant on how to fill out their application, even if you never put pen to paper, is considered claims preparation.**” VA Accreditation Program: How to Apply for VA Accreditation as an Attorney or Claims Agent, <https://www.va.gov/OGC/docs/Accred/HowtoApplyforAccreditation.pdf> (emphasis added).

These companies charge fees outside the framework established by Congress and implemented by VA. Contracts executed by these companies charge fees based on **future** benefits, which is clearly not contemplated under 38 U.S.C. § 5904 or 38 C.F.R. § 14.636. Both the statute and regulation state that fees for representation are to be paid from “past-due benefits.” 38 U.S.C. § 5904(d); 38 C.F.R. § 14.636(h)(3) (defining past-due benefits as “non-recurring payments”) Predatory claims consultant contracts that charge five or six months of the veteran’s **future** increase, yet to be received, violate the law and may also violate 38 U.S.C. § 5301(a)(3)(a) as a prohibition against assignment of benefits.

Furthermore, because their fee generally relies on increasing the veteran’s future benefits, their model provides no incentive for ensuring that the veteran’s award has been assigned the correct effective date. Pursuing a proper effective date would require appealing a decision, which these predatory claims consultants cannot do without accreditation and a valid VA Form 21-22/21-22a. While this practice benefits these unaccredited companies, their failure to ensure that the veteran has been awarded the correct effective date means that the veteran is forfeiting retroactive compensation that could, depending on the circumstances of the case, be substantial. An effective-date error can also harm a veteran’s surviving spouse – and may prevent that person from obtaining VA benefits to which they would have been entitled. And because these predatory claims consultants are not accredited, a veteran or surviving family member who is harmed by these mistakes has no recourse through VA.

Without executing a power of attorney with a claimant, unaccredited consultants cannot provide competent assistance and often interfere with an existing representation agreement. Accredited representatives sign a power of attorney with the claimant. This relationship allows the representative to request necessary records on behalf of the veteran, obtain access to the veteran’s electronic VA claims file and relevant VA databases, and

present themselves to VA employees as the accredited representative to access information and advocate on behalf of the claimant. Because of this access to VA information that is critical to the veteran's claim, accredited attorneys, agents, and VSOs have the "big picture" of the claimant's history, claims, and appeals. Veterans understand who is representing them and have someone to rely on for ongoing advice. Able to review the entire VA claims file and relevant records, accredited representatives can find pending claims, unadjudicated claims, identify potential claims for clear and unmistakable error, and provide a coordinated plan for complete representation before the agency, BVA, and federal courts as needed.

VA also knows who the veteran's accredited representative is – and is required to provide this representative with notice of decisions and of any VA action on the veteran's pending claims and appeals. This "notice" requirement is especially beneficial for unhoused veterans, or those with unstable housing, as the accredited representative is able to comply with VA requests for information in a timely manner and ensure that deadlines are met.

By contrast, unaccredited claims consultants cannot represent the veteran fully and frequently abandon the veteran once the increased rating is achieved or denied. Because these unaccredited claims consultants cannot represent veterans in appeals before VA or the courts, veterans often turn to accredited attorneys, agents, or VSOs to step in and resolve pending matters – and, often, fix their mistakes.

Recent examples reported by NOVA members or staff:

1. One company charged the client of the accredited attorney \$6000.00 for an increase that was not based on the material prepared by the company. The company's "Client Recovery Specialist" started collection action and called the veteran 20 times about the alleged sum owed. They asked the veteran to send screenshots of his eBenefits and va.gov account and asked the veteran's accredited representative to send a copy of the rating decision to them for review.
2. Another company prepared four claims for a veteran who was represented by an accredited attorney, promising the veteran a faster result. The veteran submitted four disability benefits questionnaires (DBQs) completed by the same nurse practitioner procured by this company and, on the consultant's advice, asked VA not to schedule examinations for him. This company had no idea that two of these claims were already pending at BVA. VA denied the two claims pending at BVA because they were on appeal and denied the other two claims because of the veteran's unwillingness to submit to any additional examinations.
3. An individual holding a power of attorney for a veteran in a nursing home reported that the veteran was approached by a claims consultant who came to the nursing home. The consultant told the veteran that they could help him apply for VA

benefits – and the first thing they needed from him was his bank account information.

Obtaining a veteran's eBenefits user name and password or bank information to obtain funds for payment violates the veteran's privacy and VA policy. NOVA has been made aware that some of these predatory claims consulting companies require a veteran to provide their personal log-in information to access VA's eBenefits site and the veteran's bank information. VA rightfully is concerned with protecting a veteran's privacy and identifying information. Accredited individuals do not use a veteran's log-in credentials or require bank account access; accredited individuals are able to access the veteran's electronic VA records and files as the representative lawfully recognized by VA. Regarding eBenefits: "Unauthorized attempts or acts to either (1) access, upload, change, or delete information on this system, (2) modify this system, (3) deny access to this system, or (4) accrue resources for unauthorized use on this system, are strictly prohibited. Such unauthorized attempts or acts may be considered violations subject to criminal, civil, or administrative penalties." eBenefits: My Gateway to Benefit Information, <https://www.ebenefits.va.gov/ebenefits/about/policies>.

S. __, Love Lives On Act

NOVA supports the Love Lives On Act. This important legislation would remove the bar to furnishing benefits to surviving spouses who remarry before the age of 55 and restore certain benefits to surviving spouses who remarried before age 55. Many surviving spouses forego remarriage due to the impending loss of important earned benefits that provide long-term security to themselves and their families. Congress should remedy this injustice.

CONCLUSION

Thank you again for allowing us to present our views on this important legislation. If you have questions or would like to request additional information, please feel free to contact:

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Diane Boyd Rauber is the Executive Director of the National Organization of Veterans' Advocates, Inc. (NOVA), in Washington, DC. NOVA is a not-for-profit 501(c)(6) educational membership organization, representing over 800 accredited attorneys, agents, and other qualified members assisting tens of thousands of our nation's military veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs.

Prior to joining NOVA in September 2015 as Director of Legislative and Regulatory Affairs, Ms. Rauber served as Associate General Counsel for Appeals with Paralyzed Veterans of America (PVA). In this capacity, she oversaw PVA client representation before the Board of Veterans' Appeals (BVA), wrote briefs and conducted hearings on behalf of individual clients, provided support and training to PVA's service officers, and analyzed cases for potential appeal to the U.S. Court of Appeals for Veterans Claims (CAVC).

She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney for the National Veterans Legal Services Program, representing veterans and their families before BVA and the CAVC. She frequently presents at veterans' law conferences, on topics including successful advocacy, legislative and regulatory reform, and military history research.

Ms. Rauber received her B.S. in Communication Disorders from Penn State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America School of Law. She is a member of the Maryland and District of Columbia Bar Associations, the CAVC Bar Association, and the Maryland Bar Association Veterans Affairs and Military Law Section, as well as a founding member and current president of the CAVC Historical Society. She is the co-author of *Justice and the American Veteran: A History of the United States Court of Appeals for Veterans Claims* (CAVC 2022), and received the Hart T. Mankin Distinguished Service Award in 2022 for her work on the book.