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**STATEMENT OF  
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FOR THE SENATE COMMITTEE ON VETERANS' AFFAIRS  
MAY 12, 2021**

Chairman Tester, Ranking Member Moran, and Members of the Committee:

Thank you for inviting DAV (Disabled American Veterans) to provide testimony for the Senate Veterans' Affairs Committee hearing on "Supporting Disabled Veterans: The State of Claims Processing During and After COVID-19."

Mr. Chairman, the COVID-19 pandemic has negatively impacted the Department of Veterans Affairs' (VA), Veterans Benefits Administration's (VBA) ability to process veterans' claims and appeals, contained questionable policy changes and has dramatically increased the backlog of pending cases. While VA is actively addressing the issues created by the pandemic, we are concerned that VA policy decisions are too often driven by their self-imposed metrics and not focused on the non-adversarial, veteran-centric nature of the VBA claims and benefits process.

With a growing backlog of VA examinations and VA disability claims, today's hearing is so important. Our testimony will address the VA goal of 125 days, VA policy changes, the impact of the pandemic and the current state of the claims backlog.

**VA'S GOAL OF 125 DAYS**

The March 2009 VA Office of the Inspector General (OIG) report, "Audit of Veterans Benefits Administration Compensation Rating Accuracy and Consistency Reviews," found that 22% of all veterans' claims for disability compensation were decided incorrectly in the 12-month period reviewed. During that period, over 200,000 veterans received inaccurate decisions on disability compensation. The report stated that VBA officials understated their error rate by 10% and did not implement a plan to ensure rating consistency.

Additionally in 2009, statistics from the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims revealed that approximately two-thirds of cases appealed contained errors committed by the VA regional office (VARO) of jurisdiction.

In June 2009 testimony before the House Veterans' Affairs Committee, then-Secretary Eric Shinseki said that he was working to reduce the six-month delay in paying veterans' disability claims and wanted to move quickly in adopting an all-electronic claims system and that VA would hire 1,100 additional staff to address the serious backlog of cases.

Shortly thereafter, VA announced the goal of processing all disability claims within 125 days at a 98% accuracy level. In 2010, then-Secretary Shinseki set a goal of eliminating the claims backlog of cases pending more than 125 days in 2015. The established goal was not predicated on any data or metrics showing that VA could provide accurate and favorable decisions within that time period; however, this was the start of VBA's determination that anything older than 125 days is not timely and worked to reduce those numbers.

VBA did not eliminate the backlog in 2015, but reported it had reduced the pending backlog from a peak of 611,000 in March 2013 to 71,690 at the end of September 2016. While we applaud VA's commitment to aggressively reduce the claims backlog, we are more concerned with VA providing veterans with timely, accurate decisions than an arbitrary goal of 125 days.

### **Review of accuracy of reported pending disability claims backlog statistics**

The September 2018 VA OIG Report, "Review of Accuracy of Reported Pending Disability Claims Backlog Statistics," found that VBA's reported backlog did not include all claims that had been awaiting rating decisions for more than 125 days during the first and second quarters of FY 2016.

The OIG estimated VARO staff completed about 63,600 claims that required rating decisions that took over 125 days to complete, but that VBA did not count as part of the backlog. As a result, the OIG estimated that in its completed backlog, VBA only reported about 79% of the claims that required rating decisions that took over 125 days. In addition, inaccurate claims classifications and date of claim misrepresented the status of some claims. For instance, the OIG estimated that 8,000 incorrect changes altered the backlog status of existing claims on the days they occurred. In some cases, VBA policy changes directed staff to make these changes.

The OIG found that VBA's prioritization of its backlog resulted in delays in processing other claims, even if they were older and required rating decisions. This is clear evidence that the intent of some policy changes were driven toward VA's backlog reporting.

### **VBA POLICY CHANGES BEFORE AND DURING THE PANDEMIC**

We are grateful for VA's significant process in reducing the backlog by adding new programs such as an electronic claims file, the Veterans Benefits Management System and realizing efficiencies with the National Work Queue. However, we wonder if

some of the policy changes were made for the purpose of improving the timeliness and quality of disability claims decisions or if they were made only to improve VA's self-imposed metrics.

### **Standardized VA forms cost veterans effective dates**

Effective March 24, 2015, VA started a major change in its policy and regulations regarding use of standard forms. The expressed motivation to use standardized forms was to allow VA to streamline, scan and automate parts of the claims submission process. VA eliminated informal claims and replaced it with an Intent to File form, which acts as a placeholder, preserving the effective date for one year. VA further requires all claims and appeals to be submitted on specific forms and will not accept any claim or appeal on the incorrect VA form.

Currently, if a veteran submits a claim or appeal on the wrong form, it may take VA months to review and advise the veteran that the claim will not be accepted because it was submitted on the wrong form. Additionally, VA does not consistently advise the veteran which form should have been used and does not provide the correct form to the claimant to file. Thus, when a veteran does file the correct form, they can lose months of entitlement as VA does not accept the claim submitted on the wrong form as a claim submission or as a place holder for benefits, even though the exact same information may have been provided by the veteran on both forms.

This issue was complicated by the implementation of the Appeals Modernization Act (AMA). VA will not accept any claims for previously denied issues on any form except a Supplemental Claim, which again can lead to a significant delay before the correct form is submitted and loss of an earlier effective date. The complexity increases as the VA's Intent to File form cannot be associated with a supplemental claim and many claimants are not aware of what conditions were applied for in the past. Additionally, if a veteran submits an appeal directly to the Board of Veterans' Appeals on the wrong form, it may be months before it is discovered and the veteran may lose an earlier effective date or even expiration of the appeal period.

VA's current processes are firmly placing an unnecessary burden on too many veterans, which was not the intent of Congress when the AMA was enacted into law. When a veteran submits a claim and it is understood by VBA what the veteran is seeking, it should accept that as a date of claim, advise the veteran on the correct form, provide the correct form, and adjudicate said claim. At the very least, VBA should consider the incorrect form as an Intent to File and protect the veteran.

On multiple occasions, DAV addressed the standardized form and effective date issues directly with VBA. We were encouraged to hear VBA agree with us and advised that they would work on formal rule changes to the Federal Register. However, after many attempts to follow up with VBA, we were finally notified that they could not make the changes.

Additionally, DAV has inquired with VA as to the number of veterans that have been impacted by submitting incorrect forms and VA has not been able to provide us with this information. VA should have the ability to determine the number of incorrect forms or incomplete applications they received especially because they are directly notifying the veteran. If VA is not able to determine the number of veterans impacted, they need to establish a mechanism to do so and report that information to all interested parties.

While serving as the Administrator of the Veterans Administration, General Omar Bradley stated, “we are dealing with veterans, not procedures; with their problems, not ours.” In reference to the standardized forms, veterans need VA to live up to this ideal.

Policy changes regarding standardized forms may have made VA more efficient in establishing claims, but by not accepting the form submitted even as an Intent to File, the policy negates any effective date until the veteran submits the correct form. Once the veteran submits the VA-dictated correct form, then it would be established as a claim. This policy takes months of entitlement from veterans and does not provide them with timely access to their earned benefits. However, it does allow VA to control how and when claims are established and possibly reduce the number of days a claim is pending in VA’s inventory goal, which may help VA realize the 125-day goal.

### **Elimination of the VSO pre-decisional review**

For over seven decades, VBA maintained a policy, as previously included in their M21-1 Adjudication Procedures Manual, which allowed accredited veterans service organizations (VSOs) a pre-decisional review period of all VA decisions on those veterans and claimants they represented.

The pre-decisional review period of 48 hours assisted VSOs in identifying errors before the decisions were formally promulgated. The types of mistakes identified included: incorrect effective dates of grants, incorrect combined evaluations, incorrect evaluations and incorrect denials of benefits. This process helped thousands of veterans and claimants avoid the time-consuming appeals process.

Although DAV and seven other VSOs representing millions of veterans and 42 State Attorneys General representing millions of citizens opposed the removal of this policy, on April 24, 2020, VBA officially eliminated the pre-decisional review period during the early days of the pandemic. DAV believes VBA’s decision was wrong, ill-timed and responsible for additional negative impacts on veterans and their representatives. At the beginning of the COVID-19 pandemic, VA ceased delivering paper copies of written notices to VSOs that are co-located at VA facilities. Due to the elimination of the review period, VA was not advising VSOs electronically of decisions being rendered.

Since February of this year, VBA has reengaged and collaborated with the VSO community to address the notification concerns and errors in decisions. On April 19, 2021, VBA launched the pilot, Claims Accuracy Request (CAR). The program allows accredited representatives to request a review of errors in VA decisions. If successful, VBA may make this pilot program permanent and expand its scope to include all claimants.

DAV is encouraged by the collaboration with VBA and optimistic that changes to the notification process and the CAR pilot will address our concerns and if successful, we will request this be codified into law. However, we remain vigilant and if these collaborations with VBA fail, we will need legislation such as S. 458, the Veterans Claim Transparency Act, to again provide the 48-hour review period.

When collaborating with VBA earlier this year, it was made clear that the 48-hour period would not return as its elimination provided VBA the opportunity to continue to drive down the days pending of backlogged claims. This is yet another example of a policy change that impacts the 125-day goal more than providing quality decisions to veterans.

### **Removal of publicly-available Disability Benefit Questionnaires (DBQs)**

Disability Benefits Questionnaires (DBQs) were introduced in 2010 to facilitate the collection of evidence for veterans' claims for disability compensation benefits. Although originally designed for veterans by the VBA, for more than a decade, DBQs were used internally by VA physicians and by private medical providers to supplement disability claims evidence.

In 2016, VBA changed its policy to disallow veterans to have DBQs completed by a private physician via telehealth. However, VBA did not advise veterans or indicate on any of the forms that this policy had changed.

A February 2020 Office of Inspector General (OIG) report, "Telehealth Public-Use Questionnaires Were Used Improperly to Determine Disability Benefits," posits that DBQs may have been used by veterans to perpetrate fraud in disability claims. The report notes that although VBA prohibits the use of private provider telehealth appointments for the submission of claims evidence, many of the claims investigated by the OIG may have involved telehealth examinations. At no point did the report substantiate this claim or explain the basis for this conclusion. Moreover, although the report makes vague reference to fraud, this assertion was merely conclusory. The OIG doesn't cite a single instance of fraud in its report.

Another problem cited by VBA was that public-facing DBQs must be updated under the requirements of the Paperwork Reduction Act of 1995 (PRA), a process that can take more than one year for each of the over 60 DBQs. VBA often noted that time delays of updating the DBQs and keeping them current, which negatively impacted the amount of time to process claims with privately completed DBQs. Without implementing

any of the recommendations from the OIG report, in April 2020, again during the early stages of the pandemic, VA removed public-facing DBQs from its website, thereby preventing private medical providers and veterans from accessing these forms.

We thank this Committee for its support and ultimate passage of Public Law 116-315, which included provisions requiring VA to make all DBQs available via their website. All of the DBQs are again available for veterans to use.

The policy changes that were implemented during the pandemic were at best ill-timed, and at worst were opportunistic changes during a national emergency that has challenged VA to maintain timely and accurate disability claims decisions.

### **IMPACT OF THE PANDEMIC ON VA CLAIMS PROCESSING**

The COVID-19 pandemic has negatively impacted VBA's ability to fulfill its mission. In late February 2020, states and local communities began declaring emergencies and issued shelter-in-place directives. On March 13, then-President Trump declared a national emergency in response to the COVID-19 pandemic. As a result of the pandemic and quarantine, VA experienced significant delays in scheduling VA examinations and obtaining records from the National Personnel Record Center.

#### **VA exams during the pandemic**

On April 6, 2020, VBA issued guidance that the COVID-19 pandemic was considered an acceptable cause for veterans failing to report for an exam. It instructed VARO staff to reschedule the exam. This guidance was retroactive to March 1, 2020, based on the presidential proclamation declaring COVID-19 a national emergency effective on that date. On April 24, 2020, VBA assured veterans no final action, including denials of their claims, would be taken when an in-person exam was needed.

In May 2020, VA released its plan for resuming normal operations. "Charting the Course: Maintaining Continuous Services to Veterans and Resuming Normal, Pre-COVID-19 Operations" provided limited information on exams. It stated VBA would work with its contractors to formulate a plan to resume in-person exams. Also in May, VA established the Program Integration Office to oversee disability exams. It was designed to provide new leadership and oversight as VBA has taken on more responsibilities for conducting exams so that VHA can focus on its health care mission and additional demands related to COVID-19.

A press release dated May 28, 2020, announced in-person exams would be restarting in 20 locations at contract exam facilities. VA has since expanded these in-person exams to other locations based on local COVID-19 risk assessments.

In October 2020, VA announced plans to shift a majority of all VA disability examinations to contract examiners in an effort to allow VHA physicians to focus on the

pandemic. This shift means that VHA will be conducting only 10 to 15% of all VA exams.

As of March 18, 2021, VA in-person disability medical exams by VBA contractors became available for scheduling throughout the entire country. Facilities in some areas are performing in-person exams but do not allow removal of personal protective equipment while other areas allow removal during in-person exams as determined by the contract examiner.

## **Lessons learned**

The enormity of the impact of the COVID-19 pandemic will be felt for years if not decades to come with continued lessons learned. In November 2020, the VA Office of the Inspector General (OIG) report, "Enhanced Strategy Needed to Reduce Disability Exam Inventory Due to the Pandemic and Errors Related to Canceled Exams," made the following findings:

- VBA discontinued in-person exams to protect veterans
- Protective measures contributed to VBA's exam inventory growth  
VBA prepared for increased use of telemental health and ACE exams
- VBA's use of telehealth was limited by the need for a telepresenter for some exams
- VBA prematurely or improperly denied claims based on canceled exams
- VBA needs to further develop and test its strategy to address the inventory of exams

Prior to the pandemic, there were roughly 140,000 pending VA exam requests with an average 21 days to completion. As of March 23, 2021, there were over 350,000 pending exam requests with an average 90 days to completion.

At the House Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs hearing on March 23, 2021, David McLenachen, Executive Director of the Medical Disability Examination Office, noted that over 55,000 exam requests were deferred awaiting the veteran to acknowledge their willingness to appear for an in-person exam. Further, it was recommended by the Government Accountability Office that VBA must have a written action plan for scheduling and providing VA examinations through VHA or VBA contractors. VBA acknowledged that they did not have a written action plan.

These pending exam requests have already impacted the number of pending VA compensation claims and if not aggressively addressed, veterans will be waiting additional months, if not years, for their earned VA benefits and health care.

## **National Personnel Record Center (NPRC) during the pandemic**

The National Personnel Records Center (NPRC) is one of the National Archives and Records Administration's (NARA) largest operations. Located in St. Louis, it is the central repository of personnel-related records for both the military and civil services of the United States Government. Due to the COVID-19 pandemic, the NPRC had been closed and only completing emergency requests. On March 8, 2021, the NPRC entered into a phased expansion of its onsite workforce.

VA requires medical evidence obtained from military personnel records to adjudicate veteran claims for compensation. Due to pandemic-related facility work restrictions, NARA has had limited onsite ability to process requests for military personnel records. These documents are only accessible through copies made available by NPRC, thus, the pending claims count will continue to increase while waiting for requested documents.

VA announced on April 1, 2021, there are more than 25,000 pending requests for personnel records. However, a recent letter from members of the House of Representatives notes, "According to the National Archives and Records Administration's (NARA's) own reporting, in March 2021 there was a backlog of almost 500,000 records requests." This large of a discrepancy between the reported numbers is disconcerting and requires a thorough explanation. NARA needs to provide a report, at the very least, addressing the number of pending veteran records requests and the number of pending VA records requests.

The pandemic had a serious long-term negative impact on VA claims processing, specifically on scheduling and providing VA disability exams and obtaining necessary records from the NPRC. While VA is not to blame for these two major challenges, we do have concerns on how the increased backlog will guide VA's path and policy decisions moving forward to address the current status of VA claims.

### **CURRENT STATUS OF VA CLAIMS**

In February 2020, VA had only 70,000 pending claims; however, today there are nearly 200,000 claims pending over 125 days. The number of pending claims has nearly tripled in the last year due to the enormous impact of the pandemic. The largest contributor to this increase is the backlog of VA C&P examinations, which is now over 350,000. However, there are other factors that VA must be cognizant of, such as the pending Blue Water Navy claims.

In January 2020, VBA started processing Blue Water Navy claims for diseases related to their now-conceded exposure to Agent Orange. To date, VA has received over 82,000 claims and has adjudicated over 47,000 claims but still has almost 35,000 pending claims. In many instances, these have been delayed due to closure of the NPRC during the pandemic. These are vital for establishing the veteran's ship location off the coast of Vietnam.



Usually, VA will not request C&P examinations for these claims until they have the records requested from NPRC; thus, there are potentially another 35,000 claims awaiting examinations, which will further confound the existing backlog.

Public Law 116-283 added three new diseases, bladder cancer, hypothyroidism, and Parkinsonism, as presumptive conditions to Agent Orange exposure in January of this year. VA has already received thousands of claims for these new conditions.

At the May 5 House Veterans' Affairs Committee hearing, VBA noted that its policy memo to start adjudicating claims for these three new presumptives is in concurrence. Once released in the next few months, VA will need to verify each of these Vietnam veterans' exposure to Agent Orange in-country or aboard ship. These thousands of new claims will also require C&P exams once VA starts developing these claims, again adding more examinations to the pending backlog and increasing the weight of the already growing backlog of claims.

Although VBA reacted quickly with the use of telehealth, ACE exams, and has recently increased the contractors' workload by 20%, these alone will not aggressively reduce the backlog of exams and in turn, the backlog of VA claims.

DAV is especially concerned that, if not appropriately addressed, the VA examination backlog, the pending Blue Water Navy claims and the looming addition of new Agent Orange presumptive diseases, could be the catalyst to a backlog of historic proportions. This gives us pause, as it has been shown that some VA policy decisions made to address the backlog have been overly driven to the 125-day goal rather than focused on providing veterans and their families a thoughtful, quick and agile response plan from VA.

## **RECOMMENDATIONS**

### **Reducing VA's backlog of exams**

VA contract examiners constitute the lion's share of all pending examinations while VHA is currently only conducting telehealth examinations for approximately 10 to 15% of those requests. This, coupled with contractors increasing their workload will not quickly reduce the number of pending examination requests. Although contract examiners completed over 1.1 million exam requests in calendar year 2020, during the national emergency, we need a strategy to consider all available means.

In order to attack this problem head-on, we recommend that VHA increase its workload of C&P examinations to their upper capacity levels. This should include in-person examinations as well. While we understand that VHA is under significant stress in providing COVID health care and vaccinations, VBA needs to utilize VHA as an experienced resource to slow down the steadily rising exam requests and address the backlog. We recommend an "all hands on deck" approach to drive down the backlog.

We further recommend moving forward, that VHA have primary responsibility for all VA C&P exams for initial post-traumatic stress disorder (PTSD) claims, military sexual trauma (MST) claims, traumatic brain injuries (TBI), prisoners of war (POW), amputees and the catastrophically disabled. VHA is a world leader in PTSD, TBI and amputee treatment and these should benefit from VA's unmatched expertise. Examination requests from claims filed through the Benefits Delivery at Discharge (BDD) program and the Integrated Disability Evaluation System (IDES), should also be filtered through VHA.

We recommend that VBA also provide updates and reports on the decisions identified by VA OIG that were prematurely denied without a VA C&P exam. Just as important are the number of claims that have examinations deferred waiting for exams. We recommend that VBA track and provide routine updates on these cases as well.

### **Oversight and quality of VA exams**

DAV wants to ensure that all veterans receive timely and quality C&P examinations whether they are conducted by contract examiners or VHA. VBA must have oversight and management of all VA examinations, which is imperative for quality exams. This has been problematic in the past.

Quality examinations are critical in the VA claims process and essential to veterans gaining access to their earned benefits and health care. We recommend that VBA continue its monitoring and oversight of contract examiners, but also believe that all VHA C&P examinations must be included as well. We have recommended to expand their ability to provide more examinations and thus VBA should have the same oversight. VA's Program Integration Office should have the ability to review VHA examinations based on quality and return them when deemed inadequate.

VBA must continue to provide training and information for all examiners and needs a dedicated professional platform to provide, monitor and track this training. Although VBA is currently doing this manually, an online platform will provide better oversight and control.

### **VBA's tendency to overdevelop**

Another contributing factor to the backlog of examination requests and claims, is VBA's tendency to overdevelop a claim. For example, if a veteran submits VA or private medical evidence or a completed Disability Benefits Questionnaire (DBQ) that is sufficient for VA to decide the case, in many instances, VBA will still request a VA C&P exam.

When the submitted evidence or DBQ does not contain the required information, we agree that a C&P exam should be requested; however, our service officers often review decisions that could have been rendered based on the evidence without a C&P

examination. In some instances, the additional C&P exam is used as a reason to deny the benefits veterans are seeking.

We recommend that VBA create a tracking mechanism in VBMS for all decisions that have privately completed DBQs, yet an exam is requested and provide reporting to all interested parties. This can provide insight to the examination request culture and even reduce the number of requests, thus aiding in reducing the exam and claims backlogs currently facing VA.

We believe that all of these recommendations can assist in reducing VA's current backlogs. These and the lessons learned from the pandemic can be used to develop a response by VA for future national emergencies or a resurgence of the current pandemic. In addition, these lessons will help make VBA more efficient beyond the pandemic both in managing workload and better serving veterans, not just focused on its self-imposed 125-day metric.

In conclusion, the pandemic contributed to over 350,000 pending exam requests and nearly 200,000 pending disability claims. Without quick and decisive actions, the current backlog of exams and claims, coupled with nearly 35,000 pending Blue Water Navy claims and the incoming claims for the new Agent Orange presumptives, VA's backlog of claims will reach historic levels.

Mr. Chairman, the increased number of pending claims is very concerning. While VA measures its performance on metrics that are intended to provide faster decisions, veterans are more concerned about receiving an accurate decision the first time. Does getting a favorable decision after going through the CAR pilot, a Higher Level of Review or an appeal to the Board of Veterans' Appeals reflect timeliness? It does not. Veterans need VA to be prepared with a VA-wide approach, a veteran-centric response and a plan for the future. We need to ensure that VA policy choices will focus on accurate claims decisions not just a decision within 125 days.

Mr. Chairman, this concludes my testimony and I would be pleased to answer any questions you or members of the Committee may have.