



Federal Bar Association

Veterans & Military Law Section

May 25, 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 & Military Law Section (V&MLS) of the Federal Bar Association is pleased to submit further comments on the proposed legislation addressed in yesterday's hearing. These comments were inadvertently omitted from the comments submitted on May 18, 2016. The opinions herein asserted are those of the Veterans & Military Law Section and not necessarily those of the entire Federal Bar Association.

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 required consultants on the



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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 and veterans are waiting inordinately long for medical care, the continued duplication of effort in this regard is a waste of taxpayer dollars.

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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 yesteryear. 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, at surrounding and nearby military installations accessed base medical, commissary and exchange facilities. This is commendable legislation that is needed to provide oversight and guidance to ensure 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.



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V&MLS further supports the expansion and transition of the Choice Act to a permanent entity within VHA. The difficulty of travel to VA VHA facilities for many aging and severely impaired veterans would be greatly alleviated by this measure. We do note that the reports of failure of administration which has led to payment issues for private providers still requires considerable Congressional oversight. We applaud the Committee's efforts in this regard.

Thank you for your invitation to submit written testimony. We hope to provide information and perspective on further issues as they arise. V&MLS has a strong commitment to our active duty military service members and to our veterans.

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