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**STATEMENT OF
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OF THE DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
JULY 13, 2021**

Chairwoman Luria, Ranking Member Nehls, and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to provide testimony for your hearing, "VA Appeals Program: Examining the State of Modernization Efforts."

DAV is a congressionally chartered national veterans' service organization (VSO) of more than one million wartime veterans, all of whom were wounded, injured or made ill while serving on behalf of this nation. To fulfill our service mission, DAV directly employs a corps of more than 240 national service officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every VA regional office (VARO) as well as other VA facilities throughout the nation including the Board of Veterans Appeals (Board).

In 2020, DAV represented veterans and families in more than 160,000 claims and in more than 16,000 decided appeals by the Board. DAV represented nearly 20% of all Board decisions in fiscal year (FY) 2020, the largest amount of any accredited VSO.

Based on our experience, our testimony will discuss the Appeals Modernization Act (AMA), the performance of the Board in FY 2020 and our concerns including the backlog of pending hearings, the AMA appeals intake process and remand decisions.

THE APPEALS IMPROVEMENT AND MODERNIZATION (AMA) ACT

Starting in 2015, DAV collaborated with the Veterans Benefits Administration (VBA), the Board, and other stakeholders to improve and streamline the appeals process. The AMA, a veteran-centric appeals process, was the result of those combined efforts and was implemented in February 2019.

In the legacy appeals process, appeals could languish for several years within each VARO before being certified to the Board and then, potentially spend several more years there before a final decision.

AMA created three options, referred to as lanes, for claimants dissatisfied with the initial decisions on their claim. Claimants may seek a higher-level review of the decision based on the same evidence presented to the initial claims processors; they may file a supplemental claim that includes the opportunity to submit additional evidence; or they may appeal directly to the Board.

Claimants appealing to the Board may elect one of three appeal options: 1) a direct review of the evidence that the Agency of Original Jurisdiction (AOJ) considered; 2) an opportunity to submit additional evidence without a hearing; or 3) an opportunity to have a hearing before a veterans law judge (VLJ), which includes the opportunity to submit additional evidence.

The Board reported in their FY 2020 report that legacy appeals had an average time of 1,583 days from the substantive appeal at the local VARO until a decision by the Board. In reference to AMA appeals in FY 2020, direct review appeals were decided in an average of 225 days, an appeal with evidence in 277 days, and an appeal requesting a hearing was in 377 days. AMA successfully reduced the amount of time for appeals and we strongly believe it will continue to streamline the appeals process for all veterans and claimants. The Board, despite the new AMA requirements and the COVID-19 pandemic, had an exceptionally productive FY 2020.

THE BOARD OF VETERANS APPEALS FY 2020

In FY 2020, the Board issued 102,663 decisions and surpassed its FY 2020 goal of 91,500 decisions by over 11,000 cases. They also improved decision output by approximately 8% over FY 2019's 95,089 decisions.

The Board completed 85,461 legacy appeals decisions while granting 28,896 (34%) and remanding 34,732 (40%). A total of 17,202 AMA cases were decided, 6,369 (37%) were granted and 4,845 (28%) were remanded. The Board conducted 13,686 legacy hearings and 1,983 AMA hearings.

The Board's Office of Quality Review (QR) is tasked with identifying objective errors that fall outside the bounds of judicial discretion. In FY 2020, the Board achieved an accuracy rating of approximately 91% for legacy decisions. The Board indicated they did not have an appropriate number of AMA decisions and remands to effectively assess quality during FY 2020.

The Board ended FY 2020 with 174,733 cases pending, 121,740 (70%) of which are legacy appeals and 52,993 (30%) AMA. They are receiving both legacy and AMA cases simultaneously until final completion of legacy appeals, resulting in higher

inventory levels in the short term until the vast majority of legacy appeals are resolved by the end of calendar year 2022.

We are very pleased with the Board's response to the pandemic and its successful year in deciding over 100,000 appeals. The Board's report also reveals the true impact of the AMA in reducing the number of days pending by 1200 days in comparison to the legacy appeals process.

Although the Board performed admirably in FY 2020, DAV is concerned about the long-term and potentially negative impact of the pending backlog of hearings, the intake and docketing of AMA appeals and the remand decisions for both legacy and AMA appeals.

BACKLOG OF PENDING HEARINGS

In February 2020, the Board had approximately 76,000 pending hearings, 59,000 were legacy appeals and 17,000 were AMA appeals. At that time, DAV and our partners in the *Independent Budget*, PVA and VFW, recommended that VA's budget be increased to account for 100 FTE to address the backlog of hearings. However, our recommendations were not heeded.

In March 2020, COVID-19 necessitated the temporary suspension of all VARO and central office hearings as well as all travel board hearings. In response, the Board's hearing branch moved to a 100% telework posture and worked swiftly to notify scheduled veterans for the remaining months of the fiscal year. Veterans were provided the option of either postponing their hearing or opting in to a virtual tele-hearing. Over 9,100 video and central office hearings and 2,200 travel board hearings were postponed over the second half of FY 2020 due to the pandemic.

With the signing of the VA Tele-hearing Modernization Act in April 2020, the Board fully implemented virtual tele-hearings, which became the primary means for veterans to have hearings for the remainder of FY 2020. The Board held more than 4,300 virtual tele-hearings from the beginning of COVID-19 operations through September 2020.

At the end of FY 2020, the Board had 55,265 legacy and 31,584 AMA hearings pending. However, as of July 1, 2021, the Board had 40,609 legacy hearings and 50,465 AMA hearings totaling over 91,000 backlogged hearings—an increase of over 15,000 since February 2020.

To mitigate the effects of the pandemic on hearing operations, the Board has established a goal to hold 50,000 hearings in FY 2021. As the Board continues resolution of legacy appeals and associated hearing requests, the proportion of AMA hearing requests pending will increase. The Board currently receives approximately 2,000 new AMA hearing docket appeals per month.

RECOMMENDATION

The most hearings the Board ever conducted in a year was in FY 2019 when they conducted over 23,000. Although the *Independent Budget* recently recommended an additional 200 FTE and the Administration's budget proposal would add 163 FTE, we believe that more FTE would not aggressively reduce the hearing backlog in the near term.

We are concerned that the Board does not have a definitive plan for addressing the backlog, outside of conducting more hearings, trying to convert more hearings to virtual hearings and increasing their FTE. We recommend that the Board, in collaboration with VBA and stakeholders, develop a written plan to address the continued growth of the backlogged hearings. A written strategy and plan will keep the Board focused on the long term and poised to counter increased hearing backlogs in the future.

INTAKE AND DOCKETING OF AMA APPEALS

In January 2020, the Board established the Office of the Clerk of the Board, an internal Board resource formed to ensure the proper docketing of AMA appeals. The Clerk's Office also works to identify and correct AMA docketing errors, improve Board training around AMA issues and assists VA IT professionals in refining the technological tools used by Board staff to process AMA appeals.

Although the Clerk of the Board was created, DAV is continuing to discover AMA appeals that are deemed invalid and should not have been docketed. For example, veterans who have received a proposed reduction from VBA are filing an appeal, VAF 10182, directly to the Board. However, since this is a proposed action and not a final action, the issue is not under the Board's jurisdiction and thus is an invalid appeal. This invalid appeal may not be discovered for months or longer while the veteran is completely unaware. In many instances, this has negatively impacted veterans as they could not take other timely actions.

DAV's National Appeals Office located at the Board, has estimated that 1 in 25 cases reviewed for an informal hearing presentation and 1 in 100 cases reviewed for a hearing are invalid appeals that should not have been docketed. We are greatly concerned that not only are these creating issues within the Board, veterans are potentially losing out on filing and effective dates for issues that should have been filed with VBA.

RECOMMENDATION

DAV recommends the Board to create an intake and docketing training curriculum for all Board personnel. By providing this training to all Board personnel, not just those docketing AMA appeals, they can greatly reduce the number of invalid AMA

appeals and attain greater efficiency without potentially creating effective date issues for claimants.

LEGACY REMAND DECISIONS

In the legacy appeals system, when a veteran files a VA Form 9 in response to a Statement of the Case issued by the VARO, their claim will go to the Board to be reviewed by a VLJ. The Board will then look through the veteran's file, consider all of the evidence submitted, and issue a decision. There are several situations in which the Board will decide to remand a claim, including:

- If the Board believes it needs additional information or evidence in order to come to a final determination;
- If the Board does not believe that the VARO evaluated the veteran's claim appropriately; and
- If additional evidence was submitted that the VARO did not review.

Importantly, in the legacy appeals system, the Board is obligated to remand for duty to assist errors that occurred at any time while the veteran's appeal was pending. If a veteran's case is remanded, their file will go back to the VARO. In each remand, the Board will lay out specific remand instructions to which the VARO must adhere. For example, the Board can instruct the VARO to obtain a Compensation & Pension examination, medical records, service records, or other types of additional evidence. Once the VARO completes the Board's remand instructions, it will issue a decision on the veteran's claim. It can either issue a rating decision if it determines the veteran is entitled to the benefits sought on appeal, or a Supplemental Statement of the Case (SSOC), if it is unable to grant benefits. The issuance of an SSOC will automatically send the veteran's claim back to the Board so a final decision can be made.

In previous fiscal years, the Board's legacy remand rate has been near 48%. In FY 2020, 40% of legacy appeals were remanded. Recently, the Board indicated there are 30,000 legacy remands pending within VAROs.

RECOMMENDATION

Many of these remanded legacy appeals have already been pending for years and could be pending for more years to come if they are returned to the Board's jurisdiction after VBA completes their required actions. Many of these are waiting for VA examinations, as we know the pandemic has greatly added to the backlog of pending examinations within VBA.

We recommend VBA and the Board develop a plan or agreement to expedite all legacy remands, specifically those that are waiting for VA examinations or additional evidence/records requested from the National Records Personnel Center.

AMA REMAND DECISIONS

Under AMA, the Board is no longer obligated to remand for duty to assist errors. However, if the duty to assist error is pre-decisional, meaning it occurred prior to the VARO adjudication on appeal, the Board can remand the appeal back to the VARO with instructions to correct the error. For example, the Board may request the VARO to obtain an advisory medical opinion if it should have done so prior to the initial decision.

Additionally, under AMA, remanded appeals are not automatically returned to the Board following development and correction. Instead, the AOJ will readjudicate the appeal by re-reviewing the record, conducting the development necessary to correct the pre-decisional duty to assist error, and issue a new rating decision. A veteran's appeal will only return to the Board if the claimant files another Notice of Disagreement within one year of the VARO's readjudication.

If there is no pre-decisional duty to assist error, the Board is instructed to grant or deny the appeal for benefits based on the evidence considered by the VARO, and any evidence submitted during or within 90 days after the NOD or Board hearing.

In FY 2020, 28% of AMA appeals were remanded, and in June 2021 the AMA remand rate increased to over 30%. We are greatly concerned by the percentage of AMA remands; one of the original intents of AMA was to reduce the amount of remands. This rate of AMA remands establishes that VBA claims personnel are committing a high volume of duty to assist errors pre-decision. We believe this high percentage of errors is, in part, due to training issues.

This is verified by the June 2021 Government Accountability Office (GAO) report, "Veterans Benefits Administration Could Enhance Management of Claims Processor Training" which made ten recommendations for VBA to implement. Additionally, the report noted, "fully applying leading practices for training would provide VBA greater assurance that its workforce is sufficiently skilled to efficiently and effectively process disability claims and provides high-quality service to veterans." The report clearly identifies training issues within VBA.

Additionally, we believe VBA places an overemphasis on their own training manuals, adjudication manuals and training memos which are not binding on the Board. As noted in Title 38, Code of Federal Regulations, Section 20.105, "In the consideration of appeals and in its decisions, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues."

Further, in December 2020, the Court of Appeals for Veterans Claims (CAVC) held in *Kennedy v Wilkie* that a VA Fast Letter does not constitute “law.” It is clear that VBA trains their claims processors to their own manuals and not specific to statutes, regulations and precedent decisions. VBA needs their training to focus on the law, not their own manuals.

RECOMMENDATIONS

To improve VBA quality and reduce AMA remands, we recommend that VBA and the Board track all of the AMA remanded cases. This will allow the Board to identify the reasons for the AMA remand, provide feedback to VBA and establish training specific to the pre-decision errors that are being remanded by the Board. Additionally, this would ensure that all AMA remands are being addressed in their entirety by VBA.

We further recommend that VBA include the Board in any and all manuals, circulars, or similar administrative issues changes or updates to ensure that they are not in conflict with existing statutes, regulations or precedent decisions.

In closing, the Board has continued to perform and produce at extraordinary levels in FY 2020 and into FY 2021. Also, it is evident that AMA was successfully implemented and has provided veteran-centric options while greatly reducing the average days to a decision from the Board. DAV is greatly appreciative of VBA’s and the Board’s efforts with AMA. However, we have great concerns with the pending backlog of hearings, the intake and docketing of AMA appeals and the remand decisions for both legacy and AMA appeals. Individually and collectively, these could have severe negative impacts on veterans and their families obtaining their earned and deserved benefits and health care.

This concludes my testimony on behalf of DAV. I would be happy to answer any questions you or other members of the Subcommittee may have.