

**STATEMENT OF  
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THE AMERICAN LEGION  
BEFORE THE  
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS  
COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES  
ON  
REVISING THE VA SCHEDULE FOR RATING DISABILITIES**

**FEBRUARY 26, 2008**

**Mr. Chairman and Members of the Subcommittee:**

Thank you for this opportunity to present The American Legion's views on revising the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). This statement will focus on the issues outlined in the Subcommittee's hearing invitation letter.

**Rating Schedule (General)**

The Veterans' Disability Benefits Commission (Commission or VDBC) specifically recommended the following with respect to the VASRD:

VA should immediately begin to update the current Rating Schedule, beginning with those body systems addressing the evaluation and rating of post-traumatic stress disorder and other mental disorders and of traumatic brain injury. Then proceed through the other body systems until the Rating Schedule has been comprehensively revised. The revision process should be completed within 5 years. VA should create a system for keeping the Rating Schedule up to date, including a published schedule for revising each system. **(Recommendation 4.23; Chapter 4, Section I.5)**

While The American Legion does not disagree with the need to ensure an up-to-date VASRD, by removing out-of-date and archaic criteria and using current trends in medicine, science, and technology to evaluate disabilities, the issues with the Rating Schedule should be put in proper perspective. In fact, most major body systems in the Rating Schedule have been updated over the last several years.

In the opinion of The American Legion, the Rating Schedule is not the major cause of problems with the VA disability compensation process. The American Legion supports the updating of conditions such as traumatic brain injury (TBI) that have not been recently updated, but problems such as inadequate staffing, inadequate funding, ineffective quality assurance, premature adjudications, and inadequate training that plague the VA regional offices will not be resolved by an overhaul of the rating schedule and must be the major focus of any attempts to reform the adjudication process.

The American Legion must stress that we are a nation at war. Therefore, no injury or disability to any current servicemember should receive less compensation because of an update to the Rating Schedule. Also, The American Legion believes the evaluations for some disabilities (for example: amputations, loss of use of a limb, loss of use of a creative organ) are under-compensated because these ratings fail to consider the impact of the disability on the veteran's quality of life. Other disabilities, such as mental conditions, are under-compensated because they fail to adjust to the changing work environment. The American Legion welcomes positive changes to the Rating Schedule to cure these inequities.

### **Evaluation of Post-Traumatic Stress Disorder**

The VDBC made the following recommendation regarding the evaluation of post-traumatic stress disorder (PTSD):

VA should develop and implement new criteria specific to post-traumatic stress disorder in the VARD. VA should base those criteria on the *Diagnostic and Statistical Manual of Mental Disorders* and should consider a multidimensional framework for characterizing disability due to post-traumatic stress disorder. **(Recommendation 5.28; Chapter 5, Section III.3)**

The Rating Schedule currently uses one set of rating criteria for all mental disorders. There are unique aspects of PTSD that are not properly evaluated by the current rating criteria and The American Legion supports the development of rating criteria that addresses the specific symptoms involved with PTSD.

The VDBC further recommended:

VA should establish a holistic approach that couples post-traumatic stress disorder treatment, compensation and vocational assessment. Reevaluation should occur every 2-3 years to gauge treatment effectiveness and encourage wellness. **(Recommendation 5.30; Chapter 5, Section III.3)**

While The American Legion supports a holistic approach to the treatment and compensation of PTSD that encourages wellness, we are concerned that a mandatory reevaluation every 2-3 years could result in undue stress among PTSD service-connected veterans. These veterans may be fearful that the sole purpose of such reevaluations would be to reduce compensation benefits. This perception could undermine the treatment process. We would, therefore, encourage study and review of possible unintended consequences regarding this portion of the Commission's recommendation.

### **Individual Unemployability**

The VDBC made the following recommendations regarding the use and evaluation of total ratings based on Individual Unemployability (IU):

Eligibility for Individual Unemployability should be consistently based on the impact of an individual's service-connected disabilities, in combination with education, employment history, and medical effects of an individual's age or potential employability. VA should implement a periodic and comprehensive evaluation of Individual Unemployability-eligible veterans. Authorize a gradual reduction in compensation for Individual Unemployability recipients who are eligible to return to substantially gainful employment rather than abruptly terminating disability payments at an arbitrary level of earning. **(Recommendation 7.4; Chapter 7, Section II.3)**

Recognizing that Individual Unemployability is an attempt to accommodate individuals with multiple lesser ratings, but who remain unable to work, the Commission recommends that as the VASRD is revised, every effort should be made to accommodate such individuals fairly within the basic rating system without the need for an Individual Unemployability rating. **(Recommendation 7.5; Chapter 7, Section II.3)**

Although The American Legion supports the provision calling for the gradual reduction in compensation benefits for IU recipients who are able to return to substantially gainful employment, we strongly oppose the portion of the recommendation that could be interpreted as requiring the consideration of age in determining eligibility to IU. It is inherently unfair to punish an older veteran, who would not be able to work at any age because of a service-connected condition, while awarding the benefit to a similarly disabled younger veteran. The current rule states (in essence) that the impact of a service-connected condition on a veteran cannot be evaluated to a higher degree because the veteran is old (38 C.F.R. § 3.341(a)). The schedule is based on the average impairment in earning capacity. If the veteran cannot work because of service-connected disability(ies), then IU should be awarded.

Additionally, The American Legion is extremely leery of any recommendation that would encourage the elimination of a specific benefit program on the anticipation of a revised Rating Schedule that would supposedly eliminate the need for that benefit. The current policy as enunciated by 38 C.F.R. § 3.340 states, "[T]otal disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation." This policy is fair and consistent with the non-adversarial nature of the VA claims process. Therefore, this policy should not be altered. Veterans should not be punished because they are so unfortunate to suffer from both service-connected and nonservice-connected disabilities, either of which could cause unemployability.

**38 C.F.R. § 4.16(b) states: *It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled.***

The bottom line is that veterans who are unable to work due to service-connected disability should be compensated at the 100 percent level, whether it be based on a scheduler evaluation (either single service-connected disability or a combined scheduler evaluation) or based on Individual Unemployability. This has been a longstanding VA policy and we see no need to change it. *See* 38 C.F.R. § 3.340.

## **Improving rating criteria for Traumatic Brain Injury**

On January 3, 2008, VA published in the Federal Register a proposed regulation to amend the current criteria for the evaluation of Traumatic Brain Injury (TBI). The current diagnostic code (DC 8045) is very restrictive and promotes inadequate evaluations. In fact, VA specifically noted that the current DC 8045 is 45 years old and reflects a view that the various symptoms associated with TBI could be due to malingering or hysteria. The American Legion commends VA for recognizing this situation and for making an effort to revise the current evaluation criteria for TBI.

### ***Symptom Clusters***

The current criteria limit subjective TBI symptoms to a ten percent rating evaluation without any consideration to the frequency and severity of these symptoms. Although the new criteria under the proposed regulation allow for ratings up to 40 percent for symptom clusters, frequency and severity of the symptoms are still not considered. Under the proposed rule, there must be at least three of the listed symptoms present for a compensable evaluation to be assigned. These symptom clusters include headaches, dizziness, fatigue, malaise, sleep disturbance, cognitive impairment, difficulty concentrating, delayed reaction time, behavioral changes, emotional changes, tinnitus or hypersensitivity to sound or light, blurred vision, double vision, decreased sense of smell and taste, and difficulty hearing in noisy situations in the absence of hearing loss. The disability percentage would be based on a specific number of symptoms present (40 percent -- 9 or more symptoms; 30 percent -- 5-8 symptoms; 20 percent -- 3 or 4 symptoms).

The American Legion appreciates that VA now recognizes that these symptoms could be due to subtle brain pathology. Unfortunately, because VA proposes to replace the current 10 percent maximum evaluation with rating levels of 20, 30, and 40 percent, we are concerned that this rating formula would continue to promote unfair adjudications because, just as in the current DC 8045, the frequency and severity of the symptoms are ignored. This means that the maximum rating allowed would be 40 percent no matter how severe or frequent the symptom clusters. This 40 percent maximum rating makes it extremely difficult for a veteran to receive a total rating based on IU due to TBI symptom clusters because the proposed revised rating criteria do not allow for a rating of 60 percent, which is required to satisfy the scheduler requirements for IU under 38 C.F.R. § 4.16(a). This means that the only pathway to a 100 percent disability rating is if VA grants an extra-scheduler rating under 38 C.F.R. § 4.16(b). Because very few extra-scheduler ratings are issued by VA (especially an extra-scheduler grant of total disability rating based on IU), this proposed change is highly unfair.

Lastly, the proposed regulation does not discuss the consideration of the longitudinal history of the disability. For example, TBI symptoms for some veterans may wax and wane. Therefore, some veterans may be under evaluated if the history of their symptomatology is not considered.

### ***Evaluation of Cognitive Impairment***

While the proposed regulation does attempt to define mild impairment for the purposes of evaluating cognitive impairment, it does not define the terms “moderately impaired” and

“severely impaired.” We strongly recommend that VA define these terms with specificity to promote consistency and fairness in adjudication.

In the opinion of The American Legion and the National Veterans Legal Services Program (NVLSP), the formula used by the proposed regulation to evaluate the 11 common major effects of cognitive impairment would encourage much unfair adjudication. The proposed regulation is unfair because the formula does not fairly capture the impact of some of the major effects of cognitive impairment. For example, suppose a veteran has a score of three because his or her TBI causes the veteran to require assistance with the activities of daily living some of the time (but less than half of the time). If the veteran had only zero scores in the other major effects of cognitive impairment, the veteran would be evaluated as only ten percent disabled. This is patently unfair, especially given the fact that veterans with a mental condition that causes just mild memory loss could arguably receive a 30 percent evaluation under 38 C.F.R. § 4.130 (see the 9400 diagnostic code series).

### ***Applicability Date***

VA contends that the provisions of this proposed rule would be applicable only to claims for benefits received by VA on or after the effective date of the rule. Therefore, pending claims would have to be adjudicated under the current unfavorable rule.

It does not make sense to apply the old rating criteria to a claim that has not been initially adjudicated, or is pending re-adjudication due to an appeal, simply because the claim was received prior to the effective date of the new rule. VA should amend this portion of the proposed rule to require claims and appeals filed prior to the effective date of the rule, but pending at the time the rule takes effect, to be adjudicated under the new rule.

### ***Emotional and Behavioral Dysfunction and Comorbid Mental Disorders***

It is clear, as admitted by VA in its comments, that many veterans who suffer from TBI also suffer from secondary depression (or other mental illnesses such as PTSD). Therefore, the proposed rule should be amended to require the VA to consider whether the record reasonably raises the issue whether service-connection is warranted for mental disorders (especially mental disorders secondary to the TBI) whenever service-connection is granted for TBI, and, if so, to adjudicate such a separate claim. This should be done because it is fair and because many veterans with mental disorders are already at a disadvantage when it comes to prosecuting their claims.

### **Presumptions**

The VDBC made the following recommendations regarding the replacement of the current “association” standard with a “causal effect” standard in the presumptive disability decision-making process:

The goal of the presumptive disability decision-making process should be to ensure compensation for veterans whose diseases are caused by military service and this goal must serve as the foundation for the work of the Science Review Board. The committee recommends that

the Science Review Board implement its proposed two-step process. **[Institute of Medicine (IOM) Rec. 4] (Recommendation 5.11; Chapter 5, Section II.1)**

The Science Review Board should use the proposed four-level classification scheme, as follows, in the first step of its evaluation. A standard should be adopted for “causal effect” such that if there is at least as much evidence in favor of the exposure having a causal effect on the severity or frequency of a disease as there is evidence against, then a service-connected presumption will be considered. **[IOM Rec. 5] (Recommendation 5.12; Chapter 5, Section II.1)**

- Sufficient: The evidence is sufficient to conclude that a causal relationship exists.
- Equipose and Above: The evidence is sufficient to conclude that a causal relationship is at least as likely as not, but not sufficient to conclude that a causal relationship exists.
- Below Equipose: The evidence is not sufficient to conclude that a causal relationship is at least as likely as not, or is not sufficient to make a scientifically informed judgment.
- Against: The evidence suggests the lack of a causal relationship.

When the causal evidence is at equipose and above, an estimate also should be made of the size of the causal effect among those exposed. **[IOM Rec. 7] (Recommendation 5.14; Chapter 5, Section II.1)**

The American Legion does not support these recommendations because the “association” standard currently used in the presumption determination process is consistent with the non-adversarial and liberal nature of the VA disability claims process. Moreover, as is the case of the 1991 Gulf War, there is often a lack of specific or reliable exposure data. Due to improper record keeping, resulting in a lack of reliable exposure data, during Operations Desert Shield and Desert Storm, there is insufficient information to properly determine servicemember exposure to the numerous environmental and other hazards U.S. troops were exposed to in the Southwest Asia Theater of Operations during the war. A lack of such data would clearly diminish the value and reliability of a “causation” standard as recommended by the IOM. It should also be noted by this Subcommittee that despite its recommendation, the Commission stated that it was concerned that “causation rather than association may be too stringent” and encouraged further study of the matter.

### **Evaluating Quality of Life**

The American Legion supports specifically addressing in the evaluation process the impact of a service-connected disability on a veteran’s quality of life. We do realize, however, that properly evaluating and compensating for the impact of a service-connected disability on an individual’s quality of life is not an easy task and we welcome further study on this matter, including the study VA has recently commissioned that will address quality of life matters.

## **Closing**

Thank you again, Mr. Chairman, for allowing The American Legion to present comments on these important matters. As always, The American Legion welcomes the opportunity to work closely with you and your colleagues to reach solutions to the problems discussed here today that are in the best interest of America's veterans and their families.