

**STATEMENT OF
STEVE SMITHSON, DEPUTY DIRECTOR
VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
THE VETERANS DISABILITY BENEFITS CLAIMS MODERNIZATION ACT OF 2008**

APRIL 10, 2008

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to present The American Legion's views on this draft bill being considered by the Subcommittee today. The American Legion commends the Subcommittee for holding a hearing to discuss this extensive draft bill.

Section 101. Presumption of service-connection for veterans who were deployed in support of contingency operation with post-traumatic stress disorder

There are three requirements that must be established in order to establish entitlement to service connection for post-traumatic stress disorder (PTSD): (1) A current diagnosis of PTSD; (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between the current symptomatology and the claimed in-service stressor.

According to 38 C.F.R. § 3.304(f)(1):

If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

Unless the veteran was wounded or received a specific combat decoration or badge (such as the Combat Infantryman Badge or Combat Action Ribbon) or award for valor, it is often very difficult to establish that a veteran engaged in combat with the enemy in order to verify the claimed combat-related stressor. This is especially true of service in the combat theaters of Iraq and Afghanistan. Due to the fluidity of the battlefield and the nature of the enemy's tactics, there is no defined front line or rear (safe) area. Service members in non-combat occupations and support roles are subjected to enemy attacks such as mortar fire, sniper fire, and improvised explosive devices (IEDs) just as their counterparts in combat arms-related occupational fields. Unfortunately, such incidents are rarely documented making them extremely difficult to verify.

Service members who received a combat-related badge or award for valor automatically trigger the combat-related presumptions of 38 U.S.C. § 1154(b) and 38 C.F.R. § 3.304(f)(1), but a clerk riding in a humvee, who witnesses the carnage of an IED attack on his convoy, doesn't automatically trigger such a presumption and proving that the incident happened or that he or she was involved in the incident, in order to verify a stressor in relation to a PTSD claim, can be extremely time consuming and difficult. Moreover, such claims are often denied due to the veteran's inability to verify the alleged combat-related incident (stressor) to the satisfaction of the Department of Veterans Affairs (VA).

For the reasons and examples discussed above, The American Legion supports the establishment of a presumption of stressor, for the purpose of establishing entitlement to service connection for PTSD, for any veteran who served in Operations Iraqi Freedom (OIF) and Enduring Freedom (OEF) as long as the alleged stressor is related to enemy action and is consistent with the circumstances, conditions, or hardships of such service. Such a presumption would not automatically presume service connection for PTSD, but would presume the alleged stressor occurred as long as the stressor is related to enemy action or the result of enemy activities and is consistent with the circumstances and conditions of service in Iraq or Afghanistan. As verifying the alleged stressor is often the most time and labor intensive requirement to satisfy in a PTSD claim, such a presumption would not only benefit the veteran, it would also benefit VA by negating extensive development, and in some cases overdevelopment, of the stressor portion of a PTSD claim and, in doing so, reduce the length of time it takes to adjudicate such claims.

Section 102. Readjustment of Schedule for Rating Disabilities

The American Legion is generally supportive of this section and we are pleased with the portion specifically prohibiting the lowering of the rating of a particular disability under the readjusted schedule in comparison to how it was rated under the rating schedule in effect on the date of the enactment of the Act. The American Legion also supports the provision of this section establishing an advisory committee to the Secretary of disability compensation. We do, however, note that the rating schedule is not the major cause of problems with the VA disability compensation process. Inadequate staffing, inadequate funding, ineffective quality assurance, premature adjudications, and inadequate training still plague the VA regional offices and must be satisfactorily resolved otherwise any positive benefit anticipated from the implementation of this provision will surely be minimized.

Section 103. Study on Work Credit System of Veterans Benefits Administration

The American Legion fully supports this provision. We have long been a vocal critic of the Veterans Benefits Administration's (VBA's) current end product work credit system and we have addressed our concerns in testimony before this Subcommittee on several occasions. We have also been advised that the portion of this section pertaining to suspension of award of work credits will be changed to call for suspension of issuance of work credits, only if VA does not devise and implement a new system of measuring work production that differs from the current system. It currently states that VA will suspend its work credit system until a new system is implemented. The American Legion supports this anticipated change. We also recommend that the study addressed in this section be performed by an agency such as the Government Accountability Office (GAO), which is not invested in the current flawed VBA work credit system.

Section 104. Study on Work Management System

The American Legion supports the provisions of this section.

Section 105. Certification of Employees of Veterans Benefits Administration Responsible for Processing Claims

The American Legion supports this section. As discussed previously in The American Legion's testimony before this Subcommittee, VA has developed and implemented a job skill certification test for veteran service representatives (VSRs). Unfortunately, the current test for VSRs is not mandatory as a condition of employment in that position and is completely optional. Moreover, it is our understanding that VA did not conduct any tests in 2007.

The ultimate goal of certification or competency testing should be to ensure that an individual in any given position is competent, proficient, and otherwise qualified to perform the duties required of that position. This goal will not be achieved if testing is not mandatory, or is not provided for all levels or for all positions, and remedial training or other corrective action is not required for those who do not successfully pass the test. We, therefore, recommend adding language to this section specifically mandating an improvement plan for those who do not pass the examination, including eventual termination, if necessary.

Section 106. Annual Assessment of Quality Assurance Program

The American Legion supports the provisions of this section requiring VA to contract with a private entity to conduct annual assessments of its quality assurance program. Receiving input on VA's performance assessment programs from an independent entity would undoubtedly provide new insight on how to enhance the current processes. Additionally, The American Legion continues to share the results of regional office quality review visits (approximately 40 to date) with both VA and Congress. Our quality reviews identified many of the problems that this draft legislation attempts to cure and The American Legion commends the Subcommittee for its efforts to improve VA adjudications.

Section 107. Expedited Treatment of Fully-Developed Claims and Requirement for Checklist to be provided to Individuals Submitting Incomplete Claims

The American Legion supports the intent of this section but recommends adding the following language:

Nothing in this section would excuse VA from its duty to assist or its duty to notify if the claim is appealed (*see* 38 U.S.C. §§ 5103 & 5103A).

Section 108. Study and Report on Employing Medical Professionals to assist Employees of Veterans Benefits Administration

The American Legion is not opposed to the intent of this section which calls for a study to determine the need of VBA hiring medical professionals, including those who are not physicians, to act as medical reference or consultants to assist VBA employees with the assessment of medical evidence. We are also pleased that this section specifically states that such medical professionals are not to "be employed to rate any disability or evaluate any claim." We do, however, recommend that additional language be included specifically prohibiting VA

adjudicators from relying on regional office medical consultants' opinions to make decisions in claims for benefits. We oppose this because it would be far too easy for the cadre of medical professionals to dominate the adjudication process.

Section 109. Assignment of Temporary Disability Ratings to Qualifying Veterans

This proposed section closely tracks the current regulation 38 C.F.R. 4.28. The American Legion recommends that this section make it clear that mental conditions qualify for prestabilization or temporary ratings.

Section 110. Review and Enhancement of use of Information Technology at Veterans Benefits Administration

The American Legion welcomes innovative ideas, such as electronic claims processing and other uses of technology, which will enable VA to improve the service it provides to this nation's veterans, especially in the arena of benefits delivery. We must, however, caution that automation does not guarantee quality claim development and speed does not guarantee accuracy or quality of data entry. Moreover, although the use of such technology might improve the process, it is not a magic bullet that will fix all the problems that are currently plaguing VA's disability claims process.

Areas such as inadequate staffing levels, training, quality assurance, accountability, premature adjudication of claims and other problems resulting from VA's current work measurement system, as previously addressed by The American Legion in testimony before the Subcommittee, must be adequately dealt with before any real improvement resulting from use of artificial intelligence can be realized. Therefore, artificial intelligence-based programs that direct the development and the adjudication of claims should be published in the Federal Register so that the public, especially stakeholders such as The American Legion, can provide written comments.

The American Legion believes that the human element should never be removed from this equation and we are pleased that various experts that testified before the Subcommittee on the use of artificial intelligence in claims processing also agreed with this philosophy. Additionally, it must also be kept in mind that the bulk of the time and effort expended by VA in the disability claims process is not in the actual adjudication or decision making part of the process, rather it is the part of the process that involves the development of the claim prior to adjudication. This process involves informing the claimant of the evidence that is needed to substantiate the claims as well as assisting the claimant in obtaining the needed evidence, such as military personnel and medical records, relevant medical evidence (both private and VA), scheduling compensation and pension examinations and other efforts necessary before the claim is ready to be adjudicated. Evidence development can be very time consuming and it is extremely important that any electronic claims system utilized by VA in the future adequately address this important part of the process, not just the actual adjudication of the claim, or any actual improvement in the current process will be minimal at best.

Section 111. Treatment of Claims upon Death of Claimant

The American Legion is pleased to support the intent of this section. Specifically, we fully support allowing a deceased veteran's survivor to continue the claim upon the veteran's death rather than VA terminating the claim and requiring the survivor to file a separate claim for

accrued benefits, as is the current practice. Not only does the current practice cause duplication of effort and add to the existing claims backlog by requiring a “new” claim to be filed, it imposes an arbitrary 1-year deadline for the filing of such a claim. This deadline is often missed by grief stricken family members who were either unaware of the deadline or were not emotionally ready to go forward with the claims process within a year of their loved one’s death. This legislation provides a common sense approach that allows VA to avoid “reinventing the wheel” by not having to start over from scratch with a new claim and, at the same time, provides the deceased veteran’s survivors with a more user friendly and less complicated claims process.

Section 201. Creation of Single Joint Department of Veterans Affairs and Department of Defense Disability Examination Process

The American Legion supports the intent of this section. We are, however, concerned that the current military disability evaluation system, including the pilot program referenced in this section, does not have an independent appeals route for the service members during the Department of Defense (DoD) phase. If the member does not agree with the medical determination, diagnosis or extent of the service-connected unfitting condition, there is no option for a second medical opinion unless the soldier obtains it at his own expense and the Physical Evaluation Board (PEB) grants it entry into the case.

The military Medical Evaluation Board (MEB) and the PEB determinations can be formally appealed only to the Physical Disability Agency to which the PEB belongs. Thereafter, once separated or retired, the service members, now veterans, begin the appeals process at the VA regional office level thus taking extensive time before they may receive an independent appeal of their case. The American Legion does not consider this to be fully mindful of the rights of military patients and soldiers who deserve to have an objective independent recourse route in which to appeal the findings in such an important medical and benefit determination process. Therefore, The American Legion urges that language be included in this section recognizing this significant shortcoming and establish an appeals process for both the military medical separations and medical retirements.

Section 301. Annual Reports on Workload of United States Court of Appeals for Veterans Claims

The American Legion does not oppose the provisions of this section.

Section 302. Modification of Jurisdiction and Finality of Decisions of United States Court of Appeals for Veterans Claims

The American Legion does not oppose the provisions of this section.

Conclusion

Thank you again, Mr. Chairman, for allowing The American Legion to present comments on this important draft legislation. As always, The American Legion welcomes the opportunity to work closely with you and your colleagues on enactment of legislation in the best interest of America’s veterans and their families.