

**STATEMENT OF
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NATIONAL LEGISLATIVE COMMISSION
THE AMERICAN LEGION
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
ON
PROPOSALS TO LIMIT ELIGIBILITY FOR VA COMPENSATION TO VETERANS
WITH DISABILITIES DIRECTLY RELATED TO THE PERFORMANCE OF DUTY**

SEPTEMBER 23, 2003

Mr. Chairman and Members of the Committee:

Thank you for allowing The American Legion the opportunity to participate in this hearing. Over the last two weeks, The American Legion and other veterans' and military service organizations have been chasing a "ghost" proposal attempting to end the tax placed on disabled military retirees. To date, The American Legion has not been provided a written copy of the proposed legislation for its official comments. Even for this hearing, we are asked to speculate what that proposed legislation might look like.

So here is the short answer: The American Legion adamantly supports full concurrent receipt of military retirement pay and VA disability compensation. Both are earned benefits for two completely different reasons. Military retirement pay is determined and awarded by the Department of Defense for honorable military service. VA disability compensation is determined and awarded by the Department of Veterans Affairs for medical conditions incurred or aggravated while on active-duty.

Of the 26 million American veterans, less than 10 percent are service-connected disabled and only 2 percent are military retirees. Over 2 million service-connected disabled veterans receive their VA disability compensation with no offsets to their salaries or retirement plans, to include Federal and State employees. However, there are 600,000 military retirees that could not receive VA disability compensation until they were discharged from active-duty and retired – even if the disability were as obvious as a missing limb. Once they were awarded their VA disability compensation, their military retirement pay was reduced – dollar-for-dollar. The amount of military retirement pay retained by DoD would amount to literally hundreds of billions of dollars.

In fact, according to Secretary Rumsfeld, DoD plans to withhold an additional \$58 billion over the next 10 years from the retirement checks of military retirees with 20 years or more of active military service or Reservists with over 7200 points. If the Secretary included all service-connected disabled military retirees, that amount would be even greater.

The current proposal being floated around would grant full concurrent receipt at what The American Legion would consider an immoral, and unethical approach. This proposal calls for “reform” of the VA disability definition. Yet, VA has at least two full congressional committees with jurisdiction and oversight of the VA claims and adjudication process. In addition, VA has judicial review of its disability compensation decisions through the Court of Appeals for Veterans’ Claims.

Ill-advised changes in VA’s disability definitions would result in numerous examples of injustices resulting in service-connected disabled veterans being denied compensation, treatment, or rehabilitation. The adverse impact of this legislation would continue to reveal unintended consequences. With each unique case new adjustments would be made and eventually, you would be right back where you started with the current rules, regulations, and definitions.

Changes in disability standards in Titles 10 and 38 United States Code (USC) would require that injury or illness that results in disability retirement and separation must have been incurred as a “direct result of the performance of duty” and redefines service connection, respectively, as follows;

1. Injuries resulting from the performance of official military duties.
2. Illness directly resulting from exposure to the causes of the illness while performing military duties or directly resulting from exposure to the causes of the illness at the duty or directly resulting from exposure to the causes of the illness at the duty location to which the member is assigned.
3. Excludes injuries that are sustained while not performing official military duties.
4. Excludes illnesses determined to be related to aging and/or preexisting medical conditions of the member;

“Official military duties” are defined as:

1. Duties performed in an official government capacity directly related to those functions and scope of duties associated with the occupational skill assigned to the member.
2. Other actions or functions in an official government capacity that the member was ordered to execute by a member (or civilian supervisor) of senior grade or rank or in an senior or superior position, or a member, or a member that is designated by such a senior individual to give the member instructions, to include unspecified preparatory or follow-on actions and functions.
3. Includes duties that result in qualified combat-related disabilities as defined in 10 U.S.C. § 1413a.
4. Excludes actions and time periods unrelated to official government business to include travel to and from the members home and permanent duty station, meals and other activities selected and carried out by the member at an official duty location and during hours designated as duty hours for the member.

Mr. Chairman, The American Legion agrees that reform is necessary, but the reform needs to focus on the formula used to compute the annual discretionary appropriations required to supplement the Military Retirement Trust Fund. Current calculations include concurrent receipt

windfalls. A 5-year adjustment in this formula would phase-in full concurrent receipt without denying future veterans their service-connected disability claims.

This ill-conceived proposal will stand a century of veterans' law on its head. The unintended consequences can only be imagined and starts at the top. The Congressionally-mandated ideal of a non-adversary, paternalistic VA will vanish in the smoke and mirrors of petty partisan politics. The doctrine of the benefit of the doubt will be rendered moot; the tie will now go to the Federal Government and the veteran will be left twisting in the bureaucratic wind. A paralyzing upheaval in the Veterans Benefits Administration (VBA) will add months if not years to already interminable claims processing times. The Department of Defense (DoD) will spend millions of additional dollars annually retaining tons of records that would normally be disposed of, as will the National Archives storing and retrieving them. The Services must establish hundreds of new "Performance of Official Duty Determination Boards". The Secretary of Veterans Affairs will no longer have the power to add new diseases to the presumptive lists and the existing ones will be called in to question.

The U.S. Courts of Appeals for the Federal Circuit and for Veterans Claims will be swamped with litigation for years to come. DOD recruitment goals will fail to be met as young men and women reconsider whether they will be able to afford to pay for care for treatment of injuries and illnesses incurred in service while "off-duty", because private insurers will not cover pre-existing conditions.

More questions are raised than are answered by this odious language. The Marine Corps veteran is now required to prove that he or she contracted malaria while walking guard duty in some third world nation and not while the member was dining *al fresco* on MREs there between shifts? Preposterous. Under the proposed plan, conceivably, a 16-year Air Force avionics technician will be determined unfit for military service as the result of trauma sustained in a car wreck on the way to work and therefore released from service. Ineligible for the Temporary Disability Retired List (TDRL), the veteran and his or her family are now struggling to survive. Outrageous.

Following a barrage of conflicting shouted orders from midshipmen, none of whom are her direct superior, a first-year Naval Academy student tears her medial cruciate ligament running an obstacle course in the dark. The injury is determined to be "not in the performance of official duties". Unacceptable. A former Army graves registration specialist in Vietnam succumbs to refractory hypertension and coronary artery disease induced by a lifetime of chronic, severe post traumatic stress disorder. In his social withdrawal and fear of institutions, the veteran never filed a service connection claim. This secondary service connection relationship just now being recognized and accepted by VA and the widow is advised to file a claim for Dependency and Indemnity Compensation (DIC). The widow must now prove an additional element of service connection in addition to cause of death, incident in service and medical nexus; "performance of official duty." After three years of waiting the DIC claim is denied on the new element and the widow and her children continue to live in poverty. Shameful.

Mr. Chairman, before closing, let me relate another scenario to you and the Committee. Two U.S. soldiers are on patrol in a hostile fire area, be it Vietnam, Iraq or the Philippines. An enemy

hand grenade detonates between them and both soldiers receive similar shell fragment wounds, are given first aid on the scene, sent to an aid station and evacuated to a U.S. military hospital where they receive medical treatment and rehabilitation. Both recover from their wounds with similar residual scars and go on to complete their enlistment. One soldier decides to make the military a career and re-enlists; the other gets out and goes to work for the U.S. Postal Service. The postal worker files an immediate claim for his scars and is assigned a 10% disability rating, which he begins to collect monthly. The soldier must wait until he retires to file a disability claim. Both complete 20 years of faithful Federal service and retire. Only the career soldier must choose between the 10% disability compensation and his military pension. In the meanwhile, the postal worker has accrued close to \$50,000.00 that the career soldier has not. This fundamental unfairness in the law must end, but it must not be at the expense of veterans who served this nation honorably for a short time in their lives and returned to civilian life having left pieces of themselves, whether of body or psyche, behind. It is shameful that the very institution charged with the responsibility to ensure America's veterans are justly treated would employ such a vile bargaining tactic.

Military retirement is an earned benefit through time in service, as is all other Federal career retirement plans. VA disability compensation is just payment for injuries resulting from service. Both are separately earned and fully deserved entitlements. Military retirees are the only ones so treated. There is a correct way to deal with disability compensation reform. Making it more difficult for veterans to be awarded disability, in one fell swoop by a Committee that does not have jurisdiction, is not the way

The government should stop making military retirees pay for their own disability compensation – that is the issue at hand – and should set spending priorities accordingly that demonstrate respect for career military service members. The American Legion will continue to fight to end this travesty and to prevent another from occurring.

Mr. Chairman, thank you for requesting the views of The American Legion on this very important issue affecting our nation's veterans.

"The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their nation".

George Washington