



**STATEMENT OF
ZACHARY HEARN, DEPUTY DIRECTOR OF CLAIMS
NATIONAL VETERANS AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION**

BEFORE A JOINT HEARING OF THE

**SUBCOMMITTEES ON OVERSIGHT & INVESTIGATIONS
AND
DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES**

ON

"EXAMINING VA'S PROCESSING OF GULF WAR ILLNESS CLAIMS"

JULY 13, 2017

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In March 2016, The American Legion testified before a joint hearing of the Subcommittees on Oversight and Investigation, and Disability Assistance and Memorial Affairs to discuss the adjudication of Gulf War Illness claims for veterans that served in the Persian Gulf since August 2, 1990.

These veterans are prideful based on their honorable service, but many remain frustrated due to their chronic and unexplained illnesses. They defeated an aggressor, liberated a nation, and defended American interests, but for some the cost of this service to our nation has resulted in many veterans suffering with debilitating symptoms since returning from the Persian Gulf. The specific etiology of the conditions are mysterious, and the granting of presumptive claims related to Persian Gulf service remains a painfully long process that could result in years of appeals before receiving the positive adjudication they have earned.

Chairmen Bergman, Bost, Ranking Members Kuster, Esty, and distinguished members of the Subcommittees on Oversight and Investigations, and Disability Assistance and Memorial Affairs; on behalf of National Commander Charles E. Schmidt and The American Legion, the country's largest patriotic wartime service organization for veterans, comprising over 2 million members and serving *every* man and woman who has worn the uniform for this country; thank you for the opportunity to testify regarding The American Legion's position on "Examining VA's Processing of Gulf War Illness Claims".

Background

The Department of Veterans Affairs (VA) currently identifies numerous medical conditions or symptoms that are presumptively related to Gulf War service. Presumptively awarding service connection for conditions due to environmental exposures is not a new concept for VA. Conditions such as diabetes, ischemic heart disease, and a variety of cancers are presumptively related to herbicide exposure in Vietnam. Additionally, veterans of radiation testing have had multiple conditions presumptively ascribed to radiation exposure in service.

For Persian Gulf veterans, they face a unique set of challenges in their quest to gain benefits derived from their military service. Unlike herbicide and radiation exposed veterans, many Persian Gulf veterans must prove they suffer from symptoms, or clusters of symptoms, and endure years of medical tests to indicate that they suffer from an undiagnosed illness.

“Undiagnosed illness” is a frustrating explanation to a complicated medical situation. Numerous medical studies have revealed that veterans who returned from Persian Gulf service face serious health concerns following their deployments. However, a generation removed from Operations Desert Shield and Desert Storm, the medical community is still uncertain of how to properly diagnose or treat these veterans resulting in VA routinely denying disability compensation to veterans seeking service connection for Gulf War related conditions.

Due to the ambiguity in the application of presumptive conditions associated with Persian Gulf service and the uncertainty within the medical community, veterans have become increasingly frustrated while trying to get their claims properly adjudicated. A common problem The American Legion finds is that veterans who seek a claim for benefits; and because of the complexity of Gulf War Illness (GWI); find that the diagnosis may have changed multiple times. VA raters are not medical specialists and are often unaware and unable to detect that the rapidly changing diagnosis is essentially the same condition. Moreover, the situation is further complicated by the fact that if one medical professional renders a diagnosis, by definition it is no longer an undiagnosed illness; even if the veteran received a multitude of differing diagnoses related to the same symptoms; and is therefore no longer undiagnosed according to VA raters.

The American Legion has over 3,000 accredited representatives located throughout the nation. Through their dedicated efforts, The American Legion represented over 800,000 veterans in Fiscal Year 2016. We are fortunate to have trained professional service officers in each of VA’s 56 regional offices (VAROs) and were able to refer to our national network of service office in March 2016, while testifying about Gulf War Illness claims. Some of the veterans’ experienced the following road blocks while seeking service connection ratings:

- Medical professionals hesitate to connect conditions to Persian Gulf service;
- Some veterans have elected not to pursue benefits because a perception exists that there is more desire to service connect veterans with service in Vietnam;
- Medical professionals will assign symptoms to aging; and
- Medical professionals suggest the veteran is malingering, stating they are too young for the symptoms.

According to American Legion’s Department Service Officers (DSOs), little if anything has changed regarding the development and adjudication of claims in more than a year since the March 2016 hearing. Many DSOs report limited GWI research combined with adjudicators’ denial of claims have led to many appeals that result in years of waiting and increased anguish for veterans and their families.

The American Legion’s concerns were confirmed in the recently released Government Accountability Office (GAO) report¹. GAO concurs with years of complaints from veterans and

¹ Gulf War Illness: Improvements Needed for VA to Better Understand, Process, and Communicate Decisions on Claims, GAO, June 2017

veterans service organizations (VSOs) regarding the treatment, development, and adjudication of Gulf War Illness claims. GAO's report provides insight into VA's lack of providing training to medical staff and VARO employees. VA's lack of training has resulted in various interpretations of guidance provided by VA Central Office resulting in vastly different outcomes for veterans. Furthermore, GAO concludes that VA's lack of clarity in its decision letters pertaining to Gulf War Illness claims leads to more questions than answers.

Many DSOs and veterans have discovered they may fare better if they ultimately appeal Gulf War related conditions to the Board of Veterans' Appeals (BVA). One DSO stated that he encourages veterans to submit lay statements from friends and family members detailing the symptoms the veteran has experienced to bolster the claim. He also states that a VA rater will likely ignore the lay statement that may detail the chronic symptoms; however, BVA veterans' law judges will take the lay statements into consideration when rendering a decision.

Each year The American Legion visits VAROs to review recently adjudicated claims and meet with VA employees. It is not uncommon to hear VA employees tell us that BVA has greater latitude than VA raters in adjudicating claims. It was concerning when we heard these statements from raters and decision review officers (DROs), and it was alarming when we heard it from a veterans' service center manager, and it was stunning when we heard last year from a senior official within the Veterans Benefits Administration (VBA) that the BVA has greater authority. When asked to clarify the statement and cite a regulation or statute, the official simply stated, "They just do", when in fact – they do NOT. The VA and the Board both adjudicate from the same statute.

Based on this common misconception The American Legion contacted VA's Office of General Counsel (OGC) for input. OGC agrees with The American Legion that no greater authority is given to a BVA judge than a VA rater or DRO adding, "It is not accurate to say that the Board has greater authority than the (VARO) to grant benefits, or any authority at all to circumvent the law and award benefits at will." In short, a rater has the ability to grant the same claim as the BVA judge.

VBA has routinely stated that BVA's combined 75 percent grant and remand rate for all appeals is due largely to the submission of additional evidence or the passage of time. There is some truth to that statement – however when considering that at least one senior official at VA Central Office stated that the BVA has greater authority, and numerous individuals at VAROs employed in management, as well as front line employee concur with that belief – VBA must own its routine inadequate development and premature denial of claims.

OGC's response to why the perception may exist that BVA has greater latitude sheds light on one of the issues that hamper VBA – its own manual. According to OGC, "One provision that may further misconception is 38 C.F.R. § 19.5 which provides that the Board is not bound by Department manuals, circulars, or similar administrative issues." VBA's manual was designed to provide "procedures for the adjudication of claims for compensation, pension, dependency and indemnity compensation, accrued benefits and burial allowance."² Considering the routinely

² [VBA M21-1 Adjudication Procedures](#)

different outcomes between VBA and BVA decisions, it stands to reason that VBA needs to reconsider the manual and its use of the document.

The use of lay statements in VBA decisions by VBA raters has become far less common. One reason for this is VA's implementation of its "Evaluation Builder" within the Veterans Benefits Management System. The Evaluation Builder tool was designed to provide uniform outcomes in decisions regardless of adjudicator. Discussions with line employees and VARO management at numerous offices have concluded that lay statements cannot be taken into account within the tool. This is further complicated by the fact that if a rater overrides the suggested decision, the quality review team (QRT) is notified and a review of the decision is initiated by QRT. Many employees report they will adjudicate in accordance with the Evaluation Builder tool's suggestion in order to avoid a QRT review. This lack of use of lay statements omits significant evidence, severely disadvantages veterans who submit this evidence, and causes significant harm to veterans who are denied benefits because raters refuse to consider all legal evidence. As an example, statements that support a continuity of symptoms could be evidence toward receiving a grant of benefits, or photographs would support the existence of an undocumented temporary duty assignment that wasn't properly documented in the veteran's official military record. It is absolutely critical that all levels of the VBA adjudication process fully support the use of lay statements, and The American Legion calls on VA to immediately cease the practice of largely ignoring this type of important legal evidence.

The American Legion finds that training continues to be an issue at VBA. One of our DSOs tells us that according to a VARO employee "VBA employees receive less (GWI) training than (VSOs)." The employee further states that any training received has been through VA's Talent Management System (TMS) web-based training, and that TMS training is not typically treated with the same level of focus as classroom training which has led to frustration with GWI claims.

DSOs also question the level of training that medical providers are receiving regarding Gulf War Illness claims and question if minimal, or if any training at all is being provided. VBA's expansion of contract compensation and pension exams is also raising concerns. Contractors may be hired with little to no training regarding GWI which will result in negative nexus statements and an ultimate denial by VBA.

The American Legion understands and appreciates the challenges VA faces regarding GWI. Unlike Agent Orange related claims or radiation exposure claims, a decision has to be rendered on an undiagnosed illness creating an inherent ambiguity. The American Legion suggested changes to Disability Benefits Questionnaires (DBQs) in March 2016 which have not been adopted. DBQs are a standardized form used by medical providers to evaluate the level of disabilities suffered by veterans; both VA and private sector medical professionals have the ability to access these forms.

As previously stated, many veterans are denied compensation benefits for Persian Gulf related conditions upon receiving a diagnosis, even if the diagnosis changes over the course of months or years. This lack of access to benefits can result in unequal and extraordinary hardship to veterans and their family members – all while their health continues to deteriorate. The American Legion calls on VA to identify veterans with Persian Gulf service and allow medical professionals to opine on DBQs if the sought medical conditions could at least as likely as not be related to Persian Gulf service despite having a diagnosis. This would provide the necessary path for medical providers,

VA, and most importantly, our veterans, to *finally* receive their VA disability compensation. Through this additional language examiners and VA would have the necessary latitude to provide proper benefits.

The American Legion calls on this Committee to have ongoing roundtables regarding GWI between Congress, VA, and VSOs so that we can improve the delivery of benefits for those suffering GWI. The appeals modernization effort that began in 2016 is proof that when we collaborate on a common problem, we can arrive at a successful solution.

The American Legion has been concerned about the effects of environmental exposure on our servicemembers, and the resulting health effects years following service for more than 20 years. During The American Legion's 98th National Convention, we called upon "the scientific community to focus its efforts on the most likely causes of Gulf War veterans' illnesses" and for VA to "closely monitor the implementation of changes to title 38, United States Code, section 1117, to ensure proper application of the law at the Department of Veterans Affairs regional office(s)", through passage of American Legion Resolution 122.³ Additionally, the resolution states The American Legion supports a "liberalization of the rules relating to the evaluation of studies involving exposure to any environmental hazard and that all necessary action be taken by the federal government, both administratively and legislatively as appropriate, to ensure that veterans are properly compensated for diseases and other disabilities scientifically associated with a particular exposure."

Conclusion:

The American Legion appreciates the level of difficulty associated with claims pertaining to Persian Gulf service; however, veterans have now suffered for a quarter of a century. VA's continuous reliance on the medical community to discover the etiology for a syndrome they have yet to define has cost too many veterans years of disability compensation. We call for an immediate liberalization in the way Gulf War claims are adjudicated so as to provide an opportunity for our Gulf War veterans to finally receive the benefits they have earned through their honorable service. The American Legion thanks this committee for their diligence and commitment to our nation's veterans on this topic. Questions concerning this testimony can be directed to Derek Fronabarger Deputy Director in The American Legion Legislative Division (202) 861-2700.

³ The American Legion Resolution No. 122 (Aug. 2016): [Gulf War Illnesses](#)