STATEMENT OF
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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
ON
THE FINDINGS AND RECOMMENDATIONS OF THE VETERANS' DISABILITY BENEFITS COMMISSION WITH RESPECT TO THE CURRENT DISABILITY COMPENSATION SYSTEM

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Mr. Chairman and Members of the Committee:

Thank you for this opportunity to present The American Legion's views on the recommendations of the Veterans' Disability Benefits Commission (VDBC or Commission) with respect to the current disability compensation system.

Due to the history surrounding the establishment of the Commission, The American Legion and others in the veteran service organization (VSO) community feared that it would be used as a tool to restrict veterans' benefits. In fact, key members of Congress and other government officials publicly expressed their desire to use the VDBC as a vehicle to institute radical changes in the VA disability system that would negatively impact and restrict entitlement to benefits for a large number of veterans.

Concerned about the questionable history surrounding the creation of the VDBC and the impact its recommendations would undoubtedly have on VA's disability compensation program, American Legion staff closely monitored the Commission's activities and provided written and oral testimony, as well as other input, on several occasions. From the very beginning, Commission Chairman Terry Scott assured the VSOs and others that the Commission did not have a hidden agenda and its purpose was not to cut or otherwise restrict veterans' benefits. During the course of the Commission's 2½-year study The American Legion's concerns diminished and our skepticism turned to optimism as the release of its final report approached. Our approach, however, is still "trust but verify."

The American Legion appreciates the Commission's hard work and commitment and we are generally pleased with its recommendations. As the final report contains 113 recommendations, this statement will focus, for the most part, on recommendations that will directly impact the disability compensation system as well as those addressed as high priority in the Executive Summary.

Executive Summary Priority Recommendations

Recommendation 4-23 (Chapter 4, Section I.5)

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.

American Legion Position: Most major body systems in the rating schedule have been updated over the last few years. The American Legion supports the updating of conditions such as traumatic brain injury that have not been recently updated. We wish to also note that the rating schedule is not the major cause of problems with the VA disability compensation process. VA problems such as inadequate staffing, inadequate funding, ineffective quality assurance, premature adjudications, and inadequate training still plague the VA regional offices. The American Legion wants to emphasize that, in most cases, it would be inappropriate to reduce the value of a disability as long as our troops are in harm's way.

Recommendation 5-28 (Chapter 5, Section III.3)

VA should develop and implement new criteria specific to post-traumatic stress disorder in the VA Schedule for Rating Disabilities. 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.

American Legion Position: 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 it makes sense to develop rating criteria that address the specific symptoms involved with PTSD.

Recommendation 5-30 (Chapter 5, Section III.3)

VA should establish a holistic approach that couples posttraumatic stress disorder treatment, compensation and vocational assessment. Reevaluation should occur every 2-3 years to gauge treatment effectiveness and encourage wellness.

American Legion Position: While The American Legion supports a holistic approach to the treatment and compensation of post-traumatic stress disorder (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. They may be fearful that the sole purpose of such reevaluation 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.

Recommendation 6-14 (Chapter 6, Section IV.2)

Congress should eliminate the ban on concurrent receipt for all military retirees and for all service members who separated from the military due to service-connected disabilities. In the future, priority should be given to veterans who separated or retired from the military under Chapter 61 with:

fewer than 20 years service and a service-connected disability rating greater than 50 percent, or

disability as the result of combat.

American Legion Position: The American Legion strongly supports full concurrent receipt and we are pleased with that portion of the recommendation.

Recommendation 7-4 (Chapter 7, Section II.3)

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.

American Legion Position: Although The American Legion supports the provision of this recommendation calling for the gradual reduction in compensation benefits for Individual Unemployability (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(s) then IU should be awarded. Moreover, we have found that younger veterans have to overcome VA bias when they apply for IU because VA raters think that younger people have a better chance of going back to work. Thus, allowing age to be used as a factor in determining eligibility for IU purposes may end up adversely impacting both older and younger veterans.

Recommendation 7-5 (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 *VA Schedule for Rating Disabilities* 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.

American Legion Position: 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.

38 C.F.R. § 4.16b states:

> (b) 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% level, whether it be based on a schedular evaluation (either single service-connected disability or a combined schedular 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.

Recommendation 7-6 (Chapter 7, Section III.2)

Congress should increase the compensation rates up to 25 percent as an interim and baseline future benefit for loss of quality of life, pending development and implementation of quality of life measure in the Rating Schedule. In particular, the measure should take into account the quality of life and other non-work related effects of severe disabilities on veterans and family members.

American Legion Position: The American Legion supports an increase in compensation benefits to adequately account for a service-connected disability's impact on a veteran's quality of life. Before any change is made, however, we would like to carefully analyze how this would impact special monthly compensation, which is based in part on loss of quality of life.

Recommendation 7-8 (Chapter 7, Section III.2)

Congress should consider increasing special monthly compensation (SMC), where appropriate, to address the more profound impact on quality of life by disabilities subject to special monthly compensation and review ancillary benefits to determine where additional benefits could improve a disabled uality of life.

American Legion Position: The American Legion fully supports increasing special monthly compensation to address profound impacts on quality of life for disabilities subject to SMC as

well as reviewing ancillary benefits for the purpose of determining where additional benefits could improve a disabled veteran's quality of life.

Recommendation 7-12 (Chapter 7, Section V.3)

VA and DoD should realign the disability evaluation process so that the Services determine fitness for duty, and service members who are found unfit are referred to VA for disability rating. All conditions that are identified as part of a single, comprehensive medical examination should be rated and compensated.

American Legion Position: The American Legion has long been concerned with low disability ratings issued by the military's disability evaluation system and we fully support limiting the military's role to determination of fitness while leaving the rating process to the Department of Veterans Affairs. We do, however, have concerns as to how this extra work for the VA would be funded.

Recommendation 7-13 (Chapter 7, Section VI)

Congress should enact legislation that would bring the ancillary and special purpose benefits to levels originally intended considering cost of living and provide for annual adjustments to keep pace with the cost of living.

American Legion Position: This recommendation is appropriate as ancillary and special purpose benefits, as reflected in the VDBC's report, have not been adjusted to keep pace with cost of living changes resulting in the failure of the benefits to fulfill their intended purposes.

Recommendation 8-2 (Chapter 8, Section III.1B)

Congress should eliminate the Survivor Benefit/Dependency and Indemnity Compensation offset for survivors of retirees and in-service deaths.

American Legion Position: The American Legion fully supports this recommendation.

Recommendation 9-1 (Chapter 9, Section II.6.A.b)

Improve claims cycle time by:

Establishing a simplified and expedited process for well documented claims, using best business practices and maximum feasible use of information technology; and
Implementing an expedited process by which the claimant can state the claim information is complete and waive the time period (60 days) allowed for further development.

Congress should mandate and provide appropriate resources to reduce the VA claims backlog by 50% within 2 years.

American Legion Position: While we are fully supportive of initiatives to expedite the claims process and reduce the claims backlog, The American Legion, however, is not supportive of imposing arbitrary deadlines to reduce the claims backlog because experience has shown that such production driven efforts have a tendency to sacrifice quality for quantity, resulting in more errors and, ultimately, an increase in appeals. Additionally, while we support an expedited process to grant benefits, compliance with statutory duties to assist and notify must be fully complied with in claims in which benefits would be denied. An immediate reduction in the backlog could be accomplished by VA management encouraging VA raters to grant benefits when there is sufficient evidence in the record rather than developing the record to support a denial.

Recommendation 10-11 (Chapter 10, Section VII)

VA and DoD should expedite development and implementation of compatible information systems including a detailed project management plan that includes specific mile and lead agency assignment.

American Legion Position: The American Legion supports this recommendation.

Recommendation 11-1 (Chapter 11)

Congress should establish an oversight group to ensure timely and effective implementation of the Commission's recommendations. This group should be co-chaired by VA and DoD and consist of senior representatives from appropriate departments and agencies. It is further recommended that the Veterans' Affairs Committees hold hearings and require annual reports to measure and assess progress.

American Legion Position: The American Legion has no objections to this recommendation. We do, however, urge that this recommendation be amended to specifically address VSO participation in this oversight process.

Other Recommendations

Recommendation 5-1 (Chapter 5, Section I.1)

Congress should change the character-of –discharge standard to require that when an individual is discharged from his or her last period of active service with a bad conduct or dishonorable discharge, it bars all benefits.

American Legion Position: The American Legion strongly opposes this recommendation. The Commission voted twice not to recommend a change to the current 30-year old policy that allows eligibility for VA benefits based on separate honorable periods of service. The VDBC finally decided on this position after a third vote of 8-4. We are disappointed in not only the recommendation, but also the nature in which the Commission arrived at its decision.

As noted in the VDBC 's report, it is clear from a review of the legislative history that Congress intended to liberalize the overly strict requirement of discharge under honorable conditions when it enacted the current "under conditions other than dishonorable" standard in 1944. The current standard correctly and fairly acknowledges that those who were discharged for relatively minor offenses should not be barred from receiving veterans' benefits. Congress' intent was also clear when it amended the law in 1977 to allow an individual who was discharged under dishonorable conditions, or conditions otherwise precluding basic eligibility, to receive VA benefits based upon a separate period of service if VA determined that the individual was discharged from the other period of service under conditions other than dishonorable or would have been discharged under conditions other than dishonorable if not for reenlistment.

Endorsing a change in the character of discharge standard where one period of service under other than honorable conditions would unfairly negate other periods of service that were under conditions other than dishonorable and is in direct conflict with the intent of Congress when it enacted the current Character of Discharge standards.

Recommendation 5-2 (Chapter 5, Section I.2.B)

Maintain the present definition of line of duty: that service members are on duty 24 hours a day, 7 days a week.

American Legion Position: The American Legion fully supports this position and we are hopeful that the Commission's recommendation regarding this issue will end further debate calling for a line of duty (LOD) definition that only covers injuries, diseases, or deaths incurred while performing military duties.

The intent of Congress regarding the LOD definition and the equal treatment of all veterans, no matter how, when or where a service related condition was incurred, is clearly expressed in the legislative history and current statutory provisions. Previous recommendations to limit the line of duty definition to only those disabilities that are a direct result of performance of military duties have not been acted on by Congress, despite large potential savings touted by the recommending agencies. The American Legion believes that there are very good reasons previous recommendations to limit or restrict the current LOD definition have not been implemented. First, there is the basic question of fairness. Limiting the line of duty definition to only those disabilities, deaths and illnesses incurred while actually performing one's military duties, despite the fact that an active duty service member is considered, under the Uniform Code of Military Justice (UCMJ), to be on duty 24/7 is inherently unfair and fundamentally wrong. Additionally, the message such a change would send to current service members and prospective members would undoubtedly have a negative impact on both recruitment and retention. Finally, the additional administrative costs and other burdens resulting from a change in the line of duty definition would offset any projected savings.

Recommendation 5-3 (Chapter 4, Section I.2.B)

Benefits should be awarded at the same level according to the severity of the disability, regardless of whether the injury was incurred or disease was contracted during combat or training, wartime or peacetime.

American Legion Position: The American Legion fully supports this recommendation. An injury, disease or death is just as debilitating and traumatic to an individual and his or her family no matter how the condition was incurred or where the veteran was at the time it was incurred. Making a distinction between combat and non-combat disabilities is fundamentally wrong and demeaning to the honorable service of all veterans. Moreover, implementing such a provision would add another level of complexity to an already overburdened and complex adjudication system.

Recommendation 5-4 (Chapter 5, Section I.3.B)

Maintain the current reasonable doubt standard.

American Legion Position: The reasonable doubt standard is the hallmark of VA's non-adversarial disability compensation program and we fully support this recommendation.

Recommendation 5-5 (Chapter 5, Section I.4B)

Age should not be a factor for rating service connection or severity of disability, but may be a factor in setting compensation rates.

American Legion Position: The American Legion does not support the use of age for establishing entitlement to service connection or for determining severity of disability, nor do we support using age as a factor in setting compensation rates. Although we understand the reasoning behind the Commission's recommendation calling for age to be used as a factor in setting service-connected disability compensation rates, The American Legion maintains that compensation rates should be based on the severity of disability and should not be applied differently based on the age of the veteran.

Recommendation 5-6 (Chapter 5, Section I.5B)

Maintain the current standard of an unlimited time limit for filing an original claim for service connection.

American Legion Position: The American Legion fully supports this recommendation. Although we recognize that it is prudent for veterans to file service connection disability claims as soon as possible after separating from service, and we strongly encourage such action whenever possible, that option, for various reasons, is not always feasible. Therefore, if sufficient evidence to establish entitlement to service connection is submitted, the benefit sought should be awarded, regardless of how long after service the claim was filed.

Recommendation 5-7 (Chapter 5, Section I.5B)

DoD should require a mandatory benefits briefing to all separating military personnel, including Reserve and National Guard components, prior to discharge from service.

American Legion Position: The American Legion fully supports this recommendation. It is extremely important that separating members receive sufficient information regarding all VA benefits to which they may be entitled after separation from service.

Recommendations 5-11, 5-12 & 5-14 (Chapter 5, Section II.1)

Recommendation 5-11

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. [IOM Rec. 4]

Recommendation 5-12

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]

- **Sufficient: The evidence is sufficient to conclude that a causal relationship exists.**

- **Equipoise 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 exits.**

- **Below Equipoise: 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.**

Recommendation 5-14

When the causal evidence is at Equipoise and Above, an estimate also should be made of the size of the causal effect among those exposed. [IOM Rec. 7]

American Legion Position: 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/Storm, there is insufficient information to properly determine service member 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 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.

Recommendation 7-15 (Chapter 7, Section VIII.2)

Lump sum payments should not be considered to compensate veterans for their disabilities.

American Legion Position: The Commission thoroughly studied this issue and we are hopeful that this recommendation will put an end to future proposals in favor of lump sum payments.

Closing

Mr. Chairman, that concludes my statement. Thank you again 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 issues discussed here today that are in the best interest of America's veterans and their families.