Calendar No. 654

111TH CONGRESS *2d Session* | SENATE | REPORT 111–354

CLAIMS PROCESSING IMPROVEMENT ACT OF 2010

NOVEMBER 29, 2010.—Ordered to be printed

Mr. AKAKA, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

[To accompany S. 3517]

The Committee on Veterans' Affairs (hereinafter, "the Committee"), to which was referred the bill (S. 3517), to amend title 38, United States Code (hereinafter, "U.S.C."), to improve the processing of claims for disability compensation filed with the Department of Veterans Affairs (hereinafter, "VA"), and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

INTRODUCTION

On June 22, 2010, Committee Chairman Daniel K. Akaka introduced S. 3517, the proposed "Claims Processing Improvement Act of 2010." Senators Murray, Rockefeller, and Schumer were later added as cosponsors. S. 3517, as introduced, would amend title 38 to improve the processing of disability compensation claims at VA, and for other purposes. The bill was referred to the Committee.

Earlier, on May 12, 2010, Chairman Akaka introduced S. 3348, to provide for the treatment of documents that express disagreement with decisions of the Board of Veterans' Appeals (hereinafter, "Board") and that are misfiled with the Board within 120 days of such decisions as motions for reconsideration of such decisions. The bill was referred to the Committee.

On May 13, 2010, Chairman Akaka introduced S. 3367, to increase the rate of pension for disabled veterans who are married to one another and both of whom require regular aid and attendance, and for other purposes. The bill was referred to the Committee.

On May 13, 2010, Chairman Akaka introduced S. 3368, to authorize certain individuals to sign claims filed with VA on behalf of claimants. The bill was referred to the Committee.

On May 13, 2010, Chairman Akaka introduced S. 3370, to improve the process by which an individual files jointly for Social Security and dependency and indemnity compensation (hereinafter, "DIC"), and for other purposes. The bill was referred to the Committee.

On May 19, 2010, the Committee held a hearing on the above-referenced bills and other benefits-related legislation. Testimony on the above-referenced bills was offered by: Thomas J. Pamperin, Associate Deputy Under Secretary for Policy and Program Management, Veterans Benefits Administration, Department of Veterans Affairs; Ian DePlanque, Assistant Director, Veterans Affairs and Rehabilitation Commission, The American Legion; Eric A. Hilleman, National Legislative Director, Veterans of Foreign Wars of the United States; Rick Weidman, Executive Director for Policy and Government Affairs, Vietnam Veterans of America; and Tom Tarantino, Legislative Associate, Iraq and Afghanistan Veterans of America.

On June 16, 2010, Chairman Akaka introduced S. 3499, the proposed "Fiduciary Benefits Oversight Act of 2010." S. 3499 would authorize VA to obtain financial records of fiduciaries of individuals receiving benefits from VA. The bill was referred to the Committee.

On July 14, 2010, the Committee held a hearing entitled "Review of Veterans Claims Processing: Are Current Efforts Working?" Testimony on S. 3517 was offered by: Michael Walcoff, Acting Under Secretary for Benefits, Veterans Benefits Administration, Department of Veterans Affairs; Joseph Thompson, Former Under Secretary for Benefits; Linda Jan Avant, Rating Specialist, Little Rock, Arkansas Regional Office, and 1st Vice President, Local 2054, American Federation of Government Employees; Richard Cohen, Executive Director, National Organization of Veterans' Advocates, Inc.; and Joe Violante, National Legislative Director, Disabled American Veterans, on behalf of The Independent Budget.

COMMITTEE MEETING

After carefully reviewing the testimony from the foregoing hearings, the Committee met in open session on August 5, 2010, to consider, among other legislation, an amended version of S. 3517, consisting of provisions from S. 3517 as introduced and provisions from the other legislation noted above. The Committee voted, without dissent, to report favorably S. 3517 as amended and as subsequently amended during the markup.

SUMMARY OF S. 3517 AS REPORTED

S. 3517, as reported (hereinafter, "the Committee bill"), consists of 22 sections, summarized below:

Section 1 would provide a short title and table of contents.

Section 2 would provide for partial adjudication of claims consisting of multiple issues, one or more of which can be quickly adjudicated.

Section 3 would authorize certain individuals to sign claims filed with VA on behalf of claimants who are incompetent or physically incapable of signing.

Section 4 would clarify that the requirement that VA provide notice to claimants of additional information and evidence applies only when additional evidence or information is actually required to substantiate and grant a claim.

Section 5 would require that equal deference be accorded to private medical opinions in assessing claims for disability compensation.

Section 6 would require that claims that have the potential of being adjudicated quickly, as determined by experienced claims adjudicators, be expedited. It would also authorize VA to establish procedures related to fully-developed claims.

Section 7 would authorize VA to utilize a retroactive effective date when awarding disability compensation based on applications that are fully-developed when submitted.

Section 8 would require that VA send, with a rating decision, a form that, if completed and returned, would suffice as a Notice of Disagreement (hereinafter, "NOD").

Section 9 would improve the process by which an individual files jointly for Social Security benefits and DIC.

Section 10 would authorize VA to obtain financial records of fiduciaries of individuals receiving benefits from VA.

Section 11 would provide for the treatment of documents that express disagreement with decisions of the Board and that are misfiled with the Board within 120 days of such decisions as motions for reconsideration of such decisions.

Section 12 would modify the filing period for NODs from one year to 180 days, with a good cause exception.

Section 13 would replace VA's obligation to provide a Statement of the Case with an obligation to provide a new, plain-language decision in the case.

Section 14 would require a claimant to file a substantive appeal within 60 days of VA issuing a post-NOD decision, with a good cause exception.

Section 15 would automatically waive the review of new evidence by the agency of original jurisdiction so that certain evidence submitted on or after the date a substantive appeal is filed will be subject to initial review by the Board, unless review by the agency of original jurisdiction is requested.

Section 16 would require the Board to present an appellant with the options for a Board hearing and with a recommendation to the appellant of the option that would lead to the earliest possible date for the hearing and with statistics for the average wait experienced for similarly situated appellants.

Section 17 would require the United States Court of Appeals for Veterans Claims (hereinafter, "the Court") to decide all issues raised by an appellant.

Section 18 would allow a good cause extension, not to exceed 120 days, for filing a notice of appeal with the Court.

Section 19 would require VA to carry out a pilot program on collaboration with tribal governments to improve the quality of claims for disability compensation.

Section 20 would increase the rate of pension for disabled veterans who are married to one another and who both require regular aid and attendance.

Section 21 would require VA to automatically increase the rates of disability compensation, DIC, and other rates whenever there is an increase in Social Security benefits.

Section 22 would require VA to create an action plan to improve the correlation between employee compensation and performance.

BACKGROUND AND DISCUSSION

Sec. 2. Adjudication of claims for disability compensation consisting of multiple issues one or more of which can be quickly adjudicated.

Section 2 of the Committee bill, which is derived from S. 3517 as introduced, would provide for partial adjudication of claims consisting of multiple issues, one or more of which can be quickly adjudicated.

Background. As of July 2010, it took, on average, 163.1 days for VA to complete a rating decision for a claim for compensation. Although this is better than the average for Fiscal Year (hereinafter, "FY") 2008, which was 178.9 days, the average veteran waits nearly five and one-half months for a claim for compensation to be adjudicated. VA is predicting that, by the end of FY 2011, it will take on average 190 days to complete a claim. These timeframes do not include those decisions that are appealed.

VA realized a 14.1 percent increase in claims receipts in 2009; projected a 16.2 percent increase in 2010; and projected a 12 percent increase in 2011. The volume of claims received has increased from 578,773 in 2000 to 1,013,712 in 2009 (a 75 percent increase). Many factors, including an aging veteran population, a decade of America's involvement in overseas conflicts, new laws and regulations, and greater outreach, have contributed to this increase in claims receipts.

Through July 2010, VA completed 870,921 claims while taking in 938,958 claims. In addition, during the month of July, VA had approximately 508,000 pending disability claims, about 173,000 (35 percent) of which were pending for longer than VA's strategic target of 125 days. This means that VA is taking in much more work than it can complete in a timely manner, despite a significant increase in staffing and several new initiatives aimed at bringing down the backlog.

Also, original disability claims with eight or more issues increased from 22,776 in 2001 to 67,175 in 2009—a nearly 200 percent increase. This increase in the number of issues per claim further complicates an already complex process.

Committee Bill. Section 2 of the Committee bill would amend section 1157 of title 38, by adding a new subsection (b) to require VA to assign intermediate ratings for claims of compensation that have more than one condition and VA determines that a disability rating can be assigned with respect to one or more conditions within those claims without further development.

This provision of the Committee bill would also require, in subparagraph (A) of (b)(1), that VA assign the disability rating expeditiously. New subparagraph (B) of new subsection (b)(1) would re-

quire that VA continue to develop the remaining conditions. New subsection (b)(2) would require that, if VA is able to assign a rating with respect to a remaining condition or conditions, then VA would combine such ratings with the intermediate rating or ratings previously assigned.

VA would further have the discretion, in new subsection (b)(3), to assign an intermediate rating and then continue development of such condition and reassess the rating. All of these changes would take effect on the date of enactment and apply to claims filed on or after the date that is 60 days after enactment.

It is the Committee's view that partial adjudication of claims would be beneficial to veterans, given that the average time to complete adjudication of a claim is nearly five and a half months, because at least partial payment of disability compensation could begin while that process is ongoing.

Sec. 3. Authority for certain individuals to sign claims filed with Secretary of Veterans Affairs on behalf of claimants.

Section 3 of the Committee bill, which is derived from S. 3368, would authorize certain individuals to sign claims filed with VA on behalf of claimants who are under age 18, are mentally incompetent, or are physically unable to sign a form.

Background. Some claimants for VA benefits are so disabled as to be incapable of understanding the information on a benefits application form. Under current law, section 5101 of title 38, VA lacks specific authority to authorize a court-appointed representative or caregiver to sign an application form allowing the adjudication of the claim to proceed. However, the Social Security Administration (hereinafter, "SSA") has specific authority in section 404.612 of title 20 of the Code of Federal Regulations (hereinafter, "CFR") to permit certain individuals, such as court-appointed representatives, to sign a claim form on behalf of an individual unable to understand and sign a claim form.

Committee Bill. Section 3 of the Committee bill would amend section 5101 of title 38 to modify the application process for claims filed with VA to allow court-appointed representatives or caregivers to sign applications from individuals who are under 18 years of age, mentally incompetent, or physically unable to sign a form. These changes would apply with respect to claims filed on or after the date of enactment.

This change will give VA the same authority that SSA has with respect to claimants who are unable to complete applications for benefits without requiring assistance. The Committee does not intend that this provision alter VA's responsibility to evaluate and appoint a fiduciary in cases where the beneficiary is determined to be incompetent to manage his or her benefits.

Sec. 4. Clarification that requirement of Secretary of Veterans Affairs to provide notice to claimants of additional information and evidence required only applies when additional information or evidence is actually required.

Section 4 of the Committee bill, which is derived from S. 3517 as introduced, would clarify a provision in current law that VA is obligated to provide notice to claimants of additional information and

evidence only when additional evidence or information is actually required to substantiate and grant a claim.

Background. Section 5103(a)(1) of title 38 requires VA to provide notice, upon receipt of a complete or substantially complete application, to a claimant and a claimant's representative, if any medical or lay evidence not previously provided is necessary to substantiate the claim. As part of that notice, VA is required to indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, VA will attempt to obtain on behalf of the claimant. VA has developed initiatives to adjudicate "fully developed claims," those for which the veteran submits all information and medical or lay evidence needed to adjudicate the claim with the application for benefits.

If the evidence submitted in support of a claim, together with any evidence previously submitted, is sufficient to substantiate the claim, there would be no additional information or evidence to notify the veteran to submit. In such cases, VA should proceed to adjudicate the claim. For example, if a veteran, who has a previous determination of service in the Republic of Vietnam and has been service-connected for diabetes in a prior adjudication, submits evidence of a diagnosis of prostate cancer and current treatment for the condition at a VA facility, VA has sufficient evidence to both substantiate and grant the claim without the need for additional information or evidence. In such a case, there would be no need for VA to "notify the claimant and the claimant's representative" of information or evidence to substantiate the claim.

Committee Bill. Section 4 of the Committee bill would amend section 5103(a)(1) of title 38 to require VA to provide notice to a claimant and a claimant's representative that additional information and evidence is required only when additional information or evidence is actually required to substantiate and grant a claim. These changes would apply with respect to claims filed on or after the date that is 60 days after the date of enactment.

Sec. 5. Equal deference to private medical opinions in assessing claims for disability compensation.

Section 5 of the Committee bill would provide for equal deference to private medical opinions in assessing claims for disability.

Background. Section 5125 of title 38, provides that, for purposes of establishing any claim for benefits under chapters 11 or 15, a private medical opinion that is provided by a claimant in support of a claim for benefits "may be accepted without a requirement for confirmation by an examination by a [VA employee] if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim."

Further, under section 5103A(d) of title 38, VA is required to provide an examination or medical opinion when either is necessary to adjudicate a claim. Section 5103A(d)(2) provides that an examination is required when the information of record: "(A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, or air service; but (C) does not contain sufficient medical evidence for [VA] to make a decision on the claim."

However, it appears that VA in some cases orders a medical evaluation despite having a private, non-VA, medical opinion already on record that should be sufficient to make a decision on the claim. For example, in testimony before the Committee during an oversight hearing on July 9, 2008, regarding undue delay in claims processing, the witness representing the Disabled American Veterans provided an example of VA's non-utilization of private medical opinions.

The Committee was presented with testimony about a veteran, who served 25 years honorably and was diagnosed with a right lumbar strain following a lifting injury in February 1963, after a 20 foot fall while rappelling, and once more when he was thrown from the vehicle while swerving to avoid a landmine in Vietnam.

The veteran had a medical history containing months-long spans of back pain accompanied by neurological symptoms that were reported in 1966, 1968, 1973, 1974, and 1976. X-rays of the veteran's lower back taken prior to military discharge revealed an injury, and numerous private treatment records following discharge continued to document a definite disability. A board-certified orthopedic surgeon, who was also an Associate Professor of Orthopedic Surgery, diagnosed the veteran with degenerative joint disease of the lumbar spine with spinal stenosis. Later, VA received a medical opinion from this same orthopedic surgeon wherein he stated his belief that, in all likelihood, the Vietnam War injuries contributed to his early onset of arthritis and spinal stenosis.

The veteran filed a claim for service connection for his lower back condition in January 2002, wherein he provided a detailed explanation of the circumstances of his injuries during service and the reasoning behind his failure to seek treatment in service. He submitted a statement to VA that all doctors who provided medical opinions on his condition had an opportunity to review a complete copy of his service medical records. A few months later VA received another medical opinion from a second board-certified orthopedic surgeon, an Associate Professor of Orthopedic Surgery, who stated that he had treated the veteran since March 1993 for chronic back issues and that he had reviewed the veteran's service medical records. The opinion stated that the veteran's "condition is a continuation of the difficulties he developed in the service." The veteran submitted a second medical (totaling three) opinion from one of the surgeons stating that the lower back pain complaints he had while in the military "gradually progressed to the point where he now has post-traumatic arthritis of the lumbar spine." A second opinion from the other surgeon (totaling four) was submitted that stated, "[h]e had problems dating back to 1974 * * *. I have reviewed his medical service record which indicates this difficulty to that point in time."

In developing the claim, the VA conducted an examination of the veteran, and requested an additional medical opinion, despite the four opinions already of record. The examination and medical opinion was performed by a non-certified physician assistant ("PA" rather than "PA-C"). Failing to refer to all of the treatment records in service, and without acknowledging the evidence that included four opinions presented by the two orthopedic surgeons, the physician assistant's opinion explored the likelihood that the veteran's condition was congenital and age related, thus not related to his

service. Based on the physician assistant's opinion, the VA did not grant the claim.

The veteran in the example above obtained evidence from multiple physicians. VA, in turn, obtained a contradictory opinion from one provider with lower credentials than all four physicians relied upon by the veteran. Hence, it appears that no deference was provided to the four physicians from whom medical opinions were obtained.

Committee Bill. Section 5 of the Committee bill would add a new section to title 38, section 5103B, that would require that, if a claimant submits a private medical opinion in support of a claim for disability compensation and that opinion satisfies any standards established by VA, the opinion would be treated with the same deference as a medical opinion provided by a VA health care provider. However, if the private medical opinion is found by VA to be competent, credible, and probative, but otherwise not entirely adequate for purposes of assigning a disability rating or determining service-connection, and VA determines that a medical opinion from a Department health care provider, to include a health care provider under contract with VA, is necessary for such purposes, VA would be required to obtain from an appropriate Department health care provider, a medical opinion that is adequate for such purposes. In the event that such an opinion is obtained, this provision further requires that VA, to the extent feasible, provide an opinion from a Department health care provider who has expertise in the same area as the private medical provider, if the private provider had opined on a pertinent issue within his or her expertise.

This section would also amend section 5103(a) of title 38 by adding a new paragraph (3), to require VA to notify a claimant, as the Secretary considers appropriate, regarding the rights of the claimant to assistance under section 5103A and, if the claimant submits a private medical opinion in support of the claim for disability compensation, how such medical opinion will be treated under new section 5103B.

The Committee does not intend that the effect of this provision will be to tie VA's hands with respect to private medical evidence—VA would be required to treat the private medical opinion with equal deference if, and only if, such opinion satisfies standards established by the Secretary. One goal of this change is to eliminate overdevelopment of claims, which in turn may provide a decision on disability compensation for a veteran in a timelier manner, as well as allow VA resources to be used in areas which may need them more.

The Committee further believes that there is, at a minimum, a perception of unfairness, if VA relies more heavily on a negative VA medical opinion from an examiner with lesser credentials, rather than the favorable medical opinions from one or more private medical examiners who provide competent, credible, and probative opinions with greater credentials than the VA examiner.

Sec. 6. Improvements to disability compensation claim review process.

Section 6 of the Committee bill, which is derived from S. 3517 as introduced, would require expedited review of initial claims for dis-

ability compensation that have the potential of being adjudicated quickly. It would also authorize VA to establish procedures for fully-developed claims.

Background. As noted in the discussion of section 2 of the Committee bill, the average time for the adjudication of an initial claim for disability compensation is five and a half months. In addition, as also discussed above, initial claims for compensation are growing increasingly complex as the number of claimed issues increases.

Committee Bill. Subsection (a) of section 6 of the Committee bill would add a new section to title 38—5103C, entitled "Expedited review of claims for disability compensation," which would require, in new subsection (a), VA to establish a process for the rapid identification of initial claims for disability compensation that should receive priority in review.

Subsection (b) of new section 5103C would require VA to assign employees who are experienced in the processing of claims for disability compensation to carry out a preliminary review of all initial claims for disability compensation submitted to VA in order to identify if: the claims have the potential of being adjudicated quickly, they qualify for priority treatment, and a temporary disability rating could be assigned.

Subsection (c) of new section 5103C would require VA to give priority to claims that have the potential of being adjudicated quickly. This subsection would also allow VA to prescribe by regulations the order of priority of claims for disability compensation, which allows some claims to be placed ahead of others for purposes of adjudication.

Subsection (b) of section 6 of the Committee bill would add a new section to title 38—section 5103D, entitled "Procedures for fully developed claims," which would allow a claimant to notify VA that he or she has no additional information or evidence to submit. VA would then be required to undertake any development necessary to obtain any Federal records, medical examinations, or opinions relevant to the claim and decide the claim based on all the evidence of record.

New section 5103C would take effect 90 days after the date of enactment and new section 5103D would take effect on the date of enactment.

Sec. 7. Authority for retroactive effective date for awards of disability compensation in connection with applications that are fully-developed at submittal.

Section 7, which was accepted as an amendment during Markup of the Committee bill, would allow up to a one year retroactive effective date for awards of disability compensation that are based on claims that are fully-developed when submitted to VA.

Background. Under section 221 of Public Law 110–389, the Veterans' Benefits Improvement Act of 2008, VA was required to conduct a pilot project to test "the feasibility and advisability of providing expeditious treatment of fully developed compensation or pension claims to ensure that such claims are adjudicated not later than 90 days after the date on which such claim is submitted as fully developed." After carrying out that pilot at 10 VA regional offices, VA expanded the fully-developed claim process to all VA regional offices. At a July 14, 2010, hearing before the Committee,

VA's Acting Under Secretary for Benefits explained that, "if VA receives all of the available evidence when the claim is submitted, the remaining steps in the claims-decision process can be expedited without compromising quality."

However, under current law, there is a potential disincentive for veterans to file fully-developed claims. That is because, under section 5110(a) of title 38, the effective date of an award of disability compensation generally cannot be earlier than the date on which VA received the application for those benefits. Although there are exceptions to that general rule, none of the exceptions would allow a retroactive effective date for veterans who file fully-developed claims. Accordingly, if a veteran takes time before filing a claim to gather the necessary information and evidence so as to ensure that the claim is fully-developed, the veteran could potentially lose out on benefits for the period between when the veteran began gathering the evidence and when he or she ultimately filed a fully-developed claim.

Committee Bill. Section 7 of the Committee bill would amend section 5110 of title 38 to provide that the effective date of an award of disability compensation to a veteran who submitted a fully-developed claim would be based on the facts found but would not be earlier than one year before the date on which VA received the veteran's application.

It is the Committee's expectation that, by allowing an effective date up to one year earlier than the date on which a fully-developed claim is filed, more veterans will be encouraged to file fully-developed claims and, in return, receive faster decisions on their claims.

Sec. 8. Provision by Secretary of Veterans Affairs of Notice of Disagreement forms to initiate appellate review with notices of decisions of Department of Veterans Affairs.

Section 8 of the Committee bill, which is derived from S. 3517 as introduced, would require VA to develop a form that suffices as an NOD, as required to initiate appellate review under current law.

Background. Under current law, section 511 of title 38, VA is required to decide all questions of law and fact necessary to a decision under a law that affects its provision of benefits to veterans or dependents or survivors of veterans. VA's decision is final and conclusive and may not be reviewed by any other official or court, unless it is a matter subject to judicial review by the United States Court of Appeals for Veterans Claims, or it pertains to insurance programs administered by VA or housing and small business programs administered by VA.

Section 5104(a) of title 38 requires VA to provide a claimant and the claimant's representative timely notice of decisions under section 511 that affect the provision of benefits to a claimant. That notice must include an explanation of how to obtain review of the decision. In addition, section 5104(b) provides that, if VA denies a benefit sought, the notice must include a statement of the reasons for the decision and a summary of the evidence relied upon by VA.

Pursuant to section 7105 of title 38, once notice has been given to the claimant, the claimant must initiate appellate review by filing an NOD within one year, if the claimant wishes to have the decision reviewed. This initial step in the appeals process is man-

datory. Under current VA regulations, section 20.201 of title 38, CFR, an NOD is defined as a "written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result."

Committee Bill. Section 8 of the Committee bill would amend section 5104(b) so as to require VA, in addition to providing a statement of the reasons for the decision and a summary of the evidence relied upon by VA in making a decision to provide an explanation of the procedure for obtaining review of the decision and a copy of a form that, once completed, will serve as an NOD. The explanation of the procedure for obtaining review of the decision would be required to include the period prescribed under paragraph (1) of section 7105(b) of title 38 for filing an NOD and the good cause exception under new paragraph (3) of section 7105(b), as amended by section 12 of the Committee bill. These changes would take effect on the date that is 180 days after enactment.

Given the complexity of the VA adjudication and appeals process, it is the Committee's belief that providing a form to the claimant that would suffice as the first step in obtaining appellate review would be beneficial to the claimant and should speed up the overall process.

Sec. 9. Improvement of process for filing jointly for Social Security and dependency and indemnity compensation.

Section 9 of the Committee bill, which is derived from S. 3370, would codify VA's current practice of allowing any claim for survivor benefits filed with SSA to establish the effective date for DIC benefits.

Background. Under current law, section 5105 of title 38, VA and SSA are required to develop and use joint applications for survivor benefits for those who apply for both DIC and Social Security survivor benefits. Section 5105 further provides that, if such a joint application form is filed with either VA or SSA, it will be deemed an application for both DIC and Social Security benefits. However, at present, SSA applications are primarily online and VA's are paper-based.

In a recent court case, *Van Valkenburg* v. *Shinseki*, 23 Vet. App. 113 (2009), VA represented to the Court that "there has never been an individual 'jointly prescribed form' promulgated between VA and SSA" and that, "in practice, a claim for survivor's benefits can be filed on any form, with either VA or SSA, when the applicant reflects an intent to seek such benefits." The Court accepted the Secretary's representation that "any claim, sufficient to reflect an intent to apply for survivor's benefits, that is filed with SSA will suffice to establish the effective date of DIC."

Committee Bill. Section 9 of the Committee bill would amend section 5105 of title 38 to permit—but not require—the development of a joint form for SSA and VA survivor benefits. This provision of the Committee bill would also amend section 5105 so that any form indicating an intent to apply for survivor benefits would be deemed an application for both DIC and Social Security benefits. This is intended to codify VA's practice under which any indication of intent to apply for Social Security survivor benefits is also treated as an application for VA DIC survivor benefits.

Sec. 10. Access by Secretary of Veterans Affairs to financial records of individuals represented by fiduciaries and receiving benefits under laws administered by Secretary.

Section 10 of the Committee bill, which is derived from S. 3499, would authorize VA to obtain the financial records of fiduciaries from financial institutions.

Background. Under section 5502(a)(1) of title 38, beneficiaries who have been determined by VA to be incompetent to handle their financial affairs may have a fiduciary appointed by VA to receive their benefits. Section 5502(a)(2) of title 38 allows the Secretary to authorize a reasonable commission for services rendered by an appointed fiduciary, if the appointment is necessary to obtain services that are in the best interests of the beneficiary. Under section 5502(b) of title 38, VA is responsible for monitoring the activity of fiduciaries to assure that the monies paid to the fiduciary are used only for the beneficiary and the beneficiary's dependents.

VA may request that a fiduciary sign a release of information to enable VA to obtain the records of a financial institution in order to review such records in the course of its oversight of the fiduciary. There is currently no specific sanction if a fiduciary refuses or neglects to sign an authorization. Under section 1104 of Public Law 95–630, the Financial Institutions Regulatory and Interest Rate Control Act of 1978, codified at section 3404 of title 12, United States Code, any release signed by a fiduciary is valid "for a period not in excess of three months." This amount of time is not always adequate for VA to properly monitor the financial accounts of certain fiduciaries.

The Social Security Administration, which is responsible for similar monitoring of benefits paid to "representative payees" of beneficiaries of their programs, has authority to obtain financial records for proper administration of its programs under section 3413 of title 12, United States Code, without the time limitation applicable to VA.

Committee Bill. Section 10 of the Committee bill would amend section 5502 of title 38 to add a new subsection (f) that would authorize VA to access the financial records of fiduciaries of individuals receiving benefits.

New subsection (f) of section 5502 would allow VA to require any person appointed or recognized as a fiduciary for a VA benefit to provide authorization for VA to obtain from any financial institution any financial record held by the institution with respect to the fiduciary or beneficiary if VA determines that the financial record is necessary for the administration of any program administered by VA, or to safeguard a beneficiary's benefits against neglect, misappropriation, misuse, embezzlement, or fraud.

Under new subsection 5502(f) an authorization by a fiduciary would remain in effect until the earlier of: an approval by a court or VA of a final accounting of payment of any VA-administered benefit; in the absence of any evidence of neglect, misappropriation, misuse, embezzlement, or fraud, the express revocation by the fiduciary of the authorization in a written notification to VA; or three years after the date of the authorization.

Were a fiduciary to refuse to provide or to revoke any authorization to permit VA to obtain financial records, new subsection 5502(f) would allow VA to remove the appointment of recognition

of the fiduciary for such beneficiary and any other VA beneficiary for whom the fiduciary has been appointed or recognized.

The Committee expects that enactment of this provision would improve the ability of VA to identify and prevent neglect, misappropriation, misuse, embezzlement, or fraud involving VA monies paid to fiduciaries. This provision will provide VA with authority similar to that provided to the Social Security Administration for similar beneficiaries of its programs.

Sec. 11. Treatment of certain misfiled documents as motions for reconsideration of decisions by Board of Veterans' Appeals.

Section 11 of the Committee bill, which is derived from S. 3348, would provide for the treatment of documents that express disagreement with decisions of the Board and that are misfiled with the Board or an agency of original jurisdiction (hereinafter, "AOJ") within 120 days of such decisions as motions for reconsideration of such decisions.

Background. If a claimant disagrees with a Board decision, the claimant has the option, under section 7103 of title 38, to ask the Board for reconsideration or to appeal to the U.S. Court of Appeals for Veterans Claims pursuant to section 7266 of title 38. Under section 7266, an appeal to that Court must be filed with the Court within 120 days after notice of the Board decision is mailed to the claimant. Veterans or their family members are sometimes confused by this process and incorrectly send the Notice of Appeal to one of VA's offices. If that happens and the Notice of Appeal is not forwarded to the Court within the 120-day window, the appeal eventually may be dismissed by the Court as untimely.

In *Posey* v. *Shinseki*, 23 Vet. App. 406 (2010), the Court discussed this problematic situation where claimants notify VA of their disagreement with a decision of the Board but mistakenly send their documents to VA instead of the Court. The Court suggested that VA be held accountable for properly receiving and forwarding Notices of Appeal.

Judge Hagel wrote a concurring opinion that includes this observation:

> It has become clear to me that VA somewhat routinely holds correspondence from claimants that it determines, sometime after receipt, are Notices of Appeal to this Court. As a result, in far too many cases, the Court receives the Notice of Appeal from VA only after the 120-day appeal period has expired, permitting the Secretary to then move to dismiss the appeals for lack of jurisdiction * * *.

As one possible solution, Judge Hagel made this suggestion:

> Another option * * * would be for Congress to amend 38 U.S.C. 7103 (governing reconsideration of Board decisions) or 38 U.S.C. 7266 (regarding Notices of Appeal) to include language providing that a Notice of Appeal filed with VA during the 120-day appeal period following an adverse Board decision will be treated as a motion for reconsideration of the Board decision if VA does not forward the Notice of Appeal to the Court in a timely manner.

Committee Bill. Section 11 of the Committee bill would amend section 7103 of title 38 to add a new subsection (c), to provide that a Notice of Appeal sent to VA, instead of the Court, will be considered as a motion for reconsideration by the Board in certain circumstances. Specifically, this new subsection would provide that, if a person, within the 120-day appeal period, files a document with the Board or the AOJ, expressing disagreement with a Board decision and has not yet filed a Notice of Appeal with the Court, the document will be treated as a motion for reconsideration, unless the Board or AOJ determines that the document expresses an intent to appeal to the Court and forwards the document to the Court within the 120-day appeal period and the Court receives the document within the 120-day period. This change would treat the notice sent to VA as a request for reconsideration of the Board decision, thereby permitting the claimant to have his or her case reconsidered by the Board as well as preserve the later right of appeal to the Court.

Sec. 12. Modification of filing period for notice of disagreement to initiate appellate review of decisions of Department of Veterans Affairs.

Section 12 of the Committee bill, which is derived from S. 3517 as introduced, would modify the filing period for an NOD from one year to 180 days, with a good cause exception.

Background. Under current law, section 7105(b) of title 38, a claimant has one year to file an NOD after the date on which VA mails notice of an initial decision on a claim for benefits, meaning that, in some cases, VA must wait a year to determine if a claimant disagrees with a decision on a claim for benefits. If a claimant waits until the end of the one-year period to file an NOD, VA is often required to re-develop the record to ensure the evidence of record is up to date. Data from the Board supports the conclusion that post-NOD development delays the resolution of the claim. In FY 2008, appeals in which the AOJs received an NOD more than 180 days after the date the decision was mailed took, on average, 32 additional days to decide. If the period in which to file an NOD were reduced to 180 days, VA could more quickly finalize the administrative processing of claims not being appealed and focus resources on the processing of new pending claims and appeals.

Committee Bill. Section 12 of the Committee bill would amend section 7105(b) of title 38 to modify the filing period for NODs to 180 days. It would also permit NODs to be filed electronically.

With the addition of a new paragraph (3)(A) to section 7105(b), VA would also be authorized to grant good cause exceptions to the 180-day limit under specific circumstances, such as: circumstances relating to any physical, mental, educational, or linguistic limitation of the claimant, legal guardian, representative, attorney, or authorized agent; circumstances relating to significant delay in the delivery of the initial decision or of the NOD caused by natural disaster or geographic location; or any change in financial circumstances. If good cause for lack of filing within the 180-day period is shown, the NOD will be treated as timely if filed within 186 days after the initial 180-day period ends.

These changes would take effect 180 days after the date of enactment and apply to claims filed on or after the date of enactment.

Because the majority of claimants are able to determine quickly if they are satisfied with VA's decision on their claim, it is the Committee's view that enactment of this provision should not adversely affect claimants for VA benefits. In FY 2008, 77 percent of the NODs were filed in less than 180 days. Among these cases, the average time to file an NOD was just 41 days.

Sec. 13. Provision of post-notice of disagreement decisions to claimants who file notices of disagreements.

Section 13 of the Committee bill, which is derived from S. 3517 as introduced, would replace VA's responsibility to provide a "statement of the case" with a requirement to provide a "post-notice of disagreement decision."

Background. Under current law, section 7105 of title 38, appellate review is initiated by an NOD and completed by a substantive appeal after a statement of the case is provided by VA to the claimant and to the claimant's representative, if any. Pursuant to subsection (d)(1) of that section, a statement of the case must contain a summary of the pertinent evidence, a citation to pertinent laws and regulations, a discussion of how those laws and regulations affect the decision, the decision on each issue, and a summary of the reasons for each decision.

Committee Bill. Section 13 of the Committee bill would amend section 7105 to replace VA's responsibility to provide a "statement of the case," as currently mandated by section 7105, with a requirement to provide a "post-notice of disagreement decision."

This provision of the Committee bill would additionally rewrite section 7105(d)(1) to require that the post-notice of disagreement decision include: in new subparagraph (A), a description of the specific facts that support VA's decision, including an assessment as to the credibility of any lay evidence pertinent to the issue or issues with which disagreement has been expressed; in new subparagraph (B), a citation to pertinent laws and regulations that support VA's decision; in new subparagraph (C), a statement that addresses each issue and provides the reasons why the evidence relied upon supports the conclusions of the agency under the specific laws and regulations applied; in new subparagraph (D), the date by which a substantive appeal must be filed in order to obtain further review of the decision; and in new subparagraph (E), the rights of the claimant under subsection (f) of section 7105, as added by section 15 of the Committee bill, to request that the agency of original jurisdiction initially review evidence that has been submitted after the agency of original jurisdiction receives a substantive appeal.

Section 13 would further require, in new paragraph (d)(4) of section 7105, as renumbered by section 4 of the Committee bill, that the post-notice of disagreement decision be written in plain language. The changes made by this section would take effect 180 days after enactment and apply with respect to NODs filed on or after that date.

Sec. 14. Modification of substantive appeal process.

Section 14 of the Committee bill, which is derived from S. 3517 as introduced, would require a claimant to file a substantive appeal within 60 days of VA mailing a post-notice of disagreement decision and allow an extension of that period with good cause.

Background. Under current law, section 7105(a) of title 38, an appeal to the Board must be initiated by the claimant's filing of an NOD and completed by the claimant's filing of a substantive appeal, which is the means that a claimant must use to respond to the statement of the case, or VA's version of the issues in dispute.

Current law, section 7105(d)(3), as it relates to substantive appeals, provides that:

> Copies of the "statement of the case" * * * will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

In addition, VA regulations, 38 CFR 20.302(b), provide that a "Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of the mailing of the notification of the determination being appealed, whichever period ends later." Another VA regulation, 38 CFR 19.34, provides that a determination by the agency of original jurisdiction as to the timeliness of the a Substantive Appeal is an appealable issue.

Committee Bill. Section 14 of the Committee bill is tied to the changes proposed in section 13 of the Committee bill, which would replace VA's current requirement to provide a "statement of the case" to claimants with a requirement to provide a "post-notice of disagreement decision."

Section 14 of the Committee bill would create a new subsection, (e) to section 7105, which would allow the claimant 60 days to file a substantive appeal after a post-notice of disagreement decision is mailed. This provision of the Committee bill would authorize VA to grant an additional 60 days, in new section 7105(e)(2)(A), to file a substantive appeal for good cause, rather than the undefined period in current law. Good cause is defined in new section 7105(e)(2)(B) as including those circumstances relating to any physical, mental, educational, or linguistic limitation of the claimant, legal guardian, or other accredited representative, attorney, or authorized agent filing the request; circumstances relating to significant delay in the delivery of the initial decision or of the NOD caused by natural disaster or factors relating to geography; or a change in the financial circumstances that are considered in determining eligibility for benefits or services on an annualized basis.

Consistent with current law, proposed new section 7105(e)(4) would provide that a claimant would not be presumed to agree with any statement of fact contained in the new "post-notice of dis-

agreement decision" with which he or she does not specifically disagree.

Section 7105 would be further modified by section 14 of the Committee bill to clarify, in new subparagraph (e)(5), what occurs when a claimant does not file a substantive appeal in accordance with the law, to include requiring dismissal of the case by the agency of original jurisdiction and notification of the claimant of such dismissal. The notification would include an explanation of the procedure for obtaining review of the dismissal by the Board.

The changes proposed by section 14 of the Committee bill would take effect on the date of enactment and apply with respect to claims filed on of after the date 180 days after enactment.

Sec. 15. Automatic waiver of agency of original jurisdiction review of new evidence.

Section 15 of the Committee bill, which is derived from S. 3517 as introduced, would automatically waive the review of certain new evidence by the AOJ so that certain evidence submitted after the initial decision will be subject to initial review by the Board, unless review by the agency of original jurisdiction is requested.

Background. VA regulations, section 20.1304(c) of title 38, CFR, provide that, if additional evidence is submitted to the Board after an appeal is certified to the Board, the evidence "must be referred to the agency of original jurisdiction for review, unless this procedural right is waived by the appellant or representative." The requirement that the AOJ initially consider all evidence, unless the claimant waives the right, frequently delays the final adjudication of claims because claimants often submit additional evidence after perfecting their appeals to the Board by filing a substantive appeal. Under current procedures, each time a claimant, after filing a substantive appeal, submits more evidence without waiving the right to initial AOJ consideration, the AOJ must review the evidence submitted and issue a supplemental statement of the case pursuant to section 19.31 of title 38, CFR, that addresses the additional evidence.

Committee Bill. Section 15 of the Committee bill would amend section 7105 by creating a new subsection (f) that would provide for an automatic waiver of the right to initial consideration of certain evidence by the AOJ. The evidence that would be subject to the waiver is evidence that the claimant or his or her representative submits to the AOJ or the Board concurrently with or after filing the substantive appeal. Such evidence would be subject to initial consideration by the Board, unless the appellant or his or her representative requests in writing that the AOJ initially consider the evidence. The request would be required to be submitted with the evidence or within 30 days of its submittal of the evidence.

These changes would take effect 180 days after enactment and apply with respect to claims for which a substantive appeal is filed on or after that date.

The Committee believes that the establishment of an automatic waiver would necessarily improve the timeliness of processing appeals as a whole. Because the Board bases its decisions on a de novo review of all the evidence of record, many more appeals could be more quickly transferred to the Board following the receipt of a substantive appeal. The AOJs would spend less time responding

to appellants who submit additional evidence following the filing of a substantive appeal. By presuming a waiver of AOJ review of new evidence, the Board would be able to adjudicate claims without the delay of a remand, thereby getting final decisions to veterans quicker and reducing the increased appellate workload caused by the reworking of remanded claims. In addition, any appellant wishing to have the evidence considered by the AOJ in the first instance would still have the right to such a review simply by alerting the Board of that desire.

Sec. 16. Determination of location and manner of appearance for hearings.

Section 16 of the Committee bill, which is derived from S. 3517 as introduced, would require the Board to present an appellant the options for a Board hearing.

Background. Under current law, section 7107(d) of title 38, if an individual appeals to the Board, the individual may request a hearing before the Board at the Board's principal location in Washington, DC, or at a VA facility in the area of the appellant's local regional office (called field hearings or travel Board hearings). In addition, that section provides that field hearings may be conducted "through voice transmission or through picture and voice transmission" with Board members sitting in Washington, DC. According to the Board's Annual Report to Congress for Fiscal Year 2009, in fiscal year 2009, the Board conducted 3,375 video hearings and 7,784 field hearings. Although veterans are less likely to utilize video hearings, as opposed to travel Board hearings, the Board reports that there is no statistical difference in the allowance rate of appeals in which hearings are held in the field compared to video conference hearings. Also, the Board will move to a new location in 2011, where it will have 17 video hearing rooms instead of just five.

According to the Board, the potential results of expanded use of video capabilities include serving more veterans, reducing an appellant's wait time for a hearing, and increasing efficiency in issuing final decisions on appeal, as travel days can be utilized as decision-generating workdays and the Board will not lose time in the field due to appellants who fail to show up for scheduled hearings.

Committee Bill. Section 16 of the Committee bill would amend subsection (d)(1) of section 7107 of title 38 to provide that, upon request from an appellant for a hearing before the Board, the Board would be required to present the appellant with the options for a Board hearing, to include the Board's principal location in Washington, DC, a travel board hearing, or a video hearing, along with a recommendation to the appellant of the option that would lead to the earliest possible date for the hearing and statistics for the average wait experienced for similarly situated appellants. This section would also amend subsection (e) of section 7107 of title 38 to require the Board to inform the appellant of the advantages and disadvantages of participation in a hearing utilizing the Board's principal location in Washington, DC, a travel board hearing, or a video hearing. These changes would take effect 180 days after enactment and apply to requests for hearings made on or after that date.

It is the Committee's view that these changes should allow appellants to make a better informed choice of the type of hearing that best suits their needs and preferences. If these provisions are enacted, veterans would be better informed of their options for a hearing, including the potential for video hearings, which have been shown to be statistically as advantageous to a veteran as a travel Board hearing.

Sec. 17. Decision by Court of Appeals for Veterans Claims on all issues raised by appellants.

Section 17 of the Committee bill, which is derived from S. 3517 as introduced, would require the Court of Appeals for Veterans Claims (hereinafter, "CAVC") to decide all issues raised by appellants in the cases that come before it.

Background. Under current law, section 7261(a)(1) to (4) of title 38, the Court, "to the extent necessary to its decision and when presented, shall": (1) decide relevant questions of law, interpret statutory and regulatory provisions, and determine the meaning or applicability of the terms of an action of VA; (2) compel action of VA unlawfully withheld or unreasonably delayed; (3) hold unlawful and set aside decisions, findings, conclusions, rules, and regulations issued or adopted by VA that are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, contrary to constitutional power, privilege or immunity, in excess of statutory jurisdiction, authority, or limitations, or in violation of statutory law, or without observance of procedure required by law; and (4) hold unlawful and set aside or reverse findings of fact if they are clearly erroneous. See *Mahl* v. *Principi*, 15 Vet. App. 37, 38 (2001) (holding that where remand is appropriate, the Court need not "analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand"); *Best* v. *Principi*, 15 Vet. App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him").

Committee Bill. Section 17 of the Committee bill would amend section 7261 of title 38, relating to the Court's scope of review, to require CAVC to decide all issues raised by appellants in cases before the Court. Specifically, section 7261(a) would be amended by striking the phrase "to the extent necessary to its decision," thereby removing the Court's discretion to address issues pertaining to paragraphs (1) to (4) of that section when presented by any party. This provision of the Committee bill would also add a new subsection, (c), to section 7261 to require that the Court render a decision on every issue raised by an appellant.

Sec. 18. Good cause extension of period for filing notice of appeal with United States Court of Appeals for Veterans Claims.

Section 18 of the Committee bill, which is derived from S. 3517 as introduced, would create a good cause extension, not to exceed 120 days, for filing a notice of appeal with the Court.

Background. Under section 7266(a) of title 38, if a claimant disagrees with a decision of the Board, the claimant may appeal to the

Court by filing a notice of appeal within 120 days after the date on which notice of the decision was mailed by the Board.

In *Henderson* v. *Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), the United States Court of Appeals for the Federal Circuit (hereinafter, "Federal Circuit") held that the 120-day period for filing a notice of appeal to the Court is jurisdictional and not subject to equitable tolling. This inflexible application of the time limit for appeal creates sometimes harsh results.

The absence of any provision for a "good cause" extension in section 7266(a) of title 38 also creates a disparity between veterans appealing a decision to the Court and other appellants in federal appeals courts because section 2107(c) of title 28 allows a limited "good cause" extension of the period for appealing to a Federal circuit court of appeals.

Committee Bill. Section 18 of the Committee bill would modify section 7266 of title 38 to authorize the Court of Appeals for Veterans Claims to extend the 120-day period for appealing a decision of the Board to the Court of Appeals for Veterans Claims no more than an additional 120 days based on a showing of "good cause."

It is the Committee's intent to amend section 7266(a) to permit a limited "good cause" extension of the appeal period so as to place veterans on equal footing with appellants in other federal courts and prevent sometimes harsh results due to the lack of such a period.

Matters concerning the existence of "good cause" for the extension of the appeal filing period or the timeliness of a motion for extension necessarily turn upon the facts of each litigant's case and are therefore not reviewable under section 7292(a) and (d) of title 38, which preclude the Federal Circuit from reviewing the Court of Appeals for Veterans Claims decisions on factual matters or the application of law to the facts of a case. Notwithstanding the clear jurisdictional mandate of that statute, the Federal Circuit has at times asserted authority to review all matters pertaining to the Court of Appeals for Veterans Claims, irrespective of whether the particular matter presented turned only upon the facts of a particular case. See, e.g., *Morris* v. *Principi*, 239 F.3d 1292, 1294 (Fed. Cir. 2001); *Maggitt* v. *West*, 202 F.3d 1370, 1379–80 (Fed. Cir. 2000). Without addressing whether Congress condones those actions, it is not the Committee's intent to open the door to that type of review for good cause determinations relating to filing a notice of appeal.

Sec. 19. Pilot program on participation of local and tribal governments in improving quality of claims for disability compensation submitted to Department of Veterans Affairs.

Section 19 of the Committee bill, which is derived from S. 3517 as introduced, would create a pilot program on collaboration with local and tribal governments to improve the quality of claims for disability compensation.

Background. Although VA, local governments, and tribal governments all seek to provide veterans with the benefits for which they are eligible, coordination among these entities is limited. This is especially true for VA's coordination efforts with tribal governments, despite the fact that U.S. Census data show that American Indians and Alaska Natives serve in the U.S. military at a much higher

rate than the general population. Further still, according to a September 2006 analysis by VA's Office of Policy and Planning, American Indian and Alaska Native veterans are nearly 50 percent more likely than other veterans to have a service-connected disability, and those under age 65 are twice as likely to be unemployed, making their receipt of health care, disability compensation, and other benefits even more crucial.

VA currently serves the health care needs of American Indians and Alaska Natives under a memorandum of understanding with the Indian Health Service (hereinafter, "IHS") and sharing agreements between the Veterans Health Administration and federally recognized tribal governments. The approach of collaborating with IHS and tribal governments through memoranda of understanding and sharing agreements has shown some promise. However, coordination between the Veterans Benefits Administration and federally recognized tribal governments is much more limited.

In recent years, Congress has authorized VA to operate benefits programs and conduct outreach in a way that responds to the practical realities of Indian Country, Alaska Native villages, and Hawaiian Homelands. For example, because of commercial lenders' reluctance to extend mortgage loans secured by properties resting on Native American trust land, section 103 of Public Law 109–233, the Veterans' Housing Opportunity and Benefits Improvement Act of 2006, made permanent VA's authority to make housing loans directly to Native American veterans. In addition, section 403 of Public Law 109–461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, enabled Native American tribal governments to apply for construction grants under VA's State Cemetery Grant program, a program previously only open to States. The Committee believes that further progress can be made through stronger partnerships and greater cultural understanding between VA and tribal organizations and the Native Hawaiian community.

Committee Bill. Section 19 of the Committee bill, in a free-standing provision, would require VA to establish and implement a pilot program to study the feasibility and advisability of entering into memorandums of understanding (hereinafter, "MOU") with local governments and tribal organizations in the provision of certain benefits to veterans. VA would be required to enter into an MOU with at least two tribal organizations. The program would seek to improve quality of claims submitted for compensation and provide assistance to veterans in submitting such claims.

The Committee recognizes that many local governments, as well as some tribal governments, already operate paid and volunteer services for veterans in their communities. Through the type of collaboration envisioned by this section, those service providers could work with VA to advance their shared goals. It is the Committee's view that VA must collaborate with local governments and federally recognized tribal governments in order to more effectively and efficiently provide veterans' benefits.

Sec. 20. Increase in rate of pension for disabled veterans married to one another and both of whom require regular aid and attendance.

Section 20 of the Committee bill would increase the benefit paid to married couples when both members are veterans who qualify for aid and attendance.

Background. Veterans of a period of war who meet income, net worth, and other eligibility criteria are eligible to receive a pension based upon need. The amount of the pension is based upon the number of dependents of the veteran. Additional benefits are paid if the veteran has a disability which results in housebound status or need for aid and attendance. In general, when a veteran is married to a veteran, the pension benefits paid are the same as for a veteran who is married to a non-veteran. However, in cases where one or both members of a veteran couple is housebound and/or in need of aid and attendance, the additional amounts paid are computed separately for each veteran and added to the basic grant.

In 1998, section 8206 of Public Law 105–178, the Transportation Equity Act for the 21st Century, increased the VA benefit for a veteran who requires aid and attendance by $600 per year. Because of the way the legislation was drafted, the benefit was increased for only one of the veterans in those rare cases where a veteran is married to a veteran and both require aid and attendance. The legislative history of that law does not indicate any intent to treat these spouses differently. According to VA there are currently only 74 cases in which this applies. Therefore, under current law, if a veteran who is married to a veteran where both veterans qualify for aid and attendance benefits, the benefit amount for one of the spouses is $825 per year lower than for the other spouse.

Committee Bill. The Committee bill would increase the benefit paid to married couples where both members of the couple are veterans and both qualify for aid and attendance by $825.00 per year. This amount represents the present value of the $600 increase added in 1998.

Sec. 21. Automatic annual increase in rates of disability compensation and dependency and indemnity compensation.

Section 21 of the Committee bill, which was accepted as an amendment during Markup of the Committee bill, would require that whenever there is an increase in benefit amounts payable under title II of the Social Security Act, VA would automatically increase the rates of disability compensation and DIC, among other rates, by the same percentage and make it effective on the same date.

Background. The service-connected disability compensation program under chapter 11 of title 38, provides monthly cash benefits to veterans who have disabilities incurred or aggravated during active service in the Armed Forces. The amount of compensation paid depends on the nature and severity of a veteran's disability or combination of disabilities and the extent to which the disability impairs earning capacity. Certain veterans with more severe disabilities are also eligible to receive additional compensation on behalf of the veteran's spouse, children, and dependent parents.

Under chapter 13 of title 38, VA pays DIC to the survivors of servicemembers or veterans who died on or after January 1, 1957,

from a disease or injury incurred or aggravated during military service. Survivors eligible for DIC include surviving spouses, unmarried children under the age of 18, children age 18 or older who are permanently incapable of self-support, children between the ages of 18 and 22 who are enrolled in school, and certain needy parents.

Section 415(i) of title 42 provides for an automatic annual cost-of-living adjustment (hereinafter, "COLA") for benefits payable under title II of the Social Security Act based on the annual increase in consumer prices. Title II Social Security benefits are indexed to the Consumer Price Index for Urban Wage Earners and Clerical Workers (hereinafter, "CPI-W"), which is published on a monthly basis by the Bureau of Labor Statistics. The annual COLA increase is equivalent to the increase in the CPI-W from the most recent period between the third quarter of one calendar year to the third quarter of the next.

Currently, under section 5312 of title 38, there are several VA benefits that receive automatic increases tied to the annual adjustments in title II Social Security benefits. These include pension benefits for indigent, wartime veterans who are permanently and totally disabled due to a non-service-connected condition, or over the age of 65, as well as their surviving spouses and children, and DIC benefits for the parents of a deceased veteran whose income is below a specified threshold.

However, the majority of disability compensation and DIC benefits paid by VA are not indexed to the CPI-W and do not increase automatically when title II Social Security benefits are increased. Instead, Congress regularly enacts an annual cost-of-living adjustment to ensure that inflation does not erode the purchasing power of VA benefits. Although Congress in recent years has consistently enacted legislation on time so as to provide benefit recipients with a COLA increase beginning December 1 of each year, veterans service organizations have expressed support for making the COLA automatic, as demonstrated during legislative hearings of the Committee.

Committee Bill. Section 21 of the Committee bill would amend section 5312 of title 38, so as to add a new subsection (d)(1), which would require VA to increase the amounts of certain VA benefits by the same percentage and effective on the same date as adjustments made to title II Social Security benefits pursuant to section 415(i) of title 42. Proposed new subsection (d)(2) of section 5312 would specify the VA benefits that would be covered by any annual COLA increase. The benefits covered would be:

1. Basic compensation rates for veterans with service-connected disabilities and the rates payable for certain severe disabilities (section 1114 of title 38);

2. The allowance for spouses, children, and dependent parents paid to service-connected disabled veterans rated 30 percent or more disabled (section 1115(1));

3. The annual clothing allowance paid to veterans whose compensable disabilities require the use of prosthetic or orthopedic appliances that tend to tear or wear out clothing or veterans whose service-connected skin conditions require the use of prescribed medication that causes irreparable damage to outergarments (section 1162); and

4. Dependency and indemnity compensation paid to:

(a) surviving spouses of veterans whose deaths were service-connected (section 1311);

(b) surviving spouses for dependent children below the age of 18 (sections 1313(a) and 1314);

(c) surviving spouses who are so disabled that they need aid and attendance or are permanently housebound (section 1311(i) and 1311(d));

(d) surviving spouses covered under section 1318 of title 38; and

(e) the children of veterans whose deaths were service-connected if no surviving spouse is entitled to DIC, the child is age 18 through 22 and attending an approved educational institution, or the child is age 18 or over and became permanently incapable of self-support prior to reaching age 18 (section 1313).

Proposed new subsection (d)(3) of section 5312 would require VA to publish any increases under this new authority in the Federal Register.

The effective date of section 21 of the Committee bill would be the first day of the first calendar year that begins after the date of enactment.

Sec. 22. Action plan to improve correlation between employee pay and performance.

Section 22 of the Committee bill, which was accepted as an amendment during Markup of the Committee bill, would require VA to develop an action plan for improving the correlation between the pay, advancement, and rewards of VA employees and their job performance.

Background. In July 2010, the United States Office of Personnel Management (hereinafter, "OPM") released the results from the 2010 Federal Employee Viewpoint Survey. The results suggest that VA employees do not believe there is a strong correlation between job performance and pay, awards, and promotions. For example, of the VA employees who responded to the survey, 38.8 percent disagreed or strongly disagreed with the notion that "[a]wards in my work unit depend on how well employees perform their jobs;" 39.0 percent disagreed or strongly disagreed with the notion that, "[i]n my work unit, differences in performance are recognized in a meaningful way;" 45.4 percent disagreed or strongly disagreed with the notion that "[p]romotions in my work unit are based on merit;" and 52.6 percent disagreed or strongly disagreed with the notion that "[p]ay raises depend on how well employees perform their jobs."

In that report, OPM provided this guidance to agencies: "Collecting and analyzing survey results is just the first step in moving agencies towards greater effectiveness. Taking action on the results is the most important step in the process." To that end, OPM recommended that agencies develop an action plan, which "will state the objectives, action to be taken, outcome measures, accountable personnel and improvement targets, and will describe how progress will be tracked." Following that advice, leaders at OPM announced that, in response to the survey responses provided by OPM employees, they would develop a "'corporate action plan' to address employees' biggest concerns."

Committee Bill. Section 22 of the Committee bill, in a free-standing provision, would require VA, within 90 days after the date of enactment, to submit to Congress an action plan for improving the correlation between the pay, advancement, and rewards of VA employees and their job performance. The action plan would be required to have a particular focus on employees who perform work in relation to processing and adjudicating claims for disability compensation and dependency and indemnity compensation. In addition, the action plan must include specific objectives, planned actions, metrics for measuring improvements, and methods for tracking progress. It must also include any legislative changes that VA considers necessary in order for VA to improve the correlation between pay, advancement, and rewards and job performance.

COMMITTEE BILL COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the CBO, estimates that enactment of the Committee bill would, relative to current law, increase direct spending by $393 million over the 2011–2015 period and $2.1 billion over the 2011–2020 period. S. 3517 would add $5 million in discretionary spending over the 2011–2015 period, subject to appropriation of the necessary amounts. Enactment of the Committee bill would not affect the budget of state, local or tribal governments.

The cost estimate provided by CBO, setting forth a detailed breakdown of costs, follows:

CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 19, 2010.

Hon. DANIEL K. AKAKA,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3517, the Claims Processing Improvement Act of 2010.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dwayne M. Wright.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

S. 3517—Claims Processing Improvement Act of 2010

Summary: S. 3517 would modify the procedures used by the Department of Veterans Affairs (VA) to process and adjudicate compensation and pension claims. S. 3517 also would make changes to the compensation and pension programs and institute a pilot program for local and tribal governments. CBO estimates that enacting S. 3517 would increase direct spending by $393 million over the 2011–2015 period and about $2.1 billion over the 2011–2020 period. CBO also estimates that implementing S. 3517 would add $5 million in discretionary spending over the 2011–2015 period, subject

to appropriation of the necessary amounts. Enacting the bill would not affect revenues.

Pay-as-you-go procedures apply because enacting the legislation would affect direct spending.

S. 3517 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA).

Estimated cost to the Federal Government: The estimated budgetary impact of S. 3517 is shown in the following table. The costs of this legislation fall within budget function 700 (veterans benefits and services).

	By fiscal year, in millions of dollars—											
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2011–2015	2011–2020
CHANGES IN DIRECT SPENDING												
Private Medical Opinions												
Estimated Budget Authority	5	21	53	102	158	217	278	340	405	472	339	2,051
Estimated Outlays	5	21	53	102	158	217	278	340	405	472	339	2,051
Intermediate Disability Rating												
Estimated Budget Authority	15	16	21	1	1	2	2	2	2	2	54	64
Estimated Outlays	15	16	21	1	1	2	2	2	2	2	54	64
Total Changes												
Estimated Budget Authority	20	37	74	103	159	219	280	342	407	474	393	2,115
Estimated Outlays	20	37	74	103	159	219	280	342	407	474	393	2,115

Note: In addition to the changes in direct spending shown above, S. 3517 also would increase discretionary spending by $5 million over the 2011-2015 period for a disability compensation pilot program and various administrative provisions, subject to appropriation of the necessary amounts.

Basis of estimate: For the purposes of this estimate, CBO assumes S. 3517 will be enacted by the end of calendar year 2010.

Direct Spending

S. 3517 would make several changes to the VA disability compensation and pensions programs. CBO estimates that enacting S. 3517 would increase direct spending by $2.1 billion over the 2011–2020 period.

Private Medical Opinions. Section 5 would allow medical opinions from private practitioners to be used to support claims for VA disability ratings. VA would be required to give such medical opinions the same deference as opinions provided by VA physicians. Under current law, a medical examination conducted by a physician is the main factor in assigning a disability rating, though other evidence can be used to support a claim. CBO estimates that enacting section 5 would increase direct spending by $2.1 billion over the 2011–2020 period.

CBO expects that mental disorders and other disabilities where the diagnosis is in part subjective would comprise the majority of the cases where private medical opinions would be sought by veterans, and that 25 percent of veterans with such disabilities would provide credible private opinions. Based on a review of historical data on disability ratings, CBO estimates that veterans providing a private medical opinion would see a 10 percentage- point increase in their disability rating—moving from an average disability rating of 40 percent to 50 percent—over what they would have otherwise received. That change would increase a veteran's monthly benefit by $250 in 2011. CBO does not expect the number of veterans re-

ceiving disability compensation to be significantly affected by this provision.

New Cases. In 2009, VA added 212,000 veterans to the disability compensation rolls. CBO estimates that there will be about 215,000 new accessions in 2011, growing to about 243,000 in 2020. Based on information from VA, mental and other disorders (such as back injuries) where a subjective diagnosis exists account for about 10 percent of the disabilities for which a rating for compensation is provided. Assuming a gradual phase-in of the use of private opinions, CBO estimates that in 2011 about 1,000 new veterans would receive higher disability ratings, and that this number would increase to about 6,100 in 2020. After accounting for mortality and inflation, CBO estimates that section 5 would increase direct spending for new accessions by $110 million over the 2011–2015 period and $640 million over the 2011–2020 period.

Veterans Currently On the Rolls. Under section 5, veterans who are currently receiving veterans' disability compensation also would be eligible for an increase in their disability ratings. About 3.2 million veterans currently receive veterans' disability compensation and about 15 percent return each year to be re-rated. After accounting for the factors described above, CBO estimates that the population of veterans on the rolls who would receive an increased rating would be about 2,400 in 2011, increasing to about 13,200 in 2020. Therefore, CBO estimates that section 5 would increase direct spending for veterans currently on the rolls by about $1.4 billion over the 2011–2020 period.

Intermediate Disability Rating. Section 2 would require VA to assign a temporary disability rating to any veteran who submits a claim for multiple disabilities that includes at least one disability that can be rated immediately. VA currently has the authority to assign such partial ratings but because of the large backlog of claims it has used this authority sparingly. Most veterans with multiple disabilities have to wait until their claim is fully adjudicated—often a year or more—before receiving disability compensation. When such veterans begin receiving monthly compensation payments, they also receive a retroactive payment that covers the months back to the date of their application.

Under section 2, CBO expects that such veterans would begin receiving partial disability compensation payments in the year in which they file a claim. That would increase costs in that first year (because of the earlier payments) and decrease costs in a subsequent year (because of reduced retroactive payments). CBO expects that costs would increase substantially for the first three years, as VA gradually phased in the process of assigning intermediate ratings more widely over that period. Once that process was fully phased in, CBO expects those increased costs would be largely offset by the reduced retroactive payments.

The population that would generate additional spending would be veterans filing claims for the first time. Based on information from VA, CBO estimates that about 50 percent of all new claims for a disability rating are seeking a rating based on multiple disabilities and that about 25 percent of those cases (12.5 percent of all new claims) have at least one disability that could be decided immediately. In 2007, VA assigned temporary ratings to 33 cases. Under section 2, CBO expects that VA would eventually assign in-

termediate ratings to half of the eligible population—about 6 percent of new cases each year.

In 2009, there were about 212,000 new accessions to the disability compensation rolls. CBO estimates that there will be about 215,000 new accessions in 2011, growing to about 243,000 in 2020. After accounting for a three-year phase-in and the number of veterans with a disability that could be rated immediately, CBO estimates that about 4,000 new veterans in 2011 would receive an intermediate rating (and, therefore, a payment in 2011), increasing to about 15,000 in 2020. The average disability rating for new cases is 40 percent (about $600 per month—$7,200 annually—in 2010) and CBO assumes that these veterans would receive that rating. After accounting for mortality and inflation, CBO estimates that section 2 would increase direct spending by $64 million over the 2011–2020 period.

Increased Pension for Married Veterans Requiring Aid and Attendance (A&A). Section 20 would increase the annual pension payable to married veterans when both spouses require regular A&A. Under current law, when two married veterans are in need of regular A&A, they are eligible to receive an annual combined pension of $30,480. Section 20 would increase that combined annual payment amount to $31,305.

There are currently about 75 married couples who are both receiving pensions and both in need of regular A&A. Based on information from VA, CBO estimates that the number of eligible couples will decline slightly over the next decade. Therefore, we estimate that enacting section 20 would increase direct spending by $500,000 over the 2011–2020 period.

Automatic Cost-of-Living Adjustment (COLA). Section 21 would automatically increase the amounts payable to veterans for disability compensation and to their survivors for dependency and indemnity compensation by the same COLA payable to Social Security recipients each year. Currently, this increase is authorized on an annual basis. The COLA that would be authorized by this bill is assumed in CBO's baseline, consistent with section 257 of the Balanced Budget and Emergency Deficit Control Act, and savings from rounding it down were achieved by the Balanced Budget Act of 1997 (Public Law 105–33) as extended by the Veterans Benefits Act of 2003 (Public Law 108–183); therefore, enacting section 21 would have no budgetary effect relative to the baseline.

Spending Subject to Appropriation

S. 3517 includes several provisions that would have a small impact on discretionary spending. CBO estimates that implementing those provisions would cost $5 million over the 2011–2015 period, subject to appropriation of the necessary amounts.

Pilot Program for Local and Tribal Governments. Section 19 would require VA to conduct a pilot program to determine the feasibility of entering into memorandums of understanding (MOUs) with local and tribal organizations intended to help facilitate the claims application process. VA would be required to enter into such MOUs with at least two tribal organizations. Assuming that VA entered into two such agreements, CBO expects that implementing those agreements would require VA to hire a total of four additional employees to provide on-site assistance—two for each tribal

organization. Based on information from VA, CBO estimates that implementing section 19 would cost less than $500,000 per year and about $2 million over the 2011–2015 period, subject to the availability of appropriated funds.

Other Provisions. Several sections of S. 3517 would make changes to the claims adjudication process at VA, both in terms of the filing of claims and VA's method for adjudication and the appeals process when a veteran disagrees with a VA decision. While most of those changes would have either an insignificant budget impact or no impact at all, CBO expects that implementing all of them would require VA to hire additional employees. Thus, CBO estimates that those provisions would cost about $3 million over the 2011–2015 period, subject to the availability of appropriated funds.

Pay-As-You-Go Considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget reporting and enforcement procedures for legislation affecting direct spending or revenues. S. 3517 would increase direct spending by increasing the amount of disability compensation that certain veterans would be eligible to receive. The changes in outlays that are subject to those pay-as-you-go procedures are shown in the following table.

CBO Estimate of Pay-As-You-Go Effects for S. 3517 as ordered reported by the Senate Committee on Veterans' Affairs on August 5, 2010

	By fiscal year, in millions of dollars—											
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2011–2015	2011–2020
NET INCREASE IN THE DEFICIT												
Statutory Pay-As-You-Go Impact	20	37	74	103	159	219	280	342	407	474	393	2,115

Intergovernmental and private-sector impact: S. 3517 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Dwayne M. Wright; Impact on State, Local, and Tribal Governments: Lisa Ramirez-Branum; Impact on the Private Sector: Elizabeth Bass.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Regulatory Impact Statement

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact that would be incurred in carrying out the Committee bill. The Committee finds that the Committee bill would not entail any regulation of individuals or businesses or result in any impact on the personal privacy of any individuals and that the paperwork resulting from enactment would be minimal.

Tabulation of Votes Cast in Committee

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by members of the Committee on Veterans' Affairs at its August 5, 2010, meeting. Three amendments were of-

fered to S. 3517. All three were accepted by the Chairman and the bill was ordered favorably reported.

AGENCY REPORT

On July 14, 2010, Michael Walcoff, Acting Under Secretary for Benefits, Veterans Benefits Administration, Department of Veterans Affairs, appeared before the Committee and submitted testimony on S. 3517, among other issues. Excerpts from this statement are reprinted below:

STATEMENT OF MICHAEL WALCOFF, ACTING UNDER SECRETARY FOR BENEFITS, VETERANS BENEFITS ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS

Chairman Akaka, Ranking Member Burr, and Members of the Committee:

Thank you for the opportunity to appear before you today to discuss the Department of Veterans Affairs (VA) disability compensation and pension programs. Accompanying me today are Ms. Diana Rubens, Associate Deputy Under Secretary for Field Operations; Mr. Tom Pamperin, Associate Deputy Under Secretary for Policy and Program Management; Mr. Mark Bologna, Director for the Veterans Benefits Management System (VBMS) initiative; Dr. Peter Levin, Senior Advisor to the Secretary and Chief Technology Officer; and Mr. Richard Hipolit, Assistant General Counsel. My testimony will provide preliminary views on the Chairman's bill, the Claims Processing Improvement Act of 2010. I will also focus on the Secretary's goal to eliminate the claims backlog by 2015 so as to ensure timely and accurate delivery of benefits and services to our Veterans and their families.

* * * * * * *

S. 3517: THE CLAIMS PROCESSING IMPROVEMENT ACT OF 2010

First, let me commend you Mr. Chairman and your staff for your efforts to put forward ideas on how to improve the disability claims processing system. I would like to acknowledge your work and we appreciate your staff keeping the Department informed as you developed the legislation.

S. 3517, the "Claims Processing Improvement Act of 2010," would establish a pilot program on evaluation and rating of service-connected musculoskeletal disabilities and would revise a number of statutes affecting VA's adjudication of claims and appeals. The Department is in the final stages of coordinating the Administration's full position and developing cost estimates on the legislation. However, I will provide you with a brief overview of VA's initial reactions to Title I of the bill and, with your permission, we will provide more detailed information on the entire bill in writing for the record.

* * * * * * *

Title II of this bill addresses several matters relating to the adjudication process for claims and appeals. We appreciate the inclusion of a number of provisions drawn from Secretary Shinseki's proposed legislation, known as the Veterans Benefit Programs Improvement Act of 2010, which he submitted to Congress for consideration on May 26, 2010. We look forward to the opportunity to provide our views on the legislation in the coming weeks.

THE SECRETARY OF VETERANS AFFAIRS,
Washington, DC, August 2, 2010.

Hon. DANIEL K. AKAKA,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write to provide the views and cost estimates of the Department of Veterans Affairs (VA) on S. 3517, the "Claims Processing Improvement Act of 2010." Although this bill was included on the agenda for a July 14, 2010, oversight hearing before the Senate Committee on Veterans' Affairs, VA was unable to provide full views in time for that hearing. This bill contains legislation of considerable significance to VA, and we appreciate your allowing us to submit this letter to supplement VA's testimony.

First, let me commend you, Mr. Chairman, and your staff for your efforts to put forward ideas on how to improve the disability claims processing system. I would like to acknowledge your work, and we appreciate your staff keeping the Department informed as you developed the legislation.

The "Claims Processing Improvement Act of 2010" would establish a pilot program on evaluation and rating of service-connected musculoskeletal disabilities and would revise a number of statutes affecting VA's adjudication of claims and appeals. VA supports the goals of many of the sections in this bill that would enhance the processing of claims and appeals. However, VA also has significant concerns regarding a number of provisions in the bill as discussed below.

* * * * * * *

§ 201

Section 201 would provide for the expeditious partial adjudication of a disability compensation claim for multiple conditions, when one or more of the conditions could be assigned a disability rating without further development. VA supports the underlying goal of this section as a means to expedite payment of disability compensation to a Veteran, even though it may be less than the eventual total monthly payment. In fact, VA has implemented a policy to this effect in the Compensation and Pension Service Procedures Manual. Because this procedure is already part of VA's standard operating procedure, it is unnecessary to mandate this procedure by law. We anticipate that there would be no costs associated with the enactment of this section.

§ 202

Section 202 would attempt to clarify that the Secretary is required to provide claimants notice of additional information and evidence necessary to substantiate a claim, only if additional information and evidence is required to support the claim. We support the purpose of clarifying that notice is not required when VA has sufficient information and evidence to decide the claim. However, the wording of this section is confusing and may not lead to the desired result stated in its title. We believe the purpose of this provi-

sion could be achieved by retaining the existing language in 38 U.S.C. § 5103(a) and adding a sentence stating that VA is not required to provide notice if no additional information or evidence is required. VA has already interpreted the current statute as providing such a result in its proposed rulemaking to amend 38 CFR § 3.159, which would not require VA to provide notice where the evidence is already sufficient to award all benefits sought. We anticipate that there would be no costs associated with the enactment of this section.

§ 203

Section 203 would require that the same deference be given to private medical opinions as to VA medical opinions. The section would further require that, if VA requests a VA medical opinion in response to a private medical opinion, then the professional qualifications of the VA health care provider must be equal to or greater than those of the provider of the private medical opinion.

VA does not support this section of the bill as it assumes that VA automatically gives more weight to opinions from VA clinicians as opposed to private clinicians, regardless of the content of the opinions at issue. This is simply not the case. VA adjudicators must weigh competing medical opinions, whether from a VA or private clinician, based on a variety of factors, including the discussion of relevant facts and pertinent medical history, the relative thoroughness of the opinions, and the clarity of analysis, among other things. The bill language could be construed to require VA by law to assign equal probative value to private medical opinions regardless of these factors. The assignment of probative value, however, is an essential part of the adjudicative function that involves the adjudicator looking at the reasoning provided by all clinicians, both VA and private, concerning a submitted medical opinion, and then judging the credibility and determining the weight to be assigned to the evidence. If this process were merely to become one of adding up the number of favorable versus the unfavorable medical opinions, there is a serious risk that harm would occur to both Veterans and VA.

VA further objects to the provision of this section that would require that, when a VA health care provider is responding to a private medical opinion, the professional qualifications of the VA health care provider be equal to or greater than those of the private health care provider. In many circumstances it may not be evident what VA health care provider would have "professional qualifications that are at least equal to the qualifications of the provider of the private medical opinion"—particularly in situations where a complex medical condition is at issue. Furthermore, it would be difficult for VA to assess the qualifications of those who provide private medical opinions because private clinicians often do not provide a curriculum vitae or other statement outlining their professional qualifications. In fact, many times the signature line, which may include a notation such as "M.D.," "N.P.," or "F.A.C.S.," would be the only indicator of their professional status.

We anticipate that there would be no costs associated with the enactment of this section.

§ 204

Section 204 would direct the Secretary to establish a process to identify whether claims could be quickly adjudicated or a whether a temporary disability rating could be assigned. As part of this process, VA would be required to assign employees who are experienced in the processing of claims to carry out a preliminary review of all initial disability compensation claims submitted to VA. Priority adjudication would be authorized for certain disability compensation claims, including claims of Veterans who are terminally ill, claims of homeless claimants, claims of claimants suffering severe financial hardship, and claims partially adjudicated under section 1157(b) as proposed by section 201 of this bill. This section would further provide VA the discretion to terminate development of a claim at the request of the claimant, but would still require VA to undertake any development necessary to obtain any Federal records, medical examinations, or opinions relevant to the claim. This section would also allow VA to decide these claims based on all the evidence of record.

While VA supports the underlying purpose of section 204 to identify claims that may be subject to quick adjudication, VA does not believe that the structure of this process, including the allocation of human resources, should be mandated by law. VA regional offices are presently committed to processing claims in as timely and consistent a manner as possible. Flexibility in operations at a local level is necessary to accomplish this goal. Mandating that experienced claims processing personnel be employed in these positions may deprive VA regional offices of needed flexibility in utilizing experienced claims processing personnel and adjusting their staffing in response to the natural ebb and flow of the claims adjudication process. Adding this extra layer of review may result in duplicative review of many claims and may unnecessarily delay the claims of Veterans whose claims are more complex or difficult to adjudicate. Further, we are concerned that the proposed language, if not expressly limited to claims processing by VA regional offices, could be construed to potentially interfere with the current obligation of the Board of Veterans' Appeals (Board) under 38 U.S.C. § 7107 to decide cases in docket order.

VA supports the provision that would allow VA to treat a claim as fully developed upon notification that the claimant has no further information or evidence to submit, subject to VA's completion of any necessary development. VA does not anticipate any costs associated with this section.

§ 205

Section 205 would require the Secretary, upon denying a benefit, to provide the claimant a notice of decision that includes: a statement of reasons for the decision, a summary of the evidence relied upon in making the decision, and an explanation of the procedure for obtaining appellate review. Along with the notice of decision, the Secretary would be required to provide the claimant a notice of disagreement (NOD) form that, if completed and returned, would initiate appellate review process. The content of the notice to be provided under the proposal would be the same as that provided

under current law. A NOD form is not currently provided. VA has no objection to this section, although we consider providing the NOD form unnecessary in light of the explicit notice of appellate rights already provided with VA claim decisions. We anticipate no costs associated with section 205, beyond the cost of printing the proposed NOD form.

§ 206

Section 206 would reduce the time period in which a claimant could submit a NOD to initiate appellate review from one year to 180 days from the issuance of the VA decision. This section would also create a good cause exception that would require VA to treat an untimely NOD as timely, if VA determines that the claimant, legal guardian, or accredited representative, attorney, or authorized agent filing the notice has demonstrated "good cause" for the failure to timely file and if the NOD is filed within 186 days after the initial 180-day appeal period. This section would further authorize VA to accept NODs by electronic means as well as through traditional mail.

VA supports the portion of this section that would reduce the time involved in processing appeals and provide a good cause exception for certain untimely filings. VA believes that the 180-day time frame is a sufficient period for a claimant or representative to evaluate a VA decision and respond with a NOD if the claimant decides to initiate an appeal. VA would, however, recommend restructuring the "good cause" exception as an extension request similar to that found in section 207 for the filing of a substantive appeal. Section 207 would allow for an extension of the time to file a substantive appeal provided that good cause is shown and the request is filed within the initial 60-day period to file a substantive appeal. As currently drafted, section 206 does not require that an extension request be filed within the initial 180-day NOD filing period. Requiring that extension requests be filed within the initial 180-day filing period would allow the agency of original jurisdiction (AOJ) to close an appeal 180 days after a decision is issued, provided that an NOD or extension request was not submitted. Without a requirement that extension requests be filed within the initial 180-day filing period, the AOJ would not be able to close an appeal until 366 days after the initial AOJ decision was issued (180 days for the initial NOD filing period and an additional 186 days for the extension period). Therefore, to avoid further delay, we recommend that the bill be revised to require that requests for extension of the period to file an NOD be filed within the initial 180-day filing period. We would also recommend limiting the extension period to 180-days or less versus the current 186-day period.

VA does not support the provision in section 206 stating that certain broadly described circumstances "shall" be considered as relating to good cause. While VA has no objection to the inclusion of a list of examples, VA believes that the fact-specific determination as to what is considered "good cause" should be left to the adjudicator and decided on a case-by-case basis, not mandated by law. As written, this provision seemingly would require VA to treat any linguistic barrier or change in financial circumstances as good cause,

without regard to the degree of the barrier or change and without regard to any mitigating factors.

Further, VA does not support the portion of section 206 that would extend the "good cause exception" to a Veteran's accredited representative, attorney, or agent. Such representatives are duty bound to provide competent representation and to act with reasonable diligence and promptness in representing claimants, which includes being accountable for observing the various filing deadlines. Failing in these duties may indicate misconduct or lack of competence on the part of the representative, attorney, or agent. VA does not anticipate any costs associated with this section.

§ 207

Section 207 would require a substantive appeal to be filed within 60 days from the date of the mailing of a "post-notice of disagreement decision." This time period could be extended an additional 60 days for good cause shown. The substantive appeal must identify the alleged specific errors of fact or law made by the AOJ. If the claimant does not file a substantive appeal in accordance with this section, the AOJ would be required to dismiss the appeal and notify the claimant. The dismissal notice would have to explain that the Board may review the dismissal, and such a request for review must be made within 60 days.

VA supports the 60-day time period for filing a substantive appeal as is provided under the current law. However, similar to section 206, section 207 includes a list of broad circumstances that "shall" be considered "good cause." As written, this could be construed as placing a mandatory requirement on VA to always consider certain situations to be good cause. While VA has no objection to the inclusion of a list of examples, VA believes that the fact-specific determination as to what is considered "good cause" should be left to the adjudicator. VA is in the process of developing costs for this section.

§ 208

Section 208 would replace the Secretary's obligation to provide a statement of the case with an obligation to provide a "post-notice of disagreement decision" and would clarify that VA's action is a decision on the claim. This decision would be written in plain language and contain a description of the specific facts in the case which support the decision including, if applicable, an assessment as to the credibility of any lay evidence pertinent to the issues with which disagreement has been expressed; a citation to pertinent laws and regulations that support the decision; the decision on each issue and a summary of the reasons why the evidence relied upon supports such decision under the laws and regulations applied; and the date by which a substantive appeal must be filed in order to obtain further review of the decision. The post-notice of disagreement decision is different from the statement of the case in that it has the additional requirements that the decision include a discussion of the specific facts supporting the decision and an assessment as to the credibility of any lay evidence pertinent to the

issue, that the decision be written in plain language, and that the decision contain the deadline to file a substantive appeal.

While VA generally has no objection to renaming the statement of the case, VA believes that the requirement that these post-notice of disagreement decisions be written in "plain language" is very subjective and could result in an increase in appeals that would further delay the adjudication of claims. We anticipate no costs associated with this section.

§ 209

Section 209 would provide that a claimant automatically waives the review by the AOJ of new evidence submitted after the substantive appeal is filed, so that such evidence would be subject to initial review by the Board unless the claimant, or the claimant's representative, submits a written request, with the evidence or within 30 days of submitting the evidence, that the AOJ review such evidence.

VA generally supports this section because it would allow AOJs to spend less time responding, through supplemental statements of the case, to appellants who submit additional evidence following the filing of a substantive appeal and would allow the Board to avoid time-consuming remands when the appellant submits evidence directly to the Board. We believe that this would reduce the time spent processing appeals and thereby provide final decisions to Veterans more quickly.

VA's only concern with this section is the provision that permits a request for AOJ review to be "made within 30 days of the submittal" of evidence. Providing a 30-day period to submit a request for AOJ review would require the AOJ in many cases to hold the case for at least 30 additional days following the receipt of evidence to determine whether a request for AOJ review is going to be filed before forwarding the case to the Board. Moreover, if an appellant submits evidence in piecemeal fashion after filing a substantive appeal, the AOJ would be forced to hold the case pending the expiration of multiple 30-day periods. Requiring that the request for AOJ review be filed contemporaneously with the evidence would enhance efficiency and reduce delay in the appellate process. We anticipate that there would be no mandatory or discretionary costs associated with this section.

§ 210

Section 210 would allow the Board to determine the most expeditious location for and type of hearing (i.e., an in-person hearing or a video conference hearing) to afford an appellant, unless the appellant demonstrates good cause or special circumstances to warrant another location or type of hearing. VA supports enactment of section 210 as it would improve efficiency and speed claim adjudications. We anticipate that this section would result in no mandatory or discretionary costs or savings.

§ 211

Section 211 of the draft bill would require that the Court of Appeals for Veterans Claims (Veterans Court) decide every issue

raised on appeal before remanding an issue for readjudication. VA takes no position on this provision as it directly pertains to the operation of the Veterans Court. We do not anticipate that there would be any costs associated with this section.

§ 212

Section 212 would authorize the Veterans Court to extend the 120-day time period for filing a notice of appeal for an additional period not to exceed 120 days upon a written request by the appellant filed not later than 120 days after expiration of the initial appeal period and a showing of good cause. VA supports this section of the proposed bill and anticipates that there would be no costs associated with this section.

§ 213

Section 213 would require the Secretary of Veterans Affairs to carry out a pilot program to assess the feasibility and advisability of entering into memorandums of understanding with local governments and tribal organizations to improve the quality of compensation claims submitted under chapter 11of title 38, United States Code, and to provide assistance to Veterans who may be eligible for such compensation in submitting such claims. VA is unable to provide views on the proposed pilot program or estimate the costs associated with enactment of section 213 as the purpose and intent of this section is unclear.

Thank you for the opportunity to provide the Department's views on this legislation, and again I commend you and your staff for your efforts to put forward proposals to improve the disability claims processing system.

I look forward to continuing to work together with you on our shared goal of a disability claims processing system that provides accurate and timely decisions to our Nation's Veterans. Thank you for your ongoing support of our mission.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ERIC K. SHINSEKI.

THE SECRETARY OF VETERANS AFFAIRS,
Washington, DC, July 30, 2010.

Hon. DANIEL K. AKAKA,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am pleased to provide the Committee with the views of the Department of Veterans Affairs (VA) on twelve of the thirteen bills listed in your May 21, 2010, letter. In addition, we are providing cost estimates for three bills about which we testified at the Committee's May 19, 2010, hearing but for which we were unable to develop cost estimates in time for that

hearing. We will provide views and costs on S. 3486 to the Committee in a separate letter.

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S. 3348

S. 3348 would require that certain misfiled documents be treated as motions for reconsideration of decisions of the Board of Veterans' Appeals (Board). A document so treated would be a document that expresses disagreement with a Board decision, is filed with the Board or the VA agency of original jurisdiction within 120 days after the Board issues the decision, and is filed by a person who is adversely affected by the Board decision but has not timely filed a notice of appeal with the United States Court of Appeals for Veterans Claims (Veterans Court). Such a document would not be treated as a motion for reconsideration if the Board or the agency of original jurisdiction determines that the document expresses an intent to appeal the Board decision to the Veterans Court and forwards the document to the Veterans Court, and the court receives the document within 120 days after the Board issued the decision.

VA objects to the bill for two reasons. First, it would require the Board to decide motions for reconsideration of decisions without any meaningful basis for such reconsideration. This is because the bill would allow reconsideration of previously final decisions based on nothing more than a mere expression of disagreement, rather than based on the current reconsideration standard of obvious error of fact or law. Second, by requiring VA to make an initial determination as to whether a notice of appeal was filed in a case, the bill would place VA in the unprecedented position of determining whether a particular case falls within the jurisdiction of the Veterans Court, a superior tribunal. The additional activity that S. 3348 would require could potentially burden an already overburdened adjudication system and introduce uncertainty as to the finality of Board decisions.

We believe that legislation recently proposed by VA that would authorize the Veterans Court to extend the 120-day period for appealing a Board decision on a showing of good cause presents a better solution for appellants who are unable to correctly file a notice of appeal of a Board decision. Under VA's proposal, the Veterans Court would determine whether the facts and circumstances of a particular case justify an extension of the statutory time period for filing an appeal, and the Board would not have to decide a case a second time with no clearly discernible benefit flowing to the Veteran.

Concerning costs, the Board processes between 800 and 900 motions for reconsideration each year at a cost of approximately $587,000. The Board cannot predict the number of motions for reconsideration it would have to decide each year under the bill because the proposed standard involves too many variables. However, because S. 3348 would potentially treat all expressions of disagreement filed within the 120-day period for appealing a Board decision as motions for reconsideration, it is reasonable to conclude that the

number of such motions decided would increase significantly along with VA's costs in issuing such decisions.

* * * * * * *

S. 3367

S. 3367 would increase from $8,911 to $31,305 the maximum annual rate of pension for two disabled Veterans married to one another when both are in need of regular aid and attendance currently prescribed by section 1521(f)(2) of title 38, United States Code. This bill would have the effect of amending the law governing improved pension to prospectively establish a pension rate for two Veterans married to one another, both of whom are in need of aid and attendance, at the rate that would have been payable had 38 U.S.C. § 1521(f)(2) been amended in 1998 to provide a $600 increase for each Veteran, rather than a single $600 increase for the two Veterans, and the increased rate had subsequently been adjusted by annual cost of living adjustments. VA supports this bill as an equitable approach to meeting the needs of severely disabled Veterans, subject to Congress identifying offsets for the additional costs identified below. However, VA has a technical concern with this bill. It would update in accordance with current pension rates only one of the rates specified in section 1521(f)(2). The multitude of other pension rates prescribed by section 1521 would continue to be those that were in effect years ago. To avoid confusion, should Congress decide to amend one of the rates prescribed by section 1521(f)(2), it should also update all the other rates prescribed in section 1521 to account for past cost-of-living adjustments.

Because there are only 74 pension awards for two Veterans married to one another and both in need of regular aid and attendance, VA estimates the cost of this bill, if enacted, would be $733,000 in the first year, $3.7 million over 5 years, and $8 million over 10 years. VA has determined that there would be no additional administrative or full-time employee costs associated with this bill.

S. 3368

S. 3368 would authorize certain individuals and organizations to sign an application for VA benefits on behalf of claimants under 18 years of age, mentally incompetent, or physically unable to sign the application form.

VA does not support this bill because it is unnecessary and would place Veterans, their family members, and VA at a higher risk for abuse and fraud. First, VA regulations currently provide a process for initiating a claim without a traditional signature. Section 3.2130 of title 38, Code of Federal Regulations, requires VA to accept a signature by mark or thumbprint if appropriately witnessed or certified by a notary public or certain VA employees. This alternate process enables claims to be filed by persons unable to sign an application. Second, a claimant unable to sign an application for benefits due to mental deficiency will likely be found incompetent to handle his or her own VA benefit payments, which requires VA to appoint a fiduciary, who would be qualified to sign application forms for the claimant. Allowing persons not appointed as VA fiduciaries to file claims for incompetent claimants would in-

crease the risk that VA benefits would be diverted from claimants. For these reasons, we do not support S. 3368.

VA estimates that there would be no benefit costs or administrative costs associated with this bill.

S. 3370

S. 3370 would amend 38 U.S.C. §5105(a), which directs the Secretary of Veterans Affairs and the Commissioner of Social Security to jointly prescribe forms for use by survivors of members and former members of the uniformed services to apply for benefits under both chapter 13 of title 38, United States Code, and title II of the Social Security Act. Under section 5105(b), when an application on such a form is filed with either VA or the Social Security Administration (SSA), it is deemed to be an application for benefits under both chapter 13 of title 38 and title II of the Social Security Act. Accordingly, applicants for survivor benefits need file only one of the prescribed forms with either agency to apply for such benefits at both agencies.

The bill would authorize but no longer require VA and SSA to jointly prescribe forms to apply for survivor benefits and, more significantly, require VA and SSA to interpret an application made on any form indicating an intent to apply for survivor benefits filed with either agency as an application for benefits under both chapter 13 of title 38, United States Code, and title II of the Social Security Act. Requiring VA and SSA to accept as an application for survivor benefits any application that indicates an intent to file for such benefits without regard to the application form would be inconsistent with the concept embodied in 38 U.S.C. §5101(a) that a claim for veterans benefits must be made by filing a claim "in the form prescribed by the Secretary." This requirement serves the beneficial purpose of ensuring that a claim contains sufficient information as specified in the claim form to permit VA to efficiently adjudicate the claim. Permitting the filing of "any form" to constitute a claim for survivor benefits would condone use of a multitude of forms (for example, a VA Form 21–4138, Statement in Support of Claim), that might provide only minimal information and require inefficient follow up inquiries from VA. Such a procedure would be inconsistent with VA's efforts to improve the efficiency of claim adjudications. For this reason, VA does not support S. 3370.

We estimate that there would be no cost associated with S. 3370.

* * * * * * *

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ERIC K. SHINSEKI.

THE SECRETARY OF VETERANS AFFAIRS,
Washington, DC, October 1, 2010.

Hon. DANIEL K. AKAKA,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am pleased to provide the Committee with the views of the Department of Veterans Affairs (VA) on five of the amendments agreed to at the Committee's August 5, 2010, markup.

AUTOMATIC ANNUAL INCREASE IN RATES OF DISABILITY COMPENSATION AND DEPENDENCY AND INDEMNITY COMPENSATION.

This amendment would provide for an automatic cost-of-living increase in the rates of disability compensation for Veterans with service-connected disabilities, and of dependency and indemnity compensation (DIC) for the survivors of Veterans whose deaths are service related, whenever there is such an increase in Social Security benefits, and by the same percentage as the percentage by which Social Security benefits are increased. VA benefits would increase on the date Social Security benefits are increased. VA supports enactment of this amendment.

Since 1992, Congress has enacted annual increases in these benefits in the same percentages as Social Security benefit increases. Making the cost-of-living adjustments (COLAs) automatic would simplify the annual rate adjustments for compensation and DIC in the same manner that the process for pension was simplified by indexing pension increases to Social Security COLAs. VA believes the annual increases are necessary and appropriate to provide continuous protection of the affected benefits from the effects of inflation. The beneficiaries deserve no less.

Because future COLA estimates are already included in the baseline President's budget, this legislation would not result in additional costs.

AUTHORITY FOR RETROACTIVE EFFECTIVE DATE FOR AWARDS OF DISABILITY COMPENSATION IN CONNECTION WITH APPLICATIONS THAT ARE FULLY-DEVELOPED AT SUBMITTAL.

This amendment would amend 38 United States Code (U.S.C.) § 5110(b) to provide an effective date for an award of disability compensation to a Veteran who submits an application that sets forth a claim that is "fully-developed" as of the date of submittal of the application. The effective date of such an award would be fixed in accordance with the facts found, but could not be earlier than the date one year earlier than the date VA received the application. VA does not support enactment of this amendment.

The availability of a retroactive effective date for an award of disability compensation granted on a claim fully developed when submitted would create an incentive for Veterans to file fully developed claims. Submission of more fully developed claims would free up resources at VA regional offices to address the claim backlog. However, VA does not support this amendment because it would penalize Veterans who, through no fault of their own, are not able

to submit all the evidence necessary to decide the claim with the initial application. This would lead to the inequitable result of Veterans with similar disability claims receiving different compensation amounts based on the extent of medical treatment they may have received in the year prior to submission of their claims and the types of information readily available to them. Further, it would provide Veterans whose claims involve relatively simple fact issues with a greater benefit than Veterans whose claims are factually complex but no less meritorious.

We note that certain claimants already receive retroactive benefits. Under 38 U.S.C. § 5110(b)(1), if a Veteran files a claim for disability compensation within one year of discharge from military service, the effective date of an award will be the day following the date of the Veteran's discharge. Under 38 U.S.C. § 5110(b)(2), if a Veteran files a claim for increased compensation within one year of the date the disability increased, the effective date of an award may be retroactive to the date of such increase. Entitlement to those retroactive payments is based on the prompt filing of a claim, which is generally within the claimant's control. Because retroactive payments under this amendment may rest upon matters beyond a claimant's control, it would create an inequity not found in existing law. The creation of another category of claimants, specifically those who submit a fully developed claim, who are eligible for retroactive benefits also would add more complexity to the adjudication process and significantly increase benefit entitlement costs.

We cannot estimate costs without knowing how many fully-developed claims would be submitted and the disability ratings awarded to these Veterans.

PROCESSING OF APPLICATIONS FOR RELIEF FROM ADJUDICATION OF MENTAL INCOMPETENCE FOR CERTAIN PURPOSES.

Under current law, VA has one year to process applications for relief from restrictions on buying firearms imposed because a person has been adjudicated as a mental defective or committed to a mental institution. If VA fails to resolve a claim for relief within 365 days, the claim is deemed denied for purposes of judicial review of agency action. This amendment would create a statutory provision specific to VA that would require that such applications for relief be processed not later than 180 days after receipt, and if VA fails to "resolve such application" within 180 days, for any reason, the application for relief would be deemed granted.

VA agrees that relief applications should be processed in a timely manner. However, VA has great difficulty in adjudicating cases of this type, which involve issues of public safety that fall outside VA's mission. VA is concerned that this provision could raise serious issues of public safety and potential liability if a person whose restrictions are relieved on this basis obtains firearms and causes death or injury. The Committee should also consider the Department of Justice's views regarding the legal and policy implications of this provision.

REQUIREMENT THAT BID SAVINGS ON MAJOR MEDICAL FACILITY PROJECTS OF DEPARTMENT OF VETERANS AFFAIRS BE USED FOR OTHER MAJOR MEDICAL FACILITY CONSTRUCTION PROJECTS OF THE DEPARTMENT.

This amendment would modify 38 U.S.C. § 8104(d) to state that, "[i]n any fiscal year, unobligated amounts in the Construction, Major Projects account that are a direct result of bid savings from a major medical facility project may only be obligated for other major medical facility projects authorized for that fiscal year or a previous fiscal year." VA does not support enactment of this amendment.

VA is concerned that this amendment would limit a Secretary's flexibility to apply construction dollars where he or she deems them most needed. Specifically, the amendment would restrict VA's ability to respond to emergent situations as they arise. VA currently is allowed to use major construction bid savings for any VA major construction project, consistent with authorization and programming limitations contained in chapter 81 of title 38, U.S.C. The amendment would also add new fiscal year restrictions because bid savings could only be used for projects authorized in the current fiscal year or in a prior fiscal year. This would hamper the Secretary's ability to use unobligated balances that are authorized in future fiscal years to respond to new project needs in as timely a manner as possible to optimize the infrastructure serving our Nation's Veterans.

Congress already maintains close oversight and control over major construction projects. VA projects may not move forward without budgetary review and congressional authorization, and the Department now consults with Congressional committees regarding any substantial movement of funds. This amendment would severely impede VA's ability to maintain flexibility in major construction projects.

ACTION PLAN TO IMPROVE CORRELATION BETWEEN EMPLOYEE PAY AND PERFORMANCE.

This amendment would require VA, in consultation with the Director of the Office of Personnel Management, to submit to Congress an action plan for improving the correlation between pay, advancement, and rewards of VA employees with their job performance. This amendment is specifically focused on VA employees who process and adjudicate claims for compensation under chapters 11 and 13 of title 38, U.S.C. (i.e., employees who work within VA at the Veterans Benefits Administration (VBA)), but would apply to all VA employees. While VA appreciates the intent of this amendment, VA does not support enactment.

VBA already has in place elaborate metrics for tracking the adjudication of cases on which employee performance evaluations are based. The performance management system that is already in place for VBA, and for that matter, VA, provides the necessary correlation between job performance and employee pay, advancement and compensation as required by chapter 43 of title 5, U.S.C. This performance management system includes performance standards that are aligned with VBA and VA's corporate performance objec-

tives and goals, and VA reviews and updates this system, as needed. Additionally, chapter 45 of title 5, U.S.C., provides VA authority to give awards to employees—another mechanism to connect pay and performance. Also, for General Schedule employees, VA can provide Quality Step Increases to employees with the highest performance rating.

This system, in conjunction with the existing professional development opportunities that VA offers its employees, effectively and appropriately aligns our employees' professional contributions and accomplishments with their compensation levels and rewards. Further, VA's senior executive performance management system is certified by the Office of Personnel Management and the Office of Management and Budget. Certification requirements include alignment of performance standards with VA's strategic goals and objectives. While this amendment is expressly applicable to VBA employees, it would apply to all VA employees. This approach is overly broad if Congress' goal is to improve the efficiency of VA's claims processing.

Given VBA already has a system in place for tracking the adjudication of cases on which employee performance evaluations are based, VA will be willing to work with Congress to provide a briefing regarding the system currently in existence, rather than create a new action plan as required by this legislation.

While the anticipated cost of preparing the action plan described in this proposed legislation would likely be nominal, the commitment of personnel resources and time would be significant.

Thank you for the opportunity to provide the Department's views on these amendments. I look forward to continuing to work together with you on our shared goals of improving benefits and services to our Nation's Veterans. Thank you for your ongoing support of our mission.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ERIC K. SHINSEKI.

UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Chambers of
Chief Judge William P. Greene, Jr.

625 Indiana Avenue, N.W., Suite 900
Washington, D.C. 20004
202-501-5890

July 28, 2010

The Honorable Daniel K. Akaka
Chairman
U.S. Senate Committee on Veterans' Affairs
412 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Thank you for the opportunity to formally provide views on S. 3517, the Claims Processing Improvement Act of 2010.

Section 211, entitled "Decision by the Court of Appeals for Veterans Claims on All Issues Raised by Appellants," would amend 38 U.S.C. § 7261 by, among other things, inserting a provision that states: "In carrying out a review of a decision of the Board of Veterans' Appeals, the Court shall render a decision on every issue raised by an appellant within the extent set forth in this section." The Court has commented on similar provisions and stands by our earlier statements that such a legislative change is unnecessary and would result in unintended negative consequences.

As I have testified in the past that, in conducting appellate review the Court recognizes and follows the well-established legal concepts of employing judicial restraint and conserving judicial resources in determining whether to address a particular argument when rendering a decision. The judges of the Court are statutorily directed to decide all relevant questions of law necessary to our decisions, and we are aware of the parties' interest in resolving the maximum number of issues on appeal. Many times we have informed the attorneys and non-attorney practitioners who practice before the Court that we recognize the need to balance the interests of preserving issues for further development and adjudication, and conserving judicial resources, with preventing remands of matters to the Board of Veterans' Appeals with issues not addressed by the Court that could remain unresolved and in contention, ultimately resulting in the decision on a claim again being appealed to the Court. The practice of our judges for the past several years has been to address all arguments where a final decision on a particular issue is ripe for decision, would resolve the matter, and would ensure that an error is not repeated. Last year the Court noted in *Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009), that although it is "well settled that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion," the Court recognizes the need, at times, to address additional

arguments and allegations of error "that must be corrected so as to ensure a proper decision on remand."

We strive to apply these principles when conducting our review but also remain attuned to the practice of not reaching constitutional arguments unnecessarily. Also, in our unique practice area where many appellants do not have legal representation, we often are presented with numerous unrefined or poorly articulated arguments in a single appeal. Although we "consider" all arguments when deciding a case, we do not always provide a written decision on each and every argument raised. To be required to render a decision on every such issue raised would be a significant drain on judicial resources, and at times, nearly impossible. If an appellant believes that the Court has missed an important or relevant argument, there is recourse. Currently, the Court's Rules of Practice and Procedure provides that a party may move for reconsideration of a decision if he or she feels that the Court has failed to address an allegation of error. We have repeatedly invited our practitioners to bring to the Court's attention the basis for any belief that there are routine failures in addressing relevant issues and arguments, but have not been provided examples of instances where we have failed.

As to the law of unintended consequences, there may be times where a veteran is better served by on appeal, having his or her case returned to the Board because of error but without addressing a particular issue. That way, the issue may be further explored below. Moreover, other courts regularly decline to address the remaining allegations of error if the court orders a remand and new trial based on any one allegation of error. The courts do this routinely, even if the allegation of error is theoretically capable of repetition at the new trial that the appellant will receive, such as a jury instruction or evidentiary ruling. *See, e.g., United States v. Shipsey,* 190 F.3d 1081, 1088-89 (9th Cir.1999) (because the court held that the district court erred by constructively amending the theft counts in the indictment, requiring reversal and a remand for a new trial, the court need not reach the appellant's remaining challenges); *Umpleby v. Potter & Brumfield, Inc.,* 69 F.3d 209, 215 (7th Cir.1995) ("While there were many procedural problems that occurred below, including the arguably erroneous admission of much evidence, we need not reach these issues in light of our decision to remand for a new trial"); *United States v. Young,* 17 F.3d 1201, 1205 n. 9 (9th Cir.1994) ("Because we find that [the appellant] is entitled to a new trial, we need not reach his claim that the district court abused its discretion in refusing to hear his motion to suppress the evidence found in his truck. . . . [The appellant] may renew his claim on remand."); *Dakota Industries, Inc. v. Ever Best Ltd.,* 28 F.3d 910, 914 (8th Cir.1994) ("In light of our reversal and order of a new trial, we need not consider [the appellant's] arguments of other jury instruction and trial errors."). Should the Court make a determination on such an issue before remanding the matter, the veteran would be foreclosed from raising it below. Also, what would the remedy be when a party believes an issue raised was not decided? More litigation by appealing to the Federal Circuit? Would the Federal Circuit have jurisdiction over such an issue, or would their jurisdictional statute have to be amended? Can the Court fairly address all issues if the Board's decision on a particular issue or argument is not supported by a statement of reasons or bases that is adequate for judicial review? If the Board failed to address the credibility of certain evidence upon which the need of a medical examination might be dependent, does it make sense to render a judicial decision, binding on the parties, as to the need for a medical exam? Would attorneys preparing appeals for the Court feel compelled to raise every conceivable issue, including constitutional issues, in each case because they know that the Court

would be compelled to answer each? Would this result in the Court issuing advisory opinions on matters not yet ripe for decision?

In my estimate, the cost of section 211 would result from what could be a significant drain on judicial resources. The Court currently has seven full-time judges and that number will decrease by one shortly, as I have notified the President that I will be retiring in December of this year. Although we currently have authority to expand the Court to nine judges, I am not aware of any pending nominations for those vacancies. Requiring the Court to address every issue raised by an appellant is sure to add time to the drafting and review of decisions. This could potentially result in the need for additional judgeships. Another "cost" that will result from section 211 is the additional delay for all veterans awaiting decisions on their appeals. In sum, since we believe we are deciding the issues in a case that need to be – and that can be – decided, we do not believe the proposed amendment is warranted, and likely could result in additional litigation and further delay in reaching finality in the case.

Section 212 is entitled: "Good Cause Extension of Period for Filing Notice of Appeal with United States Court of Appeals for Veterans Claims." This provision would modify 38 U.S.C § 7266 to permit the Court to extend the initial period for the filing of a notice of appeal beyond 120 days for an additional 120 days upon a showing of good cause for such extension. In testimony I submitted to this Committee on May 19, 2010, I provided the Court's position on S. 3192 – a similar legislative provision. Many of the views I urged the Committee to consider then are equally relevant when reviewing S. 3517 section 212. I will briefly summarize those views here, but also invite your attention to my May 19, 2010, testimony.

When the Court was created 20 years ago, Congress considered the unique nature of the special class of appellants who would come before it and strived to make the Court accessible and navigable to all who sought judicial review of Board of Veterans' Appeals decisions. The 120-day time limit set for filing an appeal was double the norm in other federal appellate courts, and that period was broadened over the years by adoption of the postmark rule and equitable tolling. When asked for the Court's position on the postmark rule, then Chief Judge Nebeker identified to Congress what he thought were the advantages of a bright-line deadline for filing appeals and possible justifications for not adopting the postmark rule. Judge Nebeker invited Congress to consider the judicial resources that would need to be spent in determining the legibility of a postmark; the need to develop a body of case law on postmark-related issues; the relatively few number of prospective appellants who would be impacted; the desirability of finality in the appellate system; and the user-friendly nature of a bright-line standard for veterans.

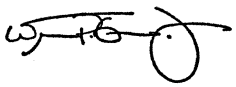
As we know, Congress considered these factors and ultimately decided to enact the postmark rule. Many of the factors identified by Chief Judge Nebeker did indeed result. A robust body of law relating to postmarks developed. Certainly some delay was added to the overall system; but likewise, appeals were heard by the Court that would otherwise have been dismissed. Similarly, with equitable tolling, our case law explored the bounds of "extraordinary circumstances" and a body of law on that topic developed following *Bailey v. West* in 1998. If Congress enacts section 212, the Court will soon embark on developing a body of law surrounding the concept of "good cause." Will such change allow some appellants to have their appeals considered on the merits when they

otherwise would be dismissed as untimely? Yes. Will it result in benefits for those appellants? Who knows? Will it delay the time in which all veterans wait to have their appeals heard? Probably somewhat. These considerations must be weighed by Congress and no matter the outcome, the Court will certainly strive to decide all appeals as fairly and efficiently as possible.

I do suggest that if it is Congress' intent that the filing period for a notice of appeal constitutes a jurisdictional time limit, that the wording of any legislation include strong and specific language stating so. I also note that section 212 does not define "good cause" and that the parameters of this standard in the context of filing a notice of appeal will need to be established. Our equitable tolling case law employed a different and arguably higher standard of "extraordinary circumstances," and the distinction between these two standards will no doubt be explored. I suggest that Congress consider providing further guidance on what it intends "good cause" to contemplate.

The costs associated with section 212 would result from the increased caseload of appeals that formerly would have been dismissed as untimely. In fiscal year 2009, the Court received 4,600 notices of appeal, and according to the Clerk of Court, 366 were dismissed as untimely. In FY 2009 the Court averaged 223 appeals decided on the merits per judge, making the Court one of the busiest federal appellate courts. The addition of the 366 cases at the merit stage would create work for an additional judge. Although the enactment of section 212 would add to the workload of the Court, and could potentially result in the need for additional personnel, I do not believe that the increase in cases due to this provision would be significant. More importantly, the creation of a "good cause" standard would add immensely to the complexity of dealing with every case that was filed after 120 days. That workload would be substantial because it would entail additional orders for affidavits and briefing on the issue and oral arguments and panel decisions to establish the meaning and parameters of a "good cause" standard.

Sincerely,



William P. Greene, Jr.
Chief Judge

Enclosures

cc: The Honorable Richard Burr
Ranking Member

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

John Gage
National President

J. David Cox, Sr.
National Secretary-Treasurer

Augusta Y. Thomas
National Vice President for
Women and Fair Practices

August 12, 2010

The Honorable Daniel K. Akaka, Chairman
Senate Committee on Veterans' Affairs
Washington, DC 20510

RE: Request for AFGE Views on Amendment to S. 3517

Dear Chairman Akaka:

Thank you for the opportunity to present AFGE's views on Ranking Member Burr's amendment to S. 3517 that would require VA to create a plan designed to improve the correlation between the pay and performance of employees of the Veterans Benefits Administration (VBA).

AFGE's grave concern with this amendment is that it could adversely impact VBA employees in a comparable manner to the failed National Security Personnel System (NSPS). The legislative language in the defense authorization bill that authorized NSPS is similar to the language in Senator Burr's amendment. As you know, the NSPS legislation led to the creation of a disciplinary process and labor relations system that operated outside of Title 5, which were so unfair to employees that they were repealed in 2008. DoD was also permitted to create a pay system that operated outside of Title 5, which was completely repealed last year through your leadership because of its blatant discriminatory bias against people of color, and its tendency to vastly reward employees earning more than $100,000 per year at the expense of employees earning less than $60,000.

Furthermore, no legislative action is needed to ensure that VBA employees processing veterans' claims are rewarded for quality work. The General Schedule already provides ample opportunity for employees to be rewarded for superior performance, and it also establishes a fair system for demoting or terminating an employee who does not perform according to the standards. Performance bonuses are provided for in the system, and AFGE strongly supports their use. Unfortunately, a lack of resources often prevents agencies from utilizing the Title 5 bonus system as much as it should be.

AFGE is also strongly opposed to Senator Burr's amendment because it could divert precious taxpayer dollars away from veterans' direct needs. The "pay-for-performance" system under NSPS was an absolute catastrophe for human resources in the Department of Defense. It wasted millions of dollars on the development and implementation of a pay system which was so complex and so unfair that it could not stand the light of day once the payouts to employees began to be evaluated.

I also note that the minority did not seek AFGE's view prior to introducing this amendment.

For the above reasons, AFGE is strongly opposed to this amendment and urges you not to include it in any legislation reported out of the Committee. President Gage will be requesting a meeting with you to discuss this further. Thank you for your consideration.

Sincerely yours,

Beth Moten

Beth Moten
Legislative and Political Director

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)
1425 K Street, NW, Suite 350
Washington, DC 20005
202-587-5708
www.vetadvocates.com

August 25, 2010

The Honorable Daniel K. Akaka, Chairman
Senate Committee on Veterans' Affairs
Room 412 Russell Building
United States Senate
Washington, DC 20510-6375

Dear Senator Akaka:

The National Organization of Veterans' Advocates, Inc. supports the proposal by Ranking Member Burr, to amend S. 3517 to require the Secretary of Veterans Affairs to create an action plan for improving the correlation among the pay, advancement, and rewards of VA employees and their job performance.

NOVA suggests, additionally, that the Secretary be directed to include in his action plan the concept that employees' performance will be measured by how well they complete their designated tasks. Evaluating performance based on a piecemeal and/or quantity of work produced has been proven counterproductive. Reviewing the **quality** of the decisions being made regarding veterans' claims is the best, most sound way to improve the VA claims process overall. By assessing job performance once a veteran's claim has been ultimately granted or denied, a quality control team will be able to determine from the final outcome of the appeal whether each of the intermediate tasks were completed properly. Of course, waiting until the conclusion of the appeal will create a delay in evaluation of job performance by a few months to several years.

Another advantage of evaluating the final outcomes of VA claims is that it would replace the unreliable STAR system by an outcome determinative system. The best way to reliably measure task accuracy is to create a quality control team to "reverse engineer" the claim using the final result and working backward to determine whether the employees who worked on the claim made accurate decisions on each step along the way. Moreover, a "reverse engineer" approach will help each local VA Regional Office identify pattern problems and tailor training accordingly, thereby improving the overall quality of decisions being made. This, in turn, will help to decrease the backlog of claims and appeals currently plaguing the VA claims process.

This action plan will not be successful without the essential component of job-specific training using both case methods and actual completed appeals to show what was done and what should have been done differently.

Finally, all VA employees who work on claims should be required to sign their work product, and should be given substantial increases in salary to reflect the increased expectations of their job and the additional educational requirements. Those who are unable to perform their jobs accurately should be terminated or transferred away from the decision making process. Rather than receiving additional monetary rewards for excellent performance, excellent workers should be promoted as trainers and should be eligible for appointment to the quality control team. Charts of job performance should be maintained by the VBA and should be displayed as an additional incentive to achieve excellence.

Very truly yours,

Richard Paul Cohen
Executive Director.
NOVA

RPC/smp

Cc: Ranking Member Burr

DAV DISABLED AMERICAN VETERANS
Building Better Lives for America's Disabled Veterans

August 26, 2010

The Honorable Daniel K. Akaka, Chairman
Senate Committee on Veterans' Affairs
412 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Akaka:

Thank you for seeking the views of the Disabled American Veterans (DAV) on amendments adopted during the Committee's markup of August 5, 2010.

While we appreciate this opportunity to provide comment on the amendments provided, we are concerned that the Committee did not also provide the text of the underlying bills approved by the Committee during the markup. One bill in particular, S. 3517, contained numerous provisions to reform the benefit claims process, a bill that is of enormous interest to DAV and our membership. Moreover, DAV and our fellow members of *The Independent Budget (IB),* provided detailed testimony on that legislation at the Committee's July 14th hearing, and it is difficult to offer definitive comment on amendments to S. 3517 without first being able to read the full legislative language of the bill and place the amendments into their proper context.

For example, Section 204 of S. 3517, as introduced, created a statutory "fully developed claims" process that would have codified and changed the existing "fully developed claims" (FDC) program the Department of Veterans Affairs (VA) rolled out nationally earlier this year. While we generally support that program, the *IB* had some specific suggestions to ensure that effective dates for claims are properly established under the FDC program. During the August 5th markup, the Committee adopted an amendment to further change how effective dates are established, allowing them to be retroactive if the evidence warrants it. Without being able to read the full bill text – as amended and adopted by the Committee – it is difficult to be certain that there are no other issues raised by the amendment when read in context.

We offer the following comments on the amendments.

1. **Amendment to authorize retroactive payments for certain claims for disability compensation benefits that are fully developed at submission.**

   This amendment would require VA to establish the effective date for claims for disability compensation filed under the FDC program as the earliest date which the evidence supports, up to one year prior to the date the fully developed claim is filed. At present, VA requires veterans to make an informal claim filing in order to protect the effective date for claims that they intend to file under the FDC program.

DAV supports this amendment that could further incentivize veterans who file disability compensation claims to do so under the fully developed claim (FDC) program, thereby saving VA time and resources, as well as providing quicker results for veterans.

2. **Amendment to provide automatic annual cost-of-living adjustment (COLA) increases.**

DAV has no objection to providing an automatic indexing of rates for disability compensation, dependency and indemnity compensation, and other related allowances to the annual Social Security COLA, rather than requiring annual authorizing legislation to provide such increases.

We would note however, that last year and almost certainly again this year, there will be no Social Security COLA increase, and therefore VA disability compensation rates will remain level. However as disabled veterans age, and their conditions become more debilitating, costs increase and the economic circumstances of millions of disabled veterans have become more difficult. Considering that disability compensation rates are based upon average impairment of earnings capacity, we believe that Congress should consider providing disability compensation parity with average wage increases, such as those provided to members of the military and federal employees through the Federal Employees Pay Comparability Act (FEPCA).

3. **Amendment to require VA to develop a plan to improve the correlation between employees' pay and performance.**

This amendment would require that VA create an action plan for improving the correlation between the pay, advancement, and rewards of VA employees and their job performance. The amendment specifically mentions "employees who perform work in relation to processing and adjudication of claims for disability compensation," however the language of the amendment would apply to all VA employees. The amendment would allow VA only 90 days to examine this complex subject and require specific recommendations for changes, including legislative changes. The amendment would not require VA to consult with employees affected by such proposed changes, nor provide for any consultation or input from VSO stakeholders.

DAV does not support this amendment as written for a number of reasons, including the extremely short time-frame, lack of consultation, and overly broad scope of the amendment. DAV agrees with the amendment's sponsor that incentives for VA employees should reward quality of work completed at least as much as the quantity produced, however the language of this amendment does not specifically nor effectively address this issue. We believe that the metrics, performance standards, pay, advancement and rewards for VA management and leadership – not just employees – must reflect the same incentives for quality.

4. **Amendment to require bid savings from major medical construction projects to be used only for other previously authorized major medical construction projects.**

This amendment would require that any savings from major medical construction projects authorized by Congress, and funded through the appropriations process, as a result of reduced costs of construction, be retained within the major medical construction account for other previously authorized major medical construction programs. Given the significant backlog of major medical construction projects, and the overall age and condition of VA health care facilities, DAV supports this amendment to retain savings accrued by VA from bid savings from construction projects to be used only for construction purposes.

5. **Amendment to create a new military pathways demonstration program in the field of law enforcement and security.**

   DAV has no objection to this amendment designed to improve the transition of veterans into private sector positions in the fields of security and law enforcement. We would caution, however, that should Congress authorize this new program, it must also provide additional appropriations for the new program so that funding for other worthy employment and training programs is not reduced to fund this new program.

6. **Amendment to change how VA processes appeals from individuals who have been declared incompetent and then reported to the Department of Justice for inclusion in the National Instant Criminal Background Check System.**

DAV takes no position on the amendment, but would not oppose its enactment.

Mr. Chairman, thank you again for soliciting the views of the Disabled American Veterans. We appreciate the work that you, Senator Burr and the Committee are doing to improve the lives of veterans, especially disabled veterans. If you, Senator Burr or your staffs have any questions regarding DAV's positions on these amendments, or on the underlying legislation, please do not hesitate to contact me. We look forward to working with you and the Committee to advance legislation that helps build better lives for America's disabled veterans, their families and survivors.

Sincerely,

Joseph A. Violante

JOSEPH A. VIOLANTE
National Legislative Director

JAV:acd

Cc: The Honorable Richard Burr, Ranking Member

IRAQ *and* AFGHANISTAN
VETERANS *of* AMERICA

To: **Senate Veterans Affairs Committee**
From: **Tom Tarantino, Sr. Legislative Associate**
Iraq & Afghanistan Veterans of America (IAVA)
Re: **IAVA Comments on Committee Amendments**
Date: **August 26, 2010**

On behalf of IAVA's 190,000 members and supporters, I would like to thank the committee for this opportunity to comment on several amendments adopted by the Senate Veterans Affairs Committee during their August 5th hearing.

Of the 6 amendments adopted, 3 have a direct and significant impact on IAVA's legislative priorities and we would like to thank the committee for addressing these critical issues. Our comments are as follows:

Military Pathways Demonstration Program

Iraq and Afghanistan Veterans of America (IAVA) wholeheartedly endorses the "Law enforcement and Security Military Pathways Demonstration Program" amendment. This amendment gives servicemembers, leaving the armed forces, the chance to build upon their military skills and transition into a career in the law enforcement career field. The unemployment rate among young veterans remains unacceptable high and programs such as this, will ease servicemembers' transition into the civilian world.

Automatic Annual Increase in the Rates of Disability Compensation and DIC.

IAVA fully supports indexing rates of VA disability compensation and Dependency and Indemnity Compensation (DIC) to the increase in Social Security. Unlike many federal benefits that are raised regularly with the cost of living, rates for VA disability and DIC remain at the annual legislative discretion of Congress. This has lead to an unnecessary reoccurring legislative process that is frequently subject to political infighting and a crowded legislative calendar. While members of the Committee have ensured that these benefits move forward every year, compensation for our disabled veterans and survivors should be automatic and outside the reach of politics.

Retroactive Effective Date for Disability Compensation for Fully Developed Claims

IAVA supports identifying and protecting the effective date for VA Disability compensation when a veteran wishes to submit a fully developed claim. Under the VA's new Fully Developed Claim program, a veteran may waive the VA's duty to assist if they submit a claim that is fully developed, thus removing the VA's lengthy development procedures from the processing of their claim. While IAVA supports this program, we have raised concerns that the effective date for compensation should not suffer if a veteran chooses to develop their own claim. This amendment allows veterans to file for an effective date prior to submitting their developed claim and ensures that veterans are not punished for taking advantage of this program.

* * * * * * *

CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, changes in existing law made by the Committee bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Title 38. Veterans' Benefits

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Part II. General Benefits

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Chapter 11. Compensation for Service-Connected Disability or Death

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Subchapter VI. General Compensation Provisions

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SEC. 1157. COMBINATION OF CERTAIN RATINGS

(a) IN GENERAL.—The Secretary [The Secretary] shall provide for the combination of ratings and pay compensation at the rates prescribed in subchapter II of this chapter to those veterans who served during a period of war and during any other time, who have suffered disability in line of duty in each period of service.

(b) INTERMEDIATE ASSIGNMENT OF RATINGS.—(1) In the case of a veteran who submits to the Secretary a claim for compensation under this chapter for more than one condition and the Secretary determines that a disability rating can be assigned without further development for one or more conditions but not all conditions in the claim, the Secretary shall—

(A) expeditiously assign a disability rating for the condition or conditions that the Secretary determined could be assigned without further development; and

(B) continue development of the remaining conditions.

(2) If the Secretary is able to assign a disability rating for a condition described in paragraph (1)(B) with respect to a claim, the Secretary shall assign such rating and combine such rating with the rating or ratings previously assigned under paragraph (1)(A) with respect to that claim.

(3) If the Secretary determines, after assigning a rating for a condition under paragraph (1)(A), that further development of the con-

dition could result in assignment of a higher rating, the Secretary shall continue development of such condition and reassess the rating.

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Chapter 15. Pension for Non-Service-Connected Disability or Death or for Service

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Subchapter II. Veterans' Pensions

* * * * * * *

NON-SERVICE-CONNECTED DISABILITY PENSION

SEC. 1521. VETERANS OF A PERIOD OF WAR

* * * * * * *

(f)(1) * * *

(2) If either such veteran is in need of regular aid and attendance, the annual rate provided by paragraph (1) of this subsection shall be $23,396. If both such veterans are in need of regular aid and attendance, such rate shall be **[**$30,480**]** *$31,305*.

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Part IV. General Administrative Provisions

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Chapter 51. Claims, Effective Dates, and Payments

Sec.

SUBCHAPTER I. CLAIMS

5100. Definition of "claimant".

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5103A. Duty to assist claimants.

5103B. Treatment of private medical opinions.

5103C. Expedited review of claims for disability compensation.

5103D. Procedures for fully developed claims.

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Subchapter I. Claims

* * * * * * *

SEC. 5101. CLAIMS AND FORMS

(a)*(1) A specific* **[**A specific**]** claim in the form prescribed by the Secretary (or jointly with the Commissioner of Social Security, as prescribed by section 5105 of this title must be filed in order for benefits to be paid or furnished to any individual under the laws administered by the Secretary.

(2) If an individual has not attained the age of 18 years, is mentally incompetent, or is physically unable to sign a form, a form

filed under paragraph (1) for the individual may be signed by a court appointed representative or a person who is responsible for the care of the individual, including a spouse or other relative. If the individual is in the care of an institution, the manager or principal officer of the institution may sign the form.

(b) * * *

(c)(1) Any person who applies for*, signs a form on behalf of a person to apply for,* or is in receipt of any compensation or pension benefit under laws administered by the Secretary shall, if requested by the Secretary, furnish the Secretary with the social security number of such person*, or TIN in the case that the person is not an individual,* and the social security number of any dependent or beneficiary on whose behalf, or based upon whom, such person applies for or is in receipt of such benefit. A person is not required to furnish the Secretary with a social security number for any person to whom a social security number has not been assigned.

(2) The Secretary shall deny the application of or terminate the payment of compensation or pension to a person who fails to furnish the Secretary with a social security number *or TIN* required to be furnished pursuant to paragraph (1) of this subsection. The Secretary may thereafter reconsider the application or reinstate payment of compensation or pension, as the case may be, if such person furnishes the Secretary with such social security number *or TIN*.

(3) * * *

(d) In this section:

(1) The term "mentally incompetent" with respect to an individual means that the individual lacks the mental capacity—

(A) to provide substantially accurate information needed to complete a form; or

(B) to certify that the statements made on a form are true and complete.

(2) The term "TIN" has the meaning given the term in section 7701(a)(41) of the Internal Revenue Code of 1986.

* * * * * * *

SEC. 5103. NOTICE TO CLAIMANTS OF REQUIRED INFORMATION AND EVIDENCE

(a) REQUIRED INFORMATION AND EVIDENCE.—

(1) [Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.] *If the Secretary receives a complete or substantially complete application that does not include information or medical or lay evidence not previously provided to the Secretary that is necessary to substantiate the claim, the Secretary shall, upon receipt of such application, notify the claimant and the claimant's representative, if any, that such information or evidence is necessary to substantiate and grant the claim.* As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which por-

tion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

(2) * * *

(3) A notice provided under this subsection shall inform a claimant, as the Secretary considers appropriate with respect to the claimant's claim—

(A) of the rights of the claimant to assistance under section 5103A of this title; and

(B) if the claimant submits a private medical opinion in support of a claim for disability compensation, how such medical opinion will be treated under section 5103B of this title.

* * * * * * *

SEC. 5103B. TREATMENT OF PRIVATE MEDICAL OPINIONS

(a) IN GENERAL.—If a claimant submits a private medical opinion in support of a claim for disability compensation in accordance with standards established by the Secretary, such opinion shall be treated by the Secretary with the same deference as a medical opinion provided by a Department health care provider.

(b) SUPPLEMENTAL INFORMATION.—(1) If a private medical opinion submitted as described in subsection (a) is found by the Secretary to be competent, credible, and probative, but otherwise not entirely adequate for purposes of assigning a disability rating or determining service-connection and the Secretary determines a medical opinion from a Department health care provider is necessary for such purposes, the Secretary shall obtain from an appropriate Department health care provider (as determined pursuant to the standards described in subsection (a)) a medical opinion that is adequate for such purposes.

(2) If a private medical opinion submitted as described in subsection (a) addresses a matter relevant to the claim described in such subsection and such matter is within an area of expertise of the provider of such opinion, any opinion obtained by the Secretary under paragraph (1) of this subsection that addresses the same matter shall, to the extent feasible, be obtained from a health care provider of the Department that has expertise in that area.

(c) DEPARTMENT HEALTH CARE PROVIDER DEFINED.—In this section, the term "Department health care provider" includes a provider of health care who provides health care under contract with the Department.

SEC. 5103C. EXPEDITED REVIEW OF CLAIMS FOR DISABILITY COMPENSATION

(a) PROCESS REQUIRED.—The Secretary shall establish a process for the rapid identification of initial claims for disability compensation that should, in the adjudication of such claims, receive priority in the order of review.

(b) REVIEW OF INITIAL CLAIMS.—As part of the process required by subsection (a), the Secretary shall assign employees of the Department who are experienced in the processing of claims for disability compensation to carry out a preliminary review of all initial claims for disability compensation submitted to the Secretary in order to identify whether—

(1) the claims have the potential of being adjudicated quickly;

(2) the claims qualify for priority treatment under paragraph (2) of subsection (c); and

(3) a temporary disability rating could be assigned with respect to the claims under section 1156 of this title.

(c) PRIORITY IN ADJUDICATION OF CLAIMS.—(1) Except as provided in paragraph (2), the Secretary shall, in the adjudication of claims for disability compensation submitted to the Secretary, give priority in the order of review of such claims to claims identified under subsection (b)(1) as having the potential of being adjudicated quickly.

(2) The Secretary may, under regulations the Secretary shall prescribe, provide priority in the order of review of claims for disability compensation.

SEC. 5103D. PROCEDURES FOR FULLY DEVELOPED CLAIMS

Upon notification received from a claimant that the claimant has no additional information or evidence to submit, the Secretary may determine that the claim is a fully developed claim. The Secretary shall then undertake any development necessary for any Federal records, medical examinations, or opinions relevant to the claim and may decide the claim based on all the evidence of record.

SEC. 5104. DECISIONS AND NOTICES OF DECISIONS

(a) In the case of a decision by the Secretary under section 511 of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. **[**The notice shall include an explanation of the procedure for obtaining review of the decision.**]**

(b) In any case where the Secretary denies a benefit sought, the notice required by subsection (a) shall **[**also include (1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary.**]** *include the following:*

(1) A statement of the reasons for the decision.

(2) A summary of the evidence relied upon by the Secretary in making the decision.

(3) An explanation of the procedure for obtaining review of the decision, including the period prescribed under paragraph (1) of section 7105(b) of this title and the good cause exception under paragraph (3) of such section.

(4) A form that, once completed, can serve as a notice of disagreement under section 7105(a) of this title.

SEC. 5105. JOINT APPLICATIONS FOR SOCIAL SECURITY AND DEPENDENCY AND INDEMNITY COMPENSATION

(a) The Secretary and the Commissioner of Social Security **[**shall**]** *may* jointly prescribe forms for use by survivors of members and former members of the uniformed services in filing application for benefits under chapter 13 of this title and title II of the Social Security Act (42 U.S.C. 401 et seq.). **[**Each such form**]** *Such forms* **[**shall**]** *may* request information sufficient to constitute an application for benefits under both chapter 13 of this title and title II of the Social Security Act (42 U.S.C. 401 et seq.).

(b) When an application **[**on such a form**]** *on any form indicating an intent to apply for survivor benefits* is filed with either the Sec-

retary or the Commissioner of Social Security, it shall be deemed to be an application for benefits under both chapter 13 of this title and title II of the Social Security Act (42 U.S.C. 401 et seq.). A copy of each such application filed with either the Secretary or the Commissioner, together with any additional information and supporting documents (or certifications thereof) which may have been received by the Secretary or the Commissioner with such application, and which may be needed by the other official in connection therewith, shall be transmitted by the Secretary or the Commissioner receiving the application to the other official. The preceding sentence shall not prevent the Secretary and the Commissioner of Social Security from requesting the applicant, or any other individual, to furnish such additional information as may be necessary for purposes of chapter 13 of this title and title II of the Social Security Act (42 U.S.C. 401 et seq.) respectively.

* * * * * * *

Subchapter II. Effective Dates

SEC. 5110. EFFECTIVE DATES OF AWARDS

(a) * * *

(b)(1) * * *

(2) The effective date of an award of disability compensation to a veteran who submits an application therefor that sets forth a claim that is fully-developed (as prescribed by the Secretary for purposes of this paragraph) as of the date of submittal shall be fixed in accordance with the facts found, but shall not be earlier than the date that is one year before the date of receipt of the application.

(3) ❙(2)❙ The effective date of an award of increased compensation shall be the earliest date as of which it is ascertainable that an increase in disability had occurred, if application is received within one year from such date.

(4) ❙(3)❙(A) The effective date of an award of disability pension to a veteran described in subparagraph (B) of this paragraph shall be the date of application or the date on which the veteran became permanently and totally disabled, if the veteran applies for a retroactive award within one year from such date, whichever is to the advantage of the veteran.

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Chapter 53. Special Provisions Relating to Benefits

* * * * * * *

SEC. 5312. ANNUAL ADJUSTMENT OF CERTAIN BENEFIT RATES

* * * * * * *

(d)(1) Whenever there is an increase in benefit amounts payable under title II of the Social Security Act (42 U.S.C. 401 et seq.) as a result of a determination made under section 215(i) of such Act (42 U.S.C. 415(i)), the Secretary shall, effective on the date of such increase in benefit amounts, increase the dollar amounts in effect for the payment of disability compensation and dependency and indemnity compensation by the Secretary, as specified in paragraph (2), as such amounts were in effect immediately before the date of such

increase in benefit amounts payable under title II of the Social Security Act, by the same percentage as the percentage by which such benefit amounts are increased.

(2) The dollar amounts to be increased pursuant to paragraph (1) are the following:

(A) COMPENSATION.—Each of the dollar amounts in effect under section 1114 of this title.

(B) ADDITIONAL COMPENSATION FOR DEPENDENTS.—Each of the dollar amounts in effect under section 1115(1) of this title.

(C) CLOTHING ALLOWANCE.—The dollar amount in effect under section 1162 of this title.

(D) NEW DIC RATES.—Each of the dollar amounts in effect under paragraphs (1) and (2) of section 1311(a) of this title.

(E) OLD DIC RATES.—Each of the dollar amounts in effect under section 1311(a)(3) of this title.

(F) ADDITIONAL DIC FOR SURVIVING SPOUSES WITH MINOR CHILDREN.—The dollar amount in effect under section 1311(b) of this title.

(G) ADDITIONAL DIC FOR DISABILITY.—Each of the dollar amounts in effect under sections 1311(c) and 1311(d) of this title.

(H) DIC FOR DEPENDENT CHILDREN.—Each of the dollar amounts in effect under sections 1313(a) and 1314 of this title.

(3) Whenever there is an increase under paragraph (1) in amounts in effect for the payment of disability compensation and dependency and indemnity compensation, the Secretary shall publish such amounts, as increased pursuant to such paragraph, in the Federal Register at the same time as the material required by section 215(i)(2)(D) of the Social Security Act (42 U.S.C. 415(i)(2)(D)) is published by reason of a determination under section 215(i) of such Act (42 U.S.C. 415(i)).

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Chapter 55. Minors, Incompetents, and Other Wards

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SEC. 5502. PAYMENTS TO AND SUPERVISION OF FIDUCIARIES

* * * * * * *

(f)(1) The Secretary may require any person appointed or recognized as a fiduciary for a Department beneficiary under this section to provide authorization for the Secretary to obtain (subject to the cost reimbursement requirements of section 1115(a) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3415)) from any financial institution any financial record held by the institution with respect to the fiduciary or the beneficiary whenever the Secretary determines that the financial record is necessary—

(A) for the administration of a program administered by the Secretary; or

(B) in order to safeguard the beneficiary's benefits against neglect, misappropriation, misuse, embezzlement, or fraud.

(2) Notwithstanding section 1104(a)(1) of such Act (12 U.S.C. 3404(a)(1)), an authorization provided by a fiduciary under para-

graph (1) with respect to a beneficiary shall remain effective until the earliest of—

(A) the approval by a court or the Secretary of a final accounting of payment of benefits under any law administered by the Secretary to a fiduciary on behalf of such beneficiary;

(B) in the absence of any evidence of neglect, misappropriation, misuse, embezzlement, or fraud, the express revocation by the fiduciary of the authorization in a written notification to the Secretary; or

(C) the date that is three years after the date of the authorization.

(3)(A) An authorization obtained by the Secretary pursuant to this subsection shall be considered to meet the requirements of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.) for purposes of section 1103(a) of such Act (12 U.S.C. 3403(a)), and need not be furnished to the financial institution, notwithstanding section 1104(a) of such Act (12 U.S.C. 3404(a)), if the Secretary provides a copy of the authorization to the financial institution.

(B) The certification requirements of section 1103(b) of such Act (12 U.S.C. 3403(b)) shall not apply to requests by the Secretary pursuant to an authorization provided under this subsection.

(C) A request for a financial record by the Secretary pursuant to an authorization provided by a fiduciary under this subsection is deemed to meet the requirements of section 1104(a)(3) of such Act (12 U.S.C. 3404(a)(3)) and the matter in section 1102 of such Act (12 U.S.C. 3402) that precedes paragraph (1) of such section if such request identifies the fiduciary and the beneficiary concerned.

(D) The Secretary shall inform any person who provides authorization under this subsection of the duration and scope of the authorization.

(E) If a fiduciary of a Department beneficiary refuses to provide, or revokes, any authorization to permit the Secretary to obtain from any financial institution any financial record concerning benefits paid by the Secretary for such beneficiary, the Secretary may, on that basis, revoke the appointment or the recognition of the fiduciary for such beneficiary and for any other Department beneficiary for whom such fiduciary has been appointed or recognized. If the appointment or recognition of a fiduciary is revoked, benefits may be paid as provided in subsection (d).

(4) For purposes of section 1113(d) of such Act (12 U.S.C. 3413(d)), a disclosure pursuant to this subsection shall be considered a disclosure pursuant to a Federal statute.

(5) In this subsection:

(A) The term "fiduciary" includes any person appointed or recognized to receive payment of benefits under any law administered by the Secretary on behalf of a Department beneficiary.

(B) The term "financial institution" has the meaning given such term in section 1101 of such Act (12 U.S.C. 3401), except that such term shall also include any benefit association, insurance company, safe deposit company, money market mutual fund, or similar entity authorized to do business in any State.

(C) The term "financial record" has the meaning given such term in such section.

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Part V. Boards, Administrations, and Services

Chapter 71. Board of Veterans' Appeals

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SEC. 7103. RECONSIDERATION; CORRECTION OF OBVIOUS ERRORS

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(c)(1) Except as provided in paragraph (2), if a person adversely affected by a final decision of the Board, who has not filed a notice of appeal with the United States Court of Appeals for Veterans Claims under section 7266(a) of this title within the period set forth in that section, files a document with the Board or the agency of original jurisdiction referred to in section 7105(b)(1) of this title that expresses disagreement with such decision not later than 120 days after the date of such decision, such document shall be treated as a motion for reconsideration of such decision under subsection (a).

(2) A document described in paragraph (1) shall not be treated as a motion for reconsideration of the decision under paragraph (1) if—

(A) the Board or the agency of original jurisdiction referred to in paragraph (1)—

(i) receives the document described in paragraph (1);

(ii) determines that such document expresses an intent to appeal the decision to the United States Court of Appeals for Veterans Claims; and

(iii) forwards such document to the United States Court of Appeals for Veterans Claims; and

(B) the United States Court of Appeals for Veterans Claims receives such document within the period set forth by section 7266(a) of this title.

(d) [(c)] The Board on its own motion may correct an obvious error in the record, without regard to whether there has been a motion or order for reconsideration.

* * * * * * *

SEC. 7105. FILING OF NOTICE OF DISAGREEMENT AND APPEAL

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a [statement of the case] *post-notice of disagreement decision* is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Secretary.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within [one year] *180 days* from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked *or transmitted by electronic means* before the expiration of the [one-year] *180-day* period will be accepted as timely filed.

(2) * * *

(3)(A) A notice of disagreement not filed within the time prescribed by paragraph (1) shall be treated by the Secretary as timely filed if—

(i) the Secretary determines that the claimant, legal guardian, or other accredited representative, attorney, or authorized agent filing the notice had good cause for the lack of filing within such time; and

(ii) the notice of disagreement is filed not later than 186 days after the period prescribed by paragraph (1).

(B) For purposes of this paragraph, good cause shall include the following:

(i) Circumstances relating to any physical, mental, educational, or linguistic limitation of the claimant, legal guardian, representative, attorney, or authorized agent concerned (including lack of facility with the English language).

(ii) Circumstances relating to significant delay in the delivery of the initial decision or of the notice of disagreement caused by natural disaster or factors relating to geographic location.

(iii) A change in financial circumstances, including the payment of medical expenses or other changes in income or net worth that are considered in determining eligibility for benefits and services on an annualized basis for purposes of needs-based benefits under chapters 15 and 17 of this title.

(c) * * *

(d)(1)Where the claimant, or the claimant's representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a **[**statement of the case**]** *post-notice of disagreement decision*. A **[**statement of the case**]** *post-notice of disagreement decision* shall include the following:

[(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.

[(B) A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.

[(C) The decision on each issue and a summary of the reasons for such decision.**]**

(A) A description of the specific facts in the case that support the agency's decision, including, if applicable, an assessment as to the credibility of any lay evidence pertinent to the issue or issues with which disagreement has been expressed.

(B) A citation to pertinent laws and regulations that support the agency's decision.

(C) A statement that addresses each issue and provides the reasons why the evidence relied upon supports the conclusions of the agency under the specific laws and regulations applied.

(D) The date by which a substantive appeal must be filed in order to obtain further review of the decision.

(E) The rights of the claimant under subsection (f).

(2) A [statement of the case] *post-notice of disagreement decision*, as required by this subsection, will not disclose matters that would be contrary to section 5701 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "[statement of the case] *post-notice of disagreement decision*" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. [The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.]

[(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.

[(5) The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.]

(4) The post-notice of disagreement decision shall be written in plain language.

(e)(1) A claimant shall be afforded a period of 60 days from the date the post-notice of disagreement decision is mailed under subsection (d) to file a substantive appeal.

(2)(A) The period under paragraph (1) may be extended for an additional 60 days for good cause shown on a request for such extension submitted in writing within such period.

(B) For purposes of this paragraph, good cause shall include the following:

(i) Circumstances relating to any physical, mental, educational, or linguistic limitation of the claimant, legal guardian, or other accredited representative, attorney, or authorized agent filing the request (including lack of facility with the English language).

(ii) Circumstances relating to significant delay in the delivery of the initial decision or of the notice of disagreement caused by natural disaster or factors relating to geographic location.

(iii) A change in financial circumstances, including the payment of medical expenses or other changes in income or net worth that are considered in determining eligibility for benefits and services on an annualized basis for purposes of needs-based benefits under chapters 15 and 17 of this title.

(3) A substantive appeal under this subsection shall identify the particular determination or determinations being appealed and allege specific errors of fact or law made by the agency of original jurisdiction in each determination being appealed.

(4) A claimant in any case under this subsection may not be presumed to agree with any statement of fact contained in the post-notice of disagreement decision to which the claimant does not specifically express disagreement.

(5) If the claimant does not file a substantive appeal in accordance with the provisions of this chapter within the period afforded under paragraphs (1) and (2), as the case may be, the agency of original jurisdiction shall dismiss the appeal and notify the claimant of the dismissal. The notice shall include an explanation of the procedure for obtaining review of the dismissal by the Board of Veterans' Appeals.

(6) In order to obtain review by the Board of a dismissal of an appeal by the agency of original jurisdiction, a claimant shall file a request for such review with the Board within the 60-day period beginning on the date on which notice of the dismissal is mailed pursuant to paragraph (5).

(7) If a claimant does not file a request for review by the Board in accordance with paragraph (6) within the prescribed period or if such a request is timely filed and the Board affirms the dismissal of the appeal, the determination of the agency of original jurisdiction regarding the claim for benefits under this title shall become final and the claim may not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(8) If an appeal is not dismissed by the agency of original jurisdiction, the Board may nonetheless dismiss any appeal which is—

(A) untimely; or

(B) fails to allege specific error of fact or law in the determination being appealed.

(f) If, either at the time or after the agency of original jurisdiction receives a substantive appeal, the claimant or the claimant's representative, if any, submits evidence to either the agency of original jurisdiction or the Board of Veterans' Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence shall be subject to initial review by the Board unless the claimant or the claimant's representative, as the case may be, requests in writing that the agency of original jurisdiction initially review such evidence. Such request for review shall accompany the submittal of the evidence or be made within 30 days of the submittal.

SEC. 7105A. SIMULTANEOUSLY CONTESTED CLAIMS

(a) * * *

(b) Upon the filing of a notice of disagreement, all parties in interest will be furnished with a [statement of the case] *post-notice of disagreement decision* in the same manner as is prescribed in section 7105. The party in interest who filed a notice of disagreement will be allowed thirty days from the date of mailing of such [statement of the case] *post-notice of disagreement decision* in which to file a formal appeal. Extension of time may be granted for good cause shown but with consideration to the interests of the other parties involved. The substance of the appeal will be communicated to the other party or parties in interest and a period of thirty days will be allowed for filing a brief or argument in answer thereto. Such notice shall be forwarded to the last known address

of record of the parties concerned, and such action shall constitute sufficient evidence of notice.

SEC. 7106. ADMINISTRATIVE APPEALS

Application for review on appeal may be made within the [one-year period described in section 7105] *period described in section 7105(b)(1)* of this title by such officials of the Department as may be designated by the Secretary. An application entered under this paragraph shall not operate to deprive the claimant of the right of review on appeal as provided in this chapter.

SEC. 7107. APPEALS: DOCKETS; HEARINGS

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(d)(1) [An appellant may request that a hearing before the Board be held at its principal location or at a facility of the Department located within the area served by a regional office of the Department.] *Upon request by an appellant for a hearing before the Board, the Board shall present the appellant with the following:*

(A) The option of holding the hearing at—

(i) the Board's principal location; or

(ii) a facility of the Department located within the area served by a regional office of the Department.

(B) A recommendation as to the option presented under subparagraph (A) that would lead to the earliest possible date for the hearing, including with respect to the use of facilities and equipment under subsection (e).

(C) Statistics on the average wait experienced by similarly situated appellants for hearings at either option presented under subparagraph (A).

* * * * * * *

(e)(1) * * *

(2)*(A) When such* [When such] facilities and equipment are available, the Chairman may afford the appellant an opportunity to participate in a hearing before the Board through the use of such facilities and equipment in lieu of a hearing held by personally appearing before a Board member or panel as provided in subsection (d).

(B) Any such [Any such] hearing shall be conducted in the same manner as, and shall be considered the equivalent of, a personal hearing.

(C) In affording the appellant an opportunity under subparagraph (A), the Board shall inform the appellant of the advantages and disadvantages of participating in a hearing through the use of such facilities and equipment.

(D) If the appellant [If the appellant] declines to participate in a hearing through the use of such facilities and equipment, the opportunity of the appellant to a hearing as provided in such subsection (d) shall not be affected.

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Chapter 72. United States Court of Appeals for Veterans Claims

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Subchapter II. Procedure

SEC. 7261. SCOPE OF REVIEW

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims**[**, to the extent necessary to its decision and when presented, shall**]** *shall, when presented—*

* * * * * * *

(c) In carrying out a review of a decision of the Board of Veterans' Appeals, the Court shall render a decision on every issue raised by an appellant within the extent set forth in this section.

(d) **[**(c)**]** In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(e) **[**(d)**]** When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

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SEC. 7266. NOTICE OF APPEAL

(a) * * *

(b)(1) The Court may extend the initial period for the filing of a notice of appeal set forth in subsection (a) for an additional period not to exceed 120 days from the expiration of such initial period upon a motion—

(A) filed with the Court not later than 120 days after the expiration of such initial period; and

(B) showing good cause for such extension.

(2) If a motion for extension under paragraph (1) is filed after expiration of the initial period for the filing of a notice of appeal set forth in subsection (a), the notice of appeal shall be filed concurrently with, or prior to, the filing of the motion.

(c) **[**(b)**]** An appellant shall file a notice of appeal under this section by delivering or mailing the notice to the Court.

(d) **[**(c)**]** A notice of appeal shall be deemed to be received by the Court as follows:

(1) * * *

(2) * * *

(e) **[**(d)**]** For a notice of appeal mailed to the Court to be deemed to be received under **[**subsection (c)(2)**]** *subsection (d)(2)* on a particular date, the United States Postal Service postmark on the cover in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

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