

Statement for the Record

of



by

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And Government Affairs

Before the

Senate Committee on Veterans' Affairs

Regarding

**Toxic Exposure: Examining the VA's Presumptive
Disability Decision-Making Process**

September 25, 2019

Chairman Isakson, Ranking Member Tester, and members of the Senate Veterans' Affairs Committee, Vietnam Veterans of America sincerely appreciates your concerns that have moved you to for hold this hearing on an issue of critical importance to *all* veterans, their families and survivors: the VA's inconsistent and incomprehensible Presumptive Disability Decision-Making Process.

Vietnam Veterans are well-versed in the delays and denials, obfuscations and other impediments in the VA's "presumptive disability decision-making process." We have long maintained that this process, and the pervasive attitude that underlies it, runs counter to the spirit and rationale in the very foundation of VA's mission, the promise made by President Abraham Lincoln: *To care for him who shall have borne the battle, and for his widow, and his orphan.*

Exposures to toxic chemicals, of course, are among the hazards of the work place for members of the military, both here in CONUS and in deployments across the globe, in times of war and eras of peace. Ever since the war in Vietnam, such exposures, for the most part invisible, are now considered to be, in many instances, just as lethal as wounds inflicted by shrapnel and bullets. But, while a bullet hole or traumatic amputation are observable results of hostile actions, of combat with the enemy, the long-term effects of exposure to toxic agents most often are not. Making a case, and a claim, for infliction of a toxic wound can be, and most often is, a daunting proposition.

Such wounds, however, are *real*. Very real. They can wreck a life, or end a life, and potentially impact the health and well-being of the offspring of service members who were only working their mission, doing their job. They are hurting when they go to the VA for help. And they hurt even more when they are told there is no nexus between a health condition afflicting them and what they were exposed to while in the service of our nation.

To illustrate the problem with how the Veterans Benefits Administration in essence flaunts the needs of veterans and the will of Congress, consider, if you will, the difficulties faced by veterans of the 1990-91 Gulf War.

According to the VA, "During the period of August through December 2015, Compensation Service [the VA's Quality Review staff] conducted a

special focus review (SFR) of Gulf War cases . . . A total of 311 cases from the first two quarters of Fiscal Year 2015 were reviewed. Although some of these cases included claims for other disabilities that were not related to the Gulf War, this review was restricted to the Gulf War-related illnesses on each claim . . . The VBA's findings: of the 311 cases reviewed, 291 were properly denied, and 20 were improperly denied. This corresponds to a 94 percent accuracy rate within our sample."

VBA officials testified as to the SFR findings during a 2016 hearing in the House of Representatives dubbed "Persian Gulf War: An Assessment of VA's Disability Claim Process with Respect to Gulf War Illness." It seems, however, that the SFR did not cover what it was supposed to cover – claims from FY11 *through* FY15.

Even after former Secretary Bob McDonald had instructed the VBA to do a second, and proper, SFR of claims from FY'11-'15, the VBA still bollixed it up. They managed to draw 112 fewer claims. Of 199 cases reviewed in each of four fiscal years, the SFR concluded that 178 decisions were correct and 21 decisions had been "prematurely denied." Of particular note was this statement by the VA's Compensation Service: "It is imperative that the reviewer fully review the narrative in these decisions to ascertain whether service connection was properly considered under 38 CFR § 3.317."

In the wake of these findings, and considering evidence presented by Gulf War activists, Secretary McDonald instructed the VBA to set up a review lane to be used to overturn wrongfully denied Gulf War Illness-related claims, one claim at a time. To date, nearly 400 wrongfully denied presumptive Medically Unexplained Chronic Multi-Symptom Illness, or MUCMI, claims, have been overturned – one claim at a time. The VBA is supposedly using these overturned claims as training aids for their adjudicators.

These data suggested that the VBA adjudicators had failed to follow statutory and regulatory provisions and the VA's own procedures (in its M21-1 manual's Notice to Examiners in Southwest Asia Claims). Thus, there was a systemic problem with presumptive Gulf War Illness-related claims,

It is instructive to note that the 2017 GAO report, *Persian Gulf War: An Assessment of VA's Disability Claims Process with Respect to Gulf War Illness* found that the VA's ability to accurately process Gulf War Illness-related claims was hampered by:

- Inadequate training for both VBA adjudicators and Compensation and Pension (C&P) examiners.
- The failure of adjudicators to recognize that the examiner has provided an unnecessary medical opinion concerning service connection (nexus), thus wrongfully denying veterans' claims.
- The abysmal number of C&P examiners – only 10 percent of them – who had taken an optional online 90-minute training course.
- The failure of VBA decision letters that often do not communicate key information as to why a veteran's claim was denied.

Since the 2016 GAO report, there has been no significant improvement in regard to the issues Gulf War veterans face in having claims properly adjudicated, despite years of advocacy efforts, two hearings in the House (March 15, 2016 and July 13, 2017), and numerous promises by the VA. Still today, according to data furnished by the VBA, Undiagnosed Illness claims (UDX) are denied at a 95 percent rate, and Medically Unexplained Chronic Multi-Symptom Illness (MUCMI) claims at a 73 percent rate.

Another recent problem in Gulf War Illness-related disability claims is that the examiner, usually a nurse practitioner, will often:

- State that the veteran doesn't have a current diagnosed disability, when in fact the examiner failed to view non-VA medical records.
- Lump several illnesses into one condition, effectively denying the other conditions.
- Overrule and alter the diagnosis, or challenge the qualifications of the veteran's treating physician, resulting in a denial.

To us, this is déjà vu all over again. Today, 45 years after the last U.S. combat troops exited South Vietnam, we're still fighting to ensure that

Vietnam veterans receive the benefits that we've earned for having served our country in a war halfway around the globe.

What should the VA, the VBA, do to do right by the veterans it serves? What can Congress do to ensure that the VA uses the tools provided by statute, in regulations, and in the VA's own processes and procedures? Inasmuch as acronyms are coin of the realm here in the nation's capital, let us offer TOAT:

TRAINING: The VBA must ensure that adjudicators and Compensation and Pension (C&P) examiners are adequately trained and updated with changes in the law, with scientific and epidemiological advances, with alterations in policy – and that they are in fact using the tools and references available to them. Also, for instance, the VA's "optional" 90-minute training module for Gulf War Illness claims should be required.

OVERSIGHT: Congress must insist that the VA provide quarterly statistics on how its adjudicators handle particular conditions, the problems and issues they perceive, the complaints they receive.

ACCOUNTABILITY: Whenever and wherever possible, claims for a particular condition – PTSD or Military Sexual Trauma or Gulf War Illness, for example – ought to be steered to adjudicators who "specialize" in such claims in order to increase consistency in ratings throughout the system. Just as important, because it has been our experience that adjudicators routinely deny presumptive, service-connected maladies, to hold their supervisors accountable, which is not done at present.

TRANSPARENCY: The VA ought to hold quarterly briefings for Congress, the media, and the veterans' community based on their quarterly reports. Officials ought to unshackle themselves from a bunker mentality, defend what they do yet acknowledge their mistakes, and make public what they will transmit to Congress what they feel they need to improve their own processes and procedures. And this can't simply be, *We need more money*.

Vietnam Veterans of America thanks you for this opportunity to submit our Statement for the Record, and will reply to any questions regarding this testimony that you may have.

VIETNAM VETERANS of AMERICA

Funding Statement

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The national organization Vietnam Veterans of America is a non-profit veterans' membership organization registered as a 501(c)(19) with the Internal Revenue Service. VVA is also appropriately registered with the Secretary of the Senate and the Clerk of the House of Representatives in compliance with the Lobbying Disclosure Act of 1995.

VVA is not currently in receipt of any federal grant or contract, other than the routine allocation of office space and associated resources in VA Regional Offices for outreach and direct services through its Veterans Benefits Program (Service Representatives). This is also true of the previous two fiscal years.

For Further Information, Contact:

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In his role as Director of Government Relations for Vietnam Veterans of America, Rick Weidman is the primary spokesperson for VVA in Washington. A 1-A-O Army Medic during the Vietnam War, Rick served with Company C, 23rd Med, AMERICAL Division, in I Corps in 1969.

Weidman was part of the staff of VVA from 1979-1987, serving variously as Membership Director, Agency Liaison, and Director of Government Relations. He left VVA to serve in the administration of New York Governor Mario M. Cuomo as statewide director of Veterans Employment & Training (State Veterans Programs Administrator) for the New York State Department of Labor.

He has served as consultant on legislative affairs to the National Coalition for Homeless Veterans and served at various times on the VA Readjustment Advisory Committee, the Secretary of Labor's Advisory Committee on Veterans Employment & Training, the President's Committee on Employment of Persons with Disabilities Subcommittee on Disabled Veterans, the Advisory Committee on Veterans' Entrepreneurship at the Small Business Administration, and numerous other advocacy posts in veterans affairs. Among his other responsibilities, he is currently serving as Chairman of the Task Force for Veterans' Entrepreneurship, which is a mechanism for veterans organizations and other Americans committed to justice for veterans to coordinate efforts on issues vital to the economic well-being of those who have served the nation in uniform.

Weidman was an instructor and administrator at Johnson State College in Vermont in the 1970s, where he also was active in community and veterans affairs. He attended Colgate University, from which he received his Bachelor of Arts degree in 1967, and did graduate study at the University of Vermont.

He is married and has four children.