

Statement for the Record
Of
Vietnam Veterans of America



Presented

By

Jack McManus, National President

Before

House Veterans Affairs Subcommittee Disability Assistance and
Memorial Affairs and
Oversight and Investigations (O&I) subcommittees

Regarding

At What Cost? – Ensuring Quality Representation in the Veteran
Benefit Claims Process

April 27, 2022

Good afternoon, Chairwoman Luria, Chairman Pappas and Ranking Members Nehls, and Mann. I am most pleased to submit our Statement for the Record today regarding “At What Cost? – Ensuring Quality Representation in the Veteran Benefit Claims Process” before these distinguish subcommittees.

As of the Department of Veterans Affairs’ (VA) Fiscal Year 2021, Vietnam Veterans of America (VVA) represents 102,062 claimants before the Agency, residing in every State of the Nation, who collectively receive \$127,059,003.61 in compensation benefits from VA each month.¹ VVA offers representation to veterans (and their survivors) of all eras, not just those who served during the Vietnam War.

VVA is deeply invested in ensuring quality representation in the veterans benefit claims process because of its long history of advocacy on this issue. In 1983, VVA took a significant step by founding Vietnam Veterans of America Legal Services (VVALS) to assist veterans seeking benefits and services from the government.

By working under the theory that a veteran’s representative should be an advocate rather than simply a facilitator, VVALS established itself as a highly competent and aggressive legal assistance program available to veterans. VVA also played a leading role in advocating for the creation of Judicial Review, championing the rights of veterans to challenge VA benefits decisions in court. In the 1990s, VVALS evolved into the current VVA Veterans Benefits Program that continues to represent and advocate for veterans today.

In our view, quality representation means: (1) being thoroughly trained in VA law and procedures; (2) being duly accredited by VA; (3) fully protecting the privacy of a veteran’s medical information; (4) zealously pursuing meritorious claims and appeals; and (5) providing real value. VVA has been made aware, from its clients and other stakeholders in the veterans’ community, of myriad so called “claim preparation” companies and found that they possess none of these traits.

As to the first trait, VVA has found very little indication that these companies have made any effort to remain abreast of changes in statutory, regulatory, or juridical authority, nor to become well versed in VA’s various adjudication

¹ According to data provided to us by VA.

manuals. In fact, many of these companies offer disclaimers explicitly stating that they are unable to offer legal advice because they are merely “medical consultants.”

However, it is precisely that legal expertise that allows a representative to know whether a particular piece of medical evidence will have any benefit to a veteran’s claim. For example, a medical “nexus” has long been established as one of the three foundational requirements to establish service-connection. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) (holding that entitlement to service-connection requires: (1) a current condition; (2) an in-service event; and (3) a medical nexus between elements one and two).

In order for a medical nexus to be legally sufficient to grant a veteran’s claim, it must be “adequate,” a term that has been clearly defined in a series of precedential decisions. *See e.g., Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (noting that “a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two”); *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (ruling that a medical opinion based upon an inaccurate factual premise has scant probative value); and *El-Amin v. Shinseki*, 26 Vet. App. 136, 140 (2013) (finding an examination inadequate where the opinion’s analysis was limited to only one of the possible theories of entitlement).

The consequences of submitting an inadequate exam in support of a veteran’s claim or appeal is also clearly defined in 38 C.F.R. §4.2² and *Hicks v. Brown*, 8 Vet. App. 417, 422 (1995) (holding that inadequate medical evaluation frustrates judicial review). This is why VVA finds it so egregious that the same companies that admit not having any legal expertise also promise to provide nexus opinions.

As to the second trait, we would hope that it went beyond saying that anyone providing legal services to our Nation’s veterans should be qualified to do so. VA is the sole authority that recognizes (accredits) agents and attorneys to represent Veterans, 38 U.S.C. §5904(a) and Veteran Service Officers (VSOs) under 38 C.F.R. §4902.

² “If a diagnosis is not supported by the findings on the examination report or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.”

Only VA-accredited agents and attorneys may assist Veterans with the “preparation, presentation, and prosecution of VA claims,” 38 C.F.R. §14.629(b). This means anyone not accredited by VA cannot and should not “prepare, present, and prosecute” VA claims on behalf of veterans and their survivors.

Moreover, VA’s Office of General Counsel is responsible for ensuring that all accredited individuals receive appropriate training and has authority to take disciplinary action where needed.

Not only is there a clear legal requirement for accreditation, but there is a practical one as well. Amongst other things, an accredited representative is entitled to electronic access to a veteran’s VA claims file. This means that they are able to view all the evidence in a claimant’s service medical and personnel files, post-service VA and private medical records, and lay testimony.

Under current law, if a medical nexus opinion is rendered without taking relevant records into consideration, it will almost certainly, and correctly, be deemed insufficient by VA adjudicators and the Veterans Court. *See Nieves-Rodriguez, supra*. Therefore, by not being accredited, these companies are not only in violation of statutory and regulatory requirements, but incapable of competently preparing helpful medical reports or opinions.

It should also be noted that VA owes every veteran the “duty to assist.” *See* 38 U.S.C. §5103A(d). In this way, it is the only federal agency mandated to help a claimant in obtaining evidence to support their claim. This includes a free medical evaluation and opinion as to whether a claimed condition was caused by, or related to, their military service. *See McLendon v. Nicholson*, 20 Vet. App. 79 (2006) (holding that VA must provide a VA medical examination and/or opinion when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran’s service or with another service-connected disability, but (4) insufficient competent medical evidence on file for VA to make a decision on the claim).

This is important because VVA has observed that many claim preparation companies target veterans seeking to increase their disability rating. While VVA believes that much could be improved in VA's Compensation and Pension examinations we have found that, generally, they are effective at capturing the necessary data to determine a veteran's appropriate rating (as determined by Title 38, Chapter I, Part 4).

In other words, the supposed services that these companies claim to provide is already part of VA's claims processing process, free. Whereas VVA has found that VA often makes errors when it comes to increased rating claims, these are almost always corrected with *legal argument*, on appeal.

VVA has heard the argument that 38 U.S.C. §5904(a) and 38 C.F.R. §14.629(b) should not apply because the companies in question provide a medical, not legal, service. We find this position utterly absurd. As noted above, one must know the law in order to prepare appropriate medical evidence. Furthermore, obtaining compensation benefits from VA is an inherently legal process.

Finally, VVA strongly opposes the proposal that claim preparation companies should be afforded a new category of accreditation. The current system affords VA claimants access to a wide variety of no cost and fee-based representatives. As part of their work, accredited VSOs, Attorneys, and Agents regularly secure the services of a medical professional, to prepare evidence for their clients. With their legal expertise, they are able to ensure that medical services rendered are actually helpful to the claim or appeal in question.

Allowing claim preparation companies to be accredited in their own right would only serve to shield their predatory conduct and perpetuate their theft of taxpayer funds and the veteran's hard earned compensation benefits.

As to the third trait, in order to gain access to a veterans' file, referenced above, a representative must undergo a background check administered by VA. Not only that, but the claimants' information is encrypted and requires a Personal Identity Verification (PIV) card to access.

Documents contained within a VA claims file include the veteran's (and often their dependent's) social security number, home address, other contact information, banking account numbers, and medical records. Basically, their

entire life is documented there. Therefore, protecting all of that information from bad actors is critical.

VVA has learned that many claim preparation companies ask, and often demand, that veterans hand over their eBenefits passwords or send (through unsecured channels) copies of their VA decisions and medical records. It does not appear that any safeguards exist, or regard given, to protect this private information. Even if we trust that these companies will not use private information obtained from claimants for nefarious purposes or, indeed, sell the information, it is still left vulnerable to third party interception.

As to the fourth trait, VVA has found that claim preparation companies do not keep track of filing deadlines, make, or preserve legal arguments. Instead, they force the veteran to do so. Given that virtually all veterans of the Vietnam era are elderly and disabled, we find this especially outrageous.

We owe it to all our veterans to zealously advocate for their rights at every stage of the VA claims process, which means submitting well supported claims, filing well-argued appeals, and above all, doing so on time. If an appeal deadline is missed, that could mean years of retroactive benefits and tens of thousands of dollars lost.

As to the final trait, VVA recognizes that, while it does so at no cost, many reputable attorneys and agents do exceptional work for a fee. In fact, VVA advocated in favor of attorneys being able to be paid more than a nominal \$10 fee to represent veterans. However, once again, it must be “reasonable,” which is a clearly defined term.

Fees to attorneys and agents may only be paid from past-due benefits. 38 U.S.C. §5904(d). Only VA-accredited agents and attorneys may receive fees after successful representation. 38 C.F.R. §14.636(b). This means fees cannot be either charged or withheld by VA for unaccredited persons.

Fees which exceed 33 percent of past-due benefits shall be presumed unreasonable. 38 CFR §14.636(f)(1). An attorney or agent may elect to have VA withhold and pay them a fee directly if it does not exceed 20 percent of past-due benefits. This means fees cannot be charged for or withheld by VA from future benefits.

VVA was horrified to learn of some of the fee structures used by some of these companies, based on copies of contracts we were provide. For example, one company demands that the veteran pay five times the amount their VA compensation increases by, in addition to a late fee! This company also charged an extra 25% for Awards made based on clear and unmistakable error³, an extra 20% for convalescence claims, reimbursable for medical opinions, and other fees.

Sadly, this is only one example of many. VVA finds it unconscionable that so many unqualified individuals are providing questionable services to our veterans and charging more than the most experienced and reputable attorney and agent practitioners of veteran's law. We urge Congress to act.

For these reasons, VVA supports the following two propositions:

1. That Congress pass legislation instructing and empowering VA's Office of General Counsel (OGC) to aggressively investigate any person or entity that charges a fee for work or services in connection with a benefit administered by the Department of Veterans Affairs, without being accredited to do so by OGC, and to sanction non-compliance with fines or referral to the Department of Justice, as appropriate.
2. That no additions be made to the current categories of representatives before VA: Veterans Service Organization (VSO), Attorney, and Agent.

In closing, I would like to express my gratitude for the opportunity to submit our Statement for the Record and thank you for what you do on behalf of our nation's veterans and their families.

³ Which is a purely legal argument that necessarily cannot involve the submission of new evidence. *See* 38 U.S.C. §§5109A, 7111; *see also* 38 C.F.R. §§3.105(a), 20.1403(a).

VIETNAM VETERANS OF AMERICA

Funding Statement

April 27, 2022

The national organization Vietnam Veterans of America (VVA) 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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Jack McManus was elected to serve as VVA National President at VVA's 20th National convention, held in November 2021 in Greensboro, North Carolina. First elected VVA national treasurer in 1995, he was reelected to the position in 1997 and again in 2019. He previously served as the VVA Michigan State Council President for six and one-half years from 1989 to 1996, overseeing the largest state program in VVA. In 1997, he was awarded VVA's highest honor,

the VVA Commendation Medal, for his extraordinary service to the organization, to all veterans, and to the community at large. He has also been recognized by the VVA New York State Council with its Commendation Medal.

During his career as a private businessman, McManus's company employed approximately 3,500 in two service-sector businesses, with \$150 million annually in sales. In 1978, his company was recognized as the first drug-free workplace in the building service contracting industry. The company also emphasizes special hiring programs for handicapped individuals, ex-offenders, and rehabilitated substance abusers for its internal rehabilitation programs. From 1978 to 1985, McManus was the program manager for his company's contract with the Kennedy Space Center space shuttle program in Florida.

Originally from New York City, Jack McManus joined the Air Force in 1965, where he served until 1969. Between 1967 and 1968, he was assigned to Operation Ranch Hand in Vietnam.

Jack received his B.A. in Business Management from New York University in 1973. He resides in North Carolina with his wife Jackie. He is a recipient of numerous business and community awards.