

**WELL-GROUNDED CLAIMS AND H.R. 3193, THE
DUTY TO ASSIST VETERANS ACT OF 1999**

HEARING
BEFORE THE
SUBCOMMITTEE ON BENEFITS
OF THE
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WELL-GROUNDED CLAIMS AND H.R. 3193, THE DUTY TO ASSIST VETERANS ACT OF 1999

THURSDAY, MARCH 23, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON BENEFITS,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 334, Cannon House Office Building, Hon. Jack Quinn, (chairman of the subcommittee) presiding.

Present: Representatives Quinn, Filner, Hayworth, and Evans.

OPENING STATEMENT OF CHAIRMAN QUINN

Mr. QUINN. Good morning, everybody, and welcome. I want to thank everybody for rearranging their schedules a little bit for us today. We are trying to get started—usually we begin at 10 o'clock, and we're trying to get about a 9:34 start here this morning.

We are centering around the VA's duty to assist veterans filing claims for disability compensation and the role the veteran plays in the claims process. It is my hope that the members of the subcommittee will come to have a better understanding of the issue, which I admit is somewhat legalistic and complex, but that hasn't stopped the Congress before.

I appreciate all the witnesses being here today to share their views, and we are going to begin this morning by hearing the testimony of the veterans' service organizations and concluding with the VA, so our order of testimony is changed a little bit.

While we will be receiving testimony on H.R. 3193, the Duty to Assist Veterans Act of 1999, we also want to learn more about the perceived problems and possible solutions to address the *Morton v. West* decision.

The sticking point, of course, of this decision is that the court ruled that the "claim must be plausible on its face and capable of substantiation in order to be considered well-grounded" before the VA can offer assistance to the veteran in obtaining any additional evidence needed to decide the claim.

The Department of Veterans Affairs has published proposed rules in response to the court decision. These rules proposed at least five exceptions or categories in which claims will be fully developed without determining first whether they are well-grounded.

I believe that this issue more than any we have addressed recently requires the need for some kind of balance, and I view this as the beginning of a whole learning process for us as to the role

of the veteran, the service organizations and the VA in trying to not delay decisions too long.

Mr. Filner is not with us this morning. He has given us the okay to begin without him. He will be here momentarily, and while the first panel is already at the table, I do want to yield to the ranking member of the full committee, Mr. Lane Evans, for any opening comments, and thank him for his work on this issue.

OPENING STATEMENT OF HON. LANE EVANS

Mr. EVANS. Thank you, Mr. Chairman. Thank you for holding this important hearing. I'm very pleased that the subcommittee today is considering H.R. 3193, the Duty to Assist Veterans Act. This legislation is needed to correct erroneous interpretations of the law. Judicial reform was intended to continue VA's longstanding obligation to assist all veterans with the development of their claims. The exact opposite has occurred.

I strongly believe in judicial review. However, courts can and do make wrong decisions, and when those decisions affect the fundamental rights of veterans, it is Congress' responsibility to correct the problem, and H.R. 3193 will do this.

Congress must reinstate the veteran-friendly process which has been virtually destroyed by the decisions which will be discussed today. In my view, the court's decisions in *Epps* and *Morton* have transformed the VA from a beneficial agency serving our nation's veterans into a maze of conflicting and confusing requirements.

The impact of these decisions on veterans seeking service-connected compensation benefits is disturbing and widespread. At my request, the Democratic staff of the House Veterans' Affairs Committee has reviewed randomly selected compensation records of veterans applying for benefits, as well as the files of veterans who have directly brought their problems to my attention. The results are, I find, very troublesome.

Veterans whose claims should be allowed under existing law and regulations are having their claims rejected as "not well-grounded."

These are some examples of the claims rejected as not well-grounded: A Korean war veteran requesting secondary service connection for Hepatitis C which his doctor attributed to blood transfusions received during surgery for a service-connected condition at a VA medical center; a Purple Heart recipient requesting service connection for Hepatitis C attributed to a blood transfusion received during surgery in Vietnam from a combat wound; a veteran recently discharged from military service due to disability rated by the Armed Services medical examination board at 20 percent; a veteran diagnosed in service with hepatitis C claiming service connection for hepatitis; a World War II POW with traumatic arthritis.

It's outrageous that Purple Heart recipients, former POWS, combat veterans, and other veterans seeking service-connected compensation benefits from the VA are not provided the minimum assistance guaranteed to applications for Social Security disability benefits and other federal disability benefits.

According to Mr. Thompson's testimony, the VA cannot legally issue regulations which would permit the VA to offer the same assistance to all veterans as other federal agencies customarily do.

Regulations which cannot completely restore VA's ability to properly develop claims is an inadequate solution to this very serious problem. We need to legislate now.

Thank you, Mr. Chairman.

[The prepared statement of Congressman Evans appears on p. 31.]

Mr. QUINN. Thank you, Lane, and thanks for your help with this. Our first panel, as I mentioned, is at the table. Mr. Richard Schneider, the Director of State Veterans Affairs for the Non Commissioned Officers, Mr. Rick Surratt, the Deputy National Legislative Director for the Disabled American Veterans, and Mr. Leonard Selfon, Director of the Veterans Benefit Program for the Vietnam Veterans of America.

Mr. Schneider, if it is okay with you, we will begin from that end of the table and work our way across. You already know from being here before that we certainly accept your full statement for the record, and ask that you try to limit your comments this morning to about 5 minutes or so.

When ready, you may begin.

STATEMENTS OF RICHARD C. SCHNEIDER, DIRECTOR, STATE/ VETERANS AFFAIRS, NON COMMISSIONED OFFICERS ASSOCIATION; RICK SURRATT, DEPUTY NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; AND LEONARD J. SELFON, DIRECTOR, VETERANS BENEFIT PROGRAM, VIETNAM VETERANS OF AMERICA

STATEMENT OF RICHARD C. SCHNEIDER

Mr. SCHNEIDER. Thank you very much, Mr. Chairman, and thank you, Mr. Evans, for introducing the legislation that we are going to address today. We, the Non-commissioned Officers Association, believe it's probably one of the most pivotal pieces of legislation that will be addressed this year, and the reason is because it affects lives, it affects people, it affects those that went to war when this country asked them, and it affects their status today when they perceive medical problems related to their military service.

I will submit the statement for the record. The statement contains the background of how the Judicial Review Act imposed in U.S. Code, the standard for establishing a well-grounded claim by the veteran before the duty to assist obligation was empowered by the Department of Veterans Affairs.

The court's temperament, as it was expressed to the Department of Veterans Affairs, that they didn't have a right to assist, and dreadfully, the department's expedient action, probably the most expedient that they ever did in issuing a decision assessment document that implemented the court's ruling and acquiesced to the court's decision, and then followed immediately with policy instructions that went out.

I think if we would go back and look at the DAD or decision assessment document, we would find that it was actually done at light speed, and that publication, it was not well-received by either the veterans services organizations or veterans who were going to

have to perform to a new standard to establish their claims with the Department of Veterans Affairs.

I might add that the veterans that were most dramatically affected were those that came out of combat, those that were in combat years ago, that those that were discharged from service not last year but years later, and whose service-connected disability or the medical problems that they were experiencing, that they could, in fact, go back to a relationship to their military service.

I would suggest to you that most of the veterans today, and we represent the enlisted community which is more than 80 percent of all veterans in the United States, that most of the enlisted members of the United States lack the where-with-all and lack the understanding of 38 USC, 38 CFR, lacked the understanding of what is a well-grounded claim, lacked the ability to take a letter and to understand that letter and to come back with a response that would provide all of the documents and details necessary for a VA person to say yes, this probably is a well-grounded claim. Yes, this probably is plausible. Yes, we will go forward and we will accept it.

The obvious or the contrary position is probably the one that will happen most often, and that will be that the claim will be rejected. I would say that right there, the history of VA changed from being an advocate for the veteran to being an adversary for the veteran when he walked through the doorway into VA to present his claim. We think that those who put their lives on the line ought to be heard when they come to VA, and that VA's duty to assist ought to be that which has been historically done for the veteran.

And if they need medical examinations, they ought to have them. If they need letters written, then by God, the bureaucracy that owns the computers and has all the form letters and all the rest of it, ought to take addresses and send those letters out to secure the details, and assist in the development of the claim.

The court sent us here today because the court recognized that its interpretation is probably factually correct, but it was not that interpretation that the Congress had expounded years ago and said that this is what we want, we want the VA to be the advocate, we want them to be the proponent for the veteran. Now we have the situation where the court says you want to change the rules, go to Congress and get a change in law.

Well, ladies and gentlemen, we are here today to ask for that change in law. We are here to say that yes, there may be costs involved with manpower, with the cost of medical examinations, but our veterans deserve that consideration. We believe that the institution ought to roll for the veteran, as the veteran has served his nation and done what his nation has asked.

Thank you, Mr. Quinn.

[The prepared statement of Mr. Schneider appears on p. 41.]

Mr. QUINN. Thanks very much. Rick?

STATEMENT OF RICK SURRATT

Mr. SURRATT. Mr. Chairman and members of the subcommittee, good morning. I am Rick Surratt, with the Disabled American Veterans.

We are here today addressing an issue that goes right to the very heart of how America treats its veterans. The outcome will determine whether, in return for their service to our nation, we will continue to assist veterans in obtaining the benefits they deserve, or whether we will refuse that simple assistance as if we owe them nothing; whether we will maintain a simple claims process with built-in safeguards and VA employees working to ensure veterans receive the benefits to which they are entitled, or whether, for government convenience, we will leave them on their own to negotiate a process filled with complexities and procedural hurdles designed to inhibit their ability to obtain the benefits they rightfully deserve.

Never before has anyone questioned the government's moral duty to assist veterans in obtaining their benefits. That duty and its spirit of goodwill have always been taken as a given and one of the most fundamental ingredients and steadfast traditions of our benevolent system of veterans' benefits. That anyone could question it is almost incomprehensible.

It is equally incomprehensible that it is the VA—the agency we have entrusted with the task of serving veterans—which now seeks to abandon that duty. Sure, it was a court that jumped to the wrong conclusion by interpreting the law to place such pre-conditions upon the duty that they defeated its whole purpose, but VA has been quite content to live with that misinterpretation, and now defends it and clings to it as a way to effectively shirk its duty to assist veterans.

Even worse, VA has proposed a regulation that would require veterans to prove much more than they were required to prove before, and much more than is necessary to demonstrate entitlement. The regulation would also severely restrict the types of evidence VA will accept to prove these points.

This proposed regulation is fatally flawed because it is premised upon the court's misinterpretation of law, yet it conveniently ignores the essence of the court's decision. The court clearly ruled that VA, without exception, cannot provide assistance to a veteran in obtaining evidence from government and private sources unless the veteran first submits evidence to preliminarily prove all facts material to the claim.

Under its current practice and proposed role, VA adheres to those parts of the court's decision that are in its own self-interest and conveniently ignores the rest. VA's practice and proposed regulation have as their precept the general rule that it cannot assist veterans until they, on their own, preliminarily prove their claims, but VA continues to obtain military medical records and records from its own medical facilities in many cases.

Perhaps VA straddles the fence here because it realizes that it cannot possibly gain acceptance of its practice and proposed rule if it fully adheres to the court's decision. Merely being half wrong does not make VA's practice and proposed rule fair or acceptable, however.

Moreover, VA's approach violates the law on one side and runs afoul of the court's decision on the other. The proposed rule will therefore satisfy no one and is unlikely to withstand judicial review. Incredibly, VA's new rule adds substantially to the amount

of work VA must do to dispose of the case just to avoid providing full assistance to a veteran.

Mr. Chairman, we have provided the subcommittee with our analysis of this rule and I ask that our analysis be included in the hearing record.

Without going into the technical details here, let me just say that this proposed regulation will do nothing to solve the problem. Rather, it will make it much worse, and it is quite frankly an insult to veterans. Only legislation can remedy this shameful situation.

As Congressman Evans noted, as it now stands, a social security claimant and perhaps many other applicants for government benefits receive more assistance and have less burdensome procedures to contend with than veterans.

Mr. Chairman, what is our nation coming to when the government no longer wants to provide simple assistance to veterans? We need legislation to remove all counter productive procedures and adverse effects of the court's misinterpretation of law. The DAV supports H.R. 3193 which will do that.

That concludes my statement, Mr. Chairman. Thank you for allowing us to present our views on this most important issue.

[The prepared statement of Mr. Surratt appears on p. 47.]

Mr. QUINN. Thank you, and your request to include in the record this tabled information, hearing no objection, is granted. Len?

STATEMENT OF LEONARD J. SELFON

Mr. SELFON. Good morning, Mr. Chairman, and other distinguished members of the subcommittee. I'm pleased to have this opportunity to present VVA's viewpoint on one of the most important issues facing veterans and their dependents today, and that is the need to redefine the reciprocal statutory obligations of claimants to submit well-grounded claims for VA benefits, and of the VA to assist these claimants with the development of their claims.

VVA wholeheartedly endorses legislative action to end the confusion and injustice created by on-going judicial and administrative interpretation of the requirement of a well-grounded claim as the trigger for the VA's duty to assist.

Indeed, we believe that new legislation is the only effective solution available at this time. Congress has spoken before concerning these threshold issues, and it is time for Congress to speak once again.

It's both unreasonable and unfair to expect claimants, many of whom suffer from serious disabilities, to develop their claims without the VA's assistance. The vast majority of these claimants just simply do not possess the specialized knowledge that will allow them to traverse the legal and evidentiary requirements of the VA adjudication process. As it was meant to be, the benevolent VA claims adjudication scheme should not be any less benevolent towards claimants who do not have the advantage of accredited representation.

For years, the VA's policy was to undertake evidentiary development prior to determining whether the claim was well-grounded. With the advent of judicial review, however, the VA's exercise of its discretion to assist claimants at the outset of the adjudication process began a downward spiral. In precedential Federal court de-

cisions, the VA's duty to assist has been eroded to the point where it is now being used to summarily deny claims for benefits without consideration of evidence that could not only render the claim well-grounded, but could also warrant a favorable decision on the merits.

The courts have accomplished this by narrowly defining the term well-grounded, and the problem is that the courts sometimes describe the well-grounded claim requirement as the low threshold to merits consideration, but in other cases, however, the courts define well-groundedness in terms of requirements that a claimant must satisfy in order to actually prevail on the merits.

This schizophrenic environment has spawned the absurd requirement that the veteran seeking entitlement to service connection must submit evidence that is legally sufficient to prove his or her claim, prior to the VA undertaking meaningful development of the evidence.

The notions of well-groundedness as representing a plausible claim versus a proven claim came to a head with the court's decision in *Morton v. West*, and as we all know in that decision, the court opined that even the minimal assistance by the VA in developing a claim is outside the scope of Section 5107(a), if that claim is not well-grounded, and in so doing, the court overruled VA adjudication procedure manual provisions and policy statements that called for such development, and said they were invalid as being contrary to the statute.

In December of 1999, the VA published a proposed regulation in response to the *Morton* decision, and although the proposed regulation allows for some initial additional development under certain circumstances, it adopts the stringent definition of well-groundedness that again requires basically the submission of dispositive evidence prior to the duty to assist arising.

If the proposed regulation goes into effect as written, the VA's duty to assist will, for all practical purposes, be relegated to an historical footnote. VA policy manuals and statements which have already been struck down by the courts show that the courts probably will not be any more generous towards the regulation that does basically the same thing.

The deleterious effects of delaying or denying the duty to assist have grave consequences beyond the veterans' entitlement to compensation. Often VA medical treatment is withheld or delayed until a veteran has established service connection. An impediment to an award of service connection frequently translates into an impediment to vitally needed treatment, and this presents a serious health problem as well. Quite literally, these are often matters of life and death.

In a related matter, VVA service representatives have advised that some VA practitioners have been instructed not to provide statements or opinions that would help veterans in establishing well-grounded claims. We have been told that some of these providers have actually been warned of disciplinary action if they elect to assist veterans in this regard.

This practice defies not only the objective behind the duty to assist, but also an expired but, we understand, informally continued VHA directive that lifted restrictions on VA physicians to provide

claims-related opinions for their patients. Clinicians cannot operate either professionally or effectively in the climate of fear like that.

Any statute designed to re-establish the duty to assist as Congress intends it must be specific enough to preclude what has happened before from happening again. Congress must explicitly state that the well-grounded claim requirement or any preliminary procedural substitute therefor is, in fact, a low threshold, more akin to a pleading requirement than an evidentiary requirement.

Thus, if a claimant presents a claim that is capable of substantiation, he or she must receive the benefit of the duty to assist. The burden of proof should be defined in terms of proving eligibility for the benefit sought, which may be satisfied by the claimant's assertion that exists competent evidence with respect to each element necessary to establish entitlement to the benefit sought.

Congress should then mandate that once eligibility has been established, the VA must assist the claimant with the development of the evidentiary record, and we have included proposed statutory language in our written testimony for the subcommittee's consideration.

VVA believes that only by including such explicit language in its bill can Congress prevent the repetition of the injustice currently visited upon deserving veterans and their families. The elimination of continuous recycling of individual claims on the basis of well-groundedness will conserve precious administrative and judicial resources, and more importantly, it will allow the VA to execute the mission that it was created to accomplish.

Vietnam Veterans of America sincerely appreciates the opportunity to present our views on this matter of vital concern to veterans, their dependents, and the American public, and we look forward to working with Congress on this and other important issues.

Thank you very much.

[The prepared statement of Mr. Selfon appears on p. 62.]

Mr. QUINN. Thanks to all three of you for your testimony, both written and comments here. I want to associate my opening remarks with Mr. Schneider's remarks, that this entire issue is at times confusing and complicated, and one of the aspects of it that veterans on the street, in their homes, in their cities and villages and towns across the country, lack is many times a legal understanding of just what their rights are and how to proceed with them. That makes this whole discussion a little bit more difficult, but clearly it is not as cut and dried as some of the issues we hear before the subcommittee, the full committee, and at the witness table.

My father has a saying that there is no pancake too thin that doesn't have two sides, however. Let me ask you all, and I will ask the next panel as well, I think we all hear your message loud and clear. Rick, you and I had a chance this week to meet in my office to hear it loud and clear earlier, and it is reinforced here today, but it is important that you get that on the record. I understand that.

But let me ask you in any order. Mr. Schneider, we will probably start with you if you have anything, are there any redeeming aspects to the VA's rule that they have set down? I mean, we have heard what your concerns are about that, but along the lines of a pancake not too thin that doesn't have two sides, is there anything

that is worthwhile in here that we could hold on to and maybe build on if we are looking for some areas to cooperate here a little?

Does anybody have any comments?

Mr. SCHNEIDER. You know, I'm really frustrated by the rule that has been proposed. The rule that I want to see is the rule that says you will assist until you have exhausted the leads that you have that the veteran has provided.

You know, basic to anything that has happened, there probably has been a new awareness created throughout VA that well-grounded claims is a real issue, and that people developing claims have got to work to secure the well-groundedness.

Veterans' service organizations have never waffled on the ability to attempt to develop a claim. I think that the issue for a bureaucracy that is overworked is that it becomes an insurmountable problem, and they are not equipped right now with the people. They have got resources in their next budget to increase their staff.

There is discussion on medical examinations. VA may have to "roll over" and do more. What they need to do is do what they historically have done, and not back away from the table. They need to become the advocate again. Right now they are offering an adversarial response to the veteran.

And you know, the regrettable part about that is that we won't know when a VA employee turns a person away from the table. That word will spread in the community and veterans will look at the institution with distrust. I think that VA needs to turn it around. Their policies need to be redefined, be absolutely positive, and then you'll remember a Secretary of Veterans Affairs 7 years ago who said let's put veterans first—let's look at the claims process and put veterans first.

Mr. QUINN. Thank you. Rick, anything to add?

Mr. SURRATT. Well, the rule is premised upon the court's holding, which is contrary to the law on one side, and then VA makes some exceptions which actually gives unconditional assistance to select excluded groups, so that's good, of course, but that only halfway remedies the problem, and restores the duty to assist.

VA is kind of between the law on one side, and the court on the other side. VA is kind of driving down the middle of the road, straddling the white line, but it is still halfway on the wrong side of the road in doing that.

Mr. QUINN. Accidents will happen.

Mr. SURRATT. Quite frankly, I think the VA's rule puts a lot more burden on the VA and makes the process much more inefficient than the way it was before.

Mr. QUINN. You and I have talked about that. Okay, fair enough.

Mr. SURRATT. Enough said.

Mr. QUINN. Len, anything?

Mr. SELFON. Again, I would like to echo Richard and Rick's sentiments. As we say, the biggest problem with the rule is that it is premised on the court's definition of what a well-grounded claim is, and again, we believe that's too onerous a burden as a threshold to adjudication.

We also like the idea that the VA is leaning in the direction of rendering assistance at the outset to veterans, and they listed I think about five different classes of veterans that they would

render assistance to before taking a look at whether or not the claim was well-grounded, and we think that that's a step in the right direction.

However, that sort of discriminates against other veterans that have equally valid reasons for having their claims developed before there is a well-groundedness adjudication, or at the threshold, so we sort of like the direction that it is going in, but there certainly needs to be much more to be done.

And again, as I indicated in my statement, there is no indication that the courts are going to allow this regulation to stand.

Mr. QUINN. Right.

Mr. SELFON. Based on what they have done with their adjudication procedures manual and directives.

Mr. QUINN. Sure. And all we have to go on is what they have done so far.

Mr. SELFON. Correct.

Mr. QUINN. Thank you all. I will yield to Mr. Evans at this point if he has any questions to follow-up to his opening statement.

Mr. EVANS. Just one quick question directed to each of the panelists. I understand that the VSO's have been meeting with the VA to discuss to a solution to the problems related to well-grounded claims and duties, but, do you think that the VA and the VSOs are going to reach a common ground to correct this problem?

Mr. SURRATT. I would like to respond to that, Mr. Evans, if I may. The VSO's have been meeting with the VA, and quite frankly, will probably continue to be meeting with them. It would be unwise to shut the door, but I think that is more of a courtesy.

I don't think there is really any chance of use resolving anything. First of all, if the VA were today to write the regulation exactly as the VSO's want that regulation, that wouldn't stop the court from what the court is doing.

If we were to get together and talk about legislation, first of all, we have a good bill. We have your bill here on the table which the VA is opposing. I would imagine that if we were to talk about legislation with the VA, they might compromise a little around the fringes, but they would want to retain the core of this well-grounded nonsense in their bill, so I don't think we can get together on legislation.

That brings me to another matter here that quite frankly I am going to have to be a little critical of the VA on. I have to be blunt to get this issue out in the open.

There is an issue of trust here. The VA created the well-grounded concept and it knows what it is, and the VA has to know that the court is completely wrong on this, but rather than going to the court in the cases that are before the court and telling the court it's wrong, the VA appears to be trying to exploit this, what it knows to be an error against veterans.

Sadly that suggests that VA is being intellectually dishonest on this. They are not dealing in good faith. As you know, you have probably seen many times before, when VA comes over here and opposes legislation beneficial to veterans, they often have a parade of horrors. They will tell you if you enact that, it is going to cost a lot more money, it's going to flood the system with claims, the sky's going to fall.

For example, if you just remember the clear and unmistakable error legislation that was recently enacted, the VA essentially told you that every veteran that ever had a denial would come back and request review, and that would flood the system with claims.

Well, quite frankly, we told you that wouldn't happen and it didn't. There has been a trickle of claims, and they are probably telling you now that this legislation is going to cost you more money, and my guess is they are telling you that, and you are going to have more personnel, but every time they come over here and tell you something like that, that just doesn't turn out to be true, that lowers their credibility a notch, and quite frankly, I've got to tell you, I think their credibility is below sea level on this one.

It's just that everything they say doesn't hold water, so no, I don't think there's any real chance that we can come to an agreement with VA on this one. Thank you.

Mr. EVANS. All right. Anybody else?

Mr. QUINN. Thank you, Len. Mr. Filner?

Mr. FILNER. Excuse me. You are lucky I can't talk today.

But I would like to submit my statement for the record.

Mr. QUINN. No objection.

[The prepared statement of Congressman Filner appears on p. 26.]

Mr. FILNER. This is just an incredible situation, as you have pointed out in your written testimony. We have Medal of Honor winners, ex-POW's being told that their combat-related injuries are not well-grounded, and I would just like to go on to the next panel now, if we can.

Mr. QUINN. Thanks very much. Gentlemen, thank you. We are going to ask our second panel to come forward now and invite them to the table. The American Legion, the Paralyzed Veterans of America, and the VFW of the United States.

We appreciate your written testimony that has been forwarded to us already. We also appreciate your attendance here this morning.

Mr. Carroll Williams, Mr. Geoff Hopkins, and Mr. John McNeill. Mr. Hopkins, we welcome you here this morning, you are on the second panel, but the first up seat as it is to that end of the table today. Mr. McNeill will follow, and then Mr. Williams will go third.

As we did with the first panel, we would ask that you could keep your oral statement to about 5 minutes or so, knowing that your full written testimony has been accepted, and will be completed in the record. You may proceed, Mr. Hopkins.

STATEMENTS OF GEOFF HOPKINS, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA; JOHN McNEILL, ASSISTANT DIRECTOR, VETERANS' BENEFIT POLICY, NATIONAL VETERANS SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES; AND CARROLL WILLIAMS, DIRECTOR, NATIONAL VETERANS' AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION

STATEMENT OF GEOFF HOPKINS

Mr. HOPKINS. Thank you, sir. Chairman Quinn, Ranking Minority Member Filner, Congressman Evans, the Paralyzed Veterans of America is honored to be invited to testify today concerning H.R. 3193, the Duty to Assist Veterans Act, and to address generally the proper construction of the VA's statutory mandate to assist claimants.

The fundamental concepts cannot be stressed too often. First, veterans programs exist to assist veterans. Second, the public policy purpose underlying veterans programs is to ensure that veterans receive all benefits to which they are entitled. Third, there is no competing or opposing interest in veterans' claims.

Actions and interpretations that subvert these basic concepts run counter to the very nature of veterans' benefits. Today we turn to one of the most egregious examples of this subversion—the misinterpretation of congressional intent to provide assistance to all veterans in establishing their claims to benefits.

Congress, in the Veterans Judicial Review Act, codified VA's ongoing practice of assisting all claimants in developing their claims. The house report that accompanies that bill states that Congress expects VA to fully and sympathetically develop the veterans' claims to its optimum before deciding on the merits.

The report noted that after a claim is filed, the VA helps the claimant compile evidence to support his or her claim. PVA does not understand how the intent behind Section 5107(a) could be stated any clearer or any more emphatically. VA must assist all claimants in developing their claims, and the claim must be fully developed before there is a decision on the merits.

That was 1988. Unfortunately in 2000, things are quite different. The Court of Appeals for Veterans' Claims has, through decisions both novel and torturous, rendered congressional intent and statutory language regarding the VA's duty to assist claimants null and void.

The court currently requires a claimant to present a well-grounded claim before the VA has the duty to assist. Of course, prior to court intervention, once a veteran had a well-grounded claim, the veteran received benefits. Essentially the three-part test required by the court to render a claim well-grounded is the three-part test required by the court for a claimant to receive benefits. Once a claim is proven, the duty to assist is unnecessary. Why would Congress enact a duty to assist all claimants if this duty was a dead letter?

As if this situation were not bad enough, the Court of Appeals for Veterans' Claims recently decided that Congress mandated that the VA was prohibited from providing assistance to any claimant until his or her claim is deemed well-grounded.

Simply stated, the court in *Morton v. West* stated that the VA cannot choose to assist veterans, even if it wanted to. We doubt that Congress envisioned or intended this result in 1988. These twisted interpretations of clear congressional intent and statutory language, this movement to remake the benefits adjudication system into a legalistic formalized maze of increasing complexity have caused real harm to real people.

I have included examples in my written comments. These instances, and the many more like them, can not be what Congress had in mind when it codified VA prior practices to create and perpetuate the ex parte and non-adversarial system.

The VA has proposed regulations on this matter. PVA along with other veteran service organizations have commented on these proposed regulations. We ask that our comments be made part of the record.

We believe that without congressional action, future court decisions may invalidate regulatory action and return us to the point that brought us here today. PVA supports H.R. 3193 and look forward to working with you to clarify certain points, and ensure that this legislation is the best legislation it can be, and that the purposes underlying this bill are fully and completely carried out.

The solution is simple. VA must assist all claimants in developing their claims, and the claim must be fully developed before there is a decision on the merits. We must not delay any longer in returning the system to what it was intended to be.

Again, on behalf of PVA, I thank you for this opportunity to testify. I will be happy to any questions you may have.

[The prepared statement of Mr. Hopkins appears on p. 70.]

Mr. QUINN. Thank you, Geoff. Thanks very much. We'll hold questions until the entire panel has a chance to testify. John?

STATEMENT OF JOHN MCNEILL

Mr. MCNEILL. Thank you, Mr. Chairman, and members of this committee. I appreciate that our written statement will be made part of the record, and that obviously goes into much greater detail on some of the things that I will say here.

Mr. QUINN. Without objection, so ordered.

Mr. MCNEILL. I actually prepared a written statement I was going to read from, but I just decided to "chuck" it. Last night, we got on the internet and started looking at some things, and I found something very much of interest that I would like to read. This is the guidelines from a government agency for individuals that are beneficiaries applying for claims, or making claims for benefits.

It reads—"If you think you may be eligible for payments, call us at 1-800 (etc.) to file a claim. What else do you need to do? You will get a fast decision if you give us," and it has a laundry list but included in that laundry list is, "medical records from your doctors, therapists, hospitals, clinics, (etc.) names, addresses, phone and fax numbers of your doctors, clinics and hospitals."

It has an important note—"Don't wait to file your claim for disability payments, even if you don't have all this information. What happens next? We will send the information you give us to the disability determination agency in your state. Then claims specialists and doctors there will review what you have given us and make a

decision if there is enough information, or request any additional information they need, and if necessary, ask you to have an exam or special test at no cost to you."

Mr. Chairman, and Mr. Filner, if I asked you, 1 year ago, as recent as 1 year ago, to name the agency you first thought would come to your mind that put these guidelines out, I am willing to bet you a trip to Niagara Falls, or wherever, or tickets a Buffalo Bills or San Diego Chargers game, that both of you would immediately say the VA.

That's not correct. That is from the Social Security Administration. Now, in comparison, note what the VA is putting out in letters, if I may read now. "Your evidence must meet three requirements. One, show current disability—your claim must include medical evidence of a current disability. This is best shown by medical records and doctors' statements which contains the diagnosis of your disability."

Two, "show an injury or disability based upon military service. We must have evidence which shows you had an injury or disease during service."

Three, and this is the critical step because this is the third step of *Caluza* which is the heart and soul of all the problems we have right now, the need to show linking evidence. "Your claim must include medical evidence, preferably your doctor's statement," and that doctor's statement must be a non-speculative medical opinion now, "showing a reasonable possibility that the disability you now have was caused by injury or disease which was again in service or was made worse during military service."

I surmise now that we no longer have—veterans no longer have—the requirement to file a plausible claim, they must file a definitive claim for service connection with those guidelines. There's no such word as "plausible" anymore in the claims adjudication process.

It goes on. "If there is any other evidence you want us to consider to make your claim well-grounded such as medical records from private doctors, you must obtain it yourself and give it to us for review. You cannot simply tell us what doctors have your records. If you complete a VA form 21-4142" which is the authorization consent to release information from doctors to the Department of Veterans Affairs, "we cannot use it to get your private medical records until your claim is well-grounded."

Now, most doctors charge around \$2 a page for copies of medical records. Further, what veteran can reasonably interpret the VA's requirement, if he has 300 or 400 pages of medical records to get. Which ones are pertinent to his claim, and which ones are not?

The VA's guidance goes on. "Once a well-grounded claim is established, we can assist you to obtain the evidence or additional evidence necessary to establish entitlement compensation." Again, there is no need for this help because veterans submit all the evidence up front to well-ground the claim. There is no further, any more duty to assist, in my mind.

"We will request private medical records and related evidence as well as records from other government agencies,"—for example, Social Security. In other words, VA is saying they can't get Social Security records until you have a well-grounded claim.

I can go on but, Mr. Chairman, I think I made my point. If I may talk just informally for the next minute. The VA regulations won't work, mainly because they are interpreting what the court is saying. What's missing here is the long time-honored, steeped in history, congressional intent of how to assist the veteran.

The court is saying with the vacuum here, they see a vacuum here of no explicit congressional intent, we are now interpreting congressional intent. The VA is attempting to implement the court's edicts as to what is congressional intent which me sitting here obviously saying we disagree with that, and asking instead what indeed should be congressional intent?

And, if I may, I will tell you that no one is really to blame here, or maybe we are all to blame. We probably should have realized that when *Caluza* first came out, there was a real problem. Maybe we should have picked it up beforehand, but I do want to say that no one really is to blame here.

With that, I think the situation has regressed to the point requiring direct congressional action, and again, there is greater detail in our written statement and I refer you to that, but I think the situation has now progressed to the point where this committee has long been the champion for veterans affairs, for the veteran, along with the Department of Veterans Affairs, and for veterans and their claims, and so all we're asking now for you to do is to step up to the plate and be Mark McGwire.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McNeill appears on p. 79.]

Mr. QUINN. Thank you, John. I appreciate the prepared statement as well as your homework from last night. Carroll?

STATEMENT OF CARROLL WILLIAMS

Mr. WILLIAMS. Thank you, Mr. Chairman. As customarily, our written statement has been presented for the record.

The American Legion on behalf of 2.9 million veterans appreciates the opportunity to comment on this important issue on the VA's responsibility to assist veterans and beneficiaries in the preparation and development of claims for benefits for which they may be entitled.

Mr. Chairman, the American Legion believes that the Court of Appeals for Veterans Claims in the *Morton v. West* decision of July 14, 1990 was a bad decision that can do nothing but damage claimants and create an adversarial relationship between veteran and the Department of Veteran Affairs.

The court essentially held that VA does not have the duty to assist a claimant who has not filed a well-grounded claim, and that it has no authority to do so under the current statute. The American Legion was so adamantly opposed to this ruling and VA's implementation of the decision to its field stations, that we immediately filed suit in the U.S. federal circuit in an effort to block VA from disseminating the regulations based on the *Morton* decision.

Unfortunately our suit was dismissed because our arguments were identical to the appeal currently pending before the federal circuit in *Morton v. West*. Nonetheless, the American Legion proceeded and joined in the lawsuit by filing an amicus curiae brief and we are actually awaiting the federal court's decision.

In the interim, we look to Congress to correct this unfavorably ruling by introducing legislation that will mandate VA to assist veterans and claimants alike with the development of their claims.

The *Morton* decision in our judgment may have a favorable impact on the regional offices' workload, but we expect an increase in the number of appeals to the Board of Veterans Appeals as veterans pursue the appellate route for further consideration of their pending claims.

In my written statement, I referenced a VHA Directive 98-052 issued on November 18, 1998. Then Dr. Ken Kizer had directed all VA medical staff that VA's obligation to care for veterans extended to providing medical opinions when requested in support of their claims for disability benefits.

This directive expired on September 30, 1999 and no action had been taken to re-establish it. Fortunately just yesterday, we received a letter from Dr. Garthwaite, deputy under secretary for health on this very same issue.

Dr. Garthwaite informed the American Legion that in its VHA's intent to support enrolled veterans' VA claims by furnishing medical information as appropriate. Dr. Garthwaite further reiterated that his letter demonstrates a strong statement of his intent to assist veterans with claims processes, and that he views support of veterans' claims processing as a core VHA function, and one of the duties that makes the VA health care system a unique resource to veterans.

This directive was then e-mailed to all VHA staff throughout the entire medical system. That, Mr. Chairman, in our opinion says it all about the uniqueness of the Department of Veteran Affairs. We submit that the same core value of VHA must also be applicable to the veterans benefits administration in assisting veterans and claimants alike with the development of their claims as being proclaimed under the one VA concept.

In conclusion, Mr. Chairman and members of this committee, when an American Legion service officer accepts a veteran's power of attorney, we also accept the full responsibility that it is our profound duty and historical obligation to assist the claimant in every legal way within our means. Our duty to assist begins immediately, as it should.

We therefore expect no less of ourselves, and we expect no less of the VA. For VA not to assist our veterans and their beneficiaries with the development of their claims, regardless of what stage the claim is in, is basically legally, morally, and technically wrong.

We thank you for the opportunity to express our views on this important issue, and we strongly support the implementation or the enactment of H.R. 3193, the Duty to Assist Act of 1999. Thank you very much.

[The prepared statement of Mr. Williams appears on p. 89.]

Mr. QUINN. Thank you, Mr. Williams. I appreciate both your written response as well as the summary here this morning. I think it's pretty clear—as it was with the last panel—where you are as well in supporting documentation.

I do want to take a minute, before you open, Mr. Filner, to ask the same question of the three of you that I asked of the panel who just left the table. Understanding that the VA has issued the rule,

in that information is there anything in there which would point us toward some common ground, or at least something to build on for the future?

Mr. Hopkins, anything?

Mr. HOPKINS. Yes, Mr. Chairman. The PVA's position is that, as the others on the first panel have already said, that the regulation does not do enough, and that it is likely to be challenged. It does recognize obligations, for example, that the VA should obtain government records, but that it puts conditions on that.

And the rest of our comments are included in the comments that I have produced for the record.

Mr. QUINN. Very good, thank you. John or Carroll, anything? How about you, John?

Mr. MCNEILL. Mr. Chairman, I stated one reason why the regulations won't work, because they are really trying to interpret what the court is saying as congressional intent. What we're really missing here is a re-affirmation of congressional intent itself, by Congress.

We also had an objection to the proposed exceptions for VA's assistance prior to establishing a well-grounded claims. Once you start providing exceptions, I think you are also very prone to having things struck down by the court because what you are doing right now is creating different "classes" of veterans, and throughout history of the regulations which also goes to—and as we suggested for H.R. 3193 in our written statement, which goes to the same point I'm making—but throughout the whole history of the veterans' entitlements program, there has only been one class, per se, of veterans that has an elevated status, and that's an individual who was involved in combat action and is classified as a combat veteran.

The only exception they have for a combat veteran is whether he has PTSD, and beyond that, it doesn't do anything for a veteran that might have had, for example, his hearing blown out in a grenade attack during the Battle of the Bulge and who now, for some unknown reason, decides to initially file a claim 50 years later.

So the regulations don't help on that. The real problem here is the duty to assist mission, not well-grounded claims. That's the problem, when is the VA going to help an individual on duty to assist? The VA and the court says you can't do it until there is established a well-grounded claim.

We believe Congress has long said you can do that—duty to assist—as part of helping to establish a well-grounded claim, and that is what it really boils down. The VA's proposed regulations say that.

Mr. QUINN. Okay, thank you. Carroll?

Mr. WILLIAMS. Well, my comment would be that as my counterpart from the VFW had highlighted, the letters that go out to veterans seeking information is just boilerplate language, and I think it has to be more specific.

And in a private conversation that I had with one of the Judges on the court, he had pointed out to me that they left the door wide open for Congress to strengthen the VA's statutory obligation to assist any and all veterans in the development of their claims.

Mr. QUINN. Would they be ready to put that in writing?

Mr. WILLIAMS. Well, you can interpret it from their decision, and as I indicated, I had a private follow-up conversation on that decision with this particular Judge, and that was his comment to me.

Mr. QUINN. Okay. Thank you, sir. Mr. Filner, anything to add?

Mr. FILNER. Thank you, Mr. Chairman. Counsel pointed out that in the decision of *Morton*, the judge has invited Congress to, in fact, make such a decision. Mr. Chairman, since we have worked together in this committee, we have been frustrated sometimes by the amount of time it takes to get back to us on things we wanted. As far as I know, we haven't had a good response on the education benefits, for example.

I know how much our veterans have to wait for claims, but in this one, they moved with incredible speed. I guess I have been watching the bottom rungs. And I'm glad we've listened, Mr. Chairman. I'm not sure that there are any easy solutions, which I find very disappointing, but—we need to get the legislation passed, as everybody says, do as much as we can do.

Mr. QUINN. Thank you, Bob. Gentlemen, thanks very much. We're going to bring our third panel up, which consists of Mr. Joe Thompson, who will be accompanied by Mr. John Thompson and Mr. Bob Epley.

I'm leaving for a 10:30 meeting but I'm happy to have the services of our Vice Chairman of the subcommittee, Mr. Hayworth, to take over for me.

Mr. HAYWORTH (presiding). Good morning, ladies and gentlemen. To our panel, greetings. Ah, the bells rang. Well, let's move along, first hearing from Mr. Joseph Thompson, please.

STATEMENT OF JOSEPH THOMPSON, UNDER SECRETARY FOR BENEFITS, VETERANS BENEFITS ADMINISTRATION, ACCOMPANIED BY JOHN THOMPSON, DEPUTY GENERAL COUNSEL, DEPARTMENT OF VETERANS AFFAIRS, AND ROBERT EPLEY, DIRECTOR, COMPENSATION AND PENSION SERVICE, VETERANS BENEFITS ADMINISTRATION

Mr. JOSEPH THOMPSON. Good morning, Mr. Chairman, Congressman Filner. As has been mentioned numerous times this morning, much of the discussion today centers around the Court of Veterans Appeals, or the Court of Appeals for Veterans Claims, decision last year in the *Morton* case which, in effect, limited our duty to assist veterans in pursuing their claims.

I need to say up front that VA takes its responsibility and its duty to assist veterans very seriously, that our goal in our public policy making is to try to make sure that everyone who is entitled to benefits, receives those benefits.

We did put out an interim policy last August instructing our regional offices to follow the court's guidance. Now, it has been commented on a couple of times at least about the speed with which we issued those instructions. You need to understand that we had been working on that, and in consultation had proposed a notice of intent to publish a regulation on well-grounded claims for a year preceding that event.

So what the *Morton* decision did was accelerate the process, but it was a process we had been engaged in for over a year.

Our proposed rule does in fact liberalize the court's decision. The VA General Counsel is quite comfortable with the fact that we do have the authority to make reasonable limited exceptions to the well-grounded rule, that, in fact, will stand up to any court challenge.

Our view on how our regulation will work is fairly straight-forward. We think that well-grounded simply means plausible, that you submit something to VA which looks like it could be proven. It's a low threshold and one that is entirely consistent with all other federal disability programs. They all have a burden of proof requirement at the front-end.

We don't believe it puts a significant burden on claimants. Earlier in this hearing, Social Security claims processing was mentioned. Social Security has a much lower threshold of proof than we do because they don't care, it's not important to them when the disabilities began, or how they began. It's quite different from establishing service connection for a veteran.

Under our proposed rule, we will presume the credibility and the truth of the admissible evidence. We will request and review service medical records and other medical records in VA's possession. In all cases, if we find that a claim is not well-grounded, we go back to the veteran and say this is what's missing, and give them time to come back and furnish that information.

As mentioned, we have carved out exceptions, people who can't afford it, people with severe problems such as psychiatric disabilities, post-traumatic stress disorder, recently-discharged veterans.

Some of the cases mentioned by Congressman Evans sound to me clearly like they were mistakes. Former prisoners-of-war are carved out as one of the exceptions.

I need to point out also that veterans are not defenseless in this process at all. They have a nationwide network of some 3,700 people who do not work for VA, they work for the National Service Organizations (NSO's), they work for the states, they work for the counties, and they are all there to help veterans with their claims.

Right now we're meeting with our stakeholders. We are reviewing the 22 comments that were sent to us on the proposed regulation. We feel that there is—I'll answer the chairman's question of the previous two panels—we think there is middle ground. We think there is a way that we can both alleviate their concerns that veterans who are entitled to benefits are being denied, and at the same time, make sure that the government's need to not spend time and money on things that will ultimately be fruitless, that those needs are met as well.

We oppose the proposed legislation. We do believe it will cost more. We believe it will lengthen the amount of time it takes to process claims. And we will, in fact, devote more resources towards implausible claims, and by definition, less resources towards veterans who have filed plausible claims.

Ultimately we don't believe it will help veterans. We don't think it will add any significant numbers of veterans to the compensation rolls. Implausible claims that come to us on their face are overwhelmingly denied ultimately in the process.

And our final belief is that this could create unforeseen new obligations for the government, and that will take a process which can be extended over many years, and extend it even longer.

Mr. Chairman, that concludes my testimony.

[The prepared statement of Mr. Joseph Thompson appears on p. 93.]

Mr. HAYWORTH. Mr. Thompson, I would like to thank you for your testimony. As we oftentimes observe, the service in the Congress of the United States, although Gen. Schwartzkof once compared it to the largest daycare center of the world, is a bit more like high school. When the bells ring, we have votes—almost like going to class—in addition to the other assignments.

So I'm going to ask you just to amplify your testimony, and we thank you for that testimony again. Joe, just in layman's terms, in everyday language, let's cut to the chase here. I just want to ask you what is the problem that, in your mind, needs to be fixed on the well-grounded claims issue?

Mr. JOSEPH THOMPSON. We think that the court's *Morton* decision was overly restrictive. We think that both there are exceptions that need to be carved out for people who would have difficulty filing a well-grounded claim, and we think with the rulemaking that we can identify what those exceptional cases are.

We also think that we need to have the flexibility to not simply say no to a claimant who doesn't submit a well-grounded claim but to go back to them and give them the opportunity to submit whatever evidence is missing.

We think those are the major weaknesses. I would ask my colleagues if they have anything to add to that.

Mr. EPLEY. To add to that, we think that the threshold under *Morton* is high, and one of our goals is to lower that threshold as Mr. Thompson said, so that every veteran who has entitlement can walk through the door and get the assistance that they need to perfect their claim.

Mr. JOHN THOMPSON. I would just add that the lawyers in the house at VA are of the view that the court's holding in *Morton* is limited to what the claimant in *Morton* argued before the court, which is that there is no responsibility on the part of claimants to present a well-grounded claim before VA's duty to assist arises. And the claimant in *Morton* cited some VBA manual provisions, and some other internal administrative documents, for his position.

The court ruled that the claimant was mistaken that VA could not have rules absolving claims of any responsibility to present well-grounded claims. We believe the court's ruling was limited to the proposition that VA cannot disregard the well-grounded claim requirement in the statute.

We do not believe, and we are making this clear in our appeals court brief, that the court held there cannot be some exceptions in regulations to the well-grounded claim threshold requirement.

So consistent with that interpretation, as Mr. Thompson said, we have proposed in the rules some significant exceptions for veterans for whom we think the burden would be especially onerous.

Mr. HAYWORTH. Thank you, sir. Mr. Filner.

Mr. FILNER. Mr. Chairman, I would just like to submit Mr. Evans' opening statement for the record.

Mr. HAYWORTH. I believe it will be accepted without objection.

Mr. FILNER. Just one quick question, Mr. Chairman. Joe; The answers are even more disappointing to me than your original statement. You talked about bars being lowered and restrictions—you have no advocacy role, no proactive role, no help for the veterans that I have yet heard in any of your statements. You would be less restrictive, but nothing that you say puts you in the role to help our veterans get what they deserve and what we owe them.

I just don't understand it, frankly. I just don't understand your refusal to advocate on behalf of the veterans. The Veterans Administration ought to be doing that, and you now have a court ruling that says you don't have to. Joe, this is an insult to the veterans, what you are doing here, and I am very disappointed. Thank you, Mr. Chairman.

Mr. HAYWORTH. Thank you, Mr. Filner. We would like to thank the panel and for all those who joined us at this hearing, and this hearing of the Benefits Subcommittee is hereby adjourned.

[Whereupon, at 10:38 a.m., the subcommittee was adjourned.]

APPENDIX

I

106TH CONGRESS
1ST SESSION

H. R. 3193

To amend title 38, United States Code, to reestablish the duty of the Department of Veterans Affairs to assist claimants for benefits in developing claims and to clarify the burden of proof for such claims.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 2, 1999

Mr. EVANS (for himself, Mr. FILNER, Mr. DOYLE, Mr. RODRIGUEZ, Mr. SHOWS, Ms. CARSON, Ms. BERKLEY, Mr. ABERCROMBIE, and Mr. HOLDEN) introduced the following bill; which was referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to reestablish the duty of the Department of Veterans Affairs to assist claimants for benefits in developing claims and to clarify the burden of proof for such claims.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Duty to Assist Vet-
5 erans Act of 1999".

1 **SEC. 2. DUTY OF DEPARTMENT OF VETERANS AFFAIRS TO**
2 **ASSIST CLAIMANTS.**

3 (a) DUTY To ASSIST.—(1) Chapter 51 of title 38,
4 United States Code, is amended by inserting after section
5 5103 the following new section:

6 **“§ 5103A. Duty to assist claimants**

7 “(a) The Secretary shall assist a person who submits
8 a claim for a benefit under a law administered by the Sec-
9 retary in developing information pertinent to a decision
10 on the claim.

11 “(b) The assistance that shall be provided by the Sec-
12 retary under subsection (a) before a decision on the claim
13 is rendered shall include the following:

14 “(1) Requesting information as described in
15 section 5106 of this title.

16 “(2) Informing the claimant of the information
17 and medical or lay evidence needed in order to fully
18 develop the claim.

19 “(3) Requesting information identified or ref-
20 erenced by the claimant if the claimant has executed
21 a release of information authorizing the Secretary to
22 obtain the information.

23 “(4) Informing the claimant if the Secretary is
24 unable to obtain pertinent evidence such as service
25 medical records or other evidence identified by the
26 claimant.

1 “(5) Providing a medical examination for the
2 purposes of determining the current disability of any
3 veteran who is unable to afford medical care as de-
4 termined under section 1722(a) of this title.

5 “(6) Any other assistance the Secretary con-
6 siders necessary and appropriate to assure the prop-
7 er development of the claim.”.

8 (2) The table of sections at the beginning of such
9 chapter is amended by inserting after the item relating
10 to section 5103 the following new item:

 “5103A Duty to assist claimants.”

11 (b) BURDEN OF PROOF.—(1) Subsection (a) of sec-
12 tion 5107 of such title is amended to read as follows:

13 “(a) A person who submits a claim for a benefit
14 under a law administered by the Secretary shall have the
15 burden of proving eligibility for that benefit. That burden
16 may be satisfied by meeting the requirements of any pre-
17 sumption provided by law or regulation applicable to the
18 claim.”.

19 (2) Subsection (b) of that section is amended by
20 striking “each” in the first sentence.

21 (c) EFFECTIVE DATE.—The amendments made by
22 this section shall apply to any claim filed with the Sec-
23 retary of Veterans Affairs on or after July 14, 1999.

OPENING STATEMENT OF HON. BOB FILNER
RANKING DEMOCRATIC MEMBER
SUBCOMMITTEE ON BENEFITS - HEARING ON
VA'S DUTY TO ASSIST VETERANS AND
H.R. 3193

March 23, 2000

Thank you, Mr. Chairman. This is a very important hearing. As we speak, countless veterans throughout this country are receiving letters from VA telling them that their claims for disability benefits are “not well-grounded”. They are being told that they must submit evidence of a “nexus” before VA will provide them any help.

They are and should be befuddled. It is **urgent** that we act before any more disabled veterans have their claims rejected without proper development and consideration.

The testimony of the veterans service organization eloquently attests to the severity of the problem.

- ◆ Veterans who claim service-connection for disabilities which are noted in their service medical records have those claims rejected as “not well-grounded.”
- ◆ Veterans who are treated by VA medical centers are denied the ability to “well-ground their claims” because VA physicians refuse to provide a medical opinion as to whether the veteran’s current disability is “as likely as not” due to an in-service disability or event.
- ◆ Homeless veterans who lack the means to obtain medical evidence on file in various parts of the country are turned away from VA’s door.
- ◆ Vietnam veterans with conditions presumed under law to be service-connected as a result of Agent Orange exposure have their claims rejected as not well-grounded.
- ◆ Medal of Honor winners and former Prisoners of War are told their claims for combat related injuries are not well-grounded.

This can not continue. VA readily acknowledges that “some regional offices” have struggled to apply the *Morton* rules for adjudicating claims. Joe, the regional offices may be struggling, but it is our Nation’s veterans who are suffering and dying without having their claims properly developed and evaluated.

A solution is needed. Incomplete regulatory redress isn’t enough. A statutory remedy is needed. Congress should provide it now.

**VETERANS' AFFAIRS COMMITTEE HEARING
SUBCOMMITTEE ON BENEFITS
OVERSIGHT HEARING ON WELL-GROUNDED CLAIMS
AND H.R. 3193, THE DUTY TO ASSIST VETERANS ACT OF 1999**

March 23, 2000

9:30 A.M.

INTRODUCTORY REMARKS

CONGRESSMAN SILVESTRE REYES

**THANK YOU MR. CHAIRMAN, AND RANKING MEMBER FILNER FOR HOLDING THIS
IMPORTANT HEARING TO ADDRESS THE ISSUE OF WELL-GROUNDED CLAIMS AND
THE DUTY TO ASSIST VETERANS MAKE THEIR CLAIMS FOR COMPENSATION AND
PENSION BENEFITS AND HEALTH CARE.**

**AS I HAVE CONSISTENTLY SAID THROUGHOUT MY TENURE ON THE HOUSE
VETERANS AFFAIRS COMMITTEE, OUR VETERANS SHOULD BE GETTING THE
BENEFIT OF THE DOUBT THROUGHOUT THE VA.**

**WE SHOULD NOT BE PLACING ROADBLOCKS AND OBSTACLES IN FRONT OF OUR
VETERANS, THEIR SPOUSES, AND THEIR FAMILIES.**

**THEY HAVE EARNED THESE BENEFITS AND IN MY VIEW IT IS OUR OBLIGATION AS
A NATION TO ASSIST THEM AS MUCH AS POSSIBLE.**

**THESE VETERANS WENT TO WAR AND FOUGHT FOR OUR NATION AND AMERICAN
VALUES.**

**OUR VETERANS SHOULD NOT HAVE TO GO TO WAR WITH THE VA TO OBTAIN THE
BENEFITS FOR WHICH THEY ARE ENTITLED.**

RATHER, IT IS INCUMBENT FOR THE VA TO DO EVERYTHING IT CAN TO ADDRESS THEIR NEEDS, BENEFITS AND CARE.

TO EXPECT ANYTHING LESS IN MY VIEW IS UNAMERICAN.

WITH THE CHANGE IN THE LAW THAT HAS REQUIRED VETERANS TO ESTABLISH A "WELL GROUNDED CLAIM" BEFORE VA PROVIDES ANY ASSISTANCE IN DEVELOPING A VETERANS CLAIM IS A SITUATION THAT NEEDS TO BE RECTIFIED AND RIGHT AWAY.

I AM THEREFORE PLEASED TO JOIN AS AN ORIGINAL CO-SPONSOR OF H.R. 3193, WHICH WILL PUT THE BURDEN BACK ON THE VA TO HELP VETERANS OBTAIN DOCUMENTS, INFORMATION, AND ANYTHING ELSE NECESSARY TO ESTABLISH THEIR CLAIM.

I LOOK FORWARD TO TODAY'S TESTIMONY. TRAGICALLY IT WILL ONLY CONVEY FURTHER THE TERRIBLE SITUATION UNDER THE CURRENT LAW AS INTERPRETED BY THE COURTS, AND THEREFORE SHOULD MOTIVATE US TO PASS H.R. 3193 AS SOON AS POSSIBLE.

THANK YOU AGAIN MR. CHAIRMAN, MR. FILNER, AND ALL OF OUR WITNESSES TODAY FOR BRINGING THIS ISSUE AND LEGISLATION TO THE TABLE IN ORDER TO DO THE RIGHT THING FOR OUR VETERANS.

WE OWE IT TO THEM, AND I LOOK FORWARD TO WORKING FOR THE QUICK PASSAGE OF THIS LEGISLATION.

OPENING STATEMENT OF HONORABLE
LANE EVANS
RANKING DEMOCRATIC MEMBER
HOUSE COMMITTEE ON VETERANS
AFFAIRS
MARCH 23, 2000 – 9:30 AM – 334 CHOB

I would like to thank the Chairman of the Subcommittee, Mr. Quinn, and the Ranking Member, Mr. Filner, for holding this hearing. I am especially pleased the Subcommittee is considering H.R. 3193, the “Duty to Assist Veterans Act”, this morning.

I introduced this measure to remove the barrier to VA helping veterans that was created by a decision of the Court of Appeals for Veterans Claims’. The purpose of H.R. 3193 is simply to restore VA’s long-standing duty to assist **all veterans** with the development of their claims.

I strongly believe in judicial review. However, I am very disappointed that the Court has ignored VA’s longstanding tradition of providing beneficial assistance to claimants for VA benefits. This tradition was clearly noted in the

legislative history of the Veterans Judicial Review Act.¹

Unfortunately, Congressional intent to maintain a “veteran friendly” process has been **virtually destroyed** by a series of decisions in cases in which VA attorneys successfully argued that VA was not required to assist claimants and indeed was prohibited from assisting claimants until a

¹ VA’s practice of assisting all claimants was reflected in the legislative history of the judicial review statute enacted in 1988:

Each year, the Veterans Administration (VA) processes approximately 5 million claims. In most cases, claimants submit their own applications without assistance. **If a claimant desires advice or other help, VA provides specially trained personnel to answer inquiries and assist in the submission of the claim.** VA’s medical facilities often serve as an important referral source, and the major veterans’ service organizations **also** furnish claims assistance by trained specialists at no charge.

Congress **has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits.** This is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.

H.R. Rep. No. 100-963, at 13 (1988). [Emphasis supplied.]

claimant had first submitted a “well-grounded claim.”²

In my view, the Court’s decisions in *Epps* and *Morton* have transformed VA from a beneficial agency serving our Nation’s veterans into an inscrutable maze of conflicting and confusing requirements. Veterans must meet these complex requirements without any of the assistance traditionally provided to other claimants seeking disability benefits from the federal government.

The impact of these decisions on veterans seeking service-connected disability compensation benefits is disturbing and widespread.

At my request, Democratic staff of the House Veterans Affairs Committee has reviewed randomly selected compensation records of veterans applying for benefits as well as the files of veterans who have directly brought their problems to my attention. The results are troubling.

² *Epps v. Brown*, 9 Vet.App. 341 (1996), *aff’d Epps v. Gober*, 126 F3d 1464 (Fed. Cir., 1997) and *Morton v. West*, 12 Vet.App. 477 (1999) (*app. pending*).

Claims of veterans which should be allowed under existing law and regulations are rejected as “not well grounded.”

- ◆ A veteran from New York wrote to me after his claim for service-connection of Hepatitis C was denied as not well grounded. As a well-educated professional, he had provided the regional office with evidence of his current Hepatitis C diagnosis and a statement from his treating specialist that his Hepatitis C was “likely” due to a transfusion he had received while undergoing surgery at a VA medical center for a service-connected disease.

Although this evidence should have been enough to “well-ground” and indeed prove the claim, even under the restrictive standards used today, the claim was denied as “not well-grounded.” Thirteen months after the claim was filed and four reviews, two of which were conducted at my request, the claim was finally judged “well-grounded” and allowed.

- ◆ In reviewing files at a regional office, my staff found that a Vietnam veteran who had received a Purple Heart for a gunshot wound to the chest during combat applied for service-connection due to Hepatitis C. He indicated that he had received a blood transfusion during chest surgery in Vietnam. Although the service medical records for his post-Vietnam stateside medical care referred to the Vietnam surgery, the claim was denied as not well-grounded, because none of the veteran's records from his in-patient treatment in Vietnam were included in his service medical records.

I was only recently informed that veterans service medical records do not ordinarily include records of in-patient hospital care such as that provided to this Purple Heart recipient. Because these hospital clinical records are stored at the National Personnel Records Center under the name of the hospital rather than under the name of the veteran, it next to impossible for many veterans to obtain the very evidence they may need to "well-ground" their

claims.³ This evidence may be in possession of the United States government such as the National Personnel Records Center in St. Louis filed under the name of the hospital.

Special rules that allow VA to accept lay evidence in support of veterans claims for service-connection for combat injuries are being ignored.⁴ The Purple Heart recipient was informed, "You need to send us evidence of a current disability, evidence of incurrence or aggravation of the injury in service, and evidence of a link between the in-service injury and the current disability before we can consider your claim for hepatitis C."

- ◆ A recently discharged veteran diagnosed in-service with Hepatitis C had his claim for Hepatitis C rejected as "not well-grounded".

³ "Health records documents include induction and separation physical examinations, and routine medical care (doctor/dental visits, lab tests, etc. when the patient was not admitted to a hospital. In comparison, clinical (hospital inpatient) records are NOT filed with the health records but are generally retired to NPRC (MPR) by the facility which created them." [Emphasis in original.] "Military Personnel and Medical Records Collections at NPRC" (Found at <http://www.nara.gov/regional/mpromp.html>)

⁴ 38 C.F.R. §3.304(d)

These problems are not confined to veterans seeking service-connection for Hepatitis C or to “some regional offices.”

- ◆ A Korean veteran from Massachusetts wrote “As you know, many records were burned at the great St. Louis Fire [at the National Personnel Records Center in 1973] (mine were) and also when records were lost or destroyed under combat situations or military movements.⁵ Without absolute documentation to prove a claim the VA does not give even the most plausible claims the “Benefit of the Doubt”!!”
- ◆ A veteran discharged from military service due to a disability rated by the Armed Forces Medical Examination Board at 20% had his claim for that disability rejected as “not well-grounded”. Eight months after discharge, his claim has not yet been allowed.

⁵ See, “The 1973 Fire at NPRC(MPR)” at <http://nara.gov/regional/mpfire.html>.

- ◆ A former POW with traumatic arthritis had his claim denied as not well-grounded because his service medical records did not document the injuries suffered after having his plane was shot down over Germany during World War II.

I received a copy of the National Association of County Veterans Service Officers, January – February 2000 issue. The stories of state and county veterans services organizations mirror those found by my staff and the reports of veterans service organizations testifying today.

- ◆ A Nebraska county service officer reported that veterans who filed initial compensation claims within two weeks of discharge with entries on their discharge physicals of the claimed conditions now have their claims denied as “not well-grounded.”
- ◆ A service officer from South Carolina reports that the majority of claims filed are now being denied as “not well-grounded.”

- ◆ An Ohio service officer reports on the difficulty veterans have obtaining military records from the National Personnel Records Center. Veterans are advised in a form letter that the veteran does not “need copies of your Service Medical Records, because the VA uses original documents when adjudicating the claim.”

These are a few of many examples of the barriers faced by our Nation’s veterans in seeking compensation today.

It is simply not acceptable that Purple Heart recipients, former POWs, combat veterans and other veterans seeking service-connected compensation benefits from the VA are not provided the minimum assistance guaranteed to applicants for Social Security disability benefits⁶, Railroad Retirement disability annuities⁷ and disabled federal workers.⁸

⁶ 20 C.F.R. §404.1512 [Social Security disability benefits] and 20 C.F.R. § 416.912[Supplemental Security Income (SSI) disability benefits]

⁷ 20 C.F.R. 216.33

⁸ See, “Chapter 4 Processing Claims”, *Injury Compensation for Federal Employees*, U.S. Department of Labor (Revised January 1999) pp. 24-30

VBA implemented the Morton decision requiring veterans to develop their own claims without any national policy on what assistance VA medical centers would provide to veteran patients concerning the “nexus” evidence now deemed essential to the development of a “well-grounded claim.” VA still has no national policy on providing this evidence to veterans. In some cases VA physicians have been prohibited from providing veterans with evidence needed to well-ground their claims. In other case, VA medical center personnel are providing the necessary evidence.

According to Mr. Thompson’s testimony, VA can **not** legally issue regulations which would permit the VA to offer the same assistance to **all veterans** as these other federal agencies routinely provide. Regulations which can not completely restore VA’s ability to properly develop claims are an inadequate response to this serious problem and this approach is certainly no solution.

The situation must be rectified by legislative action. The Committee should favorably consider HR. 3193.



Non Commissioned Officers Association of the United States of America

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STATEMENT OF

**RICHARD C. SCHNEIDER
DIRECTOR OF STATE/VETERANS AFFAIRS**

BEFORE THE

SUBCOMMITTEE ON BENEFITS

**COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES**

ON

**H.R. 3193
DUTY TO ASSIST VETERANS ACT OF 1999**

MARCH 23, 2000

Chartered by the United States Congress

DISCLOSURE OF FEDERAL GRANTS AND CONTRACTS

The Non Commissioned Officer Association of the USA (NCOA) does not currently receive, nor has the Association ever received, any federal money for grants or contracts. All of the Association's activities and services are accomplished completely free of any federal funding.

INTRODUCTION

Mr Chairman and distinguished Members of the Subcommittee, the Non Commissioned Officers Association of the USA (NCOA) is most grateful for the opportunity to appear today. As an accredited veteran service organization, the Association is privileged to routinely assist veterans in the preparation and submission of compensation and pension claims to the Department of Veterans Affairs (VA). With this experience, NCOA recognizes that today's hearing is of critical importance to all men and women who serve or have served in the Uniformed Services of this Nation. The significance of this hearing cannot be overstated because of the redefinition of VA's "duty to assist" that changed the entire claims process into an adversarial relationship between the veteran and VA

Historically, VA was considered the veterans advocate and provided administrative and technical assistance to support individual veteran claimants. VA not only assisted but also, in fact, advised and supported veterans by ensuring proper claims development for all benefits for which eligible. These requirements were recorded in 38 C.F.R. as regulatory processes, taught in training programs, and defined as necessary to ensure that veterans were well served. While these procedural concepts were defined in regulations, discussed and merits validated by representative veteran committees of the House and Senate, no effort was determined necessary to incorporate the concept(s) into law. The system as defined in 38 C.F.R. worked so successfully that the issue was a non-issue.

VBA procedures contained in 38 C.F.R. Section 3.102 detailed the provision that *reasonable doubt* arising from service origin, degree of disability, or any other point would be resolved in favor of the veteran. Reasonable doubt provides that given an approximate balance of positive and negative evidence which neither proves or disapproves a veterans claim, then reasonable doubt would favor a decision in support of the veteran claim.

Included in the due process procedure under 38 C.F.R. Section 3.103 (1987) was contained the obligation that VBA not only assist a claimant in developing the veterans claim but render information and assistance to secure every benefit available under law. NCOA considers these

actions absolutely vital to a veteran's ability to establish a claim that will satisfy all requirements in law.

The provisions of 38 C.F.R. of 1987 further defined a claim as an application made formally or informally by the veteran. This allowed the receipt of the informal inquiry to be the date that the claim was considered filed for the purpose of benefits. The duty to assist enabled VBA representatives to take whatever action was necessary to research and develop the veteran's claim. Veterans provided the basis for VBA representatives to pursue information to insure a well-grounded claim

The **Veterans' Judicial Review Act** established the Court of Appeals for Veterans Claims (CAVC, formerly Court of Veterans Appeals) and provided in law its basis for existence. Among the implementing provisions was the requirement (Title 38, Section 5107) highlighted below which placed the veteran in the position of becoming his own advocate

"the requirement that the veteran "shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded."

The veteran under this law is required to meet the evidentiary requirements for a well-grounded claim before VA can accept the claim. These simple words changed the whole concept of advocacy and support by VA to assist in the development of the claim. Absent a "duty to assist," VA is now placed in the role of evaluator as to the relative merit of the evidence that a claim is or is not well grounded. The change further presented an ethical consideration on the institution's role in the interpretation of whether or not a case is well grounded. Absent in the language of the law were a number of issues regarding VA's role including veteran advocacy and duty to assist in development of a veteran's claim.

The Veterans Judicial Review Act provided the basics for a legal system that would eventually challenge the methods and procedures used in the development of veteran claims. A number of such opinions directly addressed this issue including *Morton V. West*, which substantially

redefined VA's role. Under the new policy guidance issued in 1999: VA became a threshold arbitrator in accepting veteran claims while the burden and responsibility was placed on the veteran to prepare, document and submit a claim that on its merit would be considered a well grounded claim. VBA staff were relieved from providing claim development service and were thereby able to summarily turn veterans away to develop their own claims.

NCOA recognizes that most all veterans have neither the ability nor an understanding of laws and regulations, to properly represent themselves in veteran compensation and pension claim matters. Service officers of this Association, like VA service center support staff, need continual training and information to keep current on the administrative criteria of the veteran claim processes. It is inconceivable in the Association's view that any veteran can effectively represent themselves in these processes. The mere frustration of the process would stifle the veteran from pursuing deserved benefits.

CONCLUSION

The recent CAVC decisions on the development and acceptance of claims and the resultant VA implementation instructions make this Association ENTHUSIASTICALLY REQUEST THE CODIFICATION IN LAW OF the following recommendations contained in H.R. 3193:

- The act shall boldly be entitled "DUTY TO ASSIST VETERANS ACT OF 1999"
- That a new subparagraph 5103A be added that shall clearly provide direction that the Secretary shall assist a person who submits a claim for a benefit under a law administered by the Secretary in developing information pertinent to a decision on the claim.
- (a) The Secretary shall assist a person who submits a claim for a benefit under a law administered by the Secretary in developing information pertinent to a decision on the claim

(b) The assistance that shall be provided by the Secretary under subsection (a) before a decision on the claim is rendered shall include the following.

- (1) Requesting information as described in section 5106 of this title.
- (2) Informing the claimant of the information and medical or lay evidence need in order to fully develop the claim
- (3) Requesting the information identified or referenced by the claimant if the claimant has executed a release of information authorizing the Secretary to obtain the information.
- (4) Informing the claimant if the Secretary is unable to obtain pertinent evidence such as service medical records or other evidence identified by the claimant.
- (5) Providing a medical examination for the purposes of determining the current disability of any veteran who is unable to afford medical care as determined under section 1722(a) of this title.
- (6) Any other assistance the Secretary considers necessary and appropriate to assure the proper development of the claim

These thoughtful elements of H.R. 3193 literally provide in law the process that has served veterans well over the past years.

Mr Chairman, this Association stands ready to support the Subcommittee in every way possible to make these provisions a reality and again restore the Department of Veterans Affairs advocacy role for veterans.

Thank you for the opportunity to participate in this hearing.

**STATEMENT OF
RICK SURRATT
DEPUTY NATIONAL LEGISLATIVE DIRECTOR
OF THE
DISABLED AMERICAN VETERANS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON BENEFITS
UNITED STATES HOUSE OF REPRESENTATIVES
MARCH 23, 2000**

Mr Chairman and Members of the Subcommittee:

I am pleased to come before you to state the views of the Disabled American Veterans (DAV) on the "well-grounded" claim requirement imposed upon the Department of Veterans Affairs (VA) by the courts, the problems related to that requirement; and H R. 3193, a bill that would remedy those problems. For the reasons I will discuss below, the DAV considers this an extremely serious problem that makes enactment of remedial legislation an urgent matter.

Although the courts have given it an entirely new meaning, the requirement that veterans establish that their claims are well grounded is not a new one. This requirement existed in administrative practice since the 1920s. This was the standard for determining whether a veteran had satisfactorily proven entitlement to the benefit claimed. Under VA's administrative rule, now 38 C.F.R. § 3.102 (1999), "the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded." This rule is consistent with the traditional rule that a person making a claim has the burden of proving that claim. In the VA claims system, VA has a legal duty to assist the veteran in obtaining evidence from the military, from VA facilities, or from private sources, however. This "duty to assist" is in recognition that the government has a special obligation to help veterans prosecute their claims and ensure they receive the benefits a grateful nation has provided for them. The system was designed to obligate VA to work in veterans' best interests and deliver benefits to them without their being required to have expertise in VA law or to retain representatives to argue their cases. Unlike judicial or other administrative proceedings, VA's procedures were to be informal and helpful to veterans, in the spirit of the benevolent purpose of veterans' programs.

While requesting records from Government or private sources is a simple and routine task for VA, it can be well beyond the ability of many veterans. The laws concerning maintenance of records and privacy are designed to allow routine exchange of information between Government entities and contemplate agencies providing such information directly to one another, while these same laws place certain restrictions on release of information to individuals. For example, 38 U.S.C. § 5105(b) provides that certain claims for Social Security benefits will also serve as claims for VA dependency and indemnity compensation (DIC), or vice versa, and that the agency which receives the application will transmit it and supporting documents to the other agency. Under 38 U.S.C. § 5106, the head of any Federal agency must furnish the information VA requests for purposes of determining eligibility for benefits. However, 5 U.S.C. § 552a (f)(3) (the Privacy Act of 1974) permits Federal agencies to deny

disclosure of medical information directly to an individual when, in the judgment of the agency, the information could have an adverse effect upon the individual, and 38 U.S.C. § 5701(b)(1) requires VA to release information to veterans or claimants only when such disclosure would not be injurious to the physical or mental health of the veteran or claimant. Similarly, state laws allow state and private entities to refuse disclosure of medical records to individuals when a physician or other health care provider has determined that the information would be injurious to the patient's health or well being.

When Congress was considering legislation to authorize judicial review of VA's claims decisions, it realized that judicial review might tend to change VA's paternal relationship with veterans. Congress also realized that courts tend to favor formal procedures. To preserve the informal characteristics of the existing claims process and to protect against abandonment of VA's duty to assist and its liberal burden of proof in the environment of judicial review, Congress adopted the rule on well-grounded claims and the duty to assist and included them in the law. The sole reason Congress saw fit to incorporate these administrative rules in the law was to preserve them and ensure their continued application. However, simply because the law stated the well-grounded claim requirement first and the duty to assist second, the Court of Veterans Appeals, now the Court of Appeals for Veterans Claims (CAVC or "the Court"), interpreted the law to mean that veterans are required to prove their claims are well grounded before VA has any duty to assist them in gathering evidence. That interpretation obviously defeats the duty to assist because, to be entitled to VA assistance, veterans must first do alone the very thing for which they seek assistance. Under that interpretation, the law negates its own object. This misinterpretation of the law fundamentally changed VA's claims procedures in ways that adversely impact upon veterans seeking benefits and VA alike.

A brief comparison of the procedures that existed before with those that exist after the court-imposed change aids in understanding how the court-imposed procedure has impacted upon veterans and VA. Under the VA procedure that existed from the 1920s until CAVC changed it, the process was simple. On the application form for the benefit being claimed, the veteran provided VA with all the relevant information about his or her military service and the sources of evidence to prove entitlement. Once the veteran filed the application, VA clerical personnel proceeded to request all necessary records from Government and private sources. After all available pertinent evidence was received, the claim was referred to an adjudicator for a decision. For example, when a veteran claimed service connection for combat wounds, injuries, or a disease, VA requested the military medical records to determine whether they showed the disability during service. When the service medical records were received, the case was referred to a rating board for a decision. In the case of injuries serious enough to leave residuals or chronic diseases of service origin, verification of service incurrence established entitlement to service connection. VA then ordered an examination to determine the current level of disability and what disability rating should be assigned. Where the service medical record showed presence of the claimed disease but was insufficient to demonstrate that the disease was "chronic," that is, one that is not merely temporary in nature, VA would obtain any available post-service treatment records to determine if they demonstrated persistence of a chronic disease. Occasionally, questions would arise as to whether certain symptoms or manifestations were related to and a part of the service-connected disability or some nonservice-connected cause. In such case, VA rating boards would ask for an opinion from the VA examining physician.

Through established channels and set procedures for exchanging information between agencies, VA routinely developed millions of claims in this manner. VA was not taking the burden of proving the claim upon itself; it was merely assisting the veteran in the task of obtaining available evidence. This system was advantageous and efficient for VA because VA controlled an orderly, methodical process of record development and claims adjudication. VA employees knew what material facts had to be proven in each type of claim and how to go about obtaining the relevant evidence, where veterans generally do not understand these complexities. This system worked well for VA and veterans.

Through a misinterpretation of law that neither the Court nor VA is willing to admit though it is obvious, that simple, efficient, equitable, and time-tested system has been turned upside down and replaced with one characterized by confusion on the part of veterans and VA employees, lack of uniformity, unnecessary formalities, duplicative work processes, protracted appeals to resolve only procedural issues, added expense for veterans, and unjust denials of meritorious claims.

Under the process imposed by the Court, in which the veteran must show that the claim is well grounded as the first step, the veteran must provide, without assistance, evidence to preliminarily establish all material facts before VA has any duty to assist him or her. Where, under the previous procedure, VA gathered all relevant evidence and disposed of the claim with one decision, now, under the court-imposed process, veterans must prove the material facts preliminarily and again for the ultimate decision, and VA must make at least two decisions on every claim. The very first step for VA is a decision as to whether the claim is well grounded. If the application is accompanied by evidence sufficient to establish that the claim is well grounded, or if the veteran later submits evidence sufficient for this purpose, VA theoretically or ostensibly assists the veteran in gathering more evidence to prove the claim ultimately. In reality, the same evidence that serves to establish that the claim is well grounded, in most instances, is necessarily the same, and only, evidence that can serve to prove the claim ultimately. This process therefore rests on the pretense that, once the veteran has provided evidence to demonstrate that the claim is well grounded, VA will assist the veteran in gathering separate evidence to prove the claim ultimately. The net effect of the pretense is one in which VA avoids the duty to assist by requiring the veteran to obtain the necessary evidence without VA assistance, with full knowledge that no further evidence can be obtained. In many kinds of VA claims, only one document can serve to prove an element of the claim, and no possibility exists for gathering separate evidence to prove the claim ultimately.

Despite this pretense and the real fact that there can only be one set of evidence in most cases, two decisions are nonetheless a required formality for every claim. To avoid assisting the veteran, VA is willing to go through all the effort of making at least one additional decision—and often more than one additional decision—that accomplishes nothing beneficial, but clearly wastes time, effort, and resources. With each additional decision on a claim, VA must also provide the veteran an additional notice. As is readily apparent, the requirement for two decisions in place of one could almost double the amount of work that must be done by VA to dispose of claims.

That is only part of the story, however. This court-imposed procedure has complicated the process for both veterans and VA employees. Different types of claims present different questions of fact. However, the Court has articulated a three-part general formula for establishing a well-grounded claim for service connection that, for many types of cases, goes well beyond the requirements of law, and even common sense. As a result, VA requires veterans to provide evidence to preliminarily establish facts that are not required to prove ultimate entitlement. As a consequence of the inappropriate generalization in that formula and their lack of training in understanding the fine distinctions between a court decision on one type of case and a court decision on a slightly or substantially different type case, VA employees often fail to understand what is required in a given case, and their decisions are wrong. VA adjudicators are even denying claims because veterans failed to prove, as part of the well-grounded requirement, facts that the law presumes. VA's written explanations and instructions to veterans are often vague, ambiguous, contradictory, or erroneous. Great variations exist between the interpretations and practices of different VA regional offices. The resulting confusion and frustration on the part of veterans creates an environment of disagreement and mistrust and provides fertile ground for appeals and the necessity for even more decisions to resolve claims.

To establish that a claim for service connection is well grounded under the Court's three-part formula, a veteran must provide evidence to demonstrate (1) that he or she incurred or suffered aggravation of a disability during military service, (2) that he or she has a current disability, and (3) that there is a causal connection (a "nexus") between the disability shown during service and the disability that currently exists. Under VA's instructions on the application of this formula, lay evidence can be "competent" for purposes of establishing service incurrence or aggravation if it involves "an event that is ordinarily susceptible to observation and verification by lay persons", otherwise, "medical evidence will be necessary." However, "[m]edical evidence is required to establish the current disability and nexus requirements."

This formula requires more to establish that the claim is well grounded than VA's rules require to prove service connection for most disabilities, including chronic diseases, tropical diseases, and injuries. Under VA's rules governing service connection, if evidence shows that a veteran incurred multiple sclerosis, for example, during military service, that alone proves service connection. In such instance, current disability has no bearing on the question of service connection, it is relevant only to assigning a disability rating. Inasmuch as multiple sclerosis is a chronic disease with permanent physical damage to the nervous system, it is absurd to require the veteran to provide medical evidence to prove that he or she currently has multiple sclerosis and a physician's opinion to demonstrate that the current multiple sclerosis is related to the multiple sclerosis shown during service.

Similarly, it is absurd to require a veteran who lost an eye, a leg, or an arm, for example, during service to provide medical evidence that he or she still has a missing eye, leg, or arm and a physician's opinion that the missing eye, leg, or arm shown today is the same eye, leg, or arm lost during service.

Under VA's long-standing rules governing proof of service connection, evidence of current disability and a link to disability shown during service is required only in cases where

those facts are legitimately in question, such as in the case of a disease not clearly shown to have been chronic during service

Under the law, a veteran is entitled to a nonservice-connected disability pension if the veteran has qualifying wartime service, income within prescribed limits, and disability that is either permanent and total under VA medical criteria or, alternatively, is shown to render the veteran unemployable. Permanent and total disability is conclusively established for any permanent disability that meets the requirements for a 100% evaluation under VA's rating schedule. In addition, VA regulations provide that loss or permanent loss of use of two extremities or the sight of both eyes, or being permanently helpless or bedridden, conclusively establishes permanent and total disability. Where the veteran has a disability that is permanent and total under these rules, the veteran is not required to provide evidence of unemployability. Yet, VA's instructions to its field office adjudicators, require all veterans seeking pension to provide medical evidence that they are unemployable to make the claim well grounded. That means that a veteran with amputation of both legs or removal of both eyes could come to VA, file an application for pension, and have the claim denied as not well grounded because the veteran did not provide "medical" evidence to show that he or she is unemployable.

Purportedly, all claims governed by procedures in 38 C.F.R., part 3, are subject to the well-grounded claim requirement. Therefore, a well-grounded claim is a preliminary prerequisite that the veteran or claimant must satisfy before VA will make a second decision to determine entitlement to a wide range of benefits such as the clothing allowance and burial allowance. As discussed below, it is impossible for the veteran or claimant to provide the evidence to preliminarily prove certain elements of these kinds of claims for purposes of meeting the well-grounded requirement.

Our National Service Officers (NSOs), who provide representation to veterans and other claimants across the country, have reported serious injustices and widespread problems related to VA's attempt to follow the Court's requirements on the well-grounded claims. They report that the procedure generally places undue burdens upon veterans who often experience difficulty in understanding VA's confusing instructions and what is required of them, that veterans experience difficulty in understanding how and where to obtain the evidence necessary to establish that their claims are well grounded, and that veterans incur expense in obtaining evidence that is typically provided to VA free of charge. Our NSOs also report that this procedure provides a way for VA to quickly and easily deny claims, that it is used by some VA regional offices as a way to make it appear their timeliness is improving, and that some regional offices are so hasty in finding claims not well grounded that they neglect to note that the application was accompanied by evidence to make the claim well grounded. We have received far too many complaints to quote them all here, so we will provide only a sample.

One of our NSO supervisors reported several of these problems related to VA's implementation of the court-imposed requirements and explained how they negatively impact on veterans and VA:

As a result of implementation of instructions contained within VBA [Veterans Benefits Administration] letter 20-99-60, it is the observation of this

representative that the burden being placed upon the veteran to put forth a well-grounded claim is the highest it has ever been. It is apparent that as the VA attempts to rethink [its] adjudicative process, the well-grounded claims instructions implemented in the VBA letter allows VA to lower [its] timeliness rates, and at the same time, place an unfair burden upon the veteran and his/her representative to undertake their development process. This process will allow the VAROs [VA Regional Offices] around the country to meet their score card goals which will reflect better timeliness and less pending claims, but the long term effect will mean an increased number of appeals in [an] already overwhelmed appeals process.

. We are assisting the veterans in compiling the required documentation to set forth a well-grounded claim at its inception to include copies of service medical records (SMRs) being provided with the original application for benefits. The RO is issuing 30-day not well-grounded letters even though the veteran is filing his original claim within a year after separation from service and providing the necessary medical evidence. This is bringing the claims processing to a snail's pace on original claims. We are informing the RO that there are no private medical records to obtain and requesting examinations, if needed, for the purpose of facilitating a rating decision. This station currently has approximately 7,200 cases pending. When we enter a memorandum into the system informing the Adjudication Division that additional medical evidence exists at a VA Medical Center (VAMC), by the time that memorandum is being matched with the claims folder, the rating decision has already been accomplished as a result of no response within the VA's 30-day well-grounded letter. Once the memorandum is associated with the claims folder, the RO is obtaining those records and undertaking the proper development at that point. I have spoken to several VBA Adjudicators on station, they are as frustrated as we are concerning the instructions that are being implemented concerning this issue. . . .

My office is dealing with a host of frustrated veterans who cannot understand why the VA is requiring them to do a majority of the legwork in accomplishing their claim for benefits. This entire process has had an adverse effect on not only the veteran, but the Adjudication Division itself. This station has noticed a decline in the timeliness rate on several of their EPs [end products]. However, once the medical evidence that was solicited in the 30-day letters [is] associated with the claims folders, the folders are being routed back to the original Adjudicators to undertake proper development that would have been done the first time, if not for these new instructions. I believe the consequences of the not well-grounded instructions are counterproductive to the VA's own adjudicative processes and they are most certainly unjust to the veterans who file claims and expect an accurate and timely decision surrounding their benefits application.

Our NSO supervisor at the Buffalo, New York, office summarized the situation as follows.

To the extent that a pattern has emerged from this RO's application of the WGC [well-grounded claim] criteria, it is that the WGC criteria seems to be a convenient adjudicative "shield" that permits the RO to dispose of claims expeditiously without, of course, developing evidence to decide the claim on the merits. When in the adjudicative hands of a rating board member it has become an effective tool to avoid developing claims, and of shifting the responsibility for development of the claim. This in turn results in multiple reviews and decisions on the same claim, which doesn't only exist at the local level, it extends through the BVA [Board of Veterans' Appeals] and even the CAVC. This is quickly developing into a vicious cycle resulting in a more bogged down claims process than what currently exists. Veterans are becoming more frustrated and distrustful towards the system, which Congress initially established to assist them for their service to this great country.

Our supervisor in Louisville, Kentucky, explained that veterans do not understand the complexities of the new process, and the complexities are compounded by unclear VA instructions in written notices.

The DVA's [VA's] letter that provides a lot of technical language about the way a claim may be well grounded compounds this problem. Frequently, the DVA fails to even specify what issue is not well grounded, instead relying on a generic one size fits all form letter providing a definition of well grounded, and informing the claimant that a 30 day period will be allowed to well ground the claim before the DVA proceeds with rating the issue.

This supervisor observed that requiring veterans to obtain medical records has a particularly adverse effect upon homeless veterans. "Additionally, we have noted problems with homeless veterans. Even if they do happen to actually receive the incomplete application notice, they have no way to obtain the records from various places they have been treated, often covering several states."

After discussing problems related to specific types of claims, including denial of claims of former prisoners-of-war as not well grounded and delays inherent in the new procedure, this supervisor observed that the current process adversely affects VA, causes unfair denials, and leads to appeals.

While this policy change may initially seem to relieve some of the stress placed on the adjudication section, our observation shows it actually increases the length of time for an average claim, and results in extra workloads being placed on the appeals team and the Hearing Officers. These denials based on not being well grounded inevitably result in an appeal by the victim of the policy change, the standard applicant for benefits.

In conclusion, we feel the DVA's policy change has resulted in the denial of many claims that would have been granted if they had proceeded to obtain the medical records from service and records shown on VA Form 21-4142 [veteran's

authorization or release of medical records to VA] Kentucky's veteran population is frequently unable to understand the generic letter of impending denial, and inevitably reply with a Notice of Disagreement when the final denial is provided.

Our supervisor in Lincoln, Nebraska, provided an example in which a veteran who was released from service on December 22, 1999, filed an original application for compensation on January 31, 2000, accompanied by service medical records showing the disabilities claimed, and received a letter from VA stating that his claim was not well grounded. Where a veteran has just been released from military service and provides evidence of disability during that service that has just ended, it is absurd to require medical evidence of a "current" disability and medical evidence to demonstrate that the current disability is the same, or related to the same, disability shown in service. Under the prior procedure, it having been proven that the veteran incurred disability in service, a rating board would have had the veteran examined to determine the severity of the disability and then awarded service connection.

Several other supervisors complained that VA denies claims as not well grounded even though the veterans have just been released from active duty and provide with their applications their service medical records showing the disabilities claimed. These examples are too numerous to include here, but we provide the comments of our supervisory NSO in Detroit, Michigan.

Recently discharged veterans are being called to "well ground" their claims for service connection by furnishing medical evidence their claimed disabilities still exist. Little consideration is initially given by Rating Board members to determine whether or not service medical records document a chronic condition rather than an acute disability before well-grounded development is initiated. For example, a recently discharged veteran (1-16-00) filed a claim for service connection for a number of disabilities on January 6, 2000, ten days prior to his discharge. The veteran was asked to well ground his claim with current medical evidence showing the continued existence of these claimed conditions. The veteran's separation physical showed either diagnosis or continued complaints of the veteran's claimed conditions. [In response to a complaint by the NSO, the rating board member] indicated that his instructions were that the proximity of the date of the veteran's discharge did not alter the requirement for well-grounded development. In this case, the veteran himself called his DAV representative when he received the VA request and asked why he needs to furnish current medical evidence when this two-month old separation physical showed the existence of these conditions.

Our supervisor in Hartford, Connecticut, was one of several who complained that VA is inappropriately denying claims of recently discharged veterans as not well grounded. She noted regarding the well-grounded claim requirement, "it appears to me that it is an easy way of clearing one's desk and quickly disposing of a claim by denying the claim as not being well grounded." She also noted that the well-grounded requirement is causing veterans undue financial hardship because they have to pay physicians to get opinions to establish that their current disabilities are related to the same disabilities shown during service:

Although the VA came out with VHA Directive 98-052 allowing VA physicians to offer opinions as to etiology of a claimed condition, trying to get the opinion is extremely difficult nonetheless. Many physicians still fear retribution, don't have the time to review the necessary papers or outpatient treatment records, or are unaware the restrictions to offering an opinion have been lifted. Thus, forcing the veteran to secure private physician opinions and seeing different specialists for each condition claimed. This has essentially barred some veterans from obtaining benefits at all when they get no cooperation from the VA Medical Center physicians and cannot afford to seek a private opinion.

Some veterans rely on VA as their sole source of medical care; however, many VA physicians are reluctant to provide veterans with opinions to support benefit claims. On the other hand, VA physicians at some locations are providing medical opinions to link current disability with that shown during service. Unfortunately, this expends the time and resources of VA medical facilities. On this point, our supervisor from Albany, New York, remarked "This has also created additional work for the VA Medical Center where primary care providers are being requested to provide statements in order to well-ground claims."

Due to the problems obtaining medical opinions to satisfy the so-called nexus requirement of a well-grounded claim, our Hartford supervisor remarked "Unfortunately, this has caused some veterans to become quite irate and drop the claim, distrusting the government to 'do the right thing.' Veterans have complained that they have to 'jump through hoops' to get any benefits." She concluded "The only entity the *Morton* decision [the CAVC decision that held VA cannot voluntarily assist veterans who have not established well-grounded claims] is helping is the Department of Veterans Affairs, certainly not the disabled veterans. It has enabled VA to dispose of mass claims in an expeditious manner and bring their 'numbers' up to a more socially/politically acceptable level."

A number of our offices complained that VA is exploiting the well-grounded claim requirement to quickly dispose of claims, while allowing other claims to go unresolved for long periods of time. Our supervisor in New York City stated.

Without a doubt, the RO has placed an unprecedented effort on the NWG cases. This has caused delay on the handling of other end products. Furthermore, in the rush to get the cases completed, decisions are being made without a thorough search of the mail. This results in denials based on the veteran's failure to [respond] to the initial NWG letter when in actuality the veteran responded timely, but his/her response was not associated with the claims folder when the rating decision was made. This is not to say we do not have the regular run of the mill errors.

Some of the letters are inaccurate or just too complicated for the average person to understand. However, the worst outcome has been the burden placed on a population that is usually under employed, without quality health care, and many of whom are homeless. They must now obtain quality medical evaluations,

which are often expensive, in order to get their claims considered Many just do not bother

From information provided by DAV's field offices, some VA regional offices obtain service medical records for veterans, others do not, and some obtain them only for recently discharged veterans Our supervisors report substantial inconsistencies in applying the requirements, even among different adjudicators within the same regional offices Apparently, a few directors of VA regional offices believe the well-grounded claim requirement is so contrary to the philosophical bases underlying veterans' programs that they either have not implemented the requirement at all or enforce it very loosely It is also apparent that some VA adjudicators themselves often do not understand the requirements One of our supervisors remarked "As to the proper understanding of the well grounded concept in this RO, I could ask ten different adjudicators their interpretation of the requirements and get ten different answers" Without a doubt, VA's letters to veterans from all offices are confusing for the average person Also, when VA's letters inform veterans they must provide service medical records, the letters do not tell veterans where to write for those records Veterans everywhere are having great difficulty understanding and fulfilling the well-grounded claim requirement They are having difficulty fulfilling it because they rely on VA for their medical treatment, but cannot get VA to provide the required medical opinions, and they cannot afford to obtain them from private sources or cannot afford to pay for copies of private treatment records One office reported problems related to medical care providers refusing to release medical records directly to veterans on grounds that information in the records would have harmful effects upon the veterans

The problems just discussed are some of the ones that seem most prevalent, although our supervisors report many more Our supervisor in Nebraska provided these general observations about the well-grounded claim requirement and its effects

It is the opinion of this representative the implementation of the well-grounded claim process has adversely impacted the veterans of Nebraska The adverse effect is noted in increased frustration, delay in processing of claims, and increased paperwork and workload due to Notices of Disagreements being filed which would not have been needed had the claims been properly adjudicated after assistance had been given in the pursuit of the veteran's claim

The frustration on the part of the veteran results in continued distrust of the VA claims process and the feeling the Government they fought to defend has let them down once again In a few instances our veterans have stated they wish to "just forget it" We have found in some of our veteran's cases they do not have the money nor insurance needed in order to obtain the evidence requested and therefore ultimately find they are unable to pursue the claim

In addition to the veteran population, we have found the local VARO employees see the overall process as an additional cog in the wheel of veteran's claims, resulting in a decrease in the processing of pending claims

Our supervisor in Chicago summarized the situation there, which seems to be typical of many VA regional offices

In the short time the Chicago VARO has been utilizing the policies mandated by VBA Letter 20-99-60 a wide array of letters are being sent to claimants indicating their claims have been denied as not well-grounded. . . . Additionally, we believe the different letters being sent to claimants are confusing and lacking detailed information. This has caused an increasing need for our office to intervene and provide clarification .

Seemingly, local practice, as indicated by the enormous amount of claims denied since October 1999, has warmly embraced and accepted this practice, thereby taking advantage of the well-grounded claim requirement. The number of claims, which have been denied since October 1999, is indicative of an adversarial process without conscience. Although there have been claims rightfully denied as not well grounded, we have returned a number of claims for corrective action.

The local adjudicators seem to have proper understanding of the well grounded concept and requirements as defined by VBA Letter 20-99-60, however, we are of the opinion that some adjudicators are quick to deny a claim as not well grounded based upon a workload factor instead of fairly disposing [of] the claim

Overall, we believe this practice is counterproductive and unjust by unfairly imposing requirements on claimants to develop their own claims, or provide evidence without VA assistance. As you know, a vast number of claimants do not have the ability or means to fulfill these requirements without VA assistance [T]herefore claimants may never receive those rightfully earned benefits

Our supervisor in Des Moines, Iowa, remarked that the well-grounded claim requirement "has placed an unjust burden upon the shoulders of many claimants who have legitimate claims and have caused the VA to become an adversarial place." He noted

A number of claimants have walked away from their claim or even filing a claim, simply because they don't feel that the VA is doing what it is supposed to be doing and therefore why even try. To quote a number of claimants that I have spoken with "The Government has found another way to screw us vets." I think this can sum up what many are thinking

Again, this represents only a sample of the complaints our NSO supervisors have made regarding this issue

Certainly, the adverse effects of this requirement do not distinguish between the most meritorious claims and those in which entitlement may ultimately be found to not exist. We are aware of one recent case in which VA held that the claim of a Medal of Honor recipient seeking service connection for shell fragment wounds was not well grounded. Because VA quickly

reversed itself when it realized what it had done and of the interest in the case, the veteran did not want us to identify his case in our testimony.

In some instances, VA imposes well-grounded claim requirements that are impossible to satisfy. Under VA practice, its adjudicators determine whether a claim is well grounded as the first action after receipt of the application. If the claim is not well grounded and the veteran does not submit satisfactory evidence to make it well grounded, VA denies the claim. As noted, to establish a well-grounded claim, the veteran must submit evidence to preliminarily establish the same facts that must be established to prove the claim ultimately. A necessary premise for dual decisions—one on well groundedness and another on entitlement—is that one type of evidence is considered in the first decision and a different type of evidence is considered in the second. VA insists that it is not requiring veterans to prove the case to the same degree of certainty in the first decision as it is in the second. One case in which a veteran's claim for clothing allowance was denied as not well grounded demonstrates that VA has made it impossible for the veteran to successfully prosecute a claim for clothing allowance although the evidence shows he fully meets the eligibility requirements. The law entitles a veteran to clothing allowance when he or she, "because of service-connected disability, wears or uses a prosthetic or orthopedic appliance . . . which the Secretary [of Veterans Affairs] determines tends to wear out or tear the clothing of the veteran." VA considers all leg braces with steel components to meet the requirements for the clothing allowance. However, under VA regulations, veterans must go through a process in which the appropriate VA outpatient clinic certifies that the veteran wears a prosthetic or orthopedic appliance that tends to wear or tear clothing. The request for this certification must come from the VA regional office after the veteran files a claim for the clothing allowance. The application form includes filing instructions, which say nothing about a requirement to include evidence with the application. VA's Adjudication Manual provides that the regional office will approve or disallow the claim based on the certification provided by the outpatient clinic.

In this case, the VA Regional Office in Hawaii denied a veteran's claim for clothing allowance. The veteran was service connected for a disability of the left knee, and the record contained evidence that the veteran wore a metal knee brace provided by VA for his service-connected disability. The record also included a written statement by the veteran that he used a knee brace which wore out his clothing. In August 1997, the regional office erroneously denied the claim on the basis that the record did not show the veteran wore a knee brace. The Board of Veterans' Appeals acknowledged that the regional office made an error in that respect but nonetheless denied the claim as not well grounded. The Board held that a well-grounded claim for clothing allowance "has two elements: the presence of a service-connected disability, and certification by the Chief Medical Director [now the Under Secretary for Health] or his designee [the outpatient clinic has been delegated the authority to provide the certification] that because of such disability a prosthetic or orthopedic appliance is worn or used which tends to wear or tear the veteran's clothing." Because the regional office had erroneously determined that the veteran did not wear the brace, it did not request the certification from the outpatient clinic. The Board held that the veteran's claim must be denied as not well grounded.

because the veteran had not provided the required certification from the Chief Medical Director (i.e. the certification from the VA outpatient clinic).

The veteran has met the first prong of the well-groundedness test; namely, he has a service-connected left knee disability by virtue of the RO's May 1997 rating decision.

He has not met the second prong of the test, however. The Chief Medical Director or his or her designee has not certified that because of such disability a knee brace is worn which tends to wear [sic] or tear the veteran's clothing, and the veteran may not stand in the place of the Chief Medical Director or his or her designee with his own statements. The regulation specifies that the only one who is competent to render this certification is the Chief Medical Director or his or her designee.

In response to the representative's argument to the Board that it should remand the case with an order for the regional office to obtain the certification, the Board stated that the regional office had cited the regulation that specified the requirement of the certification, and that "from a plain reading of the regulation it is easily ascertainable what type of evidence needs to be submitted to make the claim well grounded, and where the veteran can obtain it." In other words, the veteran should have known that he was required to provide this evidence to make the claim well grounded. The Board also reasoned that it could not remand the case with instructions that the regional office obtain this certification because to do so would violate the prohibition against assisting veterans who have not established well-grounded claims. "Moreover, there is no VA duty to assist a claimant who has not submitted a well-grounded claim, and in fact, VA may not assist a claimant who has not submitted a well-grounded claim." The veteran's time pursuing this claim and appeal, from August 1997 to December 1999, was wasted. Thus, this is a situation where the veteran must provide with his application evidence to make the claim well grounded, and it must be the exact same and only evidence that can establish entitlement ultimately, but it is evidence the veteran cannot possibly provide because it can only be obtained through internal VA procedures in which an authorized regional office employee makes an official request to the outpatient clinic. Under the strict requirement of a well-grounded claim as a precondition for VA assistance, the VA official cannot provide this assistance, however. Not only is this absurd, it exposes the untruth of VA's argument that less is required to establish a well-grounded claim than to prove the claim ultimately and that two different types of evidence exist for these two different decisions. It also strongly suggests that VA is unconcerned about using this well-grounded requirement to prevent veterans from obtaining benefits to which they are clearly entitled.

As noted, we have cases in which VA denied claims as not well grounded even though the law provided for presumption of service connection. For example, on March 3, 2000, the Buffalo, New York, VA Regional Office determined that the claim of a Vietnam veteran, an Army chaplain, seeking service connection for prostate cancer was not well grounded, although the veteran noted on his application for compensation that he had been treated in the Syracuse VA Hospital from 1995 to the present for prostate cancer and although the law presumes service

connection for prostate cancer in Vietnam veterans. Other examples of routine denials of meritorious claims on the basis that they are not well grounded are too numerous to include here.

VA has proposed regulations to implement the court-imposed requirement regarding well-grounded claims. Because the proposed regulation is based on the Court's misinterpretation of the meaning of well-grounded claim, it is fundamentally flawed. Apart from being premised on an error in law, the proposed rule contains provisions that contravene numerous other VA rules on such matters as principles of service connection and admissibility of evidence. The proposed rule would compound many of the problems cited above and make an already bad situation worse. We have provided this Subcommittee a copy of DAV's comments on this proposed rule, and invite your attention to them.

Other than a decision by the Court of Appeals for the Federal Circuit, or the Supreme Court, overruling the erroneous interpretation of the well-grounded requirement, the prospects of which are uncertain, this deplorable situation can only be remedied by legislation. H R 3193 would restore and define VA's duty to assist and remove the well-grounded requirement from the statute altogether. The DAV applauds and strongly supports this bill, which had 109 cosponsors at last count. We urge this Subcommittee approve H R 3193 and report it to the full Committee as soon as possible.

On behalf of the DAV, I want to thank the Subcommittee for its consideration of this issue and for the opportunity to present our views. We sincerely appreciate your continuing support of veterans.



DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Disabled American Veterans (DAV) does not currently receive any money from any federal grant or contract.

During fiscal year (FY) 1995, DAV received \$55,252.56 from Court of Veterans Appeals appropriated funds provided to the Legal Service Corporation for services provided by DAV to the Veterans Consortium Pro Bono Program. In FY 1996, DAV received \$8,448.12 for services provided to the Consortium. Since June 1996, DAV has provided its services to the Consortium at no cost to the Consortium.

Statement of Leonard J. Selfon, Esq., Director, Veterans Benefits
Program, Vietnam Veterans of America

Vietnam Veterans of America

Well-Grounded Claims and H.R. 3193
March 23, 2000

Mr Chairman and other distinguished members of the Subcommittee, on behalf of Vietnam Veterans of America (VVA), I am pleased to have this opportunity to present our viewpoint on one of the most important issues facing veterans and their dependents, that is, the reciprocal statutory obligations of claimants to submit well-grounded claims for veterans' and dependents' benefits and of the Department of Veterans Affairs (VA) to assist them with the development of their claims. VVA is most appreciative of your allowing us to participate in this hearing, and for your leadership in helping to resolve what has become a daunting obstacle to both deserving claimants in seeking benefits to which they are entitled and to the VA in executing its mission.

VVA wholeheartedly endorses legislative action to end the confusion, injustice and the *potential* for either unintentional, or even intentional, abuse created by the judicial and administrative evolution of the requirement of a "well-grounded" claim as the trigger for the VA's duty to assist. Congress has spoken before concerning these threshold issues. It is time for Congress to speak once again. We believe that H.R. 3193, the "Duty to Assist Veterans Act", goes far in resolving these problems.

Defining the problem

At the heart of the matter is 38 U.S.C § 5107(a), which currently provides:

Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

The ultimate victims of the tumultuous evolution, or more appropriately, de-evolution, of judicial and administrative interpretation of this statute are veterans and their dependents. It is both unreasonable and unfair to expect claimants, many of whom suffer from serious disability, both physical and psychiatric, to develop their claims without the VA's assistance and guidance. The vast majority of these claimants do not possess the specialized knowledge that would allow them to traverse the legal and evidentiary requirements of the VA adjudication process. We believe that the current state of affairs is the direct result of both the judiciary's and the VA's losing sight of the very essence of the VA's special and unique mission: to care for veterans and their families.

In passing the foregoing statute, Congress made it clear that it intended to codify "the burden of proof and reasonable doubt standards in VA claims adjudication proceedings" provided for in 38 C.F.R. §§ 3.102 and 3.103. See Reports on Veterans Judicial Review Act, Pub. L. No. 100-687, reprinted in 1988 U.S.C.C.A.N. 5782, 5835-36. The legislative history further reflects that "Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." 1988 U.S.C.C.A.N. 5795. Such language reflects Congress' intention to allow the agency the authority to define the statute's terms. See *Chevron v. NRDC*, 467 U.S. 837 (1984). Thus, 38 U.S.C. § 5107(a) begins with Congress' broad grant of authority to the Secretary to assist all claimants with the development of their claims, even those whose claims do not meet the legal definition of "well-grounded". For years, the VA's policy, as reflected in various regulations, adjudication procedure manuals and policy directives, was to undertake evidentiary development of claims for VA benefits prior to making a determination as to whether such claims were well-grounded. With the advent of judicial review, however, the VA's exercise of its statutory discretion to assist claimants with the development of their claims at the outset of the adjudication process began a downward spiral. In precedential decisions of the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit, the VA's duty to assist has been eroded to the point where it is now being used offensively to summarily deny claims for benefits without consideration of evidence that could not only render a claim well-grounded, but also warrant a favorable decision on the merits. See, e.g., *Grivois v. Brown*, 6 Vet.App. 136 (1994); *Caluza v. Brown*, 7 Vet.App. 498 (1995); *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 2348, 141 L.Ed.2d 718 (1998).

The courts have accomplished this by narrowly defining the term "well-grounded". Since the enactment of the Veterans Judicial Review Act of 1988 (VJRA), the VA has been quite accepting of these definitions. Prior to the VJRA, the VA treated the well-grounded claim requirement as the low threshold that it was intended to be. That changed once the courts began to reset the parameters. The VA, as the agency charged with effectuating veterans benefits statutes, could have, in effect, advised the courts that their onerous definition of well-groundedness was incorrect, or that it was permissibly exercising its administrative discretion to assist claimants at the front end of the adjudication process. It has done neither. In the absence of administrative policy making, the courts have stepped in and established a policy for the agency. The problem is that the courts' decisions lack historical consistency. In some cases, the courts describe the requirement of a well-grounded claim as a low threshold to merits consideration. See, e.g., *Robinette v. Brown*, 8 Vet.App. 69, 76 (1995); *King v. Brown*, 5 Vet.App. 19, 21 (1993); *Murphy v. Derwinski*, 1 Vet.App. 78, 81 (1990). See also *McKnight v. Gober*, 131 F.3d 1483 (Fed. Cir. 1997). In other cases, however, the courts define well-

groundedness in terms of the requirements that a claimant must satisfy in order to prevail on the merits. This schizophrenic rubric, for example, has resulted in the absurd requirement that a veteran seeking entitlement to service connection submit evidence that is legally sufficient to prove his or her claim, prior to the VA undertaking any meaningful development. Generally, to establish service connection, a veteran must submit (1) medical evidence of a current disability, (2) medical, or in certain circumstances lay, evidence of the incurrence or aggravation of an injury or disease during service, and (3) medical evidence of a nexus between the current disability and the in-service disease or injury. See *Pond v. West*, 12 Vet.App. 341, 345 (1999); *Davis v. Brown*, 10 Vet. App. 209, 212 (1997). This, of course, is the same as the test for well-groundedness set forth in *Caluza and Epps, both supra*. As a result, the VA's duty to assist has become a nullity; completely overrun by the judicially defined obligation that claimant must first definitively prove his or her claim before the VA will even consider it.

Threshold to adjudication - plausible vs. definitive claims

The dichotomy between the notions of well-groundedness as a low threshold (*i.e.*, a plausible claim) or as an ultimate burden of proof (*i.e.*, a proven claim) came to a head in the Court of Appeals for Veterans Claims' decision in *Morton v. West*, 12 Vet.App. 477 (1999). In that decision, the Court opined that it is essentially illegal for the VA to provide even a minimal level of assistance in developing a claim for VA benefits, if that claim is not well-grounded. In so doing, the Court determined that 38 U.S.C. § 5107(a) clearly required the submission of a well-grounded claim before the VA's duty to assist arises, and that the provisions of the VA's adjudication procedures manual and policy statements were invalid because they were contrary to the statute. The Court's decision also had the practical effect of indirectly further invalidating several VA regulations that deal with the duty to assist, as well as those that concern establishing service connection for certain types of disorders (*e.g.*, presumptively service-connected conditions and undiagnosed illnesses in Gulf War veterans).

In response to *Morton*, the VA, on August 30, 1999, issued a letter to its regional offices that immediately rescinded the duty to assist manual provisions and instructed adjudicators to strictly adhere to the well-grounded claim requirement. Adjudicators were also instructed to review all claims to determine if they are well-grounded prior to beginning development, and to advise claimants whose claims are not well-grounded to provide evidence sufficient to well ground their claims within 30 days or face summary denial. While adjudicators were directed to request service medical records and sufficiently identified VA medical records prior to denying a claim as not well-grounded, they were ordered to refrain from requesting private treatment records or any other documents, even if the claimant has sufficiently identified such documentation.

On December 2, 1999, the VA published a proposed regulation in the Federal Register concerning a claimant's legal obligation to submit a well-founded claim, prior to the invocation of the VA's duty to assist. *See* 64 Fed. Reg. 67,528. The proposed regulation, which amends 38 C.F.R. §3.159, essentially codifies the procedures established in the August, 1999 letter to the regional offices. The regulation also contains certain limited exceptions to these procedures that allow for some development, even if the claim is not well-founded (e.g., claims filed within one year of separation from active service; evidence of medical treatment being denied during the previous year due to a lack of funds; the submission of competent medical evidence of terminal illness; combat veterans' post-traumatic stress disorder (PTSD) claims (supported by competent medical evidence of symptomatology); and in-service sexual assault victims' PTSD claims (also supported by competent medical evidence of symptomatology)). Significantly, the proposed regulation adopts the stringent definition of "well-founded" that effectively requires submission of evidence necessary to prove a claim on the merits before the VA will provide any meaningful assistance in developing a claim for VA benefits.

If the proposed regulation goes into effect as written, the VA's duty to assist will, for all practical purposes, be relegated to a historical footnote. The deleterious effects of a lack of evidentiary development prior to a determination of well-foundedness have grave consequences beyond a veteran's entitlement to disability compensation. Often, VA treatment of physical or psychiatric conditions is withheld until a veteran has established service connection for his or her disorder(s). An impediment to an award of service connection frequently translates into an impediment to vitally needed treatment. This presents a serious health problem. Quite literally, these are matters of life and death.

Chilling effect

In a related matter, VVA's service representatives have advised that VA Compensation and Pension (C&P) Service physicians and psychiatrists have been instructed *not* to provide statements or opinions that would assist veterans in establishing well-founded claims (generally, with regard to the medical nexus requirement). We have been told that some of these providers have actually been warned of disciplinary action if they elect to assist veterans in this respect. This practice flies in the face of not only the duty to assist, but also a Veterans Health Administration (VHA) directive (No. 98-052, Nov. 18, 1998) that lifted restrictions on C&P Service physicians to provide claims-related opinions for their patients. Often, VA doctors are a veteran's sole treating physicians and are in the best position to provide the medical evidence necessary to establish entitlement to service connection. Clinicians cannot operate effectively in a climate of fear, which can only result in a chilling effect on the willingness of VA practitioners to assist veterans. Although the authority for the VHA directive expired on September 30, 1999, it is our understanding that the policy has been informally

continued, but that no final decision has been made as to whether the policy will become permanent. Interestingly, the VA has codified allowing C&P Service physicians to complete certain non-VA disability-related benefit forms in its health care service enrollment regulations (38 C.F.R. § 17.38(a)(xiv)). See 64 Fed. Reg. 54,217 (Oct. 6, 1999).

Solutions

VVA believes that the current state of affairs with respect to the VA's duty to assist claimants is intolerable. Too much attention has been focused on the well-groundedness requirement, to the point of virtually obliterating the duty to assist. In this respect, VVA believes that the only way to remedy this situation is through legislative action. There is no indication that the courts, which have already struck down VA policy manuals and statements that provide for evidentiary development prior to determining well-groundedness, will be any more generous toward the VA's proposed regulation concerning the duty to assist before a claimant satisfies the obligation to submit a well-grounded claim. There is evidence that even the Court of Appeals for Veterans Claims agrees on this point. In *Morton, supra*, Judge Farley, writing for the Court, stated that:

Congress, of course, can choose to change or eliminate the well-grounded claim requirement altogether. Indeed, it is possible that after evaluating such considerations as fairness, equity, and the personnel, facility, and financial expenditures which would be required, Congress might well opt for requiring the Secretary to assist and examine all veterans, regardless of whether well-grounded claims have been submitted.

Id., 12 Vet App. at 485-486.

When Congress enacted the VJRA, it made itself clear that the VA's duty to assist veterans in the development of their claims is of paramount importance. To this end, the Secretary was given the authority to do so, even before a well-grounded claim had been established. The VA's efforts to exercise its Congressionally mandated discretion have been curtailed by the judiciary to the point of elimination. Moreover, the VA's "solution" to the problem, *i.e.*, its proposed regulation to amend 38 C.F.R. § 3.159, simply will not work. As discussed above, the regulation essentially requires the submission of a meritorious claim for even initial consideration. VVA therefore applauds Congress' efforts to assist veterans in its own right.

Any statute designed to reestablish the duty to assist as Congress intends it must be specific enough to preclude what has happened before from happening again. Congress must explicitly state that the well-grounded claim requirement (or any preliminary procedural substitute) is, in fact, a low threshold akin to a pleading require-

Vietnam Veterans of America

**Well-Grounded Claims and H.R. 3193
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ment, rather than an evidentiary requirement. *See, e.g.,* F.R.C.P. 8(a) and (e) (which require only a short and plain statement of entitlement to relief). Thus, if a veteran makes a plausible claim, one *capable* of substantiation, the claim should move forward and he or she must receive the benefit of the duty to assist. Congress should also make clear that the doctrine of "benefit-of-the-doubt" applies to determinations of well-groundedness, and that once the determination is made in favor of the veteran, it will not be revisited by any element of the VA, including the Board of Veterans' Appeals, unless it can be shown that the claimant was notified that the claim is not well-grounded and that he or she was given the opportunity to submit any necessary evidence to render the claim well-grounded.

To this end, VVA respectfully proposes that Congress include in the "Duty to Assist Veterans Act" the following description of a claimant's responsibility to submit a well-grounded claim and the VA's duty to assist a claimant with the development of that claim:

Except as otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for a benefit under a law administered by the Secretary shall have the burden of proving eligibility for that benefit. That burden will be satisfied where a claimant asserts that there exists competent evidence with respect to each element necessary to establish entitlement to the benefit sought. Evidence will be considered to be competent where the person offering it is qualified to offer a statement or an opinion on the matter.

The Secretary will presume the credibility of evidence offered to establish eligibility for the benefit sought, unless it is inherently incredible. If a statutory or regulatory presumption relieves a claimant from having to submit evidence concerning specific elements to establish such eligibility, the claimant need not submit evidence with respect to those elements.

The Secretary shall assist a person who satisfies this burden in developing evidence pertinent to an adjudication of the claim.

VVA believes that only by including such explicit language can Congress prevent the repetition of the injustice currently visited upon deserving veterans and their families. The elimination of continuous recycling of individual claims on the basis of well-groundedness will conserve precious administrative and judicial resources. More importantly, it will allow the VA to execute the mission it was created to accomplish.

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Vietnam Veterans of America sincerely appreciates the opportunity to present our views on this matter of vital concern to veterans, their dependents and the American people. We look forward to working with Congress on this and other important issues.



Vietnam Veterans of America, Inc.

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A Not-For-Profit Veterans Service Organization Chartered by the United States Congress

VIETNAM VETERANS OF AMERICA

Funding Statement

March 23, 2000

The national organization Vietnam Veterans of America (VVA) is a non-profit veterans membership organization registered as a 5019(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 routine allocation of office space and associated resources in VA Regional Offices and the Board of Veterans Appeals 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, please contact:

Director, Government Relations
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Statement of Geoff Hopkins, Associate Legislative Director, Paralyzed Veterans of America

Chairman Quinn, Ranking Member Filner, members of the Subcommittee, the Paralyzed Veterans of America (PVA) is honored to be invited to testify today concerning H. R. 3193, the "Duty to Assist Veterans Act" and to address generally the proper construction of the Department of Veterans Affairs' (VA) statutory mandate to assist claimants.

As stated in the Independent Budget

The purpose of veterans' programs is to assist veterans. Consistent with that purpose, the benefits delivery system is designed to assist veterans in obtaining the benefits the Nation provides for them. To achieve the public policy purposes behind veterans' programs, the goal is to ensure veterans receive all benefits to which they are entitled. Congress therefore designed a simple and helpful claims process in which the Government assumed the responsibility of assisting veterans in gathering the proper and necessary evidence to substantiate their claims. Also, because of the benevolent purpose of veterans' benefits and because there is no competing or opposing interest in veterans' claims, the burden of proof is lower than that in civil proceedings in courts or other administrative agencies. Under administrative rules dating back to the 1920s, veterans' claims needed only to be supported by enough evidence to justify a belief by a fair and impartial individual that the claim was 'well grounded.' When it authorized judicial review, Congress adopted and codified in statute this long-standing 'duty to assist' and the liberal standard of proof to ensure their continuation. The *Independent Budget* for the Department of Veterans Affairs, Fiscal Year 2001.

These fundamental concepts cannot be stressed too often. Veterans' programs exist to assist veterans; the public policy purpose underlying veterans' programs is to ensure that veterans receive all benefits to which they are entitled; and there is no competing or opposing interest in veterans' claims. Actions and interpretations that subvert these basic concepts are antithetical to the very nature of veterans' benefits. Today, we turn to one of the most egregious examples of this subversion – the misinterpretation of congressional intent to provide assistance to all veterans in establishing their claims to benefits.

Congress, in the Veterans Judicial Review Act, P.L. 100-687, 102 Stat. 4105 (1988), codified the Department of Veterans Affairs' (VA) on-going practice of assisting all

claimants in developing their claims. VA told Congress that VA practice was to aid all who brought claims, giving claimants the benefit of the doubt on all issues, and granting benefits when a well grounded claim was presented. Even after the enactment of the Veterans Judicial Review Act, the VA's own internal instructions to its employees, VA Manual M21-1, Part III ¶ 2.01(a) (1992) read, under the chapter heading "Claims Applications and Initial Actions":

- a. Assistance to Claimants. Extend all reasonable assistance to claimants in meeting the evidentiary requirements necessary to establish their claims under the applicable laws and regulations. Give them every opportunity to establish entitlement to the benefits sought, to include complete procedural and appellate rights. Provide the claimants complete information and advice in words that the average person can easily understand. Thoroughly develop information from ALL sources before making decisions affecting entitlement. (Emphasis in original).

VA regulations also evidenced a long-standing policy to ensure that veterans received the benefit of the doubt on all issues. 38 CFR § 3.102 also established that the standard to receive benefits was "evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded."¹

38 CFR 3.103, also in effect in 1988, read, in pertinent part, that "[i]t is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his

¹ 38 CFR § 3.102 (July 1, 1988 edition):

It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded []

claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government.” These VA policies are what Congress relied upon in passing the Veterans Judicial Review Act.

In the Explanatory Statement that accompanied the final version of the VJRA, Congress stated that the legislation “would amend chapter 51 of title 38 to add a section which would codify the burden of proof and reasonable doubt standards in VA claims adjudication proceedings currently provided for by regulation (38 CFR 3.102 and 3.103).” Explanatory Statement on Compromise Division A, 134 Cong.Rec. S16550 (Oct. 18, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5834, 5835-5836. This section, currently codified at 38 U.S.C. § 5107(a), reads:

Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

The House Report that accompanied the legislation stated that:

Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran’s claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to the burden of proof.

After a claim is filed, the agency helps the claimant compile evidence to support his or her claim [J. H.Rept. 100-687 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795.

Mr. Chairman, let me repeat: "Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." Congress, in drafting and passing the present day § 5107(a) merely codified the existing practices of the VA. The Report noted that: "After a claim is filed, the [VA] helps the claimant compile evidence to support his or her claim." PVA does not understand how the intent behind § 5107(a) could be stated any clearer or any more emphatically – VA must assist all claimants in developing their claims, and the claim must be fully developed before there is a decision on the merits.

That was 1988. Unfortunately, in 2000 things are quite different. The Court of Appeals for Veterans Claims has, through decisions both novel and torturous, rendered congressional intent and statutory language regarding the VA's duty to assist claimants null and void. To the Court, a claimant must first prove his or her claim before receiving assistance from the VA.

In Pond v. West, 12 Vet.App. 341, 346 (1999), the Court stated that "[g]enerally, to prove service connection, a claimant must submit (1) medical evidence of a current disability, (2) medical evidence, or in certain circumstances lay testimony, of an in-service incurrence or aggravation of an injury or disease, and (3) medical evidence of a nexus between the current disability and the in-service disease or injury."

Compare this with the definition of a well grounded claim. The United States Court of Appeals for the Federal Circuit adopted the Court of Appeals for Veterans Claims' definition of a well grounded claim: "For a claim to be well grounded there must be (1) a medical diagnosis of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service occurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between an in-service [disease or injury] and the current disability." Epps v. Gober, 126 F.3d 1464, 1468 (1997).

Therefore, once a claimant has, under the definition of the Court, presented a well grounded claim, the claimant has also, once again under the definition of the Court, proven his or her claim. Once a claim is proven the duty to assist is superfluous. Why would Congress enact a duty to assist all claimants if this duty was a dead letter?

As Congress recognized, the public policy rationale underlying the VA's duty to provide assistance goes to the very nature of the benefits system. This duty also serves practical purposes. Many of the records a claimant needs to prove his or her claim are in the possession or custody of the VA or another government entity. While the veteran claimant is frantically trying to figure out what he or she needs in order to prove a claim for benefits, the VA is often sitting on the very evidence needed by the claimant.

As if this situation were not bad enough, the Court of Appeals for Veterans Claims recently decided that Congress, with the passage of 38 U.S.C. § 5107, mandated that the

VA was prohibited from providing assistance to any claimant until his or her claim is deemed well grounded. The Court called a well grounded claim a “condition precedent” to receiving assistance under § 5107(a). The Court stated that “[t]he issue, therefore, is whether the Secretary, by regulation, Manual, and/or C & P policy can and has eliminated the condition precedent placed by Congress upon the inception of his duty to assist. The answer: No.” Morton v. West, 12 Vet.App. 477, 481 (1999). This is a fancy judicial way of saying that the VA cannot choose to assist veterans even if it wanted to. We doubt that Congress envisioned or intended this result in 1988.

These twisted interpretations of clear congressional intent and statutory language, this movement to re-make the benefits adjudication system into a legalistic, formalized maze of increasing complexity, have caused real harm to real people. For example, a veteran who has a spinal cord disease gets corrective surgery from VA. This surgery greatly worsens his medical condition and renders him quadriplegic. VA medical records reflect that his post-surgery condition was worse than his pre-surgery condition. Because the veteran was in VA care, VA holds virtually all of his medical records. The Veteran files a claim under 38 U.S.C. § 1151. His claim is denied at the Regional Office and at the Board of Veterans' Appeals. On appeal to the Court of Appeals for Veterans Claims, the VA argued, for the first time, that the claim was not well grounded, even though the veteran had never received notice of the three elements he supposedly must prove without assistance and while VA held all applicable records. The Court agreed with the VA. This case is still pending on procedural motion.

We ask you to consider the situation generally faced by widows, many of whom spent years caring for their disabled husbands. They look to the VA for help and find none when they seek DIC or other death benefits. Even though the widow has usually had no access to the veteran's claims file or medical records during the veteran's life, after his death the widow is apparently required to fulfill the three-element test of well groundedness. This is, in many instances, an insurmountable hurdle.

These instances, and the many more like them, cannot be what Congress had in mind when it codified VA prior practices to create and perpetuate the ex parte and non-adversarial system. Rather, this is the hallmark of an adversarial system filled with procedural pitfalls to trip up unsuspecting claimants. This newly-fashioned system clearly runs counter to the paternalistic, pro-veteran system intended by Congress with the advent of judicial review. Cases like the ones noted above are the bitter fruit of this new system.

The VA has proposed regulations on this matter. PVA, along with other Veterans Service Organizations, have commented on these proposed regulations. We ask that our comments, dated January 27, 1999 and January 28, 2000, be made part of the record.

PVA is concerned that, even if the VA's final regulations are favorable to veterans and reiterate the VA's traditional duty to assist claimants, without congressional action future court decisions may invalidate regulatory action and return us to the point that brought us

here today. PVA believes that the VA must be in the forefront vigorously defending its traditional role in assisting veterans with their claims.

PVA applauds this Subcommittee's interest in ensuring that the duty to assist remains an integral part of a non-adversarial, pro-veteran, claims system. We believe that H.R. 3193 would re-state the clear congressional intent – in a way that veterans, VA, and the courts will understand – that the VA has a duty to assist all claimants.

PVA supports H.R. 3193 and we look forward to working with you to ensure that this legislation is the best legislation it can be and that the purposes underlying this bill are fully and completely carried out. We ask that it be made emphatically clear that the mandatory assistance to be provided to a claimant under the proposed § 5103A(b) is not, by any means, an exhaustive list. We also ask that the Committee ensure, as this bill moves through the process, that no veteran is denied a medical examination if the VA finds one necessary for the purpose of determining a current disability; that the burden of proof is clarified in amending § 5107(a); and that no claim is denied without full notice to the veteran. Finally, we ask that this legislation ensure that no adjudication proceeds before a claim is fully developed – fully developed with the assistance of the VA.

PVA looks forward to working with this Subcommittee, and with the full Committee, to move this legislation as speedily as possible and to ensure that the congressional intent mandating a duty to assist all claimants is restored. We must not delay any longer in returning the system to what it was intended to be.

Again, on behalf of PVA I thank you for this opportunity to testify. I will be happy to answer any questions you might have.

Information Required by Rule XI 2(g)(4) of the House of Representatives

Pursuant to Rule XI 2(g)(4) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2000

General Services Administration —Preparation and presentation of seminars regarding implementation of the Americans With Disabilities Act , 42 U.S.C. §12101, and requirements of the Uniform Federal Accessibility Standards — \$30,000.

Federal Aviation Administration – Accessibility consultation – \$8000.

Department of Veterans Affairs— Donated space for veterans' representation, authorized by 38 U.S.C. §5902, — \$240,000* (estimated amount, as of December 31, 1999).

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Court of Veterans Appeals, administered by the Legal Services Corporation — National Veterans Legal Services Program— \$65,000 (estimated amount, as of December 31, 1999).

Fiscal Year 1999

General Services Administration —Preparation and presentation of seminars regarding implementation of the Americans With Disabilities Act , 42 U.S.C. §12101, and requirements of the Uniform Federal Accessibility Standards — \$30,000.

Department of Veterans Affairs— Donated space for veterans' representation, authorized by 38 U.S.C. §5902, — \$975,000* (estimated amount).

Court of Veterans Appeals, administered by the Legal Services Corporation — National Veterans Legal Services Program— \$240,000 (estimated amount).

Fiscal Year 1998

General Services Administration —Preparation and presentation of seminars regarding implementation of the Americans With Disabilities Act , 42 U.S.C. §12101, and requirements of the Uniform Federal Accessibility Standards — \$15,000.

Department of Veterans Affairs— Donated space for veterans' representation, authorized by 38 U.S.C. §5902, — \$975,000* (estimated amount).

Court of Veterans Appeals, administered by the Legal Services Corporation — National Veterans Legal Services Program— \$240,000 (estimated amount).

* This space is authorized by 38 U.S.C. § 5902. These figures are estimates derived by calculating square footage and associated utilities costs. It is our belief that this space does not constitute a federal grant or contract, but is included only for the convenience of the Committee.

STATEMENT OF
 JOHN McNEILL, ASSISTANT DIRECTOR
 VETERANS BENEFITS POLICY
 NATIONAL VETERANS SERVICE
 VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE
 SUBCOMMITTEE ON BENEFITS
 COMMITTEE ON VETERANS AFFAIRS
 UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

H.R. 3193, *Duty to Assist Veterans Act of 1999*

WASHINGTON, DC

MARCH 23, 2000

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you, Mr. Chairman, for the opportunity to testify today concerning H.R. 3193, *Duty to Assist Veterans Act of 1999*, to amend Title 38 United States Code Chapter 51 in reaffirming past Congressional intent on the very important "Duty to Assist" principle that claimants for veterans' entitlements have as an integral part in the development of their claims with the Department of Veterans Affairs (VA)

This bill will reestablish an enforceable right, given the full force and effect of law, which has had its true meaning recently diluted and rendered ineffective as a result of what we believe to be misguided jurisprudence policy-making. Legislation is now immediately required to "fix" the current intolerable situation concerning the inability of veterans to achieve an artificial and extremely high threshold of proof, as now imposed on the VA and the veteran claimant through the mandate from the Court of Appeals for Veterans Claims (CAVC or the Court, previously identified as the Court of Veterans Appeals) in *Morton v. West*, 12 Vet.App. 477, 486 (1999), just to well ground a claim before even the minimum of government assistance can be provided to that veteran.

The problem is expressed well and directly as a legislative priority goal by the VFW Department of Florida: "Stop the [VA] from mailing out to our veterans a letter stating they can not (sic) assist a veteran unless he has a 'Well grounded Claim'." Most of our veterans do not understand what the VA is stating. The [VA's] letter does not tell the veteran where he can get the documents that are required to start the 'well grounded claim'. The VA will not do anything to assist a veteran with the development of evidence and/or the claim until the veteran has submitted, with no help from the VA, a claim considered

'well grounded' by the VA [t]his create[s] a greater backlog on a system that is . . . already too clogged up. [We] thought the VA mission [is] to help the veteran. If not, then stop advertising this fallacy Support [H.R. 3193] to correct this problem " (Emphasis in original.)

This description is of a system now seemingly to be the antithesis of one steeped in Congressional history to be a benevolent method of support for this great Nation's veterans. That description is further reinforced by a January 31, 2000 letter from a VA regional office to a veteran in his attempt to file a claim of service connection for hearing loss and tinnitus as a result of combat action. The letter listed what had to be provided by the veteran before his claim could be considered. It stated "1) Please submit new and material evidence for your hearing loss, one year old or less[;] 2) Medical evidence that your tinnitus currently exists[;] 3) A doctor's statement that the condition is related to an injury or disease you had in service[; and,] 4) Medical evidence linking the two items " The claimant was then informed "[i]f the evidence is not received within 30 days, your claim will be considered on the basis of the evidence we already have . . . ", thus leaving the impression that a final decision will be rendered in that time frame. There was no mention that, under the provisions of 38 U.S.C. § 7105(b)(1) and 38 Code of Federal Regulations § 20.302(a), the veteran could still protect the original effective date if he submitted the evidence within (actually) one year. Regrettably, with such short notice of 30 days and faced with the magnitude of the evidence being required, a veteran could become easily discouraged and give up hope of any further attempt to achieve service connection.

Thus, rectifying the current unfair and unjust situation of the VA's inability (indeed, "hands-off" approach) toward assisting a veteran in an attempt to establish a well-grounded claim is now the most important veterans' benefits legislative priority goal for the Veterans of Foreign Wars of the United States (VFW). Accordingly, we strongly support H.R. 3193 as the necessary means of correction but we also propose one short albeit vital recommendation to the bill, which we will discuss later in this testimony.

As stated on pages 47-48 in the recent *Independent Budget for the Department of Veterans Affairs* for Fiscal Year 2001, of which the VFW is a co-signer, to achieve the public purposes behind the veterans' programs, the primary goal is to ensure veterans receive all benefits to which they are entitled. Consistent with that goal, Congress designed a simple and helpful claims processing system in which the government

assumed the responsibility of assisting veterans in gathering the proper and necessary evidence to substantiate their claims. VA's duty to assist arises out of its long tradition of *ex parte* proceedings and paternalism toward the veteran. *Connolly v Derwinski*, 1 Vet.App. 566 (1991). When it authorized judicial review in November 1988, Congress adopted and codified in statute (38 U.S.C. § 5107(a)) this long-standing "Duty to Assist" principle along with a liberal standard of proof to ensure its continuation.

The Court first provided a definition of "well grounded claim" in *Murphy v Derwinski*, 1 Vet App. 78, 81 (1990). As noted by the Court in *Murphy*, a well grounded claim is neither defined by 38 U.S.C. § 5107(a), nor by legislative history. (That notation is also applicable for the 38 C.F.R.; it is into this void that the Court came quickly.) Therefore, in giving a "common sense construction", the court stated that "[a] well grounded claim is a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible to satisfy the initial burden of [section 5107(a)]." (Emphasis added.) The Court went on to state that once a claimant has "submitted evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded," the claimant's initial burden has been met, and the Secretary is then obligated to assist "in developing the facts pertinent to the claim." *Id.*, 78, 81-82. Thus, the Court's initial interpretation and definition had no direct impact on the Duty to Assist principle and was accepted as a "common sense" approach.

In a number of decisions issued following *Murphy* by both the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims) and the Court of Appeals for the Federal Circuit, the courts have substantially refined (or redefined) the definition of what constitutes a "well grounded" claim beyond it merely being a plausible claim. (Actually, it is easy to characterize this redefining as now making a well grounded claim a definitive claim for service connection, as opposed to being "plausible".) In *Tirpak v Derwinski*, 2 Vet App. 609, 611 (1992), the Court held that a physician's opinion that the veteran's death "may or may not" have been averted, if medical personnel could have effectively intubated him, was speculative and not sufficient to well ground the veteran's widow's claim for death benefits. This was the first time that the factor of "speculation" entered the picture in the issue of well-grounding a claim, and it made for a continuing "Catch-22" situation for the veteran, as will soon be shown.

But, let's return to the history. Next, the decision *Grottveit v Brown*, 5 Vet.App. 91 (1993), required medical evidence to well ground a claim where the determinative issue involves medical etiology or

medical diagnosis. One of the most momentous decisions was *Caluza v Brown*, 7 Vet.App 498 (1995), where the Court set forth three steps that generally are required by the veteran in order to present a well grounded claim. These are: (1) evidence that a condition was “noted” during service or during an applicable presumption period; (2) evidence showing post-service continuity of symptomatology; and, (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology. (The second and third steps, however, could be satisfied under the provisions of 38 C.F.R. § 3.303(b).)

Indeed, at this time, the situation on well grounded claims was still manageable for veterans. This was because the VA still provided some form of the duty to assist mission (most notably, a compensation and pension examination for claims that such an exam would help resolve some doubt of a medical diagnosis). However, that changed dramatically when the courts substantially refined the definition of what constitutes a well grounded claim beyond it merely being a “plausible” claim. In *Epps v. Gober*, 126 F.3d 1464 (Fed Cir. 1997), *cert Denied sub nom. Epps v West*, 118 S. Ct. 2348 (June 22, 1998), the Federal Circuit court adopted, as one that properly expresses the meaning of the statute, the then-named Court of Veterans Appeals’ definition of a “well grounded” claim: “[f]or a claim to be well grounded, there must be (1) a medical diagnosis of a current disability; (2) medical, or in certain circumstances, lay evidence of in[-]service occurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between an in-service [disease or injury] and the current disability ”

If there was any lingering doubt as to what the courts meant, all of it was effectively erased with the CAVC’s decision in *Morton*

The point of speculation in a medical opinion soon became critical in relation to the third step in *Caluza*. (And, it has now become the “Achilles Heel” in a veteran’s attempt to well ground a claim.) While a speculative medical opinion will not be sufficient for purposes of establishing a well grounded claim, the determination as to whether a medical opinion is or is not “speculative” is not clear or easy to make. As stated by the Court in *Lee v. Brown*, 10 Vet.App. 336 (1997), while the Court had previously held that statements from doctors which are inconclusive as to the origin of a disease cannot fulfill the “nexus” requirement to ground a claim, “use of cautious language does not always express inconclusiveness in a

doctor's opinion on etiology, and such language is not always too speculative for purposes of finding a claim well grounded. It follows then, that an etiological opinion should be viewed in its full context, and not characterized solely by the medical professional's choice of words." However, the Court also previously stated that unenhanced reports of a history transcribed by a medical examiner does not constitute "competent medical evidence" for purposes of establishing a well grounded claim. *LeShore v Brown*, 8 Vet.App. 406 (1995).

To further confuse the issue of a well-grounded claim, the Court, in the decision *Hicks v West*, 12 Vet App 86 (1998), stated that "[w]ord parsing in some of its medical nexus cases has created a unclear picture for ascertaining what degree of certainty is necessary in a medical opinion in order to establish a plausible medical nexus."

With those judicial findings and definitions on speculative medical opinions in relation to establishing a medical nexus, how can a veteran -- who is a novice to the system -- possibly understand what is now being required of him in order to well ground his claim? It is thus the third step in *Caluza* that is causing all the current problems. For instance, the Board of Veterans Appeals, in many of its decisions following *Caluza*, ruled that only a (non-speculative) medical opinion sufficed to provide the nexus between the current disability and the appellant's military service. This equates to a higher and unduly restricted standard of evidence being required to well ground a claim that seems inconsistent with prior intent of the Congress. (It is interesting to note that nowhere do VA regulations provide that a veteran must only establish service connection through medical records alone. For example, see *Cartright v Derwinski*, 2 Vet App 24 (1991).) Now the whole VA, since *Epps*, is demanding a private medical opinion to create the nexus needed to well ground a claim. (It has to be a private medical opinion because of the ruling, previously in *Epps* then reinforced in *Morton*, that the VA cannot assist a claimant who has not submitted a well grounded claim.)

This has created a strict standard being applied for claims that must first be well grounded. We say strict because when the veteran happens to provide a medical opinion in an attempt to meet the nexus requirement (the *Caluza* third step), it is often ruled as being merely a recitation of the veteran's medical history, and therefore speculative, because the physician making the opinion did not have access to the veteran's service medical records so that a complete and comprehensive opinion could be rendered. But,

how can the veteran be responsible to obtain and provide a copy of the service medical records to the private physician? Why is the veteran expected to have the knowledge of this requirement by the VA (in response to the Court's mandates)? (Thus, the Catch-22 situation!) This has become an unreasonable shifting of the burden of proof to the veteran far beyond what we surely believe Congress ever intended to occur

It is evident, in our opinion, that the Court of Appeals for Veterans Claims (and where affirmed by the U.S. Court of Appeals for the Federal Circuit) in recent years has progressively interpreted the controlling statute, 38 U.S.C. § 5107(a), to such a narrow point as to now preclude the Secretary from assisting any claimant at all prior to a claim being "ruled" well grounded. Where a well grounded claim has always previously been the veteran's ultimate burden of proof, the courts have now changed it into a preliminary burden upon the veteran. Worse yet, the courts' further definition of what requirements constitute a well grounded claim, has established such a high hurdle for the common veteran, that it defeats the purpose of Duty to Assist. Veterans are refused any government assistance until they first accomplish unassisted the very thing for which that government assistance is most needed. If veterans are unsuccessful in achieving the basically unrealistic standards now imposed by the court, their claims are summarily denied without any consideration of the true merits and without any meaningful opportunity to receive the benefits they may very well rightfully deserve.

This is also an inefficient use of resources. Prior to the courts' intervention in this matter, the VA previously controlled an orderly process by assuming the responsibility of obtaining military records, VA records, and (especially) records from private sources once those records were identified by the veteran. All the evidence was concurrently obtained and reviewed with an immediate judgment as to whether any additional evidence was also needed before a decision could be made. There was no reliance on the veteran "guessing" as to the appropriate and pertinent evidence required to properly adjudicate the claim. The VA, through their control of the process, was thus assured that all conceivable evidence was obtained before making a decision effecting the entitlements of the veteran.

The current procedure now leaves it to chance that the veteran will have the ability to obtain all necessary records, be sufficiently knowledgeable to properly and efficiently negotiate (unassisted) the claims process, and then provide the evidence to well ground the claim just so the VA can then make a second *de*

novo review on the merits of the claim. This could even include a subsequent determination that additional evidence is required before a final decision can be rendered. A simple one-step process has evolved into one of multiple tiers depleting the resources of the VA by duplicating the development process. (It is ironic to note here that the Court, in *Grivois v Brown*, 6 Vet. App.139 (1994), justified their ruling on well grounded claims by stating that “implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which -- as well grounded -- require adjudication”. We are not so sure that the Court has the jurisdiction to state such a concern. Adequate resources, and the application of those resources, are the domain of the Secretary of Veterans Affairs and this Congress.)

Procedural matters now dominate the VA process because of court-imposed mandates resulting in confusion and disputes over basic things, such as the procurement of private medical records to support a claim. The current process benefits neither veterans nor the government. The real merits of veterans' claims have become secondary to the procedural maze the courts have created with the formalities they have imposed on the process.

As can be readily discerned from this discussion, this is really more of an issue on the “Duty to Assist” principle or, more precisely, with the court’s ruling as to when the VA can assist a veteran in the development of the claim. Throughout the court’s historical jurisprudence on well-groundness up until *Morton*, the VA was able and actually willing to provide at least partial assistance prior to a final determination of whether a claim was well grounded. This mainly consisted of requesting and obtaining private medical records (upon the veteran filing a VA form 21-4142, *Authorization for Release of Information*) and scheduling a Compensation and Pension examination, primarily in those cases where a veteran never previously had such an examination or it would help fill a void from the information in the claimant’s medical records.

Consequently, the system was still functioning in a reasonable manner of benevolence to the veteran claimant. The court emphatically killed this with its decision in *Morton* by mandating that there cannot be any Duty to Assist mandate (and therefore any actions) on the part of the VA until the claimant achieved a well grounded claim. That meant an austere meeting of the three steps articulated in *Caluza*.

But, as we have already stated, it has now become a very difficult process for the veteran, on his own efforts, to negotiate the obstacles as established in decisions by both the Board of Veterans' Appeals and Court of Appeals for Veterans Claims for meeting the third step of *Caluza*.

A concern has been raised that there should be some type of initial threshold established as a standard to be met in filing a claim or the VA will become overwhelmed in its Duty to Assist obligations by needlessly expending resources on frivolous claims. The question has been raised as to whether H.R. 3193 will allow that to happen. While that concern is a viable one, we just don't see that as being a sufficiently serious problem to maintain a system (in comparison) that presently makes all veterans achieve an unreasonable standard prior to receiving any government help. In our opinion, there are far more claims that, with some VA assistance, could easily mature into ones with great merit but presently never are able to establish well-groundness because the veteran-claimant becomes easily discouraged or hopelessly lost trying to obtain pertinent medical records, or harder yet, an adequate medical opinion.

Further, we have never seen any statistics that indicate that the filing of frivolous claims is an impediment toward the efficient operation of the veterans' claims processing system. The Veterans' Claims Adjudication Commission (VCAC), in its December 1996 report, attempted this through its elaborate and eloquent discussion on what was described as "repeat" claims (section 4 of Part I; pages 69-87). But, that discussion had a serious flaw to it – it combined what are two very distinct types of claims into one category. That combination was what is a claim for an increased rating evaluation (which is automatically a well grounded claim, as the court defined in *Proscelle v. Derwinski*, 2 Vet.App. 631-632 (1992), with those that are further attempts to "reopen" previously denied claims to achieve service connection.

Once those two types of claims are separated and we concentrate solely on the second category of reopened claims for service connection, then the concern is drastically mitigated of the system becoming overwhelmed with frivolous claims. We are not that naïve to the realization that there are some that continually use ("abuse" may be a better word) the system in numerous attempts to "get something" from the government. But a reopened claim for service connection is the easiest to adjudicate requiring very little in the way of (both time and people) resources and written justification toward again denying the

claim. That is because the claimant must provide “new and material” evidence from that already contained in the record just to have the VA perform a *de novo* review of the whole record and make another decision on the overall merits for now achieving service connection. The new and material evidence is actually a much higher standard and threshold to achieve than even the current one for well-groundness. 38 C.F.R. § 3.156(a). *Elkins v. West*, 12 Vet. App. 209 (1999).

(There is another important, final matter that needs to be stated. While we are criticizing the court for going beyond what we believe is their jurisprudence jurisdiction on the issue of well grounded claims and its relationship to the VA’s Duty to Assist mandate, the Court (and, accordingly, the establishment of judicial review) has been one of the most significant and beneficial events in the history of the veterans’ entitlements program. Notwithstanding all the problems associated with the well-grounding of claims, once a veteran is able to have a claim judged on its merits, there is no better time ever in the history of veterans’ claims processing than the present for that veteran to receive a fair and just decision.)

Accordingly, H.R. 3193 is currently one of the most important legislative initiatives in recent years. We have, however, a recommendation for additive language to one of the inclusions in subsection (b) of Section 5103A. In subsection (b)(5), we suggest that the words “of this title” at the end of the subsection be deleted and the following words substituted “or who is attempting to achieve service connection under the provisions of section 1154(b), both sections of this title”. The reason for this addition is that throughout the history of the veterans’ claims processing system, there has been only one “class” of veterans that has an elevated status – and that is a veteran who has been involved in combat action. There are good reasons for this: for instance, the rigors of combat increase the chances that records can be destroyed, lost or incomplete. (There is an excellent discussion of this credo by the U.S. Court of Appeals, Federal Circuit in *Jensen v. Brown*, 19 F.3d 1416-1417. See also *Smith (Morgan) v. Derwinski*, 2 Vet.App. 139-140 (citing H.R. Rep. No. 1157, 77th Cong., 1st Sess. (1941), reprinted in 1941 U.S.C.A.N. 1035) and *Caluza*, 507-508.) If there are going to be specific examples listed in H.R. 3193 -- and we agree with the one example already in subsection (b)(5) -- then the very first one must be for the combat veteran.

Thank you, Mr. Chairman, for allowing us to testify today and I am prepared to address any questions

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VFW Claims Consultant, Washington Regional Office; January - June 1992

VFW Appeals Consultant, Board of Veterans' Appeals; July 1992 -
March 1995

VFW Field Representative, VFW National Veterans Service; April 1995 -
August 1997

Assistant Director for Veterans Benefits Policy; August 1997 - present.

**The Veterans of Foreign Wars is not in receipt
of any Federal grant or contract**

STATEMENT OF CARROLL WILLIAMS, DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON BENEFITS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 3193 - THE DUTY TO ASSIST VETERANS ACT OF 1999

MARCH 23, 2000

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates this opportunity to discuss the important issues related to the nature and extent of the Department of Veterans Affairs (VA) duty to assist claimants in the preparation and development of claims for benefits to which they may be entitled.

We also welcome the opportunity to comment on HR 3193 - Duty to Assist Act of 1999 - introduced by Congressman Lane Evans, to reestablish VA's original interpretation of their "duty to assist" claimants in the development of claims and to clarify the burden of proof that will apply in such claims. We applaud the elimination of the often misunderstood term "well grounded claim" with the enactment of HR 3193.

We wish to commend you, Mr. Chairman, for your leadership in scheduling this very timely and important hearing to consider the adverse effects of the decision of the United States Court of Appeals for Veterans Claims (CAVC or the Court) decision in *Morton V. West*, 11 Vet. App. 477 (July 1999) on thousands of veterans, their families and survivors.

We also appreciate the concern about VA's implementation of Morton expressed by various Members of the full Committee hearing on the VA FY 2001 budget last month and the obvious desire to correct a situation that Congress never intended when it enacted section 5107 of Title 38, United States Code which provides:

Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim.

DUTY TO ASSIST

Mr. Chairman, the question of the nature and extent of VA's statutory duty to assist veterans and other claimants in the development of their claims was addressed by the CAVC in their decision *Morton v. West* issued on July 14, 1999. The court held VA not only does not have the duty to assist a claimant who has not filed a well grounded claim, that it has no authority to do so under the statute, 38 USC § 5107.

The court also held that language regarding claims development in regulations, manuals and policy statements of the Compensation and Pension Service, suggesting the Secretary of Veterans Affairs has a duty to assist a claimant even though he or she has not submitted a well grounded claim were, "interpretive" and did not create enforceable substantive rights.

We recognize the CAVC's holdings in *Morton* have profound workload implications for VA. On August 30, 1999 VA's Under Secretary for Benefits issued a letter to VA regional offices rescinding the invalidated manual provisions and instructing them to comply with *Morton v. West*. As a result, each day VA now issues letters to thousands of veterans advising them their claims are being denied because they are not well grounded. No doubt, VA will be reporting a significant reduction in the backlog of pending cases for FY 2000, however, we fully expect this reduction in workload will be offset by an increase in the number of appeals filed to the Board of Veterans Appeals.

On September 3, 1999, a timely appeal was filed with the Federal Circuit which, under 38 USC 7192, has jurisdiction to review the decision of the CAVC in this case. This appeal is still under review and *Morton*, is, by law, not final and should not have been implemented. VA is taking advantage of this unique opportunity to significantly reduce its current and long-term workload, regardless of the adverse and potentially irreparable harm done to veterans in the process.

Because of this response to the CAVC's holdings the VA has abandoned one of its most important cornerstone policies. For decades, veterans have looked to VA for assistance with their claims and VA's policy was to fully develop all claims. It is our contention that this abrupt about-face in long-standing VA policy and practice eviscerates the traditional, non-adversarial process of administering veterans' claims, greatly increasing the burden and cost to veterans applying for benefits and will inevitably deprive deserving veterans of needed benefits.

H.R. 3193

The American Legion supports the intent of H.R. 3193 to reestablish the duty of VA to assist claimants for benefits in developing claims and to clarify the burden of proof for such claims by amending 38 USC § 5103. Again, we applaud the elimination of the often misinterpreted term "well grounded claim" by the introduction of HR 3193.

We believe it was and is the intent of Congress that the duty to assist should be triggered when a claimant presents a reasonable claim. There is a legal duty by the VA to reasonably develop such a claim without creating an insurmountable burden for the veteran or his or her dependents by having them pay for medical examinations, or seek out medical or lay evidence of an in-service occurrence when oftentimes the records to show these are already in the government's possession.

We do, however, strongly suggest that H.R. 3193 be amended in the following manner. First, the word "information" in section 5103A (a) should be deleted to make it clear that the Secretary is obligated to help produce *evidence*. Also, the words "information and" in section (b)(2) should be deleted. We believe that the word "information" adds nothing and may confuse VA adjudicators.

Second, in section 5103A (b)(6) the words "the Secretary considers" should be deleted because the duty to assist should be mandatory not discretionary on the part of the Secretary. The American Legion believes that when the VA determines, after appropriate development regarding other elements of a claim, that an examination is necessary to determine whether a condition exists, the severity of a disability, or whether there is a nexus to service, the "duty to assist" requires the Secretary to provide that examination

Third, the amendment to section 5107(a) that deals with the burden of proof should be revised to specifically acknowledge that the VA must comply with the duty to assist mandated by section 5103A before the VA determines if the claimant has met his or her burden of proof. Also, the words "eligibility for" should be deleted and replaced with "entitlement to" because the word eligibility has sometimes been interpreted by the Secretary as meaning just a veteran with a qualifying discharge

VETERANS' HEALTH ADMINISTRATION "DUTY TO ASSIST"

VA's pro-claimant policy was expressed in the Veterans Health Administration (VHA) Directive 98-052 on November 18, 1998, from the former Under Secretary for Health, Dr. Kenneth Kizer. This directive advised all VA medical staff that VA's obligation to care for veterans extended to providing medical opinions, when requested, in support of their claim for VA disability benefits and in completing forms for other programs or benefits. The authority for that policy directive expired on September 30, 1999 and, to our knowledge, no action has been taken to reestablish it. On several occasions over the past four months, The American Legion has requested the Deputy Under Secretary for Health, Dr. Thomas Garthwaite, to address the issue of whether he intends to change or reaffirm VHA's "duty to assist" veterans, who need assistance in developing the kind of evidence to make their claims well grounded. However, to date, no response has been received.

CONCLUSION

In conclusion, when a representative of The American Legion accepts a veteran's power of attorney, we also accept the responsibility that it is our profound duty and historical obligation to help that claimant in every legal way within our means. Our "duty to assist" begins immediately, as it should. We expect no less of ourselves and we expect no less of the Department of Veterans Affairs.



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March 23, 2000

Honorable Jack Quinn, Chairman
House Veterans' Affairs Subcommittee
On Benefits
337 Cannon House Office Building
Washington, DC 20515

Dear Chairman Quinn:

The American Legion has not received any federal grants or contracts, during this year or in the last two years, from any agency or program relevant to the subject of the March 23 hearing concerning H.R. 3193-The Duty To Assist Veterans ACT of 1999.

Sincerely,

Carroll Williams, Director
National Veterans Affairs and
Rehabilitation Commission

Statement of Joseph Thompson
Under Secretary for Benefits
Veterans Benefits Administration
Department of Veterans Affairs
Before the House Veterans Affairs Committee
Subcommittee on Benefits
March 23, 2000

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify today on the concept of well grounded claims and VA's statutory duty to assist claimants in the VA claim process. My purpose today is to provide you with a chronology of our policy and procedures as they evolved in response to pertinent decisions of the Court of Appeals of Veterans Claims. I will also address our recent proposed rulemaking relevant to these issues. We believe our proposed revision to 38 C.F.R. § 3.159 strikes an appropriate balance between the obligations of claimants who seek VA benefits and the Government they honorably served. I will conclude by summarizing data we have gathered in an attempt to quantify the impact on timeliness and resources which would necessarily accompany any change in law that increases the administrative burden on VA in the claims process.

VA's Historical Role in Assisting Claimants

Historically, VA has always assumed a policy of assisting claimants in gathering evidence to support their claims for VA benefits. This assistance has included requesting service records, medical records, and other pertinent documents from sources identified by the claimant. VA also has provided medical examinations, when appropriate, to diagnose or evaluate physical and mental conditions. The claims adjudication process inevitably involves some subjective judgment in evaluating the evidence in an individual case. While VA regional offices uniformly requested documentary evidence on virtually all claims, the extent to which a claim was more fully developed to include a VA

examination, at times, differed among VA's regional offices depending on the subjective determination of the claims examiner that a particular claim was not factually plausible. In such cases, often involving claims filed many years after discharge, a claimant was sometimes requested to provide additional information before an examination was scheduled and full development of the claim was undertaken.

It is the role of the Board of Veterans' Appeals (BVA) to review these claims decisions. Notably, if a claim was denied and appealed to the BVA, development action could begin again upon the remand instructions of the BVA.

This VA claims process underwent increased scrutiny in the late 1970's and 1980's by veterans, service organizations, and members of Congress who expressed dissatisfaction with the way some of the regional offices were handling certain sensitive claims, such as those alleging injury due to Agent Orange and radiation exposure. There was a growing belief that veterans would benefit if their claims were subject to judicial review.

This belief led to the enactment of Public Law 100-687, the "Veterans' Judicial Review Act of 1988." (VJRA) The Act created the United States Court of Appeals for Veterans Claims (CAVC) (formerly named the United States Court of Veterans Appeals) to provide for judicial review of BVA decisions. The Act also amended 38 U.S.C. section 5107(a) to codify matters previously addressed only in VA regulations. The statute was revised to state that it is a claimant's burden to submit evidence to "well ground" a claim for VA benefits. It also codified VA's duty to assist a claimant in developing facts pertinent to a claim:

Except when otherwise provided by the Secretary in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Secretary shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim."

The concepts of "well-grounded claims" and VA's "duty to assist" derive from long-standing VA regulations in 38 C.F.R. §§ 3.102 and 3.103(a), respectively. These concepts were not expressly linked to one another in those regulations but the VJRA codified them and placed them together in successive

sentences in what is now 38 U.S.C. section 5107(a). In interpreting section 5107(a), courts have found the sequence of those two sentences to be significant. As I will more fully explain, the CAVC, since 1990, has issued several decisions holding that the first sentence of section 5107(a) requires a claimant to submit evidence that his or her claim is well grounded, and that VA's duty to assist "such a claimant" under the second sentence of the statute does not arise until the claimant has satisfied his or her initial burden. The United States Court of Appeals for the Federal Circuit affirmed that holding in *Epps v. Gober*, 126 F.3d 1484, 1488-89 (Fed. Cir. 1997). These decisions have directly affected the VA claims process.

Judicial expansion of the concept of a "well-grounded claim"

An understanding of the CAVC's development of the well grounded claim concept is pivotal to understanding VA's current policy on this issue.

Soon after its establishment, the CAVC began to issue decisions construing the meaning of section 5107, particularly the undefined term, "well grounded" claim. *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990) was the court's first notable decision on this issue. In *Gilbert*, the court held that the provisions of section 5107 establish "chronological obligations" in the VA claims process: the initial obligation rests with the claimant to submit a well grounded claim, which the court defined as a "facially valid" one. Once a claimant meets this initial statutory burden, VA is then obligated to "assist such a claimant in developing the facts pertinent to the claim." *Id.* at 55.

The court refined the concept of a "well grounded claim" that same year in *Murphy v. Derwinski*, 1 Vet.App. 78, 81 (1990):

Because a well grounded claim is neither defined by the statute nor the legislative history, it must be given a common sense construction. A well grounded claim is a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible to satisfy the initial burden of section 5107(a)

The well grounded threshold is "rather low," and is "the only requirement needed to obtain the Secretary's assistance." *White v. Derwinski*, 1 Vet.App.

519, 521 (1981). It is an objective threshold "which explores the likelihood of prevailing on the claim." The Court has held that while the evidence to make a claim well grounded need not be conclusive, the statutory scheme "requires more than just an allegation; a claimant must submit supporting evidence" that a claim is plausible. *Tirpak v. Derwinski*, 2 Vet.App. 609, 610 (1982).

In light of these decisions, VA Compensation and Pension Service revised provisions in its Adjudication Procedures Manual (M21-1, Part III, ¶1.03) to reflect the Court's emphasis that it is the statutory burden of the claimant to submit evidence establishing entitlement to VA benefits, and restating the *Murphy* Court's definition of a well grounded claim as a "plausible claim, meritorious on its own or capable of substantiation" -- a claim which need not be conclusive, only possible. Consistent with VA's history of providing assistance to claimants, the procedures manual was also revised to state that upon the request of a claimant, VA should "make reasonable efforts to assist claimants in securing public documents and other evidence." No distinction was made between efforts required to make a claim well grounded versus development of a claim on its merits.

The concept of the well-grounded claim continued to evolve in *King v. Brown*, 5 Vet.App. 19 (1993), in which the Court equated the well grounded requirement to the well-pleaded complaint requirement applicable to civil actions under Federal Rule of Civil Procedure 8(a)(2). This civil rule requires a clear statement of the claim, the factual elements of which are presumed to be true, establishing potential entitlement to the relief sought. The Court explained that a claimant in the VA benefits system must, likewise, submit some evidence to establish potential entitlement to benefits, and that for the purpose of well grounding a claim, the evidence submitted will also be presumed to be true. This presumption includes statements submitted by the veteran which do not require independent verification for the well grounded claim requirement.

The presumption of truth, however, does not apply to statements asserting facts beyond the competence of the person making the assertion. Medical testimony offered by a lay person, for example, falls into this category.

Accordingly, the Court concluded, "Where the determinative issue involves medical causation or a medical diagnosis, competent medical evidence to the effect that the claim is 'plausible' or 'possible' is required." *Groffveit v. Brown*, 5 Vet.App. 91, 93 (1993). Thus, as the result of Court decisions, the well grounded claim process grew to require the submission of medical evidence from a claimant who was seeking benefits for a medical condition claimed to be related to service. The lack of such medical evidence in the claim before it led the *Groffveit* Court to conclude that the claim "was not one on which relief could be granted; there was no claim to adjudicate on the merits."

The CAVC has also explained that statutory and regulatory presumptions, such as those relating to chronic diseases, combat veterans, or exposure to herbicides, would lessen the evidentiary showing necessary to make a claim well grounded.

The CAVC also issued decisions which addressed the practical effect of the concept of well grounded claims on the overall VA claims process. In *Grivois v. Brown*, 6 Vet.App. 136 (1994) CAVC stated that it is the duty of those adjudicators who first review a claim to apply the well grounded test "for it is their duty to avoid adjudicating implausible claims at the expense of delaying well-grounded ones." The CAVC noted that the statutory scheme recognizes that not all claims filed for VA benefits will be meritorious, and that section 5107(a) "reflects a policy that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay" those claims which are well grounded. The Court reproached VA for developing the not well-grounded claim before it: "We, thus, have a record which, despite the initial failure of appellant to present evidence of medical causality as to the claimed hearing loss and 'nervous condition,' reflects indulgence of that failure and a voluntary effort by the Secretary to supply the needed evidence." More significantly, the Court warned that "while no duty to assist arises absent a well-grounded claim, if the Secretary, as a matter of policy, volunteers assistance to establish well groundedness, grave questions of due process can arise if there is apparent disparate treatment between claimants in this regard." *Id.* at 140.

VA's response to this case was to revise its procedures manual in January 1994 to acknowledge that although VA is not required to carry a not well grounded claim to full adjudication, its policy was to "liberally interpret" the term "well grounded." It instructed its field offices to fully develop claims before deciding whether they are well grounded, including requesting service medical records, VA and other government records, and private records identified by the claimant as relevant to the claim. VA's policy was based on its understanding that although it may not do less than the statute requires, it was not prohibited from doing more than the statute requires.

In 1995, CAVC defined the specific requirements which would well ground a claim for service connection. In *Caluza v. Brown* 7 Vet.App. 498, 506 (1995), aff'd, 78 F.3d 604 (Fed Cir. 1996), the court held that a well grounded claim for service connection requires: (1) a medical diagnosis of a current disability; (2) medical or lay evidence of in-service occurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus or link between an in-service injury or disease and the current disability, and the United States Court of Appeals for the Federal Circuit affirmed that holding in *Epps v. Gober*, 126 F.3d 1464 (Fed.Cir. 1997), cert. denied, 118 S.Ct. 2348 (1998). These three elements correspond to the facts a claimant must show in order to establish entitlement to compensation under 38 U.S.C. § 1110.

Nonetheless, believing that the statute did not prohibit VA from volunteering assistance, the Director of the Compensation and Pension Service issued a policy letter to VA field offices in May 1996, summarizing the court decisions on well grounded claims, and reiterating that it was the policy of the Service to delay a decision on well groundedness until a claim had been fully developed.

We revised our procedures manual in August 1996 to reflect that policy, directing VA regional offices to ensure that all development was undertaken on claims which were "plausible on a factual basis." (M21-1, Part VI, ¶2.08). We continued to provide medical examinations of claimants and sought evidence to

well ground the claim through the VA exam process. BVA, as well, remanded claims to obtain "nexus opinion" medical evidence, sometimes ordering VA examinations for this purpose when such evidence was required to well ground a claim.

Morton v. West

The decisions of CAVC predictably made the VA claims process more legalistic, and veterans' representatives continually mounted challenges to the Court's interpretation of the scope and timing of VA's duty to assist and the well grounded claim requirement. Reminded of VA's historical willingness to help claimants develop evidence on their claims, veterans' advocates argued that VA's "full development" manual provisions were actually substantive rules, conferring enforceable rights on claimants to full development of claims, even if they were not well grounded under the Court's definition.

This issue was raised by the claimants in *Carbino v. Gober*, 10 Vet.App. 507 (1997) where CAVC noted that VA's manual provisions "do not appear to be particularly well thought out regarding the status of a claimant and the duty to assist," but declined to examine the issue based on the belief that VA should first address it. Internally, VBA management extensively discussed these issues, reflecting on the increasing workload in its regional offices, and the increasing delay in processing times for all claims due to the full development of those claims which were not well grounded. The wisdom of using VBA funds and VHA resources on claims that have not met the evidence thresholds of section 5107(a) was also an issue, as was the Court's questioning of VA's authority to deviate from the duties in this statute in the order in which they are laid out. The fairness of VA's current development and examination policies was placed squarely at issue.

VA was forced to confront these issues directly with CAVC's decision in *Morton v. West*, 12 Vet.App. 477 (1999) decided on July 14, 1999. In *Morton*, the claimant argued that VA had created a blanket exception to the well-grounded claim requirement of section 5107(a). Citing VA's internal procedures

manual, the claimant argued that VA had obligated itself to fully develop all claims, regardless of whether they were well grounded. He asserted that those manual provisions were valid exercises of the Secretary's authority to create exceptions under the "[e]xcept when otherwise provided" clause in the first sentence of section 5107(a).

The CAVC rejected those assertions for two reasons. First, it concluded that the manual provisions at issue were merely internal statements of policy or interpretation which could not be enforced against VA. Second, CAVC concluded that, if the manual provisions were interpreted as establishing a blanket exception to the statute, such an interpretation would be inconsistent with section 5107(a). Additionally, the Court reiterated its prior holding that section 5107 reflects a Congressional policy that implausible claims should not consume VA's limited resources and force well-grounded claims into ever greater backlog and delay. The Court also criticized VA's May 1996 policy directive to fully develop all claims before determining whether they are well grounded, observing that this directive was issued four months after the court's decision in *Grivois* and was a blanket exception to 38 U.S.C. section 5107(a) and was also inconsistent with the statute. *Morton*, which is currently on appeal to the Federal Circuit, required the Compensation and Pension Service to respond with a formal change in its policy.

VA policy after *Morton*

In August 1999, I issued a letter informing each VA regional office that a number of provisions of our procedural manual were being rescinded as the result of the *Morton* decision. Thereafter, three veterans' service organizations filed petitions in the Federal Circuit challenging that letter. The petitioners argue that, despite the CAVC's finding that the manual provisions are invalid, VA could not rescind those provisions without adhering to notice-and-comment rulemaking procedures of the Administrative Procedures Act. That case is currently being stayed pending resolution of the *Morton* appeal.

The August 1999 Letter instructed our regional offices to follow this interim

policy implementing the *Morton* decision pending proposed rulemaking:

(1) Review all claims, both pending and future, to determine whether they are well grounded prior to beginning development; (2) if a claim is not well grounded, send the claimant a letter informing him or her of the evidence required to well ground the claim, and provide 30 days for the submission of this evidence; (3) if not already of record, obtain any pertinent medical or service records in VA custody and review them to determine if they well ground the claim; (4) refrain from developing for any private treatment records and other non-VA documents or from scheduling a VA examination on claims which are not well grounded; and (5) at the end of 30 days, review any evidence of record to determine whether the claim is well grounded. If it is, develop further evidence to decide the merits of the claim. If it is not, deny it as not well grounded.

This policy represents a fundamental shift in the VA claims process. Based on our own review of regional office procedures as well as feedback we received from some service organizations, we believe that some regional offices have struggled to apply it in individual cases. We have sought to clarify any misunderstanding on the part of our regional offices as to how to implement the *Morton* decision by informal training sessions, with more formal training on claims development procedures once this policy is formalized by regulation.

Proposed Revision to 38 C.F.R. §3.159

On December 2, 1999, VA published a notice of proposed rulemaking for public comment concerning well-grounded claims and the duty to assist in volume 64 of the Federal Register at pages 67,528 to 67,534. Although the *Morton* decision indicates that VA cannot establish a blanket exception to section 5107(a) which would wholly swallow the statutory rule, VA does have the authority to establish reasonable, limited exceptions to the well-grounded claim requirement. Therefore, consistent with currently controlling judicial precedents, the proposed rule includes important exceptions to a general rule that claimants must present plausible claims before the Department's duty to assist arises

Our proposed rules would establish two types of exceptions. First, they would specify certain types of assistance which VA would provide in all claims, before it could deny a claim as not well grounded. Specifically, VA would obtain a veteran's service medical records and any identified VA medical records in all cases. Further, if VA determines that a claim is not well grounded, it would be required to inform the claimant of the types of evidence necessary to make the claim well grounded and afford the claimant an opportunity to submit such evidence before rendering a final decision on the claim.

Second, the proposed rules would entirely exempt certain groups of claimants from the threshold requirement of submitting a well-grounded claim. Specifically VA would assist claimants, even if their claims are not well grounded, if (1) the claimant is seeking disability compensation and the claim was filed within one year of separation from service; (2) the claimant has been denied medical treatment within the past 12 months due to lack of funds; (3) the claimant is terminally ill; (4) the claimant submits competent evidence that he or she engaged in combat with the enemy and is experiencing symptoms of post-traumatic stress disorder (PTSD); or (5) the claimant submits competent evidence that he or she was the victim of a sexual assault and is experiencing symptoms of PTSD. We believe that the burden of producing evidence to well ground a claim may be especially onerous for these claimants.

In addition, although not specifically mentioned in the proposed rule, the well grounded claim requirement would not affect the exam requirement for prisoners of war contained in 38 C.F.R. § 3.326, nor would it alter the statutory and regulatory presumptions already in place which may relieve a claimant from having to establish one or more of the well grounded requirements under *Caluza v. Brown*.

This proposed rule would liberalize the policy implemented in August 1999 as a result of the *Morton* decision. While remaining within the confines of current law, the proposed rule would strike an appropriate balance between the obligations of claimants who seek federal benefits and the Government they honorably served. We hope that with input from the veteran community, we can

completed.

Effect on Claims Processing

Should Congress determine that the outcome of VA's proposed rulemaking is unacceptable, and shift more of the evidentiary burden onto the Department as proposed in H.R. 3193, we ask that you consider the resource and timeliness issues which would necessarily accompany such a change in law.

In an effort to more fully understand the effect of developing not well grounded claims on the overall timeliness of claims processing, the Compensation and Pension Service conducted a nationwide sampling of claims in 1998. The purpose of this study was not only to learn if timeliness was adversely impacted by developing not well grounded claims, but also to gather statistics on whether full development of such claims resulted in eventual grants of benefits.

We reviewed a sample of 281 claim files which included original compensation, pension, and DIC claims, and supplemental claims such as claims for increased service connected compensation. Our review found that well grounded was not an issue in 34.2% of the claims which comprised appeals, claims for increased evaluation, Gulf War claims undergoing special handling, and other claims such as those raising competency and helpless child issues. It was also not an issue in 4.3% of the claims because the claims were statutorily barred for reasons such as the claimant's status.

Well groundedness was a consideration in the remaining claims, 173 claims or 61.5% of the total sample. Over half of these were original claims for service connection. These 173 claims contained 450 separate issues.

Fifty seven of these claims or 32.9% of them were found to be well grounded upon initial consideration, under the criteria established by the Court in *Caluza v. Brown*. The average processing time for these well grounded claims was 132 days.

develop a final rule that is both acceptable to veterans and is administratively feasible.

H.R. 3193

H.R. 3193 would require VA to assist all claimants for VA benefits in "developing information pertinent to a decision on the claim," and would specify that such assistance must be provided "before a decision on the claim is rendered." H.R. 3193 would also specify that VA's duty to assist claimants would include the following: (1) requesting information from other Federal agencies as described in 38 U.S.C. § 5106; (2) informing the claimant of the information and evidence needed in order to fully develop the claim; (3) requesting information identified or referenced by the claimant if the claimant has executed a release of information authorizing VA to obtain the information; (4) informing the claimant if VA is unable to obtain pertinent evidence; (5) providing a medical examination for the purpose of determining the current disability of any veteran who is unable to afford medical care as determined under 38 U.S.C. § 1722(a); and (6) any other assistance VA considers necessary and appropriate to assure the proper development of the claim.

If enacted as proposed, H.R. 3193 would have an insignificant effect on entitlement costs. However, VA's preliminary estimates of administrative costs for this legislation would be \$7 million for 174 FTE in Fiscal Year 2000, and a five-year cost of \$55 million.

We recommend that the Committee defer action on H.R. 3193 and any other measure concerning the duty to assist until VA has completed its ongoing rulemaking. We recognize that the issue of the proper allocation of responsibility between VA and claimants is one of continuing interest to the veteran community and to Congress, and our proposed rules have generated a broad range of comments and suggestions. We will carefully assess those comments and endeavor in our final rule to reach an accommodation that is acceptable to the veterans' community and to Congress. Accordingly, we recommend that the Committee defer action on this issue until the ongoing rulemaking has been

One hundred sixteen or 67% of the 173 claims were initially not well grounded. Nine of the 116 claims were denied as not well grounded without further development, while the remaining 107 claims or about 62% were developed to obtain evidence to well ground the claim. Most of these claims were fully developed in accordance with the former instructions in the VA Adjudication Procedures Manual, M21-1. However, only 16 of the 107 claims or roughly 15% of them, resulted in a grant of benefits, despite this development effort. Thirty-nine of them, or 36.4%, were still not well grounded even after we developed them, and 17 of them, or 14% were denied on the merits. Thirty-five of the claims contained issues some of which were denied and some were granted. More disconcerting is the fact that the average processing time for claims which were initially not well grounded but developed was approximately 200 days, about two months longer than the average processing time for initially well grounded claims.

This study indicated that in claims where well groundedness was an issue, two out of every three claims were not well grounded, and there was a significant amount of time in the claims adjudication process expended to develop them. Because a well-grounded claim is accompanied by evidence sufficient to justify a belief that the claim is plausible, including medical evidence, less development action is normally required.

The extended development time for claims that are not well grounded is caused, in part, by the additional development required; development of claims that are not well grounded routinely generates additional development because the evidence to support such claims is often scant if non-existent, causing multiple requests for this evidence to ensure ourselves that we have exhausted all reasonable attempts to find it. Thus, the least meritorious of the claims take up the most time and action on the part of VA. That represents a considerable expenditure of time and effort which is not only counterproductive, but creates false expectations in the minds of claimants, particularly those who have reported for VA examinations. The net outcome of this process is an overall degradation in the service provided to claimants who have submitted claims

which are plausible.

VA has also estimated the exam costs which would be associated if full development of all original claims required VA examinations to obtain evidence of a claimant's current condition or medical evidence of a nexus between the current condition and the claimed in-service event. VA projects that if we are required to examine the claimants in all of the original claims we project we will receive over the next five years, 949,030 claims, exam costs provided by VHA, alone, would be approximately \$36 million per year. The cost of the examinations for these claims would eventually decrease as claimants understand and cooperate in the process of well grounding claims, and VA examinations are appropriately scheduled for these well grounded claims.

We have also estimated that full development of all claims regardless of whether they are well grounded would require 174 more full time employees to meet the increased development needs.

Conclusion

In summary, we believe that VA's proposed regulation represents a reasonable sharing of responsibility in the claims process between the claimant and VA. The proposed regulation reflects the conclusion of the Veterans' Claims Adjudication Commission, with which VA agrees, that a policy of providing unconditional assistance to all claimants would be a waste of time and resources.

However, we believe that claims that are not well grounded also merit our attention. We believe that VA should advise such claimants of the types of evidence they must submit in order to make their claims plausible under the Courts' well grounded standard, so that those claims can be processed as timely and completely as claims which are well grounded. Realizing that there are exceptions to every general rule, VA's proposed rulemaking incorporates reasonable exceptions to the well grounded claim requirement which address the primary concerns of the veteran community that there are claimants for whom the well grounded claim requirement would be especially onerous.

This concludes my prepared statement. My colleagues and I will be pleased to answer any questions Subcommittee members may have.

JJ:C:my documents/legislative testimony - WG

AMVETS WRITTEN TESTIMONY FOR THE RECORD

HOWIE DEWOLF, MARCH 23, 2000

Mr. Chairman and Members of the Subcommittee:

We very much appreciate the opportunity to present comments for the record on behalf of the more than 250,000 members of AMVETS concerning the issue of well-grounded claims and H.R. 3193, the Duty to Assist Veterans Act of 1999. Neither AMVETS nor myself has been the recipient of any federal grants or contracts during FY2000 or the previous two years.

Historically, the veterans' claims process established by Congress was quite straight-forward and fairly simple to understand. The Government assumed the responsibility of assisting veterans in gathering the proper and necessary evidence to substantiate their claims. Veterans' claims needed only to be supported by enough evidence to justify a belief by a fair and impartial individual that the claim was "well grounded." In this context, the Veterans Administration had a "duty to assist" the veteran in obtaining available evidence to prove the claim. The duty to assist did not relieve the veteran of the burden of proof; it simply obligated the VA to assist the veteran in gathering existing evidence as a service to the veteran. Unfortunately, recent court opinions have challenged this long established principle by arguing that veterans were required to submit sufficient evidence to conclusively establish the well claim criteria before he or she was entitled to Government assistance.

Under the current procedures implemented to comply with the courts' rulings, the determination of a claim to be "well-grounded" has become a prerequisite to the VA's duty to assist. We believe this approach defeats the purpose and congressional intent which has served us quite well over time. We believe the VA's long established responsibility to assist veterans in the claims process should be preserved. If we allow the recent court actions to drive this process, we essentially place the burden upon the veteran to obtain all necessary records and pertinent evidence which might be used to establish the entitlement before any assistance can be provided. The assumption, under this procedure, is that somehow, the veteran will find his or her way through the myriad pitfalls of the fact-finding process and somehow provide the correct evidence to establish that the claim is well grounded. Based on this effort, the VA would then make an initial determination concerning whether the veteran had successfully established a well-

grounded claim. A favorable determination would then allow the VA to proceed with efforts to obtain more conclusive evidence to prove these same facts. Essentially, under these procedures, the heretofore simple process of one adjudication is replaced with a cumbersome, time consuming process requiring several reviews before the merits of the actual claim can actually be decided. The process is confusing for the veteran, and places him or her at a disadvantage by further complicating the already daunting task for some of petitioning the federal government for benefits to which they may be legally entitled at a time in their lives where need may be acute. We do not believe this was Congress' intent. Rather, we believe the original process sought to assist veterans through an advocacy proceeding. The tests applied to adjudicate a claim do not change; only the fact-finding process is altered. Our position is that both the veteran and the government have a joint responsibility in these matters, which the recent court decisions ignore.

The elements of the proposed bill provide the assistance necessary to support veterans in establishing well-grounded claims and essentially reestablish the VA's duty to assist. The duty to assist provision benefits both the VA and the claimants for two reasons. First, the VA is better equipped to determine which records are pertinent to the claim, and second, in most cases they can more promptly obtain them from government and private sources. Having the VA assist veterans in obtaining evidence is both practical and in keeping with public policy principles underlying veterans benefits. The court-imposed requirement defeats the purpose of the duty to assist provision and, in our view, simply serves to further complicate a process, which for many veterans is already confusing.

As we attempt to ensure our veterans are provided the proper benefits to which they are legally entitled, we believe we must continue to strive for simplicity and efficiency within the fact gathering process. We need to look for ways which avoid further burdening an already overburdened system. Although legislation can certainly define the specific direction Congress may believe is necessary to reestablish the historical principles of the duty to assist, the current dilemma results from the court's ruling and the VA's attendant obligation to comply by redefining how it applies the well-grounded policy. We believe the optimal solution would be to reaffirm the previous procedures to which both the VA and veterans had long become accustomed. We do not believe the Court's interpretation serves any useful purpose. Rather, it

serves to further complicate the process with the attendant disadvantage of slowing the claims adjudication procedures.

Our view is that the duty to assist process, which has served veterans well for years ought to be reaffirmed. We do not believe legislation is required to accomplish this so long as the sense of Congress is reflected within the process. We believe Congressional intent already exists and that it is consistent with VA's earlier procedures to provide the assistance to veterans to which they are entitled. Regrettably, we seem to have transformed a relatively simple process into a more complicated one by virtue of the court-imposed requirement. We believe this Court ruling serves no useful purpose. Rather, it defeats the purpose of the duty to assist provision; is contrary to the intent of Congress; is confusing to both VA and veterans; complicates the process for the VA; and, inappropriately burdens VA claimants seeking benefits.

Mr. Chairman, this concludes our written comments for the record. On behalf of the members of AMVETS, I thank you again for this opportunity to present our views to the committee.

