AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Calendar No. 166

115TH CONGRESS, *1st Session* | SENATE | REPORT 115–126

VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

JULY 10, 2017.—Ordered to be printed

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

R E P O R T

[To accompany S. 1024]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs (hereinafter, "Committee"), to which was referred the bill (S. 1024) to amend title 38, United States Code (hereinafter, "U.S.C."), to reform the rights and processes relating to appeals of decisions regarding claims for benefits under the laws administered by the Secretary of Veterans Affairs, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

INTRODUCTION

On May 3, 2017, Chairman Isakson introduced S. 1024, the proposed Veterans Appeals Improvement and Modernization Act of 2017. S. 1024 would restructure the appeals process within the Department of Veterans Affairs (hereinafter, "VA") consistent with a proposal developed by VA and stakeholders; would require VA to submit to Congress and the Government Accountability Office (hereinafter, "GAO") a comprehensive plan for processing appeals that are pending before the new appeals system takes effect (hereinafter, "legacy appeals") and implementing the new appeals system; would authorize VA to test facets of the new system before it takes effect; and would require VA periodically to publish on its website data regarding processing legacy appeals and appeals in the new system. Senators Baldwin, Blumenthal, Daines, Hassan, Kaine, King, Tester, and Udall are original cosponsors. Senators

Brown, Capito, Cochran, Collins, Crapo, Durbin, Enzi, Hatch, Heinrich, Heller, Hirono, Manchin, McCaskill, Nelson, Rounds, Thune, and Warner were later added as cosponsors. The bill was referred to the Committee.

On January 17, 2017, Senator Rubio introduced S. 152, the proposed VA Accountability First and Appeals Modernization Act of 2017. S. 152 would reform the appeals process within VA consistent with a proposal developed by VA and stakeholders. Senators McCain and Toomey are original cosponsors. Senators Daines and Grassley were later added as cosponsors. The bill was referred to the Committee.

On March 23, 2017, Senator Blumenthal introduced S. 712, the proposed Department of Veterans Affairs Appeals Modernization Act of 2017. S. 712 would reform the appeals process within VA consistent with a proposal developed by VA and stakeholders. Senators Baldwin, Brown, Casey, Durbin, Feinstein, Hassan, Hirono, Kaine, King, Manchin, Murray, Sanders, Shaheen, Tester, Udall, Van Hollen, and Warner are original cosponsors. Senators Franken, Menendez, Merkley, and Wyden were later added as cosponsors. The bill was referred to the Committee.

On April 25, 2017, Senator Sullivan introduced S. 933, the proposed Express Appeals Act of 2017. S. 933 would direct VA to carry out a pilot program to provide veterans the option of using an alternative appeals process to more quickly determine claims for disability compensation. Senator Casey is an original cosponsor. The bill was referred to the Committee.

COMMITTEE HEARING

On May 17, 2017, the Committee held a hearing on legislation pending before the Committee, including S. 1024. Testimony was received by Jennifer S. Lee, M.D., Deputy Under Secretary for Health for Policy and Services, Veterans Health Administration, U.S. Department of Veterans Affairs; Louis J. Celli, Jr., Director, National Veterans Affairs and Rehabilitation Division, The American Legion; Kayda Keleher, Associate Director, National Legislative Service, Veterans of Foreign Wars; Adrian Atizado, Deputy National Legislative Director, Disabled American Veterans; Allison Jaslow, Executive Director, Iraq and Afghanistan Veterans of America; and J. David Cox, National President, American Federation of Government Employees.

COMMITTEE MEETING

After reviewing the testimony from the foregoing hearing, the Committee met in open session on June 28, 2017, to consider an amended version of S. 1024. The Committee voted by voice vote, without objection, to report favorably to the Senate S. 1024 as amended.

SUMMARY OF THE COMMITTEE BILL AS REPORTED

S. 1024, as reported (hereinafter, "the Committee bill"), consists of six sections, summarized below.

Section 1 provides a short title.

Section 2 would restructure the appeals process within VA consistent with a proposal developed by VA and stakeholders.

Section 3 would require VA to submit to Congress and GAO a comprehensive plan for processing legacy appeals and implementing the new appeals system and to provide periodic reports on VA's progress in carrying out that plan.

Section 4 would authorize VA to test facets of the new system before it takes effect, including carrying out the fully developed appeals pilot program outlined in S. 933.

Section 5 would require VA periodically to publish on its website data regarding processing legacy appeals and appeals in the new system.

Section 6 would define several terms used in the Committee bill.

BACKGROUND AND DISCUSSION

Sec. 2. Reform of rights and processes relating to appeals of decisions regarding claims for benefits under laws administered by Secretary of Veterans Affairs.

In general, section 2 of the Committee bill, which is derived from S. 152 and S. 712, includes a proposal to restructure the VA appeals process. The proposal was developed by VA in collaboration with stakeholders.

Background. In general, an individual who is dissatisfied with VA's decision on a claim for VA benefits may appeal that decision. There are a number of potential steps in the appeals process at VA's Veterans Benefits Administration (hereinafter, "VBA"), including review by a Decision Review Officer, VA issuing a statement of the case, the appellant filing a substantive appeal, VA issuing supplemental statements of the case, and VA certifying the appeal to the Board of Veterans' Appeals (hereinafter, "Board" or "BVA"). At the Board, the appellant may request an in-person hearing in Washington, DC, an in-person hearing at a VA office in his or her locality, or a video-conference hearing. Also, an individual generally may submit evidence at any time during the appeals process and VA has a duty to assist the individual in obtaining evidence needed to prevail. Between January 2013 and January 2016, the number of appeals pending agency-wide at VA rose from approximately 325,000 appeals to over 441,000 appeals.

Beginning in 2016, VA conducted a series of meetings with a range of stakeholders in order to develop a path forward on reforming the appeals process. Based on those meetings, VA submitted to Congress in April 2016 draft legislation to restructure the VA appeals process in order to provide claimants with several options if they are not satisfied with VA's initial decision on their claims for benefits. Since that time, the Committee has received further feedback from stakeholders on the appeals reform proposal. The provisions in section 2 of the Committee bill reflect the original VA proposal along with technical changes and further improvements based on that feedback from stakeholders.

Committee Bill. The specific changes made by section 2 of the Committee bill are outlined below. The Committee expects and intends that VA will operate under the new appeals framework in a veteran-friendly manner.

Sec. 2(a). Definitions.

Section 2(a) of the Committee bill would define several terms that would be utilized in title 38, U.S.C., if the Committee bill is enacted.

Background. Section 101 of title 38, U.S.C., sets forth a number of definitions of terms used in title 38, U.S.C.

Committee Bill. Section 2(a) of the Committee bill would amend section 101 of title 38, U.S.C., to define "agency of original jurisdiction" as "the activity which entered the original determination with regard to a claim for benefits under laws administered by the Secretary"; to define "relevant evidence" as "evidence that tends to prove or disprove a matter in issue"; and to define "supplemental claim" as "a claim for benefits under laws administered by the Secretary filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis."

Sec. 2(b). Notice regarding claims.

Section 2(b) of the Committee bill would modify VA's duty to notify, so that VA would not need to notify a claimant of the information or evidence necessary to substantiate his or her claim for benefits, if the individual received a decision on that claim within the past year by the agency of original jurisdiction or the Board.

Background. Section 5103(a) of title 38, U.S.C., requires VA to provide notice to a claimant of the information or evidence necessary to substantiate the individual's claim for benefits. VA is required to prescribe by regulation the content of the notice that will be provided for an original claim, a claim for reopening, or a claim for increase.

Committee Bill. Section 2(b) of the Committee bill would amend section 5103(a) of title 38, U.S.C., to provide that VA does not need to provide that notice with respect to a supplemental claim that is filed on or before 1 year after the agency of original jurisdiction issues a decision or on or before 1 year after the Board issues a decision. Section 2(b) of the Committee bill also would delete the references in section 5103(a) of title 38, U.S.C., to a claim for reopening and claim for an increase and instead add a reference to supplemental claims, because all claims other than original claims would be called supplemental claims under the new appeals system.

Sec. 2(c). Modification of rule regarding disallowed claims.

Section 2(c) of the Committee bill would make conforming changes to section 5103A of title 38, U.S.C.

Background. Under section 5108 of title 38, U.S.C., if a claim has been disallowed, VA must reopen the claim and review the prior disposition if the claimant submits new and material evidence with respect to the claim. Also, under section 5103A of title 38, U.S.C., VA has a duty to assist claimants in obtaining evidence needed to substantiate a claim for VA benefits. Under subsection 5103A(f) of title 38, U.S.C., that duty does not require VA to reopen a previously disallowed claim unless new and material evidence has been presented or secured with respect to the claim.

Committee Bill. Section 2(c) of the Committee bill would amend section 5103A(f) of title 38, U.S.C., to omit the reference to reopening, because all claims other than original claims would be called

supplemental claims under the new appeals system. It also would change the words "new and material" to "new and relevant" to reflect the modifications made by section 2(i) of the Committee bill, which specifies that a supplemental claim would need new and relevant evidence, rather than new and material evidence, to be readjudicated.

Sec. 2(d). Modification of duty to assist claimants.

Section 2(d) of the Committee bill would amend section 5103A of title 38, U.S.C., to provide that duty to assist functions would be carried out by the agency of original jurisdiction.

Background. Under section 5103A of title 38, U.S.C., VA has a duty to assist claimants in obtaining evidence needed to substantiate a claim for VA benefits. Generally, that duty applies throughout the appeals process at VBA and the Board.

Committee Bill. Section 2(d) of the Committee bill would amend section 5103A of title 38, U.S.C., to add a new subsection (e)(1) providing that the duty to assist will apply only to a claim or supplemental claim until the time a claimant is provided notice of the decision of the agency of original jurisdiction with respect to the claim. It would add a new subsection (e)(2) specifying that the duty to assist would not apply to higher-level review (as added by section 2(g) of the Committee bill) or to review on appeal by the Board.

Section 2(d) of the Committee bill would amend section 5103A of title 38, U.S.C., to add a new subsection (f)(1) specifying that, if a higher-level adjudicator identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duty to assist and that error occurred prior to the agency of original jurisdiction decision, the higher-level adjudicator must return the claim for correction of the error and readjudication, unless the Secretary may award the maximum benefit in accordance with title 38, U.S.C., based on the evidence of record.

Section 2(d) of the Committee bill would amend section 5103A of title 38, U.S.C., to add a new subsection (f)(2)(A) specifying that, if the Board identifies or learns of an error on the part of the agency of original jurisdiction to satisfy the duty to assist and that error occurred prior to the agency of original jurisdiction decision on appeal, the Board must remand the claim to the agency of original jurisdiction for correction of the error, unless the Secretary may award the maximum benefit in accordance with title 38, U.S.C., based on the evidence of record.

Section 2(d) of the Committee bill would amend section 5103A of title 38, U.S.C., to add a new subsection (f)(2)(B) specifying that remand for correction of a duty to assist error may include directing the regional office to obtain an advisory medical opinion.

Finally, section 2(d) of the Committee bill would amend section 5103A of title 38, U.S.C., to include a new subsection (f)(3) specifying that nothing in this modified portion of section 5103A of title 38, U.S.C., shall be construed to imply that VA does not have a duty to correct a duty to assist error that was erroneously not identified during higher-level review or during review on appeal to the Board.

Given that the bill would narrow the timeframe during which the duty to assist would apply, it is the Committee's expectation that

VA will place greater emphasis on correctly fulfilling the duty to assist at the regional offices and will aggressively seek to detect and correct duty to assist errors during later review.

Sec. 2(e). Decisions and notices of decisions.

Section 2(e) of the Committee bill would require VA to enhance the information included in notifications of decisions on claims for benefits.

Background. Under section 5104(a) of title 38, U.S.C., when VA makes a decision affecting the provision of benefits to a claimant, VA must provide the claimant and his or her representative with notice of the decision. Under section 5104(b) of title 38, U.S.C., in any case where VA denies the benefit sought, that notice must include a statement of the reasons for the decision and a summary of the evidence considered by VA.

Committee Bill. Section 2(e) of the Committee bill would amend section 5104(b) of title 38, U.S.C., to specify that each notice provided under section 5104(a) must include all of the following: Identification of the issues adjudicated; a summary of the evidence considered by VA; a summary of applicable laws and regulations; identification of findings favorable to the claimant; in the case of a denial, identification of elements not satisfied leading to the denial; an explanation of how to obtain or access evidence used in making the decision; and, if applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

Sec. 2(f). Binding nature of favorable findings.

Section 2(f) of the Committee bill would add a new section to title 38, U.S.C., outlining the circumstances under which a favorable finding by one VA adjudicator will be binding on other VA adjudicators.

Background. Generally, if multiple VA adjudicators in succession make decisions on a claim for benefits, they are not bound by factual findings made by prior adjudicators.

Committee Bill. Section 2(f) of the Committee bill would add a new section 5104A to title 38, U.S.C., providing that any finding favorable to the claimant will be binding on all subsequent adjudicators within VA, unless clear and convincing evidence is shown to the contrary to rebut the favorable finding.

Sec. 2(g). Higher-level review by agency of original jurisdiction.

Section 2(g) of the Committee bill would add a new section 5104B to title 38, U.S.C., outlining the new higher-level review option for an individual who is not satisfied with VA's initial decision on his or her claim for benefits.

Background. Under the new appeals system, one of the options available to an individual who is dissatisfied with VA's initial decision on a claim for benefits would be to seek higher-level review by the agency of original jurisdiction.

Committee Bill. Section 2(g) of the Committee bill would add a new section 5104B to title 38, U.S.C., outlining the new higher-level review process.

New subsection 5104B(a) of title 38, U.S.C., would provide that a claimant may request review of the decision of the agency of

original jurisdiction by a higher-level adjudicator within the agency of original jurisdiction. VA would be required to approve each request for review.

New subsection 5104B(b) of title 38, U.S.C., would provide that a request for higher-level review must be in writing in such form as the Secretary of Veterans Affairs may prescribe and be made within 1 year of the notice of the agency of original jurisdiction's decision. The claimant may request that the review be conducted by a higher-level adjudicator at the same office or by an adjudicator at a different office. VA could not deny a request for review by an adjudicator at a different office without good cause.

New subsection 5104B(c) of title 38, U.S.C., would provide that notice of a higher-level review decision must be provided in writing and must include a general statement reflecting whether evidence was not considered because it was received after the initial decision and noting the options available to have the new evidence considered by VA.

New subsection 5104B(d) of title 38, U.S.C., would provide that the evidentiary record before the higher-level adjudicator will be limited to the evidence of record in the agency of original jurisdiction decision being reviewed.

New subsection 5104B(e) of title 38, U.S.C., would provide that review by the higher-level adjudicator will be de novo.

Sec. 2(h). Options following decision by agency of original jurisdiction.

Section 2(h) of the Committee bill would outline the options available under the new appeals system for an individual who is not satisfied with VA's initial decision on his or her claim for benefits.

Background. Under the new appeals system, individuals who are dissatisfied with VA's initial decision on a claim would have the option to seek higher-level review by the agency of original jurisdiction; to file a supplemental claim with the agency of original jurisdiction; or to appeal to the Board.

Committee Bill. Section 2(h) of the Committee bill would add a new section 5104C to title 38, U.S.C., providing in subsection (a)(1) that a claimant may take any of the following actions within the year after the agency of original jurisdiction issues a decision: File a request for higher-level review, file a supplemental claim, or file a notice of disagreement. New section 5104C(a)(2)(A) would provide that, once a claimant takes one of those actions, the claimant may not take another one of those actions with respect to that claim or the same issue contained within the claim until the higher-level review, supplemental claim, or notice of disagreement is adjudicated or the claimant withdraws the request for higher-level review, supplemental claim, or notice of disagreement.

New section 5104C(a)(2)(B) and (C) of title 38, U.S.C., would provide that nothing in subsection (a) will prohibit a claimant from taking any of the actions in succession with respect to a claim or an issue contained within the claim and that nothing in that subsection will prohibit a claimant from taking different actions simultaneously with respect to different claims or different issues contained within a claim.

New section 5104C(a)(2)(D) of title 38, U.S.C., would provide that VA may develop and implement a policy for claimants who take one of the above actions and want to withdraw that action before it has been acted on by VA and to instead take a different action.

Finally, new section 5104C(b) of title 38, U.S.C., would provide that, if more than 1 year has passed since VA issued its decision on a claim, the claimant may file a supplemental claim.

Sec. 2(i). Supplemental claims.

Section 2(i) of the Committee bill would amend section 5108 of title 38, U.S.C., to lower the evidentiary threshold for having a claim readjudicated after it has been disallowed by VA.

Background. Under section 5108 of title 38, U.S.C., if a claim has been disallowed, VA must reopen the claim and review the prior disposition if the claimant submits new and material evidence with respect to the claim. Pursuant to section 3.159(c) of title 38, Code of Federal Regulations, VA will provide a limited duty to assist with respect to a claim to reopen in order to help the claimant obtain new and material evidence. That limited duty includes assisting the claimant in obtaining from Federal agencies or from sources other than Federal agencies existing records that are reasonably identified by the claimant. See 66 Fed. Reg. 45,620, 45,628 (2001).

The draft legislation submitted to Congress by VA proposed to change the "new and material" standard to "new and relevant." Several stakeholders have expressed concern that the "new and relevant" standard could be construed as setting a higher evidentiary threshold than the current "new and material" standard. For example, in testimony provided for a hearing before the House Committee on Veterans' Affairs regarding the companion bill to S. 1024, Vietnam Veterans of America stated that they have "significant concern that VA is intending to make this definition more restrictive than what was promised to stakeholders during negotiations." In addition, some stakeholders have expressed concern about the timeframe for duty to assist ending after a decision by the agency of original jurisdiction. For example, Military-Veterans Advocacy provided this testimony for the Committee's May 17, 2017, legislative hearing:

> S. 1024 continues to strip the duty to assist from the veteran after the initial decision. As attorneys are not able to provide paid representation until after the initial decision, this measure effectively eliminates any ability to supplement the record.
> * * * While inadequate at best, the duty to assist allows the attorney some latitude to obtain records to prepare the case. Without the duty to assist, the attorney will be required to rely upon the Freedom of Information Act. This will not only result in costs being attributed to the veteran but result in undue delay.

Committee Bill. Section 2(i)(1) of the Committee bill would amend section 5108 of title 38, U.S.C., to provide that, if new and relevant evidence is presented or secured with respect to a supplemental claim, VA must readjudicate the claim taking into consideration all of the evidence of record. That would include any evidence

submitted prior to the former disposition of the claim, as well as additional evidence received before the readjudication occurs.

In light of feedback from stakeholders, section 2(i)(1) of the Committee bill makes clear that, with respect to supplemental claims, VA will have an obligation to assist a claimant in obtaining existing records even if the claimant has not yet submitted new and relevant evidence. Specifically, section 2(i)(1) of the Committee bill would add a new subsection (b) to section 5108 of title 38, U.S.C., providing that if a claimant, in connection with a supplemental claim, reasonably identifies existing records, whether or not the records are in the custody of the Federal government, VA will assist the claimant in obtaining those records in accordance with the duty to assist provisions set forth in section 5103A of title 38, U.S.C. This is intended to ensure that, even after an initial decision on a claim, a claimant will have access to VA's duty to assist in obtaining additional records.

In light of feedback from stakeholders, section 2(i)(2) of the Committee bill includes a rule of construction specifying that section 5108 of title 38, U.S.C., as amended by this bill, shall not be construed to impose a higher evidentiary threshold than the "new and material" evidentiary standard that was in section 5108 prior to the changes made by this bill.

Sec. 2(j). Remand to obtain advisory medical opinion.

Section 2(j) of the Committee bill would require the Board to remand a case to obtain an independent medical opinion if the agency of original jurisdiction should have exercised its discretion to obtain such an opinion.

Background. Under section 5109(a) of title 38, U.S.C., if, in the judgment of the Secretary, expert medical opinion in addition to that available within VA is warranted by the medical complexity or controversy involved in a case, VA may secure an advisory medical opinion from one or more independent medical experts who are not employees of VA.

Committee Bill. Section 2(j) of the Committee bill would add a new subsection (d) to section 5109 of title 38, U.S.C., providing that the Board shall remand a claim to direct the agency of original jurisdiction to obtain an advisory medical opinion from an independent medical expert if the Board finds that VBA should have exercised its discretion to obtain such an opinion. The Board's remand instructions must include the questions to be posed to the independent medical expert.

Sec. 2(k). Restatement of requirement for expedited treatment of returned or remanded claims.

Section 2(k) of the Committee bill, in order to reflect the options under the new appeals system, would make technical changes to the requirement that VA provide expedited treatment of remanded claims.

Background. Under section 5109B of title 38, U.S.C., VA is required to take such actions as may be necessary to provide for the expeditious treatment by the appropriate regional office of any claim that is remanded to a regional office by the Board.

Committee Bill. Section 2(k) of the Committee bill would amend section 5109B of title 38, U.S.C., to provide that VA must take such

actions as may be necessary to provide for the expeditious treatment by VBA of any claim that is returned by a higher-level adjudicator or remanded by the Board.

Sec. 2(l). Effective dates of awards.

Section 2(l) of the Committee bill would amend section 5110 of title 38, U.S.C., to establish the effective date of an award of benefits.

Background. Under section 5110 of title 38, U.S.C., the effective date of an award of benefits is generally no earlier than the date of receipt of the application that resulted in the award of benefits.

The draft legislation submitted to Congress by VA would provide that the date of application would be considered the date of filing the initial application for a benefit if an individual who is dissatisfied with a decision, within 1 year of a decision, seeks a higher-level review, files a supplemental claim, files an appeal to the Board, or files a supplemental claim after a Board decision. Further, the effective date would be preserved if the individual continuously pursues a new option to be reviewed at VA under the new appeals system within 1 year of the latest decision.

Stakeholders have expressed concern that the draft language did not preserve the effective date if a claimant files a supplemental claim after a decision from the Court of Appeals for Veterans Claims (hereinafter, "CAVC" or "Court"). For example, in testimony provided for a hearing before this Committee on May 24, 2016, regarding a discussion draft bill based on VA's draft, Veterans of Foreign Wars stated,

> This proposal is designed to significantly reduce the impact of the CAVC on claims processing with VA by discouraging veterans from appealing to the Court. To ensure that veterans are not discouraged from appealing to the CAVC, we urge Congress to amend this proposal to allow claimants to submit new evidence within 1 year of a CAVC decision.

Committee Bill. Section 2(l) of the Committee bill would amend section 5110 of title 38, U.S.C., to provide that the date of application will be considered the date of filing the initial application for a benefit if the claim is continuously pursued by filing any of the following, either alone or in succession: a request for higher-level review on or before the date 1 year after the date on which the agency of original jurisdiction issues a decision, a supplemental claim on or before the date 1 year after the date on which the agency of original jurisdiction issues a decision, a notice of disagreement on or before the date 1 year after the date on which the agency of original jurisdiction issues a decision, a supplemental claim on or before the date 1 year after the date on which the Board issues a decision, and a supplemental claim on or before the date 1 year after the date on which the Court of Appeals for Veterans Claims issues a decision.

Section 2(l) of the Committee bill would amend section 5110 to further provide that, for supplemental claims received more than 1 year after the agency of original jurisdiction issued a decision or the Board of Veterans' Appeals issued a decision, the effective date

will be fixed in accordance with facts found but will not be earlier than the date of receipt of the supplemental claim.

In light of stakeholder input and in an effort to preserve judicial review, the Committee bill includes the protection of the effective date if an individual files a supplemental claim within 1 year after a decision from the Court.

Sec. 2(m). Definition of award or increased award for purposes of provisions relating to commencement of period of payment.

Section 2(m) of the Committee bill would make a technical conforming change to section 5111 of title 38, U.S.C.

Background. Section 5111 of title 38, U.S.C., sets forth the criteria for when payment of monetary benefits will begin based on a successful claim, including a reopened claim.

Committee Bill. Section 2(m) of the Committee bill would make a technical change by inserting "supplemental claim" rather than "reopened," because all claims other than original claims would be called supplemental claims under the new appeals system.

Sec. 2(n). Modification of limitation on fees allowable for representation.

Section 2(n) of the Committee bill would amend section 5904 of title 38, U.S.C., to allow paid representation after VA's initial decision on a claim for benefits.

Background. Under section 5904 of title 38, U.S.C., an attorney generally may not charge a fee for services provided in connection with a claim for VA benefits until the claimant files a notice of disagreement appealing VA's decision on the claim.

Committee Bill. Section 2(n) of the Committee bill would amend section 5904 of title 38, U.S.C., to provide that a fee could not be charged until after the claimant is provided notice of the agency of original jurisdiction's initial decision on the claim.

Sec. 2(o). Clarification of Board of Veterans' Appeals referral requirements after order for reconsideration of decisions.

Section 2(o) of the Committee bill would make a technical conforming change to section 7103 of title 38, U.S.C.

Background. Section 7103 of title 38, U.S.C., provides that a decision of the Board is final unless the Chairman of the Board orders reconsideration of the decision.

Committee Bill. Section 2(o) of the Committee bill would make a technical conforming change to section 7103 of title 38, U.S.C., by changing the word "heard" to "decided" in two places.

Sec. 2(p). Conforming amendment relating to readjudication.

Section 2(p) of the Committee bill would make a technical conforming change to section 7104 of title 38, U.S.C.

Background. Section 7104 of title 38, U.S.C., outlines the jurisdiction of the Board.

Committee Bill. Section 2(p) of the Committee bill would make a technical conforming change to section 7104(b) of title 38, U.S.C., by changing the word "reopened" to "readjudicated."

Sec. 2(q). Modification of procedures for appeals to Board of Veterans' Appeals.

Section 2(q) of the Committee bill would amend section 7105 of title 38, U.S.C., to modify the procedures for appealing to the Board, including eliminating several steps from the current process.

Background. Under section 7105 of title 38, U.S.C., appellate review of an agency of original jurisdiction decision is initiated by filing a notice of disagreement within 1 year from mailing of notice of the initial determination and the appeal is completed by filing a substantive appeal after VA issues a statement of the case. The notice of disagreement must be filed with the regional office. After the notice of disagreement is filed, the agency of original jurisdiction is required to take such development or review action as it deems proper and, if those actions do not resolve the disagreement (by granting the benefit or withdrawal of the appeal), the regional office prepares the statement of the case. If any evidence is submitted by the appellant with or after a substantive appeal, the Board may review the evidence in the first instance unless the appellant requests review by the regional office. Section 7105 of title 38, U.S.C., further provides that, if a notice of disagreement is not filed in accordance with chapter 38, U.S.C., within the required timeframe, the decision will become final and will not be reopened or allowed except pursuant to regulations that are not inconsistent with title 38, U.S.C.

The draft legislation submitted to Congress by VA would require the appellant to identity in the notice of disagreement the specific determination with which the appellant disagrees and would authorize the Board to dismiss an appeal that fails to do so, but the draft did not specify whether an appellant would have an opportunity to clarify or correct the information listed in the notice of disagreement after it has been filed. Stakeholders have expressed concern that an appeal could be dismissed without giving an appellant the opportunity to cure any deficiency in the notice of disagreement. For example, in testimony provided for a May 2, 2017, hearing before the House Committee on Veterans' Affairs regarding the companion bill to S. 1024, Vietnam Veterans of America stated:

> If a veteran files a proper [notice of disagreement], but VA needs additional clarification, VA should request clarification and not "dismiss" the appeal. By filing a [notice of disagreement], clearly the veteran disagrees with something in the initial decision; policies should be implemented to assist the veteran in completing his appeal, not end it.

Committee Bill. Section 2(q) of the Committee bill would rewrite section 7105 of title 38, U.S.C., to eliminate the requirements for a substantive appeal and statement of the case. It would also eliminate the requirement for the agency of original jurisdiction to take development or review action following the filing of a notice of disagreement and delete the provision regarding the Board considering evidence in the first instance.

Specifically, section 2(q) of the Committee bill would strike from subsection 7105(a) of title 38, U.S.C., the requirement that an appellant file a substantive appeal after a statement of the case is furnished and would provide that appellate review will be initiated

by filing a notice of disagreement in the form prescribed by the Secretary.

Section 7105(b) of title 38, U.S.C., as rewritten by section 2(q) of the Committee bill, would provide that a notice of disagreement shall be filed within 1 year from the date of mailing of notice of the decision of the agency of original jurisdiction pursuant to section 5104, new section 5104B, or revised section 5108 of title 38, U.S.C.

Section 7105(b) of title 38, U.S.C., would further provide that the notice of disagreement shall be in writing and shall identify the specific determination with which the claimant disagrees. The notice of disagreement must be filed with the Board and must specify if the claimant requests a hearing before the Board, which will include an opportunity to submit evidence; an opportunity to submit additional evidence without a hearing; or a review by the Board without a hearing and without submission of evidence.

In light of stakeholder input, section 7105(b) of title 38, U.S.C., as rewritten by section 2(q) of the Committee bill, would provide that VA shall develop a policy to permit a claimant to modify the information identified in the notice of disagreement after it has been filed.

Section 7105(c) of title 38, U.S.C., as rewritten by section 2(q) of the Committee bill, would provide that, if a notice of disagreement is not filed in accordance with title 38, U.S.C., within the required time, the decision of the agency of original jurisdiction will become final and the claim will not thereafter be readjudicated or allowed except, in the case of a readjudication or allowance pursuant to higher-level review that was requested in accordance with section 5104B of title 38, U.S.C., as added by section 2(g) of the Committee bill; as may otherwise be provided in section 5108 of title 38, U.S.C.; or as may otherwise be provided in regulations consistent with title 38, U.S.C.

Section 7105(d) of title 38, U.S.C., as rewritten by section 2(q) of the Committee bill, also would provide that the Board may dismiss any appeal that fails to identify the specific determination with which the claimant disagrees.

Sec. 2(r). Modification of procedures and requirements for simultaneously contested claims.

Section 2(r) of the Committee bill would make conforming changes to section 7105A of title 38, U.S.C.

Background. Section 7105A of title 38, U.S.C., outlines the procedures for appeals with respect to simultaneously contested claims.

Committee Bill. Section 2(r) of the Committee bill would make conforming technical amendments to section 7105A of title 38, U.S.C., to reflect the steps of the appeals process that would be eliminated by section 2(q) of the Committee bill.

Sec. 2(s). Repeal of procedures for administrative appeals.

Section 2(s) of the Committee bill would delete an obsolete provision from title 38, U.S.C.

Background. Section 7106 of title 38, U.S.C., outlines the process for an administrative appeal, a process that is not currently utilized by VA.

Committee Bill. Section 2(s) of the Committee bill would delete section 7106 of title 38, U.S.C., the obsolete provision regarding administrative appeals.

Sec. 2(t). Modifications relating to appeals; dockets; hearings.

Section 2(t) of the Committee bill would amend section 7107 of title 38, U.S.C., to outline the dockets that would be used by the Board under the new appeals system.

Background. Under section 7107 of title 38, U.S.C., each case received at the Board is generally considered in docket order. A hearing before the Board may be provided in-person at the Board's principal office in Washington, DC; in-person at a regional office; or through video conferencing at a regional office.

The proposed legislation drafted by VA would create two separate dockets to be used by the Board under the new appeals system, one called the hearing option docket and the other the non-hearing option docket. Under VA's proposal, the Board would place on the hearing docket cases in which an appellant requests a hearing, as well as cases in which the appellant wishes to submit evidence and does not wish to have a hearing. VA proposed to use the other docket for cases with no hearing request and no new evidence, which according to VA would allow the Board to provide feedback to the regional offices regarding cases that were decided by the Board on the same evidentiary record as the regional office decision.

However, testimony from the Committee's May 17, 2017, hearing reflects that there is no support among stakeholders for placing on the hearing option docket cases in which no hearing is requested but the appellant wishes to submit evidence. For example, Disabled American Veterans testified that, under VA's proposal, "veterans who submit new evidence, but do not request a hearing, could be forced to wait months or even years behind veterans who request a hearing." In addition, Military Officers Association of America provided this input:

> The VA has expressed concerns that including claimants with additional evidence amongst those without additional evidence on the same docket would confuse the "feedback loop," but we believe this is manageable. The feedback loop permits the [B]oard to provide input to the [agency of original jurisdiction] regarding errors the [agency of original jurisdiction] committed in the original adjudication of the claim. There appears to be no reason, however, the Board could not simply exclude the claims with additional evidence from the feedback loop and still provide very useful feedback to the [agency of original jurisdiction] from the remaining claims.

Additionally, in testimony provided for a May 2, 2017, hearing before the House Committee on Veterans' Affairs regarding the companion bill to S. 1024, Vietnam Veterans of America stated:

> [Vietnam Veterans of America] believes veterans that do not want a hearing, but wish to submit additional evidence should not be required to choose the hearing docket. Again, the bill is penalizing a veteran for exercising his right to add evidence to the record. [Vietnam Veterans of

> America] believes veterans wishing to only add additional evidence should be able to choose the non-hearing docket.

Stakeholders also raised concerns that appellants should be able to change dockets after the initial selection. For example, the National Organization of Veterans' Advocates provided this testimony for the Committee's May 17, 2017, hearing:

> It should be made clear that a veteran can move into the non-hearing docket without penalty—with the same or more favorable docket number—if he determines he no longer wants a hearing after the initial request.

Committee Bill. In light of the feedback noted above, the Committee bill would permit VA to create a third docket for cases in which evidence is submitted but no hearing is requested or to include these cases on a docket with cases in which no evidence is submitted and no hearing takes place, but it would not permit VA to include those cases on the hearing docket. Specifically, section 2(t) of the Committee bill would amend section 7107(a) of title 38, U.S.C., to provide that the Board will maintain at least two separate dockets and may not maintain more than two unless the Board notifies the Senate and House Committees on Veterans' Affairs. The Board may assign to each docket such cases as the Board considers appropriate, except that the Board may not assign to the docket for cases in which a Board hearing is requested any cases where there is no request for a hearing. It is the view of the Committee that the Board should separately track outcomes of cases in which no hearing takes place and no evidence is submitted, in order to provide appropriate feedback to the regional offices.

Section 2(t) of the Committee bill would further amend section 7107(a) of title 38, U.S.C., to provide that each case before the Board will be decided in regular order according to its respective place on one of the dockets, unless it is advanced on the docket under section 7107(b) of title 38, U.S.C., as amended by this section of the Committee bill.

Section 2(t) of the Committee bill would amend section 7107(b) of title 38, U.S.C., to provide that, as under current law, a case on any docket may be advanced for cause shown. A motion to advance the case may be granted only if the case involves interpretation of law of general application affecting other veterans; the appellant is seriously ill or under severe financial hardship; or other sufficient cause is shown.

Section 2(t) of the Committee bill would amend section 7107(c) of title 38, U.S.C., to provide that, if a Board hearing is requested, it will be provided either at the Board's principal location in Washington, DC, or through video conferencing. In-person field hearings at the regional offices would no longer be an option. Upon notification of a hearing in Washington, DC, the appellant may request a video conference hearing instead and the Board must grant that request. Upon notification of a video conference hearing, the appellant may request a hearing in Washington, DC, instead and the Board must grant that request.

Section 2(t) of the Committee bill would amend section 7107(d) of title 38, U.S.C., to provide that nothing in revised section 7107 of title 38, U.S.C., shall be construed to preclude the screening of cases for purposes of determining the adequacy of the record for

decisional purposes or development of a record found to be inadequate.

In light of stakeholder input, section 2(t) of the Committee bill would amend section 7107(e) of title 38, U.S.C., to provide that VA shall develop and implement a policy allowing an appellant to move his or her case from one docket to another at the Board.

Sec. 2(u). Repeal of certain authority for independent medical opinions.

Section 2(u) of the Committee bill would repeal section 7109 of title 38, U.S.C., which authorizes the Board to obtain independent medical opinions.

Background. Under section 7109 of title 38, U.S.C., the Board may obtain an independent medical opinion if warranted in a particular case.

Committee Bill. Section 2(u) of the Committee bill would delete section 7109 of title 38, U.S.C., removing the Board's authority to request independent medical opinions, other than as outlined in section 5109 of title 38, U.S.C., as amended by section 2(j) of the Committee bill.

Sec. 2(v). Clarification of procedures for review of decisions on grounds of clear and unmistakable error.

Section 2(v) of the Committee bill would make a technical conforming change to section 7111 of title 38, U.S.C.

Background. Section 7111 of title 38, U.S.C., provides that a decision of the Board is subject to revision based on clear and unmistakable error.

Committee Bill. Section 2(v) of the Committee bill would make a technical conforming change to section 7111 of title 38, U.S.C.

Sec. 2(w). Evidentiary record before Board of Veterans' Appeals.

Section 2(w) of the Committee bill would add a new section 7113 to title 38, U.S.C., outlining the evidentiary record that will be considered by the Board and would amend section 7104 of title 38, U.S.C., to require the Board to note in its decision if evidence was not considered as a result of new section 7113 of title 38, U.S.C.

Background. Generally, under section 20.1304 of title 38, Code of Federal Regulations, an appellant is notified that he or she may submit evidence to the Board during the 90-day period following the appeal being certified to the Board. An appellant also may submit evidence outside that window if good cause is shown; may submit evidence during or in certain circumstances after a hearing before the Board; and may submit evidence in response to evidence obtained by the Board.

Under section 7104(d) of title 38, U.S.C., each decision of the Board is required to include a written statement of the Board's findings and conclusions as well as the reasons or bases for the Board's findings and conclusions.

Committee Bill. Section 2(w) of the Committee bill would add a new section 7113 to title 38, U.S.C., providing in subsection (a) that, if a hearing before the Board is not requested in the notice of disagreement and no request was made to submit evidence, the evidentiary record before the Board will be limited to the evidence

of record at the time of the decision of the agency of original jurisdiction on appeal.

Subsection (b) of new section 7113 of title 38, U.S.C., would provide that, for cases in which a hearing is requested in the notice of disagreement, the evidentiary record before the Board will be limited to the evidence of record at the time of the decision of the agency of original jurisdiction on appeal. However, the record will also include evidence submitted by the appellant and his or her representative at the Board hearing and evidence submitted by the appellant and his or her representative within 90 days following the Board hearing.

Subsection (c) of new section 7113 of title 38, U.S.C., would provide that, for cases in which a hearing is not requested but the appellant requested an opportunity to submit evidence, the evidentiary record before the Board will include evidence submitted by the appellant and his or her representative with the notice of disagreement and evidence submitted by the appellant and his or her representative within 90 days following receipt of the notice of disagreement.

Section 2(w) of the Committee bill also would amend section 7104(d) of title 38, U.S.C., to provide that the Board in its decision must include a general statement reflecting whether evidence was not considered in making the decision because it was received at a time not permitted under new section 7113 of title 38, U.S.C., and noting the options available for having the evidence considered by VA.

The Committee stresses that limiting the windows for submitting evidence is in no way meant to alter the veteran-friendly nature of the VA claims and appeals process. The Committee intends and expects that VA will develop robust policies for addressing evidence submitted during timeframes not contemplated by the new appeals framework and will ensure that appellants are made fully aware of what actions they would need to take to have that evidence considered by VA adjudicators. The Committee, in part through the reporting requirements in section 5(1)(T) of the Committee bill, intends to closely monitor VA's actions in response to evidence that arrives during incorrect timeframes to determine if additional changes to this law are required to ensure it is being implemented in a veteran-friendly manner.

Sec. 2(x). Applicability.

Section 2(x) of the Committee bill outlines the timeline and requirements in order for the new appeals system to go into effect and which cases would be handled under the new appeals system.

Background. On March 23, 2017, GAO released a report—entitled VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions—on VA's efforts to improve timeliness for resolving appeals relating to disability claims, including the proposal put forward in 2016 to comprehensively reform the disability claims appeals process and VA's plans to implement a new appeals system if that proposal is enacted. GAO found that VA does not have data to be able to identify the root cause of delays under the current appeals process; it is not clear if VA will be able to determine whether a new appeals process reduces "churning" of cases between different levels of review

at VA, which VA believes is a significant problem with the current process; GAO believes pilot programs to test the concepts involved in appeals reform would help detect and correct problems with the new process before it is rolled out nationally; there are inadequacies in VA's plans for implementing a new appeals process, for upgrading information technology systems, and for hiring more staff; and VA does not have a good plan for how it would measure whether a new appeals system is a success. Based on all of those findings, GAO believes that VA risks undermining the efficiencies and goals of the planned reforms.

Committee Bill. Section 2(x)(1) of the Committee bill, in a free-standing provision, would provide that the changes made by section 2 of the Committee bill shall apply to claims for which a notice of decision is provided by VA on or after the later of 540 days after enactment and 30 days after VA submits to Congress a certification that the Secretary confirms, without delegation, that VA has the resources, personnel, office space, procedures, and information technology required to carry out the new appeals system and to timely address legacy appeals and appeals under the new system. The certification must include a summary of the expected performance outcomes with respect to legacy appeals that the Secretary used in making that certification and a comparison of those expected outcomes to the performance outcomes prior to the new appeals system taking effect.

Section 2(x)(2) of the Committee bill would provide that, in determining whether and when to make that certification, VA shall collaborate with, partner with, and give weight to the advice of veterans organizations and such other stakeholders as the Secretary considers appropriate.

Section 2(x)(3) of the Committee bill would provide that VA may apply the new appeals system to claims that receive a decision after enactment of the bill but before the effective date of the new system, if the claimant elects to subject the claim to the new system.

Section 2(x)(4) of the Committee bill would provide that VA may begin implementation of the new appeals system in phases beginning on the effective date of the new system.

Section 2(x)(5) of the Committee bill would provide that, for legacy claims, claimants who receive a statement of the case or supplemental statement of the case after the effective date of the new system may elect to participate in the new system.

Section 2(x)(6) of the Committee bill would provide that VA would be required to publish in the Federal Register the effective date of the new system.

By providing VA with the authority to phase in the new appeals system and to delay the effective date of the new system until VA is fully prepared to begin parallel processing under the new and legacy systems, it is the Committee's intent to provide VA with tools to ensure a smooth roll out of the new system and to ensure that legacy appeals will not be negatively impacted.

It is also the Committee's intent that, in making the determination when and whether to submit the required certification, VA collaborate with all of the veterans organizations and other stakeholders that participated in crafting the new appeals framework.

Sec. 2(y). Rule of construction.

Section 2(y) of the Committee bill would clarify that this bill is not intended to limit the ability of individuals to seek revision of a VA decision based on clear and unmistakable error.

Background. Under sections 5109A and 7111 of title 38, U.S.C., individuals may seek revision of a VA decision on the grounds of clear and unmistakable error.

Committee Bill. Section 2(y) of the Committee bill would provide that nothing in section 2 of the Committee bill shall be construed to limit the ability of a claimant to request a revision of a decision based on clear and unmistakable error pursuant to section 5109A or 7111 of title 38, U.S.C.

Sec. 3. Comprehensive plan for processing of legacy appeals and implementing new appeals system.

Section 3 of the Committee bill, in a freestanding provision, would require VA to submit to Congress a comprehensive plan for processing legacy appeals and implementing the new appeals system and to provide periodic reports on VA's progress in carrying out that plan.

Background. On March 23, 2017, GAO released a report—entitled VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions—on VA's efforts to improve timeliness for resolving appeals relating to disability claims, including the proposal put forward in 2016 to comprehensively reform the disability claims appeals process and VA's plans to implement a new appeals system if that proposal is enacted. GAO found that VA does not have data to be able to identify the root cause of delays under the current appeals process; it is not clear if VA will be able to determine whether a new appeals process reduces "churning" of cases between different levels of review at VA, which VA believes is a significant problem with the current process; GAO believes pilot programs to test the concepts involved in appeals reform would help detect and correct problems with the new process before it is rolled out nationally; there are inadequacies in VA's plans for implementing a new appeals process, for upgrading information technology systems, and for hiring more staff; and VA does not have an adequate plan for how it would measure whether a new appeals system is a success. Based on all of those findings, GAO believes that VA risks undermining the efficiencies and goals of the planned reforms.

Consequently, GAO recommended that Congress require VA to conduct pilot programs to test the concepts of appeals reform before rolling out a new system; that VA should develop detailed plans for recruiting, hiring, and training new employees; that VA should develop a schedule for information technology updates; that VA should conduct sensitivity analysis on assumptions used in projecting productivity and staffing needs under the proposed new appeals system; that VA should develop a more detailed plan for monitoring implementation of a new appeals system; and that VA should develop a plan to assess whether the new appeals system is serving veterans better than the existing appeals system.

Committee Bill. Section 3(a) of the Committee bill would require VA, not later than 90 days after enactment, to submit to Congress and GAO a comprehensive plan for processing legacy appeals; im-

plementing the new appeals system; timely processing, under the new appeals system, supplemental claims, requests for higher-level review, and appeals on any Board docket and for monitoring the implementation of the new appeals system, including metrics and goals to track the progress of the implementation; to evaluate the efficiency and effectiveness of the implementation; and to identify potential issues relating to the implementation.

Section 3(b) of the Committee bill would require the plan to, at a minimum, include:

1. Delineation of the total resource requirements of VBA and the Board, disaggregated by resources required to implement and administer the new appeals system and resources required to address legacy appeals.

2. Delineation of the personnel requirements of VBA and the Board, including staffing levels during the period in which VBA and the Board are concurrently processing legacy appeals and appeals under the new appeals system and the period during which VBA and the Board are no longer processing any legacy appeals.

3. Identification of the legal authorities under which VBA or the Board may hire additional employees to conduct that concurrent processing and remove employees who are no longer required by VBA or the Board once VBA and the Board are no longer processing any legacy appeals.

4. An estimate of the amount of time VBA and the Board will require to hire additional employees once funding has been made available, including a comparison of such estimate and the historical average time required by VBA and the Board to hire additional employees.

5. A description of the amount of training and experience that will be required of individuals conducting higher-level reviews.

6. An estimate of the percentage of higher-level adjudicators who will be former Decision Review Officers or have comparable experience to Decision Review Officers.

7. A description of the functions that would be performed by Decision Review Officers with respect to the new appeals system.

8. Identification of and a timeline for any training that may be required as a result of hiring new employees to carry out the new appeals system or to process legacy appeals and any re-training of existing employees that may be required.

9. Identification of the costs to VA for the required training and any additional training staff and any additional training facilities that will be required.

10. A description of the modifications to the information technology systems of VBA and the Board required to carry out the new appeals system, including cost estimates and a timeline for making the modifications.

11. An estimate of the office space VBA and the Board will require during and after concurrent processing, including an estimate of the amount of time VBA and the Board will require to acquire any additional office space; the historical average time required by VBA and the Board to acquire new office space; and a plan for using telework to accommodate staff exceeding available office space, including how VBA and the Board will provide training and oversight with respect to such teleworking.

12. Projections for the productivity of individual employees at VBA and the Board in carrying out tasks relating to the processing of legacy appeals and appeals under the new appeals system, taking into account the experience level of new employees and the enhanced notice required by this bill.

13. An outline of the outreach the Secretary expects to conduct to inform veterans, families of veterans, survivors of veterans, veterans service organizations, military service organizations, Congressional caseworkers, advocates for veterans, and such other stakeholders as the Secretary considers appropriate about the new appeals system, including a description of the resources required to conduct such outreach and timelines for conducting such outreach.

14. Timelines for updating any policy guidance, websites, and official forms that may be necessary to carry out the new appeals system, including identification of which offices and entities will be involved in efforts relating to such updating and historical information about how long similar update efforts have taken.

15. A timeline, including interim milestones, for promulgating such regulations as may be necessary to carry out the new appeals system and a comparison with historical averages for time required to promulgate regulations of similar complexity and scope.

16. An outline of the circumstances under which claimants with pending legacy appeals would be authorized to have their appeals reviewed under the new appeals system.

17. A delineation of the key goals and milestones for reducing the number of legacy appeals, including the expected number of appeals, remands, and hearing requests at VBA and the Board each year until there are no longer any legacy appeals.

18. A description of each risk factor associated with each element of the plan and a contingency plan to minimize each such risk.

Section 3(c) of the Committee bill would require GAO, no later than 90 days after receiving that plan, to assess the plan and notify Congress of its findings, including an assessment of whether the plan comports with sound planning practices, identification of any gaps in the plan, and such recommendations as considered appropriate.

Section 3(d) of the Committee bill would require VA, not later than 90 days after submitting that plan and every 90 days thereafter until the new system takes effect, and every 180 days thereafter for 7 years, to submit to Congress and GAO a report on VA's progress in carrying out the plan and what steps VA has taken to address any recommendations formulated by GAO.

Section 3(e) of the Committee bill would require VA to make available on a VA website the comprehensive plan and the periodic progress reports.

Sec. 4. Programs to test assumptions relied on in development of comprehensive plan for processing of legacy appeals and supporting new appeals system.

Section 4 of the Committee bill, in a freestanding provision, would authorize VA to carry out programs to test any assumptions relied upon in developing the comprehensive plan and to test the feasibility and advisability of any facet of the new appeals system.

Background. As outlined above, in its March 2017 report, GAO recommended that Congress require VA to conduct pilot programs

to test the concepts of appeals reform before rolling out an entirely new appeals system. For example, GAO stated that "VA's plans run counter to sound redesign practices that suggest pilot testing the process changes in a more limited fashion before full implementation, in order to manage risks and help ensure successful implementation of significant institutional change." GAO further stated that "without pilot testing VA may experience challenges and setbacks on a broader scale, which could undermine planned efficiencies and other intended outcomes."

Committee Bill. Section 4(a) of the Committee bill would provide that VA may carry out such programs as the Secretary considers appropriate to test any assumptions relied upon in developing the comprehensive plan and to test the feasibility and advisability of any facet of the new appeals system. VA would be required to notify Congress if changes to the new appeals system are needed in light of any such program.

Section 4(b) of the Committee bill would provide that the authority to carry out programs would include authority to conduct the fully developed appeals program as outlined in S. 933.

Section 4(c) of the Committee bill would provide that VA may not carry out any such programs after the new appeals system takes effect.

Sec. 5. Periodic publication of metrics relating to processing of appeals by Department of Veterans Affairs.

Section 5 of the Committee bill, in a freestanding provision, would require VA periodically to publish on its website data regarding processing legacy appeals and appeals in the new system.

Background. As outlined above, the March 2017 GAO report outlined GAO's findings that VA does not have data to be able to identify the root cause of delays under the current appeals process and it is not clear if VA will be able to determine whether a new appeals process reduces "churning" of cases between different levels of review at VA, which VA believes is a significant problem with the current process. GAO recommended that VA should develop a more detailed plan for monitoring implementation of a new appeals system and that VA should develop a plan to assess whether the new appeals system is serving veterans better than the existing appeals system.

Committee Bill. Section 5 of the Committee bill would require VA to periodically publish on a VA website the following:

With respect to appeals under the new appeals system:

1. For VBA and, to the extent practicable, each regional office, the number of supplemental claims and requests for higher-level review that are pending.

2. The number of appeals on any Board docket.

3. The average duration for processing claims and supplemental claims, disaggregated by regional office.

4. The average duration for processing requests for higher-level review, disaggregated by regional office.

5. The average number of days that appeals are pending on a docket of the Board, disaggregated by appeals that include a request for a hearing, appeals that do not include a request for a hearing but do include submittal of evidence, and appeals that do

not include a request for a hearing and do not include submittal of evidence.

6. With respect to the policy VA develops and implements to allow appellants to switch Board dockets, the number of cases moved from one docket to another; the average time cases were pending prior to moving from one docket to another; and the average time to adjudicate the cases after so moving.

7. The total number of remands to obtain advisory medical opinions.

8. The average number of days between the date the Board remands a claim to obtain an advisory medical opinion and the advisory medical opinion is obtained.

9. The average number of days between the date the Board remands a claim to obtain an advisory medical opinion and the agency of original jurisdiction issues a decision taking that advisory opinion into account.

10. The number of appeals that are granted, the number of appeals that are remanded, and the number of appeals that are denied by the Board disaggregated by docket.

11. The number of claimants each year that take action to protect their effective date, disaggregated by the status of the claimants taking the actions, such as whether the claimant is represented by a veterans service organization, the claimant is represented by an attorney, or the claimant is taking such action pro se.

12. The total number of times on average each claimant files to protect their effective date, disaggregated by the action taken.

13. The average duration, from the filing of an initial claim until the claim is resolved and claimants no longer take any action to protect their effective date of claims under the new appeals system, excluding legacy claims that opt in to the new appeals system and of legacy claims that opt in to the new appeals system.

14. How frequently an action taken within 1 year to protect an effective date leads to additional grant of benefits, disaggregated by action taken.

15. The average of how long it takes to complete each segment of the claims process while claimants are protecting the effective date, disaggregated by the time waiting for the claimant to take an action and the time waiting for VA to take an action.

16. The number and the average amount of retroactive awards of benefits as a result of protected effective dates, disaggregated by action taken.

17. The average number of times claimants submit claims with respect to the same condition, such as an initial claim and a supplemental claim.

18. The number of cases each year in which a claimant inappropriately tried to take simultaneous actions, such as filing a supplemental claim while a higher-level review is pending, what actions VA took in response, and how long it took on average to take those actions.

19. In the case that VA develops and implements a policy to allow claimants to switch options, the number of actions withdrawn and new actions taken pursuant to such policy.

20. The number of times VA received evidence relating to an appeal or higher-level review at a time not authorized under the new

appeals system, disaggregated by actions taken by VA to deal with the evidence and how long on average it took to take those actions.

21. The number of errors committed by VA in carrying out the duty to assist that were identified by higher-level review and by the Board, disaggregated by type of error, such as errors relating to private records and inadequate examinations, and a comparison with errors committed by VA in carrying out such duty with respect to legacy appeals.

22. An assessment of the productivity of employees at the regional offices and at the Board, disaggregated by level of experience of the employees.

23. The percentage of cases that are decided within the goals set by VA, disaggregated by supplemental claims, higher-level reviews, and each Board docket. If VA has not set a goal, VA would report the number of cases decided within 1 year, 2 years, 3 years, and more than 3 years.

24. The percentage of decisions that are overturned in whole or in part by a higher-level adjudicator, that are upheld by a higher-level adjudicator, and that are returned by a higher-level adjudicator for correction of an error.

25. How frequently VA readjudicates a claim pursuant to section 5108 of title 38, U.S.C., as amended by this bill and how frequently the readjudication results in an award of benefits.

26. If the Board screens cases pursuant to section 7107(d) of title 38, U.S.C., as rewritten by the bill, a description of the way in which the cases are screened and the purpose for which they are screened; a description of the effect screening had on the timeliness of Board decisions and the inventory of cases at the Board; and the type and frequency of development errors detected through the screening.

With respect to the processing of legacy appeals:

1. The average duration of each segment of the appeals process, disaggregated by periods in which VA is waiting for a claimant to take an action and periods in which the claimant is waiting for VA to take an action.

2. The frequency by which appeals lead to additional grant of benefits, disaggregated by whether the additional benefits are a result of additional evidence added after the initial decision.

3. The number and average amount of retroactive awards of benefits resulting from an appeal.

4. The average duration from filing a legacy claim until all appeals and remands relating to such legacy claim are completed.

5. The average number of times claimants submit different claims with respect to the same condition, such as an initial claim, new and material evidence, or a claim for an increase in benefits.

6. An assessment of the productivity of employees at the regional offices and at the Board, disaggregated by level of experience of the employees.

7. The average number of days the duration of an appeal is extended because VA secured or attempted to secure an advisory medical opinion.

8. How frequently claims are reopened pursuant to section 5108 of title 38, U.S.C., as in effect prior to the effective date of the new appeals system and how frequently reopening results in an award of benefits.

With respect to the processing of legacy appeals that opt in to the new appeals system:

1. The cumulative number of such legacy appeals.

2. The portion of work in the new appeals system attributable to those legacy appeals.

3. The average period such legacy appeals were pending before opting in to the new appeals system and the average period required to adjudicate them after opting in with respect to claims at a regional office, disaggregated by supplemental claims and requests for higher-level review and with respect to appeals, disaggregated by Board docket.

The Committee is of the opinion that this information will be useful in gauging whether veterans, their families, and their survivors are overall receiving satisfactory answers on their cases in a more timely manner than under the legacy appeals system. Also, this information should assist VA, Congress, and stakeholders in identifying any refinements that are necessary to the new system. With regard to legacy appeals, the Committee recognizes that VA has not tracked this information in the past. It is the Committee's intent that, in processing the nearly 500,000 legacy appeals that are currently pending and any additional legacy appeals that are filed prior to the effective date of the new appeals system, VA will track this data in order to allow for a reasonable comparison between the performance of the new appeals system and the legacy system. The Committee does not intend for VA to attempt to recreate this data with regard to legacy appeals that previously have been completed.

Sec. 6. Definitions.

Section 6 of the Committee bill, in a freestanding provision, would define several terms for purposes of this bill.

Background. The Committee bill uses several terms that are not defined in title 38, U.S.C.

Committee Bill. Section 6 of the Committee bill would define "claimant" as having the meaning given that term in section 5100 of title 38, U.S.C.; would define "legacy claim" as a claim that was submitted to VA for a benefit under a law administered by VA and for which notice of a decision was provided before the applicability date set forth in section 2(x) of the Committee bill; and would define "opt in" as, with respect to a legacy claim, that the claimant elects to subject the claim to the new appeals system.

COMMITTEE BILL COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office (hereinafter, "CBO"), estimates that enactment of the Committee bill would, relative to current law, increase discretionary spending by $2 million over 5 years. Enactment of the Committee bill would not affect the budget of state, local, or tribal governments.

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

CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 5, 2017.

Hon. JOHNNY ISAKSON,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1024, the Veterans Appeals Improvement and Modernization Act of 2017.

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

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 1024—Veterans Appeals Improvement and Modernization Act of 2017

Summary: S. 1024 would modify the appeals process for benefit claims at the Department of Veterans Affairs (VA) and would require VA and the Government Accountability Office (GAO) to produce several reports. CBO estimates that implementing S. 1024 would cost about $2 million over the 2017–2022 period; such spending would be subject to the availability of appropriated funds.

Enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting S. 1024 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 1024 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary effect of S. 1024 is shown in the following table. The costs of this legislation fall within budget function 700 (veterans benefits and services).

	By fiscal year, in millions of dollars—						
	2017	2018	2019	2020	2021	2022	2017–2022
INCREASES IN SPENDING SUBJECT TO APPROPRIATION							
Estimated Authorization Level	0	1	*	*	*	*	2
Estimated Outlays	0	1	*	*	*	*	2

Note: Annual amounts do not sum to total because of rounding; * = less than $500,000.

Basis of estimate: For this estimate, CBO assumes that S. 1024 will be enacted near the beginning of fiscal year 2018, that sufficient funds will be available each year, and that outlays will follow historical spending patterns for the affected programs.

Appeals Reform. Section 2 would direct VA to implement a new process to handle appeals of claims for veterans' benefits. As described below, the current system allows for repeated revisions and resubmissions of claims while maintaining an effective date for

benefits based upon the original filing date of the claim. As a result, VA reports that under current law final decisions on appeals take an average of 3 years, with some appeals taking more than 6 years. The current backlog for appeals exceeds 470,000 claims and is growing.

The proposed changes are intended to significantly streamline the appeal process, which would allow appeals to be finalized in a shorter period of time with fewer employees. VA reports that no additional personnel would be required for training, modifications to information technology, or outreach. VA also expects that the efficiencies of the new system would allow the agency to continue processing legacy appeals under the current system, very gradually reducing the existing backlog, without the need for additional employees. (Reducing the backlog in a more expedited manner would require more employees and would have a substantial cost.) Based on an analysis of information from VA and our understanding of the appeals process, CBO expects that VA could implement the changes without an increase in workload. Therefore, CBO estimates that implementing section 2 would have no significant cost over the 2017–2022 period.

Comprehensive Plan. Section 3 would require VA to create a comprehensive plan to implement the new appeals process. That plan would include information about the existing process, including timeliness and the number of appeals, and would discuss how that information would differ under the new process. VA would be required to evaluate the potential costs for all facets of the new appeals process as well as to provide quarterly reports on VA's implementation of that process. The bill also would require GAO to conduct an assessment of VA's comprehensive plan. CBO estimates that implementing this provision would cost about $2 million to prepare the reports over the 2017–2022 period.

Pilot Program on Fully Developed Appeals. Section 4 would grant VA the authority to implement a pilot program for some appeals until the new appeals process could be implemented. VA indicates that it would not use this authority; therefore, CBO estimates that implementing section 4 would have no budgetary effects.

VA Appeals Data. Section 5 would require VA to publish data monthly about the new appeals process on their website. CBO estimates that implementing section 5 would cost less than $500,000 over the 2017–2022 period.

Pay-As-You-Go Considerations: None.

Increase in long-term direct spending and deficits: CBO estimates that enacting S. 1024 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

Intergovernmental and private-sector impact: S. 1024 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On May 19, 2017, CBO transmitted a cost estimate for H.R. 2288, the Veterans Appeals Improvement and Modernization Act of 2017, as ordered reported by the House Committee on Veterans' Affairs on May 17, 2017. Each section of S. 1024 is similar to the corresponding section of H.R. 2288 and the estimated costs of the two bills are identical.

Estimate prepared by: Federal Costs: Dwayne M. Wright; Impact on State, Local, and Tribal Governments: Jon Sperl; Impact on the Private Sector: Paige Piper/Bach.

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

REGULATORY IMPACT STATEMENT

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

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by members of the Committee on Veterans' Affairs at its June 28, 2017, meeting: The Committee bill was ordered reported favorably by voice vote without dissent.

AGENCY REPORT

On May 17, 2017, Jennifer S. Lee, M.D., Deputy Under Secretary for Health for Policy and Services, Veterans Health Administration, U.S. Department of Veterans Affairs, appeared before the Committee on Veterans' Affairs and submitted testimony on S. 1024 as well as other bills pending before the Committee. An excerpt from that statement is reprinted below:

STATEMENT OF JENNIFER S. LEE, M.D., DEPUTY UNDER SECRETARY FOR HEALTH FOR POLICY AND SERVICES, VETERANS HEALTH ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS

* * * * * * *

S. 1024, VETERANS APPEALS IMPROVEMENT AND MODERNIZATION ACT OF 2017

Modernizing the appeals process is a top priority for VA. It is more critical than ever that we continue to work together to transform an appeals process that is failing Veterans. There are currently over 470,000 appeals pending in VA, some 40 percent more than were pending only 5 years ago. Those Veterans are waiting much too long for answers on their appeals. Although Veterans wait an average of only 116 days for a decision on VA disability compensation claims, they are waiting an average of 3 years for their appeal to be resolved. Appeals that go all the way to the Board of Veterans' Appeals (Board) take even longer—an average of 6 years to resolve. A system that can deliver an answer on an initial claim in 116 days, but takes many years to resolve an appeal is a system that is not working for Veterans. If appeals reform is not passed, these already unacceptable wait times will only get worse.

S. 1024 would provide much-needed comprehensive reform for the VA appeals process to ensure that Veterans receive a timely, VA decision on their appeal. It would replace the current, lengthy, complex, confusing VA appeals process with a new appeals process that makes sense for Veterans, their advocates, VA, and stakeholders. VA supports the intent of S. 1024; however, we have some concerns with certain provisions in S. 1024 as drafted, such as the provisions that would remove finality from the process upon judicial review and require the Secretary to certify that he has the resources necessary to timely process appeals in the future. We look forward to working with the Committee to address those concerns. The Department stands committed to getting appeals reform accomplished for Veterans this year.

The current VA appeal process, which is set in law, is broken and provides Veterans a frustrating experience. In the current process, appeals have no defined endpoint. Veterans and VA adjudicators are instead engaged in continuous evidence gathering and repeated re-adjudication of the same appeal. This cycle of evidence gathering and re-adjudication means that appeals often churn for years between the Board and the agency of original jurisdiction (AOJ) to meet complex legal requirements, with little to no benefit flowing to the Veteran. The multiple layers of adjudication built into the current appeals process exacerbate delays even more. Jurisdiction is also split between the Board and the AOJ, meaning

that Veterans often don't fully understand where in VA their appeal is located any given time. All of this has resulted in a system that is complicated, inefficient, ineffective, and confusing. Due to this complex and inefficient process, Veterans wait much too long for final resolution of their appeal.

Without significant legislative reform, wait times and the cost to taxpayers will only increase. It was this stark reality that led to VA's unprecedented level of collaboration with stakeholders to design a modernized appeals process. The new appeals process contained in S. 1024 would provide Veterans an appeals decision that is timely, transparent, and fair. The new process is not just a VA idea. It is the product of over a year of collaboration between the Board, Veteran Benefits Administration, Veteran Service Organizations, the private bar, and other stakeholders. The new appeals process we designed is simpler and easier for Veterans to understand. It provides a streamlined process focused on early resolution of appeals, and generating long-term saving for taxpayers. VA is grateful to all of the stakeholders for their contributions of time, energy, and expertise in this effort.

S. 1024 would empower Veterans by providing them with the ability to tailor the process to meet their individual needs—choice that is not available in the current appeals process. Veterans in the new process can pursue one of three different lanes. One lane would be for review of the same evidence by a higher-level claims adjudicator at the AOJ. One lane would be for submitting new and relevant evidence with a supplemental claim at the AOJ, and one lane would allow Veterans to take their appeal directly to a Veterans Law Judge at the Board. In this last lane, the intermediate and duplicative steps currently required by statute to receive Board review, such as the Statement of the Case and the Substantive Appeal, would be eliminated. Furthermore, hearing and non-hearing options at the Board would be handled on separate dockets so these distinctly different types of work can be managed more efficiently.

As a result of this new design, the AOJ would be the claims adjudication agency within VA and the Board would be the appeals agency. This design would remove the confusion caused by the current process, in which a Veteran initiates an appeal in the AOJ, but the appeal is really a years-long continuation of the claim development process. It would ensure that all claim development occurs in the context of a supplemental claim filed with the AOJ, which the AOJ can quickly adjudicate, rather than in an appeal.

Currently, VA has a statutory duty to assist the Veteran in the development of a claim for benefits. This duty includes obtaining relevant Federal records, obtaining other records identified by the claimant, and providing a medical examination in certain circumstances. The new design contains a mechanism to correct any duty to assist errors by the AOJ. If the higher-level claims adjudicator or Board discovers an error in the duty to assist that occurred before the AOJ decision being reviewed, the claim/appeal would be returned to the AOJ for correction unless the claim/appeal could be granted in full. However, the Secretary's duty to assist would not apply to the lane in which a Veteran requests higher-level review by the AOJ or review on appeal to the Board. The duty to assist would, however, continue to apply whenever the Veteran initiated

a new claim or supplemental claim. Moreover, S. 1024 would require VA to modify its claims decision notices to ensure they are clearer and more detailed. This notice would help Veterans and their advocates make informed choices as to which a review option makes the most sense.

The disentanglement of processes achieved by S. 1024 would be enabled by one crucial innovation. In order to make sure that the Veteran fully understands the process and can adapt to changed circumstances, a Veteran who is not fully satisfied with the result of any lane would have 1 year to seek further review while preserving an effective date for benefits based upon the original filing date of the claim. For example, a Veteran could go straight from an initial AOJ decision to an appeal to the Board. If the Board decision was not favorable, but helped the Veteran understand what evidence was needed to support the claim, then the Veteran would have 1 year to submit new and relevant evidence to the AOJ in a supplemental claim without fearing an effective-date penalty for choosing to go to the Board first. The robust effective date protections built into the draft bill enhance Veterans' rights and ensure that Veterans and their advocates cannot make a wrong turn in navigating the new appeals process.

Beyond stopping the flow of appeals into the existing broken system, S. 1024 provides opt-ins to allow as many Veterans as possible to benefit from the streamlined features of the new process. A claimant who receives a decision after enactment and prior to the applicability date of the law could elect to participate in the new process, which would give VA discretion regarding whether to apply the new process to the claimant. However, while subsection (x)(3) envisions the possibility of processing individual claimants who opt-in under the new system prior to the applicability date, as a practical matter, VA cannot realistically offer the new system on a piecemeal basis before the entire new system is ready, which in turn depends on the certification date. Therefore, in practice, only Veterans who receive notice of decision within the 1 year period prior to the effective date of the law would be able to opt-in. Veterans who received an earlier notice of decision would not be able to submit a timely appeal into the new process within 1 year of their decision. Also, a claimant who receives a statement of the case or supplemental statement of the case in a legacy appeal could elect to participate in the new appeals system.

While VA strongly supports the fundamental features of the new process outlined in S. 1024, we have concerns with some aspects of the proposed legislation as presently drafted, as discussed below.

VA opposes a substantive change that would make the effective date protection afforded by the filing of a supplemental claim within 1 year of a decision applicable to supplemental claims filed within 1 year of a decision by the United States Court of Appeals for Veterans Claims (CAVC). This provision goes against an essential construct of the new process, which encourages Veterans to stay within VA to achieve the earliest resolution possible. It would be unfortunate to eliminate sources of unnecessary churn in VA, only to create new incentives for endless appeal at the CAVC. To the greatest extent possible, judicial review should be for substantive legal disagreements between a claimant and VA, not for record de-

velopment questions that can easily be obviated simply by pursuing additional development and assistance in the supplemental claim lane.

With regard to applicability and the proposed certification of the readiness to carry out the new system by the Secretary, the requirement that the Secretary submit a statement to Congress that he has the resources necessary to timely operate the system is problematic, given the annual budget cycle. While VA will be prepared to implement the new system at the end of the 18-month period prescribed in S. 1024 and shut off the flow of appeals to the broken process, the Secretary cannot predict the outcome of future budget cycles. Therefore, the Secretary will only be able to make a certification regarding resources available at the time of the certification and not into the future.

Moreover, if S. 1024 was enacted with this provision, it would create significant uncertainty in implementing the opt-in component of the law. We note that S. 1024 provides VA discretion to apply the new process to claimants who elect to participate in the modernized appeals system at any time after enactment and before the applicability date. The applicability date in S. 1024 is necessarily indeterminate because it depends upon when the Secretary will be able to certify under subsection (x)(1) that VA has the resources it needs to operate the modernized system; it is not possible to know when the 1 year period allowing claimants the functional ability to elect begins. As previously noted, although S. 1024 does not set the 1 year period for opt-ins, current law provides that claimants must submit a notice of disagreement within 1 year of a decision, and it will not be administratively feasible to provide claimants with the new system on a piecemeal basis before the administrative and regulatory work necessary to stand up the new system is complete. In order to provide Veterans with meaningful choice in how their appeal is handled, we must be able to inform them as to whether they will have the option of appealing into the new system. We would be happy to continue working with the Committee to discuss alternative approaches to the applicability date of the law.

S. 1024 also adds notice requirements to higher-level review and Board decisions, for the purpose of explaining whether the claimant submitted evidence that was not considered, and if so, what the claimant or appellant can do to have that evidence considered. VA views this addition as unnecessary, as a claimant who had elected either a higher-level review or an appeal to the Board would have already received notice addressing all lane options in the new process, including restrictions on the submission of new evidence. They would also be aware of the option to file a supplemental claim, where they would have the opportunity to submit new evidence for consideration by the AOJ. Additionally, the issue of how to handle improperly submitted evidence is an administrative matter that would best be determined by VA.

S. 1024 also includes reporting requirements that we believe could be adjusted to be less onerous but still provide valuable information to the Congress. We look forward to working with the Committee to better shape these provisions in a manner that achieves adequate protection for Veterans and robust information for Con-

gressional oversight, while at the same time using administrative resources wisely.

VA stands ready to provide additional technical assistance on several other aspects of the proposed legislation. We appreciate any opportunity to work with Congress to further refine this legislation.

CHANGES IN EXISTING LAW

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

Title 38. Veterans' Benefits

* * * * * * *

Part I. General Provisions

* * * * * * *

Chapter 1. General

* * * * * * *

SEC. 101. DEFINITIONS

* * * * * * *

(34) The term "agency of original jurisdiction" means the activity which entered the original determination with regard to a claim for benefits under laws administered by the Secretary.

(35) The term "relevant evidence" means evidence that tends to prove or disprove a matter in issue.

(36) The term "supplemental claim" means a claim for benefits under laws administered by the Secretary filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis.

* * * * * * *

Part IV. General Administrative Provisions

Chapter 51. Claims, Effective Dates, and Payments

SUBCHAPTER I. CLAIMS

Sec.

* * * * * * *

Subchapter I. Claims

* * * * * * *

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

(a) REQUIRED INFORMATION AND EVIDENCE.—(1) [The] *Except as provided in paragraph (3), the* Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

(2)(A) * * *

(B) The regulations required by this paragraph—

(i) shall specify different contents for notice based on whether the claim concerned is an original claim[, a claim for reopening a prior decision on a claim, or a claim for an increase in benefits;] *or a supplemental claim;*

* * * * * * *

(3) The requirement to provide notice under paragraph (1) shall not apply with respect to a supplemental claim that is filed within the timeframe set forth in subparagraphs (B) and (D) of section 5110(a)(2) of this title.

* * * * * * *

SEC. 5103A. DUTY TO ASSIST CLAIMANTS

* * * * * * *

(e) APPLICABILITY OF DUTY TO ASSIST.—(1) The Secretary's duty to assist under this section shall apply only to a claim, or supplemental claim, for a benefit under a law administered by the Secretary until the time that a claimant is provided notice of the agency of original jurisdiction's decision with respect to such claim, or supplemental claim, under section 5104 of this title.

(2) The Secretary's duty to assist under this section shall not apply to higher-level review by the agency of original jurisdiction, pursuant to section 5104B of this title, or to review on appeal by the Board of Veterans' Appeals.

(f) CORRECTION OF DUTY TO ASSIST ERRORS.—(1) If, during review of the agency of original jurisdiction decision under section 5104B of this title, the higher-level adjudicator identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision being reviewed, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the higher-level adjudicator shall return the claim for correction of such error and readjudication.

(2)(A) If the Board of Veterans' Appeals, during review on appeal of an agency of original jurisdiction decision, identifies or learns of an error on the part of the agency of original jurisdiction to satisfy its duties under this section, and that error occurred prior to the agency of original jurisdiction decision on appeal, unless the Secretary may award the maximum benefit in accordance with this title based on the evidence of record, the Board shall remand the claim to the agency of original jurisdiction for correction of such error and readjudication.

(B) Remand for correction of such error may include directing the agency of original jurisdiction to obtain an advisory medical opinion under section 5109 of this title.

(3) Nothing in this subsection shall be construed to imply that the Secretary, during the consideration of a claim, does not have a duty to correct an error described in paragraph (1) or (2) that was erroneously not identified during higher-level review or during review on appeal with respect to the claim.

(g) ⟦(e)⟧ REGULATIONS.—The Secretary shall prescribe regulations to carry out this section.

(h) ⟦(f)⟧ RULE WITH RESPECT TO DISALLOWED CLAIMS.—Nothing in this section shall be construed to require the Secretary to ⟦reopen⟧ *readjudicate* a claim that has been disallowed except when new and ⟦material⟧ *relevant* evidence is presented or secured, as described in section 5108 of this title.

(i) ⟦(g)⟧ OTHER ASSISTANCE NOT PRECLUDED.—Nothing in this section shall be construed as precluding the Secretary from providing such other assistance under subsection (a) to a claimant in substantiating a claim as the Secretary considers appropriate.

SEC. 5104. DECISIONS AND NOTICES OF DECISIONS

(a) * * *

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

(b) Each notice provided under subsection (a) shall also include all of the following:

(1) Identification of the issues adjudicated.

(2) A summary of the evidence considered by the Secretary.

(3) A summary of the applicable laws and regulations.

(4) Identification of findings favorable to the claimant.

(5) In the case of a denial, identification of elements not satisfied leading to the denial.

(6) An explanation of how to obtain or access evidence used in making the decision.

(7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.

SEC. 5104A. BINDING NATURE OF FAVORABLE FINDINGS

Any finding favorable to the claimant as described in section 5104(b)(4) of this title shall be binding on all subsequent adjudicators within the Department, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding.

SEC. 5104B. HIGHER-LEVEL REVIEW BY THE AGENCY OF ORIGINAL JURISDICTION

(a) IN GENERAL.—(1) A claimant may request a review of the decision of the agency of original jurisdiction by a higher-level adjudicator within the agency of original jurisdiction.

(2) The Secretary shall approve each request for review under paragraph (1).

(b) TIME AND MANNER OF REQUEST.—(1) A request for higher-level review by the agency of original jurisdiction shall be—

(A) in writing in such form as the Secretary may prescribe; and

(B) made within one year of the notice of the agency of original jurisdiction's decision.

(2) Such request may specifically indicate whether such review is requested by a higher-level adjudicator at the same office within the agency of original jurisdiction or by an adjudicator at a different office of the agency of original jurisdiction. The Secretary shall not deny such request for review by an adjudicator at a different office of the agency of original jurisdiction without good cause.

(c) DECISION.—Notice of a higher-level review decision under this section shall be provided in writing and shall include a general statement—

(1) reflecting whether evidence was not considered pursuant to subsection (d); and

(2) noting the options available to the claimant to have the evidence described in paragraph (1), if any, considered by the Department.

(d) EVIDENTIARY RECORD FOR REVIEW.—The evidentiary record before the higher-level adjudicator shall be limited to the evidence of record in the agency of original jurisdiction decision being reviewed.

(e) DE NOVO REVIEW.—A review of the decision of the agency of original jurisdiction by a higher-level adjudicator within the agency of original jurisdiction shall be de novo.

SEC. 5104C. OPTIONS FOLLOWING DECISION BY AGENCY OF ORIGINAL JURISDICTION

(a) WITHIN ONE YEAR OF DECISION.—(1) Subject to paragraph (2), in any case in which the Secretary renders a decision on a claim, the claimant may take any of the following actions on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision with respect to that claim:

(A) File a request for higher-level review under section 5104B of this title.

(B) File a supplemental claim under section 5108 of this title.

(C) File a notice of disagreement under section 7105 of this title.

(2)(A) Once a claimant takes an action set forth in paragraph (1), the claimant may not take another action set forth in that paragraph with respect to the same claim or same issue contained within the claim until—

(i) the higher-level review, supplemental claim, or notice of disagreement is adjudicated; or

(ii) the request for higher-level review, supplemental claim, or notice of disagreement is withdrawn.

(B) Nothing in this subsection shall prohibit a claimant from taking any of the actions set forth in paragraph (1) in succession with respect to a claim or an issue contained within the claim.

(C) Nothing in this subsection shall prohibit a claimant from taking different actions set forth in paragraph (1) with respect to different claims or different issues contained within a claim.

(D) The Secretary may, as the Secretary considers appropriate, develop and implement a policy for claimants who—

(i) take an action under paragraph (1);

(ii) wish to withdraw the action before the higher-level review, supplemental claim, or notice of disagreement is adjudicated; and

(iii) in lieu of such action take a different action under paragraph (1).

(b) MORE THAN ONE YEAR AFTER DECISION.—In any case in which the Secretary renders a decision on a claim and more than one year has passed since the date on which the agency of original jurisdiction issues a decision with respect to that claim, the claimant may file a supplemental claim under section 5108 of this title.

* * * * * * *

[SEC. 5108. REOPENING DISALLOWED CLAIMS

[If new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.**]**

SEC. 5108. SUPPLEMENTAL CLAIMS

(a) IN GENERAL.—If new and relevant evidence is presented or secured with respect to a supplemental claim, the Secretary shall readjudicate the claim taking into consideration all of the evidence of record.

(b) DUTY TO ASSIST.—(1) If a claimant, in connection with a supplemental claim, reasonably identifies existing records, whether or not in the custody of a Federal department or agency, the Secretary shall assist the claimant in obtaining the records in accordance with section 5103A of this title.

(2) Assistance under paragraph (1) shall not be predicated upon a finding that new and relevant evidence has been presented or secured.

SEC. 5109. INDEPENDENT MEDICAL OPINIONS

* * * * * * *

(d)(1) The Board of Veterans' Appeals shall remand a claim to direct the agency of original jurisdiction to obtain an advisory medical opinion from an independent medical expert under this section if the Board finds that the Veterans Benefits Administration should have exercised its discretion to obtain such an opinion.

(2) The Board's remand instructions shall include the questions to be posed to the independent medical expert providing the advisory medical opinion.

* * * * * * *

[SEC. 5109B. EXPEDITED TREATMENT OF REMANDED CLAIMS

[The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the appropriate regional office of the Veterans Benefits Administration of any claim that is remanded to a regional office of the Veterans Benefits Administration by the Board of Veterans' Appeals.]

SEC. 5109B. EXPEDITED TREATMENT OF RETURNED AND REMANDED CLAIMS

The Secretary shall take such actions as may be necessary to provide for the expeditious treatment by the Veterans Benefits Administration of any claim that is returned by a higher-level adjudicator under section 5104B of this title or remanded by the Board of Veterans' Appeals.

Subchapter II. Effective Dates

SEC. 5110. EFFECTIVE DATES OF AWARDS

[(a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.]

(a)(1) Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

(2) For purposes of determining the effective date of an award under this section, the date of application shall be considered the date of the filing of the initial application for a benefit if the claim is continuously pursued by filing any of the following, either alone or in succession:

(A) A request for higher-level review under section 5104B of this title on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision.

(B) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision.

(C) A notice of disagreement on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision.

(D) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the Board of Veterans' Appeals issues a decision.

(E) A supplemental claim under section 5108 of this title on or before the date that is one year after the date on which the Court of Appeals for Veterans Claims issues a decision.

(3) Except as otherwise provided in this section, for supplemental claims received more than one year after the date on which the agency of original jurisdiction issued a decision or the Board of Veterans' Appeals issued a decision, the effective date shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of the supplemental claim.

* * * * * * *

(i) Whenever any disallowed claim is [reopened] *readjudicated* and thereafter allowed on the basis of new and [material] *relevant* evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10, or the change, correction, or modification of a discharge or dismissal under section 1553 of title 10, or from other corrective action by competent authority, the effective date of commencement of the benefits so awarded shall be the date on which an application was filed for correction of the military record or for the change, modification, or correction of a discharge or dismissal, as the case may be, or the date such disallowed claim was filed, whichever date is the later, but in no event shall such award of benefits be retroactive for more than one year from the date of [reopening] *readjudication* of such disallowed claim. This subsection shall not apply to any application or claim for Government life insurance benefits.

* * * * * * *

SEC. 5111. COMMENCEMENT OF PERIOD OF PAYMENT

* * * * * * *

(d) * * *

(1) an original [or reopened award] *award or award based on a supplemental claim*; or

* * * * * * *

Chapter 57. Records and Investigations

* * * * * * *

Subchapter I. Records

SEC. 5701. CONFIDENTIAL NATURE OF CLAIMS

* * * * * * *

(b) * * *

(1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Secretary, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section 5109 [or 7109] of this title.

* * * * * * *

Chapter 59. Agents and Attorneys

* * * * * * *

SEC. 5904. RECOGNITION OF AGENTS AND ATTORNEYS GENERALLY

* * * * * * *

(c)(1) Except as provided in paragraph (4), in connection with a proceeding before the Department with respect to benefits under laws administered by the Secretary, a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a **[**notice of disagreement is filed**]** *claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title* with respect to the case. The limitation in the preceding sentence does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court.

(2) A person who, acting as agent or attorney in a case referred to in paragraph (1) of this subsection, represents a person before the Department or the Board of Veterans' Appeals after a **[**notice of disagreement is filed**]** *claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title* with respect to the case shall file a copy of any fee agreement between them with the Secretary pursuant to regulations prescribed by the Secretary.

* * * * * * *

Part V. Boards, Administrations, and Services

* * * * * * *

Chapter 71. Board of Veterans' Appeals

Sec.
7101. Composition of Board of Veterans' Appeals.
7101A. Members of Board: appointment; pay; performance review.
7102. Assignment of members of Board.
7103. Reconsideration; correction of obvious errors.
7104. Jurisdiction of the Board.
[7105. Filing of notice of disagreement and appeal.**]**
7105. Filing of appeal.
7105A. Simultaneously contested claims.
[7106. Administrative appeals.**]**
7107. Appeals: dockets; hearings.
7108. Rejection of applications.
[7109. Independent medical opinions.**]**
[7110. Repealed.]
7111. Revision of decisions on grounds of clear and unmistakable error.
7112. Expedited treatment of remanded claims.
7113. Evidentiary record before the Board of Veterans' Appeals.

* * * * * * *

SEC. 7103. RECONSIDERATION; CORRECTION OF OBVIOUS ERRORS

* * * * * * *

(b)(1) Upon the order of the Chairman for reconsideration of the decision in a case, the case shall be referred—

(A) in the case of a matter originally [heard] *decided* by a single member of the Board, to a panel of not less than three members of the Board; or

(B) in the case of a matter originally [heard] *decided* by a panel of members of the Board, to an enlarged panel of the Board.

* * * * * * *

SEC. 7104. JURISDICTION OF THE BOARD

* * * * * * *

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be [reopened] *readjudicated* and allowed and a claim based upon the same factual basis may not be considered.

* * * * * * *

(d) Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record[; and] *;*

(2) a general statement—

(A) reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under section 7113 of this title; and

(B) noting such options as may be available for having the evidence considered by the Department; and

(3) [(2)] an order granting appropriate relief or denying relief.

* * * * * * *

SEC. 7105. FILING OF [NOTICE OF DISAGREEMENT AND] APPEAL

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

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

[(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.]

(b)(1)(A) Except in the case of simultaneously contested claims, a notice of disagreement shall be filed within one year from the date of the mailing of notice of the decision of the agency of original jurisdiction pursuant to section 5104, 5104B, or 5108 of this title.

(B) A notice of disagreement postmarked before the expiration of the one-year period shall be accepted as timely filed.

(C) A question as to timeliness or adequacy of the notice of disagreement shall be decided by the Board.

(2)(A) Notices of disagreement shall be in writing, shall identify the specific determination with which the claimant disagrees, and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or legal guardian.

(B) Not more than one recognized organization, attorney, or agent may be recognized at any one time in the prosecution of a claim.

(C) Notices of disagreement shall be filed with the Board.

(3) The notice of disagreement shall indicate whether the claimant requests—

(A) a hearing before the Board, which shall include an opportunity to submit evidence in accordance with section 7113(b) of this title;

(B) an opportunity to submit additional evidence without a hearing before the Board, which shall include an opportunity to submit evidence in accordance with section 7113(c) of this title; or

(C) a review by the Board without a hearing or the submittal of additional evidence.

(4) The Secretary shall develop a policy to permit a claimant to modify the information identified in the notice of disagreement after the notice of disagreement has been filed under this section pursuant to such requirements as the Secretary may prescribe.

[(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.**]**

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or decision of the agency of original jurisdiction shall become final and the claim shall not thereafter be readjudicated or allowed, except—

(1) in the case of a readjudication or allowance pursuant to a higher-level review that was requested in accordance with section 5104B of this title;

(2) as may otherwise be provided by section 5108 of this title; or

(3) as may otherwise be provided in such regulations as are consistent with this title.

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

of disagreement, such agency shall prepare a statement of the case. A statement of the case shall include the following:

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

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

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

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

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

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

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

(d) The Board may dismiss any appeal which fails to identify the specific determination with which the claimant disagrees.

[(e)(1) If, either at the time or after the agency of original jurisdiction receives a substantive appeal, the claimant or the claimant's representative, if any, submits evidence to either the agency of original jurisdiction or the Board of Veterans' Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence shall be subject to initial review by the Board unless the claimant or the claimant's representative, as the case may be, requests in writing that the agency of original jurisdiction initially review such evidence.

[(2) A request for review of evidence under paragraph (1) shall accompany the submittal of the evidence.]

SEC. 7105A. SIMULTANEOUSLY CONTESTED CLAIMS

(a) * * *

[(b) Upon the filing of a notice of disagreement, all parties in interest will be furnished with a statement of the case in the same manner as is prescribed in section 7105. The party in interest who filed a notice of disagreement will be allowed thirty days from the

date of mailing of such statement of the case in which to file a formal appeal. Extension of time may be granted for good cause shown but with consideration to the interests of the other parties involved. The substance of the appeal will be communicated to the other party or parties in interest and a period of thirty days will be allowed for filing a brief or argument in answer thereto. Such notice shall be forwarded to the last known address of record of the parties concerned, and such action shall constitute sufficient evidence of notice.]

(b)(1) The substance of the notice of disagreement shall be communicated to the other party or parties in interest and a period of thirty days shall be allowed for filing a brief or argument in response thereto.

(2) Such notice shall be forwarded to the last known address of record of the parties concerned, and such action shall constitute sufficient evidence of notice.

[SEC. 7106. ADMINISTRATIVE APPEALS

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

[SEC. 7107. APPEALS: DOCKETS; HEARINGS

[(a)(1) Except as provided in paragraphs (2) and (3) and in subsection (f), each case received pursuant to application for review on appeal shall be considered and decided in regular order according to its place upon the docket.

[(2) A case referred to in paragraph (1) may, for cause shown, be advanced on motion for earlier consideration and determination. Any such motion shall set forth succinctly the grounds upon which the motion is based. Such a motion may be granted only—

[(A) if the case involves interpretation of law of general application affecting other claims;

[(B) if the appellant is seriously ill or is under severe financial hardship; or

[(C) for other sufficient cause shown.

[(3) A case referred to in paragraph (1) may be postponed for later consideration and determination if such postponement is necessary to afford the appellant a hearing.

[(b) The Board shall decide any appeal only after affording the appellant an opportunity for a hearing.

[(c) A hearing docket shall be maintained and formal recorded hearings shall be held by such member or members of the Board as the Chairman may designate. Such member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision under section 7103 of this title, participate in making the final determination of the claim.

[(d)(1)(A)(i) Upon request for a hearing, the Board shall determine, for purposes of scheduling the hearing for the earliest possible date, whether a hearing before the Board will be held at its principal location or at a facility of the Department or other appro-

priate Federal facility located within the area served by a regional office of the Department.

[(ii) The Board shall also determine whether to provide a hearing through the use of the facilities and equipment described in subsection (e)(1) or by the appellant personally appearing before a Board member or panel.

[(B)(i) The Board shall notify the appellant of the determinations of the location and type of hearing made under subparagraph (A).

[(ii) Upon notification, the appellant may request a different location or type of hearing as described in such subparagraph.

[(iii) If so requested, the Board shall grant such request and ensure that the hearing is scheduled at the earliest possible date without any undue delay or other prejudice to the appellant.

[(2) A hearing to be held within an area served by a regional office of the Department shall (except as provided in paragraph (3)) be scheduled to be held in accordance with the place of the case on the docket under subsection (a) relative to other cases on the docket for which hearings are scheduled to be held within that area.

[(3) A hearing to be held within an area served by a regional office of the Department may, for cause shown, be advanced on motion for an earlier hearing. Any such motion shall set forth succinctly the grounds upon which the motion is based. Such a motion may be granted only—

[(A) if the case involves interpretation of law of general application affecting other claims;

[(B) if the appellant is seriously ill or is under severe financial hardship; or

[(C) for other sufficient cause shown.

[(e)(1) At the request of the Chairman, the Secretary may provide suitable facilities and equipment to the Board or other components of the Department to enable an appellant located at a facility within the area served by a regional office to participate, through voice transmission or through picture and voice transmission, by electronic or other means, in a hearing with a Board member or members sitting at the Board's principal location.

[(2) Any hearing provided through the use of the facilities and equipment described in paragraph (1) shall be conducted in the same manner as, and shall be considered the equivalent of, a personal hearing.

[(f) Nothing in this section shall preclude the screening of cases for purposes of—

[(1) determining the adequacy of the record for decisional purposes; or

[(2) the development, or attempted development, of a record found to be inadequate for decisional purposes.]

SEC. 7107. APPEALS: DOCKETS; HEARINGS

(a) DOCKETS.—(1) Subject to paragraph (2), the Board shall maintain at least two separate dockets.

(2) The Board may not maintain more than two separate dockets unless the Board notifies the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the House of Representatives of any additional docket, including a justification for maintaining such additional docket.

(3)(A) The Board may assign to each docket maintained under paragraph (1) such cases as the Board considers appropriate, except that cases described in clause (i) of subparagraph (B) may not be assigned to any docket to which cases described in clause (ii) of such paragraph are assigned.

(B) Cases described in this paragraph are the following:

(i) Cases in which no Board hearing is requested.

(ii) Cases in which a Board hearing is requested in the notice of disagreement.

(4) Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the docket to which it is assigned by the Board.

(b) ADVANCEMENT ON THE DOCKET.—(1) A case on one of the dockets of the Board maintained under subsection (a) may, for cause shown, be advanced on motion for earlier consideration and determination.

(2) Any such motion shall set forth succinctly the grounds upon which the motion is based.

(3) Such a motion may be granted only—

(A) if the case involves interpretation of law of general application affecting other claims;

(B) if the appellant is seriously ill or is under severe financial hardship; or

(C) for other sufficient cause shown.

(c) MANNER AND SCHEDULING OF HEARINGS FOR CASES ON A DOCKET THAT MAY INCLUDE A HEARING.—(1) For cases on a docket maintained by the Board under subsection (a) that may include a hearing, in which a hearing is requested in the notice of disagreement, the Board shall notify the appellant whether a Board hearing will be held—

(A) at its principal location; or

(B) by picture and voice transmission at a facility of the Department where the Secretary has provided suitable facilities and equipment to conduct such hearings.

(2)(A) Upon notification of a Board hearing at the Board's principal location as described in subparagraph (A) of paragraph (1), the appellant may alternatively request a hearing as described in subparagraph (B) of such paragraph. If so requested, the Board shall grant such request.

(B) Upon notification of a Board hearing by picture and voice transmission as described in subparagraph (B) of paragraph (1), the appellant may alternatively request a hearing as described in subparagraph (A) of such paragraph. If so requested, the Board shall grant such request.

(d) SCREENING OF CASES.—Nothing in this section shall be construed to preclude the screening of cases for purposes of—

(1) determining the adequacy of the record for decisional purposes; or

(2) the development, or attempted development, of a record found to be inadequate for decisional purposes.

(e) POLICY ON CHANGING DOCKETS.—The Secretary shall develop and implement a policy allowing an appellant to move the appellant's case from one docket to another docket.

* * * * * * *

[SEC. 7109. INDEPENDENT MEDICAL OPINIONS

[(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.

[(b) The Secretary shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Any such arrangement shall provide that the actual selection of the expert or experts to give the advisory opinion in an individual case shall be made by an appropriate official of such institution.

[(c) The Board shall furnish a claimant with notice that an advisory medical opinion has been requested under this section with respect to the claimant's case and shall furnish the claimant with a copy of such opinion when it is received by the Board.]

SEC. 7111. REVISION OF DECISIONS ON GROUNDS OF CLEAR AND UNMISTAKABLE ERROR

* * * * * * *

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits[, without referral to any adjudicative or hearing official acting on behalf of the Secretary].

* * * * * * *

SEC. 7113. EVIDENTIARY RECORD BEFORE THE BOARD OF VETERANS' APPEALS

(a) CASES WITH NO REQUEST FOR A HEARING OR ADDITIONAL EVIDENCE.—For cases in which a hearing before the Board of Veterans' Appeals is not requested in the notice of disagreement and no request was made to submit evidence, the evidentiary record before the Board shall be limited to the evidence of record at the time of the decision of the agency of original jurisdiction on appeal.

(b) CASES WITH A REQUEST FOR A HEARING.—(1) Except as provided in paragraph (2), for cases in which a hearing is requested in the notice of disagreement, the evidentiary record before the Board shall be limited to the evidence of record at the time of the decision of the agency of original jurisdiction on appeal.

(2) The evidentiary record before the Board for cases described in paragraph (1) shall include each of the following, which the Board shall consider in the first instance:

(A) Evidence submitted by the appellant and his or her representative, if any, at the Board hearing.

(B) Evidence submitted by the appellant and his or her representative, if any, within 90 days following the Board hearing.

(c) CASES WITH NO REQUEST FOR A HEARING AND WITH A REQUEST FOR ADDITIONAL EVIDENCE.—(1) Except as provided in paragraph (2), for cases in which a hearing is not requested in the notice of disagreement but an opportunity to submit evidence is requested, the evidentiary record before the Board shall be limited to the evidence considered by the agency of original jurisdiction in the decision on appeal.

(2) The evidentiary record before the Board for cases described in paragraph (1) shall include each of the following, which the Board shall consider in the first instance:

(A) Evidence submitted by the appellant and his or her representative, if any, with the notice of disagreement.

(B) Evidence submitted by the appellant and his or her representative, if any, within 90 days following receipt of the notice of disagreement.

* * * * * * *

○