VOLS
VOLUNTEERS of LEGAL SERVICE

November 9, 2020

VIA ELECTRONIC SUBMISSION

Director
Compensation Service, VASRD Program Office
Department of Veterans Affairs
1800 G Street NW, Room 644
Washington, DC 20006

Re: RIN 2900-AQ80, Aggravation Definition
Docket ID: VA-2020-VBA-0021

Comments of Volunteers of Legal Service

Volunteers of Legal Service ("VOLS") appreciates the opportunity to submit these comments in response to the proposed rules by the Department of Veterans Affairs ("VA") in the above-captioned docket[1], which proposes to revise the regulations that govern VA's definition of "aggravation" under 38 C.F.R. Part 3.

Organization Background and Expertise

VOLS harnesses the power of New York City's legal community and neighborhood-based groups to provide free, civil legal services when and where they are needed most. Since 1984, VOLS has identified areas of legal need, created projects to meet these needs, and recruited and trained volunteer lawyers to provide the needed legal services. By providing pro bono legal services to people in need in our city, we strive to fulfill the highest aspirations of the legal profession. VOLS projects serve these vulnerable New York City populations: veterans, children, the elderly poor, claimants denied unemployment insurance benefits, incarcerated

[1] 85 FR 56189 (September 11, 2020).

mothers, immigrant high school students and under resourced micro-entrepreneurs. We conduct active outreach to the New York City legal community to encourage pro bono work by lawyers. We strive to provide pro bono legal assistance when and where it will be most accessible to our clients, in settings familiar to them, instead of requiring people in desperate need to come to us. We do this by working closely with hospitals, schools, senior centers, and other community organizations, and by integrating pro bono legal assistance into the array of services these organizations already provide.

Our Veterans Initiative provides free legal service to veterans aged sixty and over and is an offshoot of our Elderly Project. The VOLS Veterans Initiative works with a network of community partners, including the local VA, to provide free legal services to senior veterans with low to moderate income. Clients can reach us via our hotline or by email to access our services. These services include direct counseling on critical issues involving housing, government benefits, consumer debt, and the drafting an execution of wills, powers of attorney, and other essential advance directives. When public health guidance allows, we also meet with veterans in person at a weekly clinic at the Manhattan VA Campus, as well as at 10 senior centers around the city at which we host monthly legal clinics.

The Proposed Rule Changes

The VA is seeking to make it harder for veterans with pre-service conditions which were aggravated in service to obtain service-connected disability benefits by changing the definition and scope of what constitutes an "aggravation" of a pre-existing condition.

"To care for him who shall have borne the battle"

Veterans who have sacrificed their time, energy, physical and mental health in service to our nation deserve to be treated with dignity, care and respect. The VA's motto, taken directly from President Abraham Lincoln's second Inaugural Address[2], has been a foundational cornerstone and a guiding ethos for the VA since these words were enshrined on the entrance to the headquarters of the Department of Veterans Affairs in Washington D.C. The motto has come to mean that every service member, regardless of branch or job should be treated with the utmost care. This proposed amendment stands in deep contrast to this motto by restricting those servicemembers who should be eligible for VA care and benefits. If the VA truly believes in President Lincoln's words and their guiding principles, and are truly looking to care for all those injured in battle, they must withdraw these proposed regulations.

The Proposed Changes Will Undoubtedly Hurt Veterans

Although the proposed changes are meant to clarify possible incongruence in the interpretations of the applicable statutes, the proposed changes, if they are adopted, will undoubtedly limit the number of eligible veterans who rely on this specific interpretation of the applicable regulations to get the benefits to which they should be entitled. The VA argues that "[t]he reason that VA proposes to require an enduring, permanent increase in disability to establish service connection based on aggravation is that temporary or intermittent symptoms are difficult to rate (and thus prone to confusion and error) as well as time-consuming to identify and rate (resulting in delayed processing times)."

[2] https://www.va.gov/opa/publications/celebrate/vamotto.pdfa

The proposal to apply a narrow definition to the term "aggravation" as it pertains to 38 C.F.R. 3.306(a) and 38 C.F.R. 3.310(b) places an unnecessary burden on eligible veterans who seek to obtain a service-connected disability benefits for an injury or illness that existed prior to and was worsened by service. The VA posits that the proposed changes are meant to "remove any ambiguity in the existing text…and clarify the distinction between secondary service connection of a disability that only arose post-service and was caused by a service-connected disability[3]." However, the proposed changes would only hinder eligible veterans who seek to obtain or increase a service-connected disability by requiring that the "aggravation" include a "permanent worsening" of their injury or disease. The VA should continue to follow the holding in *Ward v. Wilkie* and should not institute the requirement of a "permanent worsening" of a disability to be eligible for compensation. Doing so would allow eligible veterans to seek disability compensation without having to meet an unnecessarily narrow standard in the already overburdened and bureaucratic system that is the Department of Veterans Affairs.

Military service is by its very nature dangerous. From 2006 until June 2020, there have been 8,091 active-duty servicemembers killed during non-overseas contingency operations from accident, illness and injury.[4] By 2011, one out of every ten veterans alive was seriously injured at some point while serving in the military, and three-quarters of those injuries occurred in combat.[5] The rigors of military service can take a toll on the physical and mental health of veterans, with

[3] 85 FR 56189 (September 11, 2020).
[4] Congressional Research Service; *Trends in Active-Duty Military Deaths Since 2006* (June 6, 2020); https://crsreports.congress.gov/product/pdf/IF/IF10899
[5] Pew Research Center; *For Many Injured Veterans, A Lifetime of Consequences* (Nov. 8, 2011); https://www.pewsocialtrends.org/2011/11/08/for-many-injured-veterans-a-lifetime-of-consequences/

certain injuries and illnesses incurred during or aggravated by service worsening as the veteran ages, leading to some form of compensable disability for many veterans.

As the military has been an all-volunteer force since 1973, enlistment standards for the armed services allow for exceptions for certain pre-existing medical conditions, which will be annotated in the servicemember's medical records and will follow them until they separate from the military. Under the VA's proposed change, an individual with pre-service scoliosis less than 30 degrees[6] who received a medical waiver to enlist would have to prove that any worsening of their scoliosis was not due to the natural progression of the disease. Even veterans who served in high-stress military occupational specialties (MOS), such as combat engineers, infantry and special operations, where servicemembers regularly march long distances with upwards of one hundred pounds of equipment, would need to show that any worsening of their scoliosis was service-connected and not due to the natural progression of the diseases. This would place an unnecessary burden on the veteran in seeking disability compensation.

Currently, under 38 C.F.R. § 3.306 veterans with a "preexisting injury or disease will be considered to have been aggravated by active…service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." Under the VA's proposed rule change, they would define "increase in disability" as requiring a "permanent worsening" of the injury or disease. This is in direct opposition to the holding in *Ward v. Wilke* by the Court of Appeals for Veterans Claims, which held that "[m]edically determined increases in disability need not be 'permanent,' in the

[6] Department of Defense; DOD Instruction 6130.03; *Medical Standards for Appointment, Enlistment, or Induction Into the Military Services* (May 6, 2018); http://www.esd.whs.mil/DD/

ordinary sense of being discernable at all times. Particularly in musculoskeletal disabilities, such as those involved in this consolidated appeal, it is well settled that an examiner must evaluate whether additional disability arises during flare-ups." [7]

The VA proposal would also restrict the ability of eligible veterans to obtain disability compensation for a secondary service-connected disability, which arises post-service and is cause by a service-connected disability. The VA claims that their "revision would remove any ambiguity as to what constitutes aggravation of a nonservice-connected condition by a service-connected condition",[8] but it would instead restrict what constitutes an increase in disability by requiring a "permanent worsening" of the condition. This would deny disability compensation to many veterans who suffer from an aggravation of their disability that can greatly impact their lives, but which does not meet the proposed standard of "permanent worsening." With advances in medicine, the goal of medical care has shifted from merely treating the symptoms of disease or injury to increasing the quality of life of the individual through rehabilitation of the existing injury or disease. Under the VA's proposed standard of "permanent worsening", a veteran who shows an improvement and a reduction in the severity of their disability would not meet the restrictive definition of "permanent worsening", and it would restrict the ability to receive an increase to a nonservice-connected disability rating, or to obtain a secondary service-connected disability rating.

The VA's proposed rule change would undo the holding in *Ward* and effectively shut-out eligible veterans seeking disability compensation for the aggravation of a preexisting injury or

[7] *Ward v. Wilkie*, 31 Vet.App. 233, 240 (2019)
[8] 85 FR 56189 (September 11, 2020).

disease and for a secondary service-connected disability. As our veterans who served during World War II, Korea, Vietnam and the Gulf War eras age, those with disabilities will undoubtably experience some increase in the severity of their disabilities, along with having latent medical issues manifest themselves as they grow older. This October we have reached the nineteen-year mark of operations in Afghanistan. As our Post-9/11 generation of veterans ages, they too will experience some increase in the severity of their disabilities. At a time when we should be expanding the eligibility of veterans' access to healthcare and disability benefits, the VA proposes to limit the ability of veterans to receive the benefits to which they are rightfully entitled.

The Proposed Change Restricts Access to VA Benefits for the Most Vulnerable Veterans

The VA's proposal would establish a new requirement of proof that an increase or aggravation of an injury or disease would need to show a "permanent worsening." Temporary or intermittent flare-ups would not constitute an increase in disability unless the underlying injury or disease shows "permanent worsening." While the VA posits that its proposed revision to 38 C.F.R. 3.306(a) and 3.310(b) would "remove any ambiguity in the existing text and would define what constitutes an 'increase in disability'", it leaves the definition of "permanent worsening" vague and subject to interpretation. This could restrict the ability of veterans in obtaining an increase in disability rating, as the veteran would need to provide evidence of a "permanent worsening" of their disability under a standard that is not clearly defined.

While most medical conditions have been studied and the methods for evaluating such conditions have been established for years, veterans have regularly incurred injury or illness

from events that have no long-term metric for gauging the direct and proximate effects of those events. From exposure to ionizing radiation during the nuclear testing of the Cold War, exposure to the chemical defoliant Agent Orange during the Vietnam War, exposure to pesticides, depleted uranium and other contaminants during the first Gulf War, and exposure to burn pits in Iraq and Afghanistan, veterans have suffered from the long-term, and at times latent side effects of these events.

Historically the VA has denied veterans disability claims related to these events "unless they could prove the condition began when they were in service or within one year of their discharge."[9] While this has changed to within five years of their discharge in the Post-9/11 era, it still does not account for the latent effects of being exposed to various toxins and contaminants, of which there is sparse data of the long-term effects on the human body.

With the shift to an all-volunteer military, we have seen a large increase in the number of women who have served in the military. There are approximately two million female veterans and as of 2015 women represented approximately 9.4 percent of the total veteran population.[10] Concerning the latent effects of exposure to toxins and contaminants during military service, there is even less data on the long-term effects on women veterans. Where there is minimal data on the effects of the exposure to such contaminants, it would be difficult for women veterans to prove a secondary service-connected disability as a result of exposure to those contaminants. Women veterans would be unnecessarily burdened, as they would be put in a uniquely

[9] Congressional Research Service; *Veterans Exposed to Agent Orange: Legislative History, Litigation, and Current Issues*; (Nov. 18, 2014) https://crsreports.congress.gov/product/pdf/R/R43790
[10] National Center for Veterans Analysis and Statistics; *The Past, Present and Future of Women Veterans* (Feb. 2017); https://www.va.gov/vetdata/docs/specialreports/women_veterans_2015_final.pdf

challenging position of proving a proximate cause to an injury or illness that is female-specific, such as effects on the female reproductive system or potential birth deformities associated with the long-term exposure to contaminants. This unnecessary burden would essentially treat women veterans different from male veterans on the basis of their sex.

Adopting the VA's proposed change would negatively impact veterans who have been exposed to toxins and contaminants of which there is minimal data on its long-term effects on the human body. This proposed change would harm veterans with existing disabilities and would place an unnecessary burden on the veteran in obtaining an increase in disability rating, as the veteran would need to provide evidence of a "permanent worsening" of their disability. The VA should continue to follow the holding in *Ward v. Wilkie,* as this would allow veterans with current disabilities to seek an increase in their disability rating or to establish a secondary service-connected disability without being unnecessarily burdened.

The Proposed Change Will Harm Veterans Suffering from Mental Illness

The VA's proposal would narrow the definition of "aggravation" and impose an unnecessary burden on veterans suffering from mental illness or psychiatric disorders by imposing a "permanent worsening" standard for a medical condition deemed to be aggravated by military service. There is still much that the medical community does not know regarding the causes, direct or proximate, of psychiatric disorders. As such, the VA's proposed change would negatively affect those suffering from mental illness or psychiatric disorders. By imposing a narrow definition of "aggravation" and establishing the requirement that an increase in disability would require a "permanent worsening" of a disability, the VA would restrict the ability of some

of our most vulnerable veterans in obtaining disability compensation for mental illness or psychiatric disorders.

The diagnosis and treatment of psychiatric disorders has progressed markedly in the past fifty years, especially as it relates to military service. Servicemembers and veterans are now encouraged to seek mental health counseling, removing the long-held stigma that seeking treatment for mental health issues demonstrated weakness and unsuitability for military service. However, there is still much that the medical community does not know regarding the causes, direct or proximate, of psychiatric disorders. What was known in World War II as "shell shock" and Vietnam as the thousand-yard stare" has been properly classified in this Post-9/11 era as Post-Traumatic Stress Disorder. The causes of PTSD vary, from one single event to prolonged exposure to a stressful environment and can develop in both peacetime and wartime service. Symptoms of PTSD can be present right after the traumatic event or may be delayed for a period, with symptoms lasting for more than a month after the event[11]. As such, PTSD may develop after incurring a service-connected disability, such as an amputation of an extremity from an improvised explosive device (IED) and would be deemed a secondary service-connected disability, as it developed due to the initial disability and exposure to the traumatic event.

The onset of PTSD can also bring about other secondary service-connected disabilities and the VA's proposed change would unnecessarily burden veterans seeking to obtain disability compensation for a secondary service-connected disability. The veteran would need to show that

[11] American Psychiatric Association; *Diagnostic and Statistical Manual of Mental Disorders (5th ed.)*; Arlington, VA; American Psychiatric Publishing (2013)

any increase in the disability would require a "permanent worsening" of their disability, which for certain psychiatric disorders can be difficult to prove.

The unnecessary burden that the VA proposes will also affect those veterans suffering from traumatic brain injury (TBI). Clinical studies of military personnel "provide sufficient evidence of an association among combat-related blast exposure without penetrating injury, postconcussive syndrome (PCS), and PTSD" and studies have shown that recurrent exposure to mild TBI and repeated exposure to low-level blast exposure can result in nonspecific symptoms of PTSD.[12] Repeated low-level blast exposure can be incurred in training environments, such as heavy weapon and munition training (e.g., artillery, recoilless rifles, shoulder-mounted rocket launchers) and activities such as explosive breaching. The VA's proposed change would unnecessarily burden veterans seeking to establish a claim for a secondary service-connected disability of PTSD or other anxiety disorders incurred from the repeated low-level blast exposure and mild TBI.

The proposed change by the VA would also affect preexisting injuries or illnesses that were incurred prior to military service. An individual who has suffered from anxiety or depressive disorders can enlist in the military, provided that they had not received treatment for the disorder within the last thirty-six months prior to entering the military[13]. The individual would receive a waiver for the disorder, and it would be annotated in their medical records, following them until they separate from the military. If the veteran would attempt to claim that

[12] Rand Corporation; *The Neurological Effects of Repeated Exposure to Military Occupational Blast Implications for Prevention and Health* (March 2018); https://www.rand.org/pubs/conf_proceedings/CF380z1.html
[13] Department of Defense; DOD Instruction 6130.03; *Medical Standards for Appointment, Enlistment, or Induction Into the Military Services* (May 6, 2018); http://www.esd.whs.mil/DD/

their preexisting anxiety or depressive disorder was aggravated by their military service, they would need to show a "permanent worsening" of their preexisting non-service-connected disability.

The VA proposes to adopt the definition of "aggravation" from *Davis v. Principi*, which "expressly excludes from aggravation any increase in disability attributable to the natural progress of the preexisting disease."[14] It would also exclude temporary or intermittent flare-ups, as the VA would require that the veteran show a "permanent worsening" of the disability. However, with psychiatric disorders the severity of the symptoms of the disorder may fluctuate with time, psychotherapy, medication and personal situation. By requiring a "permanent worsening" of the disability, the VA would be denying eligible veterans disability compensation they are rightfully entitled to.

Those most affected by the VA's proposed changes are some of the most vulnerable members of the veteran community; in particular our low-income veterans who are dealing with mental illness. For many low-income veterans, the VA is the only option they have for the treatment of their condition, as they lack the resources to obtain outside mental health care. The lack of adequate mental health care for our veterans puts them at greater risk of homelessness and substance abuse.

The Proposed Changes May Place a Strain on Veterans' Ability to Secure and Maintain Affordable Housing at a Critical Time

We are also concerned with the timing of the proposed amendment and the timing of the possible ramifications if this statute is changed. As the Covid-19 pandemic and its ramifications

[14] Davis v. Principi, 276 F.3d 1341, 1344 (2002)

ravage the United States, our veterans, especially our homeless and at-risk veterans, are being put in an even more precarious position. If the proposed regulations are adopted, they will add an additional barrier to aiding veterans in securing and maintaining fundamental and crucial housing. By limiting the number of veterans that can receive VA care and benefits, the proposal ensures that more and more veterans are pushed to the brink. We note that the CDC's eviction moratorium will expire at the end of this year, and without further action, many veterans will find themselves at risk of eviction and homelessness, while also finding income from VA benefits more difficult to obtain if the proposed regulations are adopted.

During the current COVID-19 pandemic, veterans with mental illness are at a greater risk of homelessness than the general veteran population, and at a time when we should strive to help those most in need the VA is proposing to limit their ability to obtain the disability compensation they may be entitled to. For these veterans, restricting their ability to obtain the compensation they would currently qualify for, but would be ineligible for under the VA's propose rule, could mean the difference between having a place to call home or ending up homeless.

The VA has acknowledged the significance of the Covid-19 pandemic. On their website they write:

> "Veterans experiencing or at risk for homelessness are particularly vulnerable to COVID-19 because of limited access to health care, pre-existing conditions, and lack of access to basic infection prevention and control methods. VA is committed to taking every possible precaution to protect the health and safety of these Veterans and is working closely with the Centers for Disease Control and Prevention (CDC) and other federal partners to develop and implement strategies to help prevent them from getting COVID-19."[15]

[15] https://www.va.gov/homeless/coronavirus.asp

It appears there is disconnect between what the VA COVID-19 statement and this rule making. We urge the VA to in fact take "every possible precaution" to protect veterans during this time by not limiting access to desperately needed sources of income that may help prevent more veterans from becoming homeless.

The Proposal Does Not Comport with Established Precedent and the Authorizing Legislation

The proposed amendment focuses on the definition of "aggravation" of a pre-existing non-service-related condition and the definition of a pre-existing condition aggravated by military service. However, if this proposal were to be passed it would drastically change VA care and benefits. Furthermore, the proposed amendment establishes a new requirement of proof which would be difficult, if not impossible, for veterans to comply with. The additional requirement is a demonstratable "permanent worsening" for a prior medical condition to be deemed "aggravated" by military service. This additional requirement would likely reduce the number of successful veterans claims, specifically in scenarios in which the claimant has: (1) intermittent flare-ups, (2) chronic pain alone or (3) cases in which a service-connected mental health condition aggravates a Veteran's pre-existing alcoholism and/or substance use. Current caselaw allows for the aforementioned claimant to receive disability compensation for the "aggravation" of a pre-existing condition – including *Sharp v. Shulkin*, *Saunders v. Wilkie,* and *El-Amin v. Shinseki*.

This proposal stands in stark contrast to the precedent and authorizing legislature that has guided the VA in their care for years. In order to comport with the legislative history and the legal precedent, it is urged that the VA withdraw this proposed rulemaking.

Conclusion

The VA's proposal to narrow the definition of "aggravation" and the requirement of a showing of "permanent worsening" as it pertains to 38 C.F.R. 3.306(a) and 38 C.F.R. 3.310(b) places an unnecessary burden on eligible veterans who seek to obtain a disability compensation for the aggravation of preexisting disabilities and secondary service-connected disabilities. During the COVID-19 pandemic, many of our veterans have suffered financially and are at a greater risk for homelessness than the general population. For some of our most vulnerable low-income veterans and those struggling with mental illness it can mean the difference between having adequate housing and homelessness. At a time when it should be supporting its veterans, the VA seeks to hinder them by placing an unnecessary burden on their ability to obtain disability compensation. The VA's proposed rule runs counter to its motto, "To care for him who shall have borne the battle" and we hope the VA considers these comments as they review the proposed revisions to 38 C.F.R. 3.306(a) and 38 C.F.R. 3.310(b).

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