

RETOOLING DOD AND VA DISABILITY COMPENSATION SYSTEMS

BY

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RETOOLING DOD AND VA DISABILITY COMPENSATION SYSTEMS

by

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ABSTRACT

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This paper examines appropriateness of disability compensation provided by DoD and the VA measured against the actual losses of disabled veterans. It overviews the history of disability compensation in the United States, focusing principally on disability compensation as it now exists. It then provides analysis of the actual losses borne by disabled veterans, including loss of military career, diminution in quality of life, loss of earnings capacity, and burden of transition. It provides strategic recommendations for restructuring the two disability compensation systems to work as an integrated whole in which DoD would determine fitness to serve and provide a payment to those found not fit for duty to compensate for loss of military career.

Thereafter, VA would establish the disability rating and compensate disabled veterans for loss of future earning capacity and diminution in quality of life, while providing transition benefits facilitating transition to civilian life.

RETOOLING DOD AND VA DISABILITY COMPENSATION SYSTEMS

The disability programs of the Department of Defense (DoD) and Department of Veterans Affairs (VA) are designed to “compensate” former service members for injuries and conditions that were incurred during, or aggravated by, military service. Actual compensation a veteran receives results from judgments of physicians and rating officials on how physical impairments affect the ability of that individual to “perform physical labor,” a measure mismatched with the modern workplace.¹ Meanwhile, DoD appears to seek to compensate some disabled service members for loss of their military careers, but in the majority of cases, service members receive disability severance pay. In practical effect severance pay is nothing more than a lump sum advance on loss of future earnings, since VA disability compensation is offset until an amount equal to the severance pay has been recovered.²

History of Veterans Disability Compensation

The DoD and VA disability programs that exist today are products of the United States’ long history of providing disability compensation to its veterans. In 1636, the colony of Plymouth enacted a law requiring the colony to maintain for life any soldier disabled due to injury incurred defending the colony. Other colonies soon followed Plymouth’s lead enacting similar programs. In 1776, the Continental Congress passed a resolution giving veterans who lost a limb or incurred other serious disability half pay for life.³

The United States created its first large-scale pension program as a result of the Civil War.⁴ The General Pension Act of 1862 provided disability payments to Union troops based on rank and degree of disability, including compensation for illnesses

contracted during service. This new compensation authority caused a rise in the number of pensioners from about 80,000 veterans before the war to 1.9 million in 1865.⁵

The more lethal battlefield of World War I resulted in over 200,000 veterans having service-connected disabilities, while the U.S. civilian workplace was concurrently experiencing an explosion of workplace injuries. These influences resulted in a national consensus supporting rehabilitation programs designed to restore disabled veterans and workers to gainful employment.⁶ To administer these programs for over 4.7 million veterans, the Federal Government consolidated management in the then new VA. The VA rated specific injuries and diseases according to their estimated impact on average impairments of earning capacity resulting from such injuries in civil occupations. This rating standard was formalized in the VA Schedule for Rating Disabilities (VASRD).⁷

The VASRD was last revised in 1945 to properly account for the organ-system injuries and illnesses caused by an ever more lethal battlefield. Additionally, the VASRD, as revised in 1945, empowered the VA to reevaluate a veteran and change his disability rating and the corresponding amount of compensation to reflect changes in the original service-connected disability. This change was a recognition of the reality that many disabilities are not stable with some improving and others worsening over time.⁸

The Vietnam experience resulted in a general recognition of the link between wartime experiences and otherwise unexplained chronic illnesses, increased incidence of well known diseases, and refractory psychological conditions. Vietnam also resulted in a much better understanding and acceptance of post-traumatic stress disorder (PTSD), which comprises post war symptoms of anxiety, stress and trauma.⁹

During the 1991 Gulf War, an undetermined number of the 700,000 American troops deployed to the Persian Gulf were exposed to noxious chemical and biological substances causing a variety of medical conditions now collectively commonly called “Gulf War Illnesses.” Congress passed legislation requiring VA to obtain independent evaluations of the scientific evidence of associations between the symptoms of Gulf War Illnesses and exposures to various chemical, biological, and physical substances encountered by service members in the Persian Gulf region during the war.¹⁰ The current Iraq War produced and continues to produce amputations, traumatic brain injury, blindness, burns, and multiorgan system damage. Moreover, as a result of the battlefield conditions in the current Iraq War, thousands of newly returned veterans now suffer from PTSD, anxiety, and neuropsychiatric disorders. As these new veterans are treated, the medical community continues to develop a better understanding of these disorders, thus enabling development of treatments and rehabilitation programs.¹¹

Current Disability Compensation System

The disability compensation system serving U.S. service members is composed of two separate programs, one administered by the DoD and the other administered by the VA. Each of these programs is large and complex in its own right, but taken together, these programs form an overall system exhibiting a dizzying level of complexity to the average service member.¹² Each system depends on medical evaluations by the DoD and the VA as well as interactions among detailed compensation schemes in each department.¹³ While the VA provides disability compensation to almost all disabled veterans, DoD provides disability compensation to

only the comparatively few veterans whose careers were prematurely ended due to physical disability.¹⁴

The definition of disability used in connection with the military disability compensation system is a key concept for assessing the adequacy of the compensation in terms of the scope and breadth of conditions recognized as disabling. The VA does not define the term “disability,” rather it defines “functional impairment” as: Lack of usefulness of the body as a whole or of the psyche, or of a system or organ of the body to function under the ordinary conditions of daily life including employment.... especially in self-support.¹⁵ A veteran’s VA disability rating “is based upon the average impairment in earning capacity” of all veterans having the same degree of functional impairment. Since a VA rating is based solely on average “impairment,” it does not take into account each individual’s prior earning history, education, experience, intelligence, or skills in determining the disability rating and the corresponding amount of compensation the individual will receive.¹⁶

DoD disability evaluation system. The DoD Disability Evaluation System (DES) is the process by which DoD through each of its military departments determines whether or not a service member is fit to perform the duties of his or her office, grade, rank, or rating because of disease or injury.¹⁷ A service member’s journey through the DES is all too often protracted and complex. In a typical case, a member seeks treatment from a Medical Treatment Facility (MTF); however a member’s commander may refer the member to the MTF for a mandatory medical evaluation, when the commander believes the member is unable to perform assigned duties due to a medical condition.¹⁸ In either of these cases, if the MTF identifies a medical condition that could render the service

member unfit for duty, the MTF may initiate a Medical Evaluation Board (MEB). The MEB conducts medical examinations and assess whether the member is, in fact, unable to perform assigned military duties due to the medical conditions (i.e., fails to meet medical retention standards). If the MEB finds one or more conditions that do not meet medical retention standards, the service member's case is sent to a physical evaluation board (PEB) to determine whether the member is fit or unfit for duty.¹⁹ The PEB reviews the member's MEB file, assesses the member's fitness to perform assigned military duties, and assigns a VASRD rating for members who are unfit due to service-connected impairments.

Injured military members do not enter the medical evaluation process until they have completed a course of treatment for their injuries.²⁰ The VASRD disability rating, along with years of service and other factors, determines subsequent disability and health care benefits from DOD.²¹

The DoD DES operates to compensate a select few service members for loss of their careers, while dismissing many other mid-career members without compensating them. In general, an overall VASRD rating of at least 30% is required for a member to receive permanent retirement in the DOD DES, unless the service member has over 20 years of retirement service at the time of the PEB's evaluation. Otherwise, any service member found unfit for further service by a PEB receives disability severance pay. Severance pay is a lump sum payment calculated by multiplying the member's monthly base pay by two times the number of years of service.²²

Only permanent disability retirement provides any degree of compensation for loss of a member's military career, because any VA disability compensation the

member may later receive is offset against the severance pay until the entire value of the severance pay has been recovered. Thus, the offset of VA disability compensation, which is intended to compensate lost future earnings, against severance pay effectively converts the severance pay into compensation for lost future earnings.²³

VA disability evaluation system. The VA provides tax free disability compensation to all veterans adjudicated as having service-connected disabilities.²⁴ Although service members have the option to file VA claims before leaving the military, the VA may only pay disability compensation after the members separate from the military. A minimum VASRD rating of 10 percent for an injury or illness incurred during, or aggravated by, military service triggers payments of VA disability compensation to veterans who were discharged under conditions other than dishonorable.²⁵

The amount that VA pays in monthly disability compensation to a veteran depends on the degree of impairment. Under the VASRD, impairments are rated from 0 to 100 percent in 10 percent increments. These monthly payments are also slightly increased for veterans rated 30 percent or more disabled who have dependents. VA disability compensation is exempt from federal and state income taxes.²⁶ VA's duty to pay disability compensation to veterans arises from Federal statutes that direct VA to compensate veterans based on "average impairments of earning capacity" resulting from each veteran's adjudicated disability.²⁷ The VA determines the amount of monthly compensation a veteran receives by assessing the severity of the veteran's disability and rating it as a percentage of disability according to the provisions of the VASRD.

The VASRD sets forth more than 700 diagnostic codes organized within 14 body systems. For each code, the VASRD provides criteria to be applied in assigning a

percentage rating. The criteria are designed to assess loss or loss of function of a body part or system in view of the available medical evidence. One exception is that mental disorders are based on the individual's "social and industrial inadaptability," (*i.e.*, overall ability to function in the workplace and everyday life).²⁸

The VA disability evaluation system affords veterans a high overall degree of due process. The system provides for at least five levels of review processes. Thus, veterans dissatisfied with their initial VA ratings may appeal *de novo* repeatedly. Nevertheless, some disabled veterans have wasted decades fighting to receive VA disability compensation for service-connected impairments.²⁹

Overlap of DoD and VA disability evaluation systems. According to federal law, DoD and VA must both base their evaluations on the VASRD. However, the DoD disability evaluations differ in several respects from those performed by the VA. DoD physical disability evaluations assess only conditions that would individually render a service member unfit to perform the member's military duties. In contrast, VA evaluates all claimed conditions, whether or not they were evaluated previously by the military service's process (*i.e.*, without regard to whether any particular disability or impairment renders the service member unfit to continue the member's military career). Moreover, although DoD compensation principally compensates for interruption or loss of a service member's military career, VA compensation principally compensates for loss of civilian earnings. Also, DoD ratings are permanent on final disposition, while the VA ratings change from time to time as a veteran's medical condition improves or worsens. Finally, DoD disability compensation is based on the member's years of service and

base pay, while VA disability compensation is based solely on the severity of the rated impairment, with small additions for dependents.³⁰

Taken together, these differences in rating methodology contribute to a documented difference between DoD and VA combined disability ratings. At least one study has shown that VA rates 2.4 to 3.3 more conditions per person than does DoD and that VA ratings for 8 of 13 individual diagnoses were higher by a statistically significant amount than ratings by DoD for the same individuals.³¹ DoD through the services also appears to have at least some incentive to assign permanent disability ratings less than 30 percent. By assigning ratings of less than 30% to service members having fewer than 20 years of retirement service, DoD avoids paying disabled members permanent disability retired pay and avoids providing continuing family health care.

DoD's intent to follow such an approach was reflected in the DoD policy decision in 1986 to begin rating only those condition(s) that, considered in isolation, prevent a service member from performing his or her military duties (hereinafter "unfitting conditions").³² The U.S. Army Physical Disability Agency's Home Page provides a disturbing example of how draconian this policy can be in practice. The example is of a Soldier, in a service-connected accident, who suffers internal injuries causing the loss of one kidney and a musculoskeletal injury that crushes two vertebrae, damaging disks and impinging on nerves. In this example, the loss of a single kidney is found not to prevent the Soldier from performing his military duties, but the back injury, by itself, prevents the Soldier from performing his military duties. According to the DoD policy, a disability rating would be awarded for the back injury only, because it is the only condition that renders the Soldier unfit for continued service, by itself.³³ In this example,

the DoD DES would treat the loss of a kidney in a service-connected, line-of-duty accident as completely non-compensable.

All nonmedical retirees receive thorough medical examinations upon retirement, and any retiree who desires a VA rating has the right to request a rating from VA. The formula for determining the amount of VA disability compensation that nonmedical retirees receive does not take into account receipt of regular military retired pay. Nevertheless, by U.S. law until 2004, a retiree could not receive the full amount of military retired pay and VA disability compensation; the veteran was required to disclaim one or the other. Until 2004, nonmedical retirees received the maximum of disability compensation from the VA schedule or retired military pay. Even if disability compensation did not exceed military retired pay, however, veterans favored receiving disability compensation because it is not taxable. The new law enacted in 2004 ended this retired pay offset of disability benefits for members with at least a 50 percent VA disability rating. Moreover, the current Combat Related Special Compensation statute requires payment of full retired pay (regular or medical retired pay) and full VA disability compensation, without offset, to retirees whose disabilities directly resulted from hazardous duty or an instrumentality of war.³⁴

Efficacy of the VASRD in Measuring Disabilities

In light of the fact that rating decisions in both the DoD and VA disability compensation systems are based on the VASRD, it is axiomatic that the VASRD must be accurate and current or rating decisions will not be “valid” and “reliable.” “Validity” refers to ratings produced by the VASRD reflecting each veteran’s actual degree of disability. “Reliability” means that applying the VASRD to veterans with the same

severity and type of disability produces the same rating for each veteran. Validity and reliability of rating decisions depend on the accuracy of the VASRD in producing ratings.³⁵

According to the Code of Federal Regulations, the percentage ratings set forth in the VASRD represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civilian occupations.³⁶ The earning capacity requirement corresponds to a comparison of what an individual could have earned without the disability and what the same individual who is disabled can earn.³⁷

The average impairment in earning capacity reflected in the current VASRD does not reflect individual veterans' "actual earnings loss," rather it reflects averages for all veterans with the same level of impairment. Revision of the VASRD to use each veteran's estimated "actual earning loss" as the standard for setting disability compensation would arguably provide for fairer and more accurate compensation to disabled veterans for their lost future earnings.³⁸ Nevertheless, the "actual earning loss" method of calculating lost future earnings is not without risk of error. For example, this method would overstate future earnings loss if the veteran reduced his or her quantity of work after an injury by more than the veteran's impairment would require.

As VA disability compensation is currently calculated, the broad range of earnings potential (based on education, experience, and skill) of veterans with a similar level of impairment causes some veterans to be over-compensated and others to be under-compensated for lost future earnings. The VA disability compensation schedule takes into account solely the severity of the veteran's disability, with small adjustments

for the veteran's marital status and number of dependents. Based on education, experience, and skill, service members have widely varying potentials for future earnings.

For example, a junior enlisted Soldier who loses a foot receives the same VA disability compensation as a colonel with the same injury, notwithstanding the fact that the colonel and the junior enlist Soldier likely suffer very different losses of future earnings. At first blush, one is tempted to jump to the conclusion that the colonel is almost certainly the one who is being undercompensated for lost future earnings, primarily because the colonel's earning potential is several times larger than the enlisted soldier's earning potential. However, one must consider that the colonel's larger earning potential is also very likely based upon training to perform analytical and professional tasks, while the junior enlisted Soldier's earning potential is more likely to be tied to his ability to perform physical and other semi-skilled tasks. The current VASRD and VA disability compensation schedule does not account for these factors in setting compensation rates for individual veterans and is thus simply not calibrated to compensate individual veterans according to their actual loss of future earnings. The result is that some disabled veterans are almost certainly overcompensated while others are almost certainly undercompensated.³⁹

The efficacy of the VASRD is called into question by the fact that it was last updated over 60 years ago and is based on how a disability affects the ability of a veteran to perform manual labor.⁴⁰ In the past 60 years, the physical demands of most jobs have been significantly reduced. Moreover, tasks and activities performed in the workplace have been dramatically altered.⁴¹ With the move to service and information

technology jobs, disabilities that would have significantly limited a veteran's productivity in more physically demanding jobs may cause significantly fewer limitations in a veteran's ability to work and earn today. The failure to update the VASRD to account for these changes in the workplace introduces the very real probability that the VA disability compensation system is presently erroneously calibrated to overcompensate disable veterans in the aggregate.

Trends in Service-Connected Disability

Evidence exists supporting a conclusion that over the course of time the percentage of service members separating from the military with rated disabilities has increased and appears to still be increasing. Only 35 percent of the service members who retired in 1971 (1971 cohort) receive disability compensation, while 57 percent of service members that retired in 2001 (2001 cohort) receive disability compensation.⁴² The percentage of veterans from the 2001 cohort receiving disability compensation will almost certainly increase as time passes, because many service-connected disabilities are not evident at retirement. The principal increase in the percentage of cohorts receiving disability compensation has occurred in cases involving VASRD ratings below 50%. Interestingly, the percentage of veterans having disabilities rated as severe fell substantially during the late 1980s and early 1990s. The percentage of military retirees having disabilities rated as greater than 50 percent under the VASRD is 11 percent for a recent cohort, which is a result that is very similar to the 1971 cohort. The increase in disability rates occurred principally in cases involving disabilities rated below 50%, pursuant to the guidelines of the VASRD. For example, the percentage of retirees rated between 10 and 20 percent disabled rose from 11 percent of the 1971 cohort to 22

percent of the 2001 cohort. Similarly, approximately 10 percent of the 1971 cohort was rated between 30 and 50 percent, while 25 percent of the 2001 cohort was rated in that range.⁴³

Presently, no one has been able to clearly identify the underlying causes for the rise in VASRD ratings below 50% in successive cohorts of retirees. Common sense and available evidence do not readily support a conclusion that injury rates have truly increased over the course of time. The lack of any significant and lengthy military operation in the 1990s tends to exclude an increase in injury rates as the cause for the increase in low level disability ratings. By deduction, one is compelled to consider an increased generosity in applying the VASRD as time passes as the more likely explanation.⁴⁴ This increase in low level veteran disability ratings coincides in time with what is believed to be the use of much better medical treatments, procedures, and processes. In fact, the improved medical care has substantially reduced the residuals of many service-connected disabilities. In the field of orthopedics, for example, the quality and effectiveness of technology available for treating and remediating orthopedic injuries underwent a revolution in the last 40 years. The current technology is capable of substantially restoring function in the cases of many orthopedic injuries that would have severely limited a veteran's prospects for employment previously.⁴⁵

Analysis of Losses Incurred By Veterans Due To Service-Connected Disabilities

For veterans to receive proper compensation for their service-connected disabilities, the provisions and design of the VASRD must produce horizontal and vertical equity in compensating average impairments of earning capacity. Horizontal equity means that persons assigned the same VASRD ratings percentage suffer from

the same loss of earning capacity. Vertical equity means that loss of earning capacity increases in proportion to the degree of impairment that the veterans possesses. Available evidence tends to support a finding that the average amount of earnings lost by disabled veterans typically increases as VA disability ratings increase. Moreover, mortality rates among disabled veterans rise with degree of disability. Thus, the available evidence tends to support the conclusion that vertical equity exists. Finally, the evidence indicates that horizontal equity also exists because average earnings loss is similar across different types of disabilities except for PTSD and other mental disorders.⁴⁶

Diminution in quality of life. Bona fide physical disabilities impact veterans in many more ways than simply reducing future potential work-related earnings. These additional impacts include generalized loss of enjoyment of life due to pain and suffering, reduced quality of life due to pain or due to restrictions on the activities of life, inability to perform leisure or household tasks, and reduced work performance and proficiency. The nature of these impacts makes them very difficult to measure in terms of monetary loss. Rather these impacts are subjective and amenable only to subjective estimation. For example, a typical permanent shoulder injury will likely involve life-long chronic pain, limit participation in athletics, and reduce earnings from work due to diminished performance on the job. The diminished job performance can readily be assigned a monetary value based on the fair market value of the work to be performed. However, no monetary market for participation in recreational athletics or enduring life-long chronic pain exists. Thus, no fair market value for these types of losses is available to use in assigning monetary value.⁴⁷

Up to date concepts of physical disability such as the Institute of Medicine (IOM) model of disability (1997) are moving in the direction of broadening the definition of the term “disability.” The broader definition would include both work disability and quality of life. Work disability refers to the loss of earning capacity (or impairment in earning capacity) or the actual loss of earnings resulting from an injury or disease. No generally accepted definition of quality of life exists within the field of disability compensation, however, the Institute of Medicine (IOM) committee in 1991 (IOM, 1991) defined quality of life essentially as all the consequences of an injury or disease that are not what are thought of as “work disability.” According to the IOM model of disability (1997), the disabling process is a product of the interaction of the person and the environment, thereby influencing one’s quality of life.⁴⁸

In recent years, more than one commission established by the President and Congress have concluded that disability compensation should also address the impact of impairment on quality of life. The Institute of Medicine’s Committee on Medical Evaluation of Veterans for Disability Compensation reached the same conclusion.⁴⁹

The committee wrote:

The purpose of the current veterans’ disability compensation program as stated in statute currently is to compensate for average impairment in earning capacity, that is, work disability. This is an unduly restrictive rationale for the program and is inconsistent with current models of disability. The veterans’ disability compensation program should compensate for three consequences of service-connected injuries and diseases: work disability, loss of ability to engage in usual life activities other than work, and loss in quality of life.⁵⁰

Parity in average loss of earnings means that disability compensation does not compensate veterans for the adverse impact of their disabilities on quality of life.

Current law requires only that the VASRD compensate service disabled veterans for average impairment of earning capacity.

Smooth transition from military to civilian life is important for veterans and their families to quickly and positively adjust to civilian life. DoD officials sometimes refer to a smooth transition as a “seamless transition.” Many disabled veterans would describe the transition from military life to civilian life as anything but “seamless.” While VA and DoD have made some improvements during the past few years, their medical and administrative systems have not yet achieved compatibility. Furthermore, out of necessity both departments will continue to rely on paper records for many more years. The exaggerated length of time required for disability claims processing to occur is seen as a significant weakness of the transition process.⁵¹ If DoD and VA could devise a way to significantly reduce the claims processing timeline and enable veterans to begin receiving their rightful VA disability compensation immediately after separation or shortly thereafter, veterans would likely perceive the costs of transition to be a much lighter burden.⁵²

Recommendations

Congress should work jointly with DoD and VA to restructure the two disability compensation systems to work as an integrated whole.⁵³ As discussed in this paper, the DoD and VA disability compensation systems have become highly complex and unwieldy. First, even though both DoD and the VA evaluate disabilities in accordance with the VASRD, they use materially different criteria in applying the VASRD. In addition, the compensation associated with a service connected disability is based on a combination of retired military pay, the VA disability compensation schedule, and the

offset against military retired pay. These complexities mean that it is difficult to assess why a member has received a given disability rating and harder still to assess how this disability rating translates into some incremental monthly income.

Congress is at a critical decision point, because the current disability system is primarily a creature of statute. Thus, Congress can choose either to perpetuate the current complicated disability evaluation system or legislate a new simplified system that serves the needs of veterans and society better. At a minimum, Congress should revise the law to require: 1) DoD to compensate all service members whose careers are cut short by service-connected disability for the loss of military career; and 2) VA to compensate service members for lost future earnings, diminution in quality of life and the cost of transition to civilian life.⁵⁴

Congress should require DoD and VA to study whether the current ratings system adequately reflects how disabilities affect veterans' earning potential in the civilian sector. Evidence available from recent studies suggests that the current criteria for assessing disabilities principally set forth in the VASRD are no longer valid for a significant percentage of disabled veterans. Both systems are based on the VASRD, which was created based on medical decisions made over 60 years ago concerning the ability of human beings to perform in the workplace that existed in 1945. That workplace was substantially more physically demanding than today's workplace. In fact, the VASRD rates the severity of a physical disability according to an individual's ability to perform physical tasks.

The demand for and value of workers who principally perform physical tasks is much more limited in today's workplace. A recent study revealed that about 74 percent

of disabled retirees under age 62 work full or part time and have small earnings losses compared with non-disabled retirees. This statistic strongly suggests that while many physical disabilities affecting veterans greatly limit their ability to perform physical tasks, such limitations do not substantially diminish their civilian earnings. Moreover, many retirees with a VA disability rating self-report that they have no health or disability problem that limits the type or amount of work they provide in the civilian labor market. Designing a new rating system is certainly a challenging task, but the current system does not seem adequate to deal with the dramatic changes in the workplace that have occurred in the past 60 years.⁵⁵

The VA should establish disability ratings and compensate disabled veterans for diminution in quality of life. The VASRD should be revised to include compensation for the impact of service-connected disabilities on quality of life. The VASRD does not explicitly make allowances for pain and suffering associated with a service-connected disability unless these factors in some way affect civilian earnings. Disabled individuals may have more frequent or extended unpaid absences from work for health reasons. If so, these absences would reduce earnings and be reflected in the rating schedule.⁵⁶

Congress should require DoD to change its policies concerning compensation for loss of military career and compensate all disabled service members whose military careers are cut short based on service-connected, line of duty physical disability. This compensation should not be offset against future VA disability compensation or any other type of disability compensation. A military career and expectation of receiving a military retirement are treated as property interests *vis a vis* the “for cause” involuntary separation procedures used by DoD. Therefore, these interests have economic value

to the affected service members and the loss of these expectations due to no fault of the service members should be compensated as part of the DoD disability compensation system.⁵⁷

Conclusion

Congress should work closely with DoD and VA to provide a comprehensive redesign and restructuring of a DoD and VA disability compensation system, which has grown into a complex, unwieldy bureaucracy. Congress can and should legislate a single unified adjudication process for DoD's use in determining service members' fitness for continued military duty and for VA's use in determining veterans' disability ratings and corresponding rates of compensation.

At present, only the very small minority of service members who receive permanent medical retirement can be considered to receive any meaningful compensation for the unexpected and premature loss of their military careers. Disability severance pay constitutes nothing more than illusory lump sum compensation for loss of a military career, since it is offset against VA disability compensation. Congress should recognize that a service member's military career represents a property interest of significant value and pass legislation requiring DoD to compensate those found not fit for continued duty based on service-connected, line-of-duty conditions.

Congress should require DoD and VA to study inadequacies in how current ratings schedule and corresponding compensation schedule compensate disabled service members for their bona fide losses. The criteria set forth in the VASRD need to change with the changes in the workplace and the effectiveness of medical treatments. The available evidence indicates that many veterans who receive VA disability

compensation do not have disabilities that diminish their civilian earnings, while others are being undercompensated. Something is obviously amiss with the current rating and compensation schedules. With the current fiscal constraints on the Federal budget, it is all the more important that disability compensation goes to those veterans who have suffered actual losses. Diminution in a disabled veterans' quality of life also represents a very real loss that should be recognized in any properly updated rating and compensation schedule.

Endnotes

¹ Richard Buddin et al., *An Analysis of Military Disability Compensation*, (Santa Monica, CA: RAND Corporation, 2005), 1.

² IOM (Institute of Medicine), *A 21st Century System For Evaluating, Veterans For Disability Benefits* (Washington, DC: The National Academies Press 2007): 343.

³ Until 1789, the states bore the burden of making the payments promised by the Continental Congress. Nevertheless, by the early 1800s, a system was in place to provide benefits to dependents and survivors, and to make increases in the benefits to match the rising cost of living. Veterans of the Mexican War (1846-1848) and their dependents received less generous pensions limited to death and disability incurred in service. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, (October 2007): 31-32.

⁴ Ann Hubbard, *Symposium: A Military-Civilian Coalition For Disability Rights*, *Mississippi Law Journal* 75 (Spring 2006): 979.

⁵ The Federal Government spent \$117 million in pension benefits from 1866 through 1870, more than was spent had been spent during the preceding 75 years. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 32-33.

⁶ Ann Hubbard, *Symposium: A Military-Civilian Coalition For Disability Rights*, 982.

⁷ The realities of the Great Depression motivated President Franklin D. Roosevelt to sign the Economy Act of 1933, rescinding all veterans' benefits dating back to the Spanish-American War, and issue 12 regulations that slashed veterans' benefits by 88 percent. However, when this authority expired in 1935, Congress reinstated many of the rescinded benefits. In 1935, the Social Security Act was also passed, which used employer and employee contributions to care for the elderly and disabled, including veterans. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 33-35.

⁸ The revision of the VASRD also established policies on reasonable doubt, combined ratings, and other factors still in effect today. Over 77,000 Korean veterans benefited from the programs already established under the Vocational Rehabilitation Act of 1950. However, the Veterans Benefits Act of 1958 revised, codified, and enacted as title 38 of the United States Code all laws relating to VA. Veterans'

Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 25-39.

⁹ Ann Hubbard, *Symposium: A Military-Civilian Coalition For Disability Rights*, 984. With the ever-increasing population of veterans receiving VA benefits, changes have required from time to time to provide benefits only to those veterans who truly have diminished earning capacity due to a service-connected disability. One such change involved the VA policy in place prior to 1990, providing disability pensions to all low income veterans of war over age 65 irrespective of whether they had a true disability simply by classifying them as disabled. This policy was reversed by the Omnibus Budget Reconciliation Act of 1990, which required that a veteran be unemployable as a result of a disability to be determined to be totally disabled. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 42.

¹⁰ Ann Hubbard, *Symposium: A Military-Civilian Coalition For Disability Rights*, *Mississippi Law Journal* 75 (Spring 2006): 985. Veterans who suffered from Gulf War Illnesses were the first generation of veterans for whom an undiagnosed illness was deemed to be service connected.

¹¹ *Ibid.*, 986.

¹² The President's Commission On Care For America's Returning Wounded Warriors, Final Report (July 2007): 22.

¹³ U.S. Government Accountability Office, *MILITARY DISABILITY SYSTEM Increased Supports for Servicemembers and Better Pilot Planning Could Improve the Disability Evaluation Process*, (Washington, DC: U.S. Government Accountability Office, September 2008), 6-8.

¹⁴ Richard Buddin et al., *An Analysis of Military Disability Compensation*, 7.

¹⁵ 38 C.F.R. § 4.10 [2006].

¹⁶ 38 C.F.R. § 4.15 [2006]. The Veterans Disability Benefits Commission (VDBC) adopted the following definition of disability, which is related disability to military service and rating of severity by VA: A disability is defined as either an injury or a disease that resulted from service or a preexisting injury or disease that was aggravated by service. A veteran can have multiple disabilities, each of which is assigned a rating reflecting its severity. The combination of the disability ratings for all disabilities determines a veteran's level of compensation. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 21.

¹⁷ U.S. Department of Defense, *Separation or Retirement for Physical Disability*, Directive No. 1332, 18, December 1, 2003 at paragraph 3.3; available from <http://www.dtic.mil/whs/directives> (accessed May 26, 2009).

¹⁸ U.S. Government Accountability Office, *MILITARY DISABILITY SYSTEM Increased Supports for Servicemembers and Better Pilot Planning Could Improve the Disability Evaluation Process*, (Washington, DC: U.S. Government Accountability Office, September 2008), 6-8.

¹⁹ *Ibid.*

²⁰ The first step in the PEB process is a review and initial recommendations by an informal PEB. The member is then afforded the opportunity to review the informal PEB's findings and recommendations. The member then has a right to request a formal PEB hearing to contest the informal PEB's findings and recommendations. During the entire MEB and PEB process, the member continues to draw full military pay and benefits. Richard Buddin et al., *An Analysis of Military Disability Compensation*, fn 4.

²¹ The DES process is governed under Title 10 United States Code, Chapter 61 and by DoD Instructions and Directive-Type Memoranda; The Army, Navy/Marines, and Air Force each have their own directives governing the application of the DoD guidance and convene MEB and PEBs differently, based on their needs. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 256.

²² The President's Commission On Care For America's Returning Wounded Warriors, Final Report (July 2007): 18-19.

²³ Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 198.

²⁴ Leslie C. Rogall, *An Attorney's Guide To Veterans' Rights and Benefits*, 22 GPSolo (January/February 2005): 58.

²⁵ Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 164.

²⁶ Leslie C. Rogall, *An Attorney's Guide To Veterans' Rights and Benefits*, 58.

²⁷ 38 U.S.C. § 1155 2006 and Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 57.

²⁸ Mental disorders, are rated 0, 10, 30, 50, 70, or 100 percent. The VASRD also has criteria to be used in rating conditions that are not expressly named in the more than 700 diagnostic codes. The VASRD also sets forth formulas and procedures to be used in combining the ratings assigned to multiple discrete impairments of a single veteran into a single overall rating. *Ibid.*

²⁹ Howard Roitman, *Special Feature: Overview Of Veterans Administration Disability Law*, 16 Nevada Lawyer (November 2008): 6.

³⁰ Richard Buddin et al., *An Analysis of Military Disability Compensation*, 15.

³¹ Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 267.

³² DoD conducts medical examinations of military members as part of military separation. However, VA may conduct its own independent medical examinations of members after separation at the member's request. Also, medical retirees and severance disability recipients may request reevaluation of the VA disability rating if their condition worsens or other service-connected disabilities develop after leaving active duty. The offset is rolled back by 10 percent per year for ten years. Richard Buddin et al., *An Analysis of Military Disability Compensation*, 16.

³³ *The United States Army Physical Disability Agency Home Page*, <https://www.hrc.army.mil/site/Active/TAGD/Pda/pdapage.htm> (accessed May 27, 2009).

³⁴ Nichell L. Edwards, *Combat-Related Special Compensation*, Paraplegia News 61, No. 12 (Fale Group, Inc., December 2008): 53-55.

³⁵ Validity and reliability of rating decisions also depend on the quality and relevance of medical information, accuracy and ease of use of information systems, training and experience of raters, effectiveness of the quality review system, and number of raters and other personnel involved in the

claims adjudication process. These additional factors are beyond the scope of this paper. Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 58.

³⁶ Richard Buddin et al., *An Analysis of Military Disability Compensation*, 7; 38 CFR 4.1 (2003).

³⁷ *Ibid.*

³⁸ *Ibid.*, 8.

³⁹ IOM (Institute of Medicine), *A 21st Century System For Evaluating, Veterans For Disability Benefits* (Washington, DC: The National Academies Press 2007): 92-125.

⁴⁰ Richard Buddin et al., *An Analysis of Military Disability Compensation*, 9-11.

⁴¹ In 1945, the mining, construction, and manufacturing industries represented employed 44 percent of the workforce in the U.S., compared with only 18 percent in 2000. *Ibid.*

⁴² The SRM shows the VA disability rating for a retiree at the time of the survey in 2003. It does not include information on what disability rating DoD initially assigned an individual on leaving active duty or whether the VA has revised the rating. Presumably, the disability ratings rise for a retiree cohort as the cohort ages, but we did not have direct evidence on the extent of this increase from the SRM. *Ibid.*, fn 7.

⁴³ *Ibid.*, 16-18.

⁴⁴ The increase in service-connected disabilities is consistent with a similar increase in civilian-related disabilities over a similar time period. While no consensus has been reached regarding an explanation for the rising rates, some commentators believe evidence of more health-based impairments exists while others cite more generous disability benefits as an end unto itself. *Ibid.*, fn 8.

⁴⁵ *Ibid.*, 16-18.

⁴⁶ Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 4.

⁴⁷ *Ibid.*, 245-255.

⁴⁸ IOM (Institute of Medicine), *A 21st Century System For Evaluating, Veterans For Disability Benefits* (Washington, DC: The National Academies Press 2007): 69-90.

⁴⁹ Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 164-165.

⁵⁰ *Ibid.*, 165.

⁵¹ *Ibid.*, 10.

⁵² *Ibid.*, 10.

⁵³ The President's Commission On Care For America's Returning Wounded Warriors, Final Report (July 2007): 18-19.

⁵⁴ Tim S. McClain, *VA Benefits At A Crossroads: Time To Find Solutions*, Legal Backgrounder 23, No. 42 (September 2008): 3-5.

⁵⁵ Veterans' Disability Benefits Commission, *Honoring The Call To Duty: Veterans' Disability Benefits In The 21st Century*, 6-7.

⁵⁶ *Ibid.*, 5-7.

⁵⁷ The President's Commission On Care For America's Returning Wounded Warriors, Final Report (July 2007): 21-25.