



Vietnam Veterans of America

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

May 15, 2017

Director
Regulations Management (02REG)
Department of Veterans Affairs
810 Vermont Avenue, NW
Room 1068
Washington, DC 20420

RE: Comments to Proposed Agency Information Collection Activity – Revision of Application for Disability Compensation and Related Compensation Benefits

Dear Director:

Pursuant to the Department of Veterans Affairs (VA) notice published at 82 Fed. Reg. 14276-14277 (Mar. 17, 2017), Vietnam Veterans of America, Inc. (VVA) submits its comments regarding VA's proposal to revise its Application for Disability Compensation and Related Compensation Benefits ("VA Form 21-526EZ" or "the form").

The interest and expertise of VVA to provide these comments is based on its role as a congressionally chartered national veterans service organization, comprised of more than 80,000 individual members, 650 local chapters, and 48 state councils throughout the Nation. Among other services, VVA assists disabled veterans and their families from all eras in claims for veterans' benefits by providing them with no-cost legal representation before VA regional offices and the Board of Veterans' Appeals. Many of VVA's individual members, their family members, and other disabled veterans receive, or are seeking entitlement to, benefits from VA. Thus, many of these individuals are now, or will be, subjected to the operation of the revised form.

VVA appreciates the opportunity to assist VA in its efforts to make its most important claims form more user-friendly. Specifically, VVA's comments are aimed at enhancing the quality, utility, and clarity of the VA Form 21-526EZ and minimizing the burden on those individuals using the form. When revising VA Form 21-526EZ, VVA urges VA to work closely with veterans service organizations, such as VVA, throughout the entire drafting process. Organizations that use this form on a daily basis will be able to provide practical advice and prevent misunderstanding *prior* to the final version being released.

I. VA should use easy-to-understand instructions, including prominently displayed text directing claimants to contact an accredited Veteran Service Officer.

The instructions included with the current form are too long, too complex, and do not use plain English, as required by Federal law. VA should revise the form to make the instructions easier to understand and include a prominently placed notice that claimants should contact an accredited Veteran Service Officer (VSO) for assistance.

To begin, the instructions included with the current form are too long – it should not take six pages of instructions to explain how to complete a four-page form. The current instructions contain information that is not necessary to complete the claims form, such as how VA determines the effective date, how VA determines the disability rating, and specific evidentiary requirements for many types of claims. Moreover, the absurdly small typeface used throughout the entire application makes it difficult for many Veterans to read the form. When revising the form, VA should focus on eliminating all information that does not directly pertain to the specific information required to be entered into the form.

Further, the instructions are too complex and use unclear language that is poorly organized. The form does not provide instructions on *how* to fill out the form by box. Instead, VA uses a series of charts to explain evidentiary requirements to support different claims types. Moreover, the instructions use unclear language that is arguably not in plain English as required by federal law. *See Plain Writing Act of 2010, 5 U.S.C. § 301 (2016).*¹ VVA recommends that in lieu of including incomplete and confusing information about how claims are decided, the form should provide simple step-by-step instructions on what information is requested for each box.

Finally, the form should include a prominently placed recommendation for claimants to contact a VSO for additional assistance as VSOs are better suited to explain how to fill out the form as opposed to the current complex set of instructions on the form. Although the current version of the form does prompt claimants to contact an accredited VSO, the language is not prominently displayed and it is not entirely clear that help is available—free of charge. In the revised version, VVA urges VA to prominently include clear text – **text that stands out from the other instructions** – on the first page. Indeed, it is in VA’s and the claimant’s best interest to work with a VSO as represented veterans will provide VA with fewer denials and fewer appeals.

In sum, the revised form’s instructions should be short and easy-to-understand; much of the instructions on the current form are unnecessary. Additionally, the instructions should contain information, in bold, on the first page that recommends claimants work with a VSO.

¹ VVA recommends that VA should consult the federal government’s plain language guidelines and examine forms used by other federal agencies to identify the appropriate length and style of instructions. For example, individuals filing an unfair labor practice charge form at the National Labor Relations Board against their employer use the same, simple, one-page form, regardless of the specific type of case filed. *See Internet Form NLRB-501.* Additionally, this form has one page of instructions, written in an easy-to-understand, bullet point format.

II. **VA should revise the form so that Veterans are not automatically entered into the Fully Developed Claim Program when they submit claims.**

The February 2016 version of the form causes many Veterans to unknowingly waive important rights relating to VA's Duty to Assist because the form automatically enters Veterans into the Fully Developed Claim (FDC) Program, unless the Veteran checks a box buried within paragraphs of boilerplate legalese. Even though VA purports that participation in the FDC Program is voluntary and risk-free, VA Regional Offices throughout the country routinely deny claims erroneously filed as fully developed claims that require additional evidence to substantiate the claim. In essence, Veterans' claims are being denied because they do not know they need to check a box buried in legalese at the end of their claim form. This is unacceptable.

Currently, the form automatically enrolls a Veteran in the FDC Program unless the claimant checks box twenty-six on page ten that states "**I DO NOT want my claim considered for rapid processing** under the FDC Program because I plan to submit further evidence in support of my claim." Notably, claimants are not informed in box twenty-six that they waive important rights by participating in the FDC Program. VVA finds it troubling that the language appears designed to entice Veterans into not checking the box, opting them into the FDC Program without fully understanding the implications.

When revising the form, instead of making Veterans determine whether they meet the criteria for the FDC Program, box twenty-six should be deleted and VA itself should make this determination when initially reviewing the claim pursuant to the FDC Program requirements. *See* M21-1MR, Part III, Subpart I, Chapter 3, Section B, Topic 5. This change in policy would be aligned with VA's mandate to provide benefits to Veterans and their families in a non-adversarial and pro-claimant system.²

Should VA not accept the recommendation to decide for itself if a claim belongs in the FDC Program, VA must revise the form so that claimants actively opt-in to the FDC Program because that is what Congress intended when it authorized the FDC Program, and because waivers of substantive rights should be made using a pro-veteran and non-adversarial spirit.

When Congress initially authorized the pilot for the FDC Program, it required claimants wishing to take advantage of rapid processing to "submit[] . . . an appropriate indication that the claimant does not intend to submit any additional information" and "submit[] a certification in writing that is signed and dated by the claimant stating that . . . no information or evidence is available or needs to be submitted." *See* 38 U.S.C. § 5101 (2016). When writing this law,

² *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (stating, in the context of statutory interpretation, "interpretive doubt is to be resolved in the veteran's favor"); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (indicating that "[t]his court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" and describing "the historically non-adversarial system of awarding benefits to veterans"); *Trilles v. West*, 13 Vet. App. 314, 325-26 (2000) (describing "the pro-claimant environment created by the general VA statutory scheme").

Congress required claimants to make active, affirmative submissions to participate in the FDC Program, not a passive action such as not checking box twenty-six.

Further, the form should be revised in a manner that clearly alerts claimants submitting fully developed claims that they are also waiving substantive rights afforded by VA's Duty to Assist. In the context of criminal investigations, the Supreme Court of the United States has repeatedly held that waivers of substantive rights must be made in a knowing, intelligent, and voluntary manner.³ The clear, easy-to-understand waivers of rights used in the criminal context should be a model for how rights should be waived in this uniquely pro-claimant adjudicatory scheme.

The current VA Form 21-526EZ needlessly contributes to VA's appeals backlog crisis because the form causes many Veterans to unknowingly waive significant rights under VA's Duty to Assist, causing erroneous denials that must be appealed. VA should revise the FDC Program so that VA decides if a claim is a fully developed claim, or alternatively, revise the form so that individuals filing fully developed claims must affirmatively opt-in to the program.

In conclusion, VVA recommends VA revise the VA Form 21-526EZ consistent with the above suggested comments to preserve and promote the non-adversarial system created by Congress. In particular, VVA urges VA to work closely with veterans service organizations while it creates draft versions of the new form. Veterans service organizations will be able to provide helpful feedback and suggested improvements to wording if we are included in the process from the beginning.

Respectfully submitted,

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³ See *Miranda v. Arizona*, 384 U.S. 436 (1966).