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Splendid Isolation: VA's Failure to Provide Due Process Protections and Access to Justice to Veterans and Their Caregivers

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SPLENDID ISOLATION: VA'S FAILURE TO PROVIDE DUE PROCESS PROTECTIONS AND ACCESS TO JUSTICE TO VETERANS AND THEIR CAREGIVERS

Yelena Duterte[*]

> A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards.
>
> – President Theodore Roosevelt[1]

Imagine you are a spouse and caregiver of a severely injured post-9/11 veteran. Your spouse served in the Marine Corps, with several deployments to Iraq. During their last deployment, your spouse sustained a severe traumatic brain injury and suffers from post-traumatic stress disorder. Due to these injuries, they need consistent care throughout the day. Thankfully, upon their return, the VA provided a caregiver program that allowed you to step away from your job and focus on caring for your spouse full time. As part of this program, you received a caregiver stipend of $2,400 per month, healthcare, and support from the local VA Caregiver Program. During your fourth annual assessment, a field examiner evaluated your spouse and indicated that "no change has been noted from the

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[1] *Quotations from the Speeches and Other Works of Theodore Roosevelt*, THEODORE ROOSEVELT ASS'N, https://www.theodoreroosevelt.org/content.aspx?page_id=22&club_id=991271&module_id=339333 (last visited Mar. 3, 2021).

previous year." Two months later, you receive a letter that simply states that your spouse, for whom you were caring, has improved, is no longer severely injured, and is no longer eligible for the program. There is no medical evidence or reasoning cited. To make it worse, this letter is from someone you know well, the caregiver support coordinator at your local VA Medical Center. This caregiver support coordinator has been coordinating your medical care, fielding your questions about how to best care for your spouse, and supporting you throughout this process. As of the letter, the stipend upon which you and your spouse have relied will stop. As the caregiver, you will no longer have access to VA health care, mental health care through VA providers, or the ability to obtain respite care. Without any other indication, you find that you will no longer receive the monthly stipend to subsidize the care that you are providing to your spouse, which impacts your ability to work. You have no right to a hearing to explain the daily care you provide to your veteran spouse. In fact, your voice was never heard. You now must decide how to move forward with this loss of income, healthcare, and support—while continuing to provide the caregiving necessary for your spouse. This Article explores the VA Caregiver Program and lack of due process rights afforded to veterans and their caregivers. Congress enacted transformational legislation to support post-9/11 Veterans by supporting their caregivers in 2010. Although the program was progressive in theory, in practice, the VA's implementation was anything but. In 2017, it became apparent that the VA Caregiver Program was purging its rolls of veterans and their caregivers. In order to stop the VA from arbitrarily kicking veterans out of its program, Congress or the VA must institute due process protections. This Article proposes five changes the government should make to the VA Caregiver Program to give veterans and their caregivers proper due process protections, including the right to: (1) an impartial adjudicator; (2) a hearing; (3) an impartial expert; (4) an adequate decision; and finally, (5) judicial review.

INTRODUCTION

When our military members are sent off to war, we make a promise that we will take care of them when they return.[2] Taking care of our veterans is the ultimate duty of the Department of Veterans Affairs ("VA").[3] Historically, taking care of our veterans included providing education benefits, vocational training, VA backed mortgages, disability benefits, and most importantly, healthcare.[4] VA healthcare has evolved from being exclusively inpatient treatment facilities for disabled veterans[5] to the largest integrated health care system in the United States, with over 170 VA Medical Centers ("VAMC") and over 1,000 outpatient clinics.[6]

In 2010, Congress created a program to expand healthcare for post-9/11 veterans which enabled their loved ones to become their caregivers: the Program of Comprehensive Assistance for Family Caregivers ("Caregiver Program").[7] In 2011, the VA implemented this program to support severely wounded post-9/11 veterans, by providing assistance to veterans and their caregivers, including a monthly stipend and mental healthcare for the caregiver.[8]

Not surprisingly, when this program was first implemented, caregivers and veterans were skeptical, but hopeful, that the program would help many veterans around the country.[9] Unfortunately, their skepticism was warranted.

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[2] *About VA*, DEP'T. OF VETERANS AFFS., https://www.va.gov/landing2_about.htm (last updated Apr. 11, 2018).

[3] *Id.*

[4] DEP'T. OF VETERANS AFFS., VA HISTORY IN BRIEF, 7–12, 19, 29 https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited Nov. 12, 2020).

[5] Kenneth W. Kizer & R. Adams Dudley, *Extreme Makeover: The Transformation of the Veterans Health Care System*, 30 ANN. REV. PUB. HEALTH 314 (2009).

[6] *About VHA*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/health/aboutvha.asp (last visited Jan. 26, 2021).

[7] 38 U.S.C. § 1720G.

[8] 38 C.F.R. §§ 71.10–71.50 (2014).

[9] Catrin Einhorn, *Looking After the Soldier, Back Home and Damaged*, N.Y. TIMES (Sept. 27, 2011), https://www.nytimes.com/2011/09/28/us/looking-after-the-soldier-back-home-and-damaged.html.

Just three years into the program, it was clear that the VA "significantly underestimated" the need for the Caregiver Program.[10] In 2014, a United States Government Accountability Office ("GAO") report was released focusing on the VA's overspending in the Caregiver Program and the unanticipated number of veterans and their caregivers that had enrolled.[11] The VA originally estimated that "about 4,000 caregivers would be approved for the program by September 30, 2014."[12] By May 2014, however, there were already 15,600 caregivers enrolled.[13] The report further showed that the number of approved caregivers per caregiver support coordinator varied widely by facility, likely due to the unanticipated number of veterans in need.[14]

Unsurprisingly, the VA significantly overspent its projected budget for the program.[15] The projected five-year cost for Fiscal Year ("FY") 2011–2015 was $777 million.[16] When all was said and done, the VA spent $394 million over the projected cost of the program.[17] Although the VA only anticipated that the caregiver stipends would account for about half of the cost,[18] in the end, nearly 80% of costs were allocated toward caregiver stipends.[19]

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[10] U.S. GOV'T ACCOUNTABILITY OFF., GAO 14-675, VA HEALTH CARE: ACTIONS NEEDED TO ADDRESS HIGHER THAN EXPECTED DEMAND FOR THE FAMILY CAREGIVER PROGRAM, 26 (2014), https://www.gao.gov/assets/670/665928.pdf.

[11] *Id.* at 7.

[12] *Id.* at 12.

[13] *Id.*

[14] *Id.* at 15.

[15] *Caregivers Program*, 76 Fed. Reg. 26,148, 26,159 (May 5, 2011); U.S. Dep't of Veterans Affs., VACO Caregiver Program Budget (Aug. 24, 2018) (on file with author) (document obtained in response to FOIA request by author).

[16] *Caregivers Program*, *supra* note 15, at 26,159.

[17] *Id.*; U.S. Dep't of Veterans Affs., *supra* note 15.

[18] *Caregivers Program*, *supra* note 15, at 26,159–62.

[19] U.S. Dep't of Veterans Affs., *supra* note 15.

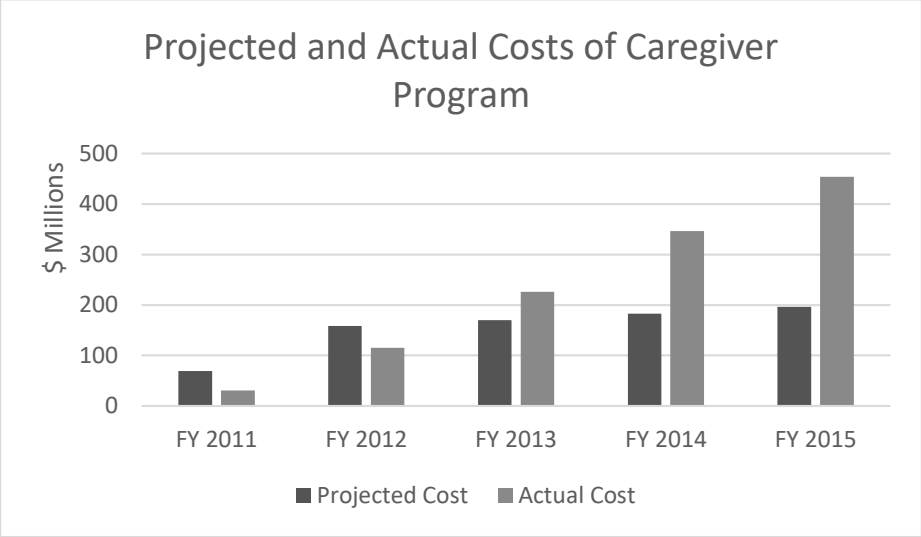

Figure 1. Costs of the Caregiver Program (2011–2015). Source: U.S. Dep't of Veterans Affs., VACO Caregiver Program Budget (Aug. 24, 2018) (on file with author).

Figure 1 demonstrates that the VA anticipated the costs to flatten after the first year; however, the budget grew each year. At its height in FY 2016, the program's budget grew to over $493 million.[20] After 2016, the overall budget for the Caregiver Program remained fairly flat, with budgets of $475 million and $489 million in FY 2017 and FY 2018, respectively.[21] During this same period of time, however, certain VA facilities removed veterans and caregivers from the program at alarming rates, reduced the monthly stipend to caregivers, and significantly reduced the percentage of caregivers approved into the program.[22] In late 2018, due to the significant concerns that VAMCs appeared inconsistent in determining

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[20] *Id.*

[21] *Id.*

[22] Quil Lawrence, *VA's Caregiver Program Still Dropping Veterans with Disabilities*, NAT'L PUB. RADIO (May 21, 2018, 1:26 PM), https://www.npr.org/2018/05/21/611733148/vas-Caregiver-program-still-dropping-veterans-with-disabilities.

eligibility, Secretary of Veterans Affairs Robert Wilkie placed a moratorium on removing veterans from the program.[23]

Despite the budgetary shortfall and concerns about inconsistent eligibility determinations, in 2018, Congress expanded the Caregiver Program to *all* veterans who have serious injuries from service[24]—a move which required the VA to promulgate new regulations. In July 2020, the VA finalized these new regulations to effectively expand the Caregiver Program to all seriously injured veterans and changed many of the criterion for eligibility.[25] The program officially expanded beyond post-9/11 veterans in October 2020.[26]

To give context, it is important to understand who is enrolled in the Caregiver Program and how the specific pieces of the program's processes impact them. What follows are two stories detailing the reality of those who participate in this program.

Albert and Valerie[27]

Albert served in the United States Marine Corps for ten years from 1996 to 2006. During that time, he had two deployments to Iraq. After coming home from his last deployment, he was diagnosed with post-traumatic stress disorder ("PTSD"). His PTSD was so severe that the military medically retired him. In fact, Albert suffers from a variety of disabilities related to service in addition to PTSD, including a traumatic brain injury ("TBI"), and back and shoulder conditions. Because of these conditions, Albert is unable to work and needs the assistance of his wife, Valerie, to tend to his daily needs. Valerie assists him in bathing and dressing because of his physical ailments. She has also taken on more of the home maintenance responsibilities, including laundry and cleaning,

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[23] *Id.*; *VA Announces Moratorium on Discharges and Decreases from Comprehensive Caregiver Program*, U.S. DEP'T OF VETERANS AFFS. (Dec. 21, 2018, 10:00 AM), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5169.

[24] VA Mission Act of 2018, Pub. L. No. 115-182, § 161, 132 Stat. 1393, 1438 (2018) (codified as amended at 38 U.S.C. § 1720G).

[25] *See* discussion *infra* Part IV.

[26] *VA Mission Act Strengthens VA Care*, U.S. DEP'T OF VETERANS AFFS., https://missionact.va.gov/ (last visited Mar. 6, 2021).

[27] Although these stories are real, I have changed names and details to protect the individuals described from any adverse action.

because of Albert's constant pain. Due to Albert's PTSD and TBI, he has some memory issues, terrible nightmares, and a short fuse. Valerie has to consistently remind Albert to take his medication and remind him of other daily tasks. After a nightmare or when Albert has moments of anger, Valerie is his support system. She is able to ground him and talk through the issues that he is facing in the moment. Because of Albert's dependence to Valerie, she is no longer able to work outside of the home.

Jamie and Lisa

Jamie served in the Navy from 2004-2010. Five years after being discharged from the Navy, Jamie was diagnosed with multiple sclerosis ("MS"). Because of the delayed onset of MS, the VA presumes that her MS is directly related to her service. Jamie's condition is progressively getting worse over time. For Jamie, her symptoms wax and wane but typically include fatigue, numbness, weakness, poor coordination, pain, and issues with memory and concentration. Her friend Lisa moved in to help care for Jamie's daily needs, including bathing, mobility, grooming, dressing and undressing, and keeping Jamie physically safe from injuring herself in her day-to-day activities.

Throughout this Article, Albert and Valerie's and Jamie and Lisa's stories will shed light on the pitfalls in the processes of the VA Caregiver Program.

This Article identifies the barriers veterans and caregivers face to access justice in the VA Caregiver Program in six parts. It is designed to provide the government with actionable items to afford veterans and their caregivers proper due process protections. Congress has the authority to move the program into the jurisdiction of the Veterans Benefits Administration and this Article will discuss in detail why it should do so.

Part I of this Article provides an overview of the legislative history of the Caregiver Program. Part II focuses on the VA's pre-existing program for veterans in need of long-term care assistance. Part III explains the processes and procedures of the VA Caregiver Program. Part IV discusses and analyzes the newly issued regulations that have redefined eligibility criteria and stipend calculations for the Caregiver Program. Part V gives an overview of

the Veterans Benefits Administration process, where veterans' claims for benefits are currently adjudicated. Finally, Part VI suggests various actions that Congress (or, alternatively, the VA) can take to protect veterans and their caregivers from devastating health outcomes.

I. LEGISLATIVE HISTORY OF THE CAREGIVER PROGRAM

Congress passed the Caregivers and Veterans Omnibus Health Services Act (the "Act") in 2010 and therein established the VA Caregiver Program,[28] laying the groundwork for individuals providing care to veterans to receive comprehensive services from the VA.[29] Through this program, qualified caregivers receive training, support, counseling, lodging, travel reimbursement, mental health services, respite care, and most significantly, medical coverage and a monthly stipend.[30] In the original legislation, Congress limited the program to post-9/11 veterans who have a serious injury that is related to their military service.[31] Further, the veteran must need assistance in performing activities of daily living or require supervision or protection.[32] Traumatic brain injury and mental health conditions are specifically mentioned in the legislation.[33] However, by using the language that, "[a] decision by the Secretary . . . affecting the furnishing of assistance or support shall be considered a medical determination," Congress created a system that was insulated from judicial review.[34] The term "medical determination" effectively eliminated due process rights for veterans and their caregivers, including due process rights to challenge determinations regarding their eligibility to the Board of

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[28] Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, § 101, 124 Stat. 1130, 1332 (2010) (codified as amended at 38 U.S.C. § 1720G).

[29] *Id.* at 1130–40 (codified as amended at 38 U.S.C. §§ 1720G, 1781, 1782).

[30] 38 U.S.C. § 1720G.

[31] Caregivers and Veterans Omnibus Health Services Act of 2010 § 101, 124 Stat. at 1132 (current version at 38 U.S.C. § 1720G(a)(2)).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 1136 (codified as amended at 38 U.S.C. § 1720G(c)(1)).

Veterans Appeals.[35] The language is calculated to avoid identifying the Caregiver Program as a public benefit, which the Supreme Court has designated is an entitlement requiring due process protections.[36]

Before the Act, individuals caring for severely injured veterans were not given any specific training, guidance, services, or benefits to care for their loved one.[37] Congress understood the need for veterans to obtain the best health care, including care from a family caregiver.[38] Congress acknowledged that family caregivers "sacrifice so much of their own lives in order to take care of our nation's heroes."[39] Congress was optimistic about this program and its capacity to provide caregivers the resources, skills, and ability to provide veterans with quality care.[40] In less than one month, Senator Akaka introduced the bill, the full Senate considered it, and passed it 98 to 0.[41] Similarly, in the House, in less than a month, it was passed and sent to the President to become law.[42]

Although the legislation passed by Congress was expansive, it also gave the Secretary of the VA sweeping authority to create both the process and substantive rules of the program.[43] Congress left many areas of the implementation up to the Secretary's discretion, including eligibility criterion relating to the definition of "severely injured" and the manner in which stipends are paid to caregivers.[44]

In 2018, Congress expanded the Caregiver Program to veterans who were seriously injured in the service before September 11,

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[35] 38 C.F.R. § 20.104(b) (2020). There is current litigation on this issue at the U.S. Court of Appeals for Veterans Claims. Beaudette v. McDonough, No. 20-4961 (Vet. App. Filed July 15, 2020).

[36] *See* Goldberg v. Kelly, 397 U.S. 254, 261–63 (1970) (establishing that welfare benefits are a statutory entitlement, and thus due process protections attach to welfare eligibility decisions).

[37] 155 CONG. REC. 28,293 (2009) (statement of Sen. Akaka).

[38] *See id.*

[39] 156 CONG. REC. 5976 (2010) (statement of Rep. Adler).

[40] *Id.* (statement of Rep. Richardson).

[41] 155 CONG. REC. 28,324 (2009).

[42] 156 CONG. REC. 6013–14 (2010).

[43] Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111–163, § 101, 124 Stat. 1130, 1132–39 (2010) (codified as amended at 38 U.S.C. § 1720G).

[44] *Id.* at 1132–33 (current version at 38 U.S.C. § 1720G(a)(2)–(3)).

2001.[45] Further, Congress expanded the types of services provided, now including financial and legal services.[46] Similar to the original Act, the expanded legislation sailed through Congress and became law within four months.[47] The new program began implementation in October 2020.[48]

II. LONG-TERM CARE FOR VETERANS BEFORE THE VA CAREGIVER PROGRAM

Although the Act was a transformative piece of legislation for post-9/11 veterans and their families, this is not the first time that the VA has provided for veterans in need of long-term care.[49] In FY 2007, the VA spent $4.1 billion on long-term care for veterans—for example, through nursing homes and non-institutional care, typically provided in the veteran's home.[50] The VA is required to pay for a veteran's long-term care if the veteran's disability is 70% service-connected or if the veteran is in need of nursing home care for a service-related condition.[51] However, in 2007, most of the VA's nursing home care expenses were paid on a discretionary basis.[52] In other words, many veterans receiving this care were not

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[45] The expansion to veterans prior to September 11, 2001, is staggered and will first focus on veterans who served prior to 1975, encompassing World War II, Korean War, and Vietnam Era Veterans. *See* VA Mission Act of 2018, Pub. L. No. 115-83, § 161, 132 Stat. 1393, 1438–39 (2018) (codified as amended at 38 U.S.C. § 1720G(a)(2)).

[46] VA Mission Act of 2018 § 161, 132 Stat. at 1439 (codified as amended at 38 U.S.C. § 1720G(a)(3)(A)).

[47] VA Mission Act of 2018, S.B. 2372, 115th Cong. (2018) (enacted).

[48] Leo Shane III, *Expansion of Veteran Caregiver Program Delayed Until at Least Next Summer*, MILITARY TIMES (Sept. 25, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/09/25/expansion-of-veteran-Caregiver-program-delayed-until-at-least-next-summer/.

[49] *See* 38 U.S.C. §§ 1710–1710B.

[50] U.S. GOV'T ACCOUNTABILITY OFF., GAO 09-145, VA HEALTH CARE: LONG TERM CARE STRATEGIC PLANNING AND BUDGETING NEED IMPROVEMENT 1 (2009), https://www.gao.gov/assets/gao-09-145.pdf.

[51] 38 U.S.C. § 1710.

[52] Veterans who are below the 70% rating but receive VA healthcare may obtain long-term care through their VA healthcare plan, but those veterans must pay a copay that is typically associated with their income and priority group.

70% disabled, nor did they have a service-related condition that required long-term care.[53] In FY 2018, the VA's long term care costs rose to $9.1 billion.[54]

Over the past three decades, concerns have been repeatedly raised that the VA is not well prepared to meet increased demands for long-term care services.[55] In 1998, GAO recommended that the VA increase the availability of non-institutional services.[56] Non-institutional care is care typically provided in the veterans' home or community, but not at an institutional facility like a nursing home.[57] Unfortunately, veterans' access to non-institutional services was limited by gaps and restrictions.[58] Many VA facilities limited the number of veterans who could receive non-institutional services and, in some cases, did not provide access to adult day care or respite care.[59] Adult day care is typically used to relieve a caregiver from their normal duties and provide a safe environment for the disabled adult.[60] Respite care similarly provides relief to the caregiver, but it may last anywhere from one day to several days or weeks.[61] Additionally, some veterans receive assistance through home health

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Typically, a veteran who is very low income will face few costs associated with this care, and the VA will pay a majority of the costs. *2021 VA Health Care Copay Rates*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/health-care/copay-rates/ (last visited Jan. 26, 2021).

[53] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 10.

[54] U.S. GOV'T ACCOUNTABILITY OFF., GAO 20-284, VA HEALTH CARE: VETERANS' USE OF LONG-TERM CARE IS INCREASING, AND VA FACES CHALLENGES IN MEETING THE DEMAND 17 (2020) https://www.gao.gov/assets/710/704690.pdf.

[55] *Id.* at 2–3.

[56] *Id.*

[57] 20 C.F.R. § 416.1143 (2020).

[58] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 3.

[59] *Id.*

[60] *What Is Adult Day Care?*, NAT'L CAREGIVERS LIBR., http://www.caregiverslibrary.org/Caregivers-Resources/GRP-Caring-For-Yourself/HSGRP-Support-Systems/What-Is-Adult-Day-Care-Article (last visited Nov. 23, 2020).

[61] *What Is Respite Care?*, NAT'L INST. ON AGING, https://www.nia.nih.gov/health/what-respite-care (last updated May 1, 2017).

aides,[62] although in today's reality, the number of skilled home health aides are not keeping up with demand.[63]

Before the 2010 Act and 2018 expansion, veterans who required daily assistance and wanted to stay in their home had very limited options. Specifically, a veteran could either hire a home health aide with the assistance of the VA or utilize respite or adult day care to give a bit of reprieve for the caregiver.[64] The VA Caregiver Program helps to rectify the lack of choices for veterans and allows family caregivers to be adequately acknowledged and compensated for the valuable care that they provide.

III. THE VA CAREGIVER PROGRAM

A. Past Eligibility Requirements

Prior to the VA's regulatory changes in October 2020, to be eligible for the VA Caregiver program, a post-9/11 veteran must have (1) incurred a serious injury related to their service and (2) been deemed unable to perform activities of daily living or be in need of supervision or protection based on their injuries.[65]

The Secretary identified four areas to consider when determining if a veteran had a "serious injury."[66] A veteran was considered seriously injured only if they were: (1) unable to perform an activity of daily living,[67] (2) in need of supervision or protection,[68] (3) suffered psychological trauma as evidenced by a Global Assessment of Functioning ("GAF") score of thirty or less,[69]

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[62] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 3.

[63] Bob Woods, *America's $103 Billion Home Health-Care System Is in Crisis as Worker Shortage Worsens*, CNBC, https://www.cnbc.com/2019/04/09/us-home-healthcare-system-is-in-crisis-as-worker-shortages-worsen.html (last updated Apr. 9, 2019, 11:06 AM).

[64] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 50, at 32–33.

[65] 38 U.S.C. § 1720G(a)(2).

[66] 38 C.F.R. § 71.20(b) (2019).

[67] *Id.* § 71.20(c)(1).

[68] *Id.* § 71.20(c)(2).

[69] *Id.* § 71.20(c)(3). A GAF score is a scoring system under the DSM IV that was previously used by the VA to determine how a mental health condition and

or (4) were service-connected at 100%[70] and had been awarded aid and attendance.[71] If the VA determined that the veteran was seriously injured through one or more of these criteria, it would then determine whether there was a proper caregiver and which caregiver benefits would be provided to the caregiver.[72]

For instance, when Albert and Valerie[73] applied for the VA Caregiver Program, the VA determined that Albert needed daily assistance with dressing and bathing. Further, it determined that his daily assistance needs related to his painful back and neck injuries, which were a result of his service. Without having to consider any of his other existing needs, the VA found that Albert was an eligible veteran for the program.

The eligibility criteria to be a "primary caregiver"[74] required that an applicant: (1) "[b]e at least 18 years of age," (2) be the veteran's family member or someone who lives with the veteran, (3) have no past or present determination of abuse, and (4) be trained to and

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its symptoms impacted a person's day-to-day life. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 5–6.

[70] Once a condition is found to be related to a veteran's service, the VA rates that disability. Specifically, the VA rates disabilities as a percentage based on the severity of the condition and symptoms. To obtain a 100% rating, a veteran must meet criteria laid out in 38 C.F.R. pt. 4. Each disability and related symptoms has a rating, which may range from 0% to 100%, although only some conditions include a 100% rating. Veterans may obtain a 100% rating with combined service-related conditions, as shown in 38 C.F.R. § 4.25, or by showing total disability due to individual unemployability under 38 C.F.R. § 4.16.

[71] 38 C.F.R. § 71.20(c)(4) (2019); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 6. Aid and Attendance is a special monthly compensation that a veteran can be awarded if they are unable to perform activities of daily living without the assistance of another. *Aid and Attendance*, MILITARY BENEFITS, https://militarybenefits.info/aid-and-attendance/ (last visited Nov. 20, 2020).

[72] 38 C.F.R. § 71.40(c)(4) (2019); *see* Jim Absher, *VA Family Caregiver Program*, MILITARY (Oct. 8, 2020), https://www.military.com/benefits/veterans-health-care/new-va-family-caregiver-program.html.

[73] *See supra* Introduction.

[74] Throughout this Article, the term "caregiver" will exclusively denote a primary caregiver. There are also secondary caregivers; however, they are not given the same benefits as a primary caregiver, including the monthly stipend. 38 C.F.R. § 71.40(b) (2020).

capable of following a treatment plan.[75] These requirements remain unchanged after the VA's rule change in 2020.

Once it had been established that both the veteran and the caregiver were eligible for the program, the VA then determined the applicable benefits and stipend amount.[76] The Secretary defined the rate of the stipend based on the Consumer Price Index, activities of daily living ("ADLs"), and the need for supervision.[77] Thus, when determining the stipend amount, the VA considered both ADLs and the veteran's need for supervision/protection.[78] The seven ADLs are: the ability to dress/undress, bathe, groom oneself, adjust prosthetics, use the toilet, feed oneself, and maintain mobility.[79] In terms of supervision, the VA considered seven categories: seizures, difficulty with planning or organizing, safety risks, difficulty with sleep regulation, delusions, difficulty with recent memory, and self-regulation.[80] The VA scored the veteran's ability to independently perform each ADL and their need for supervision.[81] The ranking system for each of these categories ranged from zero (completely independent in that area) to four (requires total assistance).[82]

For example, when scoring the ADL of dressing and undressing, the Long Beach Healthcare System considered the veteran's ability to dress upper and lower body with or without dressing aids.[83] If the

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[75] *Id.* § 71.25.

[76] *Id.* § 71.40.

[77] U.S. DEP'T OF VETERANS AFFS., FACT SHEET 11-02 (Dec. 2016), https://www.va.gov/COMMUNITYCARE/docs/pubfiles/factsheets/FactSheet_11-02.pdf. *See* 38 C.F.R. § 71.40 (2019).

[78] U.S. DEP'T OF VETERANS AFFS., *supra* note 77.

[79] 38 C.F.R. § 71.15 (2020).

[80] U.S. DEP'T OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 1152, CAREGIVER SUPPORT PROGRAM, 3–4 (2018), https://veterancaregiver.com/wp-content/uploads/2018/08/VA-Directive-1152-CG-Program-14June2017.pdf; 38 C.F.R. § 71.40 (2019).

[81] 38 C.F.R. § 71.40 (2019).

[82] VA Long Beach Healthcare Sys., Guidance for Scoring the Veteran Tier Level (July 13, 2017) (on file with author) (document obtained in response to FOIA request by author). The Long Beach Healthcare System provided a thorough scoring sheet; however, it is unclear whether this particular scoring sheet was shared across all VA facilities. *Id.*

[83] *Id.*

veteran was completely independent, he received a score of zero.[84] A score of one was merited when minimal assistance may be needed and there is supervision or coaching from the caregiver throughout the dressing him or herself.[85] A score of two meant that the veteran received "minimal to moderate hands-on assistance and supervision/coaching from the Caregiver throughout the activity."[86] A score of three signified that there was "moderate to maximal hands-on assistance and supervision/coaching from the Caregiver throughout [the] activity."[87] And finally, when a "[v]eteran require[d] maximal to total assistance" in dressing, they received a score of four.[88]

Albert and Valerie's story provides an illustrative example of this scoring system. Albert's back and shoulder injuries limit his ability to dress himself. On most days, Albert needs assistance putting on a shirt, especially when the shirt goes over his head and is not a button-down. On days when he experiences significant pain in his back and shoulders, Albert has trouble putting on his pants, socks, and shoes. Albert could have received a score of anywhere from one to three, depending on how the individual adjudicator viewed his need for assistance. The scoring process was incredibly subjective and left wide latitude for discretion.

After the VA scored the veteran on their individual ADL and need for supervision and determined a final score from the sum of all scored ADLs and supervision categories,[89] it then assigned each veteran to a tier level.[90] Tier 1 was a total score of 1–12.[91] The VA considered veterans in Tier 1 as requiring about ten hours of caregiving per week.[92] Tier 2 was a total score of 13–20.[93] The VA

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] 38 C.F.R. § 71.40(c)(4)(iii) (2019).

[90] *Id.* Although the term "Tier" is not codified in statutes or regulations, the VA uses this term throughout its VA Caregiver Program. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10.

[91] 38 C.F.R. § 71.40(c)(4)(iv)(C) (2019).

[92] *Id.*

[93] *Id.* § 71.40(c)(4)(iv)(B).

considered this about twenty hours of caregiving per week.[94] Finally, a score of twenty-one or higher was Tier 3.[95] A Tier 3 caregiver was considered someone who provided care forty hours per week.[96] According to a 2014 GAO Report, the average monthly payments were approximately $2,320 for Tier 3, $1,470 for Tier 2, and $600 for Tier 1.[97]

If successfully placed into the program, the veteran and their caregiver received, as they still do today, support, training, and a monthly stipend from the VA caregiver support at the local VAMC.[98] Through the Caregiver Support Program, the caregiver receives education and training, respite care, mental health services, access to health care, and a monthly stipend.[99]

A. Structure of the Caregiver Program

Most VA medical facilities have a local Caregiver Support Program to administer the Caregiver Program.[100] The Caregiver Support Program gives each VAMC the ability to manage its program to best suit the needs of its own veteran population.[101] There are many important players in each Caregiver Program, including the VAMC's Director, Chief of Staff, and Caregiver Support Coordinator ("CSC"). Specifically, each VAMC Director is required to ensure that *locally developed* processes and procedures are in place to access services.[102] The Chief of Staff develops processes and procedures to facilitate eligibilities, including who will have the authority to determine whether a veteran is eligible,

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[94] *Id.*

[95] *Id.* § 71.40(c)(4)(iv)(A).

[96] *Id.*

[97] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 11.

[98] Caregivers and Veterans Omnibus Health Services Act of 2010, 111 Pub. L. No. 163, § 101, 124 Stat. 1130, 1132–33 (2010) (codified as amended at 38 U.S.C. § 1720G(a)(3)(A)).

[99] U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 1.

[100] *Id.* at 4.

[101] *See id.* at 7.

[102] *Id.*

and how the assessment will be performed to determine their level of dependency.[103]

Although the VAMC's Medical Director and Chief of Staff are important players, the most integral role in the Caregiver Program is the CSC. The CSC has a variety of roles, including clerical support, advocator, adjudicator, educator, social worker, and manager of the program.[104] The CSC is responsible for assisting caregivers in the application process, determining eligibility, documenting approvals/denials, ensuring available trainings are provided to caregivers, and completing clinical assessments every ninety calendar days.[105] Additionally, the CSC advocates for services and benefits for the caregivers and veterans and educates caregivers on best practices.[106]

For instance, when Jamie and Lisa[107] applied to the VA Caregiver Program, they met with Ryan who was the CSC of their local VA facility. Ryan welcomed them, explained the program, and assisted Jamie with the application process. Ryan reviewed the application and, with the Care Team, granted Jamie and Lisa's caregiver application. Ryan provided education to Lisa about how to be a good caregiver and provided her other resources as well. Ryan enrolled Lisa in CHAMPVA,[108] which provided her with healthcare. Lisa and Jamie felt like Ryan had advocated for them and helped to make sure that Lisa had all of the tools necessary to care for Jamie's needs. Ryan was in touch quarterly to do wellness checks and to make sure that they had the resources that they needed. At the one-year mark, Ryan set up a reassessment with the Care Team to confirm that Jamie and Lisa were still eligible and to determine if their needs had changed.

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[103] *Id.* at 8.

[104] *Id.* at 9.

[105] *Id.*

[106] *Id.* at 10.

[107] *See supra* Introduction.

[108] Civilian Health and Medical Program of the Department of Veterans Affairs, better known as "CHAMPVA," is a healthcare program for eligible spouses and children. Before the Caregiver legislation, only qualified dependents (surviving spouses and dependent children) of 100% service-connected veterans could enroll in this program. SIDATH VIRANGA PANANGALA, HEALTH CARE FOR DEPENDENTS AND SURVIVORS OF VETERANS 2 (2018); *see* also 38 U.S.C. § 1781.

B. Caregiver Program Procedure

Although each hospital implements the program on a local level, there is a broad federal framework within which each program must operate.[109] Initially, a veteran and their caregiver must file an application, VA Form 10-10CG.[110] Upon receiving the application, the CSC evaluates whether the veteran and the caregiver are eligible.[111] As discussed above, eligibility for the program requires that a veteran[112] be seriously injured and that the injury requires the need for assistance in ADLs or a need for supervision.[113] Further, the CSC will assess whether the injury requires that the veteran is in need of a caregiver.[114] If the CSC determines, unilaterally, that the veteran does not qualify, the CSC issues a denial regarding eligibility.[115]

On the other hand, if the CSC finds the veteran eligible, they will refer the application to a Care Team to perform the required clinical evaluations.[116] The Care Team consists of the CSC, a primary care physician, and other medical providers—typically those who currently treat the veteran.[117] The CSC will set up appointments for the veteran to be seen by various providers to determine the level of care that the veteran needs, including appointments with members of the Care Team.[118] The CSC will also schedule a home care assessment to determine whether the caregiver can provide services to the veteran and fully understands the veteran's needs at home.[119] Once all evaluations are completed, the CSC reviews the findings of

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[109] U.S. DEP'T OF VETERANS AFFS., *supra* note 80.

[110] *Id.* at 12.

[111] *Id.*

[112] Prior to the VA's rule change in 2020, only post-9/11 veterans were eligible. *See supra* note 45 and accompanying text.

[113] *See supra* notes 31–32 and accompanying text.

[114] U.S. DEP'T OF VETERANS AFFS., *supra* note 80.

[115] *Id.* at 9.

[116] *Id.* at 13.

[117] *Id.* at 8.

[118] *Id.* at 13.

[119] *Id.* at 14.

the primary care team and determines whether the veteran is eligible for the program and what level of care must be provided.[120]

The CSC and primary care team also screen the caregiver for eligibility, evaluating the applicant based on the various factors related to whether the caregiver can adequately care for the veteran.[121] If eligible, the caregiver will be given training and education about the program.[122]

At this point, the VA may approve the veteran and the caregiver for the program or may determine that the veteran and caregiver are ineligible.[123] However, neither federal regulations nor VA guidance adequately ensure that the decision itself contains enough information for the veteran or caregiver to understand why they were denied or granted at a specific tier level.[124]

If a veteran disagrees with the determination of the CSC or the Care Team regarding basic eligibility or the determined tier level, the veteran can appeal through the Veterans Health Administration ("VHA") clinical appeals process.[125] Clinical disputes arise when a patient disagrees with a medical facility's denial of specific clinical care, usually due to differences in opinion as to the treatment suggested or requested to improve clinical outcomes.[126] For example, such a dispute may result from a disagreement between the patient and doctor concerning specific drugs prescribed.

The clinical dispute process is an odd fit for the Caregiver Program for a variety of reasons. First, it is typically unclear how

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[120] *Id.* at 12–17.

[121] *Id.* at 13.

[122] *Id.* at 13–14.

[123] *Id.* at 15.

[124] *See id.* at 13–17 (showing almost no guidance on issuing ineligibility or tier-level decisions, other than informing the veteran that they have a right to an appeal).

[125] *Id.* at 15.

[126] When a veteran is receiving care from the VA, there may be a difference of opinion between the veteran and their doctor on the best course of treatment. If a veteran does not agree with the doctor's planned course of action, they can appeal to get another opinion within the VA system. This appeal system allows for another doctor to review the treatment and whether the appeal is warranted. *See* U.S. DEP'T OF VETERANS AFFS., VETERANS HEALTH ADMIN., VHA DIRECTIVE 1041, APPEAL OF VETERANS HEALTH ADMINISTRATION CLINICAL DECISIONS 3–8 (2020).

the VA came to its decision and the evidence it considered.[127] Unlike notification letters concerning other VA benefits, neither regulations nor VA guidance require that an eligibility decision contain the evidence considered or the underlying reason for denial or tier level status.[128] This lack of transparency makes it extremely difficult for the caregiver or veteran to appeal because they likely will not have a full understanding of the reasons for denial. Second, the appeal goes to the medical center's Chief of Staff and, if appealed again, to the Veteran Integrated Service Network ("VISN")[129] director.[130] These individuals are typically medical professionals, but the determinations made by the VA Caregiver Program are not always medical in nature.[131] Specifically, there are several eligibility criteria that do not involve medical-related issues, such as the precise dates the veteran served, or whether the caregiver is a family member or lives with the veteran.[132] Even when these decisions look at medical determinations, such as how the veteran is scored for each ADL, the dispute is not about improving clinical outcomes, as it would be if it involved a decision about the most effective medication to use. In fact, the decision as to whether an individual is scored a one or a two based on the ADL of dressing, for example, will likely have no impact on the clinical outcome of the veteran.

In the event that the veteran and caregiver are approved into the program, they will be reassessed annually to confirm continued eligibility and the needs of the veteran.[133] After an annual reassessment, the caregiver and veteran may also be revoked from the program, if the CSC determines that the veteran or the caregiver are no longer eligible.[134] In the event that the revocation is due to

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[127] *See id.*; *see generally* U.S. DEP'T OF VETERANS AFFS., *supra* note 80.

[128] *See* U.S. DEP'T OF VETERANS AFFS., *supra* note 126; *see* U.S. DEP'T OF VETERANS AFFS., *supra* note 80 at 15.

[129] There are eighteen VISNs that manage regional markets that deliver health care, social services, and support services to veterans. *About VHA—Veterans Health Administration*, U.S. DEP'T OF VETERANS AFFS., https://www.va.gov/health/aboutvha.asp (last visited Nov. 13, 2020).

[130] U.S. DEP'T OF VETERANS AFFS., *supra* note 126 at 4–6.

[131] *See* U.S. DEP'T OF VETERANS AFFS., *supra* note 80 at 13–14.

[132] *Id.*

[133] *Id.* at 16.

[134] *Id.* at 19.

the veteran's improved condition, the caregiver will continue to get benefits for ninety days.[135] However, the VA may terminate the stipend immediately if it suspects that the safety of the veteran is at risk due to the caregiver's action or inaction.[136] If revoked, the veteran and their caregiver have the right to appeal under the clinical appeals process.[137] The appeal itself does not stay the revocation, however, meaning the veteran and caregiver must wait to see whether the Chief of Staff or VISN director overturn the VA Caregiver Program's determination.

In October 2018, VHA improved its processes with a more detailed standard operating procedure ("SOP").[138] Most significantly, in cases of a reduced tier level or revocation due to clinical eligibility, the VA now requires proof of sustained improvement.[139] Presently, for the CSC to revoke someone from the program, the record must demonstrate sustained improvement or sustained change.[140] This is a significant improvement, as it finally requires CSCs to document the specific reasons why the veteran is no longer eligible. Unfortunately, the VA has not implemented this type of procedure for its decision on new applications.

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *See MISSION Critical: Caring for Our Heroes: Hearing Before the Subcomm. on Health and Tech. Modernization of the H. Comm. on Veterans' Affs.* (2019) (statement of Steven Lieberman, Acting Principal Deputy Under Sec'y for Health, Veterans Health Admin., U.S. Dep't of Veterans Affs.) (explaining that VHA Directive 1152 was updated to "include 14 Standard Operating Procedures (SOP) that provide further guidance").

[139] U.S. DEP'T OF VETERANS AFFS., CAREGIVER SUPPORT PROGRAM STANDARD OPERATING PROCEDURE, PROGRAM OF COMPREHENSIVE ASSISTANCE FOR FAMILY CAREGIVERS: TIER CHANGES 2 (2018); U.S. DEP'T OF VETERANS AFFS., CAREGIVER SUPPORT PROGRAM STANDARD OPERATING PROCEDURE, PROGRAM OF COMPREHENSIVE ASSISTANCE FOR FAMILY CAREGIVERS: REVOCATION DUE TO VETERAN NO LONGER CLINICALLY ELIGIBLE 2 (2018) [hereinafter REVOCATION DUE TO CLINICAL INELIGIBILITY].

[140] REVOCATION DUE TO CLINICAL INELIGIBILITY, *supra* note 139.

C. Locally Developed Processes

Although this general framework exists, VHA Directive 1152 gives each hospital in the VA system independent authority to create its own process and set of procedures in implementing the Caregiver Program.[141] And although VHA Directive 1152 outlined a standardized process, each hospital has discretion to develop its own standards.[142] Some hospitals chose to create their own SOPs.[143] In other instances, the VISN issued SOPs for all the hospitals in their catchment area.[144] It is unclear why the VA chose to give each hospital the ability to create its own process in a nationwide program that impacts our most vulnerable veterans.

For example, in the Erie, Pennsylvania VAMC, an appeal related to the Caregiver Program must be submitted within sixty days of the decision.[145] In Erie, if the VA determines that it is revoking the stipend benefit, the benefits will be extended for ninety days for the caregiver and veteran to plan for this change in the benefits, including healthcare and the monthly stipend.[146] Erie's ninety-day stay is in line with the nationwide standard.[147]

Contrast this to the Caregiver Program in Amarillo, Texas. An appeal in Amarillo must be submitted within thirty days of the decision.[148] In Amarillo, the VA will immediately terminate the veteran and their caregiver from the program if there are concerns

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[141] *See* U.S. DEP'T OF VETERANS AFFS.*, supra* note 80 at 4.

[142] *See generally id.* (outlining the basic requirements for the Caregiver Program but leaving it to the discretion of each VAMC to develop its own standards to carry out those requirements).

[143] *E.g.*, U.S. DEP'T OF VETERANS AFFS., MED. CTR. COLUMBIA, S.C., MED. CTR. MEMORANDUM NO. 544-412, at 1 (2008).

[144] *See generally* U.S. DEP'T OF VETERANS AFFS., PROGRAM OF COMPREHENSIVE ASSISTANCE FOR FAMILY CAREGIVERS FOR THE MIDSOUTH HEALTHCARE NETWORK (VISN 9), STANDARD OPERATING PROCEDURE 10N9-SOP-17-12 (2017) (representing one VISN issued SOP for the Mid-South area).

[145] *See* U.S. DEP'T OF VETERANS AFFS. MED. CTR. ERIE, PENNSYLVANIA, MED. CTR. MEMORANDUM NO. 122-06, at 2 (2018).

[146] *See* U.S. DEP'T OF VETERANS AFFS., CAREGIVER SUPPORT PROGRAM, REASSESSMENT FACT SHEET 1 (2017).

[147] U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 19.

[148] *See* AMARILLO VETERAN'S ADMIN., CARE MANAGEMENT/SOCIAL WORK SERVICE: STANDARD OPERATING PROCEDURE 7 (2018).

over safety or if the veteran and caregiver cannot be reached, however Amarillo does not provide any other guidance for other revocations.[149] In practice, it is unclear how these SOPs are treated in conjunction with VHA 1152's standards for revocations and the timeline to remove a veteran from the program.[150]

Appeal processes seem fundamental and ought to be a critical element to the program, yet the VA chose to allow each hospital to make these important procedural decisions for the veteran and their caregiver. It is also important to highlight that the nationwide clinical appeals process does not require any specific deadlines for appeal.[151]

Not only are procedures different between hospitals, the substantive guidance that each hospital follows may also be different. For example, in defining the old tier levels, Richmond, Virginia VAMC's guidance broke the requirements down qualitatively.[152] By Richmond's standards, a veteran was Tier 3 if the "[v]eteran would require [a] nursing home or institutional level of care if not in the caregiver support program."[153] A Tier 2 veteran was one who "live[s] with severe impairment due to . . . injury that renders them incapable of attending to daily life[,] needs[, or] responsibilities."[154] Finally, a Tier 1 veteran was one who "will benefit from additional support as part of their recovery process from a physical or psychological injury."[155] Based on the VA's regulations, this guidance seems woefully improper and likely in violation of C.F.R. § 71.40.[156] Specifically, the VA's regulations required that the VA Caregiver Program rate each ADL and need of supervision individually and not paint broad brush strokes that rely on such qualitative standards.[157]

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[149] *Id.*

[150] U.S. DEP'T OF VETERANS AFFS., *supra* note 10, at 19.

[151] *See* U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 2–8.

[152] *See* U.S. Dep't of Veterans Affs. Richmond, VA Med. Ctr., Veteran Appeal Summary Sheet (on file with author) (document obtained in response to FOIA request by author).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See* 38 C.F.R. § 71.40(c)(4)(iii) (2019).

[157] *Id.* § 71.40(C)(4)(i)–(iii).

Using yet another process, the VA Long Beach Healthcare System applied a quantitative analysis in scoring, as required by the regulations.[158] Specifically, each ADL and the need for supervision was scored from 0–4 based on the level of assistance the veteran needed.[159] Long Beach's scoring methodology delineates the spectrum of need for each facet, which seems in line with the regulations, but each facility could technically have a different scoring methodology because of these localized processes. Based on the overall score, the veteran was placed on a specific tier level, as required by the regulations.[160] Although the Richmond VAMC required a Tier 3 veteran be so severely impaired to be institutionalized or be in a nursing home, Long Beach did not specifically require that level of severity.[161] Thus, it is likely that these two facilities would have very different outcomes for a veteran in need of caregiver support.

In October 2019, a memo was circulated through the VA Caregiver Program focused on new eligibility screening questions.[162] The guidance listed new criteria that would make a veteran ineligible for the program, including whether the veteran is employed, enrolled in school, and can "safely be home alone."[163] Under the law, these items alone did not make a veteran ineligible for the program, however it is likely that this memo impacted veterans and CSCs in their decision making, since it may have been treated as binding authority on the CSCs.[164] It is unclear which VA

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[158] *See* VA CAREGIVER SUPPORT, GUIDANCE FOR SCORING THE VETERAN TIER LEVEL 1 (2012); 38 C.F.R. § 71.40(4) (2019).

[159] VA CAREGIVER SUPPORT, *supra* note 158.

[160] *Id.*

[161] U.S. Dep't of Veterans Affs. Richmond, VA Med. Ctr., *supra* note 152; VA Long Beach Healthcare Sys., *supra* note 82, at 1.

[162] Leo Shane III & Patricia Kime, *Memo Outlining Supposed Changes to VA Caregiver Program Creates Confusion, Anxiety Among Veterans*, MIL. TIMES (Oct. 3, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/10/03/memo-outlining-supposed-changes-to-va-Caregiver-program-creates-confusion-anxiety-among-veterans/.

[163] *Id.*

[164] Since the Secretary gave the local VA Medical Centers the ability to create their own localized processes, many VA facilities created documents associated with substantive and procedural guidelines to assist their Caregiver Programs. These documents were then followed by the Caregiver Support

facility created this eligibility screening memo, but it circulated throughout the Arizona, Mississippi, Pennsylvania, and Florida VA facilities.[165]

Allowing hospitals to create their own procedures and substantive rules creates inconsistencies across the VA and obscures what should be a transparent process for veterans and their caregivers. It is plausible that at some point a veteran and their caregiver may move. In doing so, the veteran and caregiver may face different requirements, challenges, and processes when working with a new VA hospital—or find themselves suddenly ineligible. As the next section illustrates, the data suggests that the differences among VA hospitals can be devastating to veterans and their caregivers.

D. The Impact of a Localized Process

The localized process is not a concern simply in theory, it has serious and actual implications that affect veterans and their families. In 2014, a GAO Report was released titled, "Actions Needed to Address Higher-Than-Expected Demand for the Caregiver Program."[166] In this report, GAO found that VHA "significantly underestimated [the] demand for services when it implemented" the Caregiver Program.[167] VHA originally estimated 4,000 participants by September 2014, however by May 2014, it had well over 15,600 participants in the program.[168] Unsurprisingly, GAO also found that the VAMCs did not have enough staff, which impacted the timeliness of decisions and ability to meet the program goal of quarterly home visits.[169] GAO also discovered that there was a significant incongruity between the numbers of approved caregivers per CSC.[170] On average, a CSC had 67.2 approved

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Coordinators. Here, it is unclear who created the memo, but it does seem that Caregiver Support Coordinators were following this memo. *See id.*

[165] *Id.*

[166] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10.

[167] *Id.*

[168] *Id.* at 12.

[169] *Id.* at 17–18.

[170] *Id.* at 14.

caregivers.[171] However, the average conceals the drastic imbalance between each facility.[172] For example, at the low end, the Veterans Healthcare System of the Ozarks in Fayetteville, Arkansas only had six approved caregivers for their one CSC.[173] On the high end, Atlanta, Georgia had one CSC with 251 approved caregivers.[174]

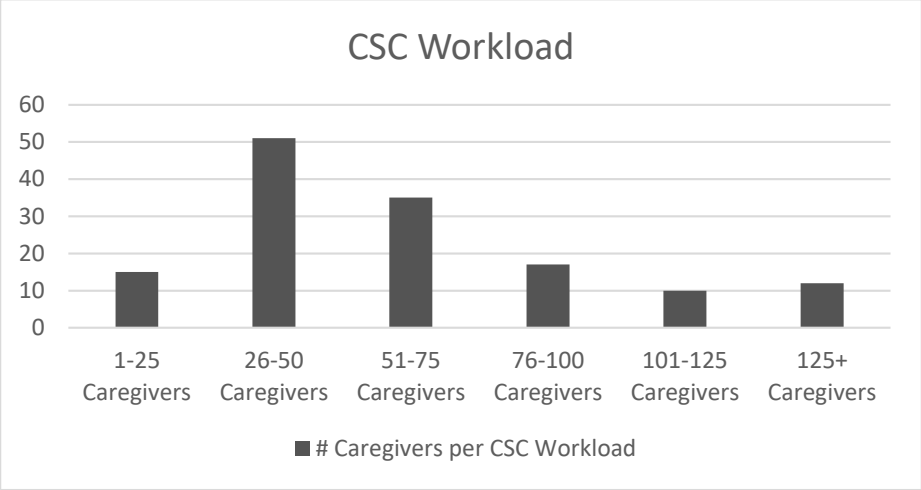

Figure 2. CSC Workload by Number of Caregivers. Source: U.S. Gov't Accountability Off., GAO 14-675, VA Health Care: Actions Needed to Address Higher Than Expected Demand for the Family Caregiver Program (2014).

Of the 140 Caregiver Programs at the time, fifteen facilities had a ratio of less than twenty-five approved caregivers to one CSC.[175] Fifty facilities had a ratio of 26–50 approved caregivers for each CSC.[176] Thirty-five facilities had a ratio of 51–75 approved caregivers for each CSC.[177] Seventeen facilities had a ratio of 76–100 approved caregivers for each CSC.[178] Ten facilities had a ratio

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[171] *See id.* at 34 (explaining that the total amount of approved caregivers is 15,661 and the number of all CSCs across VAMCs is 233).

[172] *Id.* at 29–34.

[173] *Id.* at 29.

[174] *Id.* at 34.

[175] *Id.* at 29.

[176] *Id.* at 29–31.

[177] *Id.* at 31–32.

[178] *Id.* at 32–33.

of 101–125 approved caregivers for each CSC.[179] Twelve facilities had a ratio of over 125 approved caregivers for each CSC.[180]

To fully understand what these numbers mean, one must appreciate the CSC's responsibilities. As detailed above, for every application that is filed, the CSC must review to determine administrative eligibility.[181] If they find the applicant meets eligibility guidelines, the CSC may then work with the Care Team to determine clinical eligibility.[182] The CSC will render a decision, either allowing the veteran and caregiver into the program or denying based on their ineligibility.[183] Every year, each veteran and caregiver must be reassessed and a new decision must be made by the CSC.[184] Presumably, the adjudicative responsibility of the CSC increases each year with new applicants in the program alongside the existing participants in the program.[185]

In addition to the adjudicative responsibilities, the CSC must also monitor the veteran and caregiver in the program.[186] The CSC must provide quarterly assessments, either in person or remotely.[187] The CSC must coordinate the initial and annual reassessments for every veteran in the program.[188] The CSC must also act as a social worker to offer support to the caregiver in order to reduce their stress and promote the well-being of the veteran.[189]

Viewing these workload numbers with the CSC's level of responsibility is not only concerning for the CSC, but also has a significant impact on the veterans and caregivers in the program. To illustrate this impact, the discussion below describes three facilities with different workloads. The numbers highlight the manner in which the workload impacted the number of veterans approved into the program.

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[179] *Id.* at 33.

[180] *Id.* at 33–34.

[181] U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 12.

[182] *Id.*

[183] *Id.* at 9.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 16.

[187] *Id*

[188] *Id.*

[189] *Id.*

First, Huntington, West Virginia VAMC had 10,864 post-9/11 veterans who were enrolled in its facility.[190] In 2014, Huntington had two CSCs with fifty-two approved caregivers in their program—about 26 caregivers per CSC.[191] Huntington's overall average denial rate from 2011–2018 was 24.48%.[192] Over time, denial rates at Huntington fluctuated year to year, but denial rates seem fairly consistent overall.[193] By 2018, the program had grown to 281 caregivers.[194]

Second, Mountain Home, Tennessee ("MHT") had 21,316 post-9/11 veterans who were enrolled in its facility—almost double those enrolled in Huntington's facility.[195] In 2014, MHT had two CSCs with 136 approved caregivers in its program—about sixty-eight caregivers per CSC.[196] This approximates the average CSC workload on a national level at the time.[197] Here, MHT's average denial rate from 2011–2018 was 50.79%,[198] and the denial rate ticked up each year. In 2011, the denial rate was 10%. Then, in 2012, it rose to 22.53%. From 2013–2015, the rates of denial were in the 30%–40% range, with a steady increase in denials each year.[199] However, in 2016, denials rose to 63.05%, and in 2017, the denial rate was at 74.87%.[200] By 2018, the number of approved caregivers rose to 333.[201] Compared to Huntington, the MHT has only 18% more veterans in the program, with a population that is almost double that of Huntington.

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[190] U.S. Dep't of Veterans Affs. Huntington, WV, Response to EV 108193 from Hershel "Woody" Williams VAMC (formerly Huntington VAMC) (Aug. 3, 2018) (on file with author) (document obtained in response to FOIA request by author).

[191] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 28.

[192] U.S. Dep't of Veterans Affs. Huntington, WV, *supra* note 190.

[193] *Id.*

[194] *Id.*

[195] Dep't of Veterans Affs. James H. Quillen Med. Ctr., Caregiver Support Program Executive Summary Report (Aug. 10, 2018) (on file with author) (document obtained in response to FOIA request by author).

[196] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 80, at 29–34.

[197] Dep't of Veterans Affs. James H. Quillen Med. Ctr., *supra* note 195.

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

Finally, Tennessee Valley Healthcare System ("TVHS") had 75,929 post-9/11 veterans who were enrolled in its facility.[202] In 2014, TVHS had three CSCs for 451 approved caregivers—about 150 caregivers per CSC. The facility and the CSC ratio was quite a bit larger than MHT and Huntington.[203] TVHS's average denial rate from 2011–2018 was 78.63%.[204] In 2011 and 2012, TVHS's denial rates were similar to Huntington and MHT's, 25.39% and 28.41% respectively.[205] In 2013, the denial rate increased to 47.19%.[206] In 2014, the same year as the GAO report, the denial rates increased again to 73.37%.[207] In 2015–2017, the denial rates skyrocketed to over 90%.[208] To give this percentage more context, in 2017, 569 veterans applied to the program and only six were approved, a denial rate of 98.95%. Further, from 2011–2018, 496 approved caregivers were revoked from the VA Caregiver Program at TVHS.[209] By 2018, TVHS only had 251 caregivers, 200 less than it had in 2014.[210] Alarmingly, TVHS has seven times more post-9/11 veterans enrolled in its facility than Huntington VAMC, but has thirty fewer approved caregivers.[211]

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[202] U.S. Dep't of Veterans Affs. Tennessee Valley Healthcare Sys., Caregiver Support Program Executive Summary Report (Aug. 10, 2018) (on file with author) (document obtained in response to FOIA request by author).

[203] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 33.

[204] U.S. Dep't of Veterans Affs. Tennessee Valley Healthcare Sys., *supra* note 202.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*; U.S. Dep't of Veterans Affs. Huntington, WV, *supra* note 190.

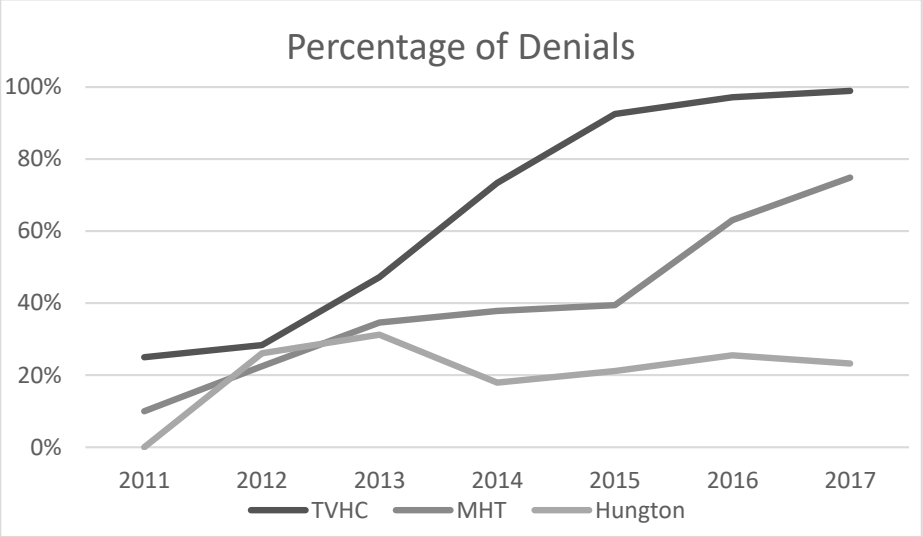

Figure 3. Percentage of Program Denials at Tennessee Valley, Mountain Home, and Huntington VAMCs 2011–2017. Sources cited supra *notes 190, 195, 202.*

These numbers tell a story. The workload of CSCs at each facility varies greatly and has a direct correlation to the rate of denials. As the number of caregivers per CSC increases, the rate of denials increases.[212] A veteran and their caregiver are directly impacted by the workload of a CSC at their facility. A veteran in West Virginia should not be adversely impacted by moving to Tennessee because of these disproportionate denial rates. These data points not only show that the VA Caregiver Programs are understaffed, but that localizing a program, as the VA has done with the Caregiver Program, has a dire impact on the veterans the VA is charged with serving.

Because of the alarming rates of denial and revocations, the VA briefly paused all revocations twice: once in May 2017 and once in December 2018.[213] The VA recognized its inconsistencies and, in its 2020 regulations, it attempted to fix them.

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[212] *See supra* Figure 3; *see supra* notes 190–211 and accompanying text.

[213] Quil Lawrence, *VA Re-Evaluates Family Caregiver Program*, NAT'L PUB. RADIO (May 29, 2017), https://www.npr.org/2017/05/29/530555463/va-re-evaluates-family-Caregiver-program; Quil Lawrence, *VA Says It Will Stop Arbitrarily Dropping Caregivers from Program*, NAT'L PUB. RADIO (Dec. 21, 2018), https://www.npr.org/2018/12/21/679123976/va-says-it-will-stop-arbitrarily-dropping-caregivers-from-program.

IV. JULY 2020 REGULATORY CHANGES

In order to implement the VA Mission Act changes to the Caregiver Program and create consistency across VA hospitals, the VA changed its regulations.[214] In addition to adding language to encompass the VA Mission Act, the VA added new definitions and redefined existing terms.[215] The new rule establishes new (though potentially problematic) eligibility guidelines, stipend levels, discharge processes, and overpayment issues.[216] However, despite any potential shortcomings, the rule does finally establish a clear transition plan for those who no longer fit the program.[217]

The VA Mission Act produced major changes to three components of the Caregiver Program. First, it expanded eligibility beyond post-9/11 veterans to veterans of all eras.[218] The other two major changes to this legislation added legal services and financial planning services for veterans and caregivers.[219] The VA interpreted legal services in this context narrowly, to only encompass "assistance with advanced directives, power of attorney, simple wills, and guardianship; educational opportunities on legal topics relevant to caregiving; and a referral service for other legal services."[220] Financial services are directed to be provided by an outside entity, pursuant to a contract entered into by the VA and the provider.[221] These three components are the major additions that the legislation produced.

However, the VA also changed fundamental characteristics of the VA Caregiver Program in ways not created by the legislation.

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[214] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. 46,226 (July 31, 2020) (codified as amended at 38 C.F.R. pt. 71).

[215] *Id.* at 46,227–51.

[216] *See generally*, *id.*

[217] *Id.* at 46,253–54.

[218] VA Mission Act of 2018, Pub. L. No. 115-182, § 161, 132 Stat. 1393, 1438 (2018) (codified as amended at 38 U.S.C. § 1720G).

[219] *Id.* 132 Stat. at 1439.

[220] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,238.

[221] *Id.* at 46,227.

As discussed in the sections that follow, the regulation amends the program in three key areas: (1) eligibility guidelines; (2) stipend changes; and (3) reduction, discharge, and overpayment issues. Unfortunately, most of these changes do not give veterans or their caregivers any true due process protections, as discussed in Part VI of this Article.

A. Eligibility Changes

In terms of eligibility for the Caregiver Program, the VA made three major changes: (1) redefining the definition of "injury" and "serious injury";[222] (2) removing the nexus requirement that the serious injury must cause the need for care;[223] and (3) changing the level of care required in terms of ADLs.[224]

First, the VA redefined "injury" and "serious injury."[225] As discussed above, a serious injury is an eligibility requirement for the VA Caregiver Program.[226] In past regulations, a veteran eligible for a Caregiver must have sustained a serious injury in the line of duty and be in need of personal care services for a minimum of six months, based on one of four criteria.[227] The four criteria were: (1) an inability to perform an activity of daily living; (2) a need for supervision or protection based on symptoms or residuals of a neurological or other impairment; (3) a GAF score of thirty or less, or (4) being service-connected at 100%[228] and awarded aid and attendance.[229] However, the VA found that these four criteria were

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[222] *Id.* at 46,245–51.

[223] *Id.*

[224] *Id.* at 46,232–37.

[225] *Id.* at 46,245–51.

[226] *See* discussion *supra* Part III.

[227] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 5–6.

[228] The rating schedule was created to compensate veterans based on the injury's symptoms and severity and how it would impact a reasonably prudent person's ability to obtain employment. The VA does not look at the veteran's ability to obtain employment when determining which rating the veteran will receive. *See* Aaron Kassraie, *Caregivers to Vietnam-Era Veterans and Earlier Now Eligible for VA Benefits*, AARP (Oct. 2, 2020), https://www.aarp.org/home-family/voices/veterans/info-2020/caregiver-benefits-expanded.html.

[229] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 5–6.

either being applied improperly across the VA system[230] or were simply out of date, like the GAF score system.[231]

In turn, the VA decided to simplify the eligibility requirements, so they could be applied consistently throughout the system.[232] First, the VA redefined injury as "service-connected disability."[233] The term *service-connected* is taken directly from Veterans Benefits Administration ("VBA") statutes regarding compensation awarded for conditions that are related to service.[234] As will be discussed in Part V of this Article, the VBA is part of the VA system, but focuses solely on the adjudication of VA benefits.[235] If a veteran is injured during their service, they can apply directly to the VBA for a determination on whether they have a service-connected disability.[236] Allowing the Caregiver Program to rely on VBA's

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[230] Program of Comprehensive Assistance for Family Caregiver Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. 13,356, 13,371 (Mar. 6, 2020) (codified as amended at 38 C.F.R. pt. 71).

[231] *Id.* at 13,371–72. *See also* Liza H. Gold, *DSM-5 and the Assessment of Functioning: The World Health Organization Disability Assessment Schedule 2.0 (WHODAS 2.0)*, 42 J. AM. ACAD. PSYCHIATRY & L. 173 (2014) (stating that the DSM V, the most recent diagnostic manual for mental health conditions, removed the GAF score component of the manual due to its limitations and low reliability).

[232] Program of Comprehensive Assistance for Family Caregiver Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 13,371–73.

[233] *Id.* at 13,365.

[234] The proposed regulations note that the VA's interpretation would minimize the risk of disparate treatment based on difficult and possibly subjective determinations as to the specific causes of a veteran's service-connected condition. It would also minimize the need for complex adjudicative determinations separate from those governing entitlement to VA disability compensation, which could delay administration of PCAFC assistance. Considering all service-connected disabilities to be injuries for purposes of PCAFC would reduce subjective clinical judgement and individual determinations with respect to whether a service-connected disability constitutes an ''injury.'' Instead, VA providers evaluating PCAFC eligibility could simply rely on VA rating decisions, finding a disability in establishing whether a veteran has an ''injury'' for purposes of PCAFC, and thereby establish a more objective standard to assess eligibility. *See id.* at 13,369.

[235] 38 C.F.R. § 3.100 (2020).

[236] *Id.* §§ 3.103, 3.151, 3.155.

determination would presumably bring consistency across VA Caregiver Programs.

The VA also redefined the term 'serious' to mean having a service-connected disability rating of 70% or more in either a singular or combined rating.[237] This change in definition to a specific rating will again likely give transparency and consistency to the program. For instance, a veteran who has been awarded service-connected benefits at a 70% rating will automatically know that they meet the serious injury threshold. This bright line rule allows the VA Caregiver Program to be more consistent across the country's VA hospital systems and gives veterans a better understanding of the eligibility requirement.

Nevertheless, this change is also an avenue for the VA to use this program as part of its long-term care requirements. As mentioned in Part II of this Article, the VA is required to provide long-term care for veterans who are service-connected at 70% or higher.[238] This change will likely catch many more veterans, but at the same time may miss a portion of the population that Congress intended to assist.

Imagine, for example, post-9/11 Veteran X, whose only disability results from an amputation of the leg below the knee. Such a disability will be rated at 40%.[239] This veteran may need assistance with prosthetics, toileting, mobility, and perhaps bathing. Under the old system, Veteran X met the definition of serious injury because of their inability to perform activities of daily living. Unfortunately, Veteran X will not be eligible for the Caregiver Program under the new rule because, under the VA's new definition, he does not have a serious injury.[240] In no reality would Congress say that a loss of a limb is not a serious injury. Unfortunately, this change may impact a population of veterans who Congress no doubt intended to assist, but who the VA's new regulations deem ineligible.

The second change to eligibility is that there is no longer a required connection between the injury and the need for personal

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[237] Program of Comprehensive Assistance for Family Caregiver Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 13,365.

[238] *See supra* Part II; 38 U.S.C. § 1710.

[239] 38 C.F.R. § 4.71 (2020).

[240] *Id.* § 71.15.

care services.[241] In essence, the requirement for a 70% rating is only a threshold issue for eligibility and not required to be the reason why the veteran needs a caregiver's assistance.[242]

Under the new rule, you may have Veteran Y, who is rated at 70%, qualify as having a "serious injury" for the eligibility purposes of the Caregiver Program. Veteran Y has sleep apnea with a prescribed CPAP machine (50% rating) and has prostrating migraines about once a month (30% rating).[243] Although Veteran Y has a 70% rating,[244] it is possible that he is not in need of the daily assistance of a caregiver for these injuries. Veteran Y can still participate in the Caregiver Program for injuries that may have happened many years after service, like a car accident or a work-related injury.[245] However, Veteran X, rated at 40%, who is in need of care based on his service-related injury—an amputation of the leg—would not be able to obtain services through the Caregiver Program, even though the need for care is directly related to his service.[246] Thus, though the new rule may help with consistency across VA Caregiver Programs, it will likely exclude a population of veterans who Congress intended to include.

The third change in eligibility clarifies some of the ambiguity surrounding the frequency of need for ADLs and supervision.[247] The VA redefines the phrase "inability to perform an ADL" to require personal care services each time a veteran completes a single ADL.[248] The redefinition would ideally provide consistency across hospitals, as it explains that the veteran does not need to be completely unable to perform a specific task, but rather needs

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[241] Program of Comprehensive Assistance for Family Caregiver Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 13,365.

[242] *See id.*

[243] 38 C.F.R. § 4.25 (2020).

[244] *See id.* (stating that a 50% rating and a 30% rating under the VA rating schedule is a 70% rating).

[245] *See supra* notes 241, 242 and accompanying text.

[246] *See supra* notes 241, 242 and accompanying text.

[247] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. 46,226, 46,232–37 (July 31, 2020) (codified as amended at 38 C.F.R. pt. 71).

[248] *Id.* at 46,234.

assistance to complete the task.[249] However, the VA requires that a veteran must need assistance every time, rather than less frequently.[250] The VA made this change to be "consistent with [its] goal of focusing [the VA Caregiver Program] on eligible veterans with moderate and severe needs," and to "provide more objective criteria" for evaluating eligibility.[251]

While the changes may lend more consistency across VA hospitals, there are issues for some veterans that may need less frequent assistance on each particular ADL, but require some assistance on several ADLs. Jamie and Lisa's situation presents a good example.[252] Jamie may have really bad days where her multiple sclerosis flairs up and she needs assistance with mobility, bathing, toileting, and dressing. On good days, Jamie may be able to complete these ADLs without the assistance of Lisa. It simply depends on the circumstances of that day. Based on the VA's new definition, it is unclear whether Jamie and Lisa would be eligible for the program, because Jamie may not need Lisa every time she is performing an ADL.

These eligibility changes will effectively transform the VA Caregiver Program into an add-on to the long-term care program. Although the regulations seem to broaden the number of veterans in the Caregiver Program and may bring about some consistency across the country, there will likely be many veterans who are unintentionally cut out of the program.

B. Stipend Changes

The second major change to the VA Caregiver Program is a change in stipends.[253] The VA acknowledged that the stipend is in recognition of the sacrifices that caregivers make when caring for a loved one.[254] In order to be consistent and transparent, the VA will

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[249] *Id.*

[250] *Id.*

[251] *Id.* at 46,235.

[252] *See supra* Introduction.

[253] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,266–71.

[254] *Id.* at 46,259.

use the government rate of "GS Annual Rate for grade 4, Step 1" for the basis of pay.[255] In 2020, that rate was $26,915.00 annually, but is set to be increased based on cost of living and normal annual increases as set out by the Office of Personnel Management.[256]

In addition to the rate change, the VA has transformed its three-tiered system into a two-tiered system.[257] As discussed in Part III of this Article, prior to the new regulations, the VA scored each ADL and need for supervision to determine the level of care the veteran needed.[258]

Here, the VA created a two-tiered system. The higher tier is to be paid out at 100% of the pay of a GS 4, Step 1, and the lower tier paid at 62.5% of the GS 4, Step 1.[259] In order to qualify for the higher level, the VA requires that the veteran be "unable to self-sustain in the community."[260] The VA defines an inability to sustain in the community in two ways: either the veteran requires personal care services each time they complete three or more ADLs and are fully dependent on the caregiver to complete the ADLs, or the veteran is in need of supervision, protection, or instruction on a continuous basis.[261] In defining continuous basis, the VA would consider the extent to which the eligible veteran can function safely and independently in the absence of personal care services.[262] The VA's example in the proposed regulations of "continuous basis" looks at a veteran with dementia.[263] The VA determines that if a veteran with

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[255] *Id.* at 46,266 (explaining that GS 4, Step 1 refers to the general schedule of pay for federal employees that is issued by the U.S. Office of Personnel Management).

[256] *2020 Salary Table 2020-GS General Schedule Increase*, U.S. OFF. OF PERS. MGMT. (Jan. 2020), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2020/GS.pdf.

[257] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,276.

[258] 38 C.F.R. § 71.40(c)(4)(iii) (2019).

[259] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,276.

[260] *Id.*

[261] *Id.* at 46,275.

[262] *Id.* at 46,271–72.

[263] *Id.* at 46,272.

dementia only has issues during specific times of day, such as sundowning or sleep disturbances, the veteran may not have the need for supervision on a continuous basis.[264] This new tiered system only looks at ADLs or need for supervision separately, and not the combined impact of caring for a veteran who needs assistance with both ADLs and supervision.[265]

How would a veteran like Albert fare in this system?[266] As recounted above, Albert is a veteran who has several conditions, including mental health issues, neurological issues, and physical limitations. Albert will likely not fit into either category for the higher tier. Albert does not need continuous supervision, although he does need supervision from Valerie during many parts of his day and night. Fortunately, Albert only needs assistance with two ADLs each time—bathing and dressing, but unfortunately, not three ADLs as required by the new tiered system. Under these new rules, Albert is not eligible for the higher tier. The VA simply did not consider how the combination of supervision and ADL assistance impacts those like Albert and Valerie. Although Valerie is likely dedicating the same amount of time and performing the same amount of work as another high-level caregiver, she would not qualify for the same stipend level.

C. Discharge and Reduction Proposals

As discussed throughout this Article, discharges and tier reductions in the VA Caregiver Program have been a hot topic in the news.[267] In response, the VA has created several rules surrounding

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[264] *Id.*

[265] *Id.*

[266] *See supra* Introduction.

[267] *See* Quil Lawrence*, Some VAs Are Dropping Veteran Caregivers from Their Rolls*, NAT'L PUB. RADIO (Apr. 5, 2017), https://www.npr.org/2017/04/05/522690583/Caregivers-for-veterans-dropped-from-va-plan; Leo Shane III & Patricia Kime*, Veteran Quick Clinical Eligibility Screen*, MIL. TIMES (Oct. 3, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/10/03/memo-outlining-supposed-changes-to-va-caregiver-program-creates-confusion-anxiety-among-veterans/.

discharge, revocation, and tier level reductions.[268] The VA found it important to define distinct categories of removal from the program, including discharge and revocation.[269] A "discharge" is defined as when a veteran no longer meets the criteria for the program.[270] By contrast, a revocation is a removal for cause, such as fraud, abuse, safety concerns, non-compliance, and VA error.[271] The VA found that it was important to distinguish between these categories so that a veteran and their caregiver have a better understanding of why they are being removed from the program.[272] Further, by creating these distinct categories, the VA could create rules around the effective date of revocation.[273]

For example, in cases of fraud, the VA will use the date of the fraud as the date of revocation.[274] This means that the VA will revoke the caregiver and the veteran as of the date of when a fraud was committed that will likely result in an overpayment or debt situation.[275]

In situations of non-compliance, the VA will wait sixty days after the notice of revocation to remove the veteran and caregiver from the program.[276] Non-compliance can include being absent for a reassessment appointment, or failing to participate in the Care Team's required wellness checks.[277] The sixty-day window can give the caregiver and veteran some time to either comply, or to transition out of the program and make adjustments in terms of income and healthcare for the caregiver.[278] Additionally, in situations where the VA is reducing the caregiver from a higher tier to a lower tier, the VA will provide a sixty-day transition period for the caregiver and

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[268] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,281–85.

[269] *Id.*

[270] *Id.*

[271] *Id.* at 46,281–82.

[272] *Id.* at 46,281.

[273] *Id.*

[274] *Id.* at 46,282.

[275] *Id.*

[276] *Id.* at 46,284.

[277] *Id.* at 46,282.

[278] *Id.* at 46,284.

veteran to adapt and plan for a lower stipend payment.[279] On its face, this sixty-day window seems fairly reasonable and will allow the caregiver and veteran some understanding of the process for planning purposes.

However, when the VA makes an error, the relevant timeline changes. In that case, the revocation date is the date the VA committed the error.[280] For instance, let us say that a veteran and their caregiver apply for the program. Let us further say that the caregiver is the veteran's unmarried partner, and that they do not live together. In this situation, the VA should have rendered a denial based on caregiver eligibility, since a caregiver must either be a family member or living with the veteran.[281] If, however, the VA mistakenly granted this pair caregiver benefits for two years, the VA could revoke back to the date of the application, and request the full two years of benefits as an overpayment.[282] If for example, the veteran and caregiver were placed within the highest tier level, the VA could ask the caregiver for over $50,000 to be paid back to the VA Caregiver Program. The veteran and caregiver could have been completely honest with the VA about their relationship and living situation, yet would have to pay back the stipend solely due to VA's administrative error, treating them similarly to those that committed fraud.[283]

Additionally, the VA's new regulations require that the decision in a Notice of Removal or Reduction must include its findings, and the specific program requirements of which the eligible veteran or caregiver are out of compliance.[284] Although this requirement is a step in the right direction, this new language does not specify how detailed the VA must be when providing this information.[285] Further, the new regulation still does not require the VA to inform

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[279] *Id.*

[280] *Id.* at 46,298.

[281] 38 C.F.R. § 71.25(b) (2020).

[282] Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,285.

[283] *Id.*

[284] *Id.* at 46,284.

[285] *See id.*

the veteran or caregiver of the evidence it relied on in making its determination.[286]

Thus, although there are some slight improvements in this new regulation, they are overshadowed by some very concerning new eligibility criteria, as well as the VA's continued disregard of the due process protections veterans and caregivers desperately need.

V. VETERANS BENEFITS ADMINISTRATION

A major change that Congress should make immediately is to move jurisdiction over the VA Caregiver Program from the VHA to the VBA. In order to appreciate the full context of VBA jurisdiction, this section outlines the procedural process, protections, and duties inherent in the VBA system, and applies the principles existing in the VBA system to the VA Caregiver Program. This is not to say that the VBA is a flawless system.[287] However, as this section shows, veterans in the VBA system enjoy and are accustomed to far greater due process protections than the VHA system currently provides.

The VA consists of three administrations: VBA, VHA, and the National Cemetery Administration.[288] The VBA is the adjudicative body that determines eligibility for compensation benefits.[289] It consists of fifty-seven Regional Offices around the country, and the adjudicators in those offices make decisions on character of service, service-connected disability benefits, and rating determinations.[290] A million claims for benefits are filed every year with the VBA.[291]

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[286] *See id.*

[287] Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513 (2019).

[288] *VBA VS. VHA VS. NCA*, N.Y. STATE DIV. OF VETERANS' SERVS., https://veterans.ny.gov/content/vbavhancs (last visited Nov. 15, 2020).

[289] *About VBA*, U.S. DEP'T OF VETERAN'S AFFS., VETERANS BENEFITS ADMIN., https://www.benefits.va.gov/BENEFITS/about.asp (last visited Nov. 15, 2020).

[290] *Regional Offices Websites*, U.S. DEP'T OF VETERAN'S AFFS., VETERANS BENEFITS ADMIN., https://www.benefits.va.gov/benefits/offices.asp (last visited Nov. 15, 2020).

[291] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-620, VA DISABILITY BENEFITS: VA SHOULD CONTINUE TO IMPROVE ACCESS TO QUALITY DISABILITY MEDICAL EXAMS FOR VETERANS LIVING ABROAD 1 (2020).

In a service-connected disability case, a veteran will file with the VBA for a disability or an injury related to their time in service.[292] Let us use Jamie's situation to illustrate.[293] In order to receive benefits for her multiple sclerosis, Jamie would file a claim with the VBA. After she files her initial claim, she has the right to request a hearing under 38 C.F.R. § 3.103(d) before an initial decision is even rendered in her case.[294] The hearing may be necessary so that the veteran and any witnesses can provide relevant testimony to the adjudicator.[295]

In addition to a hearing, and before a decision is rendered, the VBA has several duties that it must perform for the veteran in the claims process, including the statutory "duty to assist."[296] Simply put, the duty to assist requires the VA to help the veteran substantiate their claim.[297] It requires the VA to obtain all VA medical records, military personnel and treatment records, and any other records that may be relevant to the veteran's claim.[298] Additionally, the VA may also be required to provide a compensation and pension ("C&P") examination to help resolve the claim.[299] The C&P examination is completed by an independent expert who evaluates the veteran's disability.[300]

In Jamie's case, the VBA is obligated to obtain her current medical records from VA Medical Centers and other medical providers.[301] The VBA would also obtain her military records, including her service medical records.[302] Further, in order to secure an adequate assessment of her disabilities, the VBA would likely send Jamie to a C&P examiner. In an ideal situation, this examiner would review Jamie's medical history and meet with her to determine the severity of her symptoms related to her condition. The

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[292] 38 C.F.R. § 3.155 (2020).

[293] *See supra* Introduction.

[294] 38 C.F.R. § 3.103(d) (2020).

[295] *Id.* § 3.103(c).

[296] 38 U.S.C. § 5103A.

[297] 38 C.F.R. § 3.159 (2020).

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.* § 3.159(c)(1).

[302] *Id.* § 3.159(c)(4).

examiner assigned to evaluate Jamie is not her treating physician, rather the examiner's full-time job is to render opinions needed for VA benefits.[303] In addition to considering her immediate diagnosis (multiple sclerosis), the VA will typically ask the examiner to identify any other symptoms related to Jamie's condition.[304] For example, multiple sclerosis can have a variety of symptoms including vision impairment, cognitive impairments, muscle stiffness, fatigue, and numbness or weakness in the extremities.[305] The examiner will then render an independent opinion as to the severity of Jamie's symptoms.[306]

Once the VBA receives the C&P examination, it independently reviews the record[307] and considers any outside opinions.[308] If Jamie disagrees with the C&P examiner's findings, or wants to obtain her own opinion, the VBA would have to consider both opinions in its decision.[309]

The formal written decision by the VBA will be sent to Jamie.[310] The decision must identify all the evidence and issues considered.[311] The decision will specifically communicate the issues, provide a summary of the evidence considered, a summary of the laws and regulations applicable to the claim, a list of any findings that are favorable to the claimant, and, if the claim is denied, identify what elements are missing, accompanied by a summary of the appellate process.[312]

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[303] *VA Claim Exam Frequently Asked Questions*, U.S. DEP'T OF VETERANS AFFS., https://www.benefits.va.gov/COMPENSATION/docs/claimexam-faq.pdf (last visited Nov. 26, 2020).

[304] 38 C.F.R. § 3.159(c)(4) (2020).

[305] *Multiple Sclerosis Symptoms & Causes*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/multiple-sclerosis/symptoms-causes/syc-20350269 (last visited Nov. 26, 2020).

[306] *VA Claim Exam Frequently Asked Questions*, *supra* note 303.

[307] 38 C.F.R. § 3.103(c)(1) (2020) ("VA will include in the record, any evidence whether documentary, testimonial, or in other form, submitted by the claimant in support of a pending claim and any issue, contention, or argument a claimant may offer with respect to a claim.").

[308] 38 U.S.C. § 5125.

[309] 38 C.F.R. § 3.103(c)(1) (2020); 38 U.S.C. § 5125.

[310] 38 C.F.R. § 3.103(f) (2020).

[311] *Id.*

[312] *Id.*

If the VBA finds that a veteran's condition has improved and requires a reduction in benefits, the VBA issues a proposed decision.[313] If a reduction is proposed, the VBA gives the veteran sixty days to respond with evidence and arguments before it finalizes a decision.[314] Additionally, the VBA gives the veteran a right to a hearing.[315] If the hearing is requested within thirty days of the proposed reduction, the VBA will stay any adverse action until the hearing is held.[316] The stay can give the veteran an opportunity to make their arguments and to confirm that the VA has all of the evidence before it prior to a final decision being made.[317]

In the event that the veteran is not satisfied with any decision, they have several appellate options.[318] A veteran may choose to stay at the Regional Office level by filing a supplemental claim or a higher level of review.[319] The Regional Office will allow a veteran to request a second review of their claim, likely with a shorter wait time than the Board of Veterans Appeals (the "Board").[320] Alternatively, they may appeal to the Board, which is still within the VA.[321] The veteran can request another hearing and has the ability to submit additional evidence.[322] The decision here is *de novo*, meaning the earlier lower agency decision has no impact on whether the Board makes a different decision.[323] In FY 2019, the Board issued 95,089 decisions and scheduled 36,461 hearings.[324] To

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[313] *Id.* § 3.105(h).

[314] *Id.* § 3.105(e).

[315] *Id.* § 3.105(i)(1).

[316] *Id.*

[317] *Id.*

[318] *Id.* § 3.2500.

[319] *Id.*

[320] *Supplemental Claims*, DEP'T OF VETERANS AFFS., https://www.va.gov/decision-reviews/supplemental-claim/ (last visited Feb. 27, 2021) (indicating that the goal for higher level review and supplemental claims is 125 days, where the Board has 365 days for direct review, although there is no timeline goal for appeals to the Board for the evidence or hearing lanes).

[321] 38 C.F.R. § 20.202(a) (2020).

[322] *Id.* § 20.202(b).

[323] *Id.* § 20.801.

[324] U.S. DEP'T OF VETERANS AFFS., BD. OF VETERANS' APPEALS, ANNUAL REPORT FISCAL YEAR (FY) 2019 (2019) https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf.

illuminate the Board's *de novo* standard, in FY 2019, 36% of Board decisions granted the benefit, 39% remanded the case for further development, and only 20% of cases continued to be denied.[325]

After the Board makes a decision, the veteran may file a supplemental claim which, if based on new and relevant evidence, will be reviewed by the Regional Office.[326] But more importantly, the veteran has the right to judicial review by the United States Court of Appeals for Veterans Claims ("CAVC").[327]

In 1988, the Veterans' Judicial Review Act ("VJRA") established the CAVC to provide judicial review.[328] In establishing judicial review, the CAVC forced the Board to make significant improvements, including requiring "reasons and bases for its findings and conclusions," and stopping the Board from using its independent medical findings without adequate evidence.[329] Although there have been significant improvements to the Board over the last three decades, the CAVC has been an important check on the VA to ensure that it is giving veterans proper due process.[330] Of the 7,261 appeals decided by the CAVC in FY 2019, only 510 of those were fully affirmed by the Court—about 7% of the time.[331] Conversely, the CAVC remanded, at least in part, 5,935 appeals—or about 82% of the time.[332]

In practice, the VBA and its adjudicative process is not perfect and historically had significant timeliness issues.[333] However, the process used within the VBA, as checked by the CAVC, affords

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[325] *Id.*

[326] 38 C.F.R. § 3.2501 (2020).

[327] 38 U.S.C. § 7252.

[328] Rory E. Riley, *Simplify, Simplify, Simplify—An Analysis of Two Decades of Judicial Review in the Veterans' Benefits Adjudication System*, 113 W. VA. L. REV. 67, 68 (2010).

[329] *Id.*

[330] *Id.* at 79; *see generally* CT. VET. APP., FISCAL YEAR 2019 ANNUAL REPORT OCTOBER 1, 2018, TO SEPTEMBER 30, 2019 (2019), http://uscourts.cavc.gov/documents/FY2019AnnualReport.pdf. (providing CAVC adjudication statistics for FY 2019).

[331] *See* CT. VET. APP., *supra* note 330, at 1, 3.

[332] *Id.* at 3.

[333] *See* Hugh B. McClean, *Delay, Deny, Wait till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 278–81 (2019).

significant due process protections to the veteran.[334] Unfortunately for the Caregiver Program, veterans and their caregivers do not have the availability of these due process protections or judicial review.

VI. PROPOSED CHANGES FOR VETERANS AND CAREGIVERS TO ACCESS JUSTICE

To correct course for severely injured veterans and their caregivers, the VA and Congress should institute changes to the VA Caregiver Program to provide due process protections. Fifth Amendment due process rights are important instruments of justice to protect individuals from being wrongfully deprived of their life, liberty, or property.[335] The United States Supreme Court has established that welfare benefits are subject to due process protections, because they are an entitlement similar to property.[336] Similarly, VA benefits are generally afforded these same due process protections in the VBA process.[337] What makes the VA Caregiver Program unique to other VA benefits is the language in the legislation that refers to this program as a "medical determination," rather than a benefit or entitlement.[338] This language is significant because the Board (and accordingly the CAVC) does not have jurisdiction over medical determinations.[339]

In order to give veterans and their caregivers adequate protection, the VA must implement five areas of change: (1) the right to an impartial adjudicator, (2) the right to an impartial expert, (3) the right to a hearing, (4) the right to an adequate decision, and (5) judicial review. Ultimately, if Congress moved the Caregiver Program into the VBA's jurisdiction, all of these issues would be remedied. In order to implement this, Congress must remove the language *medical determination* from the statute and explicitly state that the VBA has jurisdiction over this process.

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334 *See* Riley, *supra* note 328 and accompanying text.

335 U.S. CONST. amend. V.

336 Goldberg v. Kelly, 397 U.S. 254, 261–63, 262 n.8 (1970).

337 Cushman v. Shinseki, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

338 *See supra* notes 34–36 and accompanying text.

339 38 C.F.R. § 20.104(b) (2020).

Alternatively, the VA could remedy these issues on its own (with the exception of judicial review) through regulations and guidance. If the VA acts on its own, however, judicial review must still be authorized by Congress.

A. Impartial Adjudicator

As discussed above, the CSC is an integral part of the Caregiver Program.[340] This individual decides eligibility to enter the program, collaborates with the Care Team to determine tier level, provides counseling and care to the caregiver, and has the authority to remove the veteran and caregiver from the Caregiver Program.[341] The amount of discretion given to one individual can cause great concern and distrust on the part of the caregiver and veteran. The relationship between these parties can be quite problematic. The CSC not only cares for and coordinates services for the caregiver, they also make determinations about whether the caregiver is entitled to a monthly stipend and healthcare.[342] Because of this potential conflict of interest, the VA or Congress must take significant decision-making power out of the hands of the CSC.

If Congress moves the adjudicative process from the VHA to the VBA, the determination of eligibility and revocations will be completely separate from the care provided by the CSC. In practice, the veteran and caregiver would apply for this program through the VA Regional Office. The adjudicator would review the evidence, determine eligibility and tier level, and would likely have no connection to or personal contact with the veteran. Further, unlike the CSC, a neutral adjudicator's approval or denial of the veteran and caregiver does not directly impact their workload in other areas.

If Congress does not act, then there are ways that the VA, through regulations or guidance, could move the adjudicative process into the hands of an impartial adjudicator. First, the VA could create a system where CSCs do not decide eligibility of their own veterans, but continue to have adjudicative responsibilities.

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[340] *See* discussion *supra* Part III.A–B; *see also* U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 9–10.

[341] *See* U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 8–10, 17.

[342] *Id.* at 9, 19.

Instead of having the CSC adjudicate their own veterans and caregivers, the VA could coordinate a system where a CSC from another hospital determines whether a veteran and caregiver are eligible. As discussed above, eligibility includes both veteran eligibility and caregiver eligibility.[343] By reviewing the records and having discussions with the veteran, the CSC from another facility could determine if the veteran and caregiver are eligible for the program. To schedule the in-person assessments, the local CSC can take part in coordinating appointments, but the outside CSC would review the record to make a determination on the level of care required of the veteran by the caregiver.

This may be a simple and cost-efficient way for the VA to remove the adversarial relationship between the CSC and the caregiver. Separating the CSC's adjudicative authority and care provided to the caregiver will also likely change the dynamic between the CSC and the caregiver to one that is collaborative rather than inherently oppositional. In changing this relationship from one of opposition to collaboration, CSCs will be freed up to provide the level of care that social workers are trained to provide. As an added benefit, such a change could spread adjudications among all CSCs, so that no one CSC would have more adjudicative responsibilities than another.[344] This could mirror the way in which the VBA created a national queue for pending claims, so that no one office is more burdened than another office.[345]

Alternatively, the VA could move the decision-making responsibilities to a centralized location. For example, if the VA decided that it did not want CSCs to be adjudicators at all, it could, through regulations or guidance, create national adjudicators at the VISN-level or at the central office. The obvious and substantial benefit of having a national adjudication system would be greater consistency in determinations of eligibility, tier levels, and process and procedures. CSCs are currently over-burdened by the multitude

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[343] 38 U.S.C. § 1720G(a)(1)–(6)

[344] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 9.

[345] Nicole Ogrysko, *Claims Backlog Is Up, but National Work Queue Slowly Finds Its Footing, VA Says,* FED. NEWS NETWORK (Feb. 17, 2017, 4:43 PM), https://federalnewsnetwork.com/congress/2017/02/claims-backlog-national-work-queue-slowly-finding-footing-va-says/.

of different tasks they are asked to perform.[346] Taking the adjudication out of their hands would allow them to care for their caregivers and ensure that their caregivers are getting the proper treatment and training to be competent. This route may initially cost the VA more money, however, it may also help reduce the number of required CSCs, as they would presumably have less responsibilities.

In the VA's final regulation, issued in July 2020, the VA mentions the creation of centralized eligibility and appeals teams ("CEAT").[347] The regulation itself does not specifically explain what a CEAT will do in practice, but the VA describes a CEAT as determining eligibility and tier level at the VISN level, similar to the solution stated above.[348] A CEAT will comprise a "standardized group of inter-professional licensed practitioners with specific expertise and training in the eligibility requirements" for the VA Caregiver Program.[349] It is unclear how the CSC will interface with a CEAT and how the CSC's role will change in the adjudication process.[350]

This new rule may help create an impartial adjudicating body, but it is still unclear what mechanism will be in place to create and foster this important space. However, all three of the options laid out above would remove the adversarial nature of the CSC and caregiver dynamic. In addition, the caregiver and veterans may have greater confidence in eligibility and care-level decision-making if it is taken out of the hands of those supporting the caregiver.

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[346] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 14–15.

[347] The regulation and its supporting documents call this both the Centralized Eligibility and Appeals Team and the Consolidated Eligibility Assessment Team. It is unclear which one is the proper name or if there are two teams with the same acronym with different functions. For this Article, the CEAT will refer to the Centralized Eligibility and Appeals Team. Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. 46,226, 46,230 (July 31, 2020) (codified as amended at 38 C.F.R. pt. 71).

[348] *See id.* at 46,230, 46,264.

[349] *Id.* at 46,232.

[350] *See id.* at 46,263 (describing the functional relationship between the CSC, VA, and CEATs).

B. Impartial Expert

The Care Team is another important role in the VA Caregiver Program. After the CSC determines eligibility, the Care Team determines the level of care that the veteran needs.[351] Typically, the Care Team includes a primary care provider—sometimes the veteran's primary care doctor—and the CSC, but it can also include their mental health provider.[352] The Care Team has a dual role in this process, as members of the team evaluate the veteran and then come to a decision on the appropriate tier level. In this framework, the Care Team is both the expert and the adjudicator in terms of the level of care needed.[353]

Similar to the relationship between CSC and caregiver, when a veteran's provider, either for mental health or primary care, is placed on the Care Team, the dual role of the doctor puts the doctor-patient relationship in a precarious position. Specifically, a doctor's role is to care for their patient and to ensure their medical or mental health best interests are being met. For example, a doctor who is treating the patient may know that the veteran is struggling financially. They could believe that increasing their monthly income through a caregiver stipend may be in the best interest of the veteran in order to decrease the level of anxiety over finances. On the other hand, the doctor may not believe the veteran is in financial need and thus determines that the veteran or caregiver should not receive a stipend, even if the caregiver provides a compensable level of care. Unsurprisingly, the 2014 GAO report found that some physicians were not willing to have a role in this process because it could compromise their clinical relationship with the patient.[354]

Another issue that may arise is that the primary care provider and others on the Care Team may utilize personal knowledge that is not of record. Because the Care Team knows the veteran and caregiver personally, they may use information that is not writing and not corroborated by external evidence in their decision-making.

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[351] 38 C.F.R. § 71.20 (2020).

[352] *Id.* § 71.15.

[353] *See id.* § 71.20 (2020) (outlining role of the care team to determine eligibility and care); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 17 (discussing Care Team physicians' role in rendering a tier level decision).

[354] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10, at 17.

As there is no requirement that a record or transcript be created of the discussions between the CSC and Care Team during this evaluation, there is no way of knowing if information—whether it is a rumor, truth, or somewhere in-between—is used in their decision. The resultant lack of transparency may leave the veteran and caregiver to question the decision.

Although there is a downside to the Care Team involving individuals close to the veteran, there is also an upside to the Care Team being part of the evaluation. Each of the team members have interacted with and know the veteran and the caregiver. They have firsthand knowledge of the struggles that the veteran and caregiver face and may be in the best position to identify their needs. Ultimately, however, despite the fact that these individuals may be in a better position to identify the important facts, their potential for bias should disqualify them as evaluators or decisionmakers for the veteran.

If Congress decides to move the jurisdiction from VHA to VBA, another dilemma will be remedied. In moving jurisdictions, C&P examiners would have the authority to render opinions as to the level of care that the veteran needs under the ADL and supervision standards. As discussed above, competent medical evidence can be provided by physicians or non-physicians who are able to write opinions on a variety of VA matters, including the level of disability and the likelihood that the injury resulted from service.[355] The medical reports of C&P examiners are sometimes disputed by raising questions of the examiner's competence;[356] however, using this system may bring more legitimacy to the VA Caregiver Program. If the individuals evaluating the veteran are not part of the treatment team, the veteran and caregiver may feel like the process is more equitable and unbiased, and the treatment team can focus on treating the veteran.

In the event that Congress *does not* act, the VA, through regulation or guidance, can implement specific procedural safeguards that would give the veteran and caregiver more confidence in the decision. First, the VA should remove any physician from the Care Team who treats the veteran. This first step

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[355] 38 C.F.R. § 3.159 (2020).

[356] *See, e.g.*, Francway v. Wilkie, 940 F.3d 1304, 1307–09 (Fed. Cir. 2019).

would allow the Care Team to review the evidence and information without any explicit or implicit biases against the veteran or caregiver. Further, it is important that these members have no knowledge of the veteran prior to reviewing the record and thus rely on the evidence of the record alone.

Second, the VA must require a transcript or meeting notes of all meetings between the Care Team. Further, all communication between the Care Team about a veteran must be part of the record for the veteran and caregiver to review. The availability of a transcript and access to communications about the veteran and caregiver would bring transparency to the process and likely give the caregiver a better understanding of the decision. These changes to the Care Team are easy, cost-efficient, and would give the VA Caregiver Program much more legitimacy.

C. Right to a Hearing

Currently, the caregiver and veteran have no right to a hearing during this process. The Care Team evaluates the veteran and then makes a determination together without a mechanism for the caregiver or veteran to provide testimony.[357] The caregiver has no opportunity to explain what their daily routines look like and how these responsibilities impact the caregiver's life. The adjudicator should not only rely on the Care Team's findings but should also give the veteran and caregiver an opportunity to clear up any misunderstandings with the Care Team. To improve the process, the Care Team as a whole must hear from the caregiver to understand the totality of the circumstances. The veteran and their caregiver have the most vital information available regarding the veteran's daily needs.

Should Congress move the VA Caregiver Program to the VBA, the right to a hearing would automatically attach. Veterans would have several opportunities to provide testimony during the claims process.[358] For example, a veteran can request a hearing at the initial stage of the claim.[359] This would give the adjudicator a better

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[357] *See generally* U.S. DEP'T OF VETERANS AFFS., *supra* note 80.

[358] 38 C.F.R. § 3.2500 (2020).

[359] *Id.* § 3.103(d)(1).

understanding and clear evidence as to both whether the veteran is eligible and the level of care of which the veteran is in need. Further, on appeal to the Board of Veterans Appeals, the veteran has another right to a hearing.[360] The right to a hearing is fundamental to properly adjudicating claims.

If Congress does not act, the VA can implement these changes into the VHA Directive, without requiring a change in regulation. Specifically, the VA can require that the Care Team hear the first-hand account of the caregiver's experiences caring for the veteran. This could happen when the veteran is being evaluated, revaluated, or reduced. This would give the caregiver a platform to explain how much time is required to perform the various facets of each ADL and supervision task. This can also create a clear record of the caregiving situation and the needs of the veteran and caregiver so the Care Team or adjudicator may have a full understanding with which to make a proper decision.

Ideally, the hearing would allow both the veteran and the caregiver to be forthcoming about their daily experiences. One of the major issues with a joint hearing is whether the caregiver will feel they can be candid about the burden they carry while caring for their loved one. Many caregivers are the veteran's spouse, and they may feel guilty about revealing the difficulties they face as a caregiver to a third party with their partner present, or otherwise find it hard to explain those challenges to someone who they feel cannot relate to what they are experiencing.[361] Regardless of this issue, the VA should implement some process to make sure that the caregiver and veteran have the opportunity to be heard prior to making its decision.

D. Right to an Adequate Decision

Currently, the decision provided to the veteran and caregiver simply states whether the veteran is eligible for the program and, if

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[360] *Id.* § 20.703.

[361] TERRI TANIELIAN ET AL., MILITARY CAREGIVERS: CORNERSTONES OF SUPPORT FOR OUR NATION'S WOUNDED, ILL, AND INJURED VETERANS 11 (2013), https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR244/RAND_RR244.pdf.

eligible, the tier level.[362] VA guidance does not require explanation of which service related injury or injuries make the veteran eligible or, alternatively, why the veteran is found to be ineligible for the program.[363] Regarding tier level, the VA does not require an explanation of why a veteran is placed at their assigned tier.[364] Further, the VA does not require a decision explain which facets, ADLs, or need for supervision contribute to that veteran's level of care needed.[365] A discharge letter template provided by the VA illustrates this problem:

> Your status in the Program of Comprehensive Assistance for Family Caregivers has changed. During our conversation on [Date], we discussed that your clinical team has determined you no longer meet the eligibility requirements for the Program of Comprehensive Assistance for Family Caregivers. [Insert additional information here regarding the Veteran's progress and gained independence and date of the discharge].[366]

The remainder of the letter explains that the caregiver will not be eligible for VA health benefits or a stipend and that they can contact the CSC for information about other programs.[367] The decision does not provide any specifics, including the timeline for appeals or where to send the appeal.[368]

If Congress moves jurisdiction from the VHA to the VBA, the contents of the decision will presumably be more thorough. The VBA is required to provide a detailed written notification of its decision.[369] If the VBA denies a claim, it is required to explain to the veteran which eligibility requirements were not met and why.[370]

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[362] *See* U.S. DEP'T OF VETERANS AFFS., *supra* note 80, at 12–15.

[363] *See id.*

[364] *See id.*

[365] *See id.*

[366] U.S. Dep't of Veterans Affs. New England Healthcare System, Discharge Letter Template (Aug. 14, 2018) (on file with author) (document obtained in response to FOIA request by author).

[367] *Id.*

[368] *Id.*

[369] 38 C.F.R. § 3.103(f) (2020).

[370] *Id.*

Specifically, a VBA decision communicates the issues in dispute, a summary of the evidence considered, a summary of the laws and regulations applicable to the claim, a list of any findings that are favorable to the claimant, and an explanation as to why a claim is denied and what elements are missing. The decision itself is then followed by a summary of the appellate process.[371] This is a vast improvement from the conclusory decisions made by the VA Caregiver Program today.

The VA has taken some small steps to improve the decision-making process in its new regulations. The VA's new rule would require that decisions regarding removal or tier reduction must include its findings and the specific program requirements of which the eligible veteran or caregiver are out of compliance.[372] However, it is unclear whether this level of specificity is also required in the initial decision in denying or approving a veteran and caregiver.

Regardless, these slight progressions show that the VA can in fact make additional changes on its own to improve its decisions. These decisions should include all evidence considered, identify which ADLs and needs for supervision were assessed when determining tier level, and identify what factors made the veteran or caregiver ineligible for the program. In other words, the VA should require the same level of specificity that the VBA requires.

The biggest barrier to implementing this type of specificity to the Caregiver Program process is likely the amount of work required by the CSC to write up the decision. This brings us back again to the suggested primary change that the VA remove the CSC from this decision-making role, regardless of whether Congress decides to move jurisdiction to the VBA. If the VA makes this change, but continues the CSC's role as adjudicator, the VA will likely see the process slow down significantly and may see another uptick in denials.

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[371] *Id.*

[372] Program of Comprehensive Assistance for Family Caregiver Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. 13,356, 13,397 (Mar. 6, 2020) (codified as amended at 38 C.F.R. pt. 71).

E. Judicial Review

Finally, Congress must act to ensure that the VA properly administers its Caregiver Program. As discussed above, the VHA is allowing facilities to unilaterally create their own procedural and substantive rules impacting veterans, without any oversight or consistency.[373] As the data suggests, CSCs are overburdened by the number of participants and have taken it upon themselves to fix the issue by tragically denying and discharging veterans from the program, sometimes with impunity. This program desperately needs judicial review.

When the Veterans' Judicial Review Act was implemented in the late 1980s, it was clear that the VA was living in splendid isolation, where its decisions were free from judicial scrutiny.[374] Similarly, the Caregiver Program is currently living in splendid isolation and is generally protected from the judicial system.

CONCLUSION

The VA Caregiver Program is, in theory, an innovative program for veterans and caregivers. Unfortunately for veterans and their caregivers, its implementation fell flat on many levels. By choosing to label benefits under this program as medical determinations and not entitlements, Congress failed to provide access to justice for veterans and their caregivers. However, a clear remedy for lawmakers still exists: move the decision-making authority to the VBA. If Congress does not act, the VA still has the ability to provide an impartial adjudicator, a hearing, an impartial expert, and an adequate decision without Congressional approval. As older veterans begin to enter the VA Caregiver Program, it will continue to grow exponentially, and these problems will not cease. The time to act is now.

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[373] *See* discussion *supra* Part III.C.

[374] *See* Brown v. Gardner, 513 U.S. 115, 122 (1994) (noting that longstanding VA regulations had gone unchallenged simply because Congress did not provide for judicial review of VA decisions until 1988).