**TO THE**
**UNITED STATES DEPARTMENT OF VETERANS AFFAIRS**

# PETITION FOR RULEMAKING TO AMEND PROGRAM OF COMPREHENSIVE ASSISTANCE FOR CAREGIVERS (PCAFC) REGULATIONS RESTRICTING ACCESS TO CERTAIN BENEFITS OFFERED TO VETERANS AND THEIR CAREGIVERS

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## PETITION FOR RULEMAKING

Pursuant to 5 U.S.C. § 553(e) and 38 U.S.C. § 501(a), The Independence Fund, American Retirees Association, American Logistics Association, Armed Forces Retirees Association, American Military Society, Chief Warrant Officers Association of the U.S. Coast Guard, Vietnam Veterans of America, VetsFirst, Reserve Organization of America, Sea Service Family, Foundation, Military-Veterans Advocacy, Inc., Healing Household 6, Jewish War Veterans of the United States of America, Veteran Warriors, Inc., and Fleet Reserve Association (collectively "Petitioners") hereby petition the Secretary of Veterans Affairs ("Secretary") to initiate a rulemaking process to promulgate regulations to remove certain restrictions on access to benefits offered to Veterans and their Caregivers under the Program of Comprehensive Assistance for Caregivers ("PCAFC"). The proposed rules would (1) eliminate prohibition on work and replace it with the legislation's eligibility criteria of activities of daily living and the need for supervision, protection, and instruction, (2) eliminate the requirement for a Caregiver to engage 100% of their time to provide care to a Veteran, (3) relax the strict requirement for a Veteran to fail 100% of their activities of daily living, and (4) allow for the extended period for reassessment of catastrophically disabled Veterans.

## BACKGROUND

In 2010, Congress passed the Caregivers and Veterans Omnibus Health Services Act establishing section 1720G(a) of title 38 of the United States Code.[1] This law required VA to establish a program of comprehensive assistance for Caregivers of eligible veterans who have a

[1] Public Law 111-163.

serious injury incurred or aggravated in the line of duty on or after September 11, 2001. In 2011, VA implemented the PCAFC through its regulations.[2] In 2018, Congress passed the VA MISSION Act of 2018 which expanded eligibility for PCAFC to Caregivers of eligible Veterans who incurred or aggravated a serious injury in the line of duty before September 11, 2001. Following passing of this law, in 2020, PCAFC expanded to eligible Veterans who served on or before May 7, 1975, including Veterans who served during the Vietnam era. Through PCAFC, VA provides Caregivers of eligible Veterans with certain benefits, including a monthly stipend, training, respite care, counseling, technical support, beneficiary travel, and access to health care.[3]

On March 6, 2020, VA published a proposed rule to revise its regulations that govern PCAFC to change the eligibility requirements for PCAFC and update the regulations to comply with section 161 of the VA MISSION Act of 2018.[4] In response to the proposed rule, VA received 271 comments from the public, almost all of which were critical towards the proposed rule. On July 31, 2020—disregarding the comments—VA published the Final Rule ("Final Rule") that drastically restricts access to benefits offered to Veterans and their Caregivers.[5]

On November 9, 2021, The Independence Fund and 23 other veteran and military serving organizations sent a letter to Secretary McDonough asking him to review and revise the Final Rule. On December 13, 2021, VA responded to the letter and informed the signatories to the original letter that VA will treat their letter as a petition for rulemaking under the Administrative Procedure Act.[6] Petitioners want to thank Secretary McDonough for his willingness to engage in a dialog with Veteran and military serving organizations. Given the Secretary's determination, Petitioners

[2] Part 71 of title 38 of the Code of Federal Regulations.
[3] 38 U.S.C. 1720G(a)(3); 38 CFR 71.40.
[4] 85 FR 13356 (March 6, 2020).
[5] 85 FR 46226 (July 31, 2020).
[6] 5 U.S.C. 553(e).

herein supplement their November 9, 2021 letter with (1) specific recommendations as to the proposed changes in 38 C.F.R. Part 71, and (2) the proposal to continue the rulemaking process in form of negotiated rulemaking permitted by law under 5 U.S.C. Subchapter III.

## REASONS FOR GRANTING THE PETITION

In its current form, the Final Rule drastically restricts access to benefits offered to Veterans and their Caregivers, which is inconsistent with congressional intent. The Final Rule tightened the eligibility criteria substantially beyond that required by law. Namely, VA's regulation drastically changed the program's eligibility criteria, the process to determine a Veteran's need for assistance, and the entire methodology and basis for the stipend paid to Caregivers. VA received 271 public comments voicing near-universal opposition to these changes from individuals as well as Veteran and military serving organizations. However, VA's Final Rule, failed to incorporate any of the revisions recommended in the comments.

Now, Veterans and their families are seeing the harsh impact of these changes. First, as announced by the VA concurrent with the Interim Final Rule issued September 22, 2021, the VA believes that on October 1, 2022, about 6,700 Veterans will be discharged from the PCAFC upon the expiration of the so-called Legacy Applicants eligibility extension. Representing more than one-third of so-called Legacy Caregivers, this dismissal of disabled Veterans from the Caregiver program is completely unwarranted, especially since it was VA who originally determined that these Veterans are eligible for PCAFC. Second, the recent court ruling in the *Beaudette* case found

VA's process of appeals problematic, which means that Veterans and Caregivers who are thrown out of the PCAFC have little chance of successfully appealing VA's procedures and decisions.[7]

Lastly, the Final Rule's prohibition on work, the requirement for Caregivers to engage all their time to provide care, the requirement for Veterans to fail every attempt at activities of their daily living, and a relatively short period for a reassessment of catastrophically disabled Veterans, make the PCAFC rules severely under-inclusive, meaning that many eligible and deserving Veterans and Caregivers are unfairly and unnecessarily deemed ineligible for the program.

## PROPOSED REGULATION

Accordingly, Petitioners request the VA undertake a rulemaking process to promulgate a rule to correct certain VA rules to the PCAFC regulations in 38 C.F.R. Part 71.

I. Eliminate prohibition on work and replace it with criteria of activities of daily living and/or the need for supervision, protection, and instruction.

In its current form, 38 C.F.R. Part 71 is silent as to whether working is an exclusion criterion for the Veteran. However, VA takes the position that although employment is not an automatic disqualifier for PCAFC, VA will still consider employment as one of the factors in determining eligibility for PCAFC.[8] Further, while maintaining employment does not automatically disqualify a Veteran for PCAFC, VA considers employment and other pursuits, such as volunteer services and recreational activities, in evaluating an individual's PCAFC eligibility, ostensibly as a proxy for whether or not the Veteran can complete their activities of daily living,

[7] Beaudette v. McDonough, 34 Vet. App. 95 (2021).
[8] 85 F.R. 46230.

or as an external factor to weigh whether the Veteran truly needs supervision, protection, and instruction.[9]

Similarly, 38 C.F.R. Part 71 is silent as to whether working is an exclusion criterion for the Caregiver. Although VA acknowledges that each Caregiver's situation is unique (in terms of ability to work from home and having a flexible work schedule) and that the Caregiver may have the time and ability to provide the required personal care services to the Veteran while maintaining employment, VA declined to include language to state that employment is not an exclusionary factor for the PCAFC eligibility,[10] and Caregivers are regularly asked as to their outside employment status, hours worked, and presence inside the home during their initial eligibility and re-eligibility interviews.

Based on the experiences of Veterans and Caregivers, the lack of language in the regulations relating to employment causes much unnecessary confusion in the process of eligibility evaluation. Although VA's position is clear that working is not in itself an exclusion criterion, this position does not seem to be known to many rank and file VA employees who regularly decline otherwise eligible PCAFC applications because a Veteran or a Caregiver are working or volunteering.[11]

To resolve this problem, Petitioners propose the following changes:

- Add paragraph (d) to 38 C.F.R. §71.20 (Eligible veterans and service members) to state "Maintaining employment or engaging in other pursuits, such as volunteer services and recreational activities, does not disqualify a person from being the eligible veteran or servicemember from being the eligible veteran."

[9] *Id.*
[10] 85 F.R. 46230–31.
[11] *Id.*

- Add paragraph (e) to 38 C.F.R. §71.35 (General Caregivers) to state "Maintaining employment or engaging in other pursuits, such as volunteer services and recreational activities, does not disqualify a person from being the Family Caregiver."

II. Eliminate the requirement for a Caregiver to engage 100% of their time to provide care

In its current form, 38 C.F.R. §71.15 (Definitions) states that "Unable to self-sustain in the community means that an eligible veteran … (2) Has a need for supervision, protection, or instruction *on a continuous basis*." VA states that this language is not intended to mean that the eligible Veteran requires or that the Caregiver provides 24/7 or nursing home level care.[12] Also, VA states that this language will not be used to require Caregivers to provide a log of the activities they perform.[13]

Further, while the VA attempts to state that it, "…is not our intent to require a Family Caregiver to be present at all times"[14] the VA on the same page states the PCAFC program requires the Caregiver to live with the Veteran and that the new regulation is, "establishing an expectation that Family Caregivers are providing services equivalent to that of a home health aide, which are generally furnished in person…"[15] And on the next page, the VA states, "…personal care services must be provided by the Family Caregiver, and that personal care services will not be simultaneously and regularly provided by or through another individual or entity."[16] Regardless, the practice in the field by the Centralized Eligibility and Appeals Team members conducting the

[12] 85 F.R. 46278.
[13] Id.
[14] 85 F.R. 46228
[15] Id.
[16] 85 F.R. 46229

assessments about which the Petitioners have heard is that they regularly deem proposed Family Caregivers ineligible if they are not providing 100% of the personal care services at all times.

To resolve this problem, Petitioners propose the following changes:

- Amend paragraph (c)(1)(ii) of 38 C.F.R §71.25 to read, "(ii) Whether the applicant will be capable of ensuring the performance of the required personal care services without supervision, in adherence with the eligible veteran's treatment plan in support of the needs of the eligible veteran."
- Remove the phrase "on a continuous basis" from paragraph (2) of the definition of "Unable to self-sustain in the community" in 38 C.F.R. §71.15 to read "Has a need for supervision, protection, or instruction."

III. Relax the strict requirement for a Veteran to fail 100% of their activities of daily living

In its current form, 38 C.F.R. §71.15 (Definitions) states that "Inability to perform an activity of daily living (ADL) means a Veteran or servicemember requires personal care services *each time* he or she completes one or more of the following [activities]." This definition is too limiting, is more restrictive than the previous PCAFC regulations, is too narrow to properly evaluate a Veteran's disability and symptoms, and may result in Veterans being unfairly and unnecessarily deemed ineligible for PCAFC. By a strict reading of the current regulation, if a Veteran needs assistance performing the activity of daily living 99% of the time, but one time out of every 100 times attempted, they are able to perform the activity of daily living on their own, they must be deemed ineligible for the program. The current language of the regulation assumes the disabled veterans are some binary automatons, either fully capable of completing ADLs or completely incapable, with no allowance for the variation, aggravation, and progression of a

service-connected disability that is at the heart of the disability rating system. Disabled Veterans' assistance needs will vary over time, will often fluctuate even throughout the day, based on such variables as medication, other medical care, or repeated motion), and can vary based on other circumstances (e.g., weather, after post-operative care, physical therapy, seasonally).

To resolve this problem, Petitioners propose in 38 C.F.R. §71.15 to remove the phrase "each time" and replace it with "any time when." The full ADL definition will then read "a veteran or servicemember requires personal care services *any time when* he or she completes one or more of the following [activities]."

VA takes the position that it did not define the inability to perform an ADL using "most or majority of the time" language because VA believes that such terms are too vague and subjective, leading to inconsistencies in interpretation and application.[17] Also, VA believes that using "most or majority of the time" instead of "each time" would be difficult to quantify and would require VA to establish an arbitrary threshold.[18] By this, the VA has now established that it cannot perform qualitative analyses of the extent to which an eligible Veteran's disability impacts their ability to perform an ADL, and must therefore operate under a clear criteria.

Given VA's admitted inability to perform qualitative analysis, the proposed "any time" language is not vague and subjective—it clearly means that the Veteran must be unable to perform any of the activities listed in the ADL definition all the time. This is no vaguer or more subjective than the current "each time" language.[19] So, the proposed "any time" language will not be difficult to quantify and will not require VA to establish an arbitrary threshold.

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[17] 85 F.R. 46234.
[18] Id.
[19] 85 F.R. 46233 (stating that "In some cases, the degree of assistance … may vary throughout the day. In some instances, the veteran or servicemember may only need minimal assistance…."—which creates vagueness and subjectiveness as to the meaning of "minimal" and "degree of assistance").

IV. Allow for the extended period for reassessment of catastrophically disabled Veterans

In its current form, 38 C.F.R. § 71.30 states that "Except as provided in paragraphs (b) and (c) of this section, the eligible veteran and Family Caregiver will be reassessed by VA (in collaboration with the primary care team to the maximum extent practicable) on an annual basis to determine their continued eligibility for participation in PCAFC under this part." Paragraphs (b) and (c) provide the following exceptions:

> (b) Reassessments may occur more frequently than annually if a determination is made and documented by VA that more frequent reassessment is appropriate.
>
> (c) Reassessments may occur on a less than annual basis if a determination is made and documented by VA that an annual reassessment is unnecessary.

However, the practice in the field by the Caregiver Eligibility Assessment Team members conducting the assessments about which the Petitioners have heard is that they uniformly require even the most catastrophically disabled Veterans to go through an annual reassessment, and that many of the most catastrophically disabled Veterans are being advised they will be disenrolled from the program once the grace period ends on October 1, 2022.

To resolve this problem, Petitioners propose the following changes in 38 C.F.R. §71.30:

- Change the language of paragraph (a) to read "Except as provided in paragraphs (b), (c), and (f) of this section …."
- Add paragraph (f) to state "(1) Reassessment of catastrophically disabled veterans (as defined in 38 C.F.R. §17.36(b)) may not occur more frequently than every five years; and (2) Reassessment of permanently and totally disabled veteran (as defined by 38 C.F.R. §__._) is not required, and will only be authorized by direct

order for that individual veteran by the Veterans Integrated Service Network Director covering the veteran's home of residence."

V. Eliminate the unnecessary and arbitrary minimum 70% disability rating

The VA's arguments for imposing a minimum 70% disability rating is based upon its interpretation of the eligibility requirement for the Veteran to have suffered a "serious injury." But by the VA's own discussion in the Final Rule, it recognizes "illness" is not the same as "injury" ("As indicated in the proposed rule, this definition [of serious injury] will now include any service-connected disability regardless of whether it resulted from an injury or disease."[20]) yet includes it in the disabilities which will qualify in meeting the "serious injury" definition. Further, the VA states they've modified the requirements so that the inability to perform the ADLs does not have to be related to the serious injury which renders the eligible veteran in need of the personal care services. The VA has therefore admitted its broad definition of "serious injury" is arbitrary, and so, therefore, is the minimum 70% disability rating arbitrary and unnecessary as well.

Further, by the VA's own rationale, the eligible veteran could suffer a set of service-connected disabilities which place them at or above a 70% disability rating, but which still leave the eligible veteran capable of performing all their ADLs and not needing any other personal care services. But if non-service-connected disabilities do render them in need of personal care services, they will now be eligible for the PCAFC program even though the required 70% disability rating has nothing to do with the need for that care. This is completely arbitrary and

[20] 85 F.R. 46245.

disconnected from the eligibility requirements of the law and appear to be more about restricting eligibility to the PCAFC program (reducing the outlays required to fund it) than it is about drawing any type of eligibility linkage between the eligible veteran suffering a serious injury and they being rendered in need of personal care services.

The other personal service care eligibility requirements are sufficient to ensure only those eligible Veterans in need of personal care services are admitted to the program. The 70% minimum service-connected disability rating requirement is, as the VA admits, immaterial to the eligible Veteran's need for personal care services. It serves no purpose other than to exclude eligible Veterans arbitrarily and for no discernable public policy purpose. Therefore, to resolve this problem, Petitioners propose to change the definition of "serious injury" in 38 C.F.R. §71.15 to read, "Serious injury means any service-connected disability."

## NEGOTIATED RULEMAKING

Petitioners also propose to continue the rulemaking process in form of the negotiated rulemaking process permitted by law under 5 U.S.C. Subchapter III. Although VA does not have any regulations regarding this process, other federal agencies, such as the Department of Housing and Urban Development, the Department of Education, and the Department of Agriculture, have an established process or have engaged in negotiated rulemaking in recent years.[21] Thus, Petitioners believe the VA is able to follow their example and engage in negotiated rulemaking. And, the VA can engage in an Economy Act (31 U.S.C. §1535 and FAR 17.502-2) agreement with those federal agencies that are experienced at negotiated rulemaking, many of them on Veteran-

[21] *See e.g.*, 84 F.R. 49789, 81 F.R. 83674, 77 F.R. 50561, as well as Congressional Research Service, Negotiated Rulemaking: In Brief, R46756 (April 12, 2021).

specific issues, to obtain the necessary services to conduct a negotiated rulemaking process for this issue.

Under the law governing negotiated rulemaking, there are several factors that an agency should take into consideration when determining whether to use those procedures.[22] These factors include the following:

- whether a limited number of interests that will be significantly affected by the rule can be identified,
- a committee with balanced representation would be able to be convened,
- there is a "reasonable likelihood" that a committee would be able to reach a consensus on the proposed rule within a fixed period of time,
- using negotiated rulemaking would not unreasonably delay the issuance of a proposed rule, and
- the agency can commit to using the consensus of the committee as the Proposed Rule.

Negotiated rulemaking can be a useful instrument to supplement the traditional process of rulemaking. The Administrative Conference of the United States observed that informal communications between agency personnel and individual members of the public have traditionally been an important and valuable aspect of informal rulemaking proceedings and that negotiated rulemaking conveys a variety of benefits to both agencies and the public.[23] Administrative law and political science scholars also recognize that negotiated rulemaking has

[22] *See* 5 U.S.C. §563(a).
[23] *See* Administrative Conference Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking (June 6, 2014).

many advantages and there are examples where experiences with negotiated rulemaking have been positive.[24]

Because the traditional rulemaking process did not result in VA adapting any of the changes proposed by the Veteran and military serving organizations,[25] and because the interested Veterans and Caregivers recognize the urgent need to review and revise the PCAFC regulations, Petitioners believe that it is judicious for VA to engage in negotiated rulemaking as soon as possible.

The Petitioners respectfully request that a rulemaking, preferably by a negotiated rulemaking process, be commenced to implement a regulation with this effect.

Respectfully submitted,

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American Logistics Association
Armed Forces Retirees Association
American Military Society
Chief Warrant and Warrant Officers Association of the U.S. Coast Guard
Vietnam Veterans of America
VetsFirst
Reserve Organization of America
Sea Service Family, Foundation
Military-Veterans Advocacy, Inc.
Healing Household 6
Jewish War Veterans of the United States of America
Veteran Warriors, Inc.
Fleet Reserve Association

[24] *See e.g.*, Laura Langbein and Cornelius Kerwin, "Regulatory Negotiation: Claims, Counter Claims, and Empirical Evidence," *Journal of Public Administration Research and Theory*, Vol. 10 (July 2000); Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy*, 4th edition (Washington, DC: CQ Press, 2011); Steven J. Balla and Susan E. Dudley, *Stakeholder Participation and Regulatory Policymaking in the United* States, Report for the OECD (October 2014).
[25] *See* 85 F.R. 46226 and 86 F.R. 52614.