

**SUBMISSION FOR THE RECORD OF ANTHONY HARDIE,
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**BEFORE THE U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON VETERANS' AFFAIRS,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
AND
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS**

FOR A JOINT MARCH 15, 2016 HEARING ENTITLED:

**“TWENTY-FIVE YEARS AFTER THE PERSIAN GULF WAR: AN ASSESSMENT OF
VA’S DISABILITY CLAIMS PROCESS WITH RESPECT TO GULF WAR ILLNESS”**

Thank you, Chairmen Coffman and Abraham, Ranking Members Kuster and Titus, and Members of the Committee for today’s hearing and for this opportunity to present this information to you.

I’m Anthony Hardie, a 1991 Gulf War and Somalia veteran, and Director of Veterans for Common Sense. VCS and I have provided testimony on many previous occasions, most recently my testimony as a witness at your February 23, 2016 hearing on Gulf War veterans’ health outcomes on the 25th anniversary of the 1991 Gulf War.

1998 PERSIAN GULF WAR VETERANS LEGISLATION

As I noted in my testimony of February 23, it took almost eight years after the war before Gulf War veteran’ major legislative victory, with the enactment of the *Persian Gulf War Veterans Act of 1998* (Title XVI, PL 105-277) and the *Veterans Programs Enhancement Act of 1998* (PL 105-368, Title I—“Provisions Relating to Veterans of Persian Gulf War and Future Conflicts”) – two landmark bills that set the framework for Gulf War veterans’ healthcare, research, and disability benefits.

For those of us involved in fighting for the creation and enactment of these laws, they seemed clear and straightforward, with a comprehensive, statutorily-mandated plan that would guarantee research, treatments, appropriate benefits, and help ensure that lessons learned from our experiences would result in never again allowing what happened to us to happen to future generations of warriors.

The legislation included a long list of known Gulf War exposures. VA was to presume our exposure to all of these, and then, with the assistance of the National Academy of Sciences (NAS), evaluate each exposure for associated adverse health outcomes in humans and animals. In turn, the VA Secretary would consider the reports by the NAS’s Institute of Medicine (IOM), “and all other sound medical and scientific information and analyses available,” and make

determinations granting presumptive conditions. There was a new guarantee of VA health care. There would also be a new national center for the study of war-related illnesses and post-deployment health issues, which would conduct and promote research regarding their etiologies, diagnosis, treatment, and prevention and promote the development of appropriate health policies, including monitoring, medical recordkeeping, risk communication, and use of new technologies. There was to be an effective methodology for treatment development and evaluation, a medical education curriculum, and outreach to Gulf War veterans. Research findings were to be thoroughly publicized. To ensure the federal government's proposed research studies, plans, and strategies stayed focused and on track, VA was to appoint a research advisory committee that included Gulf War veterans – presumably those who were ill and affected – and their representatives.

Instead, we learned that enactment of those laws was just another battle in our long war.

From the beginning, VA officials fought against implementing these laws, dragging their feet and upending their implementation.

In addition to the failures I noted in my February 23 testimony, the process for determining presumptions has failed to yield new presumptions without Congressional intervention. And, the laws aimed at providing a clear path for Gulf War veterans' compensation by VA while awaiting the development of effective treatments has been not just problematic, but with extraordinarily high denial rates, as VA's own data shows and as will be discussed below.

For Gulf War veterans, getting VA to approve a disability claim for a presumptive condition has been nearly impossible for most. And, as with all denied VA claims, the backlog of appealed claims is daunting and adds years to the process.

DESPITE REPEATED VA INTERVENTIONS, VA'S GULF WAR VETERAN CLAIMS DENIAL RATES ARE WORSENING OVER TIME

The rates of VA's denial of Gulf War veterans' presumptive claims – for “undiagnosed illness” and for the “chronic multisymptom illnesses” such as Fibromyalgia, Irritable Bowel Syndrome/Functional Gastrointestinal Disorders, and Chronic Fatigue Syndrome – have been getting worse over time.

This worsening has been despite repeated high-level interventions by VA – interventions made ostensibly to improve VA's review processes for Gulf War veterans' presumptive claims.

2007 VA Denial Rate of Gulf War Veterans' Presumptive Undiagnosed Illness Claims

In 2007 and 2008, I did a series of presentations about Gulf War veterans' severe challenges with VA research, healthcare and benefits. The presentations were made to a number of national and regional groups around the country and were entitled, “Lost in the Shuffle”. Among the data

presented was VA's abysmal claims failures for Gulf War claims:

Based on a May 2007 report from VA's Gulf War Information System (GWVIS), out of 696,842 Gulf War veterans, 280,623 had filed service-connected disability claims. Of those, 13,027 were "undiagnosed illness claims" (what VA terms "UDX" claims), just 3,384 had been approved – a 74 percent denial rate.

2010 VA Intervention

According to a February 4, 2010, "All VA Regional Offices Training Letter," (10-01), with the subject, "Adjudicating Claims Based on Service in the Gulf War and Southwest Asia,":

"The chronic disability patterns associated with these Southwest Asia environmental hazards have two distinct outcomes. One is referred to as "undiagnosed illnesses" and the other as "diagnosed medically unexplained chronic multisymptom illnesses" that are without conclusive pathophysiology or etiology. Examples of these medically unexplained chronic multi-symptom illnesses include, but are not limited to: (1) chronic fatigue syndrome, (2) fibromyalgia, and (3) irritable bowel syndrome."

This letter preceded regulatory amendments and provided guidance to VA claims examiners to more appropriately adjudicate Gulf War veterans' claims.

2014 VA Denial Rate of Gulf War Veterans' Presumptive Claims

Data provided by VA to the office of then-Congressman Kerry Bentivolio on March 28, 2014 showed a nearly 80% denial rate for what VA termed in the response, "a Gulf War-related illness". It appears that this is the cumulative VA denial rate of all presumptive undiagnosed illness and presumptive chronic multisymptom illness (Fibromyalgia, Irritable Bowel Syndrome; Chronic Fatigue Syndrome) claims by Gulf War veterans.

Key findings (2014)

- *80% Gulf War Illness Claims Denial Rate.* Of 54,193 Gulf War-related illness claims filed with VA, four out of five – nearly 80 percent (80%) – were denied.
- *52% of the denied for something else.* A full 52 percent of the denied Gulf War-related illness claims were approved by VA for something else, implying a VA bias against approving Gulf War Illness claims.
- *38% denied for everything.* A full 38 percent (38%) of veterans' claims for Gulf War-related illness were had their claims denied entirely, both for Gulf War-related illness and other conditions.

By the Numbers (2014)

696,842 Veterans: The total number of veterans deployed to the Persian Gulf theatre of operations during the 1991 Gulf War.

54,193 GWI Claims: The number of Gulf War-related illness claims veterans have filed with VA, to March 2014. [VA notes this figure represents original claims for service-connection; it does not include reopened claims or claims for an increased disability rating.]

11,216 Approved: The number of Gulf War Illness claims that VA granted. [VA notes that due to data limitations, this figure does not include some Veterans who have been granted service connection on a direct basis (meaning that the disability became manifest during active service) rather than under the provisions of 38 C.F.R. § 3.317.]

42,977 Denied: The total number of Gulf War-related illness VA has denied.

20% Approved: The percentage of Gulf War-related illness that VA granted (11,216 approved out of 54,193 filed = 20.7%).

80% Denied: The percentage of Gulf War-related illness VA has denied (42,977 denied out of 54,193 filed = 79.3% denial rate).

22,470 Approved for Something Else: The number of veterans filing Gulf War-related illness claims that were denied but VA approved the veterans' claims for some other condition(s).

42% Denied for GWI but Approved for Something Else: The percent of veterans filing Gulf War-related illness claims that were denied but VA approved their claims for some other condition(s) (22,470 approved for something else out of 54,193 total Gulf War-related illness claims filed = 41.5%).

52% of the Denied were Approved for Something Else: The percent of denied Gulf War-related illness claims approved for some other condition. (22,470 approved for something else out of 42,977 denied Gulf War-related illness claims = 52.3%)

20,507 Denied for all Conditions: The number of veterans filing Gulf War-related illness claims that were denied for GWI *and* not receiving compensation for other conditions. (54,193 Gulf War-related illness claims filed minus 22,470 claims approved for something else = 20,507)

38% Denied for all conditions: The percent of all Gulf War-related illness claims filed that were denied for Gulf War-related illness and also not receiving compensation for other conditions (20,507 denied out of 54,193 = 37.8%)

67% Average Disability Rating: The average disability rating granted by VA for Gulf War-related illness claims filed.

VSO Response to 2014 Denial Rates

In a July 16, 2014 letter from two of the largest veterans service organizations (VSOs), AMVETS and VVA, to then-Acting VA Secretary Sloan Gibson highlighted the newly released VA claims denial information and provided insight into why this was being allowed within VA:

“VA acknowledges that 250,000 suffer from Gulf War illness. (The recent VA ‘Gulf War Review,’ for example, states that nearly 700,000 U.S. troops deployed to the 1991 war and that VA’s major 2005 study showed that 37% of those (roughly 250,000) have chronic multisymptom illness, VA’s term for Gulf War illness. The 2010 report of the Institute of Medicine also found 250,000 veterans were ill and that their illness was associated with Gulf War service.

“Yet, VA’s own most recent statistics, provided in response to a Congressional inquiry this Spring, show that only 11,216 Gulf War-related illness claims have been granted and 80% of such claims are denied. (See VA report to Congressman Bentivolio, attached.) Even including all claims approved for other conditions, the total number of Gulf War veterans approved for care and benefits is only 36,000, out of the 250,000 afflicted.

“VA hides that damning fact in its official statements. The April 2014 VA Gulf War ‘Fact Sheet’ states that “currently, nearly 800,000 Gulf War era Veterans are receiving compensation benefits for service-connected issues.” What VA doesn’t say is that their definition of the ‘Gulf War era’ includes every veteran who has served from 1990 to the present, not just 1990-1991 Gulf War veterans. (See Fact Sheet attached.)

“Recent statements by Undersecretary for Benefits Allison Hickey provide the answer why VA is hiding this information. An April 22, 2014 article in Military Times reported that she was concerned that even using the term ‘Gulf War illness’ ‘might imply a causal link between service in the Gulf and poor health which could necessitate legislation for disability compensation for veterans who served in the Gulf.’ And on December 13, 2013, she testified that VA would be able to meet its 2015 goal of processing claims within 125 days, barring ‘something like we experienced in Agent Orange [when we added] 260,000 claims in our inventory overnight in Oct. 2010. That will kill us.’”

Recent Rates of VA Denial of Gulf War Veterans’ Presumptive Claims

Despite the latest VA intervention in 2010, the rate of denial of Gulf War veteran presumptive claims has been steadily worsening, year by year, as shown by data provided by VA for fiscal years 2011 through the first half of 2015. These claims include two types: chronic multisymptom illness claims (Fibromyalgia; Irritable Bowel Syndrome/Functional Gastrointestinal Disorders; Chronic Fatigue Syndrome); and, undiagnosed illness claims authorized under 38 U.S.C. 3.317.

A. VA Denials of Presumptive Chronic Multisymptom Illness Claims

The rate of denial of Gulf War veteran presumptive chronic multisymptom illness claims (Fibromyalgia; Irritable Bowel Syndrome/Functional Gastrointestinal Disorders; Chronic Fatigue Syndrome) has been steadily worsening, year by year. By the first half of FY15, VA was denying these claims at a rate of nearly four-out-of-every-five.

FY2011:	72.5%
FY2012:	72.1%
FY2013:	75.3%
FY2014:	77.0%
FY2015 Q1, Q2:	79.2%

“CMI = Chronic Multisymptom Illness (fibromyalgia 5025, IBS 7319, and chronic fatigue syndrome 6354) in either the hyphenated or primary code. If condition is both UDX and CMI, it is included in UDX counts.”

(G) = Total Conditions Granted (“Vets”)

(D) = Total Conditions Denied (“Vets”)

(T) = Total Conditions Granted or Denied (“Vets”)

Formulas: $(G) + (D) = (T)$; $(D)/(T) = \text{denial rate}$

FY2011: 743 (G) + 1,961 (D) = 2,704 (T); 1,961 (D) / 2,704 (T) = 72.5% CMI denial rate

FY2012: 1,114 (G) + 2,877 (D) = 3,991 (T); 2,877 (D) / 3,991 (T) = 72.1% CMI denial rate

FY2013: 1,638 (G) + 5,002 (D) = 6,640 (T); 5,002 (D) / 6,640 (T) = 75.3% CMI denial rate

FY2014: 1,300 (G) + 4,341 (D) = 5,641 (T); 4,341 (D) / 5,641 (T) = 77.0% CMI denial rate

FY2015 Q1,Q2: 746 (G) + 2,849 (D) = 3,595 (T); 2,849 (D) / 3,595 (T) = 79.2% CMI denial rate

B. VA Denials of Presumptive Undiagnosed Illness Claims

VA’s denial of Gulf War veteran presumptive undiagnosed illness claims is at even higher rates than VA’s denial of presumptive chronic multisymptom illness claims.

The rate of denial of Gulf War veteran presumptive undiagnosed illness claims has also been steadily worsening, year by year. By the first half of FY15, VA was approving only 14.7 percent of these claims – approaching the limited odds of winning a scratch-off lottery.

FY2011:	80.5%
FY2012:	78.4%
FY2013:	78.6%
FY2014:	83.1%
FY15 Q1, Q2:	85.3%

“UDX = Undiagnosed Illness, defined as diagnostic codes containing 88xx in either the hyphenated or primary code.”

Formulas: $(G) + (D) = (T)$; $(D)/(T) = \text{denial rate}$

FY2011: 480 (G) + 1,977 (D) = 2,457 (T); 1,977 (D) / 2,457 (T) = 80.5% UDX denial rate
FY2012: 628 (G) + 2,278 (D) = 2,906 (T); 2,278 (D) / 2,906 (T) = 78.4% UDX denial rate
FY2013: 925 (G) + 3,402 (D) = 4,327 (T); 3,402 (D) / 4,327 (T) = 78.6% UDX denial rate
FY2014: 627 (G) + 3,086 (D) = 3,713 (T); 3,086 (D) / 3,713 (T) = 83.1% UDX denial rate
FY2015 Q1,Q2: 339 (G) + 1,970 (D) = 2,309 (T); 1,970 (D) / 2,309 (T) = 85.3% UDX denial rate

C. VA Denials of Gulf War Presumptive Claims (Chronic Multisymptom and Undiagnosed Illness Combined):

FY2011:	76.3%
FY2012:	74.7%
FY2013:	76.6%
FY14:	79.4%
FY2015 Q1, Q2:	81.6%

Formula: $[(CMI\ D) + (UDX\ D)] / [(CMI\ T) + (UDX\ T)] = \text{denial rate}$

FY2011: $[1,961 (CMI\ D) + 1,977 (UDX\ D)] / [2,704 (CMI\ T) + 2,457 (UDX\ T)] = 76.3\%$
CMI+UDX denial rate

FY2012: $[2,877 (CMI\ D) + 2,278 (UDX\ D)] / [3,991 (CMI\ T) + 2,906 (UDX\ T)] = 74.7\%$
CMI+UDX denial rate

FY2013: $[5,002 (CMI\ D) + 3,402 (UDX\ D)] / [6,640 (CMI\ T) + 4,327 (UDX\ T)] = 76.6\%$
CMI+UDX denial rate

FY2014: $[4,341 (CMI\ D) + 3,086 (UDX\ D)] / [5,641 (CMI\ T) + 3,713 (UDX\ T)] = 79.4\%$
CMI+UDX denial rate

FY2015 Q1, Q2: $[2,849 (CMI\ D) + 1,970 (UDX\ D)] / [3,595 (CMI\ T) + 2,309 (UDX\ T)] = 81.6\%$
CMI+UDX denial rate

VA Intervention: Amending the M21-1

It appears that VA has made a new intervention by amending the M21-1 “Veterans Benefits Manual,” which is supposed to be used for rating VA claims. However, it is not clear whether

VA rating staff are aware of, let alone utilizing this manual to rate Gulf War veterans' claims.

With no new Gulf War claims data released since the second quarter of FY15, it is unclear whether this intervention has had any positive effect on improving VA's terrible denial rates for Gulf War veterans' UDX and CMI claims.

Given VA's past record, it is unclear whether this latest intervention will be just one more in a long line of ineffective "solutions". Past VA "solutions" have done nothing to quell VA's extraordinarily high denial rates of these veterans' claims.

Claims Denial Conclusions

In short, VA's denial rates for Gulf War UDX and CMI claims remained high over time. In recent years, VA's denial rates have been increasing for these Gulf War veterans' claims.

This is in complete contravention to the intent of the 1998 laws passed to improve Gulf War veterans' ability to get their claims approved, while prioritizing treatments was made an even higher priority – but not by VA.

CLAIMS DATA RECOMMENDATIONS

VA Needs to Track, Analyze, and Regularly Report VA Utilization Data for 1990-91 Gulf War Veterans.

In 2010, VCS Director Paul Sullivan testified, "In 2002, VA staff conducted a thorough review of granted and denied claims among Gulf War veterans at the diagnostic code level. VA staff concluded that VA regional offices with large claim backlogs and without training on UDX claims under 38 CFR 3.317 approved few (about 4 percent) of Gulf War veterans claims. In contrast, VA regional offices with small backlogs that received training from VA Central office approved far more UDX disability benefit claims (about 30 percent). At present, VA has no idea how many UDX claims have been granted or denied."

Today, it is unclear whether VA is consistently tracking UDX claim denials and approvals. Certainly, VA is not publicly reporting that data, at least not in any way that is regularly and readily accessible to Gulf War veterans or the veterans advocacy community.

VA must return to the regular public reporting of carefully collated and analyzed Gulf War veterans' claims and VA usage data.

VA must return to the regular public reporting of carefully collated and analyzed Gulf War veterans' claims and VA usage data. VA must be held accountable for its actions, and without easy public access to this VA data, accountability will remain difficult to achieve.

CONCLUSIONS

If we measure VA's success by how it has approved Gulf War veterans' claims twenty-five years after the war, VA has failed most ill and suffering Gulf War veterans. VA has circumvented or ignored most of the aims of the 1998 laws. Despite various high-level interventions by VA to improve the claims process, the denial rates remain unacceptably high and are getting worse each year.

In twenty-five years, VA has made little progress in finding effective, evidence-based treatments for Gulf War Illness, denied Gulf War veterans disability claims nearly across the board, and relegated these veterans to the realm of mental health interventions.

VA has the authority to develop new presumptives for these ill and suffering veterans, but unlike with Agent Orange, has failed to identify any new conditions beyond a set of rare endemic infectious diseases that affect almost no one. The latest report by the Institute of Medicine, shaped by VA's contract, argues that individual Gulf War exposures are forever unknowable. We knew that when seeking the 1998 legislation, aimed at connecting generic exposure data with health outcomes. VA has stymied those efforts.

Twenty-five years later, ill Gulf War veterans are still in pain. They are suffering. They have been begging for help for years and years. As I noted in my February 23 testimony, the letter, the spirit, and the intent of the 1998 Persian Gulf War laws have yet to be achieved.

On this 25th anniversary of the war, our Gulf War veterans are still waiting for VA to provide effective, evidenced-based treatments for Gulf War Illness. Given their level of disability, the least we can do is to cause VA to approve their presumptive, service-connected disability claims.

Please help fix these serious issues, once and for all.

ADDITIONAL INFORMATION

Public Law 102-1, enacted in January 1991, authorized the President to start the Persian Gulf War, known at the time as Operation Desert Shield and Desert Storm. Offensive U.S. military action against Iraq began on January 17, 1991 local time (the evening of January 16 in the United States).

Public Law 102-25, enacted in April 1991, retroactively established the start date of the Gulf

War as August 2, 1990, the date Iraq invaded Kuwait. Neither Congress nor the President have ever ended the Gulf War, and the conflict continues through to the present. According to 38 CFR 3.317(e)(2), “The *Southwest Asia theater of operations* refers to Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations. (Authority: 38 U.S.C. 1117, 1118).”

Public Law 102-85, enacted in November 1992, authorized the creation of the Gulf War Registry as well as the Gulf War Veterans Information System (GWVIS). VA began preparing GWVIS reports in 2000, and VA ceased producing the reports in 2008 after VCS observed that VA’s GWVIS reports were incomplete. VA has since confirmed that it failed to update computer programming to identify all disabled Gulf War veterans.

Public Law 103-210, enacted in December 1993, required VA to provide healthcare on a priority basis (Priority Group 6).

Public Law 103-446, enacted in November 1994, expanded access to VA disability benefits so ill Gulf War veterans could obtain VA medical care under for the undiagnosed illnesses. The law included a long list of toxins to which Gulf War veterans were presumably exposed, including depleted uranium, fumes and smoke from military operations, oil well fires, diesel exhaust, paints, pesticides, depleted uranium, infectious agents, investigational drugs and vaccines, indigenous diseases, and multiple immunizations.

Public Law 105-277, enacted in 1998, significantly expanded the list of toxins it presumed Gulf War veterans were exposed to during deployment to Southwest Asia, and mandated contracts between VA and the National Academy of Science (which ultimately was conducted by NAS’s Institute of Medicine (IOM)) to determine association between Gulf War exposures and Gulf War veterans’ health conditions.

Public Law 105-368, enacted on Veterans Day 1998, expanded Public Laws 103-210 and 103-446. It also directed the creation of the the Research Advisory Committee on Gulf War Veterans’ Illness (RAC), which VA failed to create the RAC until 2002 – more than three years after the statutorily mandated deadline.