NATIONAL VETERANS LEGAL SERVICES PROGRAM

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Submitted via regulations.gov

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Veterans Health Administration
Department of Veterans Affairs
810 Vermont Ave. NW
Washington, DC 20420

Re: RIN 2900-AR96 Amendments to the Program of Comprehensive Assistance for Family Caregivers

Dear Ms. Richardson,

The National Veterans Legal Services Program ("NVLSP") thanks the Department of Veterans Affairs ("VA") for promulgating a Notice of Proposed Rulemaking (NPRM) proposing changes to 38 C.F.R. §71.20-60. We also appreciate the opportunity to provide comments on the proposed rule. While we appreciate some changes that VA has proposed, we remain concerned about certain aspects of this NPRM. This comment outlines these concerns and offers potential solutions.

NVLSP is a national nonprofit organization that has worked since 1981 to ensure that our nation's 18 million veterans and active-duty personnel receive the government benefits they have earned through their military service to our country. In recent years, NVLSP has taken on a leading role in litigation related to the Program of Comprehensive Assistance for Family Caregivers (PCAFC). NVLSP and pro bono attorneys at Sidley Austin LLP represented Veteran Warriors, Inc., and an individual caregiver and veteran in successfully challenging part of the Caregiver Program regulation that VA promulgated in 2020. That case struck down VA's unlawfully narrow definition of who could qualify for the program on the basis of a need for supervision, protection, or instruction.[1] In *Beaudette v. McDonough*, NVLSP joined Public Counsel and Paul Hastings LLP as class counsel to secure the right to appeal decisions relating to the PCAFC for hundreds of thousands of veterans and their family caregivers.[2]

By litigating these cases, NVLSP has become a leading authority on the interpretation of 38 U.S.C. §1720G, the statute constituting PCAFC. We also have a stake in the clarity and

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[1] *Veteran Warriors, Inc. v. Sec'y of Veterans Affairs*, 29 F.4th 1320 (Fed. Cir. 2022).
[2] *Beaudette v. McDonough*, 93 F.4th 1361 (Fed. Cir. 2024).

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consistency of VA's regulations in this area, as such clarity and consistency will aid our clients in ongoing and future litigation.

We look forward to continuing our work with VA to ensure that the regulations governing PCAFC are as strong as they can be.

I. Introduction

A. This NPRM Improves on Current Regulations in Significant Ways.

We appreciate VA's ongoing work to improve the regulations implementing PCAFC. We agree with VA's assessment that the previous regulations promulgated on May 5, 2011 and January 9, 2015 were unworkable and wholeheartedly support the agency's decision to issue new regulations designed to expand the program. Specifically, we strongly support the following aspects of the NPRM:

a. Extending eligibility to veterans with Individual Unemployability (IU);
b. Eliminating the phrase "each and every time" in §71.20(a)(3)(i) of the eligibility criteria; and
c. Reducing the frequency of reassessments under 38 C.F.R. §71.35.

These changes will greatly improve PCAFC and make it accessible to more veterans and caregivers who need it.

B. We Believe VA Must Do More to Promote Clarity and Consistency.

Despite the improvements present in this NPRM, more must be done to create clarity and eliminate arbitrary and/or inconsistent decision-making at the Centralized Eligibility and Appeals Team (CEAT) level. Historically, inconsistent and excessively strict application of eligibility criteria has plagued PCAFC and damaged the program's reputation in the veteran community. In fact, such problematic application of eligibility criteria precipitated VA's decision to suspend discharges from the program in 2017 and again in 2018.[3] Approval rates still vary widely by region, from 42% in VISN 2 to 24% in VISN 19, and advocates continue to hear stories of eligibility criteria being applied in inconsistent and excessively strict ways.[4] NVLSP is currently assisting a veteran who was denied the program's Level 2 stipend partly because, according to the CEAT that reviewed his claim, the act of helping him up from a seated position and holding

[3] **OFFICE OF INSPECTOR GENERAL, PROGRAM OF COMPREHENSIVE ASSISTANCE FOR FAMILY CAREGIVERS: MANAGEMENT IMPROVEMENTS NEEDED** (August 2018), *available at* https://www.oversight.gov/sites/default/files/documents/reports/2018-08/VAOIG-17-04003-222.pdf; "VA Says It Will Stop Arbitrarily Dropping Caregivers From Program," **NPR** (Dec. 21, 2018), *available at* https://www.npr.org/2018/12/21/679123976/va-says-it-will-stop-arbitrarily-dropping-caregivers-from-program.

[4] This data is from the Caregiver Support Program's January 2025 briefing to Veterans Service Organizations (VSOs).

him upright until he can get a firm grip on his walker does not constitute "hands-on" assistance with mobility. Regardless of how VA writes its regulations, errors will still occur. However, VA should strive to minimize such errors by making its regulations as clear as possible.

C. The Regulations Governing PCAFC Must Align with Congressional Intent.

VA must also make a number of changes to its draft language in order to align the regulation with Congress's vision for PCAFC. Congress created the program in order to empower veterans to control more aspects of their care, as well as to recognize and compensate the work of family caregivers.[5] Thus, one of Congress's central goals was to give the veterans the option of staying at home and receiving care from a loved one when they would otherwise be forced to receive care in an institutional setting.[6] Congress also intended to reduce costs by keeping veterans out of costly nursing care programs when care could be provided more cheaply by a family caregiver.[7] VA has billed this NPRM as an "expansion" of PCAFC, tacitly recognizing that previous PCAFC regulations imposed more stringent eligibility restrictions on applicants than Congress intended.[8] However, this proposal would impose several new limits on eligibility that will likely prevent members of target populations from accessing needed benefits.

Additionally, Congress designed the program to meet the needs of veterans who need caregiving due to mental health and cognitive disabilities. PCAFC was originally created specifically for post-9/11 veterans, and legislators therefore took into account the specific needs of this demographic. Congress was well aware when drafting PCAFC's enabling legislation that traumatic brain injury (TBI) is a signature injury of the wars in Iraq and Afghanistan, and that these injuries are often coupled with severe post-traumatic stress disorder (PTSD).[9] Both of these conditions can lead to high-risk behaviors, difficulties with emotional regulation, and

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[5] Introducing the legislation, Senator Daniel Akaka stated that it filled an important gap because "Caregivers, who are members of a veteran's family, often put their lives on hold in order to provide care for the injured or disabled veteran at home. In some instances, these caregivers are unable to maintain regular jobs because of the time consumed in providing sufficient care to the veteran." 111 **CONG. REC.** S4350, *available at* https://www.congress.gov/111/crec/2009/04/02/CREC-2009-04-02-pt1-PgS4315.pdf.

[6] Stated goals of original family caregiver program proposal were "(A) to reduce the number of veterans who are receiving institutional care, or who are in need of institutional care, whose personal care service needs could be substantially satisfied with the provision of such services by a family member (or designee); and '(B) to provide eligible veterans with additional options so that they can choose the setting for the receipt of personal care services that best suits their needs." 111 **CONG. REC**. S4350, *available at* https://www.congress.gov/111/crec/2009/04/02/CREC-2009-04-02-pt1-PgS4315.pdf.

[7] *Id*.

[8] "VA proposes rule to expand access to its Program of Comprehensive Assistance for Family Caregivers," **NPR** (December 5, 2024, 9:15 am), https://news.va.gov/press-room/va-proposes-rule-to-expand-access-to-its-program-of-comprehensive-assistance-for-family-caregivers/

[9] The original 2010 legislation, passed as P.L. 111-163, specifically noted that a veteran may qualify on the basis of "traumatic brain injury, psychological trauma, or other mental disorder." In discussing the omnibus bill of which this legislation was a part, Rep. Henry Edward Brown (R-S.C.) noted that VA "must respond to the signature wounds of the wars in Iraq and Afghanistan" and that "two of the most common wounds of war in Iraq and Afghanistan have been post-traumatic stress disorder and traumatic brain injury." 111 **CONG. REC.** at H2727, available at https://www.congress.gov/111/crec/2010/04/21/CREC-2010-04-21-pt1-PgH2703-5.pdf.

suicidal ideation.[10] To serve post-9/11 veterans, it was thus vitally important for Congress to create a pathway to PCAFC eligibility based on a need for supervision, protection, and instruction (SPI). Congress recognized this and incorporated eligibility criterion based on supervision and protection from the start.[11] Legislators preserved and expanded this pathway to PCAFC eligibility when it passed the 2018 MISSION Act, maintaining parity for veterans coping with mental health and cognitive disabilities.[12]

VA has not consistently honored Congress's vision for PCAFC. In *Veteran Warriors v. McDonough*, NVLSP sued VA over the regulations implementing the MISSION Act, arguing that these regulations imposed strict eligibility criteria with no basis in the statute.[13] The Federal Circuit affirmed that VA must redraft the provisions on supervision, protection, and instruction (SPI) in order to conform to its statutory mandate.[14] VA has yet to promulgate regulations on SPI eligibility that meet judicial muster; since Veteran Warriors came down, it has simply applied the standard laid out in the statute. With this context in mind, VA must take special care now to ensure that its PCAFC regulations align with Congress's intent.

In sum, VA must ensure that its regulations are clear and promote consistent application across VA facilities. VA must also effectuate Congress's goals by ensuring program access for the populations Congress intended to help. NVLSP's recommendations, listed below, support these goals.

SPECIFIC CONCERNS AND RECOMMENDATIONS

I. VA Should Include More Definitions and Examples in 38 C.F.R. §71.15.

To provide clarity, VA should incorporate more detailed definitions into this regulation. Unfortunately, the definitions section of this proposal, 38 C.F.R. §71.15, does not improve on the 2020 regulations. Instead, it omits key definitions and removes clarifying language from others. The proposal omits key definitions and removes clarifying language from others. Specifically, the proposed regulation fails to define supervision, protection, and instruction or any related term and cuts language clarifying VA's interpretation of each activity of daily living (ADL). Rather

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[10] Yueh-Chien Lu et al., 97 **POSTGRAD MED J** 747 (Feb. 3, 2020); *Association Between Suicide Risk and Traumatic Brain Injury in Adults: A Population Based Cohort Study, available at* https://pmc.ncbi.nlm.nih.gov/articles/PMC7788485/; Verity Fox et al., *Suicide Risk in People with Post-Traumatic Stress Disorder: A Cohort Study of 3.1 Million People in Sweden*, 279 **J AFFECT DISORD**. 609 (Jan. 2021), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7758737/; Colin Mahoney et al., *The Role of Impulsivity in the Association Between Posttraumatic Stress Disorder Symptom Severity and Substance Use in Male Military Veterans*, 33 **J TRAUMA STRESS** 296 (April 2020), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7299815/; https://pubmed.ncbi.nlm.nih.gov/23816263/; Tessa Hart et al., *Anger Self-Management in Chronic Traumatic Brain Injury: Protocol for a Psycho-educational Treatment With a Structurally Equivalent Control and an Evaluation of Treatment Enactment*, 40 **CONTEMP CLIN TRIALS** 180, *available at* https://pmc.ncbi.nlm.nih.gov/articles/PMC4314341/

[11] P. L. 111-163.

[12] P.L. 115-182.

[13] 29 F.4th 1320.

[14] *Id*. at 1342.

than exacerbating the ambiguity within the PCAFC regulations, VA should take this opportunity to clarify the program's eligibility criteria without narrowing them. NVLSP therefore proposes the following:

a. Each ADL listed in 38 C.F.R. §71.15 should be followed by a list of examples, introduced with the phrase "including but not limited to."
b. The regulation should define supervision, protection, and instruction and/or closely related terms such as "need for supervision."
c. The text of the regulation should also include examples of supervision, protection, and instruction or related concepts. These examples should also be prefaced with "including but not limited to" or "such as."

Defining key terms and providing examples would give veterans, evaluators, and Centralized Eligibility and Appeals Teams (CEATs) a clear sense of how PCAFC's eligibility criteria should be interpreted, without narrowing the eligibility criteria beyond the bounds set by Congress. For example, the meaning of protection and supervision has been hotly contested: VA previously maintained that supervision and protection must be linked to a concern over the veteran's personal safety, until the court ruled in *Veteran Warriors* that this interpretation was inconsistent with the statute.[15] It is imperative that VA clarify the definitions of key terms.

Rather than reinventing the wheel, VA could simply pull definitions, categories, and lists of examples from previously issued PCAFC materials such as the program's original regulations and the eligibility assessments currently in use. For example, the 2011 regulations listed seven distinct reasons why a veteran might require supervision and/or protection.[16] Review of our clients' records has also revealed that evaluators use subcategories and definitions of ADLs found within the FASI.[17] Under the category of grooming, for instance, evaluators inquire about the veteran's ability to wash their upper body, with this defined as "the ability to wash, rinse, and dry the face, hands, chest, and arms while sitting in a chair or bed."[18] Adding these kinds of examples to the regulation would be extremely beneficial and certainly not a radical change.

VA has previously incorporated non-exhaustive lists of examples into its regulations to create clarity and facilitate consistent implementation. For example, the schedule of ratings for mental health disorders found in 38 C.F.R. §4.130 largely consists of non-exhaustive lists of potential symptoms that could cause each level of impairment. We recommend that VA use the phrase "including but not limited to" here, because the meaning of "such as" in 38 C.F.R. §4.130 was not fully clear until the Federal Circuit clarified it in a series of cases including *Mauerhan v. Principi* and *Vazquez-Claudio v. Shinseki*.[19] The longer phrase "including but not limited to" carries all the advantages of a non-exhaustive list without this potential ambiguity.

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[15] *Id.*
[16] 76 F.R. 26148, 26173.
[17] *Functional Assessment Standardized Items (FASI) Set*, **CENTERS FOR MEDICARE AND MEDICAID**, *available at* https://www.medicaid.gov/medicaid/home-community-based-services/downloads/fasi-v1-1-template.pdf
[18] Citation omitted to preserve client confidentiality.
[19] *Mauerhan v. Principi*, 16 Vet. App. 436 (U.S. 2002); *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013).

II. VA Should Revise 38 C.F.R. §71.20(a)(3)(i) to Eliminate Barriers for Veterans Who Need Support with ADLs.

The VA's current proposal unduly narrows PCAFC eligibility criteria related to ADLs and creates unnecessary ambiguity regarding their definitions. NVLSP therefore proposes the following changes:

a. Replace "typically" with "more often than not," and
b. Strike the word "hands-on."

Thus, 38 C.F.R. §71.20(a)(3)(i) should read "The individual requires assistance more often than not to complete one or more ADL."

This language would create clarity and prevent subjective, inconsistent decision-making.

A. There is No Reason to Add "Hands-On" to 38 C.F.R. §71.20(a)(3)(i).

Adding the undefined term "hands-on" to 38 C.F.R. §71.20(a)(3)(i) would only create confusion. As VA notes, it has already been applying the "hands-on" standard in PCAFC determinations. However, we have found that this standard is applied in inconsistent ways and has led to rejection of applications that we believe have clear merit. We appreciate that supervision and instruction on ADLs are covered in 38 C.F.R. §71.20(a)(3)(iii). But this leaves open the question of how VA's proposal would handle "touch assistance," which typically involves steadying the veteran or touching them lightly to guide their movements.[20] If VA intends to cover the full spectrum of assistance with ADLs, from hands-on assistance to supervision, the addition of the word "hands-on" in 38 C.F.R. §71.20(a)(3)(i) is unnecessary and confusing.

B. VA Should Replace "Typically" with a "More Often Than Not" Standard.

The VA's proposed use of the word "typically" introduces subjectivity to PCAFC's eligibility criteria. VA defines "typically requires" as "generally necessary."[21] However, this does not give clinicians an objective yardstick by which to measure a veteran's caregiving need. A percentage or ratio would be a much more workable standard. The "more often than not" standard, corresponding to 51% or more, is far more objective than "typically."

Our "more often than not" standard also aligns with Congressional intent. 38 U.S.C. §1720G states that a veteran may receive PCAFC if the veteran "is in need of personal care services because of an inability to perform one or more activities of daily living." The statute

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[20] *Coding Section GG Self-Care & Mobility Activities Included on the Post-Acute Care Item Sets: Key Questions to Consider When Coding*, CENTERS FOR MEDICARE AND MEDICAID SERVICES, *available at* https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/Downloads/GG-Self-Care-and-Mobility-Activities-Decision-Tree.pdf.
[21] 89 F.R. 97412, 97404.

does not state that this inability must be present every time that a veteran attempts the ADL, or even 66% of the time. Rather, the statutory language indicates that even an intermittent inability to perform an ADL may qualify a veteran for PCAFC—if that inability arises often enough to create a need for personal care services.

NVLSP has found that any veteran who requires assistance with an ADL more than fifty percent of the time has a high caregiving need. Most ADLs are carried out more than once a day. Veterans applying for PCAFC brush their teeth at morning and at night, eat at least three times a day, and go to the bathroom as often as everyone else. For these ADLs, "more often than not" means an average frequency of at least once per day—and in many cases, more often than that. A veteran who simply could not carry out any ADLs after 1:00 pm could theoretically be denied benefits under the "typically" standard, but would almost certainly require assistance with their ADLs "more often than not." Thus, the "more often than not" standard we propose would better align with the subset of veterans who need significant help with their ADLs.

PCAFC's eligibility criteria also need to factor in the extent to which veterans' experiences of disability vary from day to day, and the "more often than not" standard achieves this goal. The previous "each and every time" standard punished veterans for good days, in which they experienced a temporary reprieve from their most severe symptoms. While an improvement over "each and every time," the "typically" standard would still perpetuate this problem. Veterans who experience fluctuations in their symptomology may have a harder time demonstrating what they "typically" need, making it harder for them to establish eligibility even if they have the same overall disability level as their peers. By contrast, our proposed "more often than not" standard would be fair to veterans with fluctuating levels of disability.

C. 38 C.F.R. §71.20(a)(3)(i) Should Be Structured to Keep Veterans Out of Institutional Care.

Our proposed language would further Congress's goal of promoting veterans' dignity and empowering them to choose whether and when they enter institutional care. Veterans who need help with ADLs are at high risk of having to move into institutional care settings if they don't get the support they need at home. This risk extends to veterans who need help with their ADLs most of the time, but not always. It also extends to veterans who need touch assistance. If a veteran cannot go to the bathroom on most days without a caregiver standing by, for fear that they might fall over or urinate all over the floor, they simply cannot be expected to live independently. It would be an affront to their dignity to expect them to remain at home without assistance, and it would undermine their autonomy to force them into an institutional setting. Our standard would give this veteran a clear pathway to PCAFC eligibility; the VA's proposed standard would not.

III. VA Should Amend 38 C.F.R. §71.20(a)(3)(ii) and (iii) to Ensure that Veterans in Need of Supervision, Protection, and Instruction Are Eligible for PCAFC.

Rather than restricting eligibility for veterans who need supervision, protection, and instruction, VA should instead take this opportunity to create more clarity in this area. NVLSP has previously taken legal action to ensure that VA's interpretation of 38 U.S.C. §1720G(a)(2)(C)(ii) and (iii) aligns with Congress's vision for PCAFC, and we remain committed to advocacy on this issue. We recommend the following changes:

a. Eliminate the language in (iii) stipulating that only instruction and supervision related to ADLs is covered;
b. Strike the word "frequent" from (ii); and
c. Clarify that the phrase "neurological and other" does not refer solely to neurological and mental disorders.

Thus, 38 C.F.R. §71.20(a)(3)(ii) and (iii) should read:

(3) The individual is in need of personal care services for a minimum of six continuous months based on any one of the following:

> (ii) The individual has a need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury, including but not limited to mental disorders, musculoskeletal conditions, and cardiovascular conditions.
>
> (iii) The individual requires regular or extensive instruction or supervision.[22]

These proposed changes promote clarity and consistency, as well as aligning the regulations with Congress's intent.

A. Adding the Word "Frequent" to the Eligibility Criteria in 38 C.F.R. §71.20(a)(3)(ii) Would Only Cause Confusion and Introduce Subjectivity.

The word "frequent," which did not appear in previous versions of this regulation,[23] is an unnecessary addition that will only make the PCAFC eligibility criteria even more subjective. In its NPRM, VA appears to agree: the agency itself acknowledged that the term "frequent" is virtually impossible to define in this context and solicited comments suggesting alternatives.[24]

NVLSP takes the position that VA should simply omit the word "frequent," rather than trying to find a replacement term. Even without the word "frequent," or anything in its place, the regulation would not allow a veteran to qualify for PCAFC based on a minimal need for supervision or protection. Rather, eligibility would be based on whether the veteran's need for

[22] We recommend that VA remove the term "typically" from this provision. We find it confusing and disagree with VA's contention that Congress did not intend the term "regular" to define the frequency with which instruction or supervision must take place. However, our strenuous objection to the term "typically" in the context of 38 C.F.R. §71.20(a)(3)(i) does not apply here, and our other concerns regarding 38 C.F.R. §71.20(a)(3)(iii) are much more salient.

[23] 76 F.R. 26148; 80 F.R. 1357.

[24] 89 F.R. 97404, 97421.

protection or supervision was significant enough to require a family caregiver. (see 38 C.F.R. §71.20(a)(3), stating that a veteran cannot qualify for PCAFC unless "the individual is in need of personal care services.") It is common for doctors and other VA personnel to make determinations about the type and level of care that an individual requires, and they can do so in this context as well. The use of vague terms like "frequent" only detracts from this analysis.

B. VA Should Clarify the Meaning of "Neurological or Other Impairment or Injury"

VA should also clarify what the phrase "neurological or other impairment or injury" means in the context of this provision. This term has never been defined in the regulations.[25] Historically, as well as in this NPRM, VA has suggested that the phrase includes neurological conditions and mental disorders but not other types of injuries and disabilities.[26] This would be an unreasonably narrow interpretation of the statutory language. If VA views mental disorders as a subset of neurological disorders, then this interpretation would not give effect to the unqualified words "and other" in the statute. Conversely, if VA views mental disorders as separate from neurological disorders, then it is unclear why mental disorders would be included but musculoskeletal disorders would not. To address this, VA should clarify that the phrase "neurological or other impairment or injury" covers a wide range of conditions.

C. VA Should Not Add an ADL Requirement to 38 C.F.R. §71.20(a)(3)(iii).

Adding an ADL requirement to 38 C.F.R. §71.20(a)(3)(iii) would undermine the overarching goals of the statute by disregarding the caregiving needs of veterans with mental disorders and cognitive limitations. We have heard from the veteran community that instruction on basic tasks like making coffee and doing laundry is vital for veterans who might otherwise become frustrated and start engaging in destructive behavior.[27] Non-ADL instruction also enables veterans with severe depression to engage in activities that maintain their sense of self, lowering the odds of self-destructive and even suicidal behaviors. Evaluators looking only at supervision and protection may not see this kind of caregiving or give it proper weight. VA should therefore recognize instruction broadly, not only as it relates to ADLs.

Additionally, caregivers often support veterans' mental health by instructing them on grounding exercises and healthy coping mechanisms in moments of escalation. For example, a veteran may have learned breathing exercises in therapy but forget how to do them in high-stress moments. In these situations, the caregiver might notice when they begin to become agitated and guide them through the exercises. It is unnecessarily confusing and circuitous to ask veterans,

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[25] VA has previously defined "need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury," 80 F.R. 1357, but not "neurological or other impairment or injury."

[26] 76 F.R. 26148, 26173; 89 F.R. 97404, 97416.

[27] Difficulty with multi-step tasks, reduced impulse control, and bouts of rage are all common symptoms of traumatic brain injury (TBI). *See Cognitive Problems after Traumatic Brain Injury*, **MSKTC**, *available at* https://msktc.org/tbi/factsheets/cognitive-problems-after-traumatic-brain-injury; Lucien Rochat et al., *How Inhibition Relates to Impulsivity After Moderate to Severe Traumatic Brain Injury*, 19 J Int Neuropsychol Soc. 890, (Sept. 2013) *available at* https://pubmed.ncbi.nlm.nih.gov/23816263/; Vani Rao et al., *Aggression After Traumatic Brain Injury: Prevalence and Correlates*, 21 **J NEUROPSYCHIATRY CLIN NEUROSCI** 420 (Fall 2009), *available at* https://psychiatryonline.org/doi/pdf/10.1176/jnp.2009.21.4.420.

caregivers, and evaluators to assess whether this role could be recast as "protection" or "supervision," when "instruction" is also in the text of the statute.

C. As in Veteran Warriors*, VA's Proposal Violates its Duty to Adhere to 38 U.S.C. §1720G.*

NVLSP urges VA to eliminate all restrictions on SPI eligibility that do not align with the statute, including the ones listed above. Previously, VA has interpreted the statute's SPI provisions in excessively narrow ways. In 2020, the agency added a "daily" requirement with no statutory basis and maintained that supervision and protection must be linked to personal safety. We challenged this interpretation, and the U.S. Court of Appeals for the Federal Circuit held in *Veteran Warriors* that VA must stop placing limits on SPI beyond what Congress intended. Now, VA seeks to add a frequency requirement to its SPI regulations and limit "instruction" to instruction on ADLs. Like the restrictions at issue in *Veteran Warriors*, these provisions contradict the statute. As the Court noted in *Veteran Warriors*, Congress's decision not to put a frequency term in 38 U.S.C. §1720G(a)(2)(C)(ii) must be read as deliberate.[28] And just as "nothing in that portion of the statute implicates personal safety,"[29] nothing in 38 U.S.C. § 1720G(a)(2)(C)(iii) suggests that the instruction received by a veteran must be related to ADLs.

IV. VA Should Clarify How Appellate Processes Integrate with Other PCAFC Procedures.

Drafted before the VA acknowledged that PCAFC applicants have a right to appeal adverse decisions to the Board, the current regulations do not provide clarity on the appellate process. We believe that VA should take this opportunity to lay out how PCAFC appeals work and clarify how the standard application and approval/designation timeline may differ in appellate cases.

A. VA Should Take this Opportunity to Address Basic Questions About PCAFC Appeals.

Almost one year after the Federal Circuit upheld the Court of Veterans Claims' holding in *Beaudette*, veterans, caregivers, and advocates remain uncertain of how PCAFC appeals work in practice. The information provided to veterans and caregivers in Form 10-305 has been a tremendous help, but questions remain. For example, the form does not shed much light on the clinical appeals process or explain how it is—or is not—integrated with the appellate options that veterans and caregivers can pursue pursuant to the Veterans Judicial Review Act (e.g. supplemental claims, higher level review, and appeals to the Board). This leaves questions such as:

a. If a veteran is denied PCAFC in May, then receives an adverse decision through the clinical appeals process in December, may they submit a request for higher-level review? And if so, does the one-year appeal period run from May or December?
b. Is the clinical appeals process for PCAFC cases identical to the clinical appeals process for other kinds of benefits administered by VHA? NVLSP has heard anecdotally that the process differs, but we would greatly appreciate clarity on this point.
c. If a veteran is admitted into PCAFC, but the caregiver's stipend amount is calculated incorrectly, what are the veteran's appeal options? Veterans have previously been

[28] 29 F.4th 1320, 1342.
[29] *Id*.

informed that they have the option of appealing erroneous stipend calculations through VHA, but it remains unclear how a clinical appeals process would function in this instance.

d. Relatedly, how might a veteran or caregiver appeal an incorrect application of 38 C.F.R. §71.40(d), the regulation governing PCAFC's effective date? Like the stipend amount, this does not seem to be an appropriate clinical determination.

Such questions should be addressed, not only in a directive or the language accompanying the final regulations, but in the text of the regulations themselves.

B. VA Should Amend 38 C.F.R. §71.25 to Eliminate Potential Roadblocks in Appellate Cases.

The current language of 38 C.F.R. §71.25 is not explicitly designed to accommodate the appeals process, and as a result, it does not account for common scenarios that arise in appellate cases. To ensure that veterans and caregivers do not encounter arbitrary obstacles as they pursue appeals, VA must adapt its current regulations with the appellate process in mind. For example, VA must ensure that caregivers can recover stipend payments retroactively in situations in which the veteran enters an institutional care setting or passes away during the pendency of the appeal. While NVLSP maintains that the current text of 38 C.F.R. §71.25 allows for these cases to move forward, the regulations' lack of clarity on this point has had disastrous consequences for veterans' families and is the subject of ongoing litigation.

Creating clarity on this issue will require the following changes to 38 C.F.R. §71.25:

a. Adding a provision stating that in cases remanded following an appellate process, the Secretary will waive the requirement in 38 CFR §71.25(f) that the veteran and caregiver must remain eligible for PCAFC through the date of approval and designation; and
b. Noting in 38 CFR §71.25(f) that the continued eligibility requirement is subject to this exception.

Additionally, to effect the same goal, VA must add language to 38 C.F.R. §71.25 clarifying that the Secretary may deviate from standard evaluation and approval/designation processes as necessary to accommodate appeals. If a veteran has passed away during the pendency of the appeal, carrying out the home visit and caregiver training called for in 38 C.F.R. §71.25 may not be feasible. To address this scenario, we propose that VA select from among the following options:

a. State that the Secretary has discretion to waive the home visit and caregiver training requirements in cases where applicants appeal and the case is remanded, but standard processes under 38 C.F.R. §71.25 are no longer appropriate or feasible;
b. Develop alternative processes to evaluate veteran and caregiver eligibility retroactively in the case that the home visit and/or caregiver training are no longer feasible or appropriate by the time the case is remanded; and/or
c. Create a process whereby VA could conduct a home visit and offer caregiver training shortly after the veteran and caregiver submit an appeal, while the veteran is still receiving care at home.

These changes are vital to effectuate the court's holding in *Beaudette*. In over two hundred cases to date, the Board of Veterans Appeals (BVA) has denied PCAFC appellants' claims simply because the veteran passed away during the pendency of the appeal.[30] In these cases, VA maintains that the current language of 38 C.F.R. §71.25 bars the caregiver's retroactive recovery of the stipend the because the veteran and caregiver must ordinarily remain eligible for PCAFC until final approval and designation take place. It also cites the home visit and training requirements in 38 C.F.R. §71.25 as grounds to dismiss these appeals. This cannot be the proper reading of 38 C.F.R. §71.25. The PCAFC application system cannot be designed so that if VA commits clear error, then delays adjudication of an appeal until after the veteran's death, it can escape all liability to the veteran and their family. Such a reading of the regulations would be inconsistent with the right to appeal enshrined in *Beaudette*. To eliminate all ambiguity on this point, VA must clarify in its new version of 38 C.F.R. §71.25 how the outlined procedures and requirements can be reconciled with a robust appellate process.

Part of PCAFC's core mission is to recognize the sacrifices of family caregivers and compensate them for their work. As it stands, however, family caregivers do not have a reliable way to secure their stipend retroactively in cases where their family receives a wrongful denial; if the veteran passes away during the appeal, or is forced during the appeals process to enter an institutional care setting, the current regulations do not provide a clear path forward. In such cases, the years a caregiver has devoted to a veteran's needs and the financial sacrifices made by the family could go entirely uncompensated. No matter what specific plan it settles on, VA must fix this problem to ensure that the contributions of family caregivers are consistently recognized.

V. VA Should Streamline the Process by Which Secondary Caregivers Become Primary.

We appreciate that VA has given some attention to the process by which a secondary caregiver may become a primary caregiver. VA's proposal in this area is an improvement over the status quo: it cuts down on unnecessary reevaluations and creates more clarity about the transition. However, we believe that it could still be improved. Specifically, we recommend that:

a. Upon revocation or discharge of the primary caregiver, the secondary caregiver (if there is one) automatically takes on primary caregiver status.
b. At the same time, the revocation or discharge of the primary caregiver initiates a re-assessment process designed to ensure that the secondary caregiver meets eligibility criteria and that the veteran consents. This process begins with outreach to the secondary caregiver and the veteran to ensure they both approve the change.
c. If veteran and caregiver do not complete the re-assessment process in a designated period, for reasons unrelated to VA error, then the benefit is terminated.

[30] On December 12, 2024, a search of Board of Veterans' Appeals decisions available on Lexis Nexis produced 202 results with one of the following sentences: "Due to the death of the Veteran, the appeal for eligibility for PCAFC benefits must be dismissed," "Due to the death of the Veteran, the appeal for PCAFC benefits must be dismissed," "Due to the death of the Veteran, final approval and designation for PCAFC benefits is unachievable," or "Due to the death of the Veteran, the Board must deny this appeal."

This proposal would allow for smoother transitions while still ensuring that veterans receive appropriate care. The revocation or discharge of a primary caregiver often comes during a period of crisis or dramatic change in a veteran's family, and PCAFC should not unduly contribute to this instability. NVLSP previously advised a veteran whose father was found unfit for the primary caregiver role after entering treatment for lung cancer. In other cases, a veteran's spouse may have to step down after experiencing a stroke or receiving an Alzheimer's diagnosis. These families may be scrambling to provide adequate care for the veteran and the former caregiver at the same time. Family members may be deciding whether to go on leave or quit their jobs. Meanwhile, rent or mortgage payments may be due. Preventing further disruption to the family in this kind of situation should be a priority.

We appreciate that VA currently requires veterans and secondary caregivers to re-apply for PCAFC in order to ensure that all program participants meet eligibility requirements.[31] VA also states that it seeks to ensure that the agency, the veteran and the new primary caregiver are all on the same page about the change.[32] Our proposal above achieves the same objectives, but places the onus on the VA rather than on the family. Checking in with the veteran and the new primary caregiver would be a critical first step in our proposed process. The evaluations conducted under our proposal could be largely identical to the ones in VA's proposed system, to ensure that all eligibility criteria are met. And because VA has already had a chance to vet the secondary caregiver, the odds of uncovering a major barrier to their eligibility are relatively low.

PCAFC's governing regulations should be designed so as to put the needs of veterans and their families first. Requiring veterans and secondary caregivers to undergo a second application process in what might be a particularly challenging time for their family runs contrary to that goal. Our proposal would allow VA to fix this problem while still incorporating safeguards to ensure that veterans receive a high standard of care.

VII. VA Should Enhance its Data-Gathering and Reporting Processes.

NVLSP is very grateful to the Caregiver Support Team (CSP) for working with advocates over the past several years to improve transparency within PCAFC. We particularly appreciate the monthly data briefings that CSP currently provides. These presentations give us invaluable insight into how the program is functioning.

However, we believe that more could be done through this regulatory process to enhance transparency. Specifically, we recommend the following:

a. Add a section to the PCAFC regulations detailing how VA will effectuate the reporting requirements in 38 U.S.C. §1720G(15); and
b. Include procedures and/or requirements for the gathering and reporting of demographic data, including data on age, gender, and race.

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[31] 89 F.R. 97404, 97421.
[32] *Id*.

There is evidence that racial discrimination has previously occurred within PCAFC, but transparency in this area has been severely lacking. A study commissioned by the agency and published in 2022 revealed statistically significant differences in program discharge by race in five out of eighteen VISNs in the period 2011-2016.[33] VA has not released the data used in this study, nor has it revealed which VISNs had markers of discrimination, and NVLSP is unaware of any follow-up studies. VA has made significant changes to the program since 2016, some of which may have reduced or eliminated racial disparities. However, a transparency problem remains. NVLSP and other advocates should have the opportunity to review demographic data, as this information allows us to better advocate for the communities we serve.

VIII. Additional Concerns and Recommended Changes

In addition to the changes recommended above, NVLSP believes that modifications to the proposed regulations may be necessary in the following areas.

A. Concerns Regarding Level 2 Criteria

NVLSP appreciates VA's removal of the phrase "unable to self-sustain in the community" from PCAFC's level 2 criteria. However, we believe that these additional changes to 38 CFR §71.40 would be beneficial:

a. Replacing "typically" with a more objective frequency standard, such as one based on a percentage or number of times per month;
b. Defining "substantially dependent" within the regulations;
c. Defining "continuous" within the regulations; and
d. Adding language clarifying that the phrase "neurological or other impairment or injury" does not refer solely to neurological and mental disorders.

These changes are consistent with the goals and principles expressed above. As in 38 C.F.R. §71.20, we believe that more objective frequency criteria would benefit the program. Defining key terms will promote transparency and consistent implementation. While somewhat helpful, including definitions in commentary and guidance documents is not as effective as defining them within the regulations themselves. For instance, we have found that evaluators sometimes misinterpret the term "continuous" in these regulations as meaning 24/7, when VA has stated explicitly in guidance materials that continuous and 24/7 are not synonymous in this context.[34] We hope that VA will take this opportunity to introduce more clarifying language into the text of the regulations.

B. Extension of Reassessment Period for Legacy Participants

We appreciate VA's recognition that the reassessment of legacy participants will take time. However, we remain concerned that the eighteen-month reassessment period stipulated in 38 C.F.R. §71.30 will not be sufficient. VA is experiencing severe staffing problems, and this

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[33] Courtney Harold Van Houtven et al., *Predictors of Discharge From the VA Caregiver Support Program*, 28 **AM J MANAG CARE** 289 (Aug. 2022), *available at* https://pmc.ncbi.nlm.nih.gov/articles/PMC10354705/.
[34] 89 F.R. 97404, 97432; 85 F.R. 46226, 46273.

may hamper its reassessment efforts.[35] We urge the agency to consider extending the reassessment period to twenty-four months or more.

C. Expansion of Telehealth Home Visit Option Based on Veteran's Needs

To the extent possible, the PCAFC application process should conform to the accessibility needs of the veteran. Thus, telehealth home visits should not only be available during natural disasters and periods of public health crisis. For example, severely immunocompromised veterans should be able to take advantage of the telehealth option. 38 C.F.R. §71.55 should include language stating that VA may conduct home visits via telehealth when necessary based on the veteran's health and disability profile.

VIII. Conclusion

PCAFC is a tremendous program that has transformed the lives of thousands of veterans and their families. We believe that the changes outlined above will help the program live up to its full potential.

NVLSP appreciates and welcomes the opportunity to provide these comments and respectfully asks that VA consider these comments and our recommended changes to the Proposed Rule. We share VA's commitment to serving the veteran community and look forward to working with the agency to improve PCAFC. If you have any questions regarding our comments, please contact Rebecca.Harris@nvlsp.org.

Sincerely,

Paul Wright
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National Veterans Legal Services Program
1100 Wilson Blvd. Suite 900
Arlington, VA 22209

[35] **OFFICE OF INSPECTOR GENERAL, OIG DETERMINATION OF VETERANS HEALTH ADMINISTRATION'S SEVERE OCCUPATIONAL STAFFING SHORTAGES FISCAL YEAR 2024** (August 2024), *available at* https://www.vaoig.gov/reports/national-healthcare-review/oig-determination-veterans-health-administrations-severe-0.