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Docket ID: DOD-2021-OS-0047

RIN: 0790-AL22

Ms. Beth George
Acting General Counsel
Department of Defense
1600 Defense Pentagon, Ste 3E788
Washington, DC 20301-1600

Submitted via regulations.gov

Dear Ms. George:

Thank you for your leadership in establishing a process for servicemembers to receive the compensation they deserve when they are the victims of medical malpractice. As a Member of Congress, I have heard from many servicemembers about the horrible medical malpractice they have suffered at military medical treatment facilities and the pain, and in some cases shortened life expectancy, they and their families are now forced to endure. That is why I introduced and fought for the legislation that this interim final rule will implement—Section 731 of the National Defense Authorization Act for Fiscal Year 2020. While I appreciate the work done to establish a fair process, the interim final rule falls short of Congressional intent in several respects. I urge the Department to re-examine components of this rule relating to the types of noneconomic damages that will be considered, the cap on noneconomic damages awards, processing timelines, and a more meaningful opportunity for claimants to get answers regarding their treatment and be heard when they appeal.

1. **The current scope of noneconomic damages should be expanded.** Our servicemembers should not be more restricted than civilian claimants in the dimensions of noneconomic damages available to them for the same medical malpractice. Section 45.10(b) limits the categories of noneconomic damages that will be considered for claimants under this provision to "past and future conscious pain and suffering by the claimant" and "physical disfigurement." While these concepts are defined so as to include dimensions such as emotional distress and loss of enjoyment of life, they do not cover the wider range of noneconomic categories recognized elsewhere in tort law or

within other military claims processes. In addition to the classes mentioned in this rule, civilian military medical malpractice claimants under the Military Claims Act Process are entitled to noneconomic damages for emotional distress (32 CFR 536.77(b)(3)(ii)) and loss of consortium (32 CFR 536.77(b)(3)(iv)).

2. **The limit on noneconomic damages should be increased significantly.** The authorizing statute requires the Secretary of Defense to develop standards generally consistent with a majority of states, including with regard to damages (10 USC 2733a(h)(B)(iv)). A slight majority of states impose some form of a limit on damages in medical malpractice cases; however, those that do not limit damages should not be treated as outliers to be discarded. It is further noteworthy that in some states where there is no longer a limit on damages, it is because courts have ruled the cap to be unconstitutional under the state's constitution (see, for example, *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010)). Rather than excluding such states from calculation, the Department should factor them in assuming the highest limit on noneconomic damages existing in any of the states where enforceable limits do exist. Including those states in this way would better capture their approach to damages than simply disregarding them. Further, some states have tiered damages caps that allow higher caps where there is severe injury or death. Because the Department is pursuing a single cap structure, it should consider the higher limit in a tiered system since the limit under this rule would apply in all claims. If the department follows this approach, I estimate that a limit on noneconomic damages of at least $800,000 would be more appropriate and better reflect both the language of the statute and the prevailing policy in the states. The Department should also factor in an inflation adjustment so that the real effect of the cap is not more severe over time. When the Department adopts a final rule, it should ensure that any increase to the cap on noneconomic damages applies retroactively to claims settled in the interim period and automatically reevaluate and, if necessary, compensate any claimants whose claims are adjudicated prior to the date upon which the final rule takes effect.

3. **The rule should adopt a processing timeline**. While I appreciate that each claim and claimant is different and certainly want nothing more that the careful consideration of all claims, the Department should adopt a processing timeline. Adopting a timeline would give claimants some sense of how long they will have to wait, helping to set clear expectations. Establishing a timeline will also give claims reviewers a valuable benchmark to gauge their progress and would be of use in prioritizing the collection of relevant information.

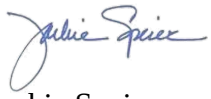
4. **The rule should provide claimants a structured process to obtain information regarding their medical care**. One thing that I have heard from constituents that have suffered medical malpractice is that they want answers about what happened in their care. Further, despite the increasing prevalence of electronic medical records, it is foreseeable that there are circumstances in which a claims examiner may want to ask questions of a provider or medical treatment facility in the course of reviewing a claim. Accordingly,

the rule should add a means by which the claimant may submit questions that they believe the claims examiner should ask, and to the extent possible, address in the explanation that is provided back to the claimant. Additionally, the Department should consider establishing a consistent, single point of contact at each military treatment facility to process treatment inquiries from both claims examiners and individuals who have filed or are considering filing a claim to better facilitate the claims process and meet the needs of claimants.

5. **Claimants should be able to request a live (in person or virtual) hearing before the appellate board**. One of the benefits of this process is for claimants to be able to express their feelings about what happened to them and share the pain it has caused them. Even the most eloquent writers can fail to capture their full experiences in the written word. For this reason, and especially because a significant part of the claim and recovery calculation is the claimant's pain and suffering, the process should include the right for claimants to request a hearing before the appellate panel if they disagree with the initial determination. This opportunity will provide claimants the actual opportunity to be heard, not just read, while not unduly burdening the initial stages of the process or when the claimant is otherwise satisfied with the disposition.

Thank you for considering my feedback as you work to finalize the regulation for this critical compensation process for servicemembers who have been harmed by medical errors and their families.

Sincerely,



Jackie Speier
Chair, Subcommittee on Military Personnel
House Armed Services Committee