**THE AMERICAN LEGION**

**DEPARTMENT OF CALIFORNIA**

**1601 7TH STREET, SANGER, CA 93657-2801**

**103 Annual Department Convention, Visalia, California**

**June 24-26, 2022**

**THIS FORM MUST BE FILLED OUT IN TRIPLICATE**

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Resolution No. 2022-029

Subject: Stayskal Act

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FEDERAL APPEAL IN THE STAYSKAL ACT

WHEREAS the SFC Richard Stayskal Military Medical Accountability Act of 2019 (H.R. 2422, S. 2451), was designed to allow active-duty members in the Armed Forces to file medical malpractice claims against the Department of Defense (DOD) for injuries and deaths caused by medical malpractice at DOD hospitals; and

WHEREAS the Bill was named after Sergeant First Class Richard Stayskal, who was suffering from terminal lung cancer because military doctors twice failed to inform him of his cancer. Stayskal was unable to file a lawsuit against the military due to a 70-year-old Supreme Court ruling called the Feres Doctrine.; and

WHEREAS the act authorized the DOD to promulgate rules for the implementation of the Stayskal Act; and

WHEREAS the act in its current form in certain sections of the rules promulgated by the DoD are in conflict with the stated intent of the Stayskal Act, refer to attached letter to Secretary Austin by the author of this resolution for clarification; and

WHEREAS the act provides little to no real avenue of appeal for the service members and their families; therefore be it

Whereas the rules promulgated by the DOD specify what claims are permitted under the act based on the DOD’s narrow definition of what constitutes a Military Treatment Facility to be any DoD medical center, inpatient hospital, or ambulatory care center. This narrow definition overlooks other areas where a service member may be treated by a military healthcare provider in a non-combat scenario such as during a training exercise or event in which a medical staff administers care to service members. All situations in which medical care is administered in a non-combat scenario should be considered under the act to ensure just compensation for those members who are subjected to medical malpractice while in service, to include US Military Treatment Facilities overseas in non-combat environments, and US Navy Vessels not directly involved in active military combat missions, and military correctional facilities housing US Service members. There are countless instances of medical malpractice that occur in non-combat situations where a DOD healthcare provider administers medical attention to a service member outside of a military treatment facility (MTF) as it is currently defined in the rule. The DOD needs to reconsider expanding the definition of a MTF to include all of these situations as to limit certain cases of medical malpractice would be unfair to the countless service men and women that have lost their life or been catastrophically injured due to malpractice that has occurred in non-combat situations outside of a MTF as it is currently defined.

RESOLVED, by Post No. 161, of The American Legion Department of California, in regular

meeting assembled in Antioch, CA on May 11, 2021, requests that The American Legion support

legislation that would allow an appeal process in accordance with Federal regulations which are consistent with other Federal processes including access to Federal Courts; and, be it finally

RESOLVED, that this Resolution shall be transmitted forthwith to The American Legion,

Department of California for consideration and adoption at the Annual Convention of the

American Legion Department of California, to be held June 24 - 26, 2021 in Visalia CA, and

thereafter upon passage submitted to the National Headquarters of The American Legion for

consideration by the appropriate Commission.

Author of Resolution

Manuel Vega, Post 731 Department of California

Autrey James Post 161 Department of California

This is to certify that the above resolution was adopted by Post 161

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Post Adjutant

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Date

This is to certify that the above resolution was adopted by Department Convention.

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Department Adjutant

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Department Commander

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Date

ATTACHMENT A

**The American Legion**

Department of California

1601 7th Street

Sanger, CA 93657

(559) 875-8387 - Fax (559) 272-5157

July 22, 2021

Lloyd J. Austin III

Secretary of Defense

U.S. Department of Defense

1000 Defense Pentagon

Washington, DC 20301

Secretary Austin,

I am writing to notify you of my concerns with the interim final rule for Section 731 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020 that the Department of Defense (DOD) published in the Federal Register on June 17, 2021.

My name is Autrey B James I proudly served in the United States Coast Guard and Coast Guard Reserve from 1990-2000.  Members of my family have proudly served in the United States Armed forces dating back to at least World War I.  I am currently serving as the State Commander of The American Legion in California and it is on behalf of the 80,000 plus members of the American Legion in California that I am writing you.

The DOD’s interim final rule does not give me hope that the DOD will handle medical malpractice claims in an honest, unbiased, and transparent manner that is consistent with what Congress intended in passing Section 731 of the NDAA for Fiscal Year 2020. It appears to me that the DOD created a system that is adversarial to a service member and or their families, and the rule language strongly suggests that the DOD does not intend to pay out many, if not any, claims under this process in good faith. As you are aware millions of men and women like you, and I have taken the oath in good faith and promised that we will honorably serve our country.  We understand that we may be required to lay down our lives in defense of this nation.  It is not too much to ask that in return the country treat veterans like you and I in good faith.  None of us should be subjected to medical malpractice but if we are we should or families should be compensated fairly for those non-combat related injuries.

For the reasons stated below, I am respectfully asking that you delay the effective date of this rule and make significant changes to the interim final rule that was published on June 17, 2021. The rule that the DOD put out goes beyond the authority that was given to the DOD by Congress in Section 731 of the NDAA for Fiscal Year 2020 and does not appear to align with what Congress intended to do by passing this provision of law. Below are some of the issues from each section of the regulation that we ask you reconsider:

**Section 45.1 Purpose**

By the DOD’s own admission, it states that the process in this interim final rule is supposed to provide *separate* compensation in cases of medical malpractice and that these claims will have no effect on any other compensation the member or family is entitled to under the comprehensive compensation systems applicable to all members. However, the DOD goes on to state that a potential malpractice award is going to be reduced or offset by the total value of the compensation the claimant is expected to receive under the comprehensive system, whether or not the claimant ultimately receives such compensation, and the ultimate amount of a settlement under this part will be the amount, if any, that a potential malpractice damage award determined under this part exceeds the value of all the compensation and benefits the claimant is otherwise expected to receive from DOD or the Department of Veterans Affairs (VA).

This was not something that was ever mentioned in the original language of Section 731 of the NDAA for Fiscal Year 2020 and the DOD was not authorized to change or affect any of a service member’s benefits that they receive under the already existing comprehensive system for military members.

**Section 45.2 Claims Payable and Not Payable in General**

This section states that the adjudication of claims under this authority is not an adversarial proceeding and there is no judicial review of any decision made by the DOD. To allow an agency like the DOD to make its own decisions on this process without any transparency to a claimant and then to restrict a claimant’s right to seek judicial review of the DOD’s decision to ensure it followed its own procedures is troublesome. Under the current set up, the DOD could presumably review a service member’s medical malpractice claim in a completely arbitrary and capricious manner, not following any of the steps outlined in the rule in making its decision, but a claimant would have no right to challenge that the DOD did not follow its own procedures under the law. To allow this section to go forward without any revisions would be contrary to law.

This section also states that when adjudicating claims, the DoD will make every effort to determine the applicable law adopted by the majority of States (at least 26 States). However, numerous sections of this rule do not follow what a majority of States use in the context of medical malpractice claims and processes for calculating damages.

This section also cites to certain exclusions that apply to claims under this new authority.  These exclusions include the discretionary function exception, which generally bars any claim challenging a discretionary agency policy. This includes a bar of any claim based upon an act or omission of a DOD health care provider, exercising due care, in the execution of a statute or regulation or based upon the exercise or performance of any discretionary function or duty on the part of DoD or a DoD health care provider.

This section also cites to a discretionary function exception and states that this applies to any DoD health care provider's act or omission that is a permissible exercise of discretion under the applicable statutes, regulations, or directive and, by its nature, is susceptible to policy analysis. The discretionary function exception applies to DoD policy decisions regarding clinical practice, patient triage, force health protection, medical readiness, health promotion, disease prevention, medical screening, health assessment, resource management, hiring and retaining employees, selection of contractors, military standards, fitness for duty, duty limitations, and health information management, among other matters affecting or involving the provision of health care services. Essentially it sounds like the DOD is creating exceptions that it can use to deny a claim if a healthcare provider makes a decision that the DOD classifies as “discretionary”. The DOD does not identify all applicable discretionary functions but notes that it does not matter if a healthcare provider makes a “discretionary” decision that was abuse of his or her discretion. Again, this creates a significant hurdle for any claims to be processed or adjudicated fairly under the current rule.

**Section 45.3 Authorized Claimants**

The DOD claims that the statute only authorizes claims by members of the uniformed services and thus, the regulation does not permit derivative claims or other claims from third parties alleging a separate injury because of harm to a member of the uniformed services. This completely overlooks claims for a service member’s spouse or children in the event of a service member’s death or permanent impairment as a result of medical malpractice. If the goal of Congress was to provide additional compensation to military members and their families that have suffered medical malpractice, then the DOD should permit consortium claims from spouses and children of service members.

This section also states that a claim may be filed by or on behalf of a reserve component member if the claim is in connection with personal injury or death occurring while the member was in a Federal duty status. 10 U.S.C. 2733a(i)(3). However, this section overlooks any claimants that may have been subjected to malpractice by a DOD healthcare official in the context of the Delayed Entry Program or while serving as a trainee.

**Section 45.4 Filing A Claim**

The DOD claims that it will conduct its own investigation on the basis of any claim filed. As part of the investigation and evaluation of a claim, DoD will access pertinent DoD or other available government information systems and records regarding the member in order to consider fully all facts relevant to the claim. This may include information in personnel records, medical records, the Defense Eligibility and Enrollment System (DEERS), reports of investigation, medical quality assurance records, and other information. However, the rule states that there is no discovery process for a claim and that Claimants are not entitled to attorney work product, attorney client privileged communications, materials that are medical quality assurance records protected under 10 U.S.C. 1102, pre-decisional material, or other privileged information. This is another substantial issue that requires correcting as the DOD is not going to be transparent with a claimant when it comes to how a claim was adjudicated and a claimant is going to be forced to accept that the DOD reviewed all applicable records but there is no mechanism to see if DOD actually reviewed what it should have or if the records they should be reviewing even existed at the time of adjudication.

**Section 45.5 Elements of a Payable Claim; Facilities and Providers**

This section states that the claimed act or omission constituting medical malpractice must have occurred in a DoD medical center, inpatient hospital, or ambulatory care center. This overlooks other areas where a service member may be treated by a military healthcare provider in a non-combat scenario such as during a training exercise or event in which a medical staff administers care to a service members. All situations in which medical care is administered in a non-combat scenario should be considered under this rule to ensure just compensation for those members who are subjected to medical malpractice while in service.

**Section 45.6 Element of Payable Claim: Negligent or Wrongful Act or Omission**

This section states that the DoD will consider medical quality assurance records relevant to the health care provided to the patient, but states that these records are required to be kept confidential. While such records may be used by DoD, any information contained in or derived from such records may not be disclosed to the claimant. Here there is no mechanism for a claimant to ensure that quality assurance records even exist for their case, even though the DOD is required to conduct quality assurance investigations on any incident that results in an “adverse event or outcome” for a patient.

There are serious issues with how the DOD conducts quality assurance in these types of cases, and the inability of a claimant to see any of those documents further draws into question whether the DOD will ensure the quality assurance process was done in accordance with law before reviewing or using the quality assurance materials in assessing claims.

**Section 45.7 Element of Payment Claim: Proximate Cause**

This section states for loss of chance or failure to diagnose claims, that a claimant must prove that the lost chance for a better outcome or the failure to diagnose a condition is attributable to the provider or providers. The claimant must prove a substantial loss as opposed to a theoretical or de minimis loss. The portion of harm attributable to the breach of duty will be the percentage of chance lost in proportion to the overall clinical outcome. Damages will be calculated based on this portion of harm. In this section the DOD does not specify how it will determine damages based on a loss of chance or failure to diagnose claim or what steps it will take to review a claimant’s claim in this context.

**Section 45.8 Calculation of Damages; Disability Rating**

This section states that the DoD will use the disability rating established in the DoD Disability Evaluation System under DoD Instruction 1332.18 or otherwise established by the Department of Veterans Affairs (VA) to assess the extent of the harm alleged to have been caused by medical malpractice. However, DOD Instruction 1332.18 is used to determine fitness for duty as well as determining return to duty, separation, or retirement of Service members because of disability in accordance with Title 10, United States Code (Reference (c)). Nothing in this DOD Instruction states that these ratings are done in a manner to assess medical malpractice damages.

Separately, the rule states that a Veterans Affairs Schedule for Rating Disability (VASRD) based disability percentage represents the Government's estimate of the lost earning capacity attributable to an illness or injury incurred during military service and will be considered by the DOD for assessing damages of the medical malpractice claim.

Nothing in the original statute gives the DOD authority to use the ratings established for an entirely different Disability Evaluation System for the purposes of assessing damages of medical malpractice claims filed under this section. The DOD is attempting to state that a VASRD rating given to a service member as part of the Disability Evaluation System is equivalent to assessing the damages someone has as a result of medical malpractice. This appears to be another section in which the DOD is overreaching or going outside of the intent of Congress.

**Section 45.9 Calculation of Damages: Economic Damages**

This section seeks to limit economic damages in these personal injury claims to past expenses, including medical, hospital and related expenses actually incurred, and future medical expenses. The DOD states this also covers lost earnings, loss of earning capacity, and compensation paid to a person for essential household services and activities of daily living that the member can no longer provide for himself or herself. However, in assessing each of these economic damages, the DOD makes it clear that it will not be including any health care service provided or paid for by the DOD or VA, or any future medical expenses paid for by TRICARE.

Again, nothing in the original statute states that the DOD has the authority to offset payments of these claims or that Congress intended to limit any economic damages incurred by a claimant, including past and future medical expense. Nothing in the original statutes references or authorizes the DOD to utilize any payment or expense made by the VA to offset the DOD’s cost of a claim, but the DOD has overreached to write in these specifics of how it will assess a claim. The failure to recognize and quantify the medical expenses of a claimant because they may have insurance or ability to have coverage through the VA benefits system, is not mentioned or considered in the original statute.

This type of structure also goes against the collateral source rule, which states that a defendant is still liable for the full extent of damages, even if an individual is reimbursed. The DOD does not reference if this portion of the rule is something that comes from a majority of states or if it is consistent with how a majority of states assess medical malpractice damages.

**Section 45.10 Calculation of Damages: Non-Economic Damages**

This section states that elements of non-economic damages in medical malpractice cases are limited to past and future conscious pain and suffering, physical disfigurement, and loss of enjoyment of life. However, the rule states that consistent with the rule of law in a majority of States, total non-economic damages may not exceed a cap amount. The DOD states that they based this on the current average cap amount in those States, and that the total cap amount for all non-economic damages arising from the malpractice is set at $500,000. This is blatantly false as the DOD is attempting to state that 26 states have non-economic caps of $500,000 but simple research from each state would show that this is false. This also goes against the plain language of the statute which states the DOD will use and develop a system that is consistent with a majority of states. However, what is laid out in this section conflicts with the statute.

**Section 45.11 Calculation of Damages: Offsets for DOD and VA Compensation**

This section provides that in the calculation of damages there is a deduction for compensation paid or expected to be paid by DoD or VA to the service member for the same harm that is caused by the medical malpractice. The DOD states that its reasoning for this is that tort damage awards against the U.S. are generally offset by other compensation paid by the U.S. for the same harm that is the subject of a malpractice claim so that the U.S. does not pay more than once for the injury. This section lists categories of compensation that are included as offsets to potential malpractice damages awards when that compensation relates to harm caused by the act or omission involved, including: Pay and allowances while a member remains on active duty or in an active status; disability retired pay; disability severance pay; incapacitation pay; involuntary and voluntary separation pays and incentives; death gratuity; housing allowance continuation; Survivor Benefit Plan; VA disability compensation; VA Dependency and Indemnity Compensation; Special Survivor Indemnity Allowance; Special Compensation for Assistance with Activities of Daily Living; Program of Comprehensive Assistance for Family Caregivers; and the Fry Scholarship. Also included is an offset of the value of TRICARE coverage, including TRICARE-for-Life for a disability retiree, family, or survivors.

However, this entire section appears to be outside of the authority that Congress gave to the DOD in the original statute. Nothing in the statute language permits the DOD or authorized the DOD to limit a payment to a service member for medical malpractice based on any payment they receive in another benefits system that is not administered by the DOD. Nor does the DOD acknowledge that the payments received by a service member or family from the VA for service-connected disability claims are provided under an entirely different set of statutes and regulations or that these payments are not made to compensate for damage from medical malpractice.

This a serious issue that requires the DOD to reconsider how they intend on offsetting claims under this section. Specifically, the DOD was supposed to create a system to compensate claimant’s beyond that of what already exists for them as a military member, but what is outlined in this section could actually limit a service member from getting the benefits they would be entitled to under some of the comprehensive compensation programs that exist, such as the VA benefits system.

If Congress intended to limit or offset these types of claims, it would have been referenced in the language of the statute. However, here the DOD has gone beyond the authority that it has been given to influence and use payments made by the VA to alter or affect a claimant’s damages under this statute.

**Section 45.12 Initial and Final Determinations**

This section seeks to describe how the DOD will make initial and final determinations of claims. The DOD alleges that it will endeavor to provide a brief explanation of the basis for an Initial Determination to the extent practicable. However, as required by 10 U.S.C. 1102, medical quality assurance records may not be disclosed to anyone outside DoD, to include the claimant, other Federal agencies, or the judiciary.

This prohibition applies to any information derived from a peer review obtained under DoD's Clinical Quality Management (CQM) Program to assess the quality of medical care provided by a DoD health care provider. The issue here is that again the DOD does not appear to want to be transparent in how it reaches its initial determination for a claim. If a claimant wishes to know or understand what the DOD used to make its determination the Claimant has no ability to see or even know what was reviewed.

**Section 45.13 Appeals**

While this section states that a claimant may request reconsideration of the damages contained in an Initial Determination, this section also requires that a claimant explain why he or she disagrees with the Initial Determination but states they may not submit additional information in support of the claim unless requested to do so by DoD.

The lack of any ability to provide additional evidence for consideration of an appeal, coupled with the lack of transparency from the DOD on how it reaches a decision, greatly detriments a claimant’s opportunity to get a fair assessment of his or her claim at the initial determination level or at the appeal level of this process. There is also no transparency on who is going to sit on the Appeal Board, and whether they are medical experts, legal experts, or Commanding Officials that will fully consider the record in an unbiased manner. This is further complicated by the fact that DOD states an appeal decision is final and not reviewable by any court to ensure the DOD followed its own rules in assessing a claim.

**Section 45.14 Final and Conclusive Resolution**

In this section the DOD states that the statute does not give Federal courts jurisdiction over claims and that settlement of a claim under this part is final and conclusive. The issue with not permitting any judicial review of these claims is that the DOD can presumably be completely arbitrary in how it decides a claim, but a claimant would have no recourse, even if he or she could show the DOD failed to decide their claim in accordance with law.

Furthermore, under the current language of the rule, the DOD would be permitted to make unconstitutional decisions in the context of these claims and then argue a claimant would not have a right for review by a court due to the language it included in this section. This is an egregious overstepping by the DOD and not something that was contemplated in the original language of the statute.

**Section 45.15 Other Claims Procedures and Administrative Matters**

Under this section, the DOD states that not later than 30 calendar days after a determination of medical malpractice or the payment of a claim, a report is sent to the Director, Defense Health Agency to be used for all necessary and appropriate purposes, including medical quality assurance. This means that DoD Final Determinations made under this new claim system—even if, due to offsets for compensation under the comprehensive system discussed above, no money is paid—will be reviewed under the Military Health System Clinical Quality Management Program, in accordance with DoD Instruction 6025.13 and Defense Health Agency Procedural Manual 6025.13.

The quality assurance steps that the DOD outlines in this section are all steps that the DOD should have been doing with its providers for years regardless of the passage of this rule. However, the fact that the DOD is now acknowledging that it will monitor the quality of health care in MTFs, identify opportunities for improvement, and maintain appropriate accountability for health care providers appears to signal that the DOD has not been abiding by the requirements that already existed prior to this statute passing, as it applies to quality assurance. This further draws into question how the DOD is going to use quality assurance records in its consideration of these claims if there is reason to believe the quality assurance records are incomplete or not done in accordance with law.

In sum, this entire rule appears to place injured service members and the families of those that have died because of medical malpractice in a far worse situation than they were prior to the passage of Section 731 of the NDAA for Fiscal Year 2020. Therefore, for the reasons stated above, we again are respectfully requesting that you delay processing any claims under this interim final rule and make the necessary changes to the process outlined in this rule so that service members and their families can have their claims processed in an honest, unbiased, and transparent manner that is consistent with what Congress intended in passing Section 731 of the NDAA for Fiscal Year 2020.

Respectfully,

Autrey B James Jr.

Department Commander,

The American Legion,

Department of California

ATTACHMENT B