

VA Compensation & Pension (C&P) Exams in the Age of Contractors

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Outline

- Background on VA Contract Exams
- Disability Exam and Claim Process
- **Quick Overview** of Statutes, Regulations, Caselaw, and Manual
- Current Issues:
 - o Bad Exam Requests
 - o Bad Exams
 - o What to do after a bad exam?
 - o Unnecessary Exams
 - o Issues with VA examiners
 - o Failure to follow Exam Requests
- Potential Solutions
 - o Challenging the Exam
 - o Steering the Exam
 - o Independent Medical Opinion?
 - o Challenging the Examiner
 - o Post Exam AAR/Questionnaire
- C&P Examiner Not Reviewing the Entire Claims File?

Why are we talking about this?

- Bottom Line: The importance of the VA Compensation & Pension Exam (C&P) cannot be overstated.
- Bad Exams account for many bad outcomes.
- At the VA Regional Office level, the VA puts more weight on VA examinations than Independent Medical Opinions
- Ineffective Quality Control: C&P Exams and VA Regional Office Rating Decisions
- VBA has effectively outsourced the evaluation and determination process to contract examiners

Disclaimers

- Presentation is based on my observations and discussions with others, including other agents, attorneys, DROs, etc. Also based on VA IG reports.
- Often, the “law” does not really matter at the VA Regional Office level– it’s all about the VA Adjudication Procedures Manual (M21) and work credit for completing a tasks.
- PACT Act hiring push has produced a lot of undertrained individuals who do not have experience and have little guidance, mentoring, or a quality control feedback loop.
- VA Raters are on a production standard and have very little time to read all the information in a VA claims file, think critically, and issue a well developed rating decision.
- Impact of recent personnel cuts and contract reviews?????????

VA CONTRACT EXAMS

-VBA'S Medical Disability Examination Office (MDEO) manages the contract medical disability exam program and does quality review to determine whether vendors comply with contract requirements.

-As of July 2024, 93% of all C&P exams were performed by Contractors.*

-As of 08 June 2022 (Pre-PACT Act), VBA had 14 contracts with three vendors:**

- OptumServe Health Services / Logistics Health Inc. (LHI) / UnitedHealth Group
- Leidos QTC Management Inc (QTC)
- Veterans Evaluation Services Inc. (VES) / Maximus

* In June 2022 a 4th exam vendor (Loyal Source Government Services (LSGS)), contracted with the VA and started exams in December 2022.

-VA spent \$6.8 billion on contract exams from Fiscal Year 2017 through 2022 (pre-PACT Act);

-VA spent \$10.4 billion on contract exams since 2017.

-Each exam can cost between \$116 and \$765 depending on type of exam.

***Source:** Congressional Research Service, *Veteran Disability C&P Exams*, 30 October 2024.

****Source:** *VA Office of Inspector General, Office of Audit and Evaluations, VBA, "Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions," Report #21-01237-127, June 8, 2022*

VA CONTRACT EXAMS

-From January 1st through December 31, 2022, MDEO reported that most disability exams were completed by three vendors, who performed 88% of total exams. As of July 2024, 93% of all C&P exams were performed by Contractors.*

-VBA renewed 18 firm fix-price contracts for three exam vendors over a 10-year period from 2018 to 2028.

-Contract exam workloads are divided into 4 geographic regions in the U.S., as well as those conducted internationally and on military bases.

-Vendors are responsible for scheduling, conducting, and documenting exams at non-VA facilities.

-Contract allows the vendors to subcontract with medical examiners to perform exams.

-As of July 2023, VA had obligated \$10 billion on all exam contracts since 2017.

-VA OIG identified one or more ADA and OSHA deficiencies at 114 of the 135 exam facilities the OIG review team visited nationwide.

Source: VA Office of Inspector General, Office of Audit and Evaluations, VBA, “Better Oversight Needed of Accessibility, Safety, and Cleanliness at Contract Facilities Offering VA Disability Exams,” Report #23-01059-72, May 8, 2024

VA CONTRACT EXAMS

-MDEO completed 12,152 quality reviews of vendor exams

- Total number of exams with errors to be 2,700 (22%)
- Of these, 2,000 had the potential to affect claims decisions (16%)
- Of these 2,000, 690 had errors were not corrected before claims processors decided the claims. (5.6%)
- Based on these numbers and results, VA OIG estimated that errors were not corrected for 35% of potentially insufficient exams before claims processors decided these claims.

-MDEO did not share routine errors with Regional Office

-Even though vendors did not meet the 92% contract quality requirement, MDEO did not use the monetary incentives/disincentives part of the contract. Despite not meeting the requirement, vendors were paid.

-The contracts did not require the vendors to correct individual errors identified by MDEO. Since vendors were not required to fix errors that MDEO identified, claims processors were receiving and basing decisions on potentially inaccurate exams. Consequently, Veterans may have received inaccurate decisions and received the benefits they were entitled.

Source: VA Office of Inspector General, Office of Audit and Evaluations, VBA, "Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions," Report #21-01237-127, June 8, 2022

VA CONTRACT EXAMS

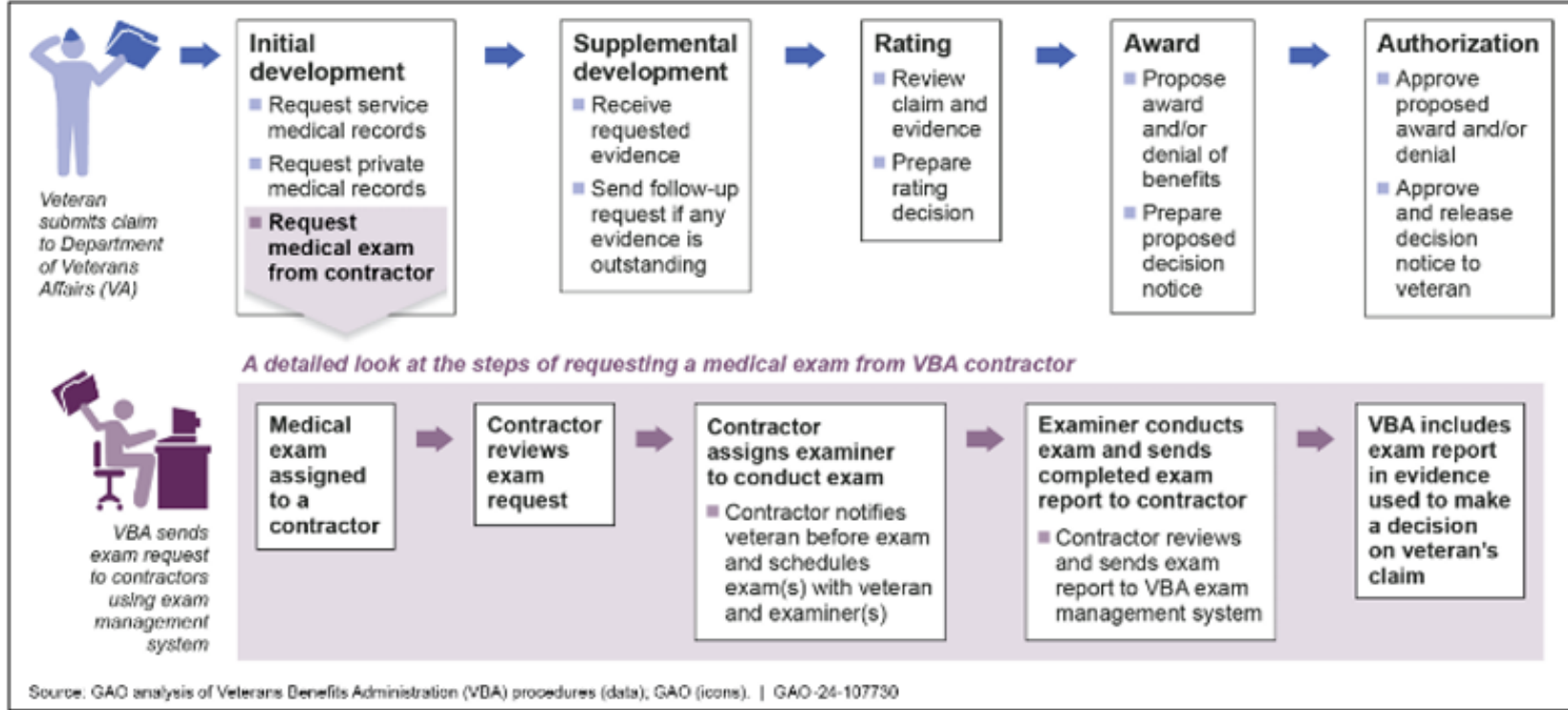
-VA OIG found errors identified by MDEO were not shared with claims processors before or after they made their decisions.

-VA OIG found VBA's contract medical disability exam program was deficient because it did not hold vendors accountable for correcting errors and improving exam accuracy.

-VBA relies on claims processors to review the Veteran's entire record and determine whether exams provide adequate support for deciding claims, but if claims processors do not know about errors in exams, they may issue decisions based partly on insufficient information.

Source: VA Office of Inspector General, Office of Audit and Evaluations, VBA, "Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions," Report #21-01237-127, June 8, 2022

Figure I. Overview of VBA’s Disability Claims Process and Contractor Process for Completing Exams

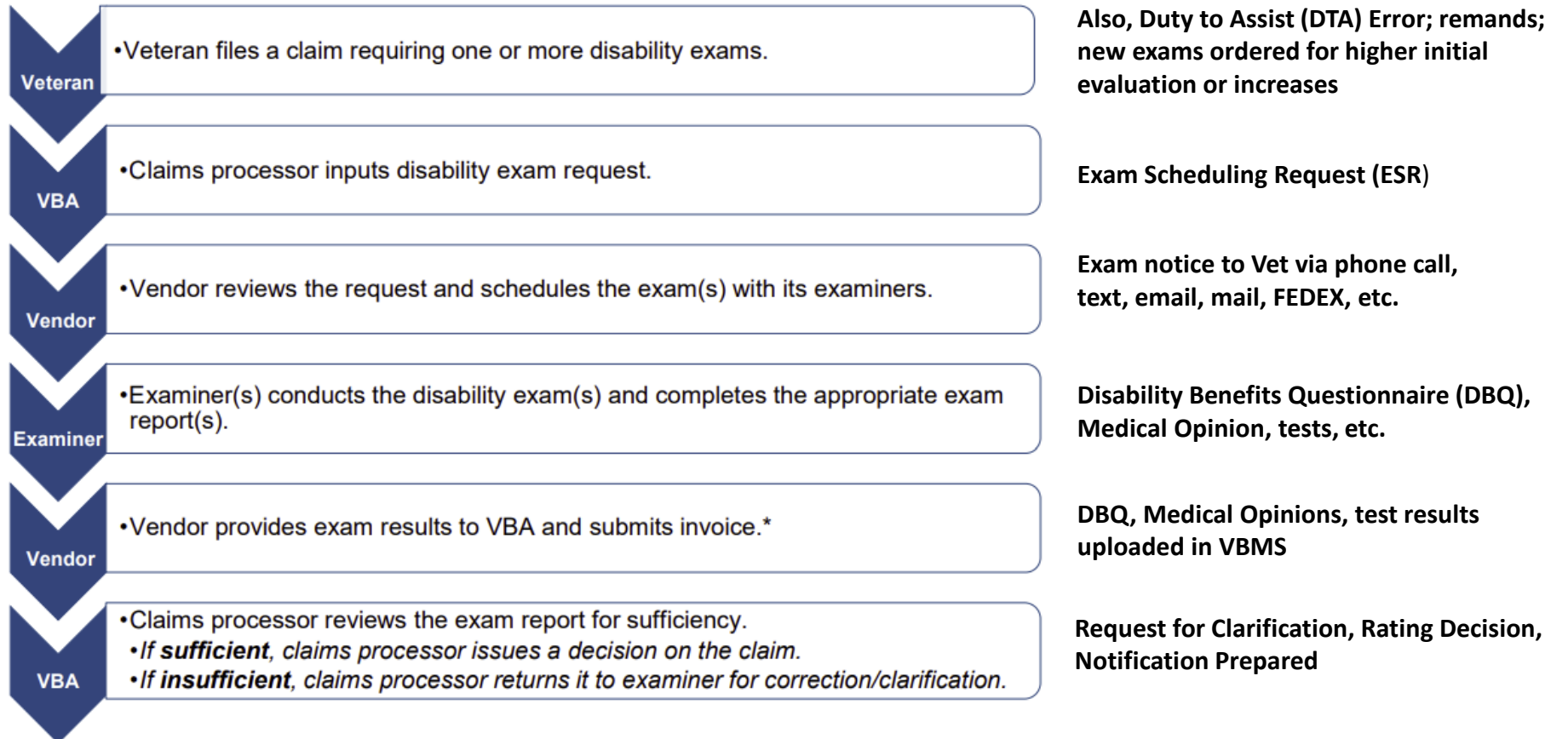


Source: Government Accountability Office, *VA Disability Exams: Improvements Needed to Strengthen Oversight of Contractors’ Corrective Actions*, GAO-24-107730, September 18, 2024, <https://www.gao.gov/assets/gao-24-107730.pdf>.

Notes: The figure represents the general process but does not include every step. See source report for limitations.

Disability Exam and Claims Processes

The process starts with the veteran filing a claim (figure 3). VBA claims processors then request an exam, if needed, and the request is routed to a Veterans Health Administration medical facility or to one of the three vendors, depending on availability and the veteran's home address. The vendor schedules the exam with one of its examiners and provides completed exam reports to VBA. VBA claims processors then make the decision on the veteran's claim. MDEO quality reviews can be conducted at any time after the vendor provides the exam results to VBA and submits an invoice.



Quick Overview of Applicable Statutes, Regs, Caselaw, and M21-1

Slides 11-22: We are not going to cover each of these in detail during the class, but we wanted to provide some the applicable statutes, regulations, caselaw, and sections of the M21-1 regarding VA exams.

- Duty to Assist
- What is an adequate exam?
- Lay Statements
- Other Common Errors
- Competent Examiners/Examinations

Duty to Assist

- **38 USC 5103A & 38 CFR 3.159**

- VA must make “reasonable efforts” to assist a claimant in substantiating the claim.
- VA “shall” provide a medical examination or opinion when it is “necessary” to make a decision on a claim.
 - “Necessary” = Competent evidence that a current condition is related to service, but insufficient medical evidence to make a decision.
 - *See also McClendon v. Nicholson*, 20 Vet. App. 79 (2006)

- **Adequate Exams**

- 38 CFR 4.1: Exam must be “adequate” for rating purposes.
 - “Adequate” = “Fully Informed” = Prior medical history + Examinations + Description of the disability
 - *See also Barr v. Nicholson*, 21 Vet. App. 303 (2007)

VA's Statutory Duty to Assist

- **38 USC 5103A**

- **(a) Duty To Assist.**-(1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.
- **(d) Medical Examinations for Compensation Claims.**-(1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim.
 - (2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)-
 - (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and
 - (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, air, or space service; but
 - (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

VA's Regulatory Duty to Assist

- **38 CFR 3.159(c)(4)**
 - (4) *Providing medical examinations or obtaining medical opinions.*
 - (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:
 - (A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;
 - (B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §§ 3.309, 3.313, 3.316, 3.317, and 3.320 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and
 - (C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

VA's Regulatory Duty to Assist

- **38 CFR 4.1**

- [...] For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition. Over a period of many years, a veteran's disability claim may require reratings in accordance with changes in laws, medical knowledge and his or her physical or mental condition. It is thus essential, both in the examination and in the evaluation of disability, that each disability be viewed in relation to its history.

What is Adequate?

➤ ***Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008)**

“It is the factually accurate, fully articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion.”

➤ ***Stefl v. Nicholson*, 21 Vet. App. 120 (2007)**

“A medical opinion provided by the VA as part of the duty to assist is adequate where it is based upon consideration of the veteran’s prior medical history and examinations and also describes the disability, if any, in sufficient detail so that the evaluation of the claimed disability by the BVA will be fully informed one.”

➤ ***Jones v. Shinseki*, 23 Vet. App. 382 (2010)**

The VA must ensure that any medical opinion, including one that states no conclusion can be reached without resorting to speculation, is “based on sufficient facts or data.”

What is Adequate?

Consider Lay Statements

➤ ***Kowalski v. Nicholson*, 19 Vet. App. 171 (2005)**

“[...] the BVA may not disregard a medical opinion solely on the rationale that the medical opinion was based on a history given by the veteran.”

➤ ***Miller v. Wilkie*, 32 Vet. App. 249 (2020)**

We read Barr and McKinney to say that an examiner must address the veteran’s relevant statements and, if the examiner fails to address the veteran’s reports of his or her medical history and the Board is silent about the credibility of the veteran’s lay statements, the Court will order a new examination absent an indication that the Board did not reach credibility. This means that when we review a Board decision reliant on a medical opinion that does not address the veteran’s own reports of symptoms, we will order a new examination if the Board never impugned the veteran’s credibility.

- ***See also Barr v. Nicholson*, 21 Vet. App. 303 (2007)**
- ***See also McKinney v. McDonald*, 28 Vet. App. 15 (2016)**

What is Adequate?

Other Common Errors

- **The Inaccurate or Non-Medical Fact**
Sizemore v. Principi, 18 Vet. App. 264 (2004)
- **The Improperly High Evidentiary Standard**
Wise v. Shinseki, 26 Vet. App. 517 (2014)
- **The Inconclusive/Irrational Opinion**
Jones v. Shinseki, 23 Vet. App. 382 (2010), Guerrieri v. Brown, 4 Vet. App. 467 (1993), Stefl v. Nicholson, 21 Vet. App. 120 (2007), etc.

Competent Examiner

➤ **38 CFR 3.159(a)(1) Competent Medical Evidence**

Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

➤ ***Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008)**

“The probative value of medical opinion evidence is based on [...] the physician’s knowledge and skill in analyzing the data [...]”

➤ ***Francway v. Wilkie*, 930 F.3d 1377 (2019)**

Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in reviewing the opinions of VA medical examiners. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1290-91 (Fed. Cir. 2009). [...] The presumption of competency requires nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raise the issue.

M21-1

M21-1, IV.i.3.A. - General Criteria for Sufficiency of Examination Reports

This topic contains information about reviewing examination reports, including

- who must sign examination reports
 - examiner qualifications and signature requirements
 - TeleCompensation and Pension (Tele-C&P) and telemental health examinations
 - review of disability benefits questionnaires (DBQs)
 - assessing sufficiency of DBQs completed by non-Department of Veterans Affairs (VA) providers
 - authenticity of DBQs
 - potential indicators of DBQ inauthenticity
 - DBQs completed by Veterans who are physicians/health care providers
 - qualification requirements of examiners –
 - psychological examinations
 - traumatic brain injury (TBI) examinations, and
 - hearing loss and tinnitus
 - requirements for
 - examination reports, and
 - acceptable clinical evidence (ACE) examination reports
 - evaluating disability diagnoses
 - questions about competency and/or validity of examinations
 - handling unusual cases
 - accepting a fee-based examiner's report, and
 - examiner statements that an opinion would be speculative
- Change Date: June 24, 2024

M21-1

M21-1, IV.i.3.A.1.o.: Questions About Competency and/or Validity of Examinations

- Duly consider concerns raised by the claimant or recognized representative about a completed examination or opinion. Communications raising concerns may take the form of (but are not necessarily limited to)

- complaints about the examiner
- requests for information about the examiner's qualifications
- assertions that records or other relevant information or evidence was not considered, and/or
- requests for another examination or opinion.

-The mere fact that such a communication is received does *not* mean that the examination is insufficient or in need of clarification, or that there is a further duty to assist to obtain records or another examination. However, consideration must be given to whether one or more of those remedies is appropriate.

- A table in this section of the M21-1 provides guidance on interpreting communications from claimants or a representative raising concerns about examinations and what action to take, as applicable.

M21-1

M21-1, IV.i.3.A.1.e.: Assessing Sufficiency of DBQs Completed by Non-VA Providers

If the evidentiary record contains a privately completed DBQ, generally, claims processors must:

- assess the authenticity of the information reported, as described in [M21-1, Part IV, Subpart i, 3.A.1.f](#) and [g](#), bearing in mind that it should generally be accepted at face value *unless there is reason to doubt or question it*
- evaluate it under the evidentiary principles discussed in [M21-1, Part V, Subpart ii, 1.A](#), and
- determine if a VA examination is still warranted in accordance with
 - [M21-1, Part IV, Subpart i, 3.A.1.d](#)
 - [M21-1, Part IV, Subpart i, 2.A.3.b](#), and
 - [M21-1, Part IV, Subpart i, 1.B](#).

Use the table provided to determine what action must be taken after receiving a DBQ that has been

- completed by a private, non-VA provider, and
- deemed insufficient for rating purposes for the reasons described in the table.

A Few Hallmarks of a Bad Exam

- Obvious failure to review service treatment records, medical records and claims file.
- Failure to take range of motion (ROM) measurements and did not use goniometer.
- Failure to account for flare-ups and provide ROM measurements for flare-ups.
- Failure to consider lay statement and lay evidence.
- Mental Health: failure to consider all symptoms.
- “Some other post service injury” - Yes, examiners will blame it on a phantom post-service injury that is not mentioned in the records.
- “Absence of Evidence”
 - o "The absence of evidence on a particular question cannot be construed as substantive negative evidence against a claimant unless there is a foundation in the record that demonstrates that such silence has a tendency to prove or disprove a relevant fact." (M21-1 V.ii.1.A.2.g) If a negative opinion is provided, the examiner must specifically address why the Veteran's lay statements regarding the history of his current disability are not considered credible or competent in this case. (M21- V.ii.1.A.2.b-c; 38 CFR 3.159)

A Few Hallmarks of a Bad Exam

- Incorrect Legal Standard for secondary conditions

- See *Spicer v. McDonough*, 61 F.4th 1360 (Fed. Cir. 2023) (invalidating the requirement of "proximate cause" and instead held a "but for" causation or aggravation is enough to show entitlement to secondary service connection). ***A service-connected disability need only be a contributing cause, not the contributing cause, to establish secondary service connection.***

- "Chronicity of Care":

- Continuing symptoms, not treatment, must be the focus of the evidentiary analysis. *Wilson v. Derwinski*, 2 Vet.App. 16, 19 (1991). Chronicity of care is not required, but symptoms, not treatment, are the essence of continuity of symptomology. *Savage v. Gober*, 10 Vet. App. 488, 496 (1997).

- In order for a medical opinion rationale to be acceptable, it must cite any general medical principles used to support the opinion, identify pertinent medical evidence and case-specific information relied on to support the opinion, and demonstrate how the opinion was formulated. A rationale for a medical opinion should include supportive argument for any opinions rendered or conclusions reached with an analysis that can be considered when weighing contradictory or conflicting opinions. The rationale should provide clear conclusions based upon supporting data and analysis including a reasoned medical explanation connecting the two. (M21-1 V.ii.1.A.3.g)

What to do after a Bad Exam?

-Why was it bad?

- Failure to consider lay statements?
- Failure to use appropriate standards for service connection?
- Failure to consider crucial fact or medical evidence?
- Poor/illogical rationale?

-Do you want to add evidence to correct/illuminate the issue?

-Did the veteran report a bad experience at the exam?

-Call the exam inadequate & support your position with relevant case law or regulation.

-Anticipate new exams: The cure for a bad exam might be a new exam.

What to do after a Bad Exam?

-Immediately After the Exam

- Review the Exam Report (Disability Benefits Questionnaire (DBQ)) in VBMS
- Submit a request for a new examination in writing
 - Goal: Attempt to have a new exam issued prior to the Rating Decision

-After the Rating Decision Issued

- Consider Higher Level Review v. Supplemental Claim Appeal v. Board of Veterans Appeal
 - Identify Goals: New exam? Decision based on existing evidence?

Unnecessary Exam Requests

The Law - Exams are authorized when medical evidence accompanying the claim is not adequate for rating purposes. 38 CFR 3.326

The Reality –

- Raters will develop ratings by looking at which blocks are checked on DBQs, not by thorough reviews of the records.
- It's easier and Raters seem to get more work credit for ordering exams than they do for actually doing a deep dive into the record.
- Tie-Breaker Exams following an Independent Medical Opinion.

Unnecessary Exam Requests

-Do I have to go to the VA ordered Compensation & Pension (C&P) exam?

- Example: In conjunction with a Supplement Claim, a private medical opinion is submitted. Then VA ordered an exam. We are worried about a negative exam and another turn on the hamster wheel.
- Must the veteran attend the C&P exam?
 - Does the medical opinion contain everything necessary to adjudicate *and rate* the claim?
 - Risk in requesting that VA adjudicate based on evidence of record?
 - High likelihood the VA will deny the claim and state in the Rating Decision that the Veteran was a “no show.”
 - Options after a bad opinion...
 - Higher-Level Review v. Supplemental Claim Appeal v. Board of Veterans Appeal?

Non-Sensical Exam Requests

Toxic Exposure Risk Activities (TERA):

- For example: is the right shoulder related to toxic exposure? (even when there is a significant right shoulder injury in the service treatment records (STRs))
- VA doesn't know where to start in a lot of cases.
 - Follow the exam request to the DBQ/Medical opinion.

VHA DIRECTIVE 1046, November 28, 2023, COMPENSATION AND PENSION DISABILITY EXAMINATIONS

-Combines Veterans Health Administration (VHA) Directive 1046, Compensation and Pension Disability Examinations and VHA Directive 1603, Training and Certification of VHA Examiners Completing VA Compensation and Pension (C&P) Disability Examinations and rescinds VHA Directive 1603, Training and Certification of VHA Examiners Completing VA C&P Disability Examinations

VHA Examiners are responsible for:

- (1) Completing all designated training courses for certification (see paragraph 3).
- (2) Registering in the DMA Registration and Certification C&P Database
- (3) Performing only VA C&P disability examinations for examination types in which they are certified.
NOTE: After a VHA examiner has completed the designated training courses for the exam types they are assigned to complete and registered in the DMA Registration and Certification C&P Database, they are considered certified.
- (4) Conducting all VA C&P disability examinations in accordance with the format on DBQs or other approved examination templates and applicable VHA and VBA policies and procedures.

VHA DIRECTIVE 1046, November 28, 2023, COMPENSATION AND PENSION DISABILITY EXAMINATIONS

TRAINING. The following TMS training courses are required for all VHA examiners prior to conducting general VA C&P disability examinations.

- (1) DMA General Certification Overview (VA 5496).
- (2) DMA Military Sexual Trauma and the Disability Examination Process (VA 131006357).
- (3) DMA Medical Opinions (VA 131006360)
- (4) DMA Gulf War Medical Examination (VA 131006368).
- (5) PACT Act: Key Terms & Medical Opinions Interactive (VA 131007583).

b. In addition to the mandatory courses for general C&P certification, the following TMS training is required for VHA examiners prior to conducting the following specialized examinations:

- (1) DMA Mental Health Examinations (VA 131001287) (e.g., mental disorders, posttraumatic stress disorder).
- (2) DMA Musculoskeletal Exam (VA 131001199).
- (3) DMA Traumatic Brain Injury (TBI) Examination (VA 9238)

****Can look up the training of a VA employed examiner on the MDEO Clinician Look-up on the VA intranet, but not a Contract Examiner.***

Examples of Issues with VA Examiners

-See **prior VHA Directive 1603, dated 15 November 2016**, which was in effect at the time of the XXXX C&P exam, clinicians performing any type of VA examinations must successfully complete several training modules.

These trainings include the (1) General Certification Overview Course; (2) Medical Opinions; and (3) Aggravation Opinions.

There is also specific specialty examination noted that require training for that specialty, such as for (1) Joint, Feet, and Spine examination; (2) Mental disorders examination; (3) PTSD examinations; and (4) TBI examinations.

In addition to the above training modules, ***ALL*** clinicians performing VA disability examinations (including VA employees, Fee-For-Service providers, and contractors) will complete the VHA designated ***mandatory training for Military Sexual Trauma (MST)*** and the disability examination process.

The C&P examiner's record indicates that she had never completed the required VHA designated mandatory training for Military Sexual Trauma (MST) and the disability examination process prior to her examination of the Veteran.

Examples of Issues with VA Examiners:

Lookup examiners licensing credential on the state board of nursing, medical examiners, etc. Some contractors may list the training on the notice of the C&P appointment to the Veteran

Some examples we found:

-NP S.D. was disciplined by the Texas Board of Nursing on 26 October 2023. She was found to have engaged in ***conduct that was deceptive and she created an inaccurate medical record, which was a Disability Benefits Questionnaire (DBQ)***. Pursuant to the signed order, NP S.D. was not allowed to practice nursing in the State of Texas until she completed required remedial training.

-The ***Texas State Board of Medical Examiners issued an order that found that Dr. B failed to document physical examinations, patient histories to support a diagnosis***, failed to practice medicine in an acceptable professional manner, and committed unprofessional or dishonorable conduct likely to deceive or defraud the public. The order included a Public Reprimand of Dr. B, he was assessed a \$25,000 administrative penalty, required the surrender of his authority to prescribe medication, he was prohibited from treating patients with chronic pain, and he was required to attend additional education.

Examples of Issues with VA Examiners:

-The **C&P exams and opinions were inadequate because the examiner had not completed the required VA training.** According to records from the VA Office of Disability and Medical Assessment (DMA), Dr. P registered for the required C&P Clinician Course entitled, “*PACT Act: Key Terms & Medical Opinions*” on 04 January 23, but she did not complete the course until 21 June 2023, which was over two months after she performed PACT Act Toxic Exposure Exams listed above. **However, VHA directives requires that C&P Examiners complete the course “PACT Act: Key Terms & Medical Opinions” before conducting toxic exposure exams. Dr. P was not certified or qualified to perform the toxic exposure exams on 04 April 2023.**

-The VA examination was performed by PA KH on 17 May 2018. **The Texas Medical Board Healthcare Provider Profile that indicates that VA examiner’s Texas medical license was cancelled on 02 March 2012. The VA examiner was not properly licensed to perform the VA exams. The VA Clinician database indicates the VA examiner was deactivated from the system.**

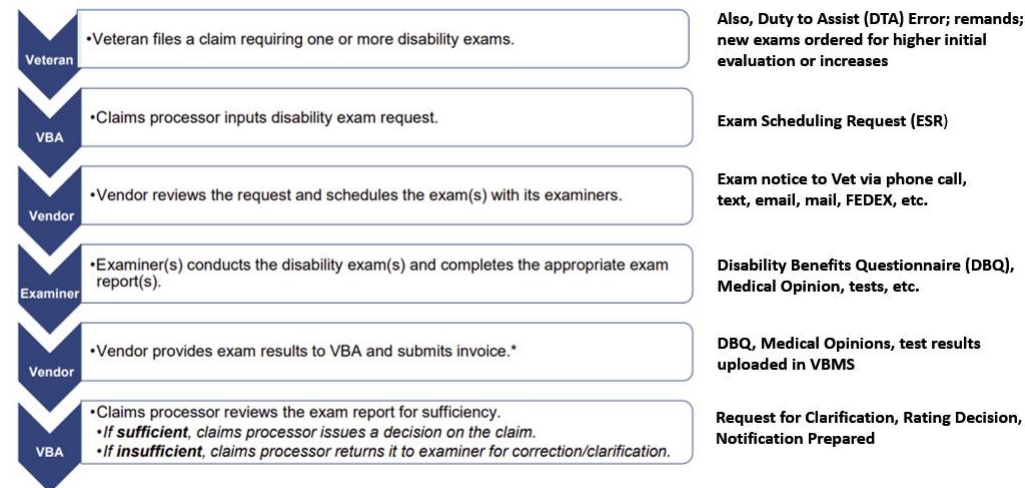
-The VA contract examiner, Dr. AB, performed the most recent VA contract examination and provided a VA medical opinion on 25 May 2021. He **performed the VA exam at XXXX, in Euless, Texas.** However, the VA examiner is not licensed to practice medicine in the State of Texas. **The DBQ and a credential search indicated the examiner was licensed in Wisconsin. According to the Texas Medical Board, Dr. AB’s license in Texas was cancelled for nonrenewal.** It appears that Dr. AB may have been licensed in Wisconsin, but the VA examination did not take place in Wisconsin.

Did the C&P Exam Deliver What was Requested?

-If remand, did the Exam Scheduling Request (ESR) follow the instructions in the remand? Did it ask for the correct type of medical opinion?

-If for a new claim or following a rating decision, Duty to Assist (DTA) error, HLR return, claim for higher initial evaluation, claim for increase, etc., did the ESR ask for the right type of medical opinion?

-After the exam, look at the DBQ and Medical Opinion. Did it follow the instructions in the ESR? Did it provide the correct type of medical opinion?



Challenge the Exam

- Request examiner's CV. *Francway v. Wilkie*, 930 F.3d 1377 (Fed. Cir. 2019).
- Challenge the examiners competency, training, and credibility.
- M21-1.IV.i.3.A – General Criteria for Sufficiency of Exam
- Is there a discussion of lay evidence?
- Did examiner consider all the relevant medical evidence?
- If medical opinion cites lack of continuity of care, raise continuity of symptoms and examiner applied the wrong standard.

BYO Evidence

- Have your clients fill out questionnaires/worksheets/diaries that answer the rating criteria, such as:
 - - Headache Diary (migrainebuddy.com)
 - - Pain journal/symptom Journal
 - - Statement in Support of Claim / Lay Statement
 - - Talk with relatives about the Veteran's mental health, and have them identify symptoms outlined in the rating criteria.
 - - Develop Statements in Support of Claim / Lay Statements / "Buddy Statements"
- Pro Tip – put them on a ESRA VA Form 21-4138.
- Post-exam AAR/Questionnaire for the Veteran.
 - - How did the exam go?
 - - If it was an exam that involved Range of Motion (ROM) testing, did they even use a goniometer?
 - - Did they discuss symptom severity?
 - - Did they ask or properly notate flare-ups?

Possible Solution: Nexus Letter / Independent Medical Opinion (IMO)

When to use:

- Complicated medical condition.
- You're going to the Board (BVA) – don't get a remand, you've waited long enough.
- You've tried and the VA can't seem to order a proper exam.

Considerations –

Build up the evidence in the file as best you can.

- Do you have sufficient evidence to support it?
- Experts like to see a statement from the Veteran; develop one before getting the IMO.
- You might have to go to the Board because VA ignores rules on IMOs or gets a “tie breaker”.
- Not all IMOs are created alike.
- Costs? Who pays (Attorney or Veteran?)

Solution – IMO/Nexus Cont'd

How to use:

- - If the VA orders a new exam despite the nexus, have the Veteran hand-carry a copy of the nexus into the exam; hopefully it's persuasive.
- Use the M21-1. See:
 - - IV.i.3.A.1.e. Assessing Sufficiency of DBQs Completed by Non-VA Providers
- Expect to go to the Board.

What are VA Contract C&P Examiners Reviewing?



Exam Scheduling Request

RECEIVED

[Redacted]

USA

[Redacted]

File Number: [Redacted]
DOB: September [Redacted]
Gender: Male
Exam Jurisdiction RO: 349
Sensitivity Level: 0

AUG 25 2023

PRINTED FROM VBMS
Criss & Rousseau Law Firm
100 W. CENTEX Expwy, Suite 302
Harker Heights, Texas 76548

POA/VSO: BKT - RICHARD W ROUSSEAU
Richard W Rousseau
Criss & Rousseau Law Firm LLP
100 W. Central TX Expressway, STE 302
Harker Heights, TX 76548
USA

Table with 4 columns: Branch(es) of Service, Entry on Duty, Release Active Duty, Era(s) of Service. Row 1: Navy, Oct 15, 1968, Oct 13, 1972, Vietnam Era

042 HLR DTA Error - Rating Date of Claim: 08/24/2023

Post-Discharge Claim
Payee Number: 00 Remand: NO

Veteran Priority Issues:
• Financial Hardship

PTSD
Classification: Post Traumatic Stress Disorder (PTSD) Combat - Mental Disorders
Type: SUP

Remand Specialist Requested: NO

Is there a gender preference for the examiner? NO

Standard Language Output Text:
A request is made to review a previous decision concerning the following contention: PTSD.

The Veteran needs to report for all examinations for the following Contention:

- PTSD

ACE process must not be used to complete the DBQ(s).

For this Contention, VBMS expects a results package to at minimum include data pertaining to the following DBQ(s):

- DBQ PSYCH PTSD Review

If more than one mental disorder is diagnosed please comment on their relationship to one another and, if possible, please state which symptoms are attributed to each disorder.

chronic obstructive pulmonary disease (COPD)
Classification: Respiratory
Type: SUP

Remand Specialist Requested: NO

Is there a gender preference for the examiner? NO

Standard Language Output Text:
TYPE OF MEDICAL OPINION REQUESTED: Toxic Exposure Risk Activities. Does the Veteran have a diagnosis of (a) chronic obstructive pulmonary disease (COPD) that is at least as likely as not (likelihood is at least approximately balanced or nearly equal, if not higher) caused by (the) Vietnam service/ herbicide exposure after considering the total potential exposure through all applicable military deployments of the Veteran and the synergistic combined effect of all toxic exposure risk activities of the Veteran? Rationale must be provided in the appropriate section. Please review the Veterans electronic folder(s) and state that it was reviewed in your report.

Clinician: If using the ACE process to complete the Medical Examination, please explain the basis for the decision not to examine the Veteran, and identify the specific materials reviewed to complete the Medical Examination.

The Veteran does not need to report for all examinations for the following Contention:

- chronic obstructive pulmonary disease (COPD)

Please review the Veteran's electronic folder(s) and state that it was reviewed in your report.
Your review is not limited to the evidence identified on this request form, or tabbed in the claims folder. If an examination or additional testing is required, obtain them prior to rendering your opinion.
POTENTIALLY RELEVANT EVIDENCE: Please enter all tab descriptions of evidence, locations, and dates.
NOTE: Your (examiner) review of the record is NOT restricted to the evidence listed below. This list is provided in an effort to assist the examiner in locating potentially relevant evidence.
Tab AA: Tera Memo
Tab BB: Personnel records- RVN service
For this Contention, VBMS expects a results package to at minimum include data pertaining to the following DBQ(s):
• DBQ Medical Opinion

Created By: vbaseabizetr
Exam Request Destination: QTC
ESR Submission Date: 09/01/2023 04:02:16 PM EDT



Respiratory Conditions (Other Than Tuberculosis and Sleep Apnea) Disability Benefits Questionnaire

FIRST NAME, LAST NAME, MIDDLE NAME (SUFFIX): [REDACTED]	SOCIAL SECURITY NUMBER/FILE NUMBER: [REDACTED]	TODAY'S DATE: 01/04/2023
HOME ADDRESS: [REDACTED]	EXAMINING LOCATION AND ADDRESS: VES	

CONTRACTOR: VES	VES NUMBER: 22622978696	VA CLAIM NUMBER:
--------------------	----------------------------	------------------

IMPORTANT - THE DEPARTMENT OF VETERANS AFFAIRS (VA) **WILL NOT PAY OR REIMBURSE** ANY EXPENSES OR COST INCURRED IN THE PROCESS OF COMPLETING AND/OR SUBMITTING THIS FORM. PLEASE READ THE PRIVACY ACT AND RESPONDENT BURDEN INFORMATION BEFORE COMPLETING FORM.

NOTE TO PHYSICIAN - Your patient is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the Veteran's claim.

Is this questionnaire being completed in conjunction with a VA21-2507, C&P examination request?
 Yes No

How was the examination completed? (check all that apply)

In-person examination
 Records reviewed
 Examination via approved video telehealth
 Other, please specify in comments box:
 Comments:
 ACE

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 Harter Heights, Texas 76548

ACCEPTABLE CLINICAL EVIDENCE (ACE)

INDICATE METHOD USED TO OBTAIN MEDICAL INFORMATION TO COMPLETE THIS DOCUMENT:

Review of available records (without in-person or video telehealth examination) using the Acceptable Clinical Evidence (ACE) process because the existing medical evidence provided sufficient information on which to prepare the questionnaire and such an examination will likely provide no additional relevant evidence.

Review of available records in conjunction with an interview with the Veteran (without in-person or telehealth examination) using the ACE process because the existing medical evidence supplemented with a telephone interview provided sufficient information on which to prepare the questionnaire and such an examination would likely provide no additional relevant evidence.

EVIDENCE REVIEW

Evidence reviewed (check all that apply):

Not requested No records were reviewed

VA claims file (hard copy paper C-file)

VA e-folder (VBMS or Virtual VA)

CPRS

Other (please identify other evidence reviewed):

Evidence comments:
 All available records were reviewed and findings considered when completing this DBQ.
 e-file

SECTION I - DIAGNOSIS

1A. Does the Veteran now have or has he or she ever been diagnosed with a respiratory condition? (This is the condition the Veteran is claiming or for which an exam has been requested.)
 Yes No

(If "Yes," complete Item 1B)

1B. Select the Veteran's condition (Check all that apply):

<input checked="" type="checkbox"/> Asthma	ICD code: J45	Date of diagnosis: 1989
<input type="checkbox"/> Emphysema	ICD code: _____	Date of diagnosis: _____
<input type="checkbox"/> Chronic obstructive pulmonary disease (COPD)	ICD code: _____	Date of diagnosis: _____
<input type="checkbox"/> Chronic bronchitis	ICD code: _____	Date of diagnosis: _____
<input type="checkbox"/> Constrictive bronchiolitis	ICD code: _____	Date of diagnosis: _____
<input type="checkbox"/> Interstitial lung disease	ICD code: _____	Date of diagnosis: _____

(If checked, specify): _____

NOTE - Interstitial lung diseases include but are not limited to asbestosis, diffuse interstitial fibrosis, interstitial pneumonitis, fibrosing alveolitis, desquamative interstitial pneumonitis, pulmonary alveolar proteinosis, eosinophilic granuloma of lung, drug-induced pulmonary pneumonitis and fibrosis, radiation-induced pulmonary pneumonitis and fibrosis, hypersensitivity pneumonitis (extrinsic allergic alveolitis) and pneumoconiosis such as silicosis, anthracosis, etc.

Restrictive lung disease ICD code: _____ Date of diagnosis: _____
 (If checked, specify): _____

NOTE - Restrictive lung diseases include but are not limited to diaphragm paralysis or paresis, spinal cord injury with respiratory insufficiency, kyphoscoliosis, pectus excavatum, pectus carinatum, traumatic chest wall defect, pneumothorax, hernia, etc., post-surgical residual (lobectomy, pneumonectomy, etc.), chronic pleural effusion or fibrosis.

Mycotic lung disease ICD code: _____ Date of diagnosis: _____
 (If checked, specify): _____

NOTE - Mycotic lung diseases include but are not limited to histoplasmosis, blastomycosis, cryptococcosis, aspergillosis, or mucormycosis.

Sarcoidosis ICD code: _____ Date of diagnosis: _____
 Benign or malignant neoplasm or metastases of respiratory system ICD code: _____ Date of diagnosis: _____
 (If checked, specify): _____

Pulmonary vascular disease (Including pulmonary thromboembolism) ICD code: _____ Date of diagnosis: _____
 (If checked, specify): _____

Pleurisy with empyema, with or without pleurocutaneous fistula ICD code: _____ Date of diagnosis: _____
 Unresolved Resolved

Other diagnosis:
 (If checked, specify): _____
 ICD code: _____
 Date of diagnosis: _____

C&P Examiner Not Reviewing the Entire Claims File?

Scenario:

Veteran and representative submitted/uploaded several medical/scientific studies linking OSA to asthma on a secondary basis. VA examiner stated in opinion that there was no literature that connected the two conditions. Representative requested MDEO to investigate and take action.

MDEO responded:

“When requesting and examination, the Regional Office (RO) determines what available information is relevant to the exam and specifies that information in the exam request. Only the information specified by the RO is provided to the examiner for review as part of the examination. Due to privacy issues, the examiner is not granted access to the Veteran’s entire claims file.”

Issue: Is the VA examiner only looking at the items that are “tabbed” in VBMS and listed as “tabbed” in the ESR?

C&P Examiner Not Reviewing the Entire Claims File due to “Bookmarking” or Tabbing?

-Maximus, a company that contracts for VES advertised jobs for “bookmarkers.”

-Advertisement said, *“Bookmarkers have the responsibility of going through and entire medical record and determining what is pertinent to the case using the tools at their disposal and best judgment.”*

Translation: Someone who is not the VA examiner but works for the contractor is deciding what should be viewed by the examiner.



Maximus

Medical File Clerk - Veterans Services

📍 Houston, TX

🏠 Full Time

💰 Paid

[Similar Jobs >](#)

Responsibilities

Medical Record Bookmarkers supporting the Veterans Evaluation Services (VES) administered by Maximus, make an impact everyday by facilitating providers' review of the veteran's medical records by providing the pertinent information that is being requested. Bookmarkers have the responsibility of going through an entire medical record and determining what is pertinent to the case using the tools at their disposal and best judgment. CANDIDATES MUST POSSESS THE DESIRE TO ASSIST OUR WOUNDED VETERANS AND SERVICE MEMBERS WITH A CARING, POSITIVE, AND PATRIOTIC ATTITUDE. To prepare you for this role, the VES provides paid, comprehensive training which ensures all new employees provide the highest levels of knowledge and professionalism.

This position is temporarily remote due to Covid-19, however, YOU MUST BE ABLE AND WILLING TO WORK ON SITE IN OUR HOUSTON, TX location when needs arise.

JOB DESCRIPTION SUMMARY

Facilitating providers' review of the veteran's medical records by providing the pertinent information that is being requested. Go through an entire medical record and determine what is pertinent to the case using the tools at disposal and best judgment. We also rush through any cases that need to be pushed.

JOB SUMMARY

Essential Duties and Responsibilities:

- Separate all pertinent information from the Veteran's medical record;
- Successfully research and document medical conditions;
- Communicate with VBMS for CAPRI checks if needed;
- Make sure the case is complete before the scheduled exam;
- Maintain the correct status in OMS for each case;
- Researching both common and uncommon medical conditions.

Additional Duties and Responsibilities:

- Break down and scan physical c- files if needed;
- Train for both scanning and bookmarking when needed;



Maximus

Medical File Clerk - Veterans Services

Houston, TX

Full Time

EDUCATION AND EXPERIENCE REQUIREMENTS

PRIMARY RESPONSIBILITIES:

- Separate all pertinent information from the Veteran's medical record
- Successfully research and document medical conditions
- Communicate with VBMS for CAPRI checks if needed
- Make sure the case is complete before the scheduled exam
- Maintain the correct status in OMS for each case
- Research both common and uncommon medical conditions

ADDITIONAL DUTIES AND RESPONSIBILITIES

- Break down and scan physical c-files if needed
- Train for both scanning and bookmarking when needed
- Occasional special projects from other departments
- Strive to achieve quota on a daily basis
- Ensure compliance with HIPAA
- Attend periodic meetings
- Overtime available with overflow of cases

REQUIREMENTS

- High School diploma or GED equivalent required; some College preferred
- Basic computer skills
- Proficiency with Microsoft and Adobe programs
- Functional knowledge of medical terminology

C&P Examiner Not Reviewing the Entire Claims File?

- Does the contract examiner only have access to “tabbed” items listed in the ESR? If so, did the contract examiner check the DBQ that the entire claims file was reviewed as part of the exam/medical opinion?
- Does the contract examiner have access to the entire claims and does he/she review the entire claims file as indicated in the DBQ?
 - Some Veteran’s are being told to bring or upload key documents like sleep studies for sleep apnea. Why? If the contractor examiner has access to claims file the Veteran should not have to bring or upload anything to the contractor portal?
- Is the contractor (Optum/LHI, QTC, VES, LSGS) pairing down or limiting what evidence from the claims files the contract examiner can see and review?
- NOTE: Some contractors are having the Veteran complete “worksheets” prior to exams but then the contractor does not upload the worksheets to the Veteran’s claims file.

C&P Examiner Not Reviewing the Entire Claims File?

Issues:

- VA ESR tells examiner to review entire claims file. Are they?
- Some items are tabbed in VBMS and listed on ESR. Is the VA examiner only reviewing the tabbed items? Does the VA examiner only have access to the tabbed items and not the entire claims file?
- Has the contractor “bookmarked” items for the VA examiner to review....and do they only have access to review those items bookmarked? What can the examiner actual see and review?
- Contract examiner completes DBQ and indicates entire eFolder was reviewed. False statement?
- Food for Thought: VA pays contractor for completed exam and based on invoice (contract claim). Has the VA examiner made a false statement that entire claims file was reviewed and has the contractor submitted a false claim? False Claims Act violation?
 - o -If the Veteran received an inadequate exam that resulted in an improper denial or lower evaluation, is this a violation of the False Claims Act?



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Rick Rousseau

July 27, 2016

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[RICK.ROUSSEAU@CRISSEAU.COM](mailto:rick.rousseau@crissrousseau.com)
254-699-9999***

BACK UP SLIDES

Example of VA examiner not following Remand Instruction & ESR

BVA Decision:

Specifically, in the December 2023 hearing, the Veteran attested that as an aircrew member and aviation machinist mate mechanic he was exposed to **ultraviolet radiation**, herbicide agents, asbestos, radiation, firefighting foam, and occupational hazardous materials such as solvents, fuels, and chemicals. He claims that due to these exposures he has squamous cell carcinoma in-situ.

Remand:

The examiner is asked to opine as to whether it is at least as likely as not that his skin disability is etiologically related to service, to include as a result of his exposure to herbicide agents, asbestos, **ultraviolet radiation**, firefighting foam, radiation, and occupational hazardous materials such as solvents, fuels, and chemicals. ***The examiner should consider and address the medical literatures associated with the file that shows that pilots, flight attendants, and aircrew are at a higher risk for skin cancer, and that exposure to herbicide agents may have a higher risk for certain type of skin cancer. See February 2024 Correspondence documents.***

Example of VA examiner not following Remand Instruction & ESR

(ESR) issued 29 March 24

“Does the Veteran have a diagnosis of (a) squamous cell carcinoma in-situ (Bowen's disease), claimed as skin cancer that is at least as likely as not (likelihood is at least approximately balanced or nearly equal, if not higher) caused by (the) exposure to herbicide agents, asbestos, **ultraviolet radiation**, firefighting foam, radiation, and occupational hazardous materials such as solvents, fuels, and chemicals after considering the total potential exposure through all applicable military deployments of the Veteran and the synergistic combined effect of all toxic exposure risk activities of the Veteran? ***The examiner should consider and address the medical literatures associated with the file that shows that pilots, flight attendants, and aircrew are at a higher risk for skin cancer, and that exposure to herbicide agents may have a higher risk for certain type of skin cancer. See February 2024 Correspondence documents.***

Exam performed 18 April 24 & Medical Opinion issued 02 May 24 by NP

“Does the Veteran have a diagnosis of (a) squamous cell carcinoma in-situ (Bowen's disease), claimed as skin cancer that is at least as likely as not (likelihood is at least approximately balanced or nearly equal, if not higher) caused by (the) exposure to herbicide agents, asbestos, **ultraviolet radiation**, firefighting foam, radiation, and occupational hazardous materials such as solvents, fuels, and chemicals after considering the total potential exposure through all applicable military...

The claimed condition was less likely than not (likelihood is less than approximately balanced or nearly equal) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the veteran and the synergistic, combined effect of all toxic exposure risk activities of the veteran.

Unable to find any current medical literature that shows a causative link between Toxic exposure in service and Squamous Cell Carcinoma. This type of cancer is usually related to UV exposure or weakened immune system. Unable to for a nexus.

Example of VA examiner not following Remand Instruction & ESR

ESR issued 10 May 24.

Please follow 3/26/24 Remand. The examiner is asked to opine as to whether it is at least as likely as not that his skin disability is etiologically related to service, to include a result of his exposure to herbicide agents, asbestos, ***ultraviolet radiation***, firefighting foam, radiation, and occupational hazardous materials such as solvents, fuels, and chemicals. ***The examiner should consider and address the medical literatures associated with the file that shows that pilots, flight attendants, and aircrew are at a higher risk for skin cancer, and that exposure to agents may have a higher risk for certain type of skin cancer. See February 2024 Correspondence document.***

Two Medical Opinions issued 06 June 24 by NP

Veteran has claimed bowman disease as being directly related to military service. Based on review of the available evidence, it is less likely than not that the claimed condition is due to service as there is a lack of substantiating evidence supporting a nexus between the current diagnosis of bowman disease and military service. ***Unable to find any current medical literature that shows a causative link between Toxic exposure in service and Squamous Cell Carcinoma/ Bowman disease. This type of cancer is usually related to UV exposure or weakened immune system. A nexus is not warranted.***

RD issued 10 June 24 with notice sent 17 June 24.

“VA Medical Opinion found no link between your diagnosed medical condition and military service.”