Changing the Game: VA Examinations

Trainee Handout

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Objectives

* Identify when to request VA examinations and medical opinions
* Understand the requirements under 38 C.F.R. 3.326
* Develop an “exam by exception” mentality without compromising our duty to assist, where appropriate

# References

All M21-1 references are found in the [Live Manual Website](https://vaww.compensation.pension.km.va.gov/).

* [*Public Law 106-475,* Veterans Claims Assistance Act of 2000](https://www.gpo.gov/fdsys/pkg/PLAW-106publ475/pdf/PLAW-106publ475.pdf)
* [*Public Law 112-154,* Section 505,Duty to assist claimants in obtaining private records](https://www.gpo.gov/fdsys/pkg/PLAW-112publ154/pdf/PLAW-112publ154.pdf)
* [38 U.S.C. 5103, Notice to claimants of required information and evidence](https://www.law.cornell.edu/uscode/text/38/5103)
* [38 C.F.R. 3.159, Department of Veterans Affairs assistance in developing claims](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1159)
* [38 C.F.R. 3.303(b), Chronicity and continuity](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1304)
* [38 C.F.R. 3.304, Direct service connection: wartime and peacetime](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38" \l "se38.1.3_1304)
* [38 C.F.R. 3.326, Examinations](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=39c7e367a71c8efc570650851b266303&rgn=div5&view=text&node=38:1.0.1.1.4&idno=38#se38.1.3_1304)
* [M21-1, Part I, Subpart 1, Duty to Assist](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?encodedHash=%23!agent%2Fportal%2F554400000001034%2Farticle%2F554400000013969%2FM21-1-Part-I-Chapter-1-Section-A-Description-and-General-Information-on-Duty-to-Notify-and-Duty-to-Assist)
* M21-1, Part III, Subpart iv, 5, Evaluating Evidence and Making a Decision
* [Proscelle v. Derwinski, No. 90-570, July 24, 1992](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk)
* [Shoffner v. Principi, No. 99-967, July 30, 2002](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk)
* [Kowalski v. Nicholson, No. 02-1284, June 8, 2005](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk)
* [McLendon v. Nicholson, No. 04-0185, June 5, 2006](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk)
* [Palczewski v. Nicholson, No. 04-1001, April 24, 2007](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmp)
* [Waters v. Shinseki, No. 2009-7071, April 6, 2010](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk)
* [Walker v. Shinseki, No 2011-7184, February 21, 2013](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk)

Topic 1: Examination by Exception

**Why Do We Need This Training?** *Slide 4*

Veterans Benefits Administration (VBA) employees need this training in order to:

* Develop an “examination by exception” mentality
* Clarify when medical evidence is “too old” for rating purposes
* Discuss means to rate claims without ordering examinations
* Ensure we are ordering examination only when they are required

This lesson does not cover in detail the following topics:

* Walker v. Shinseki
* Waters v. Shinseki
* Evaluating lay evidence

Employees are encouraged to complete the separate training that covers these lessons in more detail, as they coincide with this lesson.

**Veterans Claims Assistance Act** *Slide 5*

Before the Veterans Claims Assistance Act of 2000 (VCAA), Veterans were required to obtain a diagnosis of a current disability on their own. Without submission of a diagnosis by the Veteran, VBA had no duty to further assist a Veteran with their claim for disability compensation.

This created a catch-22 for Veterans, as many could not obtain a diagnosis from a private physician because they could not afford the cost and they were unable to obtain a free examination from the VA because we would not request an examination without evidence of a current diagnosis.

In 2000, the VCAA changed this approach, and 38 U.S.C. 5103 was changed to state that VBA will assist a Veteran in substantiating a disability compensation claim, to “include providing a medical examination or obtaining a medical opinion *when such an examination or opinion is necessary to make a decision on a claim.*” (emphasis added)

It further states that a medical examination or opinion is necessary to make a decision on a claim if the evidence of record (to include lay statements from the Veteran):

* contains competent evidence of a current disability or persistent or recurrent symptoms of a disability: and
* indicates the disability or symptoms may be associated with active military service; and
* does not contain sufficient evidence to make a decision on a claim.

Remember, to grant service connection, three principles needed for service connection:

1. An in-service event or injury
2. Continuity of symptoms, or nexus
3. Current diagnosis

**Congressional Intent** Slide 5

Congress passed the Veterans Claims Assistant Act of 2000 with the intent that duty to assist applied only when necessary to help substantiate a Veteran’s claim. When there is no additional information needed, duty to assist no longer applies.

“Changing the game” means that when the benefit sought can be granted, there is no duty to notify or assist.

**Development for Evidence** Slide 6

Under the regulations, VBA can refuse to provide a medical examination or opinion *if there is already enough sufficient competent medical evidence of record to make a decision on a claim.* Simply put, this is the basis for the “exam by exception” mentality.

The regulations clearly state that an examination is only required when necessary to make a decision on a claim. If the medical evidence of record is competent and contains the information necessary to decide a claim for service connection, no examination is necessary.

For example, a Veteran files a claim for sleep apnea three years after his honorable discharge. His service treatment records show he was diagnosed with sleep apnea by a sleep study in service. He submits current medical evidence showing use of a CPAP machine. An examination is not required because the service connection can be granted without examination.

38 C.F.R. 3.304(c) further states that “the development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it *should not be undertaken when evidence present is sufficient for this determination.”* Overdevelopment of a claim could not only result in a STAR error, but could also cause unnecessary delay for the Veteran’s claim.

“In initially rating disability at the time of honorable discharge, the records at the time of discharge, the records of the service department, including reports of examination at enlistment and the clinical records during service, will ordinarily suffice” for development purposes. An examination may still be necessary in order to assign the correct evaluation.

**Medical Examinations** Slide 6

The purpose of duty to assist in ordering a medical examination and/or medical opinion is to obtain medical evidence that is relevant to establishing entitlement to benefits. Such information requested from the examination or medical opinion includes diagnosis, onset, or etiology.

38 C.F.R. 3.326 explains that an examination should be requested by VBA when the medical evidence accompanying the claim is not adequate for rating purposes. The evidence, including but not limited to hospital reports or examinations from any government or private institution or statements from private physicians, should be reviewed to determine what information it contains for rating purposes. Provided the evidence is adequate for rating purposes, an examination may not be necessary.

**Medical Evidence** Slide 7

Medical evidence does not need to be in the Disability Benefits Questionnaire format; this includes legacy/non-DBQ examinations that are otherwise sufficient for rating purposes.

A new examination should be requested ONLY when the prior examination is insufficient or there is clear evidence that a new examination is needed to evaluate for a worsening of the disability. The focus is on the information contained in the examinations and medical evidence, not the format.

**Age of Evidence** Slide 8

Whether the evidence is “current” should not be confused with the age of the evidence. The age of medical evidence does not, in and of itself, render it too old for rating purposes, as demonstrated in Palczewski v. Nicholson. VBA can use reports that are old as long as the reports show that the benefit can be granted.

If service connection is the issue at hand, the focus is whether the medical evidence of record is adequate for rating purposes.

If an already service connected disability (claim for increase), the focus is whether the medical evidence of record is “current” for rating purposes.

Bottom-line is that the focus should be on whether or not the evidence shows a material change in the disability. If there is no evidence showing a worsening of the condition, an examination may not be necessary. Keep in mind however that the Veteran is competent to report a material change or worsening of their condition.

It is best to review all evidence of record, as in some cases evidence showing material change, may be submitted after the examination was completed, as demonstrated in Proscelle v. Derwinski.

**When is an Examination NOT necessary?** Slide 9

Not all claims for disability compensation require current, or in some cases, ANY, VA examination. Specifically, a VA examination is not necessary whenever private, military, or VA medical evidence in the file is sufficient to grant the benefit sought.

While the duty to assist is more evident for increase, there will be circumstances where a Veteran submits a claim for increase and a VA examination will not be necessary:

* Veteran submitted adequate evidence to grant an increased evaluation without examination
* VA outpatient treatment records may provide sufficient evidence to grant an increased evaluation without examination.

**Conclusion**

If Veteran says the condition at issue has worsened and there is no contemporaneous medical evidence which is adequate for rating purposes allowing for a grant of the benefit sought, then a VA examination is warranted.

If a nexus or medical opinion is REQUIRED; then a VA examination is warranted.

If there is no medical evidence to evaluate the disability under the rating schedule; then a VA examination is required.

This training does not change when an examination is required under 38 CFR 3.159

Don’t forget to use the ACE process for exams and remember that if you can ***grant the benefit sought***, no duty to assist or duty to notify is needed.

If it is determined that a VA examination is necessary, that VA examination must be full and complete.

Remember that certain portions of 38 CFR Part 4, in particular, the respiratory, visual, audio, and cardiovascular regulations, require certain specific finding or results in order to evaluate the disability.

# Examples

*Slides 10-18*

Instructor for course will have the copy of the questions with the correct answer to hand out for your reference.

**Example 1**

Veteran was honorably discharged on July 31, 2006. On July 10, 2010, the Veteran requested service connection for a right knee condition. STRs and VA examination show right knee degenerative joint disease. The VA examination from October 2010 shows a 10 percent evaluation is warranted based on painful range of motion and crepitus. No lay statements or other evidence has been received since the examination. You are rating this case on September 1, 2014 – what action should you take?

**Example 2**

A peacetime Veteran who was honorably discharged in 1988 following 4 years of service files a claim for ALS. The Veteran submits medical reports from his private neurologist with his claim, confirming the diagnosis of ALS. The date of claim is April 30, 2012. STRs show no diagnosis of ALS or neurological disorder. You are rating this case today – what action should you take?

**Example 3**

Veteran is SC for DM II with nephropathy at 20 percent. On July 10, 2012, the Veteran submits medical reports from his private physician that is treating the nephropathy, revealing a chronically elevated creatinine level of 2.5 since November 11, 2011. You are rating this case today – what action should you take?

**Example 4**

Veteran claims a right knee disability due to parachute jumping in service and submits a statement that he suffers with right knee pain. STRs do not show right knee treatment, but the DD214 shows the Veteran earned a Master Parachutist Badge. The date of claim is May 1, 2012; the Veteran was released from active duty on September 4, 2005. You are rating this case today – what action should you take?

Practical Scenarios

Below are questions that were reviewed by Quality Review Teams. Instructor for course will have the copy of the questions with the correct answer to hand out for your reference.

**Diabetic Complications**

If we have a claim for diabetes mellitus and can grant a 20 percent evaluation based on evidence of a diagnosis and required insulin, can we grant the 20 percent evaluation and clear the EP without requesting an examination to determine if there are diabetic complications?

**Total Disability based on Individual Unemployability**

The Veteran files a claim for total disability based on individual unemployability (TDIU) in December 2012 stating he last worked in June 2012. The evidence of record is sufficient to grant a 100 percent scheduler evaluation from the date of claim. Do we have a duty to assist since we are granting the total evaluation?

**Asthma**

The Veteran is service connected for asthma at 10 percent disabling and the medical records show use of an inhaler daily. Do we have to obtain pulmonary function testing?

**General Medical Examination**

For Veterans who have been out of service less than one year and who require a general medical examination, would we still have to get an exam if the STRs or other evidence provide sufficient evidence for granting? For example, a Veteran diagnosed with sleep apnea and prescribed a CPAP machine in service with no other claims associated with the original claim.

**ACE Examinations and Tender Scars**

If a physician conducts an exam via telephone in accordance with ACE procedures, can we use that to grant a tender scar if it is noted as tender on the ACE examination?

**METs, hypertrophy, and dilatation**

For cardio cases involving ischemic heart disease (IHD), can an evaluation of 10 percent be assigned based on continuous medication noted in the medical evidence or do we need an examination?

**Goldman Chart**

Is the Goldman chart for vision cases still needed?

**Tinnitus**

Can we grant tinnitus based on evidence in the STRs? When STRs show complaints versus a diagnosis of tinnitus, should we get an examination? In which case?

**Chiropractor**

Can we use chiropractor reports for range of motion testing for rating purposes?

**VA Form 21-4142**

We can grant the benefit sought, but the Veteran submitted VA Form 21-4142s. Do we have to obtain those records?

**Non-compensable Evaluations**

How do we balance doing an interim rating as opposed to getting an exam altogether? What if the “grant” is only 0 percent?

**Painful Motion**

A Veteran who is already service connected at 0 percent for a knee disability submits a claim for increased evaluation. In addition, the Veteran submits medical evidence from his physician showing painful range of motion testing on examination. May we assign a 10 percent evaluation and not order an examination to assess all potential means to rate a knee disability?

**Appeals**

Does “changing the game” and developing an “examination by exception” mentality apply to claims on appeal?