

Office of Administrative Review (OAR)

Quality Call Bulletin

September 2021

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DECISION REVIEW OPERATIONS CENTER (DROC) NATIONAL ERROR EXAMPLES FOR THE MONTH OF JULY 2021

Target Audience: DROC Management, Quality Review Teams (QRT), Decision Review Officers (DRO), Rating Veterans Service Representatives (RVSR) and Veterans Service Representatives (VSR)

Presenter: JaVon Chisley, Senior Management and Program Analyst, OAR Program Administration (PA)

National Authorization Error Example:

VA regulations and policy require VA to identify duty to assist (DTA) errors during a higher-level review (HLR) and take appropriate/timely adjudicative action.

OAR cited the following error:

The VA Form 20-0999, *Higher-Level Review Return* was not available for review. A higher-level reviewer who finds a DTA error will complete a VA Form 20-0999, *Higher-Level Review Return*, for the affected issue(s). M21-5.5.d, *Returning DTA Errors for Correction*

38 C.F.R. §3.2502, *Return by Higher-Level Adjudicator or Remand by Board of Veterans' Appeals*, states, in part:

In readjudicating the claim, the agency of original jurisdiction will correct all identified duty to assist errors.

M21-5 5.d, *Returning DTA Errors for Correction*, states, in part:

The return of a request to correct a DTA error concludes the HLR for that issue. Veterans Service Representatives (VSR) and Rating VSRs (RVSR) will then treat that issue like a supplemental claim.

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In this case, the HLR reviewer should have drafted and uploaded VA Form 20-0999 after reviewing the claim and noting the DTA error in failing to request FY2019 drill pay dates from DFAS.

National Rating Error Example:

VA regulations and policy require a VA examination report submitted to the rating activity be as complete as possible.

OAR cited the following error:

DROC issued Supplemental Statement of the Case (SSOC) dated 6/24/21 prior to returning an insufficient medical opinion. Board of Veterans Appeals (BVA) Remand dated 2/22/21 and exam request dated 2/24/21 requested a VA examination (VAE) in which the examiner was to review the lumbar spine range of motion studies from the April 2016 VAE and estimate the lumbar spine motion loss during repetitive use over time. The thoracolumbar spine Disability Benefits Questionnaire (DBQ) dated 6/05/21 did not estimate the lumbar spine motion loss during repetitive use over time for the April 2016 VAE. No subsequent medical evidence provided this estimate. Of note: the April 2016 VAE did not include the findings required by *Correia v. McDonald*, which is why BVA required the above estimate in the remand.

38 C.F.R. §4.2, *Interpretation of Examination Reports*, states, in part:

It is the responsibility of the rating specialist to interpret reports of examination in the light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability present.

38 C.F.R. §4.70, *Inadequate Examinations*, states, in part:

If the report of examination is inadequate as a basis for the required consideration of service connection and evaluation, the rating agency may request a supplementary report from the examiner.

M21-1 III.iv.3.D.3.a, *Purpose of the Reasons for Decision* states, in part:

There are instances where missing information in an examination report does not make the examination itself insufficient. However, claims processors must seek and obtain the missing information via communication with and clarification by the examiner, as discussed in [M21-1, III.iv, 3.D.3.c, Clarification of Examination Reports](#), before issuing a final decision on the underlying claim.

In this case the adjudicator should have reviewed the BVA Remand instructions and examination request, then concluded the examination results were insufficient for rating purposes as it lacked the range of motion estimates requested for the specific time frame.

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PUBLIC LAW 116-283: THREE NEW PARTICULATE MATTER EXPOSURE PRESUMPTIVE CONDITIONS

Target Audience: DROC Management, QRTs, DROs, RVSRs and VSRs

Presenter: Christina Ngom, Program Analyst, OAR PA

References:

38 C.F.R. §3.317, *Compensation for Certain Disabilities Occurring in Persian Gulf Veterans*

M21-1 VIII.ii.1.A, *General Information on Claims Based on Service in Southwest Asia Under 38 C.F.R. §3.317*

M21-1 VIII.ii.1.B, *Developing Claims Based on Service in Southwest Asia Under 38 C.F.R. §3.317*

M21-1 VIII.ii.1.C, *Rating Claims Based on Service in Southwest Asia Under 38 C.F.R. §3.317*

38 C.F.R. §3.320, *Compensation Based on Exposure to Particulate Matter*

M21-1 VIII.ii.2.A, *General Information on Claims Based on Particulate Matter Exposure Under 38 C.F.R. §3.320*

M21-1 VIII.ii.2.B, *Developing Claims Based on Particulate Matter Exposure Under 38 C.F.R. §3.320*

M21-1 VIII.ii.2.C, *Rating Claims Based on Particulate Matter Exposure Under 38 C.F.R. §3.320*

38 C.F.R. §3.317 & §3.320 Presumption:

The addition of three new diseases to the list of conditions presumptively associated with exposure to particulate matter:

- Asthma
- Rhinitis
- Sinusitis, to include rhinosinusitis

Presumptive service connection can be established under 38 CFR §3.320, effective August 5, 2021.

During the Development and Rating Process:

Service connection can be granted for when the Veteran has manifested chronic asthma, chronic rhinitis, and/or chronic sinusitis, to include rhinosinusitis, within ten years from the date of separation and,

Veteran has served any length of time in the Southwest Asia theater of operations, as defined by 38 CFR §3.317(e), beginning on August 2, 1990 through the present, as well as Afghanistan, Syria, Djibouti, or Uzbekistan on or after September 19, 2001.

Entitlement to the presumption of service connection for one of these conditions only

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requires the condition to manifest to a degree of 0 percent or more. A 10 percent or more evaluation for the condition is not required to establish service connection under this guidance.

Development:

The claimant is not required to specifically identify the condition as being related, or attributed, to a deployment to one of the specified locations to be afforded presumptive consideration. If symptoms of a general medical condition, such as “shortness of breath” or “respiratory issues” are claimed and the Veteran has qualifying service, consideration of the claim under the presumptive policy should be liberally applied.

After review of the Veteran’s record, if the qualifying criteria is met, request an examination to confirm diagnosis and severity.

For supplemental claims, consider this guidance as both new evidence, sufficient to render the supplemental claim complete, and relevant evidence, sufficient to trigger a duty to assist under 38 USC §5103A and issue a merit-based decision.

Rating:

Regular rating principles, to include chronicity and continuity as provided in 38 C.F.R. §3.303(b), apply when evaluating these new conditions.

Do not assign an effective date for service connection of any of these conditions, based on exposure to particulate matter, earlier than the effective date of the act or administrative issue, in accordance with 38 C.F.R. §3.114.

OAR FEEDBACK ON JULY SEATTLE DROC AND ST. PETERSBURG DROC RATING QUALITY REVIEW SPECIALIST (RQRS) SYNC MEETING MINUTES

Target Audience: DROC Management, QRTs, DROs, RVSRs and VSRs

Presenter: James Fogg, Program Analyst, OAR PA

Topic:

- Is due process required when combined evaluation changes, but payment does not? Is due process required when past or present evaluations change, but payment does not?

Feedback:

- OAR agrees due process, i.e. a proposal, is not required if the overall combined payment, past or present, does not change as long as this does not involve severance of a condition, past or present. Both M21-1 III.iv.8.B.1.a, *When to Prepare a Proposed Rating Decision*, and M21-1 IV.ii.3.A.2.a, *Handling a CUE That, When Corrected, Will not Benefit the Beneficiary*, require the decision maker to provide due process even if severing service connection will not affect the current

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or a prior combined disability evaluation.

Topic:

- What effect does *Holmes v. Wilkie*, 33 Vet.App. 67 (2020) have upon M21-1 III.iv.4.N.7.a, *Evaluation Criteria for Migraine Headaches*?

Feedback:

- OAR agrees *Holmes v. Wilkie* does not change how VBA evaluates headaches under DC 8100, so long as the decision maker considers all symptoms experienced as a result of headache attacks and how they impact the Veteran, i.e. do they result in prostrating attacks (for all evaluation levels) and prolonged attacks productive of severe economic inadaptability (50% evaluation).

Topic:

- How should the DROC process a CUE claim received on a VA Form 20-0996, *Decision Review Request: Higher-Level Review*?

Feedback:

- OAR agrees if a claimant claims a CUE on a timely VA Form 20-0996, the DROC should address the CUE claim on an HLR, with an EP 030. If the VA Form 20-0996 is not timely, then it is appropriate to CEST an EP 020 since no specific form is required for CUE claims.

Topic:

- How should the DROC interpret M21-5 5.3.c, *Initial Actions*, in relation to VA Form 20-0996, *Decision Review Request: Higher-Level Review*?

Feedback:

- There does not appear to be ambiguity if item 16A of the VA Form 20-0996 contains anything showing the claimant selected this option. If there is any indication the claimant requests an informal conference, i.e. the claimant selects item 16A or anything in item 16B of the VA Form 20-0996, then the DROC should attempt to schedule an informal conference. This would be in accordance with the note in M21-5 5.3.c, *Initial Actions*, which states: "Assume the claimant does not desire an informal condition if item 16 is blank."

Based upon this, OAR does not agree it is the DRO's decision on what is ambiguous in this scenario. OAR does agree there is a clear error if item 16A of the VA Form 20-0996 is checked and the informal conference process is not completed. Additionally, OAR determines there is a clear error if item 16A of the VA Form 20-0996 is not checked but the informal conference process is completed as this would be overdevelopment significantly delaying the processing of the claim, in accordance with M21-4 6.A.b, *Instructions and Guidelines for VSR Review*, and M21-4 6.B.b, *Instructions and Guidelines for RVSR Review*.

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Topic:

- Can the Decision Review Officer (DRO) address one aspect of the higher-level review (HLR) request, e.g. effective date, and return based upon a duty to assist error or reject another aspect of the HLR request, e.g. evaluation?

Feedback:

- OAR agrees earlier effective date (EED) and evaluation are two separate issues. However, it is unclear how often the DRO could separate these issues, i.e. grant the EED while returning the evaluation error. Per M21-5 5.5.a, Definition: DTA Errors: (t)he reviewer must return the issue(s) for development, unless they can grant the claimant the maximum benefits.
- But what is the maximum benefit for EED? EED is different from the grant of SC or evaluation. This type of claim appears most closely to resemble a claim for the grant of a benefit, e.g. SAH, in that if the claimant requests a specific effective date (ED) then the grant of the requested ED would be a grant of the maximum benefit. This appears to be in accordance with M21-5 5.5.b, *Definition: Maximum Benefit*. For ancillary benefits, an award of the benefit sought is the maximum benefit.

Based upon this reasoning, OAR does agree that if the DRO can separate the issue of effective date from evaluation, then the DRO can either grant the EED while completing a DTA return for the evaluation issue or grant the EED while the evaluation issue is pending in another lane, e.g. 020, 040, etc. No critical error is present were a DRO to do this in either scenario.

RECENT UPDATES TO M21-5, CHAPTER 3, QUALITY ASSURANCE

Target Audience: DROC Management, QRTs, DROs, RVSRs and VSRs

Presenter: ReEdna Bankhead, Program Analyst, OAR PA

References:

M21-5, 3.A, *Decision Review Operations Center (DROC) Quality Review Team (QRT)*
M21-5, 3.B, *National Quality Reviews*

M21-5, Chapter 3 - Quality Assurance Updates:

OAR Updated the Quality Assurance Section of the Manual

- Updates went live on August 17, 2021
- OAR updated both Section A & Section B

Major Updates included:

- Adding Virtual and In-Person Progression (VIP) and Claims Assistants (CA) to the QRT involvement in training
- Removal of references to VA Pulse
- DRO task-based reviews to the standard for review of individual quality reviews

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- (IQR)
- QRT coaches to provide regulation citations, manual reference, or other appropriate reference to support if an error is overturned.

Additional major updates included:

- Providing clarification to the grace period for national quality errors
- Adding pension rating and non-rating end products
- Adding pension to the National Compensation Rating Quality Review Checklist
- Including National Pension Authorization Quality Review Checklist
- Including Instructions and Guidelines for Authorization Review and Authorization Review Elements
- Correcting minor grammatical errors

FAVORABLE FINDINGS IN DEPENDENCY AND INDEMNITY COMPENSATION (DIC) AND SERVICE CONNECTION FOR CAUSE OF DEATH (SCD) DECISIONS

Target Audience: DROC Management, QRTs, DROs, RVSRs and VSRs

Presenter: Suzi Ribish, Management and Program Analyst, OAR PA

References:

M21-1 III.iv.6.C.5.a, *Purpose of the Reasons for the Decision*

M21-1 III.iv.6.C.5.f, *Addressing Favorable Findings in the Rating Decision Narrative*

Favorable Findings:

M21-1 III.iv.6.C.5.a, states:

Rating decisions prepared in pension management centers (PMC) are not required to address favorable findings *unless* the rating is prepared for accrued benefits for disability compensation issues. Favorable findings are addressed in PMC decision notices.

M21-1 III.iv.6.C.5.f, states:

PMC rating decisions need only document favorable findings in accrued cases involving disability compensation. The notification letter, in PMC cases which includes DIC/SC death decisions, provides the favorable findings.

A QRS should not call errors based upon the exceptions provided by M21-1 III.iv.6.C.5.a and M21-1 III.iv.6.C.5.f. These procedures also apply to rating decisions made by the decision review operations centers (DROC).

OAR submitted a request for a manual update to Pension & Fiduciary Service to modify the manual reference language to include decisions worked at the DROCs.