

Reading C&P Exams: Nexus Opinions

<https://bmvetlaw.participoll.com/>



Lesson Learning Objectives

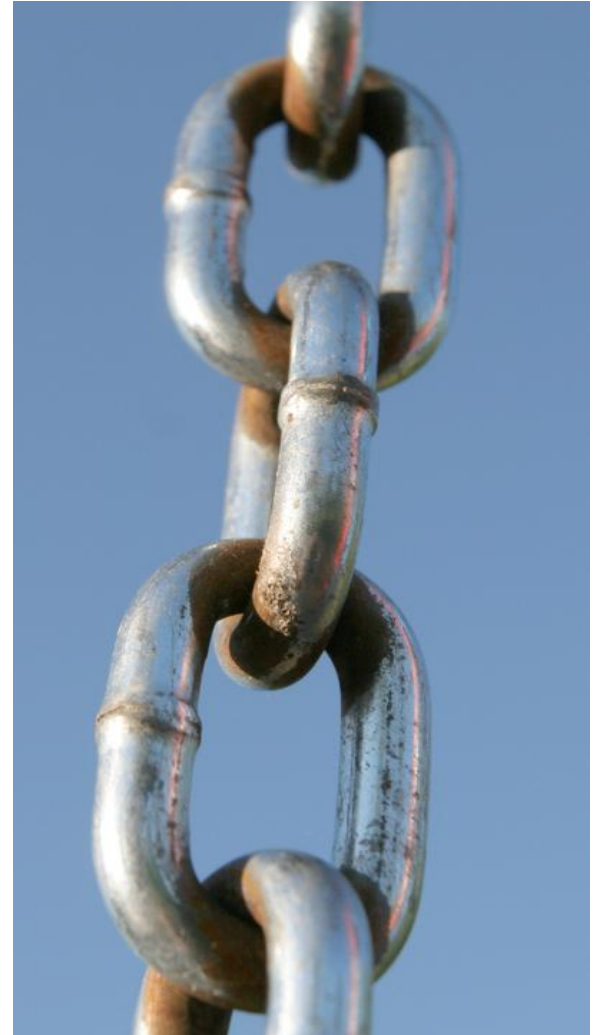
Learn about common errors in VA Compensation and Pension (C&P) nexus examinations and how to dispute them:

- Learn about the purpose and use of C&P nexus examinations.
- Learn about common problems in nexus exams and the best strategies to dispute them.
- Learn considerations for choosing a type of review under the Appeals Modernization Act (AMA).

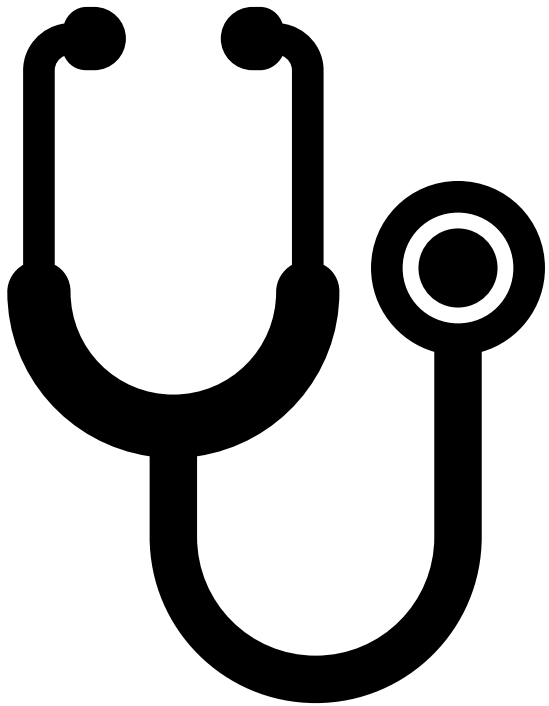
Purpose of C&P Nexus Examinations

The purpose of VA C&P nexus examinations is to determine if a Veteran's disability is related to service or to a service-connected disability.

- VA obtains a nexus examination in most service connection claims, often unfavorable.
- Many Veterans are unable to obtain a private opinion so it's important to ensure VA provides an adequate one.



Examinations Must Be Adequate



- VA's Duty to Assist includes providing an examination.
- Once VA provides a C&P examination, the exam must be **adequate**.¹
- An adequate nexus opinion:
 - Considers prior medical history and examinations,
 - Contains sufficient detail, and
 - Provides an adequate rationale.

¹ *Barr v. Nicholson*, 21 Vet.App. 303, 312 (2007).

Examiners are Expert Witnesses

- VA examiners are expert witnesses who provide **medical** opinions.
 - Is the examiner informed of ***sufficient facts***?
 - Is the opinion supported by ***sufficient reasoning***?
- The final decision on a claim must be made by the VA rater or the Board, ***not*** the examiner.

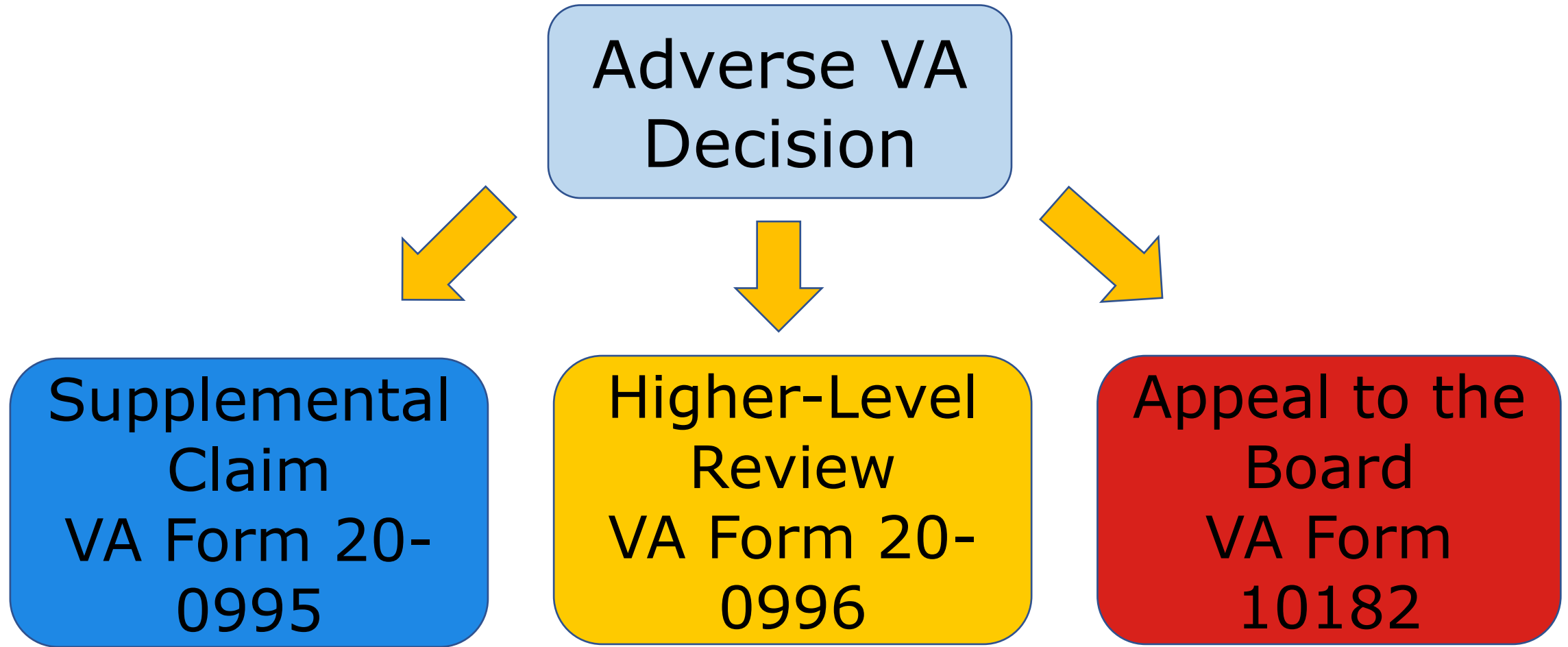


Types of Errors in Nexus Exams

- The failure to provide an adequate exam is a duty to assist error.
 - Errors of ***fact***: an opinion based on incorrect facts has no probative value.
 - Errors of ***reasoning***: failure to provide essential rationale for opinion connecting facts to the medical conclusion.

Advocacy tip: Identify and explain the specific type of error when arguing a VA C&P medical opinion is inadequate.

Appeals Modernization Act (AMA)



Disputing Nexus Exams - I

- Determine the nature of the error and whether the relevant information is in the file.
- Veteran may not have informed VA or the examiner of a relevant fact.
- If the evidence is **not** in the file, submit a Supplemental Claim and include the evidence that provides the additional information.

**File a
Supplemental
Claim
VA Form 20-0995**

**Statement in
Support of Claim
VA Form 21-4138**

**Release of Medical
Records
VA Form 21-4142**

Disputing Nexus Exams - II

- Duty to Assist errors can be fixed using a Higher-Level Review.
- If the information showing the inadequacy of the exam is already in the file, then submit an HLR.
- Cite specifically to the record in VBMS that shows the problem.

Advocacy tip: Consider filing a Supplemental Claim with additional evidence *even when* the examination is inadequate on the current record.

**Request Higher-Level Review
VA Form 20-0996**

**Statement in Support of Claim
VA Form 21-4138**

**Release of Medical Records
VA Form 21-4142**

Disputing Nexus Exams - III

- Duty to Assist errors can be fixed through Board appeals.
- Appealing to the Board should be a last resort for dealing with an inadequate C&P examination.
- Board appeals are best only if all relevant evidence has been submitted and a Higher-Level Review was unsuccessful.

**Appeal to
the Board
VA Form
10182**

**Submitting a positive
opinion along with an
inadequate VA exam
argument *may* result in
remand for another VA
exam.**

Errors of Fact

- Errors of fact: What facts did the examiner misstate, ignore, or overlook?
 - Service Medical Records (SMRs).
 - Lay statements about in-service incidents, or onset and history of symptoms over time.
 - Post-service VA or private medical records.
 - Specific facts pointed out by the exam request or Board remand instructions.

Question 1

Veteran Clyde filed a claim for service connection for bilateral hearing loss. He served in the military between 1969 and 1971. At a January 2011 hearing, he testified that he first noticed a change in his hearing during the 1970s. Clyde attended a VA C&P exam in May 2011 where the examiner concluded that because no audiometric testing was performed as part of the veteran's 1971 separation examination, she could not offer a definitive nexus opinion without resorting to speculation. Do you think this examination opinion is adequate?

- A. Yes, because the examiner provided a conclusion.**
- B. No, because there is no indication the examiner considered the significance of the veterans hearing testimony.**
- C. No, because the examiner failed to address the VA medical records showing tinnitus.**
- D. Yes, because the examiner was a doctor.**



vote at bmvetlaw.participoll.com

Answer, Part 1

B. No, because there is no indication the examiner considered the significance of the veterans hearing testimony.

This is based on a precedential Court case: *McKinney v. McDonald*, 28 Vet.App. 15 (2016). The Court found the opinion ***inadequate*** because the examiner failed to consider the Veteran's relevant lay testimony that he first noticed a change in hearing soon after service. It noted that "this fact may have assisted the VA examiner in determining the likelihood that [the Veteran's] in-service exposure . . . affected his hearing."

Answer, Part 2

- ## Higher-Level Review (VA Form 20-0996)

- Argue that the opinion is inadequate because the examiner failed to address relevant lay testimony.
- Because the lay testimony is already in VBMS, there is no additional evidence to submit.
- Ask for a new C&P examination and opinion. *See Miller v. Wilkie*, 32 Vet.App. 249, 262 (2020) (VA must obtain a new examination when an examiner fails to address relevant lay evidence, unless it has been found not credible).

Department of Veterans Affairs		OMB Control No. 2900-XXXX Re respondent Decision: 15 minutes Expiration Date: XXXXXXXX
DECISION REVIEW REQUEST: HIGHER-LEVEL REVIEW		
INSTRUCTIONS: PLEASE READ THE PRIVACY ACT NOTICE AND RESPONDENT BURDEN INFORMATION ON PAGE 1 BEFORE COMPLETING THIS FORM.		
PART I - CLAIMANT'S IDENTIFYING INFORMATION		
NOTE: You can either complete the form online or by hand. If completed by hand, print the information requested in ink, neatly, and legibly to expedite processing the form.		
1. VETERAN'S NAME (First, Middle Initial, Last) 		
2. VETERAN'S SOCIAL SECURITY NUMBER 	3. VA FILE NUMBER (if applicable) 	4. VETERAN'S DATE OF BIRTH (MM/DD/YYYY)
5. VETERAN'S SERVICE NUMBER (if applicable) 	6. INSURANCE POLICY NUMBER (if applicable) 	
7. CLAIMANT'S NAME (First, Middle Initial, Last) (if other than veteran) 		
8. CLAIMANT TYPE: ☐ VETERAN ☐ VETERAN'S SPOUSE ☐ VETERAN'S CHILD ☐ VETERAN'S PARENT ☐ OTHER (Specify)		
9. CURRENT MAILING ADDRESS (Number, street or rural route, City or P.O. Box, State and ZIP Code and Country) No. & Street Apt./Unit Number City State/Province Country ZIP Code/Postal Code		
10. TELEPHONE NUMBER (include Area Code) 		11. E-MAIL ADDRESS (Optional)
12. BENEFIT TYPE: PLEASE CHECK ONLY ONE (If you would like to file for multiple benefit types, you must complete a separate request form for each benefit type.) ☐ COMPENSATION ☐ PENSIONS/SURVIVORS BENEFITS ☐ FIDUCIARY ☐ EDUCATION ☐ VETERANS HEALTH ADMINISTRATION ☐ VOCATIONAL REHABILITATION AND EMPLOYMENT ☐ LOAN GUARANTEE ☐ INSURANCE ☐ NATIONAL CEMETERY ADMINISTRATION		
PART II - HIGHER-LEVEL REVIEW OPTIONS		
13. IF YOU WOULD LIKE THE SAME OFFICE THAT ISSUED YOUR PRIOR DECISION TO CONDUCT THE REVIEW, YOU CAN MAKE THAT REQUEST BY CHECKING THE BOX BELOW. IF YOU DO NOT CHECK THE BOX, VA WILL TAKE THAT AS A REQUEST TO HAVE A DIFFERENT OFFICE CONDUCT THE REVIEW. (Please note VA may be unable to grant your request.) ☐ If available, I would like HIGHER-LEVEL REVIEW conducted at the same office within the agency of original jurisdiction.		
14. IN ADDITION, YOU OR YOUR AUTHORIZED REPRESENTATIVE MAY REQUEST AN INFORMAL CONFERENCE WITH THE HIGHER-LEVEL REVIEWER. (This is a telephonic communication with the higher level reviewer for the sole purpose of pointing out errors of fact or law in the prior decision. VA will only conduct one informal conference associated with this request for higher-level review. Check the box below to request an informal conference.) ☐ I, or my representative, would like an informal conference . (VA will make up to two attempts to call you between 8:00a.m. and 4:30p.m. Eastern Standard Time at the telephone number and time period you select below to schedule your informal conference . Please select up to two time periods you are available to receive a phone call.) ☐ 8:00a.m. - 10:00a.m. ☐ 10:00a.m. - 12:30p.m. ☐ 12:30p.m. - 2:00p.m. ☐ 2:00p.m. - 4:30p.m.		
If you would like for VA to contact your representative, please provide your representative's name and telephone number where he or she can be reached at the above checked time.		

Errors of Reasoning



- Errors of reasoning: Is the opinion supported by an adequate rationale?
- Was any rationale provided?
- Were all theories of entitlement addressed?
- Does the opinion make sense?

Question 2

Veteran Harold has filed a claim for service connection for a low back disability. His initial C&P examination was found inadequate. Subsequently, he was provided another examination. The examiner concluded that the veteran's low back disability was most likely not related to service. He provided the following one sentence statement: "I must agree with the original finding that the current back condition is not related to his time in service, but rather most likely related to age, wear and tear, and occupations in the past, which may have led to his disability." Do you think this opinion is adequate?⁽¹⁾

- A. NO, because the examiner did not discuss the veteran's current symptoms.**
- B. YES, because the examiner clearly states he agrees with the previous examination.**
- C. YES, because the examiner provided a medical conclusion.**
- D. NO, because the examiner failed to provide any rationale for how he reached his determination.**



Answer, Part 1

D. NO, because the examiner failed to provide any rationale for how he reached his determination.

This comes from a non-precedential case: *Townsend v. McDonald*, No. 15-0061 (December 28, 2015).

The C&P exam opinion is ***inadequate*** because the examiner failed to provide any reasoning for how he reached his conclusion. The Court noted, “it remains unclear what facts [the examiner] relied upon to form his opinion and what factors about the veteran’s age, lifestyle, and previous occupations led the examiner to conclude it was more likely than not that those circumstances caused the veteran’s back condition rather than his in-service MVAs or other back incidents.”

Answer, Part 2

- What should the Veteran file?

Higher-Level Review (VA Form 20-0996)

- Argue that the opinion is inadequate because the examiner failed to provide a rationale. He did not specify the facts relied upon or explain how certain factors led to his conclusion.
- A VA medical examination report or opinion must “contain not only clear conclusions with supporting data but also a reasoned medical explanation connecting the two.” See *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008).

Department of Veterans Affairs
VA DATE STAMP
DO NOT WRITE IN THIS SPACE

DECISION REVIEW REQUEST: HIGHER-LEVEL REVIEW

INSTRUCTIONS: PLEASE READ THE PRIVACY ACT NOTICE AND RESPONDENT BURDEN INFORMATION ON PAGE 1 BEFORE COMPLETING THIS FORM.

PART I - CLAIMANT'S IDENTIFYING INFORMATION

NOTE: You can either complete the form online or by hand. If completed by hand, print the information requested in ink, neatly, and legibly to expedite processing the form.

1. VETERAN'S NAME (First, Middle Initial, Last):

2. VETERAN'S SOCIAL SECURITY NUMBER:

3. VA FILE NUMBER (if applicable):

4. VETERAN'S DATE OF BIRTH (MM/DD/YYYY):

5. VETERAN'S SERVICE NUMBER (if applicable):

6. INSURANCE POLICY NUMBER (if applicable):

7. CLAIMANT'S NAME (First, Middle Initial, Last) (if other than veteran):

8. CLAIMANT TYPE:

☐ VETERAN ☐ VETERAN'S SPOUSE ☐ VETERAN'S CHILD ☐ VETERAN'S PARENT ☐ OTHER (Specify):

9. CURRENT MAILING ADDRESS (Number, street or rural route, City or P.O. Box, State and ZIP Code and Country):

10. TELEPHONE NUMBER (Include Area Code):

11. E-MAIL ADDRESS (if available):

12. BENEFIT TYPE: PLEASE CHECK ONLY ONE (If you would like to file for multiple benefit types, you must complete a separate request form for each benefit type.)

☐ COMPENSATION ☐ PENSION/SURVIVORS BENEFITS ☐ FIDUCIARY ☐ EDUCATION ☐ VETERANS HEALTH ADMINISTRATION
☐ VOCATIONAL REHABILITATION AND EMPLOYMENT ☐ LOAN GUARANTY ☐ INSURANCE ☐ NATIONAL CEMETERY ADMINISTRATION

PART II - HIGHER-LEVEL REVIEW OPTIONS

13. IF YOU WOULD LIKE THE SAME OFFICE THAT ISSUED YOUR PRIOR DECISION TO CONDUCT THE REVIEW, YOU CAN MAKE THAT REQUEST BY CHECKING THE BOX BELOW. IF YOU DO NOT CHECK THE BOX, VA WILL TAKE THAT AS A REQUEST TO HAVE A DIFFERENT OFFICE CONDUCT THE REVIEW. (Please use form 1A only for requests for higher-level review. Check the box below to request an informal conference.)

☐ If available, I would like a HIGHER-LEVEL REVIEW conducted at the same office within the agency of original jurisdiction.

14. IN ADDITION, YOU OR YOUR AUTHORIZED REPRESENTATIVE MAY REQUEST AN INFORMAL CONFERENCE WITH THE HIGHER-LEVEL REVIEWER. (This is a telephone conference with the higher-level reviewer for the sole purpose of providing and/or receiving information in the prior decision. It will only conduct an informal conference associated with this request for higher-level review. Check the box below to request an informal conference.)

☐ I, or my representative, would like an informal conference. (VA will make up to two attempts to call you between 2:00 a.m. and 4:00 p.m. Eastern Standard Time at the telephone number and time period you select below to schedule your informal conference. Please be kept up to two time periods you are available to receive a phone call.)

☐ 8:00 a.m. - 1:00 p.m. ☐ 10:00 a.m. - 12:30 p.m. ☐ 12:30 p.m. - 2:00 p.m. ☐ 2:00 p.m. - 4:30 p.m.

If you would like for VA to contact your representative, please provide your representative's name and telephone number where he or she can be reached:

Common Errors in Nexus Exams



- Every C&P examination of a Veteran is unique, but some types of VA errors occur very often.
- Always ask if there are errors of fact or errors of reasoning, or both!
- Have you seen examinations with these types of VA errors?

Incomplete Opinions

- Review the Regional Office (RO)'s C&P exam request to make sure the rater included the Veteran's specific theories of entitlement:
 - Example: If the Veteran is arguing for secondary service connection, make sure that is part of the exam request.
- Compare the exam request to the final exam report to check that the examiner answered all of the rater's questions.

Advocacy tip: Unless you plan to submit additional evidence, correct the above errors using Higher-Level Review.

Inaccurate Facts

- C&P examinations and opinions must be based on accurate facts.
 - Example: A C&P examination report finds no current joint disability, but private x-ray reports document arthritis.
- The Court has held that an opinion based on an inaccurate factual premise has no probative value. *Reonal v. Brown*, 5 Vet.App. 458 (1993).

Advocacy tip: If the relevant evidence is already in the file, correct the above error using Higher-Level Review.

Ignoring Lay Statements

- VA examiners must address a Veteran's lay statements when formulating a C&P nexus opinion:
 - Statements about in-service accidents.
 - Statements about onset and continuity of symptoms.
- Merely repeating the statement in another part of the report is not sufficient. The examiner must address the Veteran's statements in their rationale.

Advocacy tip: Unless you plan to submit additional evidence, correct the above errors using Higher-Level Review.

Credibility Findings

- Credibility involves whether a Veteran's statements are accurate and reliable.
- Credibility decisions are to be made by the RO rater or by the Board, **not** by the C&P examiner.
- Examiners should inform the rater or the Board by addressing whether a Veteran's reports are medically plausible.

Advocacy tip: The strategy for disputing an improper credibility decision will depend on whether you want to submit additional evidence.

Other Issues with Credibility

- Sometimes a Veteran's credibility will become an issue due to inconsistent statements:
 - Details of an accident, including when it occurred.
 - Details about the onset or continuity of symptoms.
- Submit additional evidence to fill in any gaps and ask for a new examination to consider the evidence.

**File a
Supplemental
Claim
VA Form 20-0995**

**Statement in
Support of Claim
VA Form 21-4138**

**Release of Medical
Records
VA Form 21-4142**

Inadequate Rationale

- Errors of reasoning can be difficult to catch.
 - What did the examiner conclude?
 - How did the examiner reach that conclusion?

Example: "It is more likely that the Veteran's condition is due to age than due to the in-service accident."

Why does the examiner say this?
Do they offer any explanation for this conclusion?

Arguments for new exams based on inadequate reasoning may have to go to the Board.

Secondary Service Connection

- A C&P medical opinion on secondary service connection must address both causation and aggravation.¹
- For aggravation, the examiner should address whether the service-connected disability results in any additional functional impairment associated with the condition at issue.
- An opinion that provides the same rationale for causation and aggravation is inadequate.

Advocacy tip: Unless you plan to submit additional evidence, correct the above error using Higher-Level Review.

¹ See *El-Amin v. Shinseki*, 26 Vet. App. 136, 140 (2013).

Summary

- When looking to dispute a C&P nexus examination:
 - Check if the examiner relied on incorrect facts or overlooked relevant evidence.
 - Determine if there is a rationale for the opinion and whether it makes sense.
 - Determine if the information needed is already in the claims file.
 - Submit a **Supplemental Claim** to add statements and records.
 - Submit a **Higher-Level Review** to point out errors on the face of the exam and overlooked material in the Veteran's file.

Advocacy Tip:
Always think about whether submitting a detailed statement from the Veteran could make the claim stronger and establish service connection. Use VA Form 21-4138 to submit the Veteran's lay statement.

