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Process: Evaluation of C&P Examinations

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Learning Objectives

Learn about VA Compensation and Pension (C&P) examinations and common issues with VA exams.

- Learn about the purpose and use of **C&P nexus exams**.
- Learn about the purpose and use of **C&P rating exams**.
- Learn about common **problems with C&P exams** and strategies for avoiding them.

Exams and VA's Duty to Assist

VA's Duty to Assist includes providing an ***adequate*** C&P examination.

- Once VA takes the effort to provide a C&P examination, then the exam must be adequate.
- Whether or not an examination is adequate can be a complicated legal and factual question that will depend on the specific facts of a Veteran's case.

C&P Nexus Exams

The purpose of a VA C&P ***nexus examination*** is to determine if a Veteran's disability is related to military service.

- Many Veterans are unable to obtain a private nexus opinion to support a claim, so a VA nexus opinion becomes a vital piece of evidence.

VA decides the majority of claims using nexus opinions, even though there is no strict legal requirement for it.

Reviewing Nexus Exams

- 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.

Issues with Nexus Exams

- Errors of fact – an opinion based on incorrect facts has no value.
- Errors of reasoning – the examiner must provide the essential rationale for their opinion.
- The failure to provide an adequate exam is a duty to assist error by VA.

An effective argument identifies and corrects VA's specific problems.

C&P Rating Exams

The purpose of a VA C&P rating exam is to confirm the existence and determine the severity of the Veteran's disability.

- VA's criteria for rating disabilities may be:
  - **Objective:** uses a clear standard.
  - **Subjective:** fuzzy or debatable.

Advocacy Tip: Knowing the applicable VA standard helps you identify the relevant information for the VA rater.

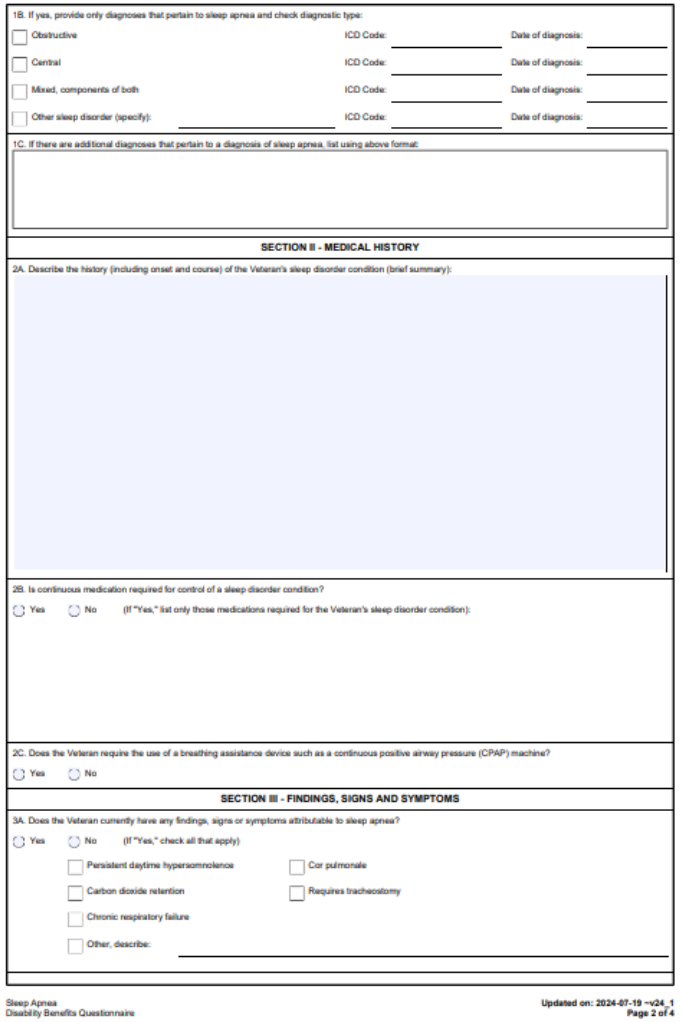
Reviewing Rating Exams

- Examiners should consider the Veteran's ability to function under the ordinary conditions of daily life.
  - At work.
  - At home.

Disability Benefits Questionnaires

- VA exams use VA's Disability Benefits Questionnaires (DBQs) to describe symptoms used to rate a service-connected disability.
- VA DBQs exist to maximize VA automation, not maximize benefits.
- Frequently, an accurate rating requires additional information.

DBQs often do not capture the detailed information necessary to for VA to accurately rate conditions under subjective standards.



1B. If yes, provide only diagnoses that pertain to sleep apnea and check diagnostic type:

☐ Obstructive	ICD Code:	Date of diagnosis:
☐ Central	ICD Code:	Date of diagnosis:
☐ Mixed, components of both	ICD Code:	Date of diagnosis:
☐ Other sleep disorder (specify):	ICD Code:	Date of diagnosis:

1C. If there are additional diagnoses that pertain to a diagnosis of sleep apnea, list using above format:

SECTION II - MEDICAL HISTORY

2A. Describe the history (including onset and course) of the Veteran's sleep disorder condition (brief summary):

2B. Is continuous medication required for control of a sleep disorder condition?

○ Yes ○ No (If "Yes," list only those medications required for the Veteran's sleep disorder condition):

2C. Does the Veteran require the use of a breathing assistance device such as a continuous positive airway pressure (CPAP) machine?

○ Yes ○ No

SECTION III - FINDINGS, SIGNS AND SYMPTOMS

3A. Does the Veteran currently have any findings, signs or symptoms attributable to sleep apnea?

○ Yes ○ No (If "Yes," check all that apply)

☐ Persistent daytime hypersomnolence ☐ Cor pulmonale
☐ Carbon dioxide retention ☐ Requires tracheostomy
☐ Chronic respiratory failure
☐ Other, describe:

Sleep Apnea
Disability Benefits Questionnaire

Updated on: 2024-07-19 –v24_1
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VA Sleep Apnea DBQ, January 2022

Issues with Rating Exams

- Missing / overlooked information
- Incomplete / misleading information
- Inaccurate information

Advocacy Tip: Submit evidence to VA and try to avoid these VA exam issues before they occur.

Predicting Common Issues

- VA exams might suffer from one of two errors:
  - Mistakes of facts.
  - Mistakes of reasoning.
- You can help the Veteran by preparing evidence to avoid these kinds of errors.

Errors of Fact

- An examiner's nexus opinion or description of the Veteran's disability must be based on the correct facts.
- A medical opinion based on inaccurate facts has no probative value. *See Reonal v. Brown*, 5 Vet.App. 458 (1993).
- Prepare lay statements or collect medical evidence that describes:
  - The Veteran's in-service accident, injury, or incident (nexus).
  - The onset and/or history of the Veteran's symptoms over time (nexus and rating).
  - The frequency, severity, and duration of the Veteran's symptoms (rating).

Question 1

Navy Veteran Reginald filed a claim for service connection for a left shoulder condition. He submitted a statement explaining that he hurt his shoulder when he was helping to lower a heavy hatch and the other sailor dropped his side. This stretched muscles and tendons in Reginald shoulders. Reginald periodically sought shoulder treatment in the years after service. Service treatment records do not document this injury. VA obtained a medical opinion that recorded Reginald statements in the medical history section but provided a negative nexus opinion because "there was no objective evidence of residuals within one year of separation." Do you think the doctor's opinion is adequate?

A. YES, because the doctor recorded Reginald statements in the medical history.
B. NO, because the doctor failed to apply the presumption of soundness.
C. YES, because the claim is not corroborated by objective medical evidence.
D. NO, because the doctor relied on the "objective" medical evidence without mentioning the veteran statements in the analysis.

Answer 1

D. NO, because the doctor relied on the "objective" medical evidence without mentioning the veteran statements in the analysis.

- These are the facts of *Smith v. Wilkie*, 32 Vet.App. 332 (2020).
- The CAVC held that a medical opinion that states that it is relying on the "objective" evidence and lack of records to justify its conclusion cannot be assumed to have considered a Veteran's lay statements.

Advocacy Tip: Always check to see if the analysis in a VA medical opinion addresses the Veteran's lay statements.

In-Service Incidents

- Information to consider includes:
  - What happened?
  - When and where did it happen?
  - How was the Veteran injured or exposed to toxins?
  - Did the Veteran receive treatment? When? Where?
  - If the Veteran did not receive treatment, why not?
  - Did the Veteran have symptoms after the incident?
- Evidence can include service records, medical records, pictures, prescriptions, and/or lay statements.

Advocacy Tip: Use a Statement in Support of Claim, VA Form 21-4138 to maximize the chance that the statement will not be overlooked.

Descriptions of Symptoms

- Remember: include key evidence about the Veteran's history of symptoms over time.
- This information goes to both nexus and the rating for a disability.
- Focus on:
  - Frequency,
  - Severity, and
  - Duration of symptoms.

Gaps in Medical Care

- VA examiners often hold the fact that a Veteran did not seek medical treatment against him or her. Can the Veteran explain why he or she did not seek medical care?
- Lack of medical insurance coverage?
- Too busy with work and/or family?
- Veteran did not think condition was serious – many people seek medical care only after a spouse insists on it.
- Why did the Veteran mention some medical problems to doctors but not others?

Information about Flare-ups

- For rating issues, information about flare-ups is often overlooked by examiners:
  - Frequency: how often do the flares occur?
  - Duration: how long do the flares last?
  - Severity: what are the symptoms during a flare?
- If the Veteran is not experiencing a flare-up during an exam, a good VA C&P examiner will address the Veteran's statements.

Question 2

Veteran Moses is service connected for a right knee problem, and he has submitted a claim for an increased rating. He says that during flare ups his knee is weaker and more unstable. He attends a contract examination, and the contract examiner says this about Moses's flare ups: "The veteran says that during a flare his knee is weaker and he feels unstable. These functional limitations are not productive of a quantitative reduction in range of motion of the right knee during a flare." Do you think that this doctor's statement about flare ups is adequate?

A. YES, because the examiner is presumed to be competent.
B. NO, because the examiner failed to discuss service medical records.
C. YES, because the examiner explained why the symptoms did not cause loss of range of motion.
D. NO, because the examiner failed to describe additional functional loss in terms of additional range of motion.

Answer 2

C. YES, because the examiner explained why the symptoms did not cause loss of range of motion.

- This is a tough case that goes ***against*** the Veteran. *Norman v. McDonald*, No. 20-1605 (2021).
- The examiner stated that there was no additional loss of range of motion during a flare-up. The Court reasoned that the examiner provided an adequate explanation for this by discussing the Veteran's actual symptoms.

Advocacy Tip: Ensure that the Veteran fully describes <u>all</u> additional functional loss during a flare-up.

Errors of Reasoning

- It's harder to avoid errors of reasoning, as a VA examiner will render an independent opinion.
- ***Minimize*** the possibility for VA errors:
  - Be clear to VA about the Veteran's theory of entitlement.
  - Be clear to VA about the Veteran's personal history – inconsistent statements can hurt the Veteran's claim.
  - Submit supporting medical studies and articles to VA as soon as possible.
- Give the examiner fewer chances to misunderstand the Veteran's claim.

Question 3

Veteran Samantha is seeking service connection for PTSD. She sees a VA counselor for treatment, and VA psychologist has diagnosed her with PTSD. She attended a contract examination for her claim, and you reviewed the report on VBMS. The contract doctor stated that she did not have PTSD. The doctor noted the diagnosis from the VA doctor but stated that Samantha did not meet the criteria for a PTSD diagnosis. Do you think that this doctor's opinion is adequate?

A. YES, because the doctor addressed the VA psychologist report.
B. NO, because the doctor failed to explain how Samantha did not meet the criteria for PTSD.
C. YES, because the doctor used the correct DBQ form.
D. NO, because the examination was not performed by a VA doctor.

Answer 3

B. NO, because the doctor failed to explain how Samantha did not meet the criteria for PTSD.

- This comes from a Court decision, *Ross v. McDonough*, No. 20-7369 (2022).
- The Court said that the opinion was not adequate because the examiner listed facts (the Veteran's medical history) and made a conclusion (she did not have PTSD), but the examiner failed to give a reasoned medical explanation between the two.
- PTSD examinations usually only provide checkboxes for diagnostic criteria. A new VA exam will have to provide a more detailed explanation about the Veteran's symptoms.

Dealing with Inadequate Exams

- You often won't know if an exam is inadequate until you review VA's rating decision for each condition.
- If possible, carefully read the Veteran's claim file after the exam and review the C&P exam report before VA issues a rating decision.
- Avenues for dispute will depend on if the Veteran needs to submit additional evidence.

KEY: Does the Veteran need to submit a statement or other additional evidence to correct the factual basis of the examination?


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