



Lesson 18

Process: Evaluation of C&P Examinations

The American Legion DSO School

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Lesson 18 Learning Objectives

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

- Many Veterans are unable to obtain a private nexus opinion to support their claims, 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 Ratings Exams



The purpose of a VA C&P examination 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 Ratings 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 accurately rate conditions under subjective standards.

The image shows a portion of the VA Sleep Apnea Conditions Disability Benefits Questionnaire (DBQ) form. It is divided into several sections:

- SECTION I - DIAGNOSIS:** Asks if the veteran has or has ever had sleep apnea. If yes, it requires providing ICD codes and dates of diagnosis for obstructive, central, mixed, or other sleep disorders.
- SECTION II - MEDICAL HISTORY:** Includes questions about the history of the sleep disorder condition (2A), if continuous medication is required for control (2B), and if the veteran requires a breathing assistance device like CPAP (2C).
- SECTION III - FINDINGS, SIGNS AND SYMPTOMS:** Asks if the veteran currently has any findings, signs, or symptoms attributable to sleep apnea, with checkboxes for persistent daytime hypersomnolence, carbon dioxide retention, chronic respiratory failure, cor pulmonale, and requires tracheostomy.
- SECTION IV - OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS AND/OR SYMPTOMS:** Includes questions about other physical findings related to the conditions (4A) and scars related to any conditions or treatment (4B). It also provides a section for comments (4C).

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.
- 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).

Quiz

Click the **Quiz** button to edit this object

You are helping Veteran Mark with his claim for service connection for temporomandibular joint syndrome (TMJ), a jaw problem. He has shown you service medical records where he was treated for a stiff jaw and he actually was diagnosed with TMJ in service. Mark attended a C&P examination, and you review the report on VBMS. The contract doctor provided a negative nexus opinion and said:

"The condition is not as least as likely as not due to service because I could find no military medical records showing any jaw problems in service."

Do you think the doctor's opinion is adequate? (This question does not count toward your final grade.)

- YES, because the doctor states that they reviewed Mark's SMRS.
- NO, because the doctor failed to apply the presumption of soundness.
- YES, because the doctor used the term "as least as likely as not."
- NO, because the doctor failed to discuss medical records of jaw problems in service.

Answer 1

“NO, because the doctor failed to discuss medical records of jaw problems in service.”

- This comes from a recent Court case, *Robertson v. McDonough*, No. 21-1674 (Decided Jan. 20, 2022).
- The Court noted that the examiner completely failed to address the relevant service medical records.
- A medical opinion based on inaccurate facts has no probative value. *See Reonal v. Brown*, 5 Vet.App. 458 (1993). (This is a good case to cite for this situation.)

In-Service Incidents

- Information to consider includes:
 - What happened?
 - When and where did it happen?
 - How was the Veteran injured?
 - 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.
- A VA exam that does not consider the Veteran's lay statements is **not** adequate.

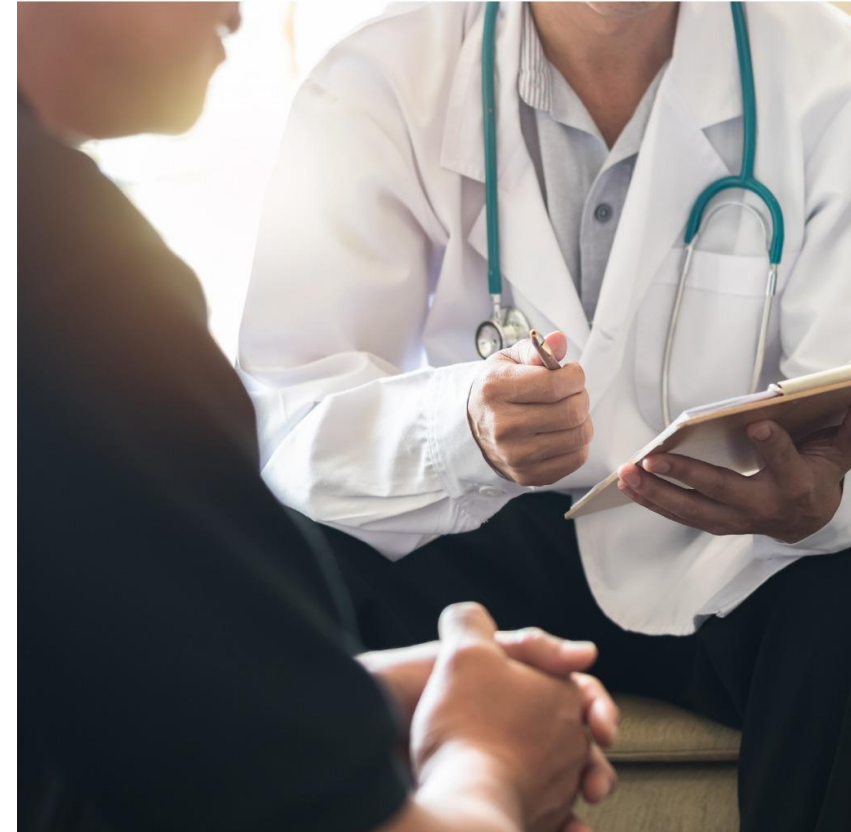
Descriptions of Symptoms



- 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 a 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 examiner will address the Veteran's statements.

Advocacy Tip: If the Veteran is not experiencing a flare-up during an exam, then the examiner should ask them to describe their flares.

Quiz

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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' flare-ups:

"The veteran says that during a flare his knee is weaker and 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 the doctor's statement about flare-ups is adequate? (This question does not count toward your final grade.)

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

Answer 2

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. It comes from a recent Court decision, *Norman v. McDonald*, No. 20-1605 (Decided Mar. 12, 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.
- Ensure that the Veteran fully describes all 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.



Quiz

Click the **Quiz** button to edit this object

Veteran Samantha is seeking service connection for PTSD. She sees a VA counselor for treatment, and a VA psychologist had diagnosed her with PTSD. She attended a contract examination for her claim, and you review 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 the doctor's opinion is adequate? (This question does not count toward your final grade.)

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

Answer 3

- **No, because the doctor failed to explain how Samantha did not meet the criteria for PTSD.**
- This comes from a recent Court decision, *Ross v. McDonough*, No. 20-7369 (Decided Jan. 7, 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 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 exam report before VA issues a rating decision.
- Avenues for dispute will depend on if the Veteran needs to submit additional evidence.

Join Bergmann & Moore this Summer for exciting information about disputing errors in VA decisions.

- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the course for future reference.