

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.



Statement for the Record

Before the

**House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs**

Concerning

“VA Disability Exams: Are Veterans Receiving Quality Services?”

July 27, 2023

Chairman Luttrell, Ranking Member Pappas, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on VA disability examinations and the quality of those services received by veterans.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 800 accredited attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans and families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits. In 2000, the U.S. Court of Appeals for Veterans Claims (CAVC) recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA members represent veterans before the Department of Veterans Affairs and the Board of Veterans' Appeals (BVA). Accredited attorneys continue to represent more appeals before BVA than any other service organization or listed category; in FY 2022, attorneys represented appellants in 23.4 percent of decided appeals. With agent representation included, that level reached 25.7 percent. U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2022* at 49-50 (https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2022ar.pdf).

NOVA members also appear before the CAVC, the U.S. Court of Appeals for the Federal Circuit, and the Supreme Court, representing individual appellants and advancing veterans law in the process. As an organization, NOVA also advances important cases and files amicus briefs in others. *See, e.g., NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *National Organization of Veterans' Advocates, Inc., et al., v. Secretary of Veterans Affairs*, 2020-1321 (Sept. 20, 2022) (Federal Circuit invalidated knee replacement rule); *Arellano v. McDonough*, 598 U.S. ____ (2023) (amicus); *Terry v. McDonough*, CAVC 20-7251 (amicus) (case pending).

Introduction

NOVA has long detailed deficiencies in the disability examination process, which result in poor quality of exams, inferior service to veterans, and ongoing delays across the entire VA disability adjudication system. *See, e.g., National Organization of Veterans' Advocates, Statement for the Record Before the House Committee on Veterans' Affairs Concerning Fulfilling Our Pact: Ensuring Effective Implementation of Toxic Exposure Legislation* (Dec. 7, 2022); National Organization of Veterans' Advocates, *Statement for*

the Record Before the House Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs Concerning Supporting Survivors: Assessing VA's Military Trauma Programs (Nov. 17, 2021); National Organization of Veterans' Advocates, *Statement for the Record Before the House Committee on Veterans Affairs Concerning Discussion Draft: Veterans Appeals Improvement and Modernization Act of 2017* (May 2, 2017). We address these issues in detail below.

I. VA and Its Contractors Struggle to Provide Veterans with Adequate Examinations.

The CAVC has repeatedly emphasized VA's role in obtaining examinations and ensuring those examinations are adequate. *See, e.g., McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (outlining when VA must obtain an examination); *Barr v. Nicholson*, 21 Vet.App. 120, 123 (2007) (when VA seeks an opinion, the Secretary must ensure it is adequate); *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012) (adequate medical report must be based on correct facts and reasoned medical judgment).

Despite this clear precedent, VA frequently failed to ensure veterans received timely, adequate VA disability examinations when the Veterans Health Administration conducted nearly all examinations. *See, e.g., Department of Veterans Affairs (VA) Appeals Data Requested by House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs* (January 2015) (reasons for remands between FY 2009 and 2014 centered on issues with medical examinations and opinions). This problem has not been solved with the shift to contract examinations.

During stakeholder discussions leading up to the passage of the Veterans Appeals Improvement and Modernization Act of 2017 (AMA) and before this Subcommittee, NOVA testified to the importance of adequate examinations and the problems created when claims are sent back time and again for new examinations when the first examination or subsequent ones are deficient. Even with the 2019 implementation of the AMA, which was intended to reduce remands, NOVA members continue to report a significant number of cases remanded due to inadequate examinations. Current BVA statistics confirm these reports.

Frequently, BVA orders a particular type of examination, but it is conducted by an inappropriate provider, e.g., an OB/GYN nurse practitioner handling a neck and back exam. Or BVA provides specific instructions that are ignored by the examiner. Example: The veteran's claims for bilateral knee conditions were remanded back to BVA from the CAVC in 2020. BVA remanded in May 2021 and February 2022 for new medical opinions. In February 2022, BVA specifically ordered the VA examiner to address the veteran's competent lay statements regarding the history and chronicity of his knee symptoms. Because the VA examiner failed to comply with these instructions, BVA yet

again remanded these claims for the examiner to comply with the order, adding untold months of waiting before the veteran receives resolution.

Unfortunately, a BVA remand under the AMA is far more costly than one in the legacy system. When BVA remands an appeal in the legacy system, a veteran, survivor, or family member who is dissatisfied with the results of the remand can return to BVA with **the same docket date** as before. By contrast, an AMA remand means the appellant loses their original docket date. If their appeal is remanded and denied again, they must start over again with a new docket date if they choose to return to BVA. Because backlogs at BVA continue unabated and the promise to reduce remands has not been kept, absent qualifying for advancement on the docket, the appellant will wait many years for BVA to issue a decision.

In addition, NOVA members report that confusing examination requests contribute to inadequate exams and deficient reports. Many times, the request does not match the veteran's claims or incorporate the remand instructions articulated by BVA or the CAVC. Sometimes, the request is not clear as to whether the veteran must appear for an exam or the examiner can write the report based on a record review. Without clear guidance, examiners burdened with large workloads are bound to conduct inadequate exams and write incomplete reports.

Just a year ago, in a report highlighted by this Subcommittee in its June 27, 2023, invitation, the VA Office of Inspector General acknowledged that “[r]esults of medical exams are critical pieces of evidence in supporting veterans’ claims for benefits, and the exams represent a significant investment by VBA.” Department of Veterans Affairs, Office of Inspector General, *Veterans Benefits Administration: Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions* i, June 8, 2022 (<https://www.va.gov/oig/pubs/VAOIG-21-01237-127.pdf>). The report also found, among other things, that “[a]ll three vendors failed to consistently provide VBA with the accurate exams required by the contracts” and “vendor exam accuracy has not improved and exam errors have not been resolved.” *Id.* at 8; 10. Contract examiners must comply with the terms of their contracts and be held accountable when they fail to do so. Furthermore, contractors must correct errors and provide adequate examinations to reduce repeated remands, which result in continuing delay and backlogs.

NOVA urges this Subcommittee to conduct additional oversight to understand and quantify the root causes of inadequate examinations, the ongoing high remand rates due to inadequate examinations and potential overdevelopment, and the resulting delays endured by veterans with claims and appeals before the Veterans Benefits Administration and the Board of Veterans’ Appeals due to these factors.

II. VA Seeks Additional Development When Adequate Evidence of Record Exists.

NOVA members also report that VA frequently orders additional examinations even when adequate medical evidence of record exists and a favorable opinion has been rendered. VA may not undertake “additional development if a purpose [is] to obtain evidence against an appellant’s claim.” *Mariano v. Principi*, 17 Vet.App. 305, 312 (2003). In some instances, NOVA members report the ordering of additional examinations that appear to be “tie breakers,” e.g., when there is one negative and one favorable opinion. Such exams are in contravention of VA law and policy requiring adjudicators to grant the claim when the evidence is in relative equipoise.

Example 1: In February 2022, a VA contract examiner provided a favorable opinion on the veteran’s claim for service connection for an arthritic condition. Despite this favorable opinion, VA obtained a second set of exams, which were unfavorable, and VA’s denial made no mention of the first favorable exam. After a higher-level review, the claim was sent back for more development due to the “difference of opinion.” This time, the original examiner ultimately concluded the condition was “more likely than not” service connected. Nonetheless, VA denied the claim.

Example 2: In July 2023, VA sent a claim out for an additional medical opinion where the VA examiner already provided a nexus opinion advising that the veteran’s depression was secondary to his service-connected hypothyroidism. The veteran, as a result of his Agent Orange exposure, is also service connected for Parkinson’s disease.

Furthermore, VA also routinely rejects favorable, well-rationalized, private medical opinions for improper/unlawful reasons, such as the examiner’s “failure to review the veteran’s claims file” or because the examiner’s opinion “was based on the history reported by the veteran.” The CAVC has repeatedly admonished BVA for rejecting favorable evidence for these reasons, yet these types of rejections continue to occur on a regular basis. *See, e.g., Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (Board may not reject a private medical opinion in favor of a VA opinion solely because the VA examiner reviewed the claims file); *Kowalski v. Nicholson*, 19 Vet.App. 171, 179-80 (2005) (Board may not disregard a medical opinion solely because the opinion was based on a history provided by the veteran); *see also Coburn v. Nicholson*, 19 Vet.App. 427, 432 (2006) (“[R]eliance on a veteran’s statement renders a medical report incredible only if the Board rejects the statements of the veteran.”).

In July 2022, NOVA filed a statement in support of draft legislation, i.e., No Bonuses for Bad Exams Act, before the Senate Committee on Veterans’ Affairs. National Organization of Veterans’ Advocates, *Statement for the Record Before the Senate Committee on Veterans’ Affairs Concerning Pending Legislation to Include Discussion Draft*, S. ___, No

Bonuses for Bad Exams Act of 2022 (July 13, 2022). That bill would have ensured inadequate examinations do not adversely impact veterans' claims, e.g., by prioritizing new exams and subsequent claims processing when a veteran has received an inadequate examination, by permitting reports of inadequate or unnecessary examinations to be removed from the veteran's record, and by ensuring inadequate or unnecessary examinations are not used for adjudication, review, or litigation purposes. The House and Senate Committees on Veterans' Affairs should take up such legislation in this Congress and conduct ongoing oversight of the VA disability examination process.

III. Contractors Must Improve Communication to Veterans and Their Accredited Representatives and Provide More Overall Transparency.

A. Accredited Representatives Should Receive Copies of All Communication Between the Contractor and Veteran.

NOVA members report confusion and a lack of clear communication about scheduling to veterans that causes them to miss examinations. When a veteran cannot make the scheduled examination, it needs to be properly and timely rescheduled or there is a strong likelihood VA will deny the claim. Accredited representatives can assist their clients with navigating this process but timely notice is necessary.

At this Subcommittee's March 2023 hearing, NOVA provided a statement which supported, among other bills, H.R. 1530, Veterans Benefits Improvement Act. This bill would require that every communication from a contractor to a claimant regarding the scheduling of a covered medical disability examination be "contemporaneously transmitted" to the accredited representative. Contractors should agree to provide this notice **without the need for legislation**, but if not, Congress should move to pass this bill.

In addition, any legislation should contain a new section that requires VA to automatically mail a copy of the veteran's examination report to the veteran and his or her accredited representative (if one has been appointed by the veteran). This amendment is necessary given the CAVC's recent unfavorable interpretation of the statute. *See, e.g., Martinez v. Wilkie*, 31 Vet.App. 170 (2019) (VA not required to provide copy of examination report under 38 U.S.C. § 5103A).

Finally, contractors should recognize and respect the veteran/representative relationship. NOVA members report that contractors state they are only authorized to speak with the veteran. If contractors do not have access to the signed 21-22 or 21-22a, they should be provided with such and accept the assistance of the veteran's representative who is authorized to speak for the veteran.

B. Contractors Need to Take Additional Steps to Improve Scheduling and Related Issues.

NOVA members report continuing issues, outlined below, that result in unnecessary denials and poor service to veterans. Contractors should take the necessary steps to eliminate these issues.

- **Failure to confirm appointment with veteran.** Timely notice is not always provided, the appointment is not confirmed, and when the veteran does not show, they are penalized because they have not shown good cause for missing the appointment. Contractors should ensure the appointment is properly confirmed.
- **Providers unable to accept cancellations.** When an issue or illness arises that prevents the veteran from attending an appointment shortly before, or the day of, the examination, the provider will refuse to accept the cancellation or inform a veteran they must contact the contractor. In many instances, the veteran does not have that information, and then gets marked as a “no-show.” Providers should be able to handle these cancellations.
- **Failure to provide basic information upon request.** Sometimes examiners refuse to answer basic questions raised by the veteran, such as their full name, specialty, diagnosis, or ROM measurements. Veterans have a right to know this basic information and it should be provided when requested.

Conclusion

Many aspects of the VA disability examination process remain problematic. NOVA urges this Subcommittee to continue oversight, with an emphasis on examining the high remand rates due to inadequate examinations and overdevelopment that add to ongoing backlogs before the Veterans Benefits Administration and the Board of Veterans’ Appeals.

For more information:

NOVA staff would be happy to assist you with any further inquiries you may have regarding our views on this important legislation. For questions regarding this testimony or if you would like to request additional information, please feel free to contact Diane Boyd Rauber by calling NOVA’s office at (202) 587-5708 or by emailing Diane directly at drauber@vetadvocates.org.