



CONGRESSIONAL TESTIMONY

STATEMENT FOR THE RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

HEARING ON

**VA COMPENSATION AND PENSION EXAMS DURING THE COVID-19 PANDEMIC: A PATH
FORWARD**

MARCH 23, 2021

Chairwoman Luria, Ranking Member Nehls, and Members of the Subcommittee:

The American Federation of Government Employees, AFL-CIO and its National Veterans Affairs Council (AFGE) appreciate the opportunity to provide our views on today's hearing titled, "VA Compensation and Pension Exams During the COVID-19 Pandemic: A Path Forward."

AFGE represents more than 700,000 federal and District of Columbia government employees, 260,000 of whom are dedicated Department of Veterans Affairs (VA) employees. Our membership includes the Veterans Benefits Administration (VBA) claims processors who order the compensation and pension (C&P) exams that are the subject of this hearing, as well as the VA clinicians who perform these exams internally for the Veterans Health Administration (VHA). Veterans are better served by receiving their care, including C&P exams, internally within the VA. The problems identified in the Office of the Inspector General (OIG) Report titled "Enhanced strategy needed to reduce disability exam inventory due to the pandemic and errors related to canceled exams"¹ show problems related to C&P exams have only worsened during the COVID-19 Pandemic. AFGE urges the committee to pass legislation that continues to mandate that the VA must maintain and expand internal C&P exam capacity to serve veterans and provide better exams than what they receive in the private sector.

Background:

C&P exams used to be performed exclusively by VA clinicians with limited exceptions. In 1996, Congress authorized a pilot program that allowed only 10 VBA Regional Offices (ROs)

¹ VA OIG 20-02826-07|November 19, 2020

to assign C&P exams to outside contractors.² This program was later expanded, and gradually allowed all ROs to engage outside contractors starting in Fiscal Year 2017.³ Even with this expansion, contracting out exams has consistently been done with the clear intent to supplement the VA's C&P exam capacity, not supplant it. Assertions that Congress' intent was to give the VA the power to completely outsource this vital VA function is a gross contortion of the law, and a deliberate attempt to abuse what was intended to be limited authority.

This is not the first time that problems with contract C&P exams have been identified and examined by this committee. In 2018, the GAO issued a report titled "VA DISABILITY EXAMS: Improved Performance Analysis and Training Oversight Needed for Contracted Exams."⁴ AFGE was disturbed to learn in the report that "VBA reported that almost all contractors missed VBA's quality target of 92 percent in the first half of calendar year 2017."⁵ Additionally, it remains disturbing that "VBA's lack of reliable data on the status of exams, including insufficient exams—exam reports that VBA returns to contractors to be corrected or clarified—limits its ability to effectively oversee certain contract provisions."⁶ Moreover, it is unacceptable that at the time "VBA relies on contractors to verify that their examiners complete required training, [...] VBA does not review contractors' self-reported training reports for accuracy or request supporting documentation such as training certificates from contractors."⁷ While these examples are problematic, they were not the last to be presented to this Subcommittee.

² Veterans' Benefits Improvement Act of 1996 § 504(b), 38 U.S.C § 5101 note.

³ Consolidated and Further Continuing Appropriations Act of 2015, Division I, Title II § 241, 38 U.S.C 5101 note.

⁴ Gov't Accountability Office, GAO-19-13, "VA DISABILITY EXAMS: Improved Performance Analysis and Training Oversight Needed for Contracted Exams (October 12, 2018).

⁵ *Id.* at 11.

⁶ *Id.* at 20.

⁷ *Id.* at 24.

In 2019, the VA OIG issued a report titled “Inadequate Oversight of Contracted Disability Exam Cancellations.”⁸ This report detailed, as its title suggests, the problems the VA was having overseeing contract C&P exams as it continued to contract out more and more exams. In a scathing letter that Chairman John Tester (D-MT), then Ranking Member of the Senate Committee on Veterans’ Affairs, and nine other Senators sent to the VA on November 20, 2020,⁹ the Senators point out that this particular OIG report:

found that VA paid \$12.3 million in costs to contractors for veteran no-shows or reschedule requests too close to an appointment date. However, the VA OIG found in that same report that VBA did not typically verify those no-shows were accurate before payment, potentially paying contractors millions for false no-shows. Our offices have all heard from veterans directly documenting the red-tape filled process that a veteran must go through when conducting a contracted C&P exam.

Unfortunately for veterans, the VA’s failure in its ability to administer contract C&P exams does not end there and was only exacerbated by COVID-19.

Contract C&P exams during COVID-19

The Trump Administration VA’s handling of C&P exams during the COVID-19 Pandemic only intensified its approach to C&P exams pre-pandemic, which was to rely on contractors and provide minimal oversight. In a memo dated April 2, 2020, the Undersecretary for the Veterans Health Administration wrote that VHA should “immediately transition[] C&P examinations directly to VBA contracted resources, to the fullest extent possible...”.¹⁰ The

⁸ VA OIG 18-04266-115 | June 10, 2019

⁹ Letter from Ranking Member Tester and nine other Senators to VA Secretary Wilkie. November 20, 2020. <https://www.veterans.senate.gov/newsroom/minority-news/tester-colleagues-slam-va-privatization-of-compensation-and-pension-exams-for-disabled-veterans>

¹⁰ Department of Veterans Affairs Memorandum Subject “Immediate Transition of Veterans Health Administration (VHA) Compensation and Pension (C&P) Exams to Veterans [Benefits] Administration (VBA) Contracted Resources.” April 2, 2020.

memo goes on to say that “[VISNs] and VHA Facility Leadership will be notified to maintain minimal C&P activities, such as Telehealth, Acceptable Clinical Evidence, and other distance services...”.¹¹ However, on April 8th, the Veterans Benefits Administration Medical Disability Examination Program Office told its employees that VBA “is taking the temporary measure to route all C&P examination requests to the VBA vendors until further notice.”¹² This left VHA C&P professionals who were not re-assigned to other duties with limited work, as they cannot perform exams if VBA does not forward any cases to VHA, exacerbating a dramatically growing backlog. While, VBA amended this guidance effective May 15th, over a month later, to say that “Based on [Examination Request Routing Assistance or ERRA] results, claims processors are directed to send any eligible examination request(s) to VHA.”¹³ However, the ERRA tool only keeps C&P exams within VHA if VHA is reporting accurate capacity data to VBA. In turn, the VA’s reliance on contractors and gross inability to manage and coordinate its own staff contributed greatly to the backlog, which according to the letter Chairwoman Luria sent to the President Biden on January 28, 2021, “hovers around 356,000.”¹⁴

The VA OIG Report “Enhanced Strategy Needed to Reduce Disability Exam Inventory Due to the Pandemic and Errors Related to Canceled Exams”¹⁵ further illustrates the problems that faced the VA and its contractors during the COVID-19 Pandemic, and its inability to perform many exams that are required to be done either in person by the examiner, or with in-

¹¹ *Id.*

¹² VA Guidance for Routing Compensation and Pension (C&P) Examinations Requests. April 8, 2020.

During the COVID-19 Pandemic

¹³ Medical Disability Examination Program Office (MDEPO) guidance on “Use of the Exam Request Routing Assistant (ERRA) Tool.” May 15, 2020.

¹⁴ Letter from Chairwoman Luria and nine other Members of Congress to President Joseph R. Biden. January 28, 2021.

https://luria.house.gov/sites/luria.house.gov/files/wysiwyg_uploaded/2021.01.28%20Member%20Letter%20to%20President%20Biden%20Re%20CP%20Exam%20Program.pdf

¹⁵ VA OIG 20-02826-07| November 19, 2020

person assistance. Because of this, the report notes that “as of July 31, 2020, VBA reported an inventory consisting of 346,221 pending exam requests.”¹⁶ However, even more importantly the report explains that “[e]xam requests can contain one or more claimed disabilities. For example, a single exam request could include a claim for hearing loss, headaches, and a back condition, each requiring a separate exam. The 346,221 exam requests contained about 1.5 million distinct claimed disabilities likely to require an exam.”¹⁷ This is a staggering number that must immediately be addressed, and only further underscores the need for the VA to maintain maximum internal C&P capacity.

This OIG report was published prior to the passage of the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, which was signed into law on January 5, 2021 (Isakson Roe Act). When negotiating this law, Congress included a provision that prohibits the VA from eliminating jobs related to C&P exams below the C&P personnel level the VA had on March 1, 2020.¹⁸ The provision also demands the VA present a thorough report to Congress on the efforts it will undertake to repair its internal C&P capacity, including its strategy to “increase the capacity, efficiency, and timeliness of medical examiners of the Veterans Health Administration with respect to completing medical examinations,” as well as “[t]he total number of full-time equivalent employees among all medical and health care professions needed for the increases described.”¹⁹ Additionally, the report requires “[a]n assessment regarding the importance of retaining a critical knowledge base within the

¹⁶ *Id.* at 6

¹⁷ *Id.*

¹⁸ See Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, H.R. 7105, 116th Cong. § 2002 (2020).

¹⁹ *Id.*

Department for performing medical examinations for veterans filing claims for compensation.”²⁰
This report is due to congress by July of 2021.

The Isakson Roe Act only gives the VA limited and temporary authorization for the use of clinicians other than physicians to perform C&P exams, underscoring Congress’ intent to keep C&P exam capacity within the VA. Expanded authority is only for the use of outside contractors to assist with a short-term backlog of C&P exams caused by the COVID-19 pandemic. The VA had previously entered into contracts that use outside contract clinicians who do not meet the statutory definition of physician, which at the time was a violation of the law, demonstrating that the VA was exceeding its authority. Congress only granted the VA prospective permission to use non physician clinicians to perform contract C&P exams in the Isakson Roe Act with a sunset provision, not indefinitely, demonstrating that Congress was not forgiving previous violations of statute, and that Congress was requiring that the VA maintain internal C&P exam capacity for the future. The VA has a long way to go to get through the backlog caused by COVID-19, but any strategy going forward must include in-house C&P exams.

Benefits of VHA In House Exams

As this committee considers the future of C&P exams in the era of COVID-19 and beyond, it is also important to take note of the benefits to veterans for performing C&P exams by VA personnel. While this is true for all veterans, it is particularly relevant for veterans who have multiple or complex issues. As the OIG recently stated:

In discussions with VBA, the OIG discerned the estimated number of individual exams needed could be most accurately determined from the underlying claimed disabilities, referred to as contentions. VBA’s August 2020 VBMS User Guide (page 261) defines contentions as conditions or diagnoses that a veteran contends are the cause of a current

²⁰ *Id.*

disability and may qualify for benefits if directly related to military service. A single disability benefits claim can include more than one contention. In some cases, an in-person exam may not be needed if adequate clinical evidence is provided, but multiple exams may also be required. For example, a claim for traumatic brain injury or a common form of diabetes (mellitus) may require multiple exams that could drive the number of pending exams even higher.²¹

For the veteran who has a condition that requires more than one exam, when they get their C&P exam(s) at VA, they are planned to occur the same day at the VA facility, and only require one trip. When they are performed by contractors, they can occur over multiple days with multiple vendors, creating extreme inconvenience for the veteran, and increases the likelihood that an appointment may be missed, leading to delayed benefits or denied claims. This is particularly relevant for veterans who have severe disabilities resulting from their service, when one trip to a doctor is a challenging ordeal.

AFGE has advocated over many years for the VA to recognize that veteran-centric medicine is itself a specialty and has stressed the importance of the training and expertise required to conduct high-quality C&P exams. AFGE strongly agrees with the reasoning that Chairwoman Luria put in her letter to President Biden that VA C&P medical personnel have built extensive experience in both observing specific veteran health care conditions and developing the ability to readily recognize and observe the subtle symptoms of veteran centric medical conditions for which the veteran is being examined, and that “may be alien to a civilian practitioner.”²² Complex conditions are more likely to be noticed by a clinician with significant

²¹ *Id.* at 7. Footnote 27.

²² Letter from Chairwoman Luria and nine other Members of Congress to President Joseph R. Biden. January 28, 2021.

https://luria.house.gov/sites/luria.house.gov/files/wysiwyg_uploaded/2021.01.28%20Member%20Letter%20to%20President%20Biden%20Re%20CP%20Exam%20Program.pdf

experience performing C&P exams and should be exclusively performed by VA personnel. These conditions include but are not limited to Traumatic Brain Injury (TBI), Post Traumatic Stress Disorder (PTSD), Military Sexual Trauma (MST), veterans who served as Prisoners of War (POWs), veterans who suffered catastrophic injuries, and veterans who are currently eligible (or will likely soon be eligible) to pursue toxic exposure claims. Each of these conditions are veteran centric in nature, and veterans benefit from having experts who exclusively perform these exams for the VA and are more likely to recognize the nuances of these complex conditions. Additionally, for certain exams that are particularly sensitive in nature, such as MST or PTSD, if an exam upsets a veteran and they are in a VA facility, there are VA mental health providers on site who can assist in an emergency, instead of occurring in contractor's office where personnel are unequipped to help.

AFGE would also like to highlight the VA's use of telehealth C&P exams during the COVID-19 Pandemic, particularly for mental health exams. For the remainder of the COVID-19 Pandemic, as well as after it, telehealth makes it easier for veterans to see a provider when a physical examination is not required, and as telehealth makes distance a non-issue, VA personnel can be deployed instantly all over the world to perform mental health C&P exams.

All of these arguments, particularly for specialty claims, apply to current military personnel who are about to be discharged, and instead of receiving C&P exams, receive Integrated Disability Evaluation System (IDES) exams on military bases in lieu of a C&P exam.

Recommendations:

AFGE recommends that VA's own highly trained, credentialed, experienced, and accountable employees should perform C&P exams, with very few exceptions, and should be the

VA's exclusive provider for specialty claims. The continued failures of C&P contractors make the elimination of in-house C&P capacity around the country all the more troubling. AFGE welcomes the opportunity to work with the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs to build on the progress made in the last Congress and craft new legislation to restore VA's internal C&P exam capacity and narrow the VA Secretary's unrestricted authority to contract out these exams. In the near term, AFGE urges immediate action to stop the elimination of C&P examiner positions around the nation and urges the VA to only provide internal C&P exams for mental health and specialty claims to better assist veterans when immediate or emergency treatment is needed.

AFGE appreciates the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs holding this important hearing, and we look forward to working with the Committee to find ways to improve C&P exams for all veterans.