

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

**“Examining VA’s Challenges With Ensuring Quality Contracted Disability
Compensation Examinations”**

September 18, 2024

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's challenges with ensuring quality contracted disability compensation examinations.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents more than 850 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 (Board). Accredited attorneys continue to represent more appeals before the Board than any other service organization or listed category; in FY 2023, attorneys represented appellants in 27.2 percent of decided appeals. With agent representation included, that level reached 29.8 percent. U.S. Department of Veterans Affairs, *Board of Veterans' Appeals Annual Report Fiscal Year 2023* at 53 (https://www.bva.va.gov/Chairman_Annual_Rpts.asp).

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. 1 (2023) (amicus); *Terry v. McDonough*, 37 Vet.App. 1 (2023) (amicus).

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, Subcommittee on Disability Assistance and Memorial Affairs Concerning VA Disability Exams: Are Veterans Receiving Quality Services?* (July 27, 2023); 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's Contracted Medical Examiners 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 Board statistics confirm these reports.

NOVA members report several common issues with both contract examiners and VA, as outlined below, that result in inadequate exams.

Poorly written examination scheduling requests (ESRs) by VA. The contracted examiner will only perform what is stated in the ESR, so if that is not sufficiently detailed,

the result will be inadequate. NOVA members report that requests frequently do not match the veteran's claims or incorporate the remand instructions articulated by the Board 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 thorough details and clear guidance, inadequate exams and incomplete reports are the result, as demonstrated in the specific examples below.

- If a “TERA exam” is ordered without additional detail, the examiner will conduct a very broad exam and often come back with a negative “canned” answer regarding the “synergistic effect of TERA.” The ESR should contain specific details about why the exam is being ordered, e.g., due to exposure to a specific toxin, such as TCE, benzene, fuels, solvents, etc.
- Another example provided by a NOVA member relates to claims for erectile dysfunction (ED) secondary to medication prescribed for posttraumatic stress disorder (PTSD). The ESR will specify an exam to determine if ED is secondary to PTSD but fail to mention the claimed causation between the PTSD medication and ED.

In FY23 and 1Q FY24, VA reported 3,879,753 ESRs were submitted and claims processors sought clarification on 895,635—or 23 percent—of those. The top reasons for clarification included the following: (1) wrong disability benefits questionnaire (DBQ); (2) missing DBQ; and (3) incomplete/missing medical opinion. These clarifications require time and rework on the part of VA employees. In June 2024, as part of a VBA enterprise-wide quality standdown, the Medical Disability Examination Office (MDEO) led a training on ESRs and the rework process. **VBA should continue with at least one standdown per year (and perhaps more) to allow for this type of training to reduce exam-related rework.**

Contractor failure to comply with ESR or Board remand instructions. Frequently, the Board orders a particular type of examination, but it is conducted by an inappropriate provider. Example: In an appeal that had been pending since 2010 and remanded multiple times, the Board remanded most recently in 2023 with specific instructions to obtain a medical opinion from someone who “specializes in vascular diseases or other related discipline.” Nearly a year later, the contractor returned an opinion from a family physician. A few months later, an opinion was finally secured from a vascular surgeon, which was favorable. VA then failed to mention this opinion in its denial and relied on the family physician's negative opinion to deny the claim.

The repeated failure of contractors to comply with remand instructions requires VA to then seek addendum opinions, adding to rework and backlogs. Unfortunately, a Board remand under the AMA is far more costly than one in the legacy system. When the Board 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 the Board 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 the Board. Because backlogs at the Board 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 the Board to issue a decision.

Concern regarding whether contracted examiners are receiving and reviewing the entire eFolder. NOVA members express concern that contract examiners are not receiving a copy of the veteran's entire file to review. Clients report examiners are asking them for copies of materials that are already in the VBMS file.

- “VA is telling contract examiners in ESRs to review the entire eFolder, but there are too many reports of veterans going to exams and contract examiners stating they do not have access to crucial documents. Where is the problem? Is the VA not giving complete access or is it being filtered out by the contractor before it gets to the examiner? Although VA examiners are checking the blocks that they have reviewed the entire eFolder, I don't think that is happening.”
- “I have had numerous clients forward me requests for copies of information that is already in the VBMS file. I respond to the vendor identifying where the information is in VBMS and am being told by the vendors that they do not have access to the claims file. My question to this is why are the vendors checking off they have reviewed the claims file when they do not have access to the file? I get the response that that is what they were trained to do. But I find this rather disturbing as it's very clear they do not have access but are saying they do.”

VA is not being transparent about this process and examiners may be falsely attesting that they have reviewed the entire file when they have not. **Congress should require VA to provide accurate information about this process and ensure that examiners are reviewing the veteran's file.**

Pressure to perform results in sloppy reports written by contracted examiners.

NOVA members report that the contractors' written product is often incomplete or inaccurate.

- In April 2024, VA received a secondary medical opinion regarding whether a left shoulder injury was caused due to overuse from compensating for a right shoulder injury. The contract examiner provided a negative opinion, appearing to copy and paste inapplicable rationale for that opinion in pertinent part: “unless there is a shortening of the limb so that the individual's gait pattern has been altered to the

extent there is a clinically obvious Trendelenburg gait.” This condition has no relationship to the shoulders, as made clear by the definition of Trendelenburg gait: “[A]n abnormal gait resulting from a defective hip abductor mechanism.” NIH, National Library of Medicine, *Trendelenburg Gait*, <https://www.ncbi.nlm.nih.gov/books/NBK541094/#:~:text=Trendelenburg%20gait%20is%20an%20abnormal,the%20contralateral%20side%20while%20walking>. The NOVA member who provided this example followed up to note that the exact same error happened in the case of a different veteran in a different region of the country.

- Despite private medical treatment indicating the veteran had herniated discs and radiculopathy, the first VA examiner concluded the veteran’s back was normal and did not check off any condition. After a higher-level review, VA returned the claim for a new examination. Although the report had basic information filled in, the opinion/nexus portions of the report were completely blank. No opinion was provided at all. VA denied the claim again for lack of a link between service and his condition.
- In a claim seeking service connection for obstructive sleep apnea (OSA), VA requested a TERA medical opinion. The TERA opinion came back “negative,” even though the contract examiner noted the veteran had a sleep test positive for OSA **during active duty**. The contract examiner only completed the part of the medical opinion template that addressed TERA and VA overlooked the critical fact that the veteran had been diagnosed with the condition while on active duty.

In June 2022, 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. **Congress should continue oversight over the contracted examination process.**

NOVA also supports certain legislative proposals that would hold VA and its contracted examiners more accountable. For example, 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.

More recently, in April 2024, NOVA filed a statement in support of certain provisions of another draft bill, i.e., the Medical Disability Examination Improvement Act of 2024. National Organization of Veterans' Advocates, *Statement for the Record Before the House Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs Concerning Pending Legislation* (April 10, 2024). Section 6 of this draft bill would require review and priority processing of claims where inadequate or unnecessary examinations were used to decide them. Of particular importance in section 6 is the requirement for VA to provide "another examination, if necessary, on a priority basis" and to provide "priority processing for the entirety of [the] impacted claim."

This Committee should continue to explore legislation that would improve the contracted examination process and ensure accountability when contractors do not provide adequate examinations.

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.

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 the Board 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.”).

We applaud VA’s recent commitment to examine this problem through the Office of Policy and Oversight’s Over-Development Reduction Task Force. VA is sharing its progress with the accredited advocate community. We are committed to supporting these efforts and look forward to future updates.

III. Contractors Must Improve Communication to Veterans and the Facilities In Which Examinations Are Conducted, As Well As 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. National Organization of Veterans’ Advocates, *Statement for the Record Before the House Committee on Veterans’ Affairs, Subcommittee on Disability Assistance and Memorial Affairs Concerning Pending Legislation* (March 29, 2023). 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. **VA should require this provision in all its contracts with vendors without the need for legislation.** An amended version of this bill is included as part of H.R. 8371, Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act (section 305), and would require the Secretary to provide health care professionals who perform exams with the contact information of any accredited attorney or agent who represents the veteran.

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 2019 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—and they certainly should have access if they attest they reviewed the entire file—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 have not reported significant improvement in scheduling issues since our July 2023 statement for the record. Common complaints include the following:

Exams are scheduled with inadequate notice and contractors are not flexible about rescheduling. Exams, particularly for rural veterans, are frequently scheduled with insufficient notice and without enough time to make appropriate travel arrangements for the examination. Contracted examiners are not sufficiently responsive to veterans who are elderly, bedridden, or otherwise unable to travel to exams. Examples of these and other notice/scheduling issues include the following:

- “My clients are frequently scheduled for exams with only one to three days advance notice.”
- From a legal services provider in Connecticut: “My clients (who are often far below the poverty line and without access to transportation) receive contract exams as far away as Long Island or Rhode Island. One was a client with advanced Parkinson's disease who had to travel to Rhode Island for his examination.”
- “If a veteran cannot attend due to previous schedule conflicts, they are told by the contractor they can only reschedule it one time and not for more than 10 days out. If veteran's schedule will not allow attendance at an exam within the next 10 days, the contractor reports to VA that the veteran is unavailable. New rating decisions are being issued denying appeals based on the veteran not appearing for the exam. We submit statements immediately and have the veteran call the contractor and VA, but most of the time it is still reported as the veteran is unavailable. I've probably had to do at least 10-15 supplemental claims in the past year due to this and fortunately almost all order new exams, but it is clogging up the system.”

- “I have a veteran that went to two appointments that he drove an hour to both times and the exam got canceled due to the provider not being available. Then he got rescheduled a third time for an exam he could not make, and they sent it back to VA. This is very frustrating for the clients.”
- “I have a client on hospice over 85. They contacted his wife a few weeks ago to schedule an exam and she requested a home visit because he is completely bedridden. Today, the exams were cancelled with the reason: ‘servicemember unavailable.’”
- “I have a veteran that drove three hours to an appointment and the office was closed for a holiday. “

Contracted examiners do not accept cancellations, resulting in unnecessary “no-shows.” NOVA has previously reported that providers are unable to accept cancellations and it is not clear if this issue has been addressed. 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.

Contract examiners fail to answer basic questions. Some 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. One NOVA member related: “I have numerous clients that will call and ask the providers what exams will be covered, and the providers do not tell them. They will also have duplicate exams ordered for the same issue within a week and when asked why they need to attend again, they get no response from VA or the provider and are forced to go to sometimes two to three exams for the same condition. Naturally this causes conflicting results which then the VA will sometimes order another exam after that to clarify all the exams. This is frustrating for them and frustrating to see on my side too.”

Furthermore, while one contractor will generally put the training classes and examiner credentials at the bottom of the appointment notification letter, most contractors do not. This information should be consistently provided to veterans.

C. Contractors Must Improve the Facilities At Which Exams Are Conducted and Ensure Compliance with ADA and OSHA.

In May 2024, the VA Office of the Inspector General (OIG) issued a report entitled, "Better Oversight Needed of Accessibility, Safety, and Cleanliness at Contract Facilities Offering VA Disability Exams." This investigation unveiled several disturbing findings, including but not limited to the following: (1) the Medical Disability Examination Office (MDEO) did not ensure or verify vendors' compliance with the American with Disabilities Act (ADA) or the Occupational Safety and Health Act (OSHA); (2) few vendor facilities complied with ADA and OSHA standards; (3) OIG identified deficiencies that could make exam facilities difficult to access and unable to accommodate some veterans who need exams; (4) exams scheduled at facilities with deficiencies may create difficulty for veterans with mobility issues; and (5) MDEO lacked formal standard operating procedures and training for site visits to assess safety and accessibility compliance. The OIG concluded that MDEO must improve its oversight of contractor disability examination facilities to ensure ADA and OSHA mandates are met.

NOVA members frequently report issues with facilities that mirror the findings of the OIG. Given its mission to provide veterans with disabilities all the benefits they have earned, to include disability compensation, **VA must demand that vendors ensure facilities are ADA- and OSHA-compliant, and Congress should continue its oversight.**

Conclusion

Many aspects of the VA contract disability examination process remain problematic. NOVA urges this Subcommittee to continue oversight and demand more transparency and accountability in the VA contract examination process.

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.