



**DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Regional Office**

[REDACTED]

VA File Number

[REDACTED]

Represented By:

[REDACTED]

Rating Decision

01/11/2024

INTRODUCTION

The records reflect that you are a Veteran of the Gulf War Era. You served in the Army from June 21, 2001 to September 21, 2005. [REDACTED]
Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

DECISION

1. Service connection for migraine including migraine variants is granted with an evaluation of 50 percent effective August 18, 2023.
2. Service connection for irritable bowel syndrome (IBS) is granted with an evaluation of 30 percent effective August 18, 2023.
3. Basic eligibility to Dependents' Educational Assistance based on permanent and total disability status is established from August 18, 2023.



EVIDENCE

- Washington VAMC (Veterans Affairs Medical Center) treatment records, for the period April 19, 2011 to November 1, 2012
- Service Personnel Records, received August 23, 2012 + April 27, 2023
- Service Treatment Records, received June 13, 2013 + February 10, 2014
- New Orleans VAMC (Veterans Affairs Medical Center) treatment records, for the period November 24, 2014 to March 2, 2015
- Atlanta VAMC (Veterans Affairs Medical Center) treatment records, for the period February 5, 2020 to September 21, 2023
- VA Form 21-526EZ: Application for Disability Compensation and Related Compensation Benefits, received April 27, 2023
- Private Medical Treatment Records, from numerous physicians, received April 27, 2023
- VA Form 21-0966: Intent to File, received August 18, 2023
- VA Form 21-526EZ Application for Disability Compensation and Related Compensation Benefits, received August 18, 2023
- VA Form 21-4138: Statement in Support of Claim, received August 18, 2023
- Section (§) 5103 Notice Response, received August 18, 2023
- Respiratory Conditions (Other Than Tuberculosis and Sleep Apnea) Disability Benefits Questionnaire, from Amma Abunyewa, M.D., dated , received November 14, 2023
- Medical Opinion Disability Benefit Questionnaire for Respiratory Conditions (Other Than Tuberculosis and Sleep Apnea), from Amma Abunyewa, M.D., dated , received November 14, 2023
- VA Form 21-4138, Statement in Support of Claim, received November 15, 2023
- Prior Rating Decision (continuing), conducted November 29, 2023
- VA Form 21-4138, Statement in Support of Claim, received November 30, 2023
- VA Form 21-4138, Statement in Support of Claim, received December 12, 2023
- VA Form 27-0820, Report of General Information, received December 20, 2023
- Headaches Disability Benefits Questionnaire (DBQ) + Medical Opinion - Veteran Provided, Dr. [REDACTED], MD, received August 18, 2023, conducted August 17, 2023
- Intestinal Conditions Disability Benefits Questionnaire (DBQ) + Medical Opinion - Veteran Provided, Dr. [REDACTED], MD, received August 18, 2023, conducted August 17, 2023

REASONS FOR DECISION

1. Service connection for migraine including migraine variants as secondary to the service-connected disability of post traumatic stress disorder (PTSD).

Service connection for migraine including migraine variants has been established as related to the service-connected disability of post traumatic stress disorder (PTSD). (38 CFR 3.303, 38 CFR 3.310)

The effective date of this grant is August 18, 2023. Service connection has been established from the day VA received your claim. When a claim of service connection is received more than one year after discharge from active duty, the effective date is the date VA received the claim. (38 CFR 3.400)



An evaluation of 50 percent is assigned from August 18, 2023.

We have assigned a 50 percent evaluation for your migraine including migraine variants based on:

- Very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability

This is the highest schedular evaluation allowed under the law for migraines. (38 CFR 4.120, 38 CFR 4.124a)

2. Service connection for irritable bowel syndrome (IBS) as secondary to the service-connected disability of post traumatic stress disorder (PTSD).

Service connection for irritable bowel syndrome (IBS) has been established as related to the service-connected disability of post traumatic stress disorder (PTSD). (38 CFR 3.303, 38 CFR 3.310)

The effective date of this grant is August 18, 2023. Service connection has been established from the day VA received your claim. When a claim of service connection is received more than one year after discharge from active duty, the effective date is the date VA received the claim. (38 CFR 3.400)

An evaluation of 30 percent is assigned from August 18, 2023.

We have assigned a 30 percent evaluation for your irritable bowel syndrome (IBS) based on:

- Abdominal distress
- Diarrhea

Additional symptom(s) include:

- Disturbances of bowel function

This is the highest schedular evaluation allowed under the law for irritable bowel syndrome. (38 CFR 4.113, 38 CFR 4.114)

3. Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35 based on permanent and total disability status.

Eligibility for Dependents' Educational Assistance is derived from a Veteran who was discharged under other than dishonorable conditions; and has permanent and total service-connected disability(ies); or permanent and total disability(ies) existed at the time of death; or the Veteran died as a result of service-connected disability(ies). Also, eligibility exists for a service member who died in service. Finally, eligibility can be derived from a service member who, as a member of the armed forces on active duty, has been listed for more than 90 days as missing in action; captured in line of duty by a hostile force; or forcibly detained or interned in line of duty by a foreign government or power. (38 USC Chapter 35, 38 CFR 3.807, 38 CFR 21.3021)



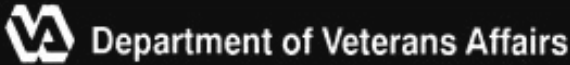
The effective date of this grant is August 18, 2023. Entitlement for Dependents' Educational Assistance has been established when your service connected disabilities met the criteria of being considered permanent and total service-connected disability(ies), this also coincides with the day VA received your claim. When a claim of service connection is received more than one year after discharge from active duty, the effective date is the date VA received the claim. (38 CFR 3.400)

Basic eligibility for Dependents' Educational Assistance is granted as the evidence shows you currently have a totally disabling service-connected disability or disabilities, permanent in nature. (38 USC Chapter 35, 38 CFR 3.807, 38 CFR 21.3021)
Evidence we have used to grant permanent and total disability status: The current rating decision, the recent examinations, and the review of all your service connected disabilities which indicate that your disabilities are static and without additional future examination reviews, meeting the criteria of being considered permanent and total service connected disability(ies).

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all Veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.





VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)

STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. Use this form to submit a statement to support a claim. For more information, contact us at <https://iris.custhelp.va.gov>, or call us toll-free at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal relay number is 711. VA forms are available at www.va.gov/vaforms. After completing the form, mail to: **Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Janesville, WI, 53547-4444.**

SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

1. VETERAN/BENEFICIARY'S NAME (*First, Middle Initial, Last*)

2. VETERAN'S SOCIAL SECURITY NUMBER

3. VA FILE NUMBER (*If applicable*)

4. VETERAN'S DATE OF BIRTH

5. VETERAN'S SERVICE NUMBER (*If applicable*)

6. TELEPHONE NUMBER (*Include Area Code*)

7. E-MAIL ADDRESS (*Optional*)

8. MAILING ADDRESS (*Number and street or rural route, P.O. Box, City, State, ZIP Code and Country*)

No. &
Street

Apt./Unit Number

City

State/Province

Country **US**

ZIP Code/Postal Code

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Private DBQ Election addendum

The VA has requested C&P exams that it knows will be falsely negative so that it can deny my claim. This strategy of "developing-to-deny" is illegal, not to mention unethical.

I demand processing of my claim based on the evidence that is already in the record. I have already submitted private medical evidence in lieu of C&P exams. This private evidence is more than sufficient according to VA guidelines. The Private DBQ Election I filed directs the VA to use that private evidence to decide my claims. The VA is ignoring that election. This arbitrary and capricious treatment of my claim is illegal.

Please refer to my previously submitted Private DBQ Election for a full discussion of this matter including citation to the governing policies.

SECTION II: REMARKS (Continued)

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

[Empty space for remarks]

SECTION III: DECLARATION OF INTENT

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

9. SIGNATURE OF VETERAN/BENEFICIARY (Required)

[REDACTED SIGNATURE]

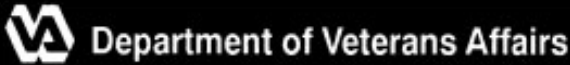
10. DATE SIGNED

12-12-2023

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.



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[REDACTED]

2. VETERAN'S SOCIAL SECURITY NUMBER
[REDACTED]

3. VA FILE NUMBER (*If applicable*)
[REDACTED]

4. VETERAN'S DATE OF BIRTH
[REDACTED]

5. VETERAN'S SERVICE NUMBER (*If applicable*)
[REDACTED]

6. TELEPHONE NUMBER (*Include Area Code*)
[REDACTED]

7. E-MAIL ADDRESS (*Optional*)
[REDACTED]

8. MAILING ADDRESS (*Number and street or rural route, P.O. Box, City, State, ZIP Code and Country*)

No. & Street [REDACTED]

Apt./Unit Number City [REDACTED]

State/Province [REDACTED] Country **US** ZIP Code/Postal Code [REDACTED]

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

I demand processing of my claim based on the evidence of record. The VA is requesting C&P exams that it hopes will be negative so that they can deny my claim. However, I have made an explicit Private DBQ Election which must be honored. I have already submitted private medical evidence that is adequate and sufficient to allow proper adjudication of my claim. By requesting C&P exams, the VA is "developing-to-deny." This is illegal.

SECTION II: REMARKS (Continued)

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

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SECTION III: DECLARATION OF INTENT

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

9. SIGNATURE OF VETERAN/BENEFICIARY (Required)

[REDACTED SIGNATURE]

10. DATE SIGNED

11-30-2023

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.



Department of Veterans Affairs

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SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

PRIVATE DBQ ELECTION AND COMPETENCY CHALLENGE

**This election makes it illegal to order C&P exams on my claim.
 The law forbids developing-to-deny.**

I hereby invoke two legal rights regarding my claims:

- 1.) Election to adjudicate my claim with private medical evidence in place of C&P exams or ACE-process reviews.**
- 2.) Challenge to the competency presumption for any C&P examiner whose evidence is contained in my C-file, now or in the future.**

Introduction:

These legal rights arise from a global analysis of the many authorities which govern VA claims. The right to make a Private DBQ Election, in turn, comes from the aggregation of three legal privileges: 1.) Exemption from C&P examinations; 2.) Waiver of C&P examinations; and 3.) Cancellation of C&P examinations. Exercising this right compels the VA to process my claim without developing medical evidence from C&P examiners. Since I have already provided the necessary evidence to support my claim, then there is no legal requirement whatsoever for me to attend C&P exams to prevail on that claim. Instead, my private medical evidence serves the purpose of C&P examinations. The right to make a Competency Challenge comes from the court precedent of *Francway v. Wilkie*, 940 F.3d 1304, and exercising it compels the VA to provide proof of the competency of any C&P examiners who provide evidence on my claim.

SECTION II: REMARKS (Continued)

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Election privilege #1: Exemption from C&P exams:

The plain language of 38 USC 5103A establishes this privilege. The statute describes the various ways in which VA must implement its duty-to-assist. It also contains the following provision at (b)(3): “[The duty-to-assist]... shall not apply if the evidence... allows for the... highest evaluation assignable in accordance with the evidence... as long as such evidence... is adequate for rating purposes and sufficient to grant the earliest possible effective date...” Clearly, Congress intended to make an allowance for claims to be decided on evidence obtained outside of the duty-to-assist process. In other words, the VA is not empowered to turn its statutory duty to assist Veterans with their claims into a ‘duty-to-verify’ or a ‘duty-to-be-examined.’ However, that is exactly how the VA presents C&P exams to Veterans. For instance, the VA website that supplies the private DBQ forms makes the following statement: “If an exam is scheduled, you must report for the examination.” That publicly published requirement has no legal basis. It also has no purpose other than intimidating Veterans into submitting themselves for inspection by the VA’s hostile and incompetent examiners. Although section 5103A does not use the exact term of ‘exemption,’ the effect of the statutory language is to create an exemption. After all, the action of section 5103A is not a positive one. Instead, it enumerates the criteria for when the statute should not be applied. The obvious intent here is to unburden the claims process from any unnecessary tasks, especially those that might do harm to a Veteran’s claim. The private medical evidence I am using for my claim meet all of the section 5103A criteria as well as the myriad requirements found in 38 USC 5125, 38 CFR 3.159 & 3.326, and M21-1 Manual Part V, Subpart ii, 1.A.3 (i.e., it is competent, adequate, sufficient, thorough, contemporaneous, detailed, and fully informed). As such, this private medical evidence makes C&P exams completely unnecessary. The duty-to-assist is not even invoked with regard to offering C&P exams for my claims.

Election privilege #2: Waiver of C&P exams:

This privilege originates from 38 USC 5103A as interpreted under court precedent. The relevant legal concept is referred to as the “equitable doctrine of waiver” and the basis is a U.S. Supreme Court decision from 1873 (Shutte v. Thompson, 82 U.S. 151): “But it is obvious that all the provisions made in the statute... introduced for the protection of the party... It is not to be doubted that he may waive them. A party may waive any provision either of a contract or of a statute, intended for his benefit... consistent with the rule, that a party may waive any conditions that are intended for his sole benefit...”

(continued on next page)

SECTION III: DECLARATION OF INTENT

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

9. SIGNATURE OF VETERAN/BENEFICIARY (Required)

10. DATE SIGNED

11/15/2023

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RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

(continuation of Form 4138)

Election privilege #2: Waiver of C&P exams (continued):

Section 5103A is unambiguously intended for the sole benefit of Veterans. Despite its age, Shutte is still good law and still binds the VA duty-to-assist. In fact, the Shutte opinion was quoted and confirmed in 2001 by the U.S. Court of Appeals for Veterans Claims (CAVC) in Janssen v. Principi, 15 Vet. App. 370. Janssen explicitly recognizes that Veterans may waive provisions of the duty-to-assist: "...absent some affirmative indication of Congress' intent to preclude waiver... [the Court must] presume that statutory provisions are subject to waiver (United States v. Mezzanato, 513 U.S. 196)... this Court has long accepted the ability of appellants to waive certain procedural Rights... an appellant can expressly waive... due process rights... if... he wishes to do so (Bowling v. Principi, 15 Vet. App. 1)... If he believes he can obtain nothing more... in terms of development... the Court finds no legal reason... not to permit him to make that choice... the Court will permit the... appellant to waive this Court's consideration of any duty-to-assist... rights potentially afforded to him..." Janssen goes on to state that explicit waivers, such as this one, must be given special consideration: "Surely an express waiver, such as we have in the instant case, is simply an emphatic way of saying "I choose not to raise this issue"... if informed implied waivers are permissible as to this Court's consideration... then so must be expressed waivers. To permit otherwise would be bizarre..." Janssen also gave specific direction regarding the waiver of C&P exams, perhaps foreseeing that these exams would be critical fulcrums in nearly every future claim: "...the Court understands that there may be compelling reasons why... a claimant may reach an informed conclusion, from the unique position he or she occupies, that further development of the claim may not only be unhelpful, but that it may be harmful to that claim. The same may be true as to a physical examination or medical opinion provided by VA... He has made clear that he believes that the claim under review has been developed as fully and completely as is necessary (or as much as he wishes it to be)... and that he considers further development of the facts... to be of no benefit to him." Finally, Janssen makes a straightforward description of the conditions under which a Veteran can assert this privilege: "...the appellant must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right (United States v. Olano, 507 U.S. 725)... if that is his or her clearly stated, informed, and voluntary desire... and has expressed his intention clearly and unequivocally... Nothing further is required (McCall v. U.S. Postal Service, 839 F.2d 664)." For the sake of clarity, I hereby affirmatively assert my waiver privilege: 1.) I have knowledge of my statutory right to C&P exams under the duty-to-assist; 2.) I intend, voluntarily and freely, to relinquish and surrender this right; 3.) I am clearly stating this desire which is informed and voluntary; and 4.) I clearly and unequivocally intend to waive this right.

Election privilege #3: Cancellation of C&P exams:

This privilege comes from M21-1 Manual Part IV, Subpart i, 2.C.1.d: "If the examination facility cancels a pending examination request based on a Veteran's election to submit a privately prepared disability benefits questionnaire (DBQ) in lieu of reporting for a clinical appointment, then follow guidance as it appears in M21-1 Part IV, Subpart i, 2.C.1.e." This paragraph implements a section of 38 USC 5101 amended in 2021 that created a statutory requirement to weigh private DBQs equally with C&P exams. The practical effect was to formalize a privilege for Veterans to cancel C&P exams in favor of using private DBQs. Although a Veteran's responsibility to support their claim with medical evidence has not been removed, they have a clear prerogative to determine the source of that evidence. The M21-1 also lays out the steps for Veterans to take when submitting private DBQs in place of C&P exams. In addition, the M21-1 has a very specific provision that electing private DBQs while declining C&P exams does not constitute a 'failure to report' which might have an adverse effect on their claim: "Note: Contract examination vendors use clarification requests with a variety of

narrative reason values to denote examination appointment scheduling irregularities. The only such reason value that may be appropriately considered equivalent to a failure to report for examination, thus warranting application of procedures discussed in M21-1, Part IV, Subpart i, 2.G is No Show." Paragraph 2.G, in turn, references 38 CFR 3.655. Since I am giving formal notice that I decline to report for C&P exams, the 'narrative reason value' for cancellation cannot be 'No Show.'

Competency challenge:

The laws, regulations, and policies governing claims describe strict quality standards for C&P exams. The duty-to-assist requires medical examinations to be adequate as well as "thorough and contemporaneous" (38 USC 5103A; Pond v. West, 12 Vet. App. 341). Adequacy is defined as "based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the 'evaluation of the claimed disability will be a fully informed one'" (Barr v. Nicholson, 21 Vet. App. 303; Gill v. Shinseki, 26 Vet. App. 386; Gardin v. Shinseki, 613 F.3d 1374). Sadly, it is quite rare for a C&P exam to be competent, adequate, sufficient, thorough, contemporaneous, detailed, or fully informed. I further contend that any C&P reports in my C-file, now or in the future, are inadequate unless proven otherwise because it is highly likely that they contain harmful errors that include, but are not limited to, at least one of the following exam or examiner deficiencies: not qualified to perform the exam, or less qualified than another examiner of record; failed to consider my credible testimony and competent lay observations regarding signs and symptoms, onset, chronicity, continuity, and/or history; failed to provide an adequate rationale for a conclusion, or issued a summary opinion without adequate rationale; drew a conclusion about a non-medical fact; relied on an inaccurate factual premise; gave an inconclusive opinion without explaining why a conclusion could not be reached; used an improper evidentiary standard; fabricated their own evidentiary standard without basis in the law; did not properly apply the laws, regulations, and policies that govern C&P exams; did not address all theories of entitlement to service connection; did not provide the information required by 38 CFR 4.40 and 4.45 when describing the effects of pain or other impairments on joint motion; or did not properly perform all of the examination components required by 38 CFR 4.59 for joint assessment.

Summary:

The laws and regulations are clear: a Veteran shall not be penalized for electing private DBQs and declining C&P exams. Effectively, there is a pathway whereby Private DBQ Elections allow for claims adjudication without C&P exams, to include ACE-process reviews. Decision makers may not arbitrarily or capriciously refuse to assign weight to a Veteran's evidence, or develop with the purpose of obtaining evidence to justify the denial of a claim. Known as 'developing-to-deny,' this practice violates numerous aspects of the laws and regulations governing VA claims. In addition, the presumption of competency enjoyed by C&P examiners is unmerited. It is common knowledge among Veterans that almost all C&P exams are performed in a cursory manner that trivializes, minimizes, or even ignores important information. Some C&P examiners outright lie in their reports. These two legal rights for making a Private DBQ Election and a Competency Challenge are well-grounded in the law and must be respected.

REFERENCES

● **Developing-to-deny is not permissible: Mariano v. Principi, 17 Vet. App. 305:**

Finally, with respect to this December 1998 VA examination, the Court notes that it is not at all clear from the record on appeal (ROA) why VA concluded, in light of the unrebutted evidence then of record, that it was necessary to obtain that medical opinion. Because it would not be permissible for VA to undertake such additional development if a purpose was to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose.

● **Private DBQs are equal to C&Ps: 38 USC 5101 Claims and forms:**

...the new process will ensure that all medical information provided will be considered equally, whether it is provided by a Department medical provider or a non-Department medical provider.

● **Private DBQs make C&Ps unnecessary: 38 USC 5103A Duty to assist claimants:**

(d) Medical Examinations for Compensation Claims. (1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. (2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant) (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, air, or space service; but (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

● **Private DBQs are sufficient and adequate: 38 USC 5125 Acceptance of reports of private physician examinations:**

For purposes of establishing any claim for benefits under chapter 11 or 15 of this title, a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.

● **C&P exams only when necessary: 38 CFR 3.159 Department of Veterans Affairs assistance in developing claims:**

(c)(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim ...

● **Private DBQs are adequate: 38 CFR 3.326 Examinations:**

(c) Provided that it is otherwise adequate for rating purposes, a statement from a private physician may be accepted for rating a claim without further examination.

● **Developing-to-deny is not permissible: 1 Veterans L. Rev. 94 Federal jurisprudence regarding VA's duty to provide a medical examination: preserving the uniquely pro-claimant nature of VA's adjudicatory system while providing timely decisions:**

In more recent cases, the Court has continued to espouse the principle that the Board has discretion in determining the extent of necessary evidentiary development for service-connection claims; however, additional evidence should not be procured for the sole purpose of denying the veteran's claim.

● **Public website for DBQ forms:**

https://www.benefits.va.gov/compensation/dbq_publicdbqs.asp

DBQs help collect necessary medical information to process your disability claims. You can use these forms to submit medical evidence from your health care providers. This information helps to support your claims for disability benefits. Please have your health care provider fill out and submit the appropriate forms for your claimed conditions ... In most instances, you're entitled to a no cost disability examination by us. In some instances, we may determine an additional disability examination is required to complete the claim. If an exam is scheduled, you must report for the examination.

● **C&P exams only when necessary: M21-1 Manual Part IV, Subpart i, 1.A.1.b Regulatory standard for finding an examination or medical opinion necessary:**

The regulatory criteria for finding an examination or medical opinion necessary under the duty to assist are in 38 CFR 3.159(c)(4). A medical opinion or examination is necessary when there is not sufficient medical evidence of record to make a decision on the claim, and there is competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability the evidence establishes that the Veteran suffered an event, injury, or disease in service, or has a disease or symptoms of a disease listed in 38 CFR 3.309, 38 CFR 3.313, 38 CFR 3.316, 38 CFR 3.317, 38 CFR 3.318, or 38 CFR

3.320 manifesting during an applicable presumptive period, and the evidence indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

● C&P exams only when necessary: M21-1 Manual Part IV, Subpart i, 1.A.1.c Reviewing evidence before determining an examination is necessary:

An examination or opinion is only necessary under 38 CFR 3.159(c)(4) when there is not sufficient medical evidence of record to make a decision on the claim. 38 CFR 3.326 similarly provides that an examination is authorized when medical evidence accompanying the claim is not adequate for rating purposes. To illustrate the principle, the regulation adds that any hospital report, any government or private institution examination report, or statement from a private physician can be used to decide a claim without an examination if adequate for rating purposes. These provisions together mean that some review of the available medical evidence is required before deciding whether an examination or opinion is necessary.

● Private DBQs are adequate: M21-1 Manual Part IV, Subpart i, 1.B.1.h Using medical evidence in lieu of examination:

As noted in 38 CFR 3.326 and M21-1, Part IV, Subpart i, 1.A.1.c, medical evidence of record may be deemed adequate for rating purposes to make a decision on a claim without requesting an examination. Generally, in claims for SC, for medical evidence of record to be considered adequate for rating purposes, the evidence must include sufficient details to establish both SC and the current level of disability. If the evidence of record includes information sufficient to grant SC, but there is a question as to the appropriate evaluation, an examination would generally be needed prior to deciding the claim. Use the below guidelines to determine if evidence of record can be used to decide a claim in lieu of requesting an examination. These guidelines should be applied to claims for SC where a nexus opinion is not needed (for example, with presumptive SC) and claims for increase. Do not routinely request an examination if a claim is accompanied by a disability benefits questionnaire completed by a private or VA physician, or medical evidence that is otherwise adequate for rating purposes as defined in 38 CFR 3.326.

● Private DBQ election: M21-1 Manual Part IV, Subpart i, 2.C.1.d Continued EP control when examinations are rescheduled:

Regional office (RO) personnel must maintain EP control over claims in which the examination facility or contract examination vendor of jurisdiction reschedules an appointment or directs resubmission of an examination request, to include by way of a request for clarification. Note: Contract examination vendors use clarification requests with a variety of narrative reason values to denote examination appointment scheduling irregularities. The only such reason value that may be appropriately considered equivalent to a failure to report for examination, thus warranting application of procedures discussed in M21-1, Part IV, Subpart i, 2.G, is *No Show*. Use the table below to determine what actions to take when examination scheduling issues arise. If the examination facility cancels a pending examination request based on a Veteran's election to submit a privately prepared disability benefits questionnaire (DBQ) in lieu of reporting for a clinical appointment, then follow guidance as it appears in M21-1 Part IV, Subpart i, 2.C.1.e.

● Private DBQ election: M21-1 Manual Part IV, Subpart i, 2.C.1.e DBQs and examination cancellations:

Use the table below to handle cases when notified that a scheduled examination(s) has been canceled because the claimant intends on submitting a DBQ completed by a private provider. Note: RO personnel must attempt to contact the claimant via telephone prior to making a rating decision. If telephone contact is successful, then document the call on VA Form 27-0820 Report of General Information, and inform the Veteran he/she has 30 days to provide the DBQ.

● C&P exams only when necessary: M21-1 Manual Part V, Subpart ii, 1.A.3.k Statements from physicians as acceptable evidence for rating purposes without further examination:

A statement from any physician can be accepted for rating purposes without further examination if it is otherwise sufficient for rating purposes, and includes clinical manifestations and substantiation of diagnosis by findings of diagnostic techniques generally accepted by medical authorities. Examples: Diagnostic techniques generally accepted by medical authorities include pathological studies, x-rays, and appropriate laboratory tests.

● No policy to minimize or deny benefits: M21-1 Manual Part V, Subpart ii, 1.A.6.b Decision-making in a non-adversarial system:

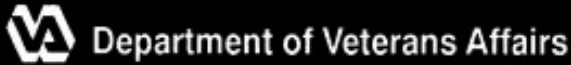
An adversarial system involves advocates representing contrary positions before an impartial decision maker. The VA system is non-adversarial. There is no advocate on behalf of VA opposing claims and no policy to minimize or deny benefits. Decision makers are expected to be impartial and liberally apply VA's pro-Veteran policies, procedures, and regulations in accordance with any applicable VA guidance. VA's policy is to award benefits where supported under the facts and law or when the evidence is in relative equipoise or balance while denying only when we must under the facts and law requir[ing] it.

● Developing-to-deny is not permissible: M21-1 Manual, Part V, Subpart ii, 3.B.1.a When development to obtain additional evidence may be needed:

Development to obtain additional evidence such as a medical examination or other records may be needed if it would provide a more complete picture of a question at issue, or the evidence of record is questionable or conflicting. Note: Decision makers must maintain objectivity when assigning weight to a claimant's evidence and may not develop with the purpose of obtaining evidence to justify a denial of the claim. Instead, decision makers must be able to support the determination that development is needed.

● Challenge to C&P examiner competency: *Francway v. Wilkie*, 940 F.3d 1304:

Here, once the veteran raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion. 38 USC 7104(d)... Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in reviewing the opinions of VA medical examiners. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009)... the VA relies on medical examiners who provide medical examinations and medical opinions based on review of the evidence in the record, *id.* 5103A(d); 38 CFR 3.159(c)(4). Both the statute and implementing regulations require that these medical examinations and opinions be based on competent medical evidence, defined, in relevant part, as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 CFR 3.159(a)(1)... The presumption of competency originated in our decision in *Rizzo*. As we said in *Rizzo*, "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Although it is referred to as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue... The limited nature of the presumption has been consistently recognized in our caselaw. Beginning with *Rizzo*, we have held that "where ... the veteran does not challenge a VA medical expert's competence or qualifications before the Board," the "VA need not affirmatively establish that expert's competency." *Id.* at 1291 (emphasis added); *id.* ("Absent some challenge ..." (emphasis added)); *id.* ("Absent some challenge ...") (emphasis added). Similarly, in *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011), we held that "when a veteran suspects a fault with the medical examiner's qualifications, it is incumbent upon the veteran to raise the issue before the Board." *Id.* at 1365–66 (emphasis added). "[T]he VA and Board are not required to affirmatively establish competency of a medical examiner unless the issue is raised by the veteran." *Id.* at 1366 (emphasis added). Our holding in *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), is consistent with this understanding. Although we noted that "[i]f an objection is raised it may be necessary for the veteran to provide information to overcome the presumption," *id.* at 585 (emphasis added), the statement was referring to the specificity of the challenge rather than requiring the veteran to submit evidence that is within the control of the VA... The presumption of competency requires nothing more than is required for veteran claimants in other contexts - simply a requirement that the veteran raise the issue. The Supreme Court has implicitly recognized that the veteran bears such a burden of raising an issue in *Shinseki v. Sanders*, 556 U.S. 396 (2009). There, the Supreme Court noted the burden placed on the claimant in ordinary litigation to raise an issue and establish prejudicial error. *Id.* at 410. When the Court held that the veteran bears the burden of showing prejudicial error, it necessarily assumed that the veteran bears the burden of raising the claim of error in the first instance. See *id.*; see also, e.g., *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009) ("[A] veteran is obligated to raise an issue in a notice of disagreement if he wishes to preserve his right to assert that issue on appeal ..."). There is nothing in the statute or its interpretation that relieves the veteran from the obligation to raise an issue in the first instance in the general run of cases... The VA agrees with this interpretation of the presumption of competency and the VA's duties. At oral argument, the VA agreed that "[the presumption] is not an evidentiary burden, it's kind of a burden to request [the examiner's qualifications]." Oral Arg. at 25:34–38. The VA also recognized its burden to "substantively respond" to the veteran's challenge "[o]nce the veteran [sufficiently] raises the issue" and that after a challenge is raised "the VA can't come in [to the Board] and say we're entitled to the presumption that this person is competent and you have to assume he is competent." Oral Arg. at 32:29–42. Then, as the VA notes, the Board has to "make a decision as to whether the medical officer was actually competent and provide reasons and bases explaining that decision." Oral Arg. 28:50–29:02.



**VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)**

STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. Use this form to submit a statement to support a claim. For more information, contact us at <https://iris.custhelp.va.gov>, or call us toll-free at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal relay number is 711. VA forms are available at www.va.gov/vaforms. After completing the form, mail to: **Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Janesville, WI, 53547-4444.**

SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

1. VETERAN/BENEFICIARY'S NAME (*First, Middle Initial, Last*)

2. VETERAN'S SOCIAL SECURITY NUMBER

3. VA FILE NUMBER (*If applicable*)

4. VETERAN'S DATE OF BIRTH

5. VETERAN'S SERVICE NUMBER (*If applicable*)

6. TELEPHONE NUMBER (*Include Area Code*)

7. E-MAIL ADDRESS (*Optional*)

8. MAILING ADDRESS (*Number and street or rural route, P.O. Box, City, State, ZIP Code and Country*)

No. &
Street

Apt./Unit Number

City

State/Province

Country

ZIP Code/Postal Code

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Table of Contents

- 1) **526EZ New Claim**
- 2) **Private DBQ Election**
- 3) **Migraines opinion**
- 4) **Migraines DBQ**
- 5) **IBS opinion**
- 6) **IBS DBQ**
- 7) **P&T Status opinion**
- 8) **4138 References for private DBQs**
- 9) **4138 C&P Challenge**
- 10) **10206 C-file request**
- 11) **Credentials**
- 12) **5103 Notice response**
- 13) **0966 Intent to File**

SECTION II: REMARKS (Continued)

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

N/A

[REDACTED] T

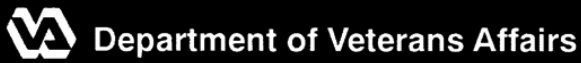
I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

9. SIGNATURE OF VETERAN/BENEFICIARY [REDACTED] 10. DATE SIGNED
08-18-2023

PENALTY: The law provides severe penalties for the willful submission of any statement or evidence of a material fact, knowing it to be false.

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.



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APPLICATION FOR DISABILITY COMPENSATION AND RELATED COMPENSATION BENEFITS

IMPORTANT: Please read the Privacy Act and Respondent Burden on page 14 before completing the form. Use this form to determine your eligibility for compensation. For more information, you can contact us online through Ask VA: <https://ask.va.gov>. Ask us a question online or call us toll-free at 1-800-827-1000 (TTY: 711). If you prefer you may complete and submit the form online at www.va.gov. VA forms are available at www.va.gov/vaforms.

1. SELECT THE TYPE OF CLAIM PROGRAM/PROCESS THAT APPLIES TO YOU. **NOTE:** Your claim will be processed as described on pages 1 through 8 unless one of the following special programs is selected. See Instruction pages 1 through 3 for definitions of the Fully Developed Claim (FDC) Program (Optional Expedited Process) or the Standard Claim Process.

- FDC PROGRAM STANDARD CLAIM PROCESS
 IDES (Select this option **only** if you have been referred to the IDES Program by your Military Service Department)
 BDD Program Claim (Select this option **only** if you meet the criteria for the BDD Program specified on Instruction Page 5)

SECTION I: VETERAN'S IDENTIFICATION INFORMATION (If claim is not an original claim, only Section I, IV (if applicable), V and a signature are required)

NOTE: You may *either* complete the form online or by hand. If completed by hand, print the information requested in ink, neatly, and legibly, insert one letter per box, and completely fill in each applicable check box to help expedite processing of the form.

2. VETERAN/SERVICEMEMBER'S NAME (First, Middle Initial, Last)

██████ ██████

3. VETERAN'S SOCIAL SECURITY NUMBER (SSN)

██████████

4. HAVE YOU EVER FILED A CLAIM WITH VA?

YES NO (If "Yes," provide your file number in Item 5)

5. VA FILE NUMBER

██████████

6. DATE OF BIRTH (MM-DD-YYYY)

██████

7. VETERANS SERVICE NUMBER (if applicable)

8. BDD CLAIM ONLY: PROVIDE THE DATE OR ANTICIPATED DATE OF
RELEASE FROM ACTIVE DUTY (MM-DD-YYYY)

9. TELEPHONE NUMBER (Optional) (Include Area Code)

██████████

Enter International Phone Number (If applicable)

10. CURRENT MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street ██████████

Apt./Unit Number City ██████████

State/Province █████ Country █████ ZIP Code/Postal Code █████

11. E-MAIL ADDRESS (Optional) I agree to receive electronic correspondence from VA in regards to my claim.

██████████

12. IF YOU ARE CURRENTLY A VA EMPLOYEE, CHECK THE BOX (Includes Work Study/Internship) (If you are not a VA employee skip to Section II, if applicable)

SECTION II: CHANGE OF ADDRESS

NOTE: If you are temporarily or permanently changing your address, complete Items 13A through 13C.

13A. TYPE OF ADDRESS CHANGE (Complete if applicable) (Check only one box)

TEMPORARY PERMANENT

13B. NEW ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street

Apt./Unit Number City

State/Province Country ZIP Code/Postal Code

13C. EFFECTIVE DATE(S) OF NEW ADDRESS (If your change of address is **temporary**, complete both the beginning and ending date of your temporary address) (If your change of address is **permanent**, please enter your effective date in the beginning date only)

Month Day Year BEGINNING DATE: Month Day Year ENDING DATE:

SECTION III: HOMELESS INFORMATION

IMPORTANT: The following questions (Items 14A through 14F) should only be completed if you are currently homeless or at risk of becoming homeless. If this item does not apply to you, skip to Section IV.

<p>14A. ARE YOU CURRENTLY HOMELESS?</p> <p><input type="checkbox"/> YES (If "Yes," complete Item 14B regarding your living situation)</p> <p><input type="checkbox"/> NO</p>	<p>14B. CHECK THE BOX THAT APPLIES TO YOUR LIVING SITUATION:</p> <p><input type="checkbox"/> LIVING IN A HOMELESS SHELTER</p> <p><input type="checkbox"/> NOT CURRENTLY IN A SHELTERED ENVIRONMENT (e.g., living in a car or tent)</p> <p><input type="checkbox"/> STAYING WITH ANOTHER PERSON</p> <p><input type="checkbox"/> FLEEING CURRENT RESIDENCE</p> <p><input type="checkbox"/> OTHER (Specify):</p>
<p>14C. ARE YOU CURRENTLY AT RISK OF BECOMING HOMELESS?</p> <p><input type="checkbox"/> YES (If "Yes," complete Item 14D regarding your living situation)</p> <p><input type="checkbox"/> NO</p>	<p>14D. CHECK THE BOX THAT APPLIES TO YOUR LIVING SITUATION:</p> <p><input type="checkbox"/> HOUSING WILL BE LOST IN 30 DAYS</p> <p><input type="checkbox"/> LEAVING PUBLICLY FUNDED SYSTEM OF CARE (e.g., homeless shelter)</p> <p><input type="checkbox"/> OTHER (Specify)</p>
<p>14E. POINT OF CONTACT (Name of person VA can contact in order to get in touch with you)</p>	<p>14F. POINT OF CONTACT TELEPHONE NUMBER (Include Area Code)</p> <p>()</p> <p>Enter International Phone Number (If applicable)</p>

SECTION IV: EXPOSURE INFORMATION

15A. ARE YOU CLAIMING ANY CONDITIONS RELATED TO TOXIC EXPOSURES? **NOTE:** See Page 4 of the Instructions for further information on the evidence needed to support your claim for presumptive service connection. (You can also refer to the following websites for more information: PACT ACT (<https://www.va.gov/PACT>) and PUBLIC HEALTH MILITARY EXPOSURES (<https://www.publichealth.va.gov/exposures/index.asp>))

YES (If "Yes," complete Items 15B, 15C, 15D and 15E) NO (If "No," skip to Item 16, Section V: Claim Information)

15B. DID YOU SERVE IN ANY OF THE FOLLOWING GULF WAR HAZARD LOCATIONS?
Iraq; Kuwait; Saudi Arabia; the neutral zone between Iraq and Saudi Arabia; Bahrain; Qatar; the United Arab Emirates; Oman; Yemen; Lebanon; Somalia; Afghanistan; Israel; Egypt; Turkey; Syria; Jordan; Djibouti; Uzbekistan; the Gulf of Aden; the Gulf of Oman; the Persian Gulf; the Arabian Sea; and the Red Sea.

YES NO

FROM: _____ TO: _____

WHEN DID YOU SERVE IN THESE LOCATIONS? (MM-YYYY)
Note: Please provide an approximate time frame (month and year).

15C. DID YOU SERVE IN ANY OF THE FOLLOWING HERBICIDE (e.g., Agent Orange) LOCATIONS?
Republic of Vietnam to include the 12 nautical mile territorial waters; Thailand at any United States or Royal Thai base; Laos; Cambodia at Mimot or Krek; Kampong Cham Province; Guam or American Samoa; or in the territorial waters thereof; Johnston Atoll or a ship that called at Johnston Atoll; Korean demilitarized zone; aboard (to include repeated operations and maintenance with) a C-123 aircraft known to have been used to spray an herbicide agent (during service in the Air Force and Air Force Reserves).

YES NO Please list other location(s) where you served, if not listed above:

FROM: _____ TO: _____

WHEN DID YOU SERVE IN THESE LOCATIONS? (MM-YYYY)
Note: Please provide an approximate time frame (month and year).

15D. HAVE YOU BEEN EXPOSED TO ANY OF THE FOLLOWING? (Check all that apply)

<input type="checkbox"/> ASBESTOS	<input type="checkbox"/> MUSTARD GAS	<input type="checkbox"/> RADIATION
<input type="checkbox"/> SHAD (Shipboard Hazard and Defense)	<input type="checkbox"/> MILITARY OCCUPATIONAL SPECIALTY (MOS)-related toxin	<input type="checkbox"/> CONTAMINATED WATER AT CAMP LEJEUNE
<input type="checkbox"/> OTHER (Specify)		

FROM: _____ TO: _____

WHEN WERE YOU EXPOSED? (MM-YYYY)
Note: Please provide an approximate time frame (month and year).

15E. IF YOU WERE EXPOSED MULTIPLE TIMES, PLEASE PROVIDE ALL ADDITIONAL DATES AND LOCATIONS OF POTENTIAL EXPOSURE

SECTION V: CLAIM INFORMATION

(For additional space, use Section XIII: Claim Information (Addendum))

16. LIST THE CURRENT DISABILITY(IES) OR SYMPTOMS THAT YOU CLAIM ARE RELATED TO YOUR MILITARY SERVICE AND/OR SERVICE-CONNECTED DISABILITY (If applicable, identify whether a disability is due to a service-connected disability; confinement as a prisoner of war; exposure to Agent Orange, asbestos, mustard gas, ionizing radiation, or Gulf War environmental hazards; or a disability for which compensation is payable under 38 U.S.C. 1151)

NOTE: List your claimed conditions below. See the following three examples for guidance on how to complete Section V.

EXAMPLES OF DISABILITY(IES)	EXAMPLES OF EXPOSURE TYPE	EXAMPLES OF HOW THE DISABILITY(IES) RELATE TO SERVICE	EXAMPLES OF DATES
Example 1. HEARING LOSS	NOISE	HEAVY EQUIPMENT OPERATOR IN SERVICE	JULY 1968
Example 2. DIABETES	AGENT ORANGE	SERVICE IN VIETNAM WAR	DECEMBER 1972
Example 3. LEFT KNEE, SECONDARY TO RIGHT KNEE		INJURED LEFT KNEE WHEN BRACE ON RIGHT KNEE FAILED	6/11/2008

SECTION V: CLAIM INFORMATION (Continued) (For additional space, use Section XIII: Claim Information (Addendum))			
CURRENT DISABILITY(IES)	IF DUE TO EXPOSURE, EVENT, OR INJURY, PLEASE SPECIFY (e.g., Agent Orange, radiation, burn pits)	EXPLAIN HOW THE DISABILITY(IES) RELATES TO THE IN-SERVICE EVENT/EXPOSURE/INJURY	APPROXIMATE DATE DISABILITY(IES) BEGAN OR WORSEMED
1. *****ATTENTION!***** Please read the enclosed Private DBQ Election.	*****ATTENTION!***** Please read the enclosed Private DBQ Election.	*****ATTENTION!***** Please read the enclosed Private DBQ Election.	Private DBQs enclosed.
2. 1. HEADACHE CONDITION - to include migraine headaches DC 8100 rated 50 percent effective 08/03/2023 (ITF date).		Secondary service connection 38 CFR 3.310	
3. 2. INTESTINAL CONDITION - to include irritable bowel syndrome (IBS) DC 7319 rated 30 percent effective 08/03/2023 (ITF date).		Secondary service connection 38 CFR 3.310	
4.			
5.			
6.			
7.			
8.			
9.			
10.			
11.			
12.			
13.			
14.			
15.			

17. LIST VA MEDICAL CENTER(S) (VAMC) AND DEPARTMENT OF DEFENSE (DOD) MILITARY TREATMENT FACILITIES (MTF) WHERE YOU RECEIVED TREATMENT AFTER DISCHARGE FOR YOUR CLAIMED DISABILITY(IES) LISTED IN ITEM 16 AND PROVIDE APPROXIMATE BEGINNING DATE (Month and Year) OF TREATMENT. IF ADDITIONAL SPACE IS NEEDED ATTACH A SEPARATE SHEET AND INCLUDE YOUR NAME, SOCIAL SECURITY NUMBER AND ITEM NUMBER.

NOTE: If treatment began from 2005 to present, you do not need to provide dates in Item 17B.

A. ENTER THE DISABILITY TREATED AND NAME/LOCATION OF THE TREATMENT FACILITY	B. DATE OF TREATMENT (MM-YYYY)	C. CHECK THE BOX IF YOU DO NOT HAVE DATE(S) OF TREATMENT
	0-	<input type="checkbox"/> Don't have date
	0-	<input type="checkbox"/> Don't have date
	0-	<input type="checkbox"/> Don't have date

NOTE: IF YOU WISH TO CLAIM ANY OF THE FOLLOWING, COMPLETE AND ATTACH THE REQUIRED FORM(S) AS STATED BELOW. (VA forms are available at www.va.gov/vaforms)

SECTION VI: SERVICE INFORMATION

18A. DID YOU SERVE UNDER ANOTHER NAME? <input type="checkbox"/> YES (If "Yes," complete Item 18B) <input type="checkbox"/> NO (If "No," skip to Item 19A)		18B. PLEASE LIST THE OTHER NAME(S) YOU SERVED UNDER	
19A. BRANCH OF SERVICE <input type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> AIR FORCE <input type="checkbox"/> COAST GUARD <input type="checkbox"/> SPACE FORCE <input type="checkbox"/> NOAA <input type="checkbox"/> USPHS		19B. COMPONENT <input type="checkbox"/> ACTIVE <input type="checkbox"/> RESERVES <input type="checkbox"/> NATIONAL GUARD	
20A. MOST RECENT ACTIVE SERVICE DATES Month Day Year ENTRY DATE: EXIT DATE:		20B. PLACE OF LAST OR ANTICIPATED SEPARATION Month Day Year	
20C. DID YOU SERVE IN A COMBAT ZONE SINCE 9-11-2001? <input type="checkbox"/> YES <input type="checkbox"/> NO	20D. ADDITIONAL PERIODS OF SERVICE (Indicate enlistment and discharge date(s), if applicable)	FROM: Month Day Year TO:	
21A. ARE YOU CURRENTLY SERVING OR HAVE YOU EVER SERVED IN THE RESERVES OR NATIONAL GUARD? <input type="checkbox"/> YES (If "Yes," complete Items 21B through 21F) <input type="checkbox"/> NO (If "No," skip to Item 22A)		21B. COMPONENT <input type="checkbox"/> NATIONAL GUARD <input type="checkbox"/> RESERVES	21C. OBLIGATION TERM OF SERVICE Month Day Year FROM: TO:
21D. CURRENT OR LAST ASSIGNED NAME AND ADDRESS OF UNIT:		21E. CURRENT OR ASSIGNED PHONE NUMBER OF UNIT (Include Area Code) ()	21F. ARE YOU CURRENTLY RECEIVING INACTIVE DUTY TRAINING PAY? <input type="checkbox"/> YES <input type="checkbox"/> NO
22A. ARE YOU CURRENTLY ACTIVATED ON FEDERAL ORDERS WITHIN THE NATIONAL GUARD OR RESERVES? <input type="checkbox"/> YES (If "Yes," complete Items 22B & 22C) <input type="checkbox"/> NO	22B. DATE OF ACTIVATION: Month Day Year	22C. ANTICIPATED SEPARATION DATE: Month Day Year	
23A. HAVE YOU EVER BEEN A PRISONER OF WAR? <input type="checkbox"/> YES (If "Yes," complete Item 23B) <input type="checkbox"/> NO	23B. DATES OF CONFINEMENT		
	FROM:		TO:
	Month Day Year	Month Day Year	Month Day Year

SECTION VII: SERVICE PAY (Retired Pay, Separation Pay, and Disability Severance Pay)

24A. ARE YOU RECEIVING MILITARY RETIRED PAY? <input type="checkbox"/> YES (If "Yes," complete Items 24C and 24D) <input type="checkbox"/> NO	24B. WILL YOU RECEIVE MILITARY RETIRED PAY IN THE FUTURE? <input type="checkbox"/> YES (If "Yes," explain below (e.g. future Reserve/National Guard retirement, pending MEB/PEB and also complete Items 24C and 24D)) <input type="checkbox"/> NO	
24C. BRANCH OF SERVICE <input type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> AIR FORCE <input type="checkbox"/> COAST GUARD <input type="checkbox"/> SPACE FORCE <input type="checkbox"/> NOAA <input type="checkbox"/> USPHS	24D. MONTHLY AMOUNT \$	25. RETIRED STATUS <input type="checkbox"/> RETIRED <input type="checkbox"/> PERMANENT DISABILITY RETIRED LIST <input type="checkbox"/> TEMPORARY DISABILITY RETIRED LIST

IMPORTANT INFORMATION ON MILITARY RETIRED PAY (Includes all Uniformed Services Retired Pay):
 Submission of this application constitutes a waiver of military retired pay in an amount equal to VA compensation awarded, if you are entitled to both benefits. Your retired pay may be reduced by the amount of VA compensation awarded. Receipt of the full amount of military retired pay and VA compensation at the same time **may** result in an overpayment, which **may** be subject to collection. If you qualify for concurrent receipt of VA compensation and military retired pay, the waiver of retired pay will not apply. If you do not want to waive any retired pay to receive VA compensation, you should check the box in **Item 26**.

Note that if you check the box in Item 26, you will not receive VA compensation, if granted. If you are currently in receipt of VA compensation and you check the box in Item 26, your VA compensation will be terminated, if you are also eligible for military retired pay.

IMPORTANT: VA COMPENSATION PAY IS NON-TAXABLE. THEREFORE, VA COMPENSATION PAY MAY BE THE GREATER BENEFIT.

26. Do NOT pay me VA compensation. I do NOT want to receive VA compensation in lieu of retired pay.

IMPORTANT INFORMATION ON SEPARATION/SEVERANCE PAY:
 VA compensation, if granted, may be withheld to recoup any disability severance or separation pay such as involuntary separation pay, voluntary separation pay, or special separation benefit, you receive from your branch of service. In addition, if you receive a Voluntary Separation Incentive (VSI), your VSI payments may be reduced if you are awarded VA compensation. Receipt of VA compensation and VSI at the same time may result in an overpayment of VSI, which **may** be subject to collection.

27A. HAVE YOU EVER RECEIVED SEPARATION PAY, DISABILITY SEVERANCE PAY, OR ANY OTHER LUMP SUM PAYMENT FROM YOUR BRANCH OF SERVICE?
 YES (If "Yes," complete Items 27B through 27D)
 NO

27B. DATE PAYMENT RECEIVED (MM-DD-YYYY)	27C. BRANCH OF SERVICE <input type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> AIR FORCE <input type="checkbox"/> COAST GUARD <input type="checkbox"/> SPACE FORCE <input type="checkbox"/> NOAA <input type="checkbox"/> USPHS	27D. AMOUNT RECEIVED (Provide pre-tax amount) \$
---	---	---

IMPORTANT INFORMATION ON INACTIVE DUTY TRAINING PAY:
 You may elect to keep the active or inactive duty training pay you received from the military service department. However, to be legally entitled to keep your training pay, you must waive VA benefits for the number of days equal to the number of days for which you received training pay. In most instances, it will be to your advantage to waive your VA benefits and keep your training pay.

If you waive VA benefits to receive training pay by checking the box in **Item 28**, VA will retroactively adjust your VA award to withhold benefits equal to the total number of training days waived and at the monthly rate in effect for the fiscal year period for which you received training pay. This action may result in an overpayment of compensation, which **may** be subject to collection.

IMPORTANT: VA COMPENSATION PAY IS NON-TAXABLE. THEREFORE VA COMPENSATION PAY MAY BE THE GREATER BENEFIT.
 28. Do NOT pay me VA compensation. I do NOT want to receive VA compensation in lieu of training pay.

SECTION VIII: DIRECT DEPOSIT INFORMATION
 (Note: If you have already signed up for direct deposit, skip to Section IX)

The Department of the Treasury requires all Federal benefit payments be made by electronic funds transfer (EFT), also called direct deposit. To enroll in direct deposit, provide the information requested below, **and** attach either a voided personal check **or** a deposit slip. If you **do not** have a bank account, please visit <https://www.benefits.va.gov/benefits/banking.asp>. This website provides information about the Veterans Benefits Banking Program (VBBP), and a link to banks and credit unions that may fit your needs. You may also call 1-800-827-1000. If you elect not to enroll, you must contact representatives handling waiver requests for the Department of the Treasury at 1-888-224-2950. They will encourage your participation in EFT and address any questions or concerns you may have.

29. I CERTIFY THAT I DO NOT HAVE AN ACCOUNT WITH A FINANCIAL INSTITUTION OR CERTIFIED PAYMENT AGENT (If you check this box skip to Section IX)

30. ACCOUNT NUMBER (Check only one box below and provide the account number)
 Account No.: CHECKING SAVINGS

31. NAME OF FINANCIAL INSTITUTION (Please provide the name of the bank where you want your direct deposit)	32. ROUTING OR TRANSIT NUMBER (The first nine numbers located at the bottom left of your check)
--	---

SECTION IX: CLAIM CERTIFICATION AND SIGNATURE
VETERAN/SERVICEMEMBER CERTIFICATION AND SIGNATURE

I certify and authorize the release of information. I certify that the statements in this document are true and complete to the best of my knowledge. I authorize any person or entity, including but not limited to any organization, service provider, employer, or government agency, to give the Department of Veterans Affairs any information about me. For the limited purpose of providing VA with this information as it may relate to my claim, I waive any privilege that may apply and would otherwise make the information confidential and not discloseable.

I certify I have received the notice attached to this application titled, **Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits.**

I certify I have enclosed all the information or evidence that will support my claim, to include an identification of relevant records available at a Federal facility such as a VA medical center; **OR**, I have checked the box in Item 1, on page 8, indicating I want my claim processed through the VA's eBenefits system; **OR**, I have checked the box in Item 1, on page 8, indicating I want to submit additional evidence in support of my claim.

33A. VETERAN/SERVICE MEMBER SIGNATURE	33B. DATE SIGNED (MM-DD-YYYY) 08-18-2023
---------------------------------------	--

34A. SIGNATURE OF WITNESS (Note: Only sign if you are providing a witness signature)	34B. PRINTED NAME AND ADDRESS OF WITNESS
--	--

35A. SIGNATURE OF WITNESS (Note: Only sign if you are providing a witness signature)	35B. PRINTED NAME AND ADDRESS OF WITNESS
--	--

Department of Veterans Affairs	VA DATE STAMP (DO NOT WRITE IN THIS SPACE)
---------------------------------------	---

STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. Use this form to submit a statement to support a claim. For more information, contact us at <https://iris.custhelp.va.gov>, or call us toll-free at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal relay number is 711. VA forms are available at www.va.gov/vaforms. After completing the form, mail to: **Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Janesville, WI, 53547-4444.**

SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

1. VETERAN/BENEFICIARY'S NAME <i>(First, Middle Initial, Last)</i> <div style="background-color: black; width: 100px; height: 15px; margin-bottom: 5px;"></div> <div style="background-color: black; width: 100px; height: 15px;"></div>		
2. VETERAN'S SOCIAL SECURITY NUMBER <div style="background-color: black; width: 100%; height: 15px;"></div>	3. VA FILE NUMBER <i>(If applicable)</i> <div style="background-color: black; width: 100%; height: 15px;"></div>	4. VETERAN'S DATE OF BIRTH <div style="background-color: black; width: 100%; height: 15px;"></div>
5. VETERAN'S SERVICE NUMBER <i>(If applicable)</i> <div style="background-color: black; width: 100%; height: 15px;"></div>		
6. TELEPHONE NUMBER <i>(Include Area Code)</i> <div style="background-color: black; width: 100%; height: 15px;"></div>	7. E-MAIL ADDRESS <i>(Optional)</i> <div style="background-color: black; width: 100%; height: 15px;"></div>	
8. MAILING ADDRESS <i>(Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)</i> No. & Street <div style="background-color: black; width: 150px; height: 15px; display: inline-block;"></div> Apt./Unit Number City <div style="background-color: black; width: 50px; height: 15px; display: inline-block;"></div> State/Province <div style="background-color: black; width: 20px; height: 15px; display: inline-block;"></div> Country <div style="background-color: black; width: 20px; height: 15px; display: inline-block;"></div> ZIP Code/Postal Code <div style="background-color: black; width: 40px; height: 15px; display: inline-block;"></div>		

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Private DBQ Election

I hereby exercise the right to adjudication of my claim using private DBQs without any C&P exams, to include ACE-process C&Ps.

Introduction:

A Veteran's right to make a private DBQ election arises from various laws and regulations governing VA claims which, when considered together, grant the following legal privileges:

1. Exemption from C&P exams
2. Waiver of C&P exams
3. Cancellation of C&P exams

These privileges give rise to a right to demand adjudication based on private DBQs without C&P exams, to include ACE-process C&Ps. Exercising this right compels VA to process a claim without developing medical evidence from its own physicians. Although the VA must offer such C&P exams to Veterans as part of the duty-to-assist, there is absolutely no legal requirement whatsoever to attend them in order to prevail on a claim. Instead, private DBQs can serve as the medical evidence that is needed.

(continued on next page)

VETERAN'S SOCIAL SECURITY NO. [REDACTED]

SECTION II: REMARKS (Continued)

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Privilege #1 - Exemption from C&P exams:

The plain language of 38 USC 5103A establishes this privilege. The statute describes the various ways in which VA must implement its duty-to-assist. It also contains the following provision at (b)(3):

“[The duty-to-assist] ... shall not apply if the evidence ... allows for the ... highest evaluation assignable in accordance with the evidence ... as long as such evidence is adequate for rating purposes and sufficient to grant the earliest possible effective date ...”

Clearly, Congress intended to make an allowance for claims to be decided on evidence that would not be obtained in the duty-to-assist process. In other words, Congress was not in any way empowering the VA to turn its duty-to-assist into a 'duty-to-verify' or into a Veteran's 'duty-to-be-examined.' In spite of Congressional intent, that is exactly how the VA presents C&P exams to Veterans. For instance, without irony, the VA website for accessing the blank DBQ forms makes the following statement:

“If an exam is scheduled, you must report for the examination.”

That publicly published requirement has no legal basis. It also has no purpose other than intimidating Veterans into submitting their minds and bodies for inspection by the VA's essentially hostile and incompetent examiners. Although section 5103A does not use the exact term of 'exemption,' the effect of the statutory language is to create exactly that: an exemption. After all, section 5103A enumerates criteria for when the parent statute should **NOT** be applied. The obvious intent is to unburden the claims process from any unnecessary tasks, especially those that might do harm to a Veteran's claim. The private DBQs I am using for my claim meet all of the section 5103A criteria - that is, they are competent, adequate, and sufficient. They also meet the myriad requirements found in 38 USC 5125, 38 CFR 3.159 & 3.326, and M21-1 Part V, Subpart ii, 1.A.3. As such, these private DBQs obviate the need for C&P exams. Therefore, the duty-to-assist is not even invoked with regard to offering C&P exams.

(continued on next page)



I CERTIFY THAT the statements on this form	are true to the best of my knowledge and belief.
9. SIGNATURE OF VETERAN/BENEFICIARY	10. DATE SIGNED 08-18-2023

PENALTY: The law provides severe penalties for the willful submission of any statement or evidence of a material fact, knowing it to be false.

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

(continuation of Form 4138: Private DBQ Election)

Privilege #2 - Waiver of C&P exams:

This privilege also originates from 38 USC 5103A when it is interpreted under precedent. The relevant legal concept is referred to as the "equitable doctrine of waiver." Its basis is the U.S. Supreme Court decision of *Shutte v. Thompson*, 82 U.S. 151, from 1873:

"But it is obvious that all the provisions made in the statute ... introduced for the protection of the party ... It is not to be doubted that he may waive them. A party may waive any provision either of a contract or of a statute, ***intended for his benefit*** ... consistent with the rule, that ***a party may waive any conditions that are intended for his sole benefit*** ..."

Section 5103A is unambiguously intended for the sole benefit of Veterans. Despite its age, *Shutte* is still good law and still binds the VA duty-to-assist. In fact, the *Shutte* opinion was quoted and confirmed in 2001 by the U.S. Court of Appeals for Veterans Claims (CAVC) in *Janssen v. Principi*, 15 Vet. App. 370. *Janssen* explicitly recognizes that Veterans may waive provisions of the duty-to-assist:

"... absent some affirmative indication of Congress' intent to preclude waiver ... [the Court must] presume that statutory provisions are subject to waiver (*United States v. Mezzanato*, 513 U.S. 196) ... this Court has long accepted the ability of appellants to waive certain procedural Rights ... an appellant can expressly waive ... due process rights ... if ... he wishes to do so (*Bowling v. Principi*, 15 Vet. App. 1) ... If he believes he can obtain nothing more ... in terms of development ... the Court finds no legal reason ... not to permit him to make that choice ... the Court will permit the ... appellant to waive this Court's consideration of any duty-to-assist ... rights potentially afforded to him ..."

Janssen goes on to state that explicit waivers, such as this one, must be given special consideration:

"Surely an express waiver, such as we have in the instant case, is simply an emphatic way of saying "I choose not to raise this issue" ... if informed ***implied*** waivers are permissible as to this Court's consideration ... then so must be ***expressed*** waivers. To permit otherwise would be bizarre ..."

Janssen also gave specific direction regarding the waiver of C&P exams, perhaps foreseeing that these exams would be critical fulcrums in nearly every future claim:

"... the Court understands that there may be compelling reasons why ... a claimant may reach an informed conclusion, from the unique position he or she occupies, that further development of the claim may not only be unhelpful, but that it may be harmful to that claim. The same may be true as to a physical examination or medical opinion provided by VA ... He has made clear that he believes that the claim under review has been developed as fully and completely as is necessary (or as much as he wishes it to be) ... and that he considers further development of the facts ... to be of no benefit to him."

(continued on next page)

Finally, Janssen makes a straightforward description of the conditions under which a Veteran can assert this privilege:

"... the appellant must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right (United States v. Olano, 507 U.S. 725) ... if that is his or her clearly stated, informed, and voluntary desire ... and has expressed his intention clearly and unequivocally ... Nothing further is required (McCall v. U.S. Postal Service, 839 F.2d 664)."

For the sake of clarity, I hereby affirmatively assert my waiver privilege: 1. I have knowledge of my statutory right to C&P exams under the duty-to-assist; 2. I intend, voluntarily and freely, to relinquish and surrender this right; 3. I am clearly stating this desire which is informed and voluntary; 4. I clearly and unequivocally intend to waive this right.

Privilege #3 - Cancellation of C&P exams:

This privilege comes from M21-1 Part IV, Subpart i, 2.C.1.d:

"If the examination facility cancels a pending examination request based on a Veteran's election to submit a privately prepared disability benefits questionnaire (DBQ) in lieu of reporting for a clinical appointment, then follow guidance as it appears in M21-1 Part IV, Subpart i, 2.C.1.e."

This paragraph implements a section of 38 USC 5101 amended in 2021 that created a statutory requirement to weigh private DBQs equally with C&P exams. The practical effect was to formalize a privilege for Veterans to cancel C&P exams in favor of using private DBQs. Although a Veteran's responsibility to support their claim with medical evidence has not been removed, they have a clear prerogative to determine the source of that evidence. The M21-1 also lays out the steps for Veterans to take when submitting private DBQs in place of C&P exams. In addition, the M21-1 has a very specific provision that electing private DBQs while declining C&P exams does not constitute a 'failure to report' which might have an adverse effect on their claim:

"Note: Contract examination vendors use clarification requests with a variety of narrative reason values to denote examination appointment scheduling irregularities. The only such reason value that may be appropriately considered equivalent to a failure to report for examination, thus warranting application of procedures discussed in M21-1, Part IV, Subpart i, 2.G is **No Show.**"

Paragraph 2.G, in turn, references 38 CFR 3.655. Since I am giving formal notice that I decline to report for C&P exams, the 'narrative reason value' for cancellation cannot be 'No Show.'

Summary:

The laws and regulations are clear: a Veteran is not to be penalized for electing private DBQs and declining C&P exams. Effectively, there is a pathway whereby private DBQ elections allow for claims adjudication without C&P exams, to include ACE-process C&Ps. Conversely, decision makers may not arbitrarily or capriciously refuse to assign weight to a Veteran's evidence, or develop with the purpose of obtaining evidence to justify the denial of a claim. Known as 'developing-to-deny,' this practice does violence to numerous aspects of the laws and regulations governing VA claims (Mariano v. Principi, 17 Vet. App. 312; M21-1 Part V, Subpart ii, 1.A.6.b and 3.B.1.a; 1 Veterans L. Rev. 94). I therefore contend that the ordering of any C&P exams for my claim would be a poorly-disguised effort at developing-to-deny.

Selected excerpts from cited references:

Private DBQs make C&Ps unnecessary:

38 USC 5103A Duty to assist claimants:

(d) Medical Examinations for Compensation Claims. (1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. (2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant) (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, air, or space service; but (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

Public website for DBQ forms:

https://www.benefits.va.gov/compensation/dbq_publicdbqs.asp:

DBQs help collect necessary medical information to process your disability claims. You can use these forms to submit medical evidence from your health care providers. This information helps to support your claims for disability benefits. Please have your health care provider fill out and submit the appropriate forms for your claimed conditions ... In most instances, you're entitled to a no cost disability examination by us. In some instances, we may determine an additional disability examination is required to complete the claim. If an exam is scheduled, you must report for the examination.

Private DBQs are sufficient and adequate:

38 USC 5125 Acceptance of reports of private physician examinations:

For purposes of establishing any claim for benefits under chapter 11 or 15 of this title, a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.

Private DBQs are adequate:

38 CFR 3.326 Examinations:

(c) Provided that it is otherwise adequate for rating purposes, a statement from a private physician may be accepted for rating a claim without further examination.

C&P exams only when necessary:

38 CFR 3.159 Department of Veterans Affairs assistance in developing claims:

(c)(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim ...

(continued on next page)

C&P exams only when necessary:

M21-1 Part V, Subpart ii, 1.A.3.k Statements From Physicians as Acceptable Evidence for Rating Purposes Without Further Examination:

A statement from any physician can be accepted for rating purposes without further examination if it is otherwise sufficient for rating purposes, and includes clinical manifestations and substantiation of diagnosis by findings of diagnostic techniques generally accepted by medical authorities. Examples: Diagnostic techniques generally accepted by medical authorities include pathological studies, x-rays, and appropriate laboratory tests.

Private DBQs are adequate:

M21-1 Part IV, Subpart i, 1.B.1.h Using Medical Evidence in Lieu of Examination:

As noted in 38 CFR 3.326 and M21-1, Part IV, Subpart i, 1.A.1.c, medical evidence of record may be deemed adequate for rating purposes to make a decision on a claim without requesting an examination. Generally, in claims for SC, for medical evidence of record to be considered adequate for rating purposes, the evidence must include sufficient details to establish both SC and the current level of disability. If the evidence of record includes information sufficient to grant SC, but there is a question as to the appropriate evaluation, an examination would generally be needed prior to deciding the claim. Use the below guidelines to determine if evidence of record can be used to decide a claim in lieu of requesting an examination. These guidelines should be applied to claims for SC where a nexus opinion is not needed (for example, with presumptive SC) and claims for increase. Do not routinely request an examination if a claim is accompanied by a disability benefits questionnaire completed by a private or VA physician, or medical evidence that is otherwise adequate for rating purposes as defined in 38 CFR 3.326.

C&P exams only when necessary:

M21-1 Part IV, Subpart i, 1.A.1.b Regulatory Standard for Finding an Examination or Medical Opinion Necessary:

The regulatory criteria for finding an examination or medical opinion necessary under the duty to assist are in 38 CFR 3.159(c)(4). A medical opinion or examination is necessary when there is not sufficient medical evidence of record to make a decision on the claim, and there is competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability the evidence establishes that the Veteran suffered an event, injury, or disease in service, or has a disease or symptoms of a disease listed in 38 CFR 3.309, 38 CFR 3.313, 38 CFR 3.316, 38 CFR 3.317, 38 CFR 3.318, or 38 CFR 3.320 manifesting during an applicable presumptive period, and the evidence indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

C&P exams only when necessary:

M21-1 Part IV, Subpart i, 1.A.1.c Reviewing Evidence Before Determining an Examination Is Necessary:

An examination or opinion is only necessary under 38 CFR 3.159(c)(4) when there is not sufficient medical evidence of record to make a decision on the claim. 38 CFR 3.326 similarly provides that an examination is authorized when medical evidence accompanying the claim is not adequate for rating purposes. To illustrate the principle, the regulation adds that any hospital report, any government or private institution examination report, or statement from a private physician can be used to decide a claim without an examination if adequate for rating purposes. These provisions together mean that some review of the available medical evidence is required before deciding whether an examination or opinion is necessary.

(continued on next page)

Private DBQ election:

M21-1 Part IV, Subpart i, 2.C.1.d Continued EP Control When Examinations Are Rescheduled:

Regional office (RO) personnel must maintain EP control over claims in which the examination facility or contract examination vendor of jurisdiction reschedules an appointment or directs resubmission of an examination request, to include by way of a request for clarification. Note: Contract examination vendors use clarification requests with a variety of narrative reason values to denote examination appointment scheduling irregularities. The only such reason value that may be appropriately considered equivalent to a failure to report for examination, thus warranting application of procedures discussed in M21-1, Part IV, Subpart i, 2.G, is No Show. Use the table below to determine what actions to take when examination scheduling issues arise. If the examination facility cancels a pending examination request based on a Veteran's election to submit a privately prepared disability benefits questionnaire (DBQ) in lieu of reporting for a clinical appointment, then follow guidance as it appears in M21-1 Part IV, Subpart i, 2.C.1.e.

Private DBQ election:

M21-1 Part IV, Subpart i, 2.C.1.e DBQs and Examination Cancellations:

Use the table below to handle cases when notified that a scheduled examination(s) has been canceled because the claimant intends on submitting a DBQ completed by a private provider. Note: RO personnel must attempt to contact the claimant via telephone prior to making a rating decision. If telephone contact is successful, then document the call on VA Form 27-0820 Report of General Information, and inform the Veteran he/she has 30 days to provide the DBQ.

Private DBQs are equal to C&Ps:

38 USC 5101 Claims and forms:

... the new process will ensure that all medical information provided will be considered equally, whether it is provided by a Department medical provider or a non-Department medical provider.

Developing-to-deny is not permissible:

Mariano v. Principi, 17 Vet. App. 305:

Finally, with respect to this December 1998 VA examination, the Court notes that it is not at all clear from the record on appeal (ROA) why VA concluded, in light of the un rebutted evidence then of record, that it was necessary to obtain that medical opinion. Because it would not be permissible for VA to undertake such additional development if a purpose was to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose.

Developing-to-deny is not permissible:

M21-1, Part V, Subpart ii, 3.B.1.a When Development to Obtain Additional Evidence May Be Needed:

Development to obtain additional evidence such as a medical examination or other records may be needed if it would provide a more complete picture of a question at issue, or the evidence of record is questionable or conflicting. Note: Decision makers must maintain objectivity when assigning weight to a claimant's evidence and may not develop with the purpose of obtaining evidence to justify a denial of the claim. Instead, decision makers must be able to support the determination that development is needed.

(continued on next page)

No policy to minimize or deny benefits:

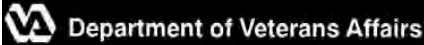
M21-1 Part V, Subpart ii, 1.A.6.b Decision-Making in a Non-Adversarial System:

An adversarial system involves advocates representing contrary positions before an impartial decision maker. The VA system is non-adversarial. There is no advocate on behalf of VA opposing claims and no policy to minimize or deny benefits. Decision makers are expected to be impartial and liberally apply VA's pro-Veteran policies, procedures, and regulations in accordance with any applicable VA guidance. VA's policy is to award benefits where supported under the facts and law or when the evidence is in relative equipoise or balance while denying only when we must under the facts and law [that] require it.

Developing-to-deny is not permissible:

1 Veterans L. Rev. 94 Federal Jurisprudence Regarding VA's Duty to Provide a Medical Examination: Preserving the Uniquely Pro-Claimant Nature of VA's Adjudicatory System While Providing Timely Decisions:

In more recent cases, the Court has continued to espouse the principle that the Board has discretion in determining the extent of necessary evidentiary development for service-connection claims; however, additional evidence should not be procured for the sole purpose of denying the veteran's claim.



**INTERNAL VETERANS AFFAIRS USE
MEDICAL OPINION DISABILITY BENEFITS QUESTIONNAIRE**

IMPORTANT - THE DEPARTMENT OF VETERANS AFFAIRS (VA) WILL NOT PAY OR REIMBURSE ANY EXPENSES OR COST INCURRED IN THE PROCESS OF COMPLETING AND/OR SUBMITTING THIS FORM. PLEASE READ THE PRIVACY ACT AND RESPONDENT BURDEN INFORMATION ON REVERSE BEFORE COMPLETING FORM.

NAME OF PATIENT/VETERAN

██████████ ██████████

PATIENT/VETERAN'S SOCIAL SECURITY NUMBER

██████████

Note to examiner - The Veteran is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the Veteran's claim.

Is this questionnaire being completed in conjunction with VA 21-2507, C&P examination request? Yes No

How was the examination completed? (check all that apply)

- In-person examination
- Records reviewed
- Examination via approved video telehealth
- Other, please specify in comments box:

Comments: Refer to the remarks in the appendix.

ACCEPTABLE CLINICAL EVIDENCE (ACE)

Indicate the method used to obtain medical information to complete this document:

- Review of available records (without in-person or video telehealth examination) using the Acceptable Clinical Evidence (ACE) process because the existing medical evidence provided sufficient information on which to prepare the questionnaire and such an examination will likely provide no additional relevant evidence.
- Review of available records in conjunction with an interview with the Veteran (without in-person or telehealth examination) using the ACE process because the existing medical evidence supplemented with an interview provided sufficient information on which to prepare the questionnaire and such an examination would likely provide no additional relevant evidence.

EVIDENCE REVIEW

Evidence Reviewed (check all that apply):

- Not requested
- VA claims file (hard copy paper C-file)
- VA e-folder
- VA electronic health record
- Other, please identify other evidence reviewed:
- No records were reviewed

Refer to the remarks in the appendix.

Evidence Comments:

Refer to the remarks in the appendix.

SECTION I - DEFINITIONS

AGGRAVATION OF PREEXISTING NONSERVICE-CONNECTED DISABILITIES. A PREEXISTING INJURY OR DISEASE WILL BE CONSIDERED TO HAVE BEEN AGGRAVATED BY ACTIVE MILITARY, NAVAL, OR AIR SERVICE, WHERE THERE IS AN INCREASE IN DISABILITY DURING SUCH SERVICE, UNLESS THERE IS A SPECIFIC FINDING THAT THE INCREASE IN DISABILITY IS DUE TO THE NATURAL PROGRESS OF THE DISEASE.

AGGRAVATION OF NONSERVICE-CONNECTED DISABILITIES. ANY INCREASE IN SEVERITY OF A NONSERVICE-CONNECTED DISEASE OR INJURY THAT IS PROXIMATELY DUE TO OR THE RESULT OF A SERVICE-CONNECTED DISEASE OR INJURY, AND NOT DUE TO THE NATURAL PROGRESS OF THE NONSERVICE-CONNECTED DISEASE, WILL BE SERVICE CONNECTED.

SECTION II - RESTATEMENT OF REQUESTED OPINION

2A. INSERT REQUESTED OPINION FROM GENERAL REMARKS:

HEADACHE CONDITION - service connection:

Refer to the remarks in the appendix.

2B. INDICATE TYPE OF EXAM FOR WHICH OPINION HAS BEEN REQUESTED (e.g. skin diseases): **HEADACHES DBQ**

SECTION III - MEDICAL OPINION FOR DIRECT SERVICE CONNECTION

CHOOSE THE STATEMENT THAT MOST CLOSELY APPROXIMATES THE ETIOLOGY OF THE CLAIMED CONDITION.

- 3A. THE CLAIMED CONDITION WAS AT LEAST AS LIKELY AS NOT (50 percent or greater probability) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 3B. THE CLAIMED CONDITION WAS LESS LIKELY THAN NOT (less than 50 percent probability) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

3C. RATIONALE:

N/A

SECTION IV - MEDICAL OPINION FOR SECONDARY SERVICE CONNECTION

- 4A. THE CLAIMED CONDITION IS AT LEAST AS LIKELY AS NOT (50 percent or greater probability) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.
- 4B. THE CLAIMED CONDITION IS LESS LIKELY THAN NOT (less than 50 percent probability) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.

4C. RATIONALE:

SECONDARY SERVICE CONNECTION:

Refer to the remarks in the appendix.

SECTION V - MEDICAL OPINION FOR AGGRAVATION OF A CONDITION THAT EXISTED PRIOR TO SERVICE

- 5A. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 5B. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS CLEARLY AND UNMISTAKABLY NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

5C. RATIONALE:

N/A

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION

6A. CAN YOU DETERMINE A BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition)?

- YES NO

IF "YES" TO QUESTION 6A, ANSWER THE FOLLOWING:

I. DESCRIBE THE BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition):

N/A

II. PROVIDE THE DATE AND NATURE OF THE MEDICAL EVIDENCE USED TO PROVIDE THE BASELINE:

N/A

III. IS THE CURRENT SEVERITY OF THE (claimed condition/diagnosis) GREATER THAN THE BASELINE?

- YES NO

IF YES, WAS THE VETERAN'S (claimed condition/diagnosis) AT LEAST AS LIKELY AS NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY (insert "service connected condition")?

- YES (provide rationale in section 6B.)
- NO (provide rationale in section 6B.)

**SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION
(continued)**

IF "NO" TO QUESTION 6A, ANSWER THE FOLLOWING:

I. PROVIDE RATIONALE AS TO WHY A BASELINE CANNOT BE ESTABLISHED (e.g. medical evidence is not sufficient to support a determination of a baseline level of severity):

N/A

II. REGARDLESS OF AN ESTABLISHED BASELINE, WAS THE VETERAN'S (claimed condition/diagnosis) AT LEAST AS LIKELY AS NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY (insert "service connected condition")?

- YES (provide rationale in section 6B.)
- NO (provide rationale in section 6B.)

6B. PROVIDE RATIONALE:

N/A

SECTION VII - OPINION REGARDING CONFLICTING MEDICAL EVIDENCE

7. I HAVE REVIEWED THE CONFLICTING MEDICAL EVIDENCE AND AM PROVIDING THE FOLLOWING OPINION:

Refer to the remarks in the appendix.

SECTION VIII - PHYSICIAN'S CERTIFICATION AND SIGNATURE

CERTIFICATION - To the best of my knowledge, the information contained herein is accurate, complete and current.

	8B. PHYSICIAN'S PRINTED NAME [REDACTED], MD	8C. DATE SIGNED Remarks.
	PROVIDER IDENTIFIER (NPI) NUMBER .	8F. PHYSICIAN'S ADDRESS Remarks.

Appendix:

Remarks for Medical Opinion

Service connection for MIGRAINE HEADACHES

Dates:

Date of examination for DBQ: 08/17/2023

Date of signature for DBQ: 08/17/2023

Examiner:

[REDACTED]

Evidence review:

My opinion is that, more likely than not, my evidence review formed a sufficient factual basis for my conclusions and additional evidence would not alter those conclusions due to the nature of the medical issues at hand, the theories by which they are service connected, and the timeline of signs and symptoms. The case law on evidence review clearly states that private examiners are not required to review any particular set of records or even to review the C-file at all: "... **the claims file is not a magical or talismanic set of documents... claims file review**, as it pertains to obtaining an overview of the claimant's medical history, **is not a requirement for private medical opinions...** claims file review may be irrelevant to the medical issue at hand" (Nieves-Rodriguez v. Peake, 22 Vet. App. 295). My evidence review encompassed all relevant documents from service entry to the present time and included:

- various documents from the C-file record.
- various documents from the military personnel record.
- various documents from the service treatment record (STR).
- the complete VA medical record.
- the complete VA claims correspondence record.
- various documents from the private medical record.
- various other documents and records.

Examination method:

[REDACTED] resides in [REDACTED] [REDACTED] I performed a comprehensive face-to-face video telehealth examination on 08/17/2023. I then completed this report in my capacity as an expert Independent Veteran Examiner (IVE) and licensed physician. We did not establish a doctor-patient relationship. My services were retained for the sole purpose of producing expert evidence for the Veteran's claim with the VA. By design, my opinion and observations in this matter are free from any corrupting bias. My fee has been paid in full without any further remuneration contingent on a positive outcome. My observations and opinions are completely unencumbered by any benefit whatsoever that might derive from a positive outcome. I avoided all undue influence and restricted my perspective to one of professional disinterest, objectivity, and fairness. I have observed and reported the truth in this

matter to the highest degree afforded by my skill, training, and virtue. I completed this report based on the following:

- my comprehensive examination.
- my extensive evidence review.
- my professional expertise from review of the medical literature and expert opinion.
- my application of sound general medical principles.
- my clinical expertise from many years of treating patients with similar conditions.
- my military expertise from twenty years of service in a variety of operational and support roles.
- my holistic consideration of the Veteran's actual functional limitations.
- the Veteran's credible lay history.
- the Veteran's competent lay observations.

Question:

Is a causal nexus established for service connection of MIGRAINE HEADACHES?

Opinions:

Note: In the context of these opinions, the phrase 'more likely than not' is used with a meaning equivalent to 'a preponderance of the evidence' or 'a likelihood or probability of greater than 50 percent' (Lynch v. McDonough, 21 F.4th 776; Jones v. Shinseki, 23 Vet. App. 382; Shedden v. Principi, 381 F.3d 1163; 38 USC 5107; and 38 CFR 3.102).

It is MORE LIKELY THAN NOT that:

- the "existence of a present disability" is established for MIGRAINE HEADACHES.
- the present disability has persisted from the time of its first manifestation and continues as the current disability of MIGRAINE HEADACHES.
- service connection is established for PTSD.
- authoritative scientific sources indicate that the present disability is "proximately due to or the result of" the service connected condition.
- **a causal nexus is established for service connection under 38 CFR 3.310 of MIGRAINE HEADACHES secondary to PTSD.**

Rationale:

The development of MIGRAINE HEADACHES from PTSD is a well-described subject in the current credible professional peer-reviewed medical literature (Afari 2009, Arcaya 2017, Cardona 2007, Juang 2014, McDermott 2016, Minen 2016, Peterlin 2011a, Peterlin 2011b, Shala 2018, and Smitherman 2013):

- "PTSD increases the risk of migraine development." (Peterlin 2011a)
 - "Posttraumatic stress disorder and combat-related physical injury were related to higher rates of self-reported headache in newly returning veterans." (Afari 2009)
 - "PTSD symptoms were associated with higher odds of experiencing frequent headaches or migraines with a standard deviation change in PTSD score corresponding to over twice the odds (95% confidence interval [1.64, 2.68])..." (Arcaya 2017)
 - "Based on our data, we can confirm an association between PTSD and migraine..." (Shala 2018)
 - "Consistently across analyses, PTSD was a robust predictor of migraine..." (Smitherman 2013)
- In addition, the way in which this particular case has progressed from its initial presentation is entirely consistent with the expected natural history indicated by sound general medical principles and authoritative scientific sources. The timeline of symptom onset is also consistent with secondary service connection. In the studies I reviewed, there was enough similarity between the subjects

investigated and the Veteran to generalize the study information to them. Several mechanisms explain the underlying causal relationship. The pathways that are best described in the literature (Juang 2014, Peterlin 2011b) are:

- serotonergic and noradrenergic dysfunction, whereby lowered levels of these neurotransmitters lead to migraines.
- autonomic nervous system dysfunction whereby excessive sympathetic stimulation and inadequate parasympathetic modulation leads to migraines.
- hypothalamus-pituitary-adrenal (HPA) axis dysfunction whereby lowered levels of cortisol and elevations of several proinflammatory cytokines lead to migraines.

Citations:

- Afari N. PTSD, combat injury, and headache in Veterans Returning from Iraq/Afghanistan. Headache. 2009. PMID: 19788469.
- Arcaya MC. Association of posttraumatic stress disorder symptoms with migraine and headache after a natural disaster. Health Psychol. 2017. PMID: 27929328.
- Cardona GP. The comorbidity of major depressive disorder, dysthymic disorder and anxiety disorders with migraine. Rev Neurol. 2007. PMID: 17876737.
- Juang KD. Psychiatric comorbidity of chronic daily headache: focus on traumatic experiences in childhood, post-traumatic stress disorder and suicidality. Curr Pain Headache Rep. 2014. PMID: 24532229.
- McDermott MJ. The relation of PTSD symptoms to migraine and headache-related disability among substance dependent inpatients. J Behav Med. 2016. PMID: 26611236.
- Minen MT. Migraine and its psychiatric comorbidities. J Neurol Neurosurg Psychiatry. 2016. PMID: 26733600.
- Peterlin BL. Post-traumatic stress disorder and migraine: epidemiology, sex differences, and potential mechanisms. Headache. 2011. PMID: 21592096.
- Peterlin BL. Post-traumatic stress disorder, drug abuse and migraine: new findings from the National Comorbidity Survey Replication. Cephalalgia. 2011. PMID: 20813779.
- Shala N. Association of depression, anxiety and post-traumatic stress disorder with migraine: Data from Kosovo. Neurol Neurochir Pol. 2018. PMID: 29580567.
- Smitherman TA. Trauma exposure versus posttraumatic stress disorder: relative associations with migraine. Headache. 2013. PMID: 23464926.

Conflicting evidence:

There is no conflicting evidence.

Date of diagnosis:

My dates of diagnosis likely differ from those found in other records. The VA provides clear and unambiguous direction on this matter in a note in the diagnosis section of all DBQs: "**Date of diagnosis can be... an approximate date determined through record review or reported history.**" Most C&P examiners disregard this guidance. They only report dates found in medical records even though that is not required by VA policy. In contrast, by completing a careful record review and medical history, I was able to determine the date when signs or symptoms first developed which, of course, most accurately reflects the beginning of impairment. That date often precedes any medical records by many years.

Examiner background:

MD: [REDACTED]

[REDACTED]

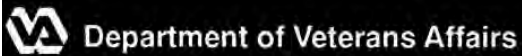
[REDACTED]. Based on my diverse professional experience and advanced education spanning multiple domains of knowledge, I have developed a particular expertise regarding medical issues that affect Veterans. This expertise also extends to the regulatory framework surrounding the complex VA claims process which poses significant scientific, legal, and philosophical challenges. The documents that I compose strongly address those challenges and exceed the VA's requirements for evidence that is thorough, adequate, sufficient, fully informed, and contemporaneous. Additional specific details about my credentials can be found in the included curriculum vitae.

Credibility & competence:

My opinion is that, more likely than not, the Veteran is eminently credible and entirely competent to make medical observations that befit a layperson, and their written and oral statements are reliable. My ability to form this opinion is common to all experienced clinicians who invariably must contend with the full breadth of human virtue and fallibility in their medical practice. Throughout my examination, the Veteran exhibited a trustworthy demeanor and they were always coherent, logical, and forthright. I did not detect any malingering or any effort at misrepresentation, embellishment, exaggeration, or deception. Their account of relevant events was consistent with the known facts and circumstances of their service. In addition, their symptom history correlated well with my observations and the generally expected course of their conditions. Finally, the evidence I reviewed demonstrated that the Veteran has been entrusted successfully with serious responsibilities in their personal and professional life that required honesty and attention to detail.

Clarifications:

All clarification requests should be directed to me since I am best suited to address them. I am naturally the most familiar with this report and the evidence on which it is based. I may possess the only existing evidence on a material issue and there is some likelihood that I possess information that is not otherwise accessible or that is absent from the evidence of record. I would like the chance to respond to any inquiry whatsoever with any information I have that might affect the probative value of my work. Please note that when "the missing information is relevant, factual, and objective - that is, not a matter of opinion" and "when a private medical report is the only evidence on a material issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight," then the VA becomes legally obligated and ***must attempt to obtain such clarification directly from the examiner who authored the report*** or must "clearly and adequately explain why such clarification is unreasonable" (Carter v. Shinseki, 26 Vet. App. 534; Savage v. Shinseki, 24 Vet. App. 259; 38 USC 5103A). If clarifications are instead requested from C&P examiners (especially those without any familiarity with the case or who are less qualified by their academic and professional credentials), such action "reasonably could be construed" as procuring evidence "for the sole purpose of denying the veteran's claim" - that is, "developing to deny" (Mariano v. Principi, 17 Vet. App. 312; 1 Veterans L. Rev. 94; M21-1 Part V, Subpart ii, 3.B.1).



**HEADACHES (INCLUDING MIGRAINE HEADACHES)
DISABILITY BENEFITS QUESTIONNAIRE**

NAME OF PATIENT/VETERAN

PATIENT/VETERAN'S SOCIAL SECURITY NUMBER

██████████ ██████████

██████████

IMPORTANT - THE DEPARTMENT OF VETERANS AFFAIRS (VA) **WILL NOT PAY OR REIMBURSE** ANY EXPENSES OR COST INCURRED IN THE PROCESS OF COMPLETING AND/OR SUBMITTING THIS FORM.

Note - The Veteran is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the Veteran's claim. VA may obtain additional medical information, including an examination, if necessary, to complete VA's review of the veteran's application. VA reserves the right to confirm the authenticity of ALL questionnaires completed by providers. **It is intended that this questionnaire will be completed by the Veteran's provider.**

Are you completing this Disability Benefits Questionnaire at the request of:

Veteran/Claimant

Other: please describe

Refer to the remarks in the appendix.

Are you a VA Healthcare provider? Yes No

Is the Veteran regularly seen as a patient in your clinic? Yes No

Was the Veteran examined in person? Yes No

If no, how was the examination conducted?

Refer to the remarks in the appendix.

EVIDENCE REVIEW

Evidence reviewed:

No records were reviewed

Records reviewed

Please identify the evidence reviewed (e.g. service treatment records, VA treatment records, private treatment records) and the date range.

Refer to the remarks in the appendix.

SECTION I - DIAGNOSIS

DOES THE VETERAN NOW HAVE OR HAS HE OR SHE EVER BEEN DIAGNOSED WITH A HEADACHE CONDITION?

 YES NO (If "Yes," complete Item 1B)

IF YES, SELECT THE VETERAN'S CONDITION (check all that apply):

<input checked="" type="checkbox"/> Migraine including migraine variants	ICD Code: <u>Refer to remarks.</u>	Date of Diagnosis: <u>Remarks.</u>
<input type="checkbox"/> Tension	ICD Code: _____	Date of Diagnosis: _____
<input type="checkbox"/> Cluster	ICD Code: _____	Date of Diagnosis: _____
<input type="checkbox"/> Other (specify type of headache): <u>Refer to remarks.</u>	ICD Code: _____	Date of Diagnosis: _____
Other Diagnosis #1: <u>Refer to remarks.</u>	ICD Code: _____	Date of Diagnosis: _____
Other Diagnosis #2: _____	ICD Code: _____	Date of Diagnosis: _____

IF THERE ARE ADDITIONAL DIAGNOSES THAT PERTAIN TO A HEADACHE CONDITION, LIST USING ABOVE FORMAT:

Refer to the remarks in the appendix.

SECTION II - MEDICAL HISTORY

2A. DESCRIBE THE HISTORY (including onset and course) OF THE VETERAN'S HEADACHE CONDITIONS (brief summary):

Refer to the remarks in the appendix.

2B. DOES THE VETERAN'S TREATMENT PLAN INCLUDE TAKING MEDICATION FOR THE DIAGNOSED CONDITION?

 YES NO IF YES, DESCRIBE TREATMENT (list only those medications used for the diagnosed condition):

Refer to the remarks in the appendix.

SECTION III - SYMPTOMS

3A. DOES THE VETERAN EXPERIENCE HEADACHE PAIN?

 YES NO

(If "Yes," check all that apply to headache pain):

- Constant head pain
- Pulsating or throbbing head pain
- Pain localized to one side of the head
- Pain on both sides of the head
- Pain worsens with physical activity
- Other, describe: Not applicable.

3B. DOES THE VETERAN EXPERIENCE NON-HEADACHE SYMPTOMS ASSOCIATED WITH HEADACHES? (Including symptoms associated with an aura prior to headache pain)

 YES NO

(If "Yes," check all that apply):

- Nausea
- Vomiting
- Sensitivity to light
- Sensitivity to sound
- Changes in vision (such as scotoma, flashes of light, tunnel vision)
- Sensory changes (such as feeling of pins and needles in extremities)
- Other, describe: Not applicable.

SECTION III - SYMPTOMS (Continued)

3C. INDICATE DURATION OF TYPICAL HEAD PAIN

- Less than 1 day
 1-2 days
 More than 2 days
 Other, describe: Not applicable.

3D. INDICATE LOCATION OF TYPICAL HEAD PAIN

- Right side of head
 Left side of head
 Both sides of head
 Other, describe: Not applicable.

SECTION IV - PROSTRATING ATTACKS OF HEADACHE PAIN

4A. MIGRAINE / NON-MIGRAINE- DOES THE VETERAN HAVE CHARACTERISTIC PROSTRATING ATTACKS OF MIGRAINE / NON-MIGRAINE HEADACHE PAIN?

- YES NO

(If "Yes," indicate frequency, on average, of prostrating attacks over the last several months):

Refer to the remarks in the appendix.

4B. DOES THE VETERAN HAVE VERY PROSTRATING AND PROLONGED ATTACKS OF MIGRAINES/NON-MIGRAINE PAIN PRODUCTIVE OF SEVERE ECONOMIC INADAPTABILITY?

- YES NO

SECTION V - OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS, SYMPTOMS, AND SCARS

5A. DOES THE VETERAN HAVE ANY OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS OR SYMPTOMS RELATED TO THE CONDITIONS LISTED IN THE DIAGNOSIS SECTION ABOVE?

- YES NO

IF YES, DESCRIBE (brief summary):

Refer to the remarks in the appendix.

5B. DOES THE VETERAN HAVE ANY SCARS (surgical or otherwise) RELATED TO ANY CONDITIONS OR TO THE TREATMENT OF ANY CONDITIONS LISTED IN THE DIAGNOSIS SECTION ABOVE?

- YES NO

IF YES, ARE ANY OF THESE SCARS PAINFUL OR UNSTABLE; HAVE A TOTAL AREA EQUAL TO OR GREATER THAN 39 SQUARE CM (6 square inches); OR ARE LOCATED ON THE HEAD, FACE OR NECK? (An "unstable scar" is one where, for any reason, there is frequent loss of covering of the skin over the scar.)

- YES NO

IF YES, ALSO COMPLETE VA FORM 21-0960F-1, SCARS/DISFIGUREMENT.

IF NO, PROVIDE LOCATION AND MEASUREMENTS OF SCAR IN CENTIMETERS.

LOCATION: Not applicable. MEASUREMENTS: length N/A cm X width N/A cm.**NOTE:** If there are multiple scars, enter additional locations and measurements in Comment section below. It is not necessary to also complete a Scars DBQ.

5C. COMMENTS, IF ANY:

Not applicable.

SECTION VI - DIAGNOSTIC TESTING

NOTE: Diagnostic testing is not required for this examination report; if studies have already been completed, provide the most recent results below.

ARE THERE ANY OTHER SIGNIFICANT DIAGNOSTIC TEST FINDINGS AND/OR RESULTS?

YES NO

IF YES, PROVIDE TYPE OF TEST OR PROCEDURE, DATE AND RESULTS (*brief summary*):

Refer to the remarks in the appendix.

SECTION VII - FUNCTIONAL IMPACT

DOES THE VETERAN'S HEADACHE CONDITION IMPACT HIS OR HER ABILITY TO WORK?

YES NO (*If "Yes," describe impact of the veteran's headache condition, providing one or more examples:*)

Refer to the remarks in the appendix.

SECTION VIII - REMARKS

8. REMARKS (*If any*)

Refer to the remarks in the appendix.

SECTION IX - EXAMINER'S CERTIFICATION AND SIGNATURE

CERTIFICATION - To the best of my knowledge, the information contained herein is accurate, complete and current.

9B. Examiner's printed name and title (e.g. MD, DO, DDS, DMD, Ph.D, Psy.D, NP, PA-C):

██████ MD

9C. Examiner's specialty (e.g. Neurology, Neurosurgery, Pediatrics, Geriatrics, Gerontology, Geropsychiatry, Geropsychology, Psychology/Psychiatry, General Practice):

Refer to the remarks in the appendix.

9D. Date Signed:

Refer to the remarks in the appendix.

9E. Examiner's phone/fax numbers:

Refer to the remarks in the appendix.

9F. National Provider Identifier (NPI) number:

Refer to the remarks in the appendix.

9G. Medical license number and state:

Refer to the remarks in the appendix.

9H. Examiner's address:

Refer to the remarks in the appendix.

Appendix:

Remarks for DBQ

HEADACHES

Dates:

Date of examination for DBQ: 08/17/2023

Date of signature for DBQ: 08/17/2023

Examiner:

[REDACTED]

Evidence review:

My opinion is that, more likely than not, my evidence review formed a sufficient factual basis for my conclusions and additional evidence would not alter those conclusions due to the nature of the medical issues at hand, the theories by which they are service connected, and the timeline of signs and symptoms. The case law on evidence review clearly states that private examiners are not required to review any particular set of records or even to review the C-file at all: "... **the claims file is not a magical or talismanic set of documents... claims file review**, as it pertains to obtaining an overview of the claimant's medical history, **is not a requirement for private medical opinions...** claims file review may be irrelevant to the medical issue at hand" (Nieves-Rodriguez v. Peake, 22 Vet. App. 295). My evidence review encompassed all relevant documents from service entry to the present time and included:

- various documents from the C-file record.
- various documents from the military personnel record.
- various documents from the service treatment record (STR).
- the complete VA medical record.
- the complete VA claims correspondence record.
- various documents from the private medical record.
- various other documents and records.

Examination method:

[REDACTED] resides in [REDACTED] [REDACTED] I performed a comprehensive face-to-face video telehealth examination on 08/17/2023. I then completed this report in my capacity as an expert Independent Veteran Examiner (IVE) and licensed physician. We did not establish a doctor-patient relationship. My services were retained for the sole purpose of producing expert evidence for the Veteran's claim with the VA. By design, my opinion and observations in this matter are free from any corrupting bias. My fee has been paid in full without any further remuneration contingent on a positive outcome. My observations and opinions are completely unencumbered by any benefit whatsoever that might derive from a positive outcome. I avoided all undue influence and restricted my perspective to one of professional disinterest, objectivity, and fairness. I have observed and reported the truth in this

matter to the highest degree afforded by my skill, training, and virtue. I completed this report based on the following:

- my comprehensive examination.
- my extensive evidence review.
- my professional expertise from review of the medical literature and expert opinion.
- my application of sound general medical principles.
- my clinical expertise from many years of treating patients with similar conditions.
- my military expertise from twenty years of service in a variety of operational and support roles.
- my holistic consideration of the Veteran's actual functional limitations.
- the Veteran's credible lay history.
- the Veteran's competent lay observations.

Remarks for DBQ form:

Diagnoses:

Migraine headaches. ICD: G43.719. Date of diagnosis: 2017.

Additional diagnoses:

PTSD.

Medical history:

See associated medical opinion.

Medications:

Ibuprofen.

Headache frequency:

This Veteran has approximately **3 headaches per week**. Many of these headaches have severe pain along with intense non-headache symptoms, as described below:

- The **CHARACTERISTIC PROSTRATING** headache attacks cause extreme exhaustion, powerlessness, and debilitation and/or incapacitation, along with a **SUBSTANTIAL INABILITY** to engage in ordinary activities. Over the last several months, these have occurred **7 times per month**, on average.
- The **COMPLETELY PROSTRATING** headache attacks are prolonged and have very severe pain and even more intense non-headache symptoms. They cause such extreme exhaustion or powerlessness that there is an **ESSENTIALLY TOTAL** inability to engage in ordinary activities. Over the last several months, these have occurred **3 times per month**, on average.

Diagnostic testing:

Quantitative symptom assessments were administered (MIDAS and HIT-6). The enclosed results indicate a severe headache disability.

Functional impact:

This Veteran has **SEVERE ECONOMIC INADAPTABILITY** from headaches due to absenteeism and from lack of productivity when he does continue working. During a **CHARACTERISTIC PROSTRATING** or **COMPLETELY PROSTRATING** headache attack, the headache and non-headache symptoms are so intense that ordinary activities of work and daily living become nearly impossible. Even if he continues trying to work during a prostrating headache, he is essentially entirely unproductive for the duration

of the attack and during the subsequent recovery period. There are almost no regular businesses that could reasonably accommodate this disability due to its severity.

Other remarks:

- I reviewed this Veteran's symptom assessments and also conducted a thorough clinical interview. I found him to be very credible. His reports about his symptoms appeared authentic and accurate.
- The severity of this Veteran's headache disability was evaluated according to guidance from relevant case law including Jones v. Shinseki, 26 Vet. App. 56. That case applies to headache conditions and instructs examiners to ignore symptom improvement from medication when assessing the level of disability. This is because the ameliorative effects of medication are not contemplated in the rating schedule under the applicable diagnostic code.

Conflicting evidence:

There is no conflicting evidence.

Date of diagnosis:

My dates of diagnosis likely differ from those found in other records. The VA provides clear and unambiguous direction on this matter in a note in the diagnosis section of all DBQs: "**Date of diagnosis can be... an approximate date determined through record review or reported history.**" Most C&P examiners disregard this guidance. They only report dates found in medical records even though that is not required by VA policy. In contrast, by completing a careful record review and medical history, I was able to determine the date when signs or symptoms first developed which, of course, most accurately reflects the beginning of impairment. That date often precedes any medical records by many years.

Examiner background:

MD: [REDACTED]

[REDACTED]

[REDACTED]. Based on my diverse professional experience and advanced education spanning multiple domains of knowledge, I have developed a particular expertise regarding medical issues that affect Veterans. This expertise also extends to the regulatory framework surrounding the complex VA claims process which poses significant scientific, legal, and philosophical challenges. The documents that I compose strongly address those challenges and exceed the VA's requirements for evidence that is thorough, adequate, sufficient, fully informed, and contemporaneous. Additional specific details about my credentials can be found in the included curriculum vitae.

Credibility & competence:

My opinion is that, more likely than not, the Veteran is eminently credible and entirely competent to make medical observations that befit a layperson, and their written and oral statements are reliable. My ability to form this opinion is common to all experienced clinicians who invariably must contend with the full breadth of human virtue and fallibility in their medical practice. Throughout my examination, the Veteran exhibited a trustworthy demeanor and they were always coherent, logical, and forthright. I did not detect any malingering or any effort at misrepresentation, embellishment, exaggeration, or deception. Their account of relevant events was consistent with the known facts and circumstances of their service. In addition, their symptom history correlated well with my observations

and the generally expected course of their conditions. Finally, the evidence I reviewed demonstrated that the Veteran has been entrusted successfully with serious responsibilities in their personal and professional life that required honesty and attention to detail.

Clarifications:

All clarification requests should be directed to me since I am best suited to address them. I am naturally the most familiar with this report and the evidence on which it is based. I may possess the only existing evidence on a material issue and there is some likelihood that I possess information that is not otherwise accessible or that is absent from the evidence of record. I would like the chance to respond to any inquiry whatsoever with any information I have that might affect the probative value of my work. Please note that when "the missing information is relevant, factual, and objective - that is, not a matter of opinion" and "when a private medical report is the only evidence on a material issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight," then the VA becomes legally obligated and **must attempt to obtain such clarification directly from the examiner who authored the report** or must "clearly and adequately explain why such clarification is unreasonable" (Carter v. Shinseki, 26 Vet. App. 534; Savage v. Shinseki, 24 Vet. App. 259; 38 USC 5103A). If clarifications are instead requested from C&P examiners (especially those without any familiarity with the case or who are less qualified by their academic and professional credentials), such action "reasonably could be construed" as procuring evidence "for the sole purpose of denying the veteran's claim" - that is, "developing to deny" (Mariano v. Principi, 17 Vet. App. 312; 1 Veterans L. Rev. 94; M21-1 Part V, Subpart ii, 3.B.1).

08/17/2023

The Migraine Disability Assessment Test

The **MIDAS** (Migraine Disability Assessment) questionnaire was put together to help you measure the impact your headaches have on your life. The information on this questionnaire is also helpful for your primary care provider to determine the level of pain and disability caused by your headaches and to find the best treatment for you.

INSTRUCTIONS

Please answer the following questions about **ALL** of the headaches you have had over the last 3 months. Select your answer in the box next to each question. Select zero if you did not have the activity in the last 3 months. Please take the completed form to your healthcare professional.

- 2 1. On how many days in the last 3 months did you miss work or school because of your headaches?
- 10 2. How many days in the last 3 months was your productivity at work or school reduced by half or more because of your headaches? (Do not include days you counted in question 1 where you missed work or school.)
- 10 3. On how many days in the last 3 months did you not do household work (such as housework, home repairs and maintenance, shopping, caring for children and relatives) because of your headaches?
- 10 4. How many days in the last 3 months was your productivity in household work reduced by half or more because of your headaches? (Do not include days you counted in question 3 where you did not do household work.)
- 5 5. On how many days in the last 3 months did you miss family, social or leisure activities because of your headaches?
- 37 Total (Questions 1-5)

What your Physician will need to know about your headache:

- 35 A. On how many days in the last 3 months did you have a headache? (If a headache lasted more than 1 day, count each day.)
- 7 B. On a scale of 0 - 10, on average how painful were these headaches? (where 0=no pain at all, and 10=pain as bad as it can be.)

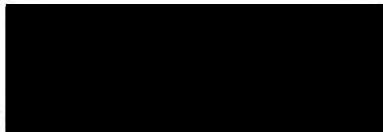
Scoring: After you have filled out this questionnaire, add the total number of days from questions 1-5 (ignore A and B).

MIDAS Grade	Definition	MIDAS Score
I	Little or No Disability	0-5
II	Mild Disability	6-10
III	Moderate Disability	11-20
IV	Severe Disability	21+

If Your MIDAS Score is 6 or more, please discuss this with your doctor.

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HIT-6TM
(VERSION 1.1)

08/17/2023



This questionnaire was designed to help you describe and communicate the way you feel and what you cannot do because of headaches.

To complete, please circle one answer for each question.

1

When you have headaches, how often is the pain severe?

Never Rarely Sometimes **Very Often** Always

2

How often do headaches limit your ability to do usual daily activities including household work, work, school, or social activities?

Never Rarely **Sometimes** Very Often Always

3

When you have a headache, how often do you wish you could lie down?

Never Rarely Sometimes **Very Often** Always

4

In the past 4 weeks, how often have you felt too tired to do work or daily activities because of your headaches?

Never Rarely **Sometimes** Very Often Always

5

In the past 4 weeks, how often have you felt fed up or irritated because of your headaches?

Never Rarely **Sometimes** Very Often Always

6

In the past 4 weeks, how often did headaches limit your ability to concentrate on work or daily activities?

Never Rarely Sometimes **Very Often** Always



+



+



+



+



COLUMN 1
(6 points each)

COLUMN 2
(8 points each)

COLUMN 3
(10 points each)

COLUMN 4
(11 points each)

COLUMN 5
(13 points each)

To score, add points for answers in each column.

Please share your HIT-6 results with your doctor.

Total Score

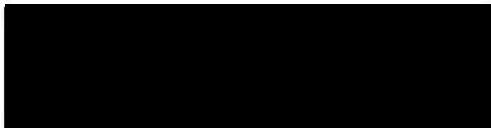
63

Higher scores indicate greater impact on your life.



HEADACHE IMPACT TEST™

What Does Your Score Mean?



08/17/2023

If You Scored 60 or More

Your headaches are having a very severe impact on your life. You may be experiencing disabling pain and other symptoms that are more severe than those of other headache sufferers. Don't let your headaches stop you from enjoying the important things in your life, like family, work, school or social activities.

Make an appointment **today** to discuss your HIT-6 results and your headaches with your doctor.

If You Scored 56 – 59

Your headaches are having a substantial impact on your life. As a result you may be experiencing severe pain and other symptoms, causing you to miss some time from family, work, school, or social activities.

Make an appointment **today** to discuss your HIT-6 results and your headaches with your doctor.

If You Scored 50 – 55

Your headaches seem to be having some impact on your life. Your headaches should not make you miss time from family, work, school, or social activities.

Make sure you discuss your HIT-6 results and your headaches at your next appointment with your doctor.

If You Scored 49 or Less

Your headaches seem to be having little to no impact on your life at this time. We encourage you to take HIT-6 monthly to continue to track how your headaches affect your life.

If Your Score on HIT-6 is 50 or Higher

You should share the results with your doctor. Headaches that are disrupting your life could be migraine.

Take HIT-6 with you when you visit your doctor because research shows that when doctors understand exactly how badly headaches affect the lives of their patients, they are much more likely to provide a successful treatment program, which may include medication.

HIT is also available on the Internet at www.headachetest.com.

The Internet version allows you to print out a personal report of your results as well as a special detailed version for your doctor.

Don't forget to take HIT-6 again or try the Internet version to continue to monitor your progress.

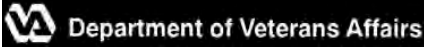
About HIT

The Headache Impact Test (HIT) is a tool used to measure the impact headaches have on your ability to function on the job, at school, at home and in social situations. Your score shows you the effect that headaches have on normal daily life and your ability to function. HIT was developed by an international team of headache experts from neurology and primary care medicine in collaboration with the psychometricians who developed the SF-36® health assessment tool.

HIT is not intended to offer medical advice regarding medical diagnosis or treatment. You should talk to your healthcare provider for advice specific to your situation.

SF-36® is a registered trademark of Medical Outcomes Trust and John E. Ware, Jr.

HIT-6 Scoring Interpretation English Version 1.1
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**INTERNAL VETERANS AFFAIRS USE
MEDICAL OPINION DISABILITY BENEFITS QUESTIONNAIRE**

IMPORTANT - THE DEPARTMENT OF VETERANS AFFAIRS (VA) WILL NOT PAY OR REIMBURSE ANY EXPENSES OR COST INCURRED IN THE PROCESS OF COMPLETING AND/OR SUBMITTING THIS FORM. PLEASE READ THE PRIVACY ACT AND RESPONDENT BURDEN INFORMATION ON REVERSE BEFORE COMPLETING FORM.

NAME OF PATIENT/VETERAN

[REDACTED]

PATIENT/VETERAN'S SOCIAL SECURITY NUMBER

[REDACTED]

Note to examiner - The Veteran is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the Veteran's claim.

Is this questionnaire being completed in conjunction with VA 21-2507, C&P examination request? Yes No

How was the examination completed? (check all that apply)

- In-person examination
- Records reviewed
- Examination via approved video telehealth
- Other, please specify in comments box:

Comments: Refer to the remarks in the appendix.

ACCEPTABLE CLINICAL EVIDENCE (ACE)

Indicate the method used to obtain medical information to complete this document:

- Review of available records (without in-person or video telehealth examination) using the Acceptable Clinical Evidence (ACE) process because the existing medical evidence provided sufficient information on which to prepare the questionnaire and such an examination will likely provide no additional relevant evidence.
- Review of available records in conjunction with an interview with the Veteran (without in-person or telehealth examination) using the ACE process because the existing medical evidence supplemented with an interview provided sufficient information on which to prepare the questionnaire and such an examination would likely provide no additional relevant evidence.

EVIDENCE REVIEW

Evidence Reviewed (check all that apply):

- Not requested
- VA claims file (hard copy paper C-file)
- VA e-folder
- VA electronic health record
- Other, please identify other evidence reviewed:

Refer to the remarks in the appendix.

Evidence Comments:

Refer to the remarks in the appendix.

SECTION I - DEFINITIONS

AGGRAVATION OF PREEXISTING NONSERVICE-CONNECTED DISABILITIES. A PREEXISTING INJURY OR DISEASE WILL BE CONSIDERED TO HAVE BEEN AGGRAVATED BY ACTIVE MILITARY, NAVAL, OR AIR SERVICE, WHERE THERE IS AN INCREASE IN DISABILITY DURING SUCH SERVICE, UNLESS THERE IS A SPECIFIC FINDING THAT THE INCREASE IN DISABILITY IS DUE TO THE NATURAL PROGRESS OF THE DISEASE.

AGGRAVATION OF NONSERVICE-CONNECTED DISABILITIES. ANY INCREASE IN SEVERITY OF A NONSERVICE-CONNECTED DISEASE OR INJURY THAT IS PROXIMATELY DUE TO OR THE RESULT OF A SERVICE-CONNECTED DISEASE OR INJURY, AND NOT DUE TO THE NATURAL PROGRESS OF THE NONSERVICE-CONNECTED DISEASE, WILL BE SERVICE CONNECTED.

SECTION II - RESTATEMENT OF REQUESTED OPINION

2A. INSERT REQUESTED OPINION FROM GENERAL REMARKS:

INTESTINAL CONDITION - service connection:

Refer to the remarks in the appendix.

2B. INDICATE TYPE OF EXAM FOR WHICH OPINION HAS BEEN REQUESTED (e.g. skin diseases): **INTESTINES DBQ**

SECTION III - MEDICAL OPINION FOR DIRECT SERVICE CONNECTION

CHOOSE THE STATEMENT THAT MOST CLOSELY APPROXIMATES THE ETIOLOGY OF THE CLAIMED CONDITION.

- 3A. THE CLAIMED CONDITION WAS AT LEAST AS LIKELY AS NOT (50 percent or greater probability) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 3B. THE CLAIMED CONDITION WAS LESS LIKELY THAN NOT (less than 50 percent probability) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

3C. RATIONALE:

N/A

SECTION IV - MEDICAL OPINION FOR SECONDARY SERVICE CONNECTION

- 4A. THE CLAIMED CONDITION IS AT LEAST AS LIKELY AS NOT (50 percent or greater probability) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.
- 4B. THE CLAIMED CONDITION IS LESS LIKELY THAN NOT (less than 50 percent probability) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.

4C. RATIONALE:

SECONDARY SERVICE CONNECTION:

Refer to the remarks in the appendix.

SECTION V - MEDICAL OPINION FOR AGGRAVATION OF A CONDITION THAT EXISTED PRIOR TO SERVICE

- 5A. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 5B. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS CLEARLY AND UNMISTAKABLY NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

5C. RATIONALE:

N/A

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION

6A. CAN YOU DETERMINE A BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition)?

- YES NO

IF "YES" TO QUESTION 6A, ANSWER THE FOLLOWING:

I. DESCRIBE THE BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition):

N/A

II. PROVIDE THE DATE AND NATURE OF THE MEDICAL EVIDENCE USED TO PROVIDE THE BASELINE:

N/A

III. IS THE CURRENT SEVERITY OF THE (claimed condition/diagnosis) GREATER THAN THE BASELINE?

- YES NO

IF YES, WAS THE VETERAN'S (claimed condition/diagnosis) AT LEAST AS LIKELY AS NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY (insert "service connected condition")?

- YES (provide rationale in section 6B.)
- NO (provide rationale in section 6B.)

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION
(continued)

IF "NO" TO QUESTION 6A, ANSWER THE FOLLOWING:

I. PROVIDE RATIONALE AS TO WHY A BASELINE CANNOT BE ESTABLISHED (e.g. medical evidence is not sufficient to support a determination of a baseline level of severity):

N/A

II. REGARDLESS OF AN ESTABLISHED BASELINE, WAS THE VETERAN'S (claimed condition/diagnosis) AT LEAST AS LIKELY AS NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY (insert "service connected condition")?

- YES (provide rationale in section 6B.)
- NO (provide rationale in section 6B.)

6B. PROVIDE RATIONALE:

N/A

SECTION VII - OPINION REGARDING CONFLICTING MEDICAL EVIDENCE

7. I HAVE REVIEWED THE CONFLICTING MEDICAL EVIDENCE AND AM PROVIDING THE FOLLOWING OPINION:

Refer to the remarks in the appendix.

SECTION VIII - PHYSICIAN'S CERTIFICATION AND SIGNATURE

Information contained herein is accurate, complete and current.

8B. PHYSICIAN'S PRINTED NAME

██████████ MD

8C. DATE SIGNED

Remarks.

PROVIDER IDENTIFIER (NPI) NUMBER

8F. PHYSICIAN'S ADDRESS

Remarks.

Appendix:

Remarks for Medical Opinion

Service connection for IRRITABLE BOWEL SYNDROME

Dates:

Date of examination for DBQ: 08/17/2023

Date of signature for DBQ: 08/17/2023

Examiner:

[REDACTED]

Evidence review:

My opinion is that, more likely than not, my evidence review formed a sufficient factual basis for my conclusions and additional evidence would not alter those conclusions due to the nature of the medical issues at hand, the theories by which they are service connected, and the timeline of signs and symptoms. The case law on evidence review clearly states that private examiners are not required to review any particular set of records or even to review the C-file at all: "... **the claims file is not a magical or talismanic set of documents... claims file review**, as it pertains to obtaining an overview of the claimant's medical history, **is not a requirement for private medical opinions...** claims file review may be irrelevant to the medical issue at hand" (Nieves-Rodriguez v. Peake, 22 Vet. App. 295). My evidence review encompassed all relevant documents from service entry to the present time and included:

- various documents from the C-file record.
- various documents from the military personnel record.
- various documents from the service treatment record (STR).
- the complete VA medical record.
- the complete VA claims correspondence record.
- various documents from the private medical record.
- various other documents and records.

Examination method:

[REDACTED] resides in [REDACTED] [REDACTED] I performed a comprehensive face-to-face video telehealth examination on 08/17/2023. I then completed this report in my capacity as an expert Independent Veteran Examiner (IVE) and licensed physician. We did not establish a doctor-patient relationship. My services were retained for the sole purpose of producing expert evidence for the Veteran's claim with the VA. By design, my opinion and observations in this matter are free from any corrupting bias. My fee has been paid in full without any further remuneration contingent on a positive outcome. My observations and opinions are completely unencumbered by any benefit whatsoever that might derive from a positive outcome. I avoided all undue influence and restricted my perspective to one of professional disinterest, objectivity, and fairness. I have observed and reported the truth in this

matter to the highest degree afforded by my skill, training, and virtue. I completed this report based on the following:

- my comprehensive examination.
- my extensive evidence review.
- my professional expertise from review of the medical literature and expert opinion.
- my application of sound general medical principles.
- my clinical expertise from many years of treating patients with similar conditions.
- my military expertise from twenty years of service in a variety of operational and support roles.
- my holistic consideration of the Veteran's actual functional limitations.
- the Veteran's credible lay history.
- the Veteran's competent lay observations.

Question:

Is a causal nexus established for service connection of IRRITABLE BOWEL SYNDROME?

Opinions:

Note: In the context of these opinions, the phrase 'more likely than not' is used with a meaning equivalent to 'a preponderance of the evidence' or 'a likelihood or probability of greater than 50 percent' (Lynch v. McDonough, 21 F.4th 776; Jones v. Shinseki, 23 Vet. App. 382; Shedden v. Principi, 381 F.3d 1163; 38 USC 5107; and 38 CFR 3.102).

It is MORE LIKELY THAN NOT that:

- the "existence of a present disability" is established for IRRITABLE BOWEL SYNDROME.
- the present disability has persisted from the time of its first manifestation and continues as the current disability of IRRITABLE BOWEL SYNDROME.
- service connection is established for PTSD.
- authoritative scientific sources indicate that the present disability is "proximately due to or the result of" the service connected condition.
- **a causal nexus is established for service connection under 38 CFR 3.310 of IRRITABLE BOWEL SYNDROME secondary to PTSD.**

Rationale:

The development of IRRITABLE BOWEL SYNDROME from PTSD is a well-described subject in the current credible professional peer-reviewed medical literature (Cohen 2006, Goodwin 2013, Graham 2010, Iorio 2014, Maguen 2014, Ng 2019, Riddle 2016, Savas 2009, and White 2010). In addition, the way in which this particular case has progressed from its initial presentation is entirely consistent with the expected natural history indicated by sound general medical principles and authoritative scientific sources. The timeline of symptom onset is also consistent with secondary service connection. In the studies I reviewed, there was enough similarity between the subjects investigated and the Veteran to generalize the study information to them. Several mechanisms explain the underlying causal relationship. The pathways that are best described in the literature are those mediated by visceral neural hypersensitivity as well as dysregulation of the hypothalamic - pituitary - adrenal (HPA) axis which is closely intertwined with the mind/body fight/flight/freeze instinct. The relationship between PTSD and IRRITABLE BOWEL SYNDROME often begins with an internal focusing of mental hypervigilance on otherwise normal bodily sensations. This increases conscious awareness of bowel functioning that would otherwise be ignored. This serves to increase the apparent severity of gut symptoms which then initiates a positive feedback loop between abdominal symptoms and a worried concern about those symptoms. In parallel with this mental process, there is also transmission of the

hyperaroused PTSD neural state from the central nervous system to the neuronally-dense autonomic nervous system in the intestines. This results in the gut making exaggerated responses even to normal stimuli. This in turn alters intestinal transit time (either faster or slower - that is, diarrhea or constipation). Under stress, these mental and intestinal responses become even more exaggerated. These mechanisms are very consistent with the commonly observed phenomenon of a PTSD panic attack with nearly simultaneous onset of an IBS attack.

Citations:

- Cohen H. Post-traumatic stress disorder and other co-morbidities in a sample population of patients with irritable bowel syndrome. Eur J Intern Med. 2006. PMID: 17142176.
- Goodwin L. Irritable bowel syndrome in the UK military after deployment to Iraq: what are the risk factors? Soc Psychiatry Psychiatr Epidemiol. 2013. PMID: 23636672.
- Graham DP. Irritable bowel syndrome symptoms and health related quality of life in female veterans. Aliment Pharmacol Ther. 2010. PMID: 19814746.
- Iorio N. Post-traumatic Stress Disorder Is Associated With Irritable Bowel Syndrome in African Americans. J Neurogastroenterol Motil. 2014. PMID: 25273122.
- Maguen S. Association of mental health problems with gastrointestinal disorders in Iraq and Afghanistan veterans. Depress Anxiety. 2014. PMID: 23494973.
- Ng QX. Systematic review with meta-analysis: The association between post-traumatic stress disorder and irritable bowel syndrome. J Gastroenterol Hepatol. 2019. PMID: 30144372.
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- Savas LS. Irritable bowel syndrome and dyspepsia among women veterans: prevalence and association with psychological distress. Aliment Pharmacol Ther. 2009. PMID: 18785989.
- White DL. Trauma history and risk of the irritable bowel syndrome in women veterans. Aliment Pharmacol Ther. 2010. PMID: 20528828.

Conflicting evidence:

There is no conflicting evidence.

Date of diagnosis:

My dates of diagnosis likely differ from those found in other records. The VA provides clear and unambiguous direction on this matter in a note in the diagnosis section of all DBQs: "**Date of diagnosis can be... an approximate date determined through record review or reported history.**" Most C&P examiners disregard this guidance. They only report dates found in medical records even though that is not required by VA policy. In contrast, by completing a careful record review and medical history, I was able to determine the date when signs or symptoms first developed which, of course, most accurately reflects the beginning of impairment. That date often precedes any medical records by many years.

Examiner background:

[REDACTED] MD: [REDACTED]
[REDACTED]
[REDACTED]. Based on my diverse professional experience and advanced education spanning multiple domains of knowledge, I have developed a particular expertise regarding medical issues that affect Veterans. This expertise also extends to the

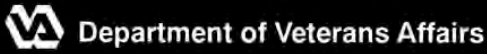
regulatory framework surrounding the complex VA claims process which poses significant scientific, legal, and philosophical challenges. The documents that I compose strongly address those challenges and exceed the VA's requirements for evidence that is thorough, adequate, sufficient, fully informed, and contemporaneous. Additional specific details about my credentials can be found in the included curriculum vitae.

Credibility & competence:

My opinion is that, more likely than not, the Veteran is eminently credible and entirely competent to make medical observations that befit a layperson, and their written and oral statements are reliable. My ability to form this opinion is common to all experienced clinicians who invariably must contend with the full breadth of human virtue and fallibility in their medical practice. Throughout my examination, the Veteran exhibited a trustworthy demeanor and they were always coherent, logical, and forthright. I did not detect any malingering or any effort at misrepresentation, embellishment, exaggeration, or deception. Their account of relevant events was consistent with the known facts and circumstances of their service. In addition, their symptom history correlated well with my observations and the generally expected course of their conditions. Finally, the evidence I reviewed demonstrated that the Veteran has been entrusted successfully with serious responsibilities in their personal and professional life that required honesty and attention to detail.

Clarifications:

All clarification requests should be directed to me since I am best suited to address them. I am naturally the most familiar with this report and the evidence on which it is based. I may possess the only existing evidence on a material issue and there is some likelihood that I possess information that is not otherwise accessible or that is absent from the evidence of record. I would like the chance to respond to any inquiry whatsoever with any information I have that might affect the probative value of my work. Please note that when "the missing information is relevant, factual, and objective - that is, not a matter of opinion" and "when a private medical report is the only evidence on a material issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight," then the VA becomes legally obligated and **must attempt to obtain such clarification directly from the examiner who authored the report** or must "clearly and adequately explain why such clarification is unreasonable" (Carter v. Shinseki, 26 Vet. App. 534; Savage v. Shinseki, 24 Vet. App. 259; 38 USC 5103A). If clarifications are instead requested from C&P examiners (especially those without any familiarity with the case or who are less qualified by their academic and professional credentials), such action "reasonably could be construed" as procuring evidence "for the sole purpose of denying the veteran's claim" - that is, "developing to deny" (Mariano v. Principi, 17 Vet. App. 312; 1 Veterans L. Rev. 94; M21-1 Part V, Subpart ii, 3.B.1).



**INTESTINAL CONDITIONS (OTHER THAN SURGICAL OR INFECTIOUS)
(INCLUDING IRRITABLE BOWEL SYNDROME, CROHN'S DISEASE, ULCERATIVE COLITIS,
AND DIVERTICULITIS) DISABILITY BENEFITS QUESTIONNAIRE**

NAME OF PATIENT/VETERAN

PATIENT/VETERAN'S SOCIAL SECURITY NUMBER

██████████ ██████████

████████████████████

IMPORTANT - THE DEPARTMENT OF VETERANS AFFAIRS (VA) **WILL NOT PAY OR REIMBURSE** ANY EXPENSES OR COST INCURRED IN THE PROCESS OF COMPLETING AND/OR SUBMITTING THIS FORM.

Note - The Veteran is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the Veteran's claim. VA may obtain additional medical information, including an examination, if necessary, to complete VA's review of the veteran's application. VA reserves the right to confirm the authenticity of ALL questionnaires completed by providers. **It is intended that this questionnaire will be completed by the Veteran's provider.**

Are you completing this Disability Benefits Questionnaire at the request of:

Veteran/Claimant

Other: please describe

Refer to the remarks in the appendix.

Are you a VA Healthcare provider? Yes No

Is the Veteran regularly seen as a patient in your clinic? Yes No

Was the Veteran examined in person? Yes No

If no, how was the examination conducted?

Refer to the remarks in the appendix.

EVIDENCE REVIEW

Evidence reviewed:

No records were reviewed

Records reviewed

Please identify the evidence reviewed (e.g. service treatment records, VA treatment records, private treatment records) and the date range.

Refer to the remarks in the appendix.

SECTION I - DIAGNOSIS

1A. DOES THE VETERAN NOW HAVE OR HAS HE OR SHE EVER BEEN DIAGNOSED WITH AN INTESTINAL CONDITION (other than surgical or infectious)?

YES NO If "Yes," complete Item 1B

1B. SELECT THE VETERAN'S CONDITION (Check all that apply)

- | | | |
|---|---------------------------|------------------------------------|
| <input checked="" type="checkbox"/> IRRITABLE BOWEL SYNDROME | ICD code: <u>Remarks.</u> | Date of diagnosis: <u>Remarks.</u> |
| <input type="checkbox"/> SPASTIC COLITIS | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> MUCOUS COLITIS | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> CHRONIC DIARRHEA | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> ULCERATIVE COLITIS | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> CROHN'S DISEASE | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> CHRONIC ENTERITIS | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> CHRONIC ENTEROCOLITIS | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> CELIAC DISEASE | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> DIVERTICULITIS | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> INTESTINAL NEOPLASM | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> PERITONEAL ADHESIONS ATTRIBUTABLE TO DIVERTICULITIS.
IF CHECKED, ALSO COMPLETE Peritoneal Adhesions Questionnaire | ICD code: _____ | Date of diagnosis: _____ |
| <input type="checkbox"/> OTHER NON-SURGICAL OR NON-INFECTIOUS INTESTINAL CONDITIONS: | | |
| OTHER DIAGNOSIS #1: <u>Refer to remarks.</u> | ICD code: _____ | Date of diagnosis: _____ |
| OTHER DIAGNOSIS #2: _____ | ICD code: _____ | Date of diagnosis: _____ |

1C. IF THERE ARE ADDITIONAL DIAGNOSES THAT PERTAIN TO INTESTINAL CONDITIONS (other than surgical or infectious), LIST USING THE FORMAT:

Refer to the remarks in the appendix.

SECTION II - MEDICAL HISTORY

2A. DESCRIBE THE HISTORY (including onset and course) OF THE VETERAN'S INTESTINAL CONDITION (Brief summary)

Refer to the remarks in the appendix.

2B. IS CONTINUOUS MEDICATION REQUIRED FOR CONTROL OF THE VETERAN'S INTESTINAL CONDITION?

YES NO

IF YES, LIST ONLY THOSE MEDICATIONS REQUIRED FOR THE INTESTINAL CONDITION

Refer to the remarks in the appendix.

2C. HAS THE VETERAN HAD SURGICAL TREATMENT FOR AN INTESTINAL CONDITION?

YES NO

IF YES, ALSO COMPLETE THE INTESTINAL SURGERY QUESTIONNAIRE

SECTION III - SIGNS AND SYMPTOMS

3. DOES THE VETERAN HAVE ANY SIGNS OR SYMPTOMS ATTRIBUTABLE TO ANY NON-SURGICAL NON-INFECTIOUS INTESTINAL CONDITIONS?

YES NO If "Yes," check all that apply

- DIARRHEA (If checked, describe)
Refer to the remarks in the appendix.
- ALTERNATING DIARRHEA AND CONSTIPATION (If checked, describe)
Refer to the remarks in the appendix.
- ABDOMINAL DISTENSION (If checked, describe)
Refer to the remarks in the appendix.
- ANEMIA (If checked, provide hemoglobin/hematocrit in Section IX, Diagnostic Testing)
- NAUSEA (If checked, describe)
Refer to the remarks in the appendix.
- VOMITING (If checked, describe)
Refer to the remarks in the appendix.
- OTHER (If checked, describe)
Not applicable.

SECTION IV - SYMPTOM EPISODES, ATTACKS AND EXACERBATIONS

4. DOES THE VETERAN HAVE EPISODES OF BOWEL DISTURBANCE WITH ABDOMINAL DISTRESS, OR EXACERBATIONS OR ATTACKS OF THE INTESTINAL CONDITION?

YES NO IF YES, INDICATE SEVERITY AND FREQUENCY (Check all that apply)

- Episodes of bowel disturbance with abdominal distress
If checked, indicate frequency
 - Occasional episodes
 - Frequent episodes
 - More or less constant abdominal distress
- Episodes of exacerbations and/or attacks of the intestinal condition. If checked, describe typical exacerbation or attack

Not applicable.

Indicate number of exacerbations and/or attacks in past 12 months

0 1 2 3 4 5 6 7 or more

SECTION V - WEIGHT LOSS

5. DOES THE VETERAN HAVE WEIGHT LOSS ATTRIBUTABLE TO AN INTESTINAL CONDITION (other than surgical or infectious condition)?

YES NO

If "Yes," provide Veteran's baseline weight: N/A and current weight: N/A

For VA purposes, baseline weight is the average weight for 2-year period preceding onset of disease

SECTION VI - MALNUTRITION, COMPLICATIONS AND OTHER GENERAL HEALTH EFFECTS

6. DOES THE VETERAN HAVE MALNUTRITION, SERIOUS COMPLICATIONS OR OTHER GENERAL HEALTH EFFECTS ATTRIBUTABLE TO THE INTESTINAL CONDITION?

YES NO If "Yes," indicate findings) (Check all that apply)

- Health only fair during remissions
- General debility
- Serious complication such as liver abscess (Describe)
Not applicable.
- Malnutrition. If checked, is malnutrition marked? YES NO
- Other (Describe)
Not applicable.

NOTE: Complete additional Disability Benefits Questionnaire(s) for complications noted, as deemed appropriate (schedule with appropriate provider).

SECTION VII - TUMORS AND NEOPLASMS

7A. Does the Veteran currently have, or has had, a benign or malignant neoplasm or metastases related to any condition in the diagnosis section?

Yes No If yes, complete the following section.

7B. Is the neoplasm

Benign
 Malignant (if malignant complete the following):

Active In remission

Primary Secondary (metastatic) (if secondary, indicate the primary site, if known): _____

7C. Has the Veteran completed treatment or is the Veteran currently undergoing treatment for a benign or malignant neoplasm or metastases?

Yes No; watchful waiting

If yes, indicate type of treatment the Veteran is currently undergoing or has completed (check all that apply):

Treatment completed

Surgery

If checked, describe: _____

Date(s) of surgery: _____

Radiation therapy

Date of most recent treatment: _____ Date of completion of treatment or anticipated date of completion: _____

Antineoplastic chemotherapy

Date of most recent treatment: _____ Date of completion of treatment or anticipated date of completion: _____

Other therapeutic procedure

If checked, describe procedure: _____

Date of most recent procedure: _____

Other therapeutic treatment

If checked, describe treatment: _____

Date of completion of treatment or anticipated date of completion: _____

7D. Does the Veteran currently have any residuals or complications due to the neoplasm (including metastases) or its treatment, other than those already documented in the report above?

Yes No

If yes, list residuals or complications (brief summary), and also complete the appropriate questionnaire:

7E. If there are additional benign or malignant neoplasms or metastases related to any of the diagnoses in the diagnosis section, describe using the above format:

SECTION VIII - OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS, SYMPTOMS, AND SCARS

8A. DOES THE VETERAN HAVE ANY OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS OR SYMPTOMS RELATED TO THE CONDITIONS LISTED IN THE DIAGNOSIS SECTION ABOVE?

YES NO

IF YES, DESCRIBE (brief summary):

Refer to the remarks in the appendix.

SECTION VIII - OTHER PERTINENT PHYSICAL FINDINGS, COMPLICATIONS, CONDITIONS, SIGNS, SYMPTOMS, AND SCARS (continued)

8B. DOES THE VETERAN HAVE ANY SCARS (surgical or otherwise) RELATED TO ANY CONDITIONS OR TO THE TREATMENT OF ANY CONDITIONS LISTED IN THE DIAGNOSIS SECTION ABOVE?

YES NO

IF YES, ARE ANY OF THESE SCARS PAINFUL OR UNSTABLE; HAVE A TOTAL AREA EQUAL TO OR GREATER THAN 39 SQUARE CM (6 square inches); OR ARE LOCATED ON THE HEAD, FACE OR NECK? (An "unstable scar" is one where, for any reason, there is frequent loss of covering of the skin over the scar.)

YES NO

IF YES, ALSO COMPLETE VA FORM 21-0960F-1, SCARS/DISFIGUREMENT.

IF NO, PROVIDE LOCATION AND MEASUREMENTS OF SCAR IN CENTIMETERS.

LOCATION: Not applicable. MEASUREMENTS: length N/A cm X width N/A cm.

NOTE: If there are multiple scars, enter additional locations and measurements in Comment section below. It is not necessary to also complete a Scars DBQ.

8C. COMMENTS, IF ANY:

Not applicable.

SECTION IX - DIAGNOSTIC TESTING

NOTE: If imaging studies, diagnostic procedures or laboratory testing has been performed and reflects the veteran's current condition, provide most recent results; no further studies or testing are required for this examination.

9A. HAS LABORATORY TESTING BEEN PERFORMED?

YES NO If "Yes," check all that apply

CBC (If anemia due to any intestinal condition is suspected or present)

Date of test: N/A

Hemoglobin: N/A Hematocrit: N/A White blood cell count: N/A Platelets: N/A

Other (Specify) Not applicable.

Date of test: N/A

Results: Not applicable.

9B. HAVE IMAGING STUDIES OR DIAGNOSTIC PROCEDURES BEEN PERFORMED AND ARE THE RESULTS AVAILABLE?

YES NO IF YES, PROVIDE TYPE OF TEST OR PROCEDURE, DATE AND RESULTS (Brief summary)

Refer to the remarks in the appendix.

9C. ARE THERE ANY OTHER SIGNIFICANT DIAGNOSTIC TEST FINDINGS AND/OR RESULTS?

YES NO IF YES, DESCRIBE TYPE OF TEST OR PROCEDURE, DATE AND RESULTS (Brief summary)

Refer to the remarks in the appendix.

SECTION X - FUNCTIONAL IMPACT

10. DOES THE VETERAN'S INTESTINAL CONDITION IMPACT HIS OR HER ABILITY TO WORK?

YES NO IF YES, DESCRIBE THE IMPACT OF EACH OF THE VETERAN'S INTESTINAL CONDITIONS, PROVIDING ONE OR MORE EXAMPLES

Refer to the remarks in the appendix.

SECTION XI - REMARKS

11. REMARKS (If any)

Refer to the remarks in the appendix.

SECTION XII - EXAMINER'S CERTIFICATION AND SIGNATURE

CERTIFICATION - To the best of my knowledge, the information contained herein is accurate, complete and current.

12B. Examiner's printed name and title (e.g. MD, DO, DDS, DMD, Ph.D, Psy.D, NP, PA-C):

[Redacted] MD

[Redacted] (e.g. Pediatrics, Psychology/Psychiatry, General Practice):

12D. Date Signed:

Refer to the remarks in the appendix.

Refer to the remarks in the appendix.

12E. Examiner's phone/fax numbers:

12F. National Provider Identifier (NPI) number:

12G. Medical license number and state:

Refer to the remarks in the appendix.

Refer to the remarks in the appendix.

Refer to the remarks in the appendix.

12H. Examiner's address:

Refer to the remarks in the appendix.

Appendix:

Remarks for DBQ

INTESTINAL CONDITIONS

Dates:

Date of examination for DBQ: 08/17/2023

Date of signature for DBQ: 08/17/2023

Examiner:

[REDACTED]

Evidence review:

My opinion is that, more likely than not, my evidence review formed a sufficient factual basis for my conclusions and additional evidence would not alter those conclusions due to the nature of the medical issues at hand, the theories by which they are service connected, and the timeline of signs and symptoms. The case law on evidence review clearly states that private examiners are not required to review any particular set of records or even to review the C-file at all: "... **the claims file is not a magical or talismanic set of documents... claims file review**, as it pertains to obtaining an overview of the claimant's medical history, **is not a requirement for private medical opinions...** claims file review may be irrelevant to the medical issue at hand" (Nieves-Rodriguez v. Peake, 22 Vet. App. 295). My evidence review encompassed all relevant documents from service entry to the present time and included:

- various documents from the C-file record.
- various documents from the military personnel record.
- various documents from the service treatment record (STR).
- the complete VA medical record.
- the complete VA claims correspondence record.
- various documents from the private medical record.
- various other documents and records.

Examination method:

[REDACTED] resides in [REDACTED] [REDACTED] I performed a comprehensive face-to-face video telehealth examination on 08/17/2023. I then completed this report in my capacity as an expert Independent Veteran Examiner (IVE) and licensed physician. We did not establish a doctor-patient relationship. My services were retained for the sole purpose of producing expert evidence for the Veteran's claim with the VA. By design, my opinion and observations in this matter are free from any corrupting bias. My fee has been paid in full without any further remuneration contingent on a positive outcome. My observations and opinions are completely unencumbered by any benefit whatsoever that might derive from a positive outcome. I avoided all undue influence and restricted my perspective to one of professional disinterest, objectivity, and fairness. I have observed and reported the truth in this

matter to the highest degree afforded by my skill, training, and virtue. I completed this report based on the following:

- my comprehensive examination.
- my extensive evidence review.
- my professional expertise from review of the medical literature and expert opinion.
- my application of sound general medical principles.
- my clinical expertise from many years of treating patients with similar conditions.
- my military expertise from twenty years of service in a variety of operational and support roles.
- my holistic consideration of the Veteran's actual functional limitations.
- the Veteran's credible lay history.
- the Veteran's competent lay observations.

Remarks for DBQ form:

Diagnoses:

Irritable bowel syndrome (IBS). ICD: K58.8. Date of diagnosis: 2005.

Additional diagnoses:

PTSD.

Medical history:

Refer to associated medical opinion.

Medications:

Not applicable.

Signs and symptoms:

- Diarrhea - Four bowel movements per day with two or three of these being diarrhea.
- Alternating diarrhea and constipation - Not applicable.
- Anemia - Not applicable.
- Abdominal distention - Intermittent diffuse abdominal pain with some focality in the lower abdomen approximately 5 times per week lasting for about 30 minutes. Frequent bloating sensation after meals approximately 10 times per week.
- Nausea - Intermittent nausea, especially after meals, approximately 5 times per week lasting for about 30 minutes.
- Vomiting - Not applicable.
- Other - Not applicable.

Imaging and diagnostics:

- Not applicable.

Functional impact:

The acute and chronic symptoms interfere with all forms of physical and sedentary occupational tasks due to distraction and lack of concentration from frequent symptoms (especially abdominal pain) as well as having to frequently leave tasks in progress to attend to the needs of nature.

Other remarks:

The severity of this Veteran's intestinal disability was evaluated according to guidance from relevant case law including Jones v. Shinseki, 26 Vet. App. 56. That case applies to intestinal conditions and instructs examiners to ignore symptom improvement from medication when assessing the level of disability. This is because the ameliorative effects of medication are not contemplated in the rating schedule under the applicable diagnostic code.

Conflicting evidence:

There is no conflicting evidence.

Date of diagnosis:

My dates of diagnosis likely differ from those found in other records. The VA provides clear and unambiguous direction on this matter in a note in the diagnosis section of all DBQs: "**Date of diagnosis can be... an approximate date determined through record review or reported history.**" Most C&P examiners disregard this guidance. They only report dates found in medical records even though that is not required by VA policy. In contrast, by completing a careful record review and medical history, I was able to determine the date when signs or symptoms first developed which, of course, most accurately reflects the beginning of impairment. That date often precedes any medical records by many years.

Examiner background:

[REDACTED] MD: [REDACTED]
 [REDACTED]
 [REDACTED]. Based on my diverse professional experience and advanced education spanning multiple domains of knowledge, I have developed a particular expertise regarding medical issues that affect Veterans. This expertise also extends to the regulatory framework surrounding the complex VA claims process which poses significant scientific, legal, and philosophical challenges. The documents that I compose strongly address those challenges and exceed the VA's requirements for evidence that is thorough, adequate, sufficient, fully informed, and contemporaneous. Additional specific details about my credentials can be found in the included curriculum vitae.

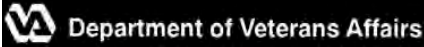
Credibility & competence:

My opinion is that, more likely than not, the Veteran is eminently credible and entirely competent to make medical observations that befit a layperson, and their written and oral statements are reliable. My ability to form this opinion is common to all experienced clinicians who invariably must contend with the full breadth of human virtue and fallibility in their medical practice. Throughout my examination, the Veteran exhibited a trustworthy demeanor and they were always coherent, logical, and forthright. I did not detect any malingering or any effort at misrepresentation, embellishment, exaggeration, or deception. Their account of relevant events was consistent with the known facts and circumstances of their service. In addition, their symptom history correlated well with my observations and the generally expected course of their conditions. Finally, the evidence I reviewed demonstrated that the Veteran has been entrusted successfully with serious responsibilities in their personal and professional life that required honesty and attention to detail.

Clarifications:

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issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight," then the VA becomes legally obligated and **must attempt to obtain such clarification directly from the examiner who authored the report** or must "clearly and adequately explain why such clarification is unreasonable" (Carter v. Shinseki, 26 Vet. App. 534; Savage v. Shinseki, 24 Vet. App. 259; 38 USC 5103A). If clarifications are instead requested from C&P examiners (especially those without any familiarity with the case or who are less qualified by their academic and professional credentials), such action "reasonably could be construed" as procuring evidence "for the sole purpose of denying the veteran's claim" - that is, "developing to deny" (Mariano v. Principi, 17 Vet. App. 312; 1 Veterans L. Rev. 94; M21-1 Part V, Subpart ii, 3.B.1).



**INTERNAL VETERANS AFFAIRS USE
MEDICAL OPINION DISABILITY BENEFITS QUESTIONNAIRE**

IMPORTANT - THE DEPARTMENT OF VETERANS AFFAIRS (VA) WILL NOT PAY OR REIMBURSE ANY EXPENSES OR COST INCURRED IN THE PROCESS OF COMPLETING AND/OR SUBMITTING THIS FORM. PLEASE READ THE PRIVACY ACT AND RESPONDENT BURDEN INFORMATION ON REVERSE BEFORE COMPLETING FORM.

NAME OF PATIENT/VETERAN

██████████ ██████████

PATIENT/VETERAN'S SOCIAL SECURITY NUMBER

██████████

Note to examiner - The Veteran is applying to the U.S. Department of Veterans Affairs (VA) for disability benefits. VA will consider the information you provide on this questionnaire as part of their evaluation in processing the Veteran's claim.

Is this questionnaire being completed in conjunction with VA 21-2507, C&P examination request? Yes No

How was the examination completed? (check all that apply)

- In-person examination
- Records reviewed
- Examination via approved video telehealth
- Other, please specify in comments box:

Comments: Refer to the remarks in the appendix.

ACCEPTABLE CLINICAL EVIDENCE (ACE)

Indicate the method used to obtain medical information to complete this document:

- Review of available records (without in-person or video telehealth examination) using the Acceptable Clinical Evidence (ACE) process because the existing medical evidence provided sufficient information on which to prepare the questionnaire and such an examination will likely provide no additional relevant evidence.
- Review of available records in conjunction with an interview with the Veteran (without in-person or telehealth examination) using the ACE process because the existing medical evidence supplemented with an interview provided sufficient information on which to prepare the questionnaire and such an examination would likely provide no additional relevant evidence.

EVIDENCE REVIEW

Evidence Reviewed (check all that apply):

- Not requested
- VA claims file (hard copy paper C-file)
- VA e-folder
- VA electronic health record
- Other, please identify other evidence reviewed:

Refer to the remarks in the appendix.

Evidence Comments:

Refer to the remarks in the appendix.

SECTION I - DEFINITIONS

AGGRAVATION OF PREEXISTING NONSERVICE-CONNECTED DISABILITIES. A PREEXISTING INJURY OR DISEASE WILL BE CONSIDERED TO HAVE BEEN AGGRAVATED BY ACTIVE MILITARY, NAVAL, OR AIR SERVICE, WHERE THERE IS AN INCREASE IN DISABILITY DURING SUCH SERVICE, UNLESS THERE IS A SPECIFIC FINDING THAT THE INCREASE IN DISABILITY IS DUE TO THE NATURAL PROGRESS OF THE DISEASE.

AGGRAVATION OF NONSERVICE-CONNECTED DISABILITIES. ANY INCREASE IN SEVERITY OF A NONSERVICE-CONNECTED DISEASE OR INJURY THAT IS PROXIMATELY DUE TO OR THE RESULT OF A SERVICE-CONNECTED DISEASE OR INJURY, AND NOT DUE TO THE NATURAL PROGRESS OF THE NONSERVICE-CONNECTED DISEASE, WILL BE SERVICE CONNECTED.

SECTION II - RESTATEMENT OF REQUESTED OPINION

2A. INSERT REQUESTED OPINION FROM GENERAL REMARKS:

PERMANENT AND TOTAL STATUS (P&T) - entitlement:

Refer to the remarks in the appendix.

2B. INDICATE TYPE OF EXAM FOR WHICH OPINION HAS BEEN REQUESTED (e.g. skin diseases): Not applicable.

SECTION III - MEDICAL OPINION FOR DIRECT SERVICE CONNECTION

CHOOSE THE STATEMENT THAT MOST CLOSELY APPROXIMATES THE ETIOLOGY OF THE CLAIMED CONDITION.

- 3A. THE CLAIMED CONDITION WAS AT LEAST AS LIKELY AS NOT (50 percent or greater probability) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 3B. THE CLAIMED CONDITION WAS LESS LIKELY THAN NOT (less than 50 percent probability) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

3C. RATIONALE:

N/A

SECTION IV - MEDICAL OPINION FOR SECONDARY SERVICE CONNECTION

- 4A. THE CLAIMED CONDITION IS AT LEAST AS LIKELY AS NOT (50 percent or greater probability) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.
- 4B. THE CLAIMED CONDITION IS LESS LIKELY THAN NOT (less than 50 percent probability) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.

4C. RATIONALE:

SECONDARY SERVICE CONNECTION:

Refer to the remarks in the appendix.

SECTION V - MEDICAL OPINION FOR AGGRAVATION OF A CONDITION THAT EXISTED PRIOR TO SERVICE

- 5A. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 5B. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS CLEARLY AND UNMISTAKABLY NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

5C. RATIONALE:

N/A

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION

6A. CAN YOU DETERMINE A BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition)?

- YES NO

IF "YES" TO QUESTION 6A, ANSWER THE FOLLOWING:

I. DESCRIBE THE BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition):

N/A

II. PROVIDE THE DATE AND NATURE OF THE MEDICAL EVIDENCE USED TO PROVIDE THE BASELINE:

N/A

III. IS THE CURRENT SEVERITY OF THE (claimed condition/diagnosis) GREATER THAN THE BASELINE?

- YES NO

IF YES, WAS THE VETERAN'S (claimed condition/diagnosis) AT LEAST AS LIKELY AS NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY (insert "service connected condition")?

- YES (provide rationale in section 6B.)
- NO (provide rationale in section 6B.)

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION
(continued)

IF "NO" TO QUESTION 6A, ANSWER THE FOLLOWING:

I. PROVIDE RATIONALE AS TO WHY A BASELINE CANNOT BE ESTABLISHED (e.g. medical evidence is not sufficient to support a determination of a baseline level of severity):

N/A

II. REGARDLESS OF AN ESTABLISHED BASELINE, WAS THE VETERAN'S (claimed condition/diagnosis) AT LEAST AS LIKELY AS NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY (insert "service connected condition")?

- YES (provide rationale in section 6B.)
- NO (provide rationale in section 6B.)

6B. PROVIDE RATIONALE:

N/A

SECTION VII - OPINION REGARDING CONFLICTING MEDICAL EVIDENCE

7. I HAVE REVIEWED THE CONFLICTING MEDICAL EVIDENCE AND AM PROVIDING THE FOLLOWING OPINION:

Refer to the remarks in the appendix.

SECTION VIII - PHYSICIAN'S CERTIFICATION AND SIGNATURE

CERTIFICATION - To the best of my knowledge, the information contained herein is accurate, complete and current.

	8B. PHYSICIAN'S PRINTED NAME [REDACTED] MD	8C. DATE SIGNED Remarks.
	PROVIDER IDENTIFIER (NPI) NUMBER	8F. PHYSICIAN'S ADDRESS Remarks.

Appendix:

Remarks for Medical Opinion

Entitlement to PERMANENT AND TOTAL (P&T) STATUS

Dates:

Date of examination for DBQ: 08/17/2023

Date of signature for DBQ: 08/17/2023

Examiner:

[REDACTED]

Evidence review:

My opinion is that, more likely than not, my evidence review formed a sufficient factual basis for my conclusions and additional evidence would not alter those conclusions due to the nature of the medical issues at hand, the theories by which they are service connected, and the timeline of signs and symptoms. The case law on evidence review clearly states that private examiners are not required to review any particular set of records or even to review the C-file at all: "... **the claims file is not a magical or talismanic set of documents... claims file review**, as it pertains to obtaining an overview of the claimant's medical history, **is not a requirement for private medical opinions...** claims file review may be irrelevant to the medical issue at hand" (Nieves-Rodriguez v. Peake, 22 Vet. App. 295). My evidence review encompassed all relevant documents from service entry to the present time and included:

- various documents from the C-file record.
- various documents from the military personnel record.
- various documents from the service treatment record (STR).
- the complete VA medical record.
- the complete VA claims correspondence record.
- various documents from the private medical record.
- various other documents and records.

Examination method:

[REDACTED] resides in [REDACTED] [REDACTED] I performed a comprehensive face-to-face video telehealth examination on 08/17/2023. I then completed this report in my capacity as an expert Independent Veteran Examiner (IVE) and licensed physician. We did not establish a doctor-patient relationship. My services were retained for the sole purpose of producing expert evidence for the Veteran's claim with the VA. By design, my opinion and observations in this matter are free from any corrupting bias. My fee has been paid in full without any further remuneration contingent on a positive outcome. My observations and opinions are completely unencumbered by any benefit whatsoever that might derive from a positive outcome. I avoided all undue influence and restricted my perspective to one of professional disinterest, objectivity, and fairness. I have observed and reported the truth in this

matter to the highest degree afforded by my skill, training, and virtue. I completed this report based on the following:

- my comprehensive examination.
- my extensive evidence review.
- my professional expertise from review of the medical literature and expert opinion.
- my application of sound general medical principles.
- my clinical expertise from many years of treating patients with similar conditions.
- my military expertise from twenty years of service in a variety of operational and support roles.
- my holistic consideration of the Veteran's actual functional limitations.
- the Veteran's credible lay history.
- the Veteran's competent lay observations.

Question:

Is entitlement established for P&T STATUS?

Opinions:

Note: In the context of these opinions, the phrase 'more likely than not' is used with a meaning equivalent to 'a preponderance of the evidence' or 'a likelihood or probability of greater than 50 percent' (Lynch v. McDonough, 21 F.4th 776; Jones v. Shinseki, 23 Vet. App. 382; Shedden v. Principi, 381 F.3d 1163; 38 USC 5107; and 38 CFR 3.102).

It is MORE LIKELY THAN NOT that:

- the total impairment will persist indefinitely at a severity equal to or worse than the current level (M21-1 Part V, Subpart ii, 3.D.4), and
- there is clear and specific evidence that the total impairment is permanent (M21-1 Part XIII, Subpart i, 1.A.1), and
- no reexamination is warranted since there is no reasonable likelihood of improvement of these disabilities, and therefore
- **entitlement to P&T STATUS is established.**

Rationale:

The service connected disability evaluations in this case combine to 100 percent. Consideration of permanence immediately follows from the finding that an overall rating is total, thus making P&T STATUS an ancillary rating issue (M21-1 Part XIII, Subpart i, 1.A.1; Part V, Subpart ii, 3.D.4). I have thoroughly studied the underlying pathophysiology of these disabilities and how they specifically manifest themselves in this case. These conditions do not have a temporary or transient nature. All reliable evidence from the medical literature, expert consensus, and sound medical principles indicates that these conditions have no reasonable prognosis for sustained substantial improvement, although their intensity may wax and wane. These conditions are expected to remain symptomatic and progressively decline over time and with age. Therefore, the total impairment in this case meets the criteria of permanence: "reasonably certain to continue throughout the life of the disabled person" (38 USC 3501; 38 CFR 3.340, 4.15, & 21.3021); "permanent in character and of such nature that there is no likelihood of improvement" (38 CFR 3.327); "manifestations reasonably certain to continue throughout the lifetime of the individual" (M21-1 Part V, Subpart ii, 3.D.4); and "evidence at the time of evaluation affirmatively shows that the total disability will continue for the remainder of the person's life" (M21-1 Part V, Subpart ii, 3.D.4).

Conflicting evidence:

There is no conflicting evidence.

Date of diagnosis:

My dates of diagnosis likely differ from those found in other records. The VA provides clear and unambiguous direction on this matter in a note in the diagnosis section of all DBQs: "**Date of diagnosis can be... an approximate date determined through record review or reported history.**" Most C&P examiners disregard this guidance. They only report dates found in medical records even though that is not required by VA policy. In contrast, by completing a careful record review and medical history, I was able to determine the date when signs or symptoms first developed which, of course, most accurately reflects the beginning of impairment. That date often precedes any medical records by many years.

Examiner background:

[REDACTED] MD: [REDACTED]
[REDACTED]
[REDACTED]

. Based on my diverse professional experience and advanced education spanning multiple domains of knowledge, I have developed a particular expertise regarding medical issues that affect Veterans. This expertise also extends to the regulatory framework surrounding the complex VA claims process which poses significant scientific, legal, and philosophical challenges. The documents that I compose strongly address those challenges and exceed the VA's requirements for evidence that is thorough, adequate, sufficient, fully informed, and contemporaneous. Additional specific details about my credentials can be found in the included curriculum vitae.

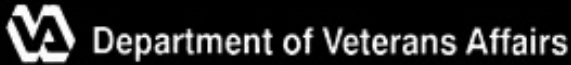
Credibility & competence:

My opinion is that, more likely than not, the Veteran is eminently credible and entirely competent to make medical observations that befit a layperson, and their written and oral statements are reliable. My ability to form this opinion is common to all experienced clinicians who invariably must contend with the full breadth of human virtue and fallibility in their medical practice. Throughout my examination, the Veteran exhibited a trustworthy demeanor and they were always coherent, logical, and forthright. I did not detect any malingering or any effort at misrepresentation, embellishment, exaggeration, or deception. Their account of relevant events was consistent with the known facts and circumstances of their service. In addition, their symptom history correlated well with my observations and the generally expected course of their conditions. Finally, the evidence I reviewed demonstrated that the Veteran has been entrusted successfully with serious responsibilities in their personal and professional life that required honesty and attention to detail.

Clarifications:

All clarification requests should be directed to me since I am best suited to address them. I am naturally the most familiar with this report and the evidence on which it is based. I may possess the only existing evidence on a material issue and there is some likelihood that I possess information that is not otherwise accessible or that is absent from the evidence of record. I would like the chance to respond to any inquiry whatsoever with any information I have that might affect the probative value of my work. Please note that when "the missing information is relevant, factual, and objective - that is, not a matter of opinion" and "when a private medical report is the only evidence on a material issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight," then the VA becomes legally obligated and **must attempt to obtain such clarification directly from the examiner who authored the report** or must "clearly and adequately explain why such clarification is unreasonable" (Carter v. Shinseki, 26 Vet. App. 534; Savage v. Shinseki, 24

Vet. App. 259; 38 USC 5103A). If clarifications are instead requested from C&P examiners (especially those without any familiarity with the case or who are less qualified by their academic and professional credentials), such action "reasonably could be construed" as procuring evidence "for the sole purpose of denying the veteran's claim" - that is, "developing to deny" (Mariano v. Principi, 17 Vet. App. 312; 1 Veterans L. Rev. 94; M21-1 Part V, Subpart ii, 3.B.1).


VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)
STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. Use this form to submit a statement to support a claim. For more information, contact us at <https://iris.custhelp.va.gov>, or call us toll-free at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal relay number is 711. VA forms are available at www.va.gov/vaforms. After completing the form, mail to: **Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Janesville, WI, 53547-4444.**

SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

 1. VETERAN/BENEFICIARY'S NAME (*First, Middle Initial, Last*)
 [REDACTED]

 2. VETERAN'S SOCIAL SECURITY NUMBER
 [REDACTED]

 3. VA FILE NUMBER (*If applicable*)
 [REDACTED]

 4. VETERAN'S DATE OF BIRTH
 [REDACTED]

 5. VETERAN'S SERVICE NUMBER (*If applicable*)
 [REDACTED]

 6. TELEPHONE NUMBER (*Include Area Code*)
 [REDACTED]

 7. E-MAIL ADDRESS (*Optional*)
 [REDACTED]

 8. MAILING ADDRESS (*Number and street or rural route, P.O. Box, City, State, ZIP Code and Country*)

 No. &
 Street [REDACTED]

Apt./Unit Number

City [REDACTED]

State/Province [REDACTED]

Country [REDACTED]

ZIP Code/Postal Code [REDACTED]

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Selected excerpts from cited references

I cite to several references throughout my private medical opinions and DBQs. I have selected helpful excerpts from those references and included them here for ease of reference.

- Thomas Seiter, M

M21-1 Part IV, Subpart i, 3.A.1.g - DBQs Completed by Veterans Who are Physicians/Health Care Providers: VA cannot summarily discount otherwise competent medical evidence from a Veteran who is a physician or health care provider. DBQ reports completed by these individuals will be reviewed under the same criteria for reviewing DBQs submitted by a third-party health care provider. In effect, VA claims adjudicators must subject the evidence of record to some degree of scrutiny to determine its probative worth. It is improper in VA practice to "exclude" evidence. Decision makers must weigh the probative value of the evidence and discuss its probative value in the decision narrative. Note: Exercise the same weighing of probative value for internal-use DBQs that are completed by an external non-VA provider.

38 USC 5125- Acceptance of reports of private physician examinations: For purposes of establishing any claim for benefits under chapter 11 or 15 of this title, a report of a medical examination administered by a private physician that is provided by a claimant in support of a claim for benefits under that chapter may be accepted without a requirement for confirmation by an examination by a physician employed by the Veterans Health Administration if the report is sufficiently complete to be adequate for the purpose of adjudicating such claim.

Fed. R. Evid. 702 - Testimony by Expert Witnesses: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if ... (b) the testimony is based on sufficient facts or data ...

(continued on next page)

VETERAN'S SOCIAL SECURITY NO [REDACTED]

SECTION II: REMARKS (Continued)*(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)*

38 USC 5107 - Claimant responsibility; benefit of the doubt: (a) Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary. (b) The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

38 CFR 3.102 - Reasonable doubt: It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

M21-1 Part IV, Subpart i, 3.C.1.h - Requesting Clarification From Private Physicians: Note: When an examination or opinion is requested to remedy a lacking element, the exam and/or opinion may be requested specific to only the lacking element. A complete examination need not be requested to remedy a lacking element when the evidence of record will otherwise be sufficient once the examination or opinion is received.

*(continued on next page)***SECTION III: DECLARATION OF INTENT**

I declare that the information provided is true and correct to the best of my knowledge and belief.

d) [REDACTED] [REDACTED] MD	10. DATE SIGNED 08-18-2023
-----------------------------	--------------------------------------

I understand that providing false information may result in a fine or imprisonment, or both, for the willful submission of any statement or

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

(continuation of Form 4138: Selected excerpts from cited references)

Nieves-Rodriguez v. Peake, 22 Vet. App. 295: This Court, however, has not required VA medical examiners to perform a complete review of the entire claims file or state that they have done so in every instance. See Snuffer v. Gober, 10 Vet.App. 400, 403-04 (1997) (review of claims file not required where it would not change the objective and dispositive findings made during a medical examination); see also D'Aries v. Peake, 22 Vet.App. 97, 106 (2008) (holding that it is not necessary for a VA medical examiner to specify that he has read the entire claims file where it is clear from the report that he has done so and is familiar with the claimant's extensive medical history)... Therefore, VA is statutorily permitted, but not required, to accept a report provided by a private physician as sufficient to grant a claim without confirmation by a VA examination, "if the [private physician's] report is sufficiently complete to be adequate for the purpose of adjudicating the claim." 38 U.S.C. 5125. This Court has noted that while this statutory language is permissive, "clearly it would not permit the Board to act in an arbitrary and capricious manner in not crediting a claimant's medical evidence." Kowalski v. Nicholson, 19 Vet.App. 171, 177 (2005) (citing Struck v. Brown, 9 Vet.App. 145, 155 (1996)); see also Mariano, supra... The first inquiry is whether the medical expert is informed of sufficient facts upon which to base an opinion relevant to the problem at hand. FED. R. EVID. 702. In this inquiry, the claims file is not a magical or talismanic set of documents, but rather a tool to assist VA examiners to become familiar with the facts necessary to form an expert opinion to assist the adjudicator in making a decision on a claim. There are other means by which a private physician can become aware of critical medical facts, not the least of which is by treating the claimant for an extended period of time. See, e.g., Kowalski, 19 Vet.App. at 179 (holding that the Board may rely on a private medical opinion that is based on an accurate medical history offered by the veteran). Review of pertinent medical literature may also furnish information relevant to diagnostic and nexus issues... The mere statement that one physician did or did not have access to a claims file is of little use in providing adequate reasons or bases for a decision where the Board fails to explain what information in the claims file was important and necessary for a competent and persuasive medical opinion, and why the absence of record review detracts from the probative value of the opinion of a physician. It follows that review of a claims file by a VA examiner, without more, does not automatically render the examiner's opinion competent or persuasive, see Stefl, supra. Moreover, the absence of claims file review by a private medical expert does not categorically exclude the possibility that he is nevertheless informed of the relevant facts, see Snuffer, supra. There are even instances where claims file review may be irrelevant to the medical issue at hand. See, e.g., Francisco v. Brown, 7 Vet.App. 55, 58 (1994) (where entitlement to compensation has already been established and an increase in the disability rating is at issue, the present level of disability, not the medical history, is of primary concern)... In all cases, it is what an examiner learns from the claims file for use in forming the expert opinion - and not just the reading of the file - that matters... Accordingly, the Court holds that claims file review, as it pertains to obtaining an overview of the claimant's medical history, is not a requirement for private medical opinions. This Court has never imposed a burden of claims file review on all private physicians furnishing medical evidence... Imposing on a physician a requirement that he read a compilation of documents that can run to thousands of pages (many of which, as noted above, are often irrelevant to the issue before the physician) in order that his or her opinion not be summarily discounted, has no inherent value to the probity of the opinion. Furthermore, treatment of the claims file as a surrogate for awareness of significant facts in a medical history may lead to error. The Court is reluctant to expand the duty to assist in a direction that seems to countenance, and even institutionalize, such practices... Therefore, a private medical opinion may not be discounted solely because the opining physician did not review the claims file. Likewise, the Court holds that the Board may not prefer a VA medical opinion over a private medical opinion solely because the VA examiner reviewed the claims file... It should now be obvious that a review of the claims file cannot compensate for lack of the reasoned analysis required in a medical opinion. It is the factually accurate, fully

articulated, sound reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion. The Board must be able to conclude that a medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion. See Stefl, supra. These significant facts may or may not include matters evident from a review of the claims file, given the nature of the issue under consideration.

Snuffer v. Gober, 10 Vet. App. 400:... the Court has never decided that in every case, a medical examiner must review all prior medical records before issuing a medical opinion or diagnosis. Cf. Suttman v. Brown, 5 Vet. App. 127, 138 (1993) (Court held that where the record did not provide an adequate basis for adjudicating the veteran's claim, the duty to assist included the conduct of a thorough and contemporaneous medical examination that takes into account the records of prior medical treatment)... A review of the appellant's claims file in this case would not have changed the objective findings made during the March 1995 examination...

Kowalski v. Nicholson, 19 Vet.App. 171: In Struck v. Brown, the Court held that section 5125 is not mandatory but, rather, permissive in nature, but that it would not permit the Board to act in an arbitrary and capricious manner in not crediting a claimant's evidence. Struck, 9 Vet. App. 145, 155 (1996). Thus, even if the audiologist's letter was adequate to support the adjudication of Mr. Kowalski's claim, reliance on such report alone is not required by VA unless failure to do so would be arbitrary and capricious.

Struck v. Brown, 9 Vet. App. 145: 38 U.S.C 5125... The new provision is permissive in nature, although clearly it would not permit the Board to act in an arbitrary and capricious manner in not crediting a claimant's medical evidence.

Stefl v. Nicholson, 21 Vet.App. 120: Not only must the medical opinion clearly consider direct service connection, it must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions... We hold only that a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion.

Francisco v. Brown, 7 Vet. App. 55: Where entitlement to compensation has already been established and an increase in the disability rating is at issue, the present level of disability is of primary concern.

Lynch v. McDonough, 21 F.4th 776: So, let us be clear. Under 5107(b) and Ortiz, a claimant is to receive the benefit of the doubt when there is an "approximate balance" of positive and negative evidence, which Ortiz interpreted as "nearly equal" evidence. This interpretation necessarily includes scenarios where the evidence is not in equipoise but nevertheless is in approximate balance. Put differently, if the positive and negative evidence is in approximate balance (which includes but is not limited to equipoise), the claimant receives the benefit of the doubt... Accordingly, to eliminate the potential for confusion going forward, we depart from Ortiz's "preponderance of the evidence" language and determine that the benefit-of-the-doubt rule simply applies if the competing evidence is in "approximate balance," which Ortiz correctly interpreted as evidence that is "nearly equal." As a corollary, evidence is not in "approximate balance" or "nearly equal," and therefore the benefit-of-the-doubt rule does not apply, when the evidence persuasively favors one side or the other.

VA Clinicians Guide v3.0 03/2002: This guide provides information for performing examinations that meet the requirements of the federal law... Use a goniometer to measure both passive and active ROM, including movement against gravity and strong resistance.

Carter v. Shinseki, 26 Vet. App. 534: In *Savage*, the Court explicitly limited VA's duty to seek clarification of private medical reports to situations where "the missing information is relevant, factual, and objective - that is, not a matter of opinion." 24 Vet.App. at 270. Specifically, the Court held that when a private medical report is the only evidence on a material issue, and material medical evidence can no longer be obtained as to that issue, yet clarification of a relevant, objective fact would render the private medical report competent for the assignment of weight, the Secretary must attempt to obtain such clarification. Id. at 267.

Savage v. Shinseki, 24 Vet. App. 259: Accordingly, pursuant to section 5103A(a), when a private examination report reasonably appears to contain information necessary to properly decide a claim but it is "unclear" or "not suitable for rating purposes," and the information reasonably contained in the report otherwise cannot be obtained, VA has a duty to either (1) ask the private examiner to clarify the report, (2) request that the claimant to obtain the necessary information to clarify the report, or (3) explain why such clarification is not needed. Any request for clarification to a private examiner or to a claimant should clearly indicate what further action needs to be taken to make the insufficient private examination report acceptable for VA consideration... Accordingly, when VA concludes that a private medical examination report is unclear or insufficient in some way, and it reasonably appears that a request for clarification, both as limited elsewhere in this opinion, could provide relevant information that is otherwise not in the record and cannot be obtained in some other way, the Board must either seek clarification from the private examiner or the claimant or clearly and adequately explain why such clarification is unreasonable. See 38 U.S.C. 5103A(a), 7104(d)(1); *Tyrues*, 23 Vet.App. at 184; 38 C.F.R. 4.2, 19.9(a)... Rather, our holding is limited to those instances in which the missing information is relevant, factual, and objective - that is, not a matter of opinion - and where the missing evidence bears greatly on the probative value of the private examination report... After considering these factors, should VA determine that seeking clarification would be unreasonable or that the missing information is located elsewhere in the record or may be more easily obtained by some other means without compromising the favorable character of the private examiner's opinion, VA must clearly and adequately explain that decision. See 38 U.S.C. 7104(d)(1); *Tyrues*, 23 Vet.App. at 184.

Hart v. Mansfield, 21 Vet. App. 505: The Secretary has a duty to assist a claimant by providing a thorough and contemporaneous medical examination when the record does not adequately reveal the current state of the claimant's disability. See 38 U.S.C. 5103A(d)(1); *Green v. Derwinski*, 1 Vet. App. 121, 124 (1991); see also *Caffrey v. Brown*, 6 Vet. App. 377, 381 (1994). However, VA may not pursue such development if the purpose is to obtain evidence against the claim. See *Mariano v. Principi*, 17 Vet. App. 305, 312 (2003); see also 38 C.F.R. 3.304(c) (2007) (development of evidence should not be undertaken when evidence present is sufficient for service connection determination).

38 CFR 4.45 - The joints: As regards the joints the factors of disability reside in reductions of their normal excursion of movements in different planes. Inquiry will be directed to these considerations... Pain on movement, swelling, deformity or atrophy of disuse. Instability of station, disturbance of locomotion, interference with sitting, standing and weight-bearing are related considerations.

Solomon v. Brown, 6 Vet. App. 396: The question of degree of impairment resulting from a disability, or the appropriate rating under the VA schedule for rating disabilities, is a question of fact, which this Court reviews under the "clearly erroneous" standard. *Lovelace v. Derwinski*, 1 Vet. App. 73.

38 CFR 4.59 - Painful motion: The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

Mariano v. Principi, 17 Vet. App. 312: Finally, with respect to this December 1998 VA examination, the Court notes that it is not at all clear from the record on appeal (ROA) why VA concluded, in light of the un rebutted evidence then of record, that it was necessary to obtain that medical opinion. Because it would not be permissible for VA to undertake such additional development if a purpose was to obtain evidence against an appellant's case, VA must provide an adequate statement of reasons or bases for its decision to pursue further development where such development reasonably could be construed as obtaining additional evidence for that purpose.

1 Veterans L. Rev. 94 - Federal Jurisprudence Regarding VA's Duty to Provide a Medical Examination: Preserving the Uniquely Pro-Claimant Nature of VA's Adjudicatory System While Providing Timely Decisions: In more recent cases, the Court has continued to espouse the principle that the Board has discretion in determining the extent of necessary evidentiary development for service-connection claims; however, additional evidence should not be procured for the sole purpose of denying the veteran's claim.

M21-1, Part V, Subpart ii, 3.B.1.a - When Development to Obtain Additional Evidence May Be Needed: Development to obtain additional evidence such as a medical examination or other records may be needed if it would provide a more complete picture of a question at issue, or the evidence of record is questionable or conflicting. Note: Decision makers must maintain objectivity when assigning weight to a claimant's evidence and may not develop with the purpose of obtaining evidence to justify a denial of the claim. Instead, decision makers must be able to support the determination that development is needed.

38 CFR 4.40 - Functional loss: Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements. The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled. A little used part of the musculoskeletal system may be expected to show evidence of disuse, either through atrophy, the condition of the skin, absence of normal callosity or the like.

Correia v. McDonald, 28 Vet. App. 158: Proper Interpretation of 4.59. We hold that the final sentence of 4.59 creates a requirement that certain range of motion testing be conducted whenever possible in cases of joint disabilities... Consequently, we are left with the inescapable conclusion that, to be adequate, a VA examination of the joints must, wherever possible, include the results of the range of motion testing described in the final sentence of 4.59.

DeLuca v. Brown, 8 Vet. App. 202: Accordingly, the case must be remanded for the Board to obtain a new medical examination which complies with the requirements of 4.40, and the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups or when the arm is used repeatedly over a period of time. See *Voyles*, 5 Vet. App. at 454. Because DC 5201 provides for a rating solely on the basis of loss of range of motion, these determinations should, if feasible, be "portrayed" (4.40) in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups. Cf. *Lathan v. Brown*, 7 Vet. App. 359.

Mitchell v. Shinseki, 25 Vet. App. 32: Specifically, in the context of examinations evaluating functional loss in the musculoskeletal system under DCs based upon limitation of motion, DeLuca stands for the proposition that when pain is associated with movement, to be adequate for rating purposes an examination must "compl[y] with the requirements of 4.40, and the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups or when the arm is used repeatedly over a period of time." 8 Vet.App. at 206. Such "determinations should, if feasible, be 'portray[ed]'... in terms of the degree of additional range-of-motion loss due to pain on use or during flare-ups." Id. (quoting 4.40). As described below, the October 2006 examiner did not provide this information, or otherwise explain why such detail feasibly could not be determined, rendering his report inadequate for rating purposes... Thus, it is unclear from the examiner's notation regarding the appellant's range of motion on flexion and extension of her leg whether and at what point during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain. It is important for the medical examiner to note this information so that the VA rating official can have a clear picture of the nature of the veteran's disability and the extent to which pain is disabling. This will allow the Board to ensure that the disabling effects of pain are properly considered when evaluating any functional loss due to pain that is attributable to the veteran's disability... Moreover, the October 2006 medical opinion is inadequate for disability rating evaluation because the examiner did not discuss whether any functional loss was attributable to pain during flareups, despite noting the appellant's assertions that her knee "does flare up approximately two to three times per month," and that "[t]he flare-ups last approximately one day" and cause her "difficulty getting around." R. at 65. When discussing the appellant's functional loss during flareups, the Board should request the examiner to provide the detail required by DeLuca or explain why this information could not feasibly be provided. Because the examiner failed to address any range-of-motion loss specifically due to pain and any functional loss during flareups, the examination lacks sufficient detail necessary for a disability rating, and it should have been returned for the required detail to be provided, or the Board should have explained why such action was not necessary.

M21-1, Part X, Subpart ii, 2.A.2.b - ITFs and Supplemental Claims: Effective July 30, 2021, claims processors must consider whether an intent to file (ITF) of record applies to a qualifying supplemental claim. A qualifying supplemental claim is substantially complete, the first application received for the same benefit type identified on the ITF, and received within one year of the ITF. Note: Prior to July 30, 2021, VA did not apply ITFs to supplemental claims. However, in *Military-Veterans Advocacy v. Secretary of Veterans Affairs*, 7 F.4th 1110 (Fed. Cir. 2021) the court invalidated a portion of the introductory language to 38 CFR 3.155, which excluded supplemental claims from the ITF process.

M21-1, Part X, Subpart ii, 2.A.2.c - ITFs and Continuous Pursuit in Supplemental Claims: Effective July 30, 2021, an ITF filed within one year of notification of a VA decision may operate to maintain continuous pursuit if the ITF is followed by a complete supplemental claim, even if the supplemental claim is filed after the one-year period following notice of a decision.

M21-1 Part II, Subpart iii, 2.A.1.h - Applying an ITF to Multiple Claims Received on the Same Day: When an active ITF is of record and multiple claims are subsequently received all on the same date, apply the ITF to all claims received on the same day. Example: An ITF for compensation was received on June 11, 2019. Subsequently, on September 14, 2019, an initial claim for compensation is received through the mail. Also, on September 14, 2019, an initial claim for compensation is submitted online. The ITF will apply to both claims received on September 14, 2019, since they were received on the same day.

M21-1 Part V, Subpart ii, 3.A.2.c - Considering Complications of an Expressly Claimed Issue: When deciding expressly claimed issues, decision makers must consider entitlement to any complications that are within scope of the claim, including those identified by the rating criteria for that condition in 38 CFR Part 4. A specific claim is not required to award a within-scope complication. Decision makers will consider all lay and medical evidence of record in order to adjudicate entitlement to any additional benefits for complications of a claimed issue, such as: complications of diabetes mellitus, residuals of cancer or treatment for the SC cancer, scars as the result of surgical intervention for an SC disability, neurological disabilities related to the spine, complications of progressive disorders (such as ALS, or multiple sclerosis (MS)), or constitutional symptoms caused by systemic disorders (such as rheumatoid arthritis (RA), or ankylosing spondylitis). Notes: The above list is not intended to be comprehensive. Decision makers must consider the evidence in each case and determine whether additional issues are within scope. Entitlement to SC for the complication, unless explicitly claimed, should only be placed at issue when entitlement is established. When entitlement is not established, but relevant evidence is present, discussing the relevant evidence is appropriate for inclusion in the Reasons for Decision of the expressly claimed issue. When evidence shows the presence of a potential complication, decision makers must ensure there is adequate medical evidence, including an examination, if needed, in order to determine entitlement.

M21-1 Part V, Subpart iii, 1.B.3.d - Objective Neurological Impairment Associated With Spinal Disabilities: Objective neurological abnormalities associated with spinal disabilities are evaluated separately from the spinal disability except, as noted in M21-1, Part V, Subpart iii, 1.B.3.a, when IVDS is evaluated based on incapacitating episodes. Notes:... Because spinal disease can cause objective neurological abnormalities, onset of a neurological complication represents medical progression or worsening of the spinal disease. For that reason and because neurological complications of spinal disease are contemplated in the evaluation criteria for spinal conditions under 38 CFR 4.71a, a claim asserting new complications of spinal disease is a claim for increase rather than a claim for secondary SC. When assigning effective dates for new neurological spinal complications, consider effective date provisions specifically for increases. The intention is to treat spinal complications cases in a way that is consistent with the handling of diabetes complications as set forth in M21-1, Part V, Subpart iii, 11.2.a-c.

Shutte v. Thompson, 82 U.S. 151: But it is obvious that all the provisions made in the statute... introduced for the protection of the party... It is not to be doubted that he may waive them. A party may waive any provision either of a contract or of a statute, intended for his benefit... consistent with the rule, that a party may waive any conditions that are intended for his sole benefit...

38 CFR 3.326 Examinations: (c) Provided that it is otherwise adequate for rating purposes, a statement from a private physician may be accepted for rating a claim without further examination.

M21-1 Part IV, Subpart , 1.B.1.g - Increased Evaluation Claims: In a claim for increase in the evaluation of an SC condition, the three specific elements identified in 38 CFR 3.159(c)(4)(i)(A-C) are neither applicable to, nor required to be demonstrated for, examination purposes. There is no prescribed standard for evidence that must be present prior to requesting an examination in a typical claim for increase, *except* that 38 CFR 3.159(c)(4)(i) directs that the examination will be provided if VA determines there is insufficient competent medical evidence to decide the claim. If a claim for increase is received, regardless of whether a statement of worsening is received or whether an examination for the claimed condition was completed within the last year, request an examination for the claimed condition except in the circumstances described below. Do not routinely request an examination if a claim is accompanied by a disability benefits questionnaire completed by a private or VA physician, or medical evidence that is otherwise adequate for rating purposes.

M21-1 Part V, Subpart iii, 1.C.2.b - Establishing SC for Degenerative Arthritis: Degenerative arthritis is evaluated using 38 CFR 4.71a, DC 5003. Degenerative arthritis can affect multiple joints, and its cause is likely multi-factorial. When 38 CFR 4.71a, DC 5003 is assigned for an arthritic condition, every joint or group of joints affected by this disease is subject to service connection (SC) in the absence of an intervening cause. If it has been medically determined that the Veteran has service-connected (SC) degenerative arthritis, and not post-traumatic arthritis, there is no need for a medical opinion to establish SC for each affected joint. Once degenerative arthritis has been clinically diagnosed and SC has been properly established for one affected joint, establish SC for and evaluate each joint as it becomes affected, with x-rays used to verify involvement of individual joints. Note: In evaluating arthritis of the spine, the principles for establishing SC for joints affected by the subsequent development of degenerative arthritis (as contemplated under 38 CFR 4.71a, DC 5003) are not dependent on the choice of DC. Example: Veteran is SC for degenerative arthritis of the spine under 38 CFR 4.71a, DC 5242, and subsequently develops degenerative arthritis in the right elbow, with no intercurrent cause noted. In this case, the principles of establishing SC for arthritic joints, as contemplated in 38 CFR 4.71a, DC 5003, also apply even though the Veteran is rated under 38 CFR 4.71a, DC 5242. Thus, SC for arthritis of the right elbow may be established.

M21-1 Part IV, Subpart i, 2.C.1.d - Continued EP Control When Examinations Are Rescheduled:

Regional office (RO) personnel must maintain EP control over claims in which the examination facility or contract examination vendor of jurisdiction reschedules an appointment or directs resubmission of an examination request, to include by way of a request for clarification. Note: Contract examination vendors use clarification requests with a variety of narrative reason values to denote examination appointment scheduling irregularities. The only such reason value that may be appropriately considered equivalent to a failure to report for examination, thus warranting application of procedures discussed in M21-1, Part IV, Subpart i, 2.G, is *No Show*. Use the table below to determine what actions to take when examination scheduling issues arise. If the examination facility cancels a pending examination request based on a Veteran's election to submit a privately prepared disability benefits questionnaire (DBQ) in lieu of reporting for a clinical appointment, then follow guidance as it appears in M21-1 Part IV, Subpart i, 2.C.1.e.

M21-1 Part IV, Subpart i, 2.C.1.e - DBQs and Examination Cancellations: Use the table below to handle cases when notified that a scheduled examination(s) has been canceled because the claimant intends on submitting a DBQ completed by a private provider. Note: RO personnel must attempt to contact the claimant via telephone prior to making a rating decision. If telephone contact is successful, then document the call on VA Form 27-0820 Report of General Information, and inform the Veteran he/she has 30 days to provide the DBQ.

Janssen v. Principi, 15 Vet. App. 370:... absent some affirmative indication of Congress' intent to preclude waiver... [the Court must] presume that statutory provisions are subject to waiver (United States v. Mezzanato, 513 U.S. 196 ... this Court has long accepted the ability of appellants to waive certain procedural rights... an appellant can expressly waive... due process rights... if... he wishes to do so (Bowling v. Principi, 15 Vet. App. 1)... If he believes he can obtain nothing more... in terms of development... the Court finds no legal reason... not to permit him to make that choice... the Court will permit the... appellant to waive this Court's consideration of any duty-to-assist... rights potentially afforded to him... Surely an express waiver, such as we have in the instant case, is simply an emphatic way of saying "I choose not to raise this issue"... if informed implied waivers are permissible as to this Court's consideration... then so must be expressed waivers. To permit otherwise would be bizarre... the Court understands that there may be compelling reasons why... a claimant may reach an informed conclusion, from the unique position he or she occupies, that further development of the claim may not only be unhelpful, but that it may be harmful to that claim. The same may be true as

to a physical examination or medical opinion provided by VA... He has made clear that he believes that the claim under review has been developed as fully and completely as is necessary (or as much as he wishes it to be)... and that he considers further development of the facts... to be of no benefit to him... the appellant must first possess a right, he must have knowledge of that right, and he must intend, voluntarily and freely, to relinquish or surrender that right (United States v. Olano, 507 U.S. 725)... if that is his or her clearly stated, informed, and voluntary desire... and has expressed his intention clearly and unequivocally... Nothing further is required (McCall v. U.S. Postal Service, 839 F.2d 664).

38 USC 5103A Duty to assist claimants: (d) Medical Examinations for Compensation Claims. (1) In the case of a claim for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. (2) The Secretary shall treat an examination or opinion as being necessary to make a decision on a claim for purposes of paragraph (1) if the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant) (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and (B) indicates that the disability or symptoms may be associated with the claimant's active military, naval, air, or space service; but (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.

38 CFR 3.159 Department of Veterans Affairs assistance in developing claims: (c)(4) Providing medical examinations or obtaining medical opinions. (i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim...

M21-1 Part V, Subpart ii, 1.A.3.k - Statements From Physicians as Acceptable Evidence for Rating Purposes Without Further Examination: A statement from any physician can be accepted for rating purposes without further examination if it is otherwise sufficient for rating purposes, and includes clinical manifestations and substantiation of diagnosis by findings of diagnostic techniques generally accepted by medical authorities. Examples: Diagnostic techniques generally accepted by medical authorities include pathological studies, x-rays, and appropriate laboratory tests.

M21-1 Part IV, Subpart i, 1.B.1.h - Using Medical Evidence in Lieu of Examination: As noted in 38 CFR 3.326 and M21-1, Part IV, Subpart i, 1.A.1.c, medical evidence of record may be deemed adequate for rating purposes to make a decision on a claim without requesting an examination. Generally, in claims for SC, for medical evidence of record to be considered adequate for rating purposes, the evidence must include sufficient details to establish both SC and the current level of disability. If the evidence of record includes information sufficient to grant SC, but there is a question as to the appropriate evaluation, an examination would generally be needed prior to deciding the claim. Use the below guidelines to determine if evidence of record can be used to decide a claim in lieu of requesting an examination. These guidelines should be applied to claims for SC where a nexus opinion is not needed (for example, with presumptive SC) and claims for increase. Do not routinely request an examination if a claim is accompanied by a disability benefits questionnaire completed by a private or VA physician, or medical evidence that is otherwise adequate for rating purposes as defined in 38 CFR 3.326.

M21-1 Part IV, Subpart i, 1.A.1.b - Regulatory Standard for Finding an Examination or Medical Opinion Necessary: The regulatory criteria for finding an examination or medical opinion necessary under the

duty to assist are in 38 CFR 3.159(c)(4). A medical opinion or examination is necessary when there is not sufficient medical evidence of record to make a decision on the claim, and there is competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability the evidence establishes that the Veteran suffered an event, injury, or disease in service, or has a disease or symptoms of a disease listed in 38 CFR 3.309, 38 CFR 3.313, 38 CFR 3.316, 38 CFR 3.317, 38 CFR 3.318, or 38 CFR 3.320 manifesting during an applicable presumptive period, and the evidence indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

M21-1 Part IV, Subpart i, 1.A.1.c - Reviewing Evidence Before Determining an Examination Is Necessary:

An examination or opinion is only necessary under 38 CFR 3.159(c)(4) when there is not sufficient medical evidence of record to make a decision on the claim. 38 CFR 3.326 similarly provides that an examination is authorized when medical evidence accompanying the claim is not adequate for rating purposes. To illustrate the principle, the regulation adds that any hospital report, any government or private institution examination report, or statement from a private physician can be used to decide a claim without an examination if adequate for rating purposes. These provisions together mean that some review of the available medical evidence is required before deciding whether an examination or opinion is necessary.

38 USC 5101 Claims and forms:... the new process will ensure that all medical information provided will be considered equally, whether it is provided by a Department medical provider or a non-Department medical provider.

M21-1 Part V, Subpart ii, 1.A.6.b - Decision-Making in a Non-Adversarial System: An adversarial system involves advocates representing contrary positions before an impartial decision maker. The VA system is non-adversarial. There is no advocate on behalf of VA opposing claims and no policy to minimize or deny benefits. Decision makers are expected to be impartial and liberally apply VA's pro-Veteran policies, procedures, and regulations in accordance with any applicable VA guidance. VA's policy is to award benefits where supported under the facts and law or when the evidence is in relative equipoise or balance while denying only when we must under the facts and law requir[ing] it.

M21-1 Part IV, Subpart i, 3.A.1.c - Tele-C&P and Telemental Health Examination: Tele Compensation and Pension (Tele-C&P) disability evaluations can provide accurate and fully descriptive face-to-face evaluations for VBA rating purposes through use of telehealth video technologies. When an examiner elects to conduct a Tele-C&P (or telemental health) examination utilizing telehealth video technologies in lieu of performing an in-person examination, assess the report for sufficiency under the same standards applicable to in-person examinations. Important: When reviewing DBQs or medical / examination reports prepared by private, non-VA providers via means of telehealth / telemental health, for the purposes of determining adequacy for rating purposes, exercise prudent judgment by applying the general assessment principles discussed in M21-1, Part IV, Subpart i, 3.A.1.e, and considering the credibility and probative value associated with variables disclosed in the DBQ/report, to include the clinician's knowledge of the claimant's relevant history length of time the clinician has treated the Veteran, and extent to which medical records and/or other records were reviewed and considered, and compatibility of the DBQ/report submitted with the types identified as suitable for performance via telehealth technology in the Office of Disability and Medical Assessment (DMA) Fact Sheet 20-002, Telehealth for Compensation and Pension (C&P) Examinations.

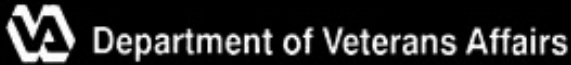
Pond v. West, 12 Vet. App. 341: The BVA cannot reject evidence favorable to the claimant without providing adequate reasons and bases for its decision. See Meyer v. Brown, 9 Vet. App. 425, 433 (1996)... "Moreover, the Board may not rely on its own unsubstantiated medical conclusions to reject

expert medical evidence in the record; rather, the Board may reject a claimant's medical evidence only on the basis of other independent medical evidence." *Flash v. Brown*, 8 Vet. App. 332, 339 (1995); see also *Thurber v. Brown*, 5 Vet. App. 119, 122 (1993); *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)... In this matter, the Board failed to discuss the medical opinion of the appellant himself. The Board rejected the appellant's testimony that he had had neck pain since his discharge from service because his testimony was not supported by the contemporaneous objective medical reports. However, the Board did not discuss the appellant's opinions that his current neck condition was caused by the in-service jeep accident. The appellant is a medical professional, and he is therefore competent to provide medical nexus evidence. See *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993); *Espiritu v. Derwinski*, 2 Vet. App. 492, 494 (1992). This does not mean that the Board cannot consider the personal interest the appellant-expert has in his own case, but the Board is not free to ignore his opinion. See *Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991) (holding that while interest in the outcome of a proceeding "may affect the credibility of testimony, it does not affect competency to testify") (citing *Dixie Ohio Express Co. v. Lowery*, 115 F.2d 56, 57 (5th Cir. 1940)); see also *Hatlestad v. Derwinski*, 1 Vet. App. 164, 170 (1991). Therefore, the Board's failure to discuss his opinion was error. See *Cartright* and *Gilbert*, both *supra*.

Cartwright v. Derwinski, 2 Vet. App. 24: The Secretary cannot ignore appellant's testimony simply because appellant is an interested party. See *Hatlestad v. Derwinski*, U.S. Vet. App. No. 90-103, slip op. at 10, 12 (Mar. 6, 1991) (BVA cannot treat a veteran's sworn testimony only as a part of his contentions; it must account for and explain its reasons for rejecting the testimony). At common law, a party was generally not considered a competent witness; this is no longer true. Interest in the outcome of a proceeding has long since ceased to be a basis upon which to disqualify witnesses. Although interest may affect the credibility of testimony, it does not affect competency to testify. *Dixie Ohio Express Co. v. Lowery*, 115 F.2d 56, 57 (5th Cir. 1940).

Jones v. Shinseki, 26 Vet. App. 56: The Court holds that the Board committed legal error by considering the effects of medication on the appellant's IBS when those effects were not explicitly contemplated by the rating criteria... As this Court has made clear, "[t]he Board's consideration of factors which are wholly outside the rating criteria provided by the regulations is error as a matter of law." *Massey v. Brown*, 7 Vet.App. 204, 208 (1994); see also *Drosky v. Brown*, 10 Vet.App. 251, 255 (1997) (finding legal error where the Board, "in essence, impermissibly rewrote" the regulation by considering factors wholly outside the rating criteria); *Pernorio v. Derwinski*, 2 Vet.App. 625, 628 (1992) ("In using a standard that exceeded that found in the regulation, the Board committed legal error.")... "Thus, "if the Secretary wishes to establish a DC containing [specific] criteria for a... rating, it is his obligation to do so clearly, not ambiguously." *Otero-Castro*, 16 Vet.App. at 382. Indeed, in *Otero-Castro*, the Court held that "the Board's consideration of factors outside the rating criteria ([including] relief with rest and medication) could not be a basis for denial of a 60% rating... The Secretary has demonstrated in other DCs that he is aware of how to include the effect of medication as a factor to be considered when rating a particular disability. See, e.g., 38 C.F.R. 4.71a, DC 5025 (2012) (10% rating for fibromyalgia requires symptoms "[t]hat require continuous medication for control"); 38 C.F.R. 4.97, DC 6602 (2012) (rating criteria for bronchial asthma)... see also *Buczynski v. Shinseki*, 24 Vet.App. 221, 227 (Secretary's omission from a DC of a limitation included in other DCs was an important factor in determining the plain meaning of the DC); *Tropf*, 20 Vet.App. at 321 ("Numerous authorities state that when a statute or regulation omits a term in one place that is used in other places, that omission should be regarded as intentional and given effect."). His failure to include the effects of medication as a criterion to be considered under DC 7319 while including such effects as criteria under other DCs must therefore be read as a deliberate choice... In *Massey*, for example, the Court held that the Board erred when it found that a higher rating was not warranted based on factors and symptoms that, while representative of Mr. Massey's mental disability and

arguably related to his earning capacity, were not specifically included in the DC. 7 Vet.App. at 207-08. The Court similarly rejected this approach in Drosky. In that case, the Board denied entitlement to a 30% rating for rheumatic heart disease because Mr. Drosky's enlarged heart - one of the requirements for a 30% rating - was "expected" and not "significant, abnormal, or disabling." Drosky, 10 Vet.App. at 255. The Court vacated the Board's decision, holding that the Board erred by considering factors outside the rating criteria - namely, whether the appellant's enlarged heart was unexpected or significant... In this case, the Board has committed a similar error by considering the ameliorative effects of the appellant's medication. As in Massey and Drosky, this relief - though relevant to the appellant's overall disability picture - is not explicitly mentioned in either the rating criteria under DC 7319 or the general compensation regulations. Absent a clear statement setting out whether or how the Board should address the effects of medication, the Board erred in taking those effects into account when evaluating the appellant's disability, rather than limiting itself to the symptoms expressly contemplated by DC 7319. Put another way, DC 7319 requires the Board to inquire whether the appellant suffers from diarrhea or alternating diarrhea and constipation, with more or less constant abdominal distress. 38 C.F.R. 4.114, DC 7319. It does not, however, direct the Board to consider relief from those symptoms afforded by medication, nor may the current versions of 4.1 and 4.2 be read that way in light of the Court's prior case law... Thus, to the extent that the Court did not explicitly hold in Otero-Castro that the Board may not deny entitlement to a higher rating on the basis of relief provided by medication when those effects are not specifically contemplated by the rating criteria, it does so today. This ensures that all similarly structured DCs are interpreted and operate in the same manner so that diagnostic criteria are applied consistently. Therefore, as DC 7319 is silent as to the effects of medication, the Board erred in denying entitlement to a higher disability rating based on the relief provided by the appellant's anti-acid medication... However, as the current version of DC 7319 does not contemplate the effects of medication in controlling ICS (or, by analogy, IBS) while other DCs do explicitly consider the effects of medication, the Court will vacate the Board's decision with respect to the issue of a higher initial disability rating for IBS and will remand that matter for readjudication consistent with this decision... On remand, the Board must reevaluate the appellant's condition and may not consider the relief afforded by his medication when doing so.


VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)
STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. Use this form to submit a statement to support a claim. For more information, contact us at <https://iris.custhelp.va.gov>, or call us toll-free at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the Federal relay number is 711. VA forms are available at www.va.gov/vaforms. After completing the form, mail to: **Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Janesville, WI, 53547-4444.**

SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

 1. VETERAN/BENEFICIARY'S NAME (*First, Middle Initial, Last*)
 [REDACTED]

 2. VETERAN'S SOCIAL SECURITY NUMBER
 [REDACTED]

 3. VA FILE NUMBER (*If applicable*)
 [REDACTED]

 4. VETERAN'S DATE OF BIRTH
 [REDACTED]

 5. VETERAN'S SERVICE NUMBER (*If applicable*)
 [REDACTED]

 6. TELEPHONE NUMBER (*Include Area Code*)
 [REDACTED]

 7. E-MAIL ADDRESS (*Optional*)
 [REDACTED]

 8. MAILING ADDRESS (*Number and street or rural route, P.O. Box, City, State, ZIP Code and Country*)

 No. &
 Street [REDACTED]

Apt./Unit Number

City [REDACTED]

State/Province [REDACTED]

Country [REDACTED]

ZIP Code/Postal Code [REDACTED]

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

Challenge to C&P Examiner Competency

I hereby explicitly challenge and rebut the presumption of competency of any and all C&P examiners, exams, and reports contained in my C-file or otherwise associated with my claims or otherwise communicated to anyone in any way and at any time, according to the precedent of *Francway v. Wilkie*, 940 F.3d 1304.

I contend that any and all such evidence is inadequate. The presumption of competency enjoyed by C&P examiners is unmerited. It is common knowledge among Veterans that almost all C&P exams are performed in a cursory manner that trivializes, minimizes, or even ignores important information. Some C&P examiners outright lie in their reports. In contrast, the governing laws, regulations, and policies describe strict quality standards for C&P exams. For example, the duty-to-assist requires medical examinations to be adequate as well as "thorough and contemporaneous" (38 USC 5103A; *Pond v. West*, 12 Vet. App. 341). Adequacy is defined as "based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the evaluation of the claimed disability will be a fully informed one" (*Barr v. Nicholson*, 21 Vet. App. 303; *Gill v. Shinseki*, 26 Vet. App. 386; *Gardin v. Shinseki*, 613 F.3d 1374). Sadly, it is quite rare for a C&P exam to be adequate, thorough, contemporaneous, detailed, or fully informed.

(continued on next page)

VETERAN'S SOCIAL SECURITY NO. [REDACTED]

SECTION II: REMARKS (Continued)

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

I further contend that any and all C&P exam reports in my C-file contain harmful errors that include, but are not limited to, at least one of the following examiner deficiencies:

- not qualified to perform the exam, or less qualified than another examiner of record
- failed to consider my credible testimony and competent lay observations regarding signs and symptoms, onset, chronicity, continuity, and/or history
- failed to provide an adequate rationale for a conclusion, or issued a summary opinion without adequate rationale
- drew a conclusion about a non-medical fact
- relied on an inaccurate factual premise
- gave an inconclusive opinion without explaining why a conclusion could not be reached
- used an improper evidentiary standard
- fabricated their own evidentiary standard without basis in the law
- did not properly apply the laws, regulations, and policies that govern C&P exams
- did not address all theories of entitlement to service connection
- did not provide the information required by 38 CFR 4.40 and 4.45 when describing the effects of pain or other impairments on joint motion.
- did not properly perform all of the examination components required by 38 CFR 4.59 for joint assessment.

(continued on next page)

	NT
I CERTIFY THAT the statements on this for [REDACTED]	wledge and belief.
9. SIGNATURE OF VETERAN/BENEFICIAR [REDACTED]	10. DATE SIGNED 08-18-2023
PENALTY: The law provides severe penalties [REDACTED] evidence of a material fact, knowing it to be fa	h, for the willful submission of any statement or

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

(continuation of Form 4138: Challenge to C&P Examiner Competency)

Selected excerpts from *Francway v. Wilkie*, 940 F.3d 1304

Here, once the veteran raises a challenge to the competency of the medical examiner, the presumption has no further effect, and, just as in typical litigation, the side presenting the expert (here the VA) must satisfy its burden of persuasion as to the examiner's qualifications. The Board must then make factual findings regarding the qualifications and provide reasons and bases for concluding whether or not the medical examiner was competent to provide the opinion. 38 USC 7104(d).

Since 2009, we have held that the Board and Veterans Court properly apply a presumption of competency in reviewing the opinions of VA medical examiners. See *Rizzo v. Shinseki*, 580 F.3d 1288, 1290–91 (Fed. Cir. 2009).

... the VA relies on medical examiners who provide medical examinations and medical opinions based on review of the evidence in the record, *id.* 5103A(d); 38 CFR 3.159(c)(4). Both the statute and implementing regulations require that these medical examinations and opinions be based on competent medical evidence, defined, in relevant part, as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 CFR 3.159(a)(1).

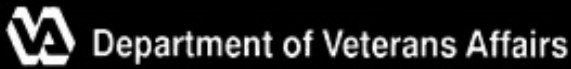
The presumption of competency originated in our decision in *Rizzo*. As we said in *Rizzo*, "[a]bsent some challenge to the expertise of a VA expert, this court perceives no statutory or other requirement that VA must present affirmative evidence of a physician's qualifications in every case as a precondition for the Board's reliance upon that physician's opinion." 580 F.3d at 1291. Although it is referred to as the presumption of competency, we have not treated this concept as a typical evidentiary presumption requiring the veteran to produce evidence of the medical examiner's incompetence. Instead, this presumption is rebutted when the veteran raises the competency issue.

The limited nature of the presumption has been consistently recognized in our caselaw. Beginning with *Rizzo*, we have held that "where ... the veteran does not challenge a VA medical expert's competence or qualifications before the Board," the "VA need not affirmatively establish that expert's competency." *Id.* at 1291 (emphasis added); *id.* ("Absent some challenge ..." (emphasis added)); *id.* ("Absent some challenge ...") (emphasis added). Similarly, in *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011), we held that "when a veteran suspects a fault with the medical examiner's qualifications, it is incumbent upon the veteran to raise the issue before the Board." *Id.* at 1365–66 (emphasis added). "[T]he VA and Board are not required to affirmatively establish competency of a medical examiner unless the issue is raised by the veteran." *Id.* at 1366 (emphasis added). Our holding in *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013), is consistent with this understanding. Although we noted that "[i]f an objection is raised it may be necessary for the veteran to provide information to overcome the presumption," *id.* at 585 (emphasis added), the statement was referring to the specificity of the challenge rather than requiring the veteran to submit evidence that is within the control of the VA.

(continued on next page)

The presumption of competency requires nothing more than is required for veteran claimants in other contexts - simply a requirement that the veteran raise the issue. The Supreme Court has implicitly recognized that the veteran bears such a burden of raising an issue in *Shinseki v. Sanders*, 556 U.S. 396 (2009). There, the Supreme Court noted the burden placed on the claimant in ordinary litigation to raise an issue and establish prejudicial error. *Id.* at 410. When the Court held that the veteran bears the burden of showing prejudicial error, it necessarily assumed that the veteran bears the burden of raising the claim of error in the first instance. See *id.*; see also, e.g., *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009) (“[A] veteran is obligated to raise an issue in a notice of disagreement if he wishes to preserve his right to assert that issue on appeal ...”). There is nothing in the statute or its interpretation that relieves the veteran from the obligation to raise an issue in the first instance in the general run of cases.

The VA agrees with this interpretation of the presumption of competency and the VA’s duties. At oral argument, the VA agreed that “[the presumption] is not an evidentiary burden, it’s kind of a burden to request [the examiner’s qualifications].” Oral Arg. at 25:34–38. The VA also recognized its burden to “substantively respond” to the veteran’s challenge “[o]nce the veteran [sufficiently] raises the issue” and that after a challenge is raised “the VA can’t come in [to the Board] and say we’re entitled to the presumption that this person is competent and you have to assume he is competent.” Oral Arg. at 32:29–42. Then, as the VA notes, the Board has to “make a decision as to whether the medical officer was actually competent and provide reasons and bases explaining that decision.” Oral Arg. 28:50–29:02.



**VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)**

FREEDOM OF INFORMATION ACT (FOIA) OR PRIVACY ACT(PA) REQUEST

INSTRUCTIONS: Read the Privacy Act and Respondent Burden information on Page 4 before completing the form. This form must be signed by the requester, authorized organization, or third party who has been authorized by the requester. For additional information on VA FOIA and PA requests visit our website at <https://www.va.gov/FOIA/Requests.asp> . You may also contact the VA at <https://iris.custhelp.va.gov> or call us toll-free at 1-800-827-1000. If you use a Telecommunications device for the deaf (TDD),the Federal Relay number is 711. VA forms are available at www.va.gov/vaforms.

SECTION I: REQUEST FOR INFORMATION ON YOURSELF

(If you are seeking information on yourself, complete Sections I, III, V and VI. Complete Section IV, if applicable.)

NOTE: You may complete the form on-line or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and completely fill in each applicable circle to help expedite processing of the form.

1. NAME (First, Middle Initial, Last)

██████████ ██████████

2. SOCIAL SECURITY NUMBER

██████████

3. ALIEN REGISTRATION NUMBER (A-number) (If applicable)

4. VA FILE NUMBER (If applicable)

██████████

5. DATE OF BIRTH

██████████

6. PLACE OF BIRTH (Provide City and State, County and State or City and Country)

██████████

7. CURRENT MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street ██████████

Apt./Unit Number City ██████████

State/Province ██████ Country ██████ ZIP Code/Postal Code ██████

8A. TELEPHONE NUMBER (Include Area Code)

██████████
Enter International Phone Number
(If applicable)

8B. FAX NUMBER (If applicable)

██████████
Enter International FAX Number
(If applicable)

9. E-MAIL ADDRESS I agree to receive electronic correspondence from VA in regards to my claim.

██████████

SECTION II: REQUEST FOR INFORMATION ON A PERSON OTHER THAN YOURSELF

(If you are seeking information on an individual other than yourself, complete Sections II, III, V and VII or VIII. Complete Section IV, if applicable.)

10. NAME (First, Middle Initial, Last) OR YOUR ORGANIZATION'S NAME

11. CURRENT MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street

Apt./Unit Number City

State/Province Country **US** ZIP Code/Postal Code

12A. TELEPHONE NUMBER (Include Area Code)

Enter International Phone Number
(If applicable)

12B. FAX NUMBER (If applicable)

Enter International FAX Number
(If applicable)

SECTION II: REQUEST FOR INFORMATION ON A PERSON OTHER THAN YOURSELF (Continued)

(If you are seeking information on an individual other than yourself, complete Sections II, III, V and VII or VIII. Complete Section IV, if applicable.)

NOTE: Items 13 through 16 must be completed to inform VA on whom the person is you are requesting the information about.

13. NAME OF THE PERSON YOU ARE REQUESTING INFORMATION ON (First, Middle Initial, Last)

14. SOCIAL SECURITY NUMBER

15. ALIEN REGISTRATION NUMBER (A-number) (If applicable)

16. VA FILE NUMBER (If applicable)

SECTION III: RECORDS YOU ARE SEEKING

(This information is required in order to complete the request)

17. SELECT THE TYPE(S) OF RECORDS YOU ARE REQUESTING, BELOW:

- CLAIMS FILE (C-FILE) DD FORM 214 HUMAN RESOURCE RECORDS LIFE INSURANCE BENEFIT RECORDS
(If applicable, enter policy number in Section IV, Item 18, Remarks)
- SERVICE TREATMENT RECORDS / MILITARY TREATMENT RECORDS LIFE INSURANCE RECORDS HOME LOAN BENEFIT RECORDS
- VOCATIONAL REHABILITATION AND EMPLOYMENT RECORDS FIDUCIARY SERVICES RECORDS MILITARY TO CIVILIAN TRANSITION (TAP) DOCUMENTS DISABILITY EXAMINATIONS (C & P EXAMS) (If applicable enter date of exam in Section IV, Item 18, Remarks)
- PENSION BENEFIT DOCUMENTS EDUCATION BENEFIT RECORDS FINANCIAL RECORDS
- OTHER (Specify)
See item 18 (Remarks).

SECTION IV: REMARKS

18. REMARKS (If any)

I request my entire C-file as well as all information reasonably attainable by VBA or its contract examination vendors relating to the competency, education, training, and expertise of all C&P examiners who have provided opinions, exams, or any other input on my claims up until the date that this request is answered. Without limiting the scope of my request, I am seeking at least a curriculum vitae (CV) or resume for each C&P examiner. I am entitled to this information under the precedent of *Francway v. Wilkie*, 940 F.3d 1304: 'Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by the VA's duty to assist. See 38 USC 5103A; *Harris v. Shinseki*, 704 F.3d 946.'

SECTION V: WILLINGNESS TO PAY FEES

19. **IMPORTANT:** For the purpose of fees only, FOIA divides requesters into three categories: (1) commercial requesters may be charged fees for searching for records, reviewing the records, and photocopying them; (2) educational, non-commercial scientific institutions, and representatives of the news media are charged for photocopying after the first 100 pages; (3) all other requesters (requesters who do not fall into any of the other two categories) are charged for photocopying after the first 100 pages and for time spent searching for records in excess of two hours. VA charges \$0.15 per single-sided page for photocopying. Actual costs are charged for a format other than paper copies.

An agency may grant fee waivers if the requester successfully demonstrates that the disclosure of information is in the public's interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

 I AM WILLING TO PAY THE APPLICABLE FEES UP TO THE AMOUNT OF \$1.00 IF YOU BELIEVE YOU ARE ENTITLED TO A FEE WAIVER OR EXPEDITED PROCESSING, INDICATE HERE:

SECTION VI: REQUESTER CERTIFICATION AND SIGNATURE

I CERTIFY THAT I have completed this FOIA/PA request and declare it is true and correct to the best of my knowledge and belief.

D)

20B. DATE SIGNED

Month Day Year

08-18-2023**SECTION VII: THIRD-PARTY CERTIFICATION AND SIGNATURE****(Valid only if Section II has been completed and requester has an authorized third party)**

I CERTIFY THAT the requester has authorized me as the undersigned representative and certifies that the truth and completion of the information contained in this document is to the best of the requesters knowledge and belief.

NOTE: A third-party signature will not be accepted unless a valid VA Form 21-0845, *Authorization to Disclose Personal Information to a Third Party* is of record or completed and attached to this request. A third-party may be a family member or other designated person who is not a Power of Attorney, agent, or fiduciary.

21A. THIRD-PARTY SIGNATURE

21B. DATE SIGNED

Month Day Year

SECTION VIII: POWER OF ATTORNEY (POA) CERTIFICATION AND SIGNATURE**(Valid only if Section II has been completed and requester has authorized POA representation)**

I CERTIFY THAT the requester has authorized me as the undersigned representative and certifies the truth and completion of the information contained in this document to the best of the requesters knowledge and belief.

NOTE: A POA's signature **will not** be accepted unless a valid VA Form 21-22, *Appointment of Veterans Service Organization as Claimant's Representative* or VA Form 21-22a, *Appointment of Individual as Claimant's Representative* is of record or attached to this request.

22A. POA/AUTHORIZED REPRESENTATIVE SIGNATURE)

22B. DATE SIGNED

Month Day Year

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact knowing it to be false, or for fraudulent receipt of any document to which you are not entitled.

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is voluntary.

RESPONDENT BURDEN: We need this information to identify and obtain the information you are requesting. Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain . If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

Vet name: [REDACTED]

SSN: [REDACTED]

38 U.S.C § 5103 NOTICE RESPONSE

We provided a notice to you about the evidence and information VA needs to support your claim for benefits. At this time, you may choose to indicate whether you intend to submit additional information or evidence that would help support your claim.

Your signed response will let us know whether to decide your claim without waiting 30 days, or whether we should give you the full 30 days from the date of the letter sent with this notice response before deciding your claim.

Your signature on this response will not affect:

- Whether or not you are entitled to VA benefits;
- The amount of benefits to which you may be entitled;
- The assistance VA will provide you in obtaining evidence to support your claim; or
- The date any benefits will begin if your claim is granted.

RESPONSE

I elect *one* of the following: (Whichever box you check, you have one year from the date of the notice to give VA any other information or evidence you think will support your claim.)

I have enclosed all the remaining information or evidence that will support my claim, or I have no other information or evidence to give VA to support my claim. Please decide my claim as soon as possible.

I will send more information or evidence to VA to support my claim. VA will wait the full 30 days from the date of the letter sent with this notice response before deciding my claim.

08-18-2023

Date



Department of Veterans Affairs

VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)

**INTENT TO FILE A CLAIM FOR COMPENSATION AND/OR PENSION,
OR SURVIVORS PENSION AND/OR DIC**

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. This form is used to notify VA of your intent to file for the general benefit(s). For more information, contact us online through ASK VA: <https://ask.va.gov/>. Ask us a question online or call us toll-free at 1-800-827-1000 (TTY:711). VA forms are available at www.va.gov/vaforms.

SECTION I: VETERAN'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, insert one letter per box, and completely fill in each applicable check box to expedite processing of the form.

1. VETERAN'S NAME (First, Middle Initial, Last)

██████████ ██████████

2. SOCIAL SECURITY NUMBER

██████████

3. HAVE YOU EVER FILED A VA CLAIM?

YES (If "YES," complete Item 4)
 NO

4. VA FILE NUMBER (If applicable)

██████████

5. DATE OF BIRTH (MM/DD/YYYY)

██████████

6. VETERAN'S SERVICE NUMBER (If applicable)

7. MAILING ADDRESS (If applicable) (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street ██████████

Apt./Unit Number City ██████████

State/Province ██████████ Country ██████████ ZIP Code/Postal Code ██████████

8. TELEPHONE NUMBER (Include Area Code)

██████████
Enter International Phone Number (If applicable)

9. E-MAIL ADDRESS (If applicable)

I agree to receive electronic correspondence from VA in regards to my claim.

████████████████████

SECTION II: CLAIMANT'S IDENTIFICATION INFORMATION
(Complete this section ONLY if the claimant is NOT the veteran)

10. CLAIMANT'S NAME (First, Middle Initial, Last)

11. SOCIAL SECURITY NUMBER

██████████

12. HAVE YOU EVER FILED A VA CLAIM?

YES (If "YES," complete Item 13)
 NO

13. VA FILE NUMBER (If applicable)

14. RELATIONSHIP TO VETERAN (Check one)

SPOUSE CHILD FIDUCIARY VETERAN SERVICE OFFICER ALTERNATE SIGNER
 THIRD-PARTY OTHER (Specify)

15. CLAIMANT'S DATE OF BIRTH (MM/DD/YYYY)

16. MAILING ADDRESS (If applicable) (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

No. & Street

Apt./Unit Number City

State/Province Country ZIP Code/Postal Code

17. TELEPHONE NUMBER (Include Area Code)

Enter International Phone Number (If applicable)

18. E-MAIL ADDRESS (If applicable)

I agree to receive electronic correspondence from VA in regards to my claim.

SECTION III: GENERAL BENEFIT ELECTION

IMPORTANT: VA may not be able to use this form to establish an effective date for benefits if you do not select one or more of the general benefits listed below.

19. I INTEND TO FILE FOR THE GENERAL BENEFIT(S) CHECKED BELOW: (Choose all that apply)

COMPENSATION PENSION

NOTE: Only check this box if you are a surviving dependent of the veteran.

SURVIVORS PENSION AND/OR DEPENDENCY AND INDEMNITY COMPENSATION (DIC)

IMPORTANT: After receiving this form, VA will give you the appropriate application to file for the general benefit you select above. You can also apply for VA disability compensation online at www.va.gov. If you give VA a completed application for the selected general benefit within *one* year of filing this form, your completed application will be considered filed as of the date of receipt of this form. Only the *first* completed application for each selected general benefit that is received after you file this form will be considered filed as of the date of receipt of this form. You may indicate your intent to file for more than one general benefit on this form or you may submit a separate intent to file (VA Form 21-0966) for each general benefit. Please complete as much of this form as possible, as VA cannot process this form if we cannot identify the claimant and/or veteran.

SECTION IV: DECLARATION OF INTENT AND SIGNATURE

By filing this form, I **HEREBY INDICATE MY INTENT** to apply for one or more general benefits under the laws administered by VA.

I acknowledge that:

- (1) this is **not a claim for benefits**,
- (2) I must file a complete application for each general benefit with VA before VA will process my claim; and
- (3) a complete application for the same general benefit(s) as indicated on this form must be received within one year of the date VA receives this form for my application to be considered filed as of the date of this form.

AUTHORIZED AGENT (REQUIRED)

21. DATE SIGNED (MM/DD/YYYY)
08/18/2023

SERVICE ORGANIZATION (VSO) (Please Print)

NOTE: This form may only be completed by a VSO, attorney, or agent if a valid power of attorney has been completed.

Where to Send Correspondence - After completing this form, mail to:

Department of Veterans Affairs
Evidence Intake Center
P.O. Box 4444
Janesville, WI 53547- 4444

PENALTY: The law provides severe penalties (including fine and/or imprisonment) for willfully submitting any statement or evidence of a material fact you know to be false, or for fraudulent receipt of any document you are not entitled to.

PRIVACY ACT NOTICE: VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Veteran Readiness and Employment Records-VA, published in the Federal Register. Your obligation to respond is required only to preserve a date of claim for an application that is received within one year of receipt of this form. VA uses your Social Security number to identify if you have a claim file and to ensure that your records are properly associated with your claim file. VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine the appropriate application and provide it to the claimant.

RESPONDENT BURDEN: We need this information to determine the intent of the claimant and to provide the claimant with the appropriate application for VA benefits (38 U.S.C. 5102). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 5 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.