

Lesson 8

VA's Duty to Assist and Issues with Locating Records

The American Legion

New Service Officer School

Lesson 8 Learning Objectives

Learn about VA's "duty to assist" Veterans in collecting evidence plus issues related to obtaining evidence.

- Learn details about VA's duty to assist and how it is triggered.
- Learn about VA's duty to collect records and provide C&P examinations.
- Learn strategies for deciding what evidence to locate and then collect.

VA's Duty to Assist

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Overview of the Duty to Assist

- VA's "duty to assist" was established by Congress in 2001 and is mandatory. 38 U.S.C. § 5103A.
- Two main components:
 - VA's duty to collect relevant records, and
 - VA's duty to provide a medical opinion or examination if necessary.



Duty to Obtain Records

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- Automatic:
 - DD214 (Certificate of Release or Discharge from Active Duty)
 - Service medical records (SMRs)
- Triggered:
 - Other relevant records that are adequately identified. 38 U.S.C. § 5103A.

Triggering the Duty to Obtain Records

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- “Adequately identified” records are:
 - **Relevant**
 - Details are sufficient to contact custodian of records.
 - Details are sufficient for custodian to locate records.
- VA is not required to go on “fishing expeditions.”¹
- Authorization from Veteran may be required, use [VA Form 21-4142](#).

The image shows a portion of a VA Form 21-4142. The section is titled "SOURCE OF RECORD(S):" and lists several categories of potential record sources. A red circle highlights the form number "21-4142" and the date "MAR 2018" at the bottom of the form.

SOURCE OF RECORD(S):

- **ALL** medical sources (hospitals, clinics, and VA health care facilities,
- Social workers/rehabilitation counselors
- Consulting examiners used by VA,
- Employers, insurance companies, work-related contacts
- Others who may know about my contact information

VA FORM **21-4142**
MAR 2018

¹*Gobber v. Derwinski*, 2 Vet.App. 470 (1992).
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Medical Records

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- All medical records related to a condition are presumptively relevant.
- No matter when or where treatment occurred, VA must obtain all pertinent medical records.

¹*Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009).

Service Records

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Service Records

- Service Treatment Records (STRs)- outpatient
- Clinical Records – inpatient
- Personnel Records

- VA uses Personnel Information Exchange System (PIES) to request STRs and personnel records.
- For more information on “service records” see M21-1 Adjudication Procedures Manual, Part II, Subpart ii, 2.A.





Click the [Quiz](#) button to edit this object

A Veteran is seeking service connection for TBI. Do you think the statement below is enough to trigger VA's duty to assist to collect records? (This question does not count toward your final grade.)

"After I was in the IED blast in Iraq, they sent me to a field doctor, but she had me evacuated to some hospital in Bethesda, Maryland. I don't remember the name, but I was there for a few weeks."

- YES, because VA must collect clinical records identified by the Veteran.
- NO, if the documents are not already in his SMRs then VA can assume that they do not exist.
- YES, because TBI is a presumptive condition.
- NO, because the Veteran has not proven that the hospital records would be relevant to the claim.

Answer 1

- **YES, because VA must collect relevant clinical records identified by the Veteran.** See next slide.
- **NO, if the documents are not already in his SMRs then VA can assume that they do not exist.** Incorrect. See next slide.
- **YES, because TBI is a presumptive condition.** Incorrect. TBI is not a presumptive condition, and that doesn't relate to VA's duty to collect records.
- **NO, because the Veteran has not proven that the hospital records would be relevant to the claim.** Incorrect. The hospital records appear to be directly related to the in-service injury. They are relevant "on their face."

Service Medical Records

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Womack Army Hospital Center, NC
Photo: DoD

- Service treatment records are obtained ***automatically***.
- Service clinical (hospital) records are ***separate!***
 - Organized primarily by hospital name/number.
 - Organized secondarily by date of treatment.
 - Specify month/year if possible.

Advocacy Tip: Ask the Veteran if they ever obtained private medical care during service.

VA Treatment Records

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- If the Veteran wants to submit Veterans Health Administration (VHA) records, then the Veteran must provide Veterans Benefits Administration (VBA) with treatment locations.
 - Be sure to list Community Based Outreach Clinics (CBOCs) and Vet Centers.
- VBA does not automatically get treatment records from VHA.
- Not all VHA records are uploaded into VBMS, so be sure to check.

Advocacy Tip: VA must obtain all identified VA medical records, not just relevant ones.

Private Treatment Records

- VA's duty to assist includes obtaining private treatment records.
 - Veteran must provide sufficient information for VBA to contact private locations where treatment was provided.
 - Veteran must sign **VA Form 21-4142**, a request and authorization to release private records.
 - Most private providers have record-destruction schedules.
 - Be prepared to submit alternative evidence in lieu of obtaining older records, such as a statement.

Mandatory Minimum Efforts

- Sometimes VA will be unable to obtain a Veteran's records.
- VA must make at least **two** attempts to obtain **private** records.
- VA must make **unlimited** attempts to get **government** records, *but ...*
 - VA can give up after negative response or when further efforts may be futile.



When VA is Unable to Obtain Records

- If records cannot be obtained, then VA must:
 - Notify the Veteran, and
 - Provide an opportunity to find the records or submit other evidence before deciding the claim.
- If the Veteran receives such a letter, consider:
 - Other places that might have copies of the records.
 - Alternative ways to prove the facts at issue, such as the Veteran's statement or lay testimony.

Duty to Obtain Medical Opinion

- VA must obtain a medical opinion when:
 - There is some evidence on each of the elements, but
 - Insufficient evidence to decide the claim.
- The threshold for obtaining a nexus opinion is **very low**.¹
- VA gets **millions** of medical opinions each year!
- VA can't change its mind about providing an opinion.

¹ *McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

Service Connection Examinations

- For a current condition:
 - A diagnosis is not required.
 - Symptoms are sufficient to trigger an exam.
- For nexus:
 - The record “indicates” a possible nexus.¹
 - Generally, a Veteran’s statement asserting a possible connection between a disability and service will trigger an exam.²

¹ *McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

² M21-1.I.1.c.3.f.

Examinations for Disability Ratings

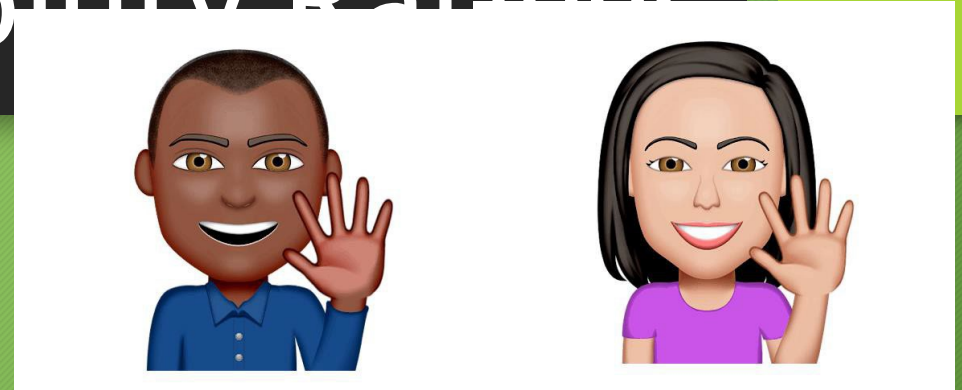
- The mere passage of time does not entitle a Veteran to a new examination to determine the level of disability.¹
- The Veteran needs to explicitly state that the condition has gotten worse since the last examination.

¹ *Palczweski v. Nicholson*, 21 Vet. App. 174 (2007).



Examinations for Disability Ratings

- Neither the **21-526EZ** (**Wally**) nor the **20-0995** (**Diane**) includes a place for the Veteran to make a statement that the condition worsened.
- Use a **21-4138** to submit a description of the worsening.



| | | | |
|---|---|---|---|
| Department of Veterans Affairs | | VA DATE STAMP (DO NOT WRITE IN THIS SPACE) | |
| STATEMENT IN SUPPORT OF CLAIM | | | |
| INSTRUCTIONS: Read the Privacy Act and Respondent Burden on Page 2 before completing the form. Complete as much of Section I as possible. The information requested will help process your claim for benefits. If you need any additional room, use the second page. | | | |
| SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION | | | |
| NOTE: You will <i>either</i> complete the form online or by hand. Please print the information request in ink, neatly, and legibly to help process the form. | | | |
| 1. VETERAN/BENEFICIARY'S NAME (First, Middle Initial, Last) | | | |
| <input type="text"/> | | | |
| 2. VETERAN'S SOCIAL SECURITY NUMBER | | 3. VA FILE NUMBER (If applicable) | 4. VETERAN'S DATE OF BIRTH (MM/DD/YYYY) Month Day Year |
| <input type="text"/> - <input type="text"/> - <input type="text"/> | | <input type="text"/> | <input type="text"/> - <input type="text"/> - <input type="text"/> |
| 5. VETERAN'S SERVICE NUMBER (If applicable) | 6. TELEPHONE NUMBER (Include Area Code) | 7. E-MAIL ADDRESS (Optional) | |
| <input type="text"/> | <input type="text"/> | <input type="text"/> | |
| 8. MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country) | | | |
| No. & Street | <input type="text"/> | | |
| Apt./Unit Number | <input type="text"/> | City | <input type="text"/> |
| State/Province | <input type="text"/> | Country | <input type="text"/> |
| ZIP Code/Postal Code | <input type="text"/> | - | <input type="text"/> |
| SECTION II: REMARKS (The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.) | | | |
| <input type="text"/> | | | |

Advocacy Tip: Submit claims *with* evidence !



Click the [Quiz](#) button to edit this object

A Veteran is already service connected for residuals of an in-service ankle injury. Which statement(s) below do you think are sufficient to trigger VA's duty to provide a new rating examination? (This question does not count toward your final grade.)

- "I receive care for my ankle from my private doctor."
- "My ankle hurts more now than in the past. It's harder to stand up for long periods."
- "I broke my ankle in service when I fell off a ladder."
- "I think that I should receive more compensation for my ankle problems."

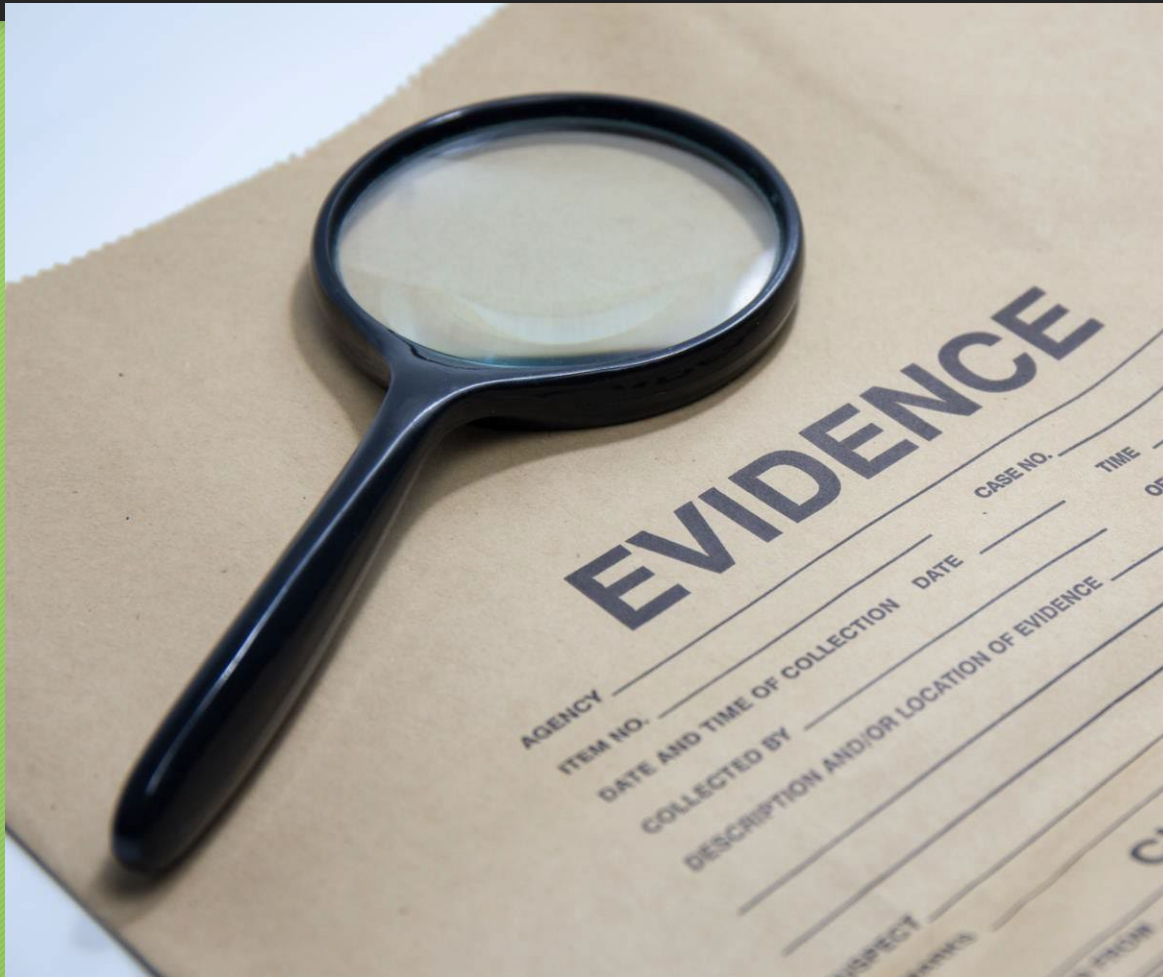
Answer 2

- **“I receive care for my ankle from my private doctor.”** This only shows that the Veteran presently receives medical care.
- **“My ankle hurts more now than in the past. It’s harder to stand up for long periods.”** This is the only answer showing that the Veteran’s condition has worsened.
- **“I broke my ankle in service when I fell off a ladder.”** This is a statement going to service connection, which is already established.
- **“I think that I should receive more compensation for my ankle problems.”** This doesn’t show that the Veteran’s ankle condition has gotten worse.

Locating Records

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Main Questions about Evidence



- What evidence do you want to collect?
- How will the evidence support the Veteran's claim?

- VA will automatically collect the Veteran's service records.
- Ask the Veteran if he or she has any original records.
- Ask the Veteran if they ever received treatment at a military hospital.

VA Medical Records

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- Ask the Veteran about every VA medical center where they ever received treatment.
- Ask about VA's Community Based Outpatient Clinics (CBOC) and VA's Vet Centers.
- VA does not automatically collect CBOC and Vet Center records.
- It's probably easier for VA to collect these VA records than the Veteran.



Private Medical Records

- Ask the Veteran about every private facility where they have received treatment.
- Don't focus on specialist treatment for conditions that aren't relevant.
- It's probably easier and faster for the Veteran to collect these records than VA. The Veteran may be asked to pay for copies, especially for older paper records.

Focusing Evidence on What Matters

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- Be focused! Submit evidence targeting the specific elements of the Veteran's claim.
 - Service connection claims: What is the Veteran's disability and how is it related to service?
 - Increased ratings claims: What are the Veteran's symptoms and how do they support a higher rating under the correct diagnostic code?
- Tell VA your theory of entitlement and submit evidence to support that theory.

Last Slide

Questions?