

MODULE #3 Duty to Assist & Claims Development

DATE STARTED: _____ **LOCATION:** _____

SERVICE OFFICER/TRAINEE SIGNATURE: _____

TRAINER SIGNATURE: _____

DATE COMPLETED _____

I. Please rate the effectiveness of this training module.

Objective		Acceptable	Marginal	Unacceptable
Veteran's Claim Assistance Act of 2000	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			
Objective				
VA's Statutory duty to assist:	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			
Objective				
VA Duty to Assist Letters	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			
Objective				
New and Material Evidence; definition of and application(s) in given situations	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			
Objective				
Requesting government maintained records	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			
Objective				
Requesting non-government maintained records	Objective achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			
Objective				
	Objective achieved			
	Applied objective content through practical exercises			
	Effectiveness of teaching methods used			

MODULE # 3 CONTINUED

Objective		Acceptable	Marginal	Unacceptable
	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of methods used			
Objective				
	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of methods used			
Objective				
	Objective Achieved			
	Applied objective content through practical exercises			
	Effectiveness of methods used			

SUBJECTIVE EVALUATION

		Good	Fair	Poor
1. Please rate the extent to which you met your personal objective for this module				
2. Rate the information provided in the Training Manual & other reference materials				
3. Please evaluate the physical environment where the training was held.				
4. Is there anything that we could have done to make this training better for you? (Please comment)				

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DUTY TO ASSIST & CLAIM DEVELOPMENT

Objective: To learn the basic requirements of each type of claim submitted to the VA, the VA's responsibilities to claimants, and how to assist a claimant in submitting a claim for benefits.

References:

Title 38, U.S. Code, Section 5103, 5107

38 Code of Federal Regulations 3.159, 3.303-3.385

Public Law 106-475 "Veteran Claims Assistance Act of 2000"

M21-1MR, Part 1, Chapter 1

M21-1MR, Part III, Subpart iii, Chapter 1, Section A

Instructions: Study the assigned reference materials to learn the basic initial requirements for the different types of claims. To distinguish between the VA's and claimant's responsibilities in identifying/obtaining evidence from sources to support each claim. To give careful attention to the information listed in the initial application for benefits, as that will form the primary basis for development of the claim.

Summary:

The Veteran's Claim Assistance Act of 2000 (VCAA Public Law 106-475) altered the process of presenting claims for benefits to the VA. The VA now has a statutory duty to assist the claimant in identifying/obtaining the evidence necessary to substantiate the claim when that claimant presents a substantially complete claim for those benefits. A substantially complete claim includes, a written statement indicating the benefit sought, location(s) of evidence and properly completed release of information requirements, and the signature of the claimant. The VA's responsibility to identify and re-adjudicate previously denied claims/appeals based on the former "Not Well Grounded" policy ended 11/10/02; and did not provide for re-adjudication of those claims/appeals that were considered final (any appeal period had expired) prior to 11/09/00.

When information sufficient to identify and locate necessary evidence is of record, the VA shall assist a claimant by requesting, directly from the source, existing evidence, which is either in the custody of military authorities or maintained by another Federal agency. At the claimant's request, and provided that he or she has authorized the release of such evidence in a form acceptable to the custodian thereof, the VA shall assist a claimant by attempting to obtain records maintained by State or local governmental authorities and medical, employment, or other non-government records which are pertinent and specific to the claim. This requirement to provide assistance shall not be construed as shifting from the claimant to the Department of Veterans Affairs the responsibility to produce necessary evidence.

VA's Obligation to Assist With Claims

The Department of Veterans Affairs (VA) is obligated by law to:

- notify a claimant of what information or evidence is necessary to substantiate his/her claim
- assist a claimant who files a substantially complete claim in obtaining evidence to substantiate his/her claim before making a decision on that claim, and grant every benefit supported by the law which is consistent with the facts of the case, while protecting the interests of the government per 38 CFR 3.103(a).

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VA Efforts to Obtain Evidence to Resolve a Claim

VA should:

- make every effort to request all the evidence needed to decide the claim based on the records available when the claim is filed
- develop additional evidence as it is identified by the claimant and/or his/her representative
- make reasonable efforts to obtain non-governmental records identified by the claimant if the claimant
 - provides a release acceptable to the record holder, and
 - adequately identifies the records, and
- obtain Federal records.

What Constitutes Reasonable Efforts to Obtain Non-Federal records

“Reasonable efforts” to obtain non-Federal agency records is considered as:

- an initial request, and
- at least one follow-up request.

What Constitutes Reasonable Efforts to Obtain Federal Records

VA will make as many requests as necessary to obtain relevant records from a Federal department or agency. Such efforts will cease only when VA concludes that:

- the records sought do not exist, or
- further efforts to obtain the records would be futile.

Claimant Responsibilities in Providing Evidence

The claimant is ultimately responsible for:

- providing evidence, and
- insuring that non-governmental information is in the record at the time of the decision.

***Note: The VA is not responsible for the cost of obtaining private evidence, nor will it reimburse the claimant for such costs.**

In the development of a claim for benefits there are three evidentiary points that must be met. **First**, there must be medical evidence of a disability, **second**, there must be an incurrence or aggravation of condition while on active duty, or within one year of release from active duty, **third**, there must be medical nexus or link from the incident or occurrence to the disability. While the links between the three evidentiary points may be casual in nature, the presence of all three is **mandatory** for a claim to be successful. These three evidentiary points are required for claims for service-connected disability and or Dependency and Indemnity Compensation.

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The evidentiary requirements for Improved Pension are wartime era service, disability, or age 65, and income within the limits as established by Congress. For Improved Death Pension the evidentiary requirements are wartime era service, deemed valid marriage, and income within the limits as established by Congress.

All VA DTA (Duty to Assist) letters are created using VA Central Office approved templates that offer little opportunity for providing specific details that are unique to each claimant. 38 CFR 3.159(a) provides the four basic VCAA requirements of all DTA letters issued to claimants by the VA:

1. The information and evidence not of record that is necessary to substantiate the claim.
2. The information and evidence that VA will obtain.
3. The information and evidence that the claimant must submit; and
4. To advise the claimant to provide any evidence in the claimant's possession that pertains to the claim.

The VA will refrain from/discontinue providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim (38 U.S.C. 5103A(a)(2)). Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

1. The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;
2. Claims that are inherently incredible or clearly lack merit; and
3. An application requesting a benefit to which the claimant is not entitled as a matter of law.

The U.S. Court of Veterans Appeals (now the Court of Appeals for Veterans Claims) issued a decision in *Sabonis V. Brown*, 6 Vet. App. 426, 430 (1994) that upheld the VA's legal basis for such action. The key portion of the decision (still cited to this date) is as follows:

"To avoid confusion, in a case such as this one, where the law and not the evidence is dispositive, the claim should be denied or the appeal to the BVA terminated because of the absence of legal merit or the lack of entitlement under the law. Cf. Fed. R. Civ. P. 12(b) (6) ("failure to state a claim upon which relief can be granted")." The term "dispositive" is defined by Black's Law Dictionary 2nd Ed. As "being a deciding factor".

The implication is that if the law does not provide a means to grant the benefit applied for (i.e. peacetime veteran or widow is legally ineligible to receive pension benefits, a dishonorable discharge prohibiting a widow from receiving DIC, or a disability not being listed as a presumptive condition under Herbicide Exposure regulations, a claim or appeal can be denied statutorily without being provided VCAA development of evidence. However, the VA *may* extend VCAA development of evidence in such cases as a means to demonstrate a good faith effort on its behalf to assist a claimant.

The VCAA also allows the VA to "defer" decisions on those claims lacking key evidence and to render decisions on other issues that the evidence of record will allow for. This "deferral" can

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cause confusion for claimants, so it is important for Veterans Service Officers to provide claimants with suitable explanations when this arises.

The VA's duty to assist has been and will continue to be an evolving process that will replace careful attention to detail by the Regional Offices, the Board of Veterans Appeals, and the Court.

Application:

The VCAA redefined the nature of the VA's duty to assist claimants by bringing it back in line with the original intent of Congress in creating the VA's paternalistic relationship with claimants. The VCAA did not, however, "open the doors" to providing the full resources of the VA in *any and all* claims. It simply specified what the VA shall/may do in those instances where the law provides for possible entitlement. Thus a representative's understanding of how the VCAA applies to each claim will play an important and intricate role in the successful development phase of the claim.

As the recognized Professional Veterans Service Office we have the responsibility: to provide sound counseling to our claimants that helps them to avoid potential legal pitfalls, gathering such evidence, and to thoroughly review the evidence received to ensure it is sufficient to support the claim prior to submission to the VA. There is no requirement in the Title 38 CFR that requires the representative of the claimant to provide *any and all* evidence to the VA. As the claimant's representative it is important for us to review any and all evidence to ensure that it is supportive of the claim and will not adversely affect it (i.e., a weak physician statement may not be suitable for submission to the VA if a stronger statement can be obtained).

This by no means indicates that as a representative we should participate (intentionally or not) in the presentation of a fraudulent claim for benefits or allow a claimant to be misled into a false sense of potential success if the law does not provide for entitlement. It is our purpose to ensure that those claims that have a legal basis for potential entitlement are properly developed with the goal of obtaining a grant of the benefits in question. In order to do this we must be proactive in determining what evidence is best suited to each claim's success; identify how best to rebut evidence that the VA has against the claim.

A proactive attitude means that we provide claimants with a firm understanding of applicable laws, regulations, and that we direct the claim in the best possible direction for success from the start (properly completed benefit application forms), that additional supporting evidence is submitted in a timely manner, and that all efforts are directed to winning a claim on the original application. It also means that we must carefully review VA correspondence upon receipt; discuss these with our claimants, and to respond in a manner supporting the claimant's best interest.

New and Material Evidence:

Of all the subjects none can cause more frustration for both a claimant, a Veterans Service Officer, or the VA for that matter than the phrase "new and material evidence" when attempting to reopen a previously denied claim. The VCAA defines it as follows:

"A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decision makers.

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Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an un-established fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 U.S.C. 501, 5103A (f), 5108"

Any attempt to reopen a previously denied claim with new and material evidence is cause for careful consideration by the Veterans Service Officer of the evidence about to be submitted in view of what evidence was lacking in the previous claim. Often the evidence of question is of a medical or psychiatric nature, thus being subject to the opinion(s) of competent medical/psychiatric professionals, their choice of examinations, and the manner in which medical/psychiatric records are written. Certain lay statements or other records (employment) may be the missing new and material evidence. It is our responsibility to aid the claimant in understanding what new and material evidence is necessary to reopen a claim in order to trigger the VCAA development.

Example:

A USAF veteran seeking original service connection for Diabetes II due to herbicide exposure in the Republic of Vietnam was previously unable to provide evidence of having set foot in country and his claim was denied. He is able to locate a personal letter that he mailed home from the U.S. Air Base at Cam Ranh Bay, Vietnam and its envelope showing a U.S. Postal marking from the Base Post Office. The envelope, more so than the personal letter, is both new and material evidence that substantiates the claim. Receipt of this evidence by the VA will trigger the VCAA duty to assist provisions.

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Review Questions: Duty to Assist & Claim Development

Using the assigned references and reading materials, answer the following questions:

1. The basic evidentiary requirements for a claim for service-connection includes: 3-2
 - a. Evidence of disability, evidence of incurrence or aggravation, and evidence of medical nexus (link)
 - b. Evidence of disability, evidence of incurrence or aggravation, and copy of DD 214
 - c. Evidence of disability, evidence of incurrence or aggravation, and copies of service medical records
 - d. Current medical evidence, evidence of incurrence or aggravation, and evidence of medical nexus (link)

2. A "substantially complete claim" is defined as. 3-1
 - a. a written statement indicating the benefit sought, location(s) of evidence, properly completed release of information requirements, and the signature of the claimant
 - b. a written statement indicating the benefit sought and the signature of the claimant
 - c. a written statement indicating the benefit sought, dates of all injuries, location(s) of evidence, properly completed release of information requirements, and the signature of the claimant

3. Under the VCAA, Duty to Assist (DTA) letters must contain certain information. Which statement is **not** one of the requirements of a DTA letter? 3-2
 - a. The information and evidence not of record that is necessary to substantiate the claim.
 - b. The information and evidence that VA will obtain.
 - c. The information explaining exactly how to get the claim approved
 - d. The information and evidence that the claimant must submit.
 - e. To advise the claimant to provide any evidence in the claimant's possession that pertains to the claim.

4. In claims development, what is meant by the term link/nexus? 3-2
 - a. There is a connection between the claimant's job on active duty and the claimed disability
 - b. There is a connection between the claimed disability and military service
 - c. There is a connection between claimed disability and current medical evidence
 - d. There is a connection between current medical evidence and the service medical records

5. Which of the following is an example of an instance where the VA will refrain from or discontinue providing assistance in obtaining evidence for a claim: 3-2
 - a. Lack of medical diagnosis
 - b. Lack of legal eligibility
 - c. Lack of stressor information
 - d. Lack of complete financial information

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6. As the claimant's representative, you must assist the claimant by. 3-3, 3-4
 - a. Submitting any and all evidence to the VA to support the claim even if the evidence is weak
 - b. Reviewing any and all evidence to ensure that it is supportive of the claim and will not adversely affect it
 - c. Only submit evidence that the claimant provides in support of their claim
 - d. By law, all evidence that is brought to your attention must be submitted to avoid committing fraud

7. Which statement is true when considering new and material evidence defined as. 3-4
 - a. New evidence means existing evidence that was previously submitted to agency decision makers.
 - b. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an un-established fact necessary to substantiate the claim.
 - c. New and material evidence can be either cumulative or redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, as long as it relates to the claim
 - d. Must be reasonably related to the claim and can be additional evidence that was previously submitted.