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DUTY TO IMPAIR: FAILURE TO ADOPT THE FEDERAL RULES OF EVIDENCE ALLOWS THE VA TO RELY ON INCOMPETENT EXAMINERS AND INADEQUATE MEDICAL EXAMINATIONS

Yelena Duterte*

I. INTRODUCTION

When a servicemember leaves the military, she may be entitled to benefits from the Department of Veterans Affairs (VA) for any disability or injury related to her time in service.¹

These disabilities can range from hearing loss associated with acoustic trauma to leukemia related to radiation exposure in the service.² The outcome of a claim for disability benefits can seriously impact a veteran's life. For example, one study relating to disability benefits for posttraumatic stress disorder (PTSD) confirmed that poverty was almost three times as prevalent, and homelessness nearly twice as high, among denied claimants compared to VA beneficiaries.³

Congress created a paternalistic and non-adversarial adjudicative body in the VA benefits system.⁴ With this focus, Congress also implemented the VA's duty to assist,⁵ believing it would enable veterans to navigate the system without the assistance of counsel.⁶ Once a veteran⁷ applies for benefits, the VA's duty to assist arises and must be fulfilled.⁸ This duty includes obtaining relevant federal records, including military, VA medical, and, potentially, Social Security records.⁹ Further, to help the veteran establish their entitlement to benefits, the VA may need to provide the veteran with a medical examination and opinion, through a

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¹ 38 U.S.C. § 1110.

² See generally 38 C.F.R. pt. 4 (2021).

³ Maureen Murdoch, et al., *Long-term Outcomes of Disability Benefits in US Veterans with Posttraumatic Stress Disorder*, ARCHIVES GEN. PSYCH. (2011).

⁴ See Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513 (2019).

⁵ 38 U.S.C. § 5130A.

⁶ S. REP. NO. 109-297 (2006).

⁷ Although the term “veteran” is used throughout this article, a claimant, like a surviving spouse or surviving child, has similar rights and responsibilities to those of a veteran.

⁸ 38 U.S.C. § 5103A.

⁹ *Id.* § 5103A(c).

Compensation and Pension examination (C&P examination).¹⁰ For instance, if a Vietnam veteran believes his pancreatic cancer resulted from his exposure to Agent Orange,¹¹ the VA has an affirmative duty to provide a medical opinion.¹² The VA would request an examiner¹³ to opine as to the likelihood that the veteran's pancreatic cancer relates to his exposure to Agent Orange in Vietnam.¹⁴

To illustrate the enormity of this program, the VA processed more than 1.2 million claims for benefits in Fiscal Year (FY) 2017.¹⁵ From January of 2017 through April of 2018, the VA spent \$765 million on about one million exams conducted by outside contractors.¹⁶ During this period, outside contractors completed about half of all C&P examinations.¹⁷ Thus, the VA and outside contractors administered approximately two million examinations in total within that time.¹⁸

Although veterans have the burden of proof to show their entitlement to benefits, the VA provides them with a C&P examination to assist in meeting that burden.¹⁹ Generally, a medical professional performs the C&P examination based on the evidence in the record, including lay statements from the veteran and other witnesses, and reliable principles and methods.²⁰ C&P examiners are “nothing more or less than expert witnesses.”²¹ The VA assigns examiners to render an opinion on the veteran's condition and/or the relationship of the condition to their military service.²² The VA, however, does not automatically provide the

¹⁰ *Id.* § 5103A(d).

¹¹ Agent Orange is a well-known defoliant that was used during the Vietnam War. There are a variety of illnesses and diseases that are presumptively linked with exposure to Agent Orange. Pancreatic cancer is not currently on the presumptive list.

¹² See generally *McLendon v. Nicholson*, 20 Vet. App. 79, 86 (Vet. App. 2006). This examination is necessary because pancreatic cancer is not a presumptively related condition to Agent Orange like other cancers, such as soft-tissue sarcoma or prostate cancer.

¹³ Throughout this Article, the people who render opinions will be identified as C&P examiners or examiners, instead of medical professionals or doctors. Although certainly all of these examiners are medical professionals, this Article is about this narrow part of their identity and not a wholesale critique on the entire medical profession.

¹⁴ See U.S. DEP'T OF VETERANS AFF., M21-1 ADJUDICATION PROCEDURES MANUAL pt. I, ch. 1, § C, topic 3 [hereinafter M21-1 MANUAL]. This manual contains the policies and procedures for the handling of veterans' disability benefit claims and is available at https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/topic/55440000004049/M21-1-Adjudication-Procedures-Manual. Citations.

¹⁵ See U.S. GOV'T ACCOUNTABILITY OFF., GAO 19-13, VA DISABILITY EXAMS: IMPROVED PERFORMANCE ANALYSIS AND TRAINING OVERSIGHT NEEDED FOR CONTRACTED EXAMS (2018).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 38 U.S.C § 5107.

²⁰ See *Nieves-Rodriguez v. Peake*, 22 Vet App. 295, 302-04 (Vet. App. 2008).

²¹ *Id.* at 302.

²² See M21-1 MANUAL, *supra* note 14, at pt. III, subpt. iv, ch. 3, § D, topic 2 (indicating that there are only a few very particular types of claims—posttraumatic stress disorder, traumatic brain injury TBI, and audiology—for which veterans required to be provided a specific type of doctor to perform the evaluation and provide an opinion).

examiner's credentials to the veteran.²³ The VA simply relies on the hospital or contractor to assign the examination to a qualified examiner and presumes their competence.²⁴ For instance, the VA allows a neurologist, cardiologist, dermatologist, or physician's assistant to provide an opinion about the etiology of a veteran's multiple sclerosis (MS) condition and when symptoms of MS first arose. While a neurologist may have expertise in MS, the VA would presume even a dermatologist qualified to provide such an opinion.

Aside from unqualified examiners, C&P examinations may be inadequate if the examiner does not explain the evidence on which they rely or the principles and methods they use, or if the examination is conclusory and does not fully explain their analysis.²⁵ To fulfill its duty to assist, the VA must provide adequate C&P examinations.²⁶ A variety of factors may render an examination inadequate, including whether the expert relied on sufficient facts or data, whether the opinion contains clear conclusions with supporting data, and whether the opinion is the product of reliable principles and methods.²⁷ In many C&P examinations, such as those involving PTSD, examiners are not expected to use any specific methods or standards when performing the evaluation.²⁸ Therefore, inadequate medical examinations are, unsurprisingly, the most common error, requiring the Board of Veterans Appeals (Board)²⁹ or Court of Appeals for Veterans Claims (Veterans Court)³⁰ to remand for a new opinion.³¹ However, obtaining relief from the Board

²³ *Mathis v. Shulkin*, 137 S. Ct. 1994, 1994-95 (2017) (Sotomayor, J., statement respecting the denial of certiorari) (noting that the veteran must raise a specific objection to the examiner's competency in order for the VA to provide the credentials of the examiner).

²⁴ See M21-1 MANUAL, *supra* note 14, at pt. III, subpt. iv, ch. 3, § D ("VA medical facilities (or the medical examination contractor) are responsible for ensuring that examiners are adequately qualified. RO employees are *not* expected to routinely scrutinize or question the credentials of clinical personnel to determine acceptability of their reports, unless there is contradictory evidence of record."); see also *Francway v. Wilkie*, 940 F.3d 1304, 1307 (Fed. Cir. 2019) (recognizing that VA medical examiners are presumed to be competent unless the veteran challenges the examiner's expertise or qualifications).

²⁵ See generally *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 300-04 (Vet. App. 2008) (discussing the law and practice of evaluating the probative value of medical opinions).

²⁶ *Barr v. Nicholson*, 21 Vet. App. 303, 310-11 (Vet. App. 2007).

²⁷ *McCray v. Wilkie*, 31 Vet. App. 243, 257 (Vet. App. 2019).

²⁸ Brian P. Marx et al., *The Influence of Veteran Race and Psychometric Testing on Veterans Affairs Posttraumatic Stress Disorder (PTSD) Disability Exam Outcomes*, 29 PSYCH. ASSESSMENT 710, 711 (2017) (stating that examiners "are asked to determine whether the claimant's symptoms meet the diagnostic criteria for PTSD as defined by the *Diagnostic and Statistical Manual for Mental Disorders*," but "there is no standard methodology required to conduct the examination").

²⁹ The Board of Veterans Appeals is the second and final agency review in VA claims adjudication. U.S. DEP'T OF VETERANS AFF., BD. OF VETERANS' APPEALS, ANNUAL REPORT, FISCAL YEAR 2020, at 5 (2020), available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf.

³⁰ The Court of Appeals for Veterans Claims is an Article I court that has exclusive jurisdiction to review Board of Veterans Appeals decisions. *About the Court*, U.S. CT. APP. VETERANS CLAIMS, <http://uscourts.cavc.gov/about.php> (last visited Aug. 13, 2021).

³¹ James D. Ridgway, *Mind Reading and the Art of Drafting Medical Opinions in Veterans Benefits Claims*, 5 PSYCH. INJ. & L. 72, 73 (2012) (observing that inadequate medical evidence is the most common reason for errors in the veterans' disability benefits system, and these problems lead to cases being remanded and delayed).

or Veterans Court still involves quite a delay.³² For legacy cases, the average timeline to obtain a Board decision was 1,538 days.³³ The Veterans Court averages about 238 to 265 days to issue a decision.³⁴ Therefore, a veteran may have to wait over 1,700 days for the Court to remand the case to the Regional Office³⁵ for a new examination.

Although the VA has a duty to assist veterans in this process, the VA impairs veterans by providing and relying on incompetent examiners and inadequate medical opinions.³⁶ To ensure the VA properly and timely assists veterans, this Article explains why the VA should adopt the Federal Rules of Evidence (FRE) 104(a), 702, and 403 when reviewing C&P examinations. The Veterans Court uses some of the FREs as guidance for probative purposes, including parts of Rule 702.³⁷ This Article, however, proposes that the VA go a step further and remove C&P examinations that do not comply with these FREs from the record completely because these opinions should not be relied on in the adjudication.

FREs 104(a) and 702(a)³⁸ will allow the VA and the veteran to determine whether the examiner is qualified and competent to render the opinion.³⁹ If the examiner is unqualified, this rule will allow the removal of the C&P examination from the record. FRE 702(b)-(d) will provide the VA and veteran a full understanding of the evidence and methods the examiner used in their opinion.⁴⁰ If the examination were inadequate because it fails to consider a relevant piece of evidence or uses unreliable methods, FRE 702 would permit the examination to be removed from the record. And finally, FRE 403 will allow unfairly prejudicial or confusing C&P examinations to be removed from the record.⁴¹

The VA, the Board, or the Veterans Court may inquire into the purpose of removing an examination. When the Board or the Court remands the case for a new opinion, the inadequate opinion continues to live in the claims file for future adjudicators to rely on.⁴² Every veteran who files a claim with the VA has a claims file.⁴³ The claims file stores all documents related to a veteran's benefits, like

³² U.S. DEP'T OF VETERANS AFF., *supra* note 29, at 30-32. Although the Board has begun tracking Appeals Modernization Act (AMA) cases and those timelines, it is unclear how reflective those timelines will be in the coming years.

³³ *Id.* at 30.

³⁴ U.S. CT. APP. FOR VETERANS CLAIMS, FISCAL YEAR 2020 ANNUAL REPORT 4 (2020), <http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf>.

³⁵ There are fifty-seven Regional Offices around the country that are the first level of adjudication. U.S. DEP'T OF VETERANS AFF., VETERANS BENEFITS ADMIN., *Regional Offices Websites*, <https://www.benefits.va.gov/benefits/offices.asp> (last updated Aug. 12, 2020).

³⁶ *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari).

³⁷ *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302 (Vet. App. 2008).

³⁸ This Article separates FRE 702(a) from the rest of FRE 702, because 702(a) goes to the qualities of the examiner, rather than to the reliability of the examination itself.

³⁹ FED. R. EVID. 104(a).

⁴⁰ FED. R. EVID. 702.

⁴¹ FED. R. EVID. 403.

⁴² M21-1 MANUAL, *supra* note 14, at pt. III, subpt. iv, ch. 5, § A, topic 2 ("With a few exceptions, all evidence submitted is admitted into the record.").

⁴³ Benjamin P. Pomerance and Katrina J. Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, 23 WIDENER L. REV. 1, 13 (2017).

compensation, GI Bill, Vocational Rehabilitation, and pension.⁴⁴ Documents will typically include all correspondence to and from the VA, military records, VA and private medical records, past decisions, and past examinations.⁴⁵

By keeping an inadequate opinion in the claims file, a later adjudicator or C&P examiner may continue to rely on it. For example, in *Medina*, the Veterans Court found that the Board inexplicably relied on examinations that the Board previously determined were inadequate.⁴⁶ In this decade-long proceeding, the VA obtained four C&P examinations,⁴⁷ seeking a fourth after three inadequate examinations.⁴⁸ However, the Board continued to rely on the findings of all four examinations, without explaining how each examination was reliable and why they could trust those previously inadequate examinations.⁴⁹ The Court pointed out that even the fourth opinion may be inadequate, as it relies on the same deficiencies as the previous three opinions.⁵⁰ Here, keeping inadequate examinations in the file clearly interfered with the Board's decision-making process and may have even influenced the fourth examiner.

Considering these issues—the veteran's burden of proof, unqualified examiners, inadequate VA examinations, and long delays—the VA has ultimately created a frustrating process that is nearly impossible for veterans to navigate alone. For the process to be fair, the unreliable examination must be removed from the file once the VA or the Court deems it inadequate. In some instances, it may be appropriate for the VA to remove only the inadequate part of the examination by redacting the unreliable portions.⁵¹ This Article posits that the VA's duty to assist requires the VA to remove medical examinations from unqualified examiners who use unreliable methods and fail to thoroughly review the record.

The remainder of this Article consists of three parts. Part II discusses the role of C&P examinations in the VA system. Part III explains how the Veterans Court has used the Federal Rules of Evidence to help mold VA rules in the past. And Part IV identifies actionable items for the VA, veteran advocates, and the Court to implement Federal Rules of Evidence 104(a), 702, and 403 to ensure that this process is fair for veterans.

⁴⁴ Veterans Benefits Manual 16.1.1. Almost all material created by or received by the VA that is related to the veteran's claims, and the claims of the veteran's dependents or survivors, is included in the claims folder.

⁴⁵ Veterans Benefits Manual 16.1.3.

⁴⁶ *Medina v. Wilkie*, No. 19-5823, 2020 U.S. App. Vet. Claims LEXIS 1966, *3-4 (Vet. App. Oct. 27, 2020).

⁴⁷ *Id.*

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 6.

⁵¹ See *Monzingo v. Shinseki*, 26 Vet. App. 97, 107 (Vet. App. 2012). The court determined that even if a medical opinion is inadequate to decide the claim, it does not necessarily follow that the opinion is entitled to absolutely no probative value.

II. THE ROLE OF COMPENSATION & PENSION EXAMINATIONS IN THE VA SYSTEM

As it deliberated whether to allow judicial review in the Veterans Judicial Review Act (VJRA), Congress struggled to balance the paternalistic nature of VA claims and review by the courts.⁵² It specifically acknowledged the non-adversarial nature of the system.⁵³

Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. . . . In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.⁵⁴

A hallmark of the VA system was—and still is—its paternalistic, non-adversarial nature, along with the non-binding nature of the Federal Rules of Evidence.⁵⁵ Congress did not want *veterans* to be limited by the types of evidence they could submit to support their claims for benefits.⁵⁶ It did not consider, however, that the VA would use the lack of rules to protect itself. Congress created a system in which the VA has no representation at the hearing, does not call witnesses, and does not resort to cross-examination of witnesses presented by the veteran.⁵⁷ The veteran, on the other hand, may present any witnesses, present any evidence, and be represented by counsel.⁵⁸

To obtain benefits, the veteran has the burden of proof.⁵⁹ They must show that they have a current disability, that they experienced an event or injury in service, and that a nexus exists between the in-service occurrence and the disability.⁶⁰ Generally, to establish a nexus, a veteran must have competent medical

⁵² See generally Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

⁵³ H.R. REP. NO. 100-963 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782, 5782.

⁵⁴ Manio v. Derwinski, 1 Vet. App. 140, 144 (Vet. App. 1991).

⁵⁵ See *id.*

⁵⁶ H.R. REP. NO. 100-963, at 14 (emphasis added) (“[A] claimant is free to submit medical reports from private physicians, statements from fellow service members, photographs, or any other evidence to supplement the claim. The material is incorporated into the official claims folder and becomes part of the record for review without regard to any of the formal rules of evidence commonly found in courts”).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 38 U.S.C. § 5107(a) (2000).

⁶⁰ *Id.* § 1110.

evidence⁶¹ to support the relationship between service and the current disability.⁶² In many cases in which a veteran does not have medical evidence to support a nexus, the VA requires a medical examination and opinion about the relationship between the disability and service.⁶³

Before scheduling an examination, the VA reviews the record to determine whether an evaluation is necessary in accordance with its duty to assist.⁶⁴ The VA must schedule an examination when evidence exists of an in-service occurrence, a diagnosis, or recurrent or persistent symptoms, along with an indication that the disability may be associated with service.⁶⁵ If an adequate medical examination is already in the file, the VA need not schedule an examination and can instead rely on the medical evidence in the file.⁶⁶ When no sufficient examination is in the file, the veteran's burden to show that an examination is required is fairly low.⁶⁷ The stakes of the examination, however, are not.⁶⁸ The examiner may opine as to the diagnosis of the condition, the symptomology of that condition, and, most significantly, the relationship of that condition to service.⁶⁹

For example, if an Operation Iraqi Freedom (OIF) veteran who has been diagnosed with PTSD explains that it stems from an incident related to her Humvee's collision with a roadside Improvised Explosive Device (IED), the VA would schedule an examination. The examination would require the C&P examiner to render an opinion as to the likelihood that the traumatic incident in Iraq caused her PTSD;⁷⁰ the opinion does not have to rise to the level of medical certainty.⁷¹ Once an examination is complete, the adjudicators⁷² review the evidence to determine whether the veteran meets the requirements for service-connected compensation.⁷³ To rely on the examination, the adjudicator must

⁶¹ See 38 C.F.R. § 3.159(b)(1) (2019). "Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses." *Id.* § 3.159(a)(1).

⁶² 38 C.F.R. § 3.303 (1961).

⁶³ *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (Vet. App. 2006).

⁶⁴ *See id.*

⁶⁵ *Id.* at 81 (2006).

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ Maureen Murdoch, et al., *Long-term Outcomes of Disability Benefits in US Veterans with Posttraumatic Stress Disorder*, 68 ARCHIVES GEN. PSYCH. 1072, 1072 (2011). The study examined long-term outcomes associated with receiving or not receiving disability benefits for PTSD. The study found that those receiving PTSD benefits had reductions in PTSD symptoms, less homelessness, and less poverty.

⁶⁹ *See generally* M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § A.

⁷⁰ *See McLendon*, 20 Vet. App. at 84.

⁷¹ *Jones v. Shinseki*, 23 Vet. App. 382, 387 n.1 (Vet. App. 2010).

⁷² Hugh McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 291 (2019). It is important to note that the adjudicators are not lawyers or medical professionals.

⁷³ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 6, § C.

confirm that the examination is adequate.⁷⁴ “A medical opinion is adequate when it is based upon consideration of the veteran’s prior medical history and examinations and also describes the disability in sufficient detail so that the Board’s evaluation of the claimed disability will be a fully informed one.”⁷⁵ The Veterans Court provides a non-exhaustive list of considerations when determining an examination’s adequacy; this list includes analyzing the expert’s skill and knowledge, the expert’s clear conclusions, whether the expert relied on sufficient facts or data, and whether the medical text evidence upon which an examination relies contains qualifying or contradictory aspects.⁷⁶ If an adjudicator finds an examination inadequate, the VA must order a new examination or request clarification from the examiner.⁷⁷

Once the file contains an adequate examination, the adjudicator can weigh the evidence to determine if the veteran is entitled to benefits.⁷⁸ The standard of proof is the benefit of the doubt—if reasonable doubt arises after reviewing all of the evidence, the doubt should be resolved in favor of the veteran.⁷⁹ In its review, the adjudicator should weigh all evidence for each element: whether a veteran has a disability; whether the veteran experienced an event or injury in service; and whether a relationship, or nexus, exists between the two.⁸⁰ The Regional Office adjudicators, unfortunately, adopt the examiner’s words and conclusions for the disability and nexus elements.⁸¹ The VA’s reliance on *Colvin*,⁸² such that the Board cannot depend on its own unsubstantiated medical conclusions, seemingly forces the VA to rely almost exclusively on the C&P examiner’s opinions.⁸³

The following subsections dissect three main areas of concerns about C&P examinations: (A) competency of the C&P examiner and how to raise such a challenge; (B) adequacy of the examination; and (C) other concerns, including the scope of the examination and biases.⁸⁴ Competency focuses on the examiner’s particular qualifications, background, and expertise in the area,⁸⁵ while adequacy focuses on the data, methods, and analysis used to complete the examination.⁸⁶

A. Competency of C&P Examiners

The VA consists of three administrations: the Veterans Benefits Administration (VBA), the Veterans Health Administration (VHA), and the

⁷⁴ Barr v. Nicholson, 21 Vet. App. 303, 310-11 (Vet. App. 2007).

⁷⁵ *Id.* at 311.

⁷⁶ *See id.*

⁷⁷ 38 C.F.R. § 4.70.

⁷⁸ *Id.* § 3.102.

⁷⁹ *Id.*

⁸⁰ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 5, § A.

⁸¹ Blair E. Thompson, *The Doctor Will Judge You Now*, 89 U. CIN. L. REV. 963, 982 (2020).

⁸² Colvin v. Derwinski, 1 Vet. App. 171, 175 (Vet. App. 1991).

⁸³ Thompson, *supra* note 80, at 964.

⁸⁴ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § A.

⁸⁵ Rizzo v. Shinseki, 580 F.3d 1288, 1292 (Fed. Cir. 2009).

⁸⁶ Nieves-Rodriguez v. Peake, 22 Vet App. 295, 299 (Vet. App. 2008).

National Cemetery Administration (NCA).⁸⁷ The VBA orders C&P examinations from either the VHA or a third-party contractor.⁸⁸ The VA medical facilities or the contactors then find proper examiners.⁸⁹ The VA adjudication manual reveals that the medical facilities (or the medical examination contractors) bear the responsibility to ensure that examiners are adequately qualified.⁹⁰

Although the Veterans Court treats C&P examiners as experts, the Regional Office adjudicators do not routinely scrutinize the qualifications of clinical personnel to determine the acceptability of their reports.⁹¹ For VHA clinicians, the VA merely requires a signature, name, and credentials (MD, Ph.D., NP, etc.).⁹² Yet, for outside contractors, examinations must specify the examiner's specialty, like cardiologist, pulmonologist, or psychiatrist.⁹³ No other information about the examiner's background is required.⁹⁴ As a broad policy, though, the VA does not require a specialist to evaluate the veteran.⁹⁵ Licensed health care professionals, including nurse practitioners and physician assistants, can conduct examinations.⁹⁶ The only mandatory training for examiners is a five-hour recorded training on the general examinations, military sexual trauma, medical opinions, aggravation opinions, and Gulf War examinations.⁹⁷ The VA guidance even instructs C&P examiners to “[r]efrain from making statements regarding individual lack of training or skill as being inadequate to make determinations.”⁹⁸

The VA does, however, require that specialists conduct five types of examinations: initial mental health, hearing loss, vision, dental, and initial traumatic brain injury (TBI).⁹⁹ For instance, psychiatrists, licensed doctorate level psychologists, or closely supervised mental health professionals,¹⁰⁰ must perform initial mental health examinations. Moreover, the VA requires that an audiologist complete evaluations for hearing loss or tinnitus.¹⁰¹

C&P examiner requirements for traumatic brain injuries require further history and background for optimal clarity. A 2018 Office of Inspector General (OIG) report explained that the VBA enforced certain requirements for TBI

⁸⁷ John W. Brooker, Evan R. Seamone & Leslie C. Rogall, *Beyond “T.B.D.”: Understanding VA’s Evaluation of a Former Servicemember’s Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 MIL. L. REV. 1, 42 (2012).

⁸⁸ *Nieves-Rodriguez*, 22 Vet App. at 302-04; 38 C.F.R. § 3.326; 38 C.F.R. § 4.70.

⁸⁹ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* § A - Examination Requests Overview, Specialist Examinations; *see generally* M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

⁹⁶ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

⁹⁷ VHA Directive 1603.

⁹⁸ DMA Clinician’s Guide, 2021, 10, *Common Pitfalls to Avoid*.

⁹⁹ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § A; *see generally* M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

¹⁰⁰ Doctorate level mental health professionals, psychiatry residents, and clinical or counseling psychologists completing one year internship or residency are including in the definition of other mental health professionals, who need supervision to provide an opinion.

¹⁰¹ *Id.*

examiners that did not entirely align with the VHA's requirements.¹⁰² As discussed above, the VBA relies on the VHA's determination of who qualifies to complete examinations. By permitting misaligned or contradictory guidance, veterans may not have received qualified examiners for their TBI examinations.¹⁰³ In response to these conflicting guidelines, the VA determined that many veterans received examinations by unqualified examiners and sought to remedy the situation.¹⁰⁴ In 2016, "VBA initiated a review of TBI medical examinations and found more than 24,000 [] veterans who received a medical examination by someone outside of the four categories required."¹⁰⁵ The Secretary granted equitable relief¹⁰⁶ to those veterans to correct the error and allowed them to receive a new examination from a qualified examiner.¹⁰⁷ The Secretary's need to remedy the situation arose from three main issues: this inconsistent guidance by VBA and VHA, the need for examinations exceeding VA capacity, and the lack of credentials required on the examination itself.¹⁰⁸

As of 2021, the VA allows only psychiatrists, neurosurgeons, or neurologists—upon completion of TBI training for C&P examinations—to perform initial diagnoses.¹⁰⁹ Although TBI diagnoses are complex, the reason TBIs are one of only few conditions that require a specialist is unknown.

For example, the VA does not require any type of specialist to examine veterans claiming Gulf War-related illnesses.¹¹⁰ Gulf War veterans receive presumptive service connection for medically unexplained chronic multi-symptom illnesses (MUCMI).¹¹¹ VA regulations define a MUCMI as "a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities."¹¹² Further, VA regulations provide examples of manifestations of undiagnosed illnesses, including fatigue, symptoms involving the skin, headaches, muscle pain, joint pain, neurological issues, neuropsychological issues, respiratory issues, sleep disturbances, gastrointestinal conditions, cardiovascular conditions, weight loss, and menstrual disorders.¹¹³ Considering all the potential symptoms and conditions related to the Gulf War—

¹⁰² DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., VA OIG 16-04558-249, VA POLICY FOR ADMINISTERING TRAUMATIC BRAIN INJURY EXAMINATIONS i (2018).

¹⁰³ See generally M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D - Examination Reports.

¹⁰⁴ DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., VA OIG 16-04558-249, VA POLICY FOR ADMINISTERING TRAUMATIC BRAIN INJURY EXAMINATIONS 11 (2018).

¹⁰⁵ *Id.* at 12.

¹⁰⁶ Equitable relief is a broad and discretionary power that the Secretary may use when it determines there is administrative error. 38 U.S.C. § 503.

¹⁰⁷ See DEP'T OF VETERANS AFFS., OFF. OF INSPECTOR GEN., VA OIG 16-04558-249, VA POLICY FOR ADMINISTERING TRAUMATIC BRAIN INJURY EXAMINATIONS 6 (2018). OIG is unclear how many veterans actually received new evaluations based on this guidance.

¹⁰⁸ *Id.* at 13-15.

¹⁰⁹ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

¹¹⁰ See generally M21-1 MANUAL, *supra* note 14, pt. IV, subpt. i, ch. 3, § A.

¹¹¹ 38 C.F.R. § 3.317(a)(2)(ii).

¹¹² *Id.*

¹¹³ *Id.* § 3.317(b).

including neurological and neuropsychological issues¹¹⁴—why the VA does not require a doctor or doctors with a specialty to examine veterans with this illness is unclear. An examiner unspecialized in this area may attribute these symptoms to several conditions, rather than considering them holistically as part of a MUCMI.

Allowing any medical provider to perform the examination is not only an issue for diagnosing a condition, but the VA also requires examiners to render opinions about the nexus element—the relationship between military service and the diagnosis.¹¹⁵ For instance, a veteran may claim that their currently diagnosed cancer (which is not on a presumptive list¹¹⁶) relates to some exposure to Agent Orange,¹¹⁷ from Camp Lejeune contamination,¹¹⁸ burn pits,¹¹⁹ or one of the many bases designated Superfund sites by the Environmental Protection Agency (EPA).¹²⁰ The VA does not require any specialist to surmise as to the probability a veteran’s cancer relates to their exposure.¹²¹

In one very specific instance, concerning brain cancer claims related to service in the Gulf, the VA instructs the adjudicator to provide specific language to the examiner.¹²² The adjudicator must tell the examiner that specific environmental hazards include “[r]eports of chemical alarms sounding in Saudi Arabia,” “[s]abotage of some Kuwaiti oil wells, where over 600 oil wells were blown up or set on fire by Iraqi troops,” and “[d]etonation of Iraqi munitions.”¹²³ The adjudicator must also provide the “List of Resources Concerning Gulf War I Service and the Development of Brain Cancer”¹²⁴ to the claims file.¹²⁵ Since brain cancer is not a Gulf War presumption, the examiner determines on a case-by-case basis whether the condition relates to “environmental hazards” during the Gulf War.¹²⁶

¹¹⁴ Apostolos Georgopoulos, *Gulf War Illness (GWI) as a Neuroimmune Disease*, *Experimental Brain Research*, 235 EXPERIMENTAL BRAIN RSCH. 3217-25, Jul. 31, 2017. The study concludes that altered brain communication in GWI likely reflects immune-related processes.

¹¹⁵ See 38 C.F.R. § 3.159(c)(4).

¹¹⁶ *Id.* § 3.309. Statutes or regulations can create a link between some exposure, like Agent Orange or Camp Lejeune toxins in the water, and a disability that veterans are not required to prove. In short, if a veteran proves exposure and a disability on the presumptive list, the VA will assume that the condition is related to that exposure.

¹¹⁷ *Agent Orange exposure and VA disability compensation*, U.S. DEP’T. OF VETERAN AFFS., <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/agent-orange/> (June 15, 2021).

¹¹⁸ *Camp Lejeune water contamination health issues*, U.S. DEP’T. OF VETERAN AFFS., <https://www.va.gov/disability/eligibility/hazardous-materials-exposure/camp-lejeune-water-contamination/> (Sept. 22, 2020).

¹¹⁹ *Airborne Hazards and Burn Pit Exposures*, U.S. DEP’T OF VETERAN AFFS., <https://www.publichealth.va.gov/exposures/burnpits/> (last visited Aug. 12, 2021).

¹²⁰ John W. Hamilton, *Contamination at U.S. Military Bases: Profiles and Responses*, 35 STAN. ENV’T L.J. 223 (2016). Pollution at military bases is so widespread and endemic that more than two-thirds of all Superfund sites listed by the Environmental Protection Agency (EPA)—nearly nine hundred sites in all—are military affiliated.

¹²¹ See generally M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

¹²² M21-1 MANUAL, *supra* note 14, pt. IV, subpt. ii, ch. 1, § E.

¹²³ *Id.*

¹²⁴ This list includes five studies, with the most recent being one from 2009.

¹²⁵ M21-1 MANUAL, *supra* note 14, pt. IV, subpt. ii, ch. 1, § E.

¹²⁶ *Id.*

Even considering the complexity of the etiology of brain cancer and its relationship to chemical exposure, the VA does not require any specialist to review this claim.¹²⁷ Rather, the VA permits a cardiologist to determine whether a Gulf War veteran's brain cancer diagnosis relates to various environmental exposures.¹²⁸

Based on the VA's lack of information about the C&P examiners, in addition to its reliance on VA medical centers or third-party contractors to identify the proper examiners, the adjudicators clearly do not assess the credentials of its examiners. To compel the VA to review the qualifications and expertise of C&P examiners, the veteran must challenge the competency of the examiner.¹²⁹

1. Raising Competency

Since 2009, the Federal Circuit has developed thorough case law on how to raise or challenge an examiner's competency.¹³⁰ In *Rizzo*, the veteran argued—for the first time at the Veterans Court—that the examiner was not qualified to opine as to whether his eye condition related to radiation exposure.¹³¹ The VA received medical testimony from a C&P examiner/physician, who was also the VA's Chief Officer of Public Health and Environmental Hazards.¹³² The examiner found that the exposure to radiation likely did not attribute to the veteran's eye condition.¹³³ A private expert, who had a Ph.D. in radiation physics, testified that the high dose of radiation may have caused Rizzo's eye condition.¹³⁴ The Board relied on the VA C&P examiner's opinion as more probative because it found the private expert's opinion speculative.¹³⁵ In *Rizzo*, the Federal Circuit analogized the presumption of regularity¹³⁶ to the VA's process in assigning an examiner to complete the evaluation.¹³⁷ Ultimately, the Federal Circuit found that if a veteran does not raise the issue or challenge the competency of the examiner when they

¹²⁷ See generally M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D.

¹²⁸ *Id.*

¹²⁹ *Rizzo v. Shinseki*, 580 F.3d 1288, 1289 (Fed. Cir. 2009).

¹³⁰ *Id.*

¹³¹ *Id.* at 1290.

¹³² *Id.* at 1291.

¹³³ *Id.* at 1289.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1289.

¹³⁶ Bonnie Lindeman, *A Circuit Supreme: How the D.C. Circuit Court is Using a Presumption of Regularity in Latif v. Obama to Make New Law and Ensure No Detainees Are Released from Guantanamo Bay*, 21 AM. U. J. GENDER SOC. POL'Y & L. 187. The presumption of regularity is a deference doctrine, in which courts defer to the agency. "In many cases, courts will grant a presumption of regularity to official acts. Courts generally confer the presumption of regularity to documents such as official tax receipts, court documents, mail delivery methods, and agency actions." *Id.*

¹³⁷ *Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009).

are before the agency, they are barred from doing so at the Court due to issue exhaustion.¹³⁸

In *Bastien*, the Federal Circuit strengthened the VA's presumption by requiring the veteran to set forth specific reasons why the veteran believed an examiner was not qualified—before the VA provided any evidence about the examiner.¹³⁹ In *Parks*, the Federal Circuit further held that if the veteran fails to object specifically to the examiner's competence, the veteran waives the issue.¹⁴⁰ Specifically, the veteran must explain why she believes the examiner is incompetent to render this type of opinion without presenting information about the examiner's credentials.¹⁴¹

Several years after *Rizzo*, *Bastien*, and *Parks*, Freddie Mathis again raised the issue of competency before the Veterans Court.¹⁴² Mathis suffered from an inflammatory condition that impacted his lungs and lymph glands.¹⁴³ The VA obtained a medical opinion from a VA examiner, Dr. Dudek, who specialized in family practice.¹⁴⁴ Dr. Dudek reviewed Mathis's claims, including lay statements and the hearing transcript.¹⁴⁵ Dr. Dudek, however, did not examine or perform any tests on Mathis.¹⁴⁶ Even so, Dr. Dudek concluded that Mathis's lung condition was less likely than not related to his service.¹⁴⁷ At the Veterans Court, Mr. Mathis raised Dr. Dudek's competency, specifically claiming that no evidence existed that Dr. Dudek had any expertise in pulmonology.¹⁴⁸ The Federal Circuit, following *Rizzo*, determined that because Mathis did not raise the issue at the agency, he could not raise it at the Court for the first time.¹⁴⁹ Mathis requested an en banc review by the Federal Circuit and petitioned for certiorari to the Supreme Court.¹⁵⁰ Both courts denied him relief.¹⁵¹

Although the Supreme Court denied certiorari on this case, Justices Sotomayor and Gorsuch provided commentary to continue the dialogue between the VA, veterans, and the courts.¹⁵² Justice Sotomayor highlights how the *Mathis* decision puts veterans in a “catch-22” situation.¹⁵³ The VA requires the veteran to specifically object to an examiner's competency before the VA provides the examiner's qualifications.¹⁵⁴ In his dissent, Justice Gorsuch questions the validity

¹³⁸ *Id.* at 1289.

¹³⁹ *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed. Cir. 2010).

¹⁴⁰ *Mathis v. McDonald*, 643 Fed. Appx. 968, 976 (Fed. Cir. 2016) (citing *Parks v. Shinseki*, 716 F.3d 581 (Fed. Cir. 2013)).

¹⁴¹ *Parks v. Shinseki*, 716 F.3d 581, 585-86 (Fed. Cir. 2013).

¹⁴² *See generally Mathis*, 643 Fed. Appx. 968 (Fed. Cir. 2016).

¹⁴³ *Id.* at 969.

¹⁴⁴ *Id.* at 970.

¹⁴⁵ *Id.* at 969.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 970.

¹⁴⁹ *See generally Mathis v. McDonald*, 643 Fed. Appx. 968, 975 (2016).

¹⁵⁰ *Id.*

¹⁵¹ *Mathis v. McDonald*, 834 F.3d 1347, 1348 (2016); *Mathis v. Shulkin*, 137 U.S. 1994, 1994 (2017).

¹⁵² *Shulkin*, 137 U.S. at 1994-95.

¹⁵³ *Id.* at 1994.

¹⁵⁴ *Id.*

of the presumption.¹⁵⁵ He illuminates the issue by asking whether the VA should have the power to presume the competence of its own examiners when its job is to assist the veteran and not impair them through this process.¹⁵⁶ He also muses that several of his colleagues at the Federal Circuit have begun to question this presumption and that its days may be numbered.¹⁵⁷

The Federal Circuit seemingly considered Justice Gorsuch's dissent when deciding *Francway*. It clarified the presumption of competency, specifying that the veteran must only raise the issue at the agency.¹⁵⁸ The Court presumably retreats from its earlier findings in *Rizzo*, *Bastien*, *Parks*, and *Mathis*.¹⁵⁹ The Federal Circuit explains that “[they] 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.”¹⁶⁰ The Court did not mince words: “[t]he presumption of competency requires nothing more than is required for veteran claimants in other contexts—simply a requirement that the veteran raises the issue.”¹⁶¹

Since *Francway*, the Board has inconsistently implemented the rules outlined by the Federal Circuit. For example, in a 2021 Board Decision, the Board noted that the veteran sought to challenge competency.¹⁶² The veteran submitted a statement requesting a qualified medical doctor, preferably an orthopedic, to perform the examination.¹⁶³ The Board determined that this statement did not adequately raise the competency issue because the veteran never identified any arguments or evidence that the examiner was not qualified.¹⁶⁴ The Board continued to use *Rizzo* as a shield, explaining that the presumption of competence applies to the physician assistant.¹⁶⁵ Because the Board determined that the presumption of competence still stood, it did not analyze this examiner's qualifications.¹⁶⁶ This decision denotes that the Veterans Court may need to provide better guidance to the Board, since the Board improperly requires specific identification of the examiner's competency before analyzing whether an examiner is competent.

The law may evolve even further in this area due to the Supreme Court's recent decision in *Carr v. Saul*. In this Social Security case, the Supreme Court found that courts cannot impose issue exhaustion when no statute or regulation requires issue exhaustion.¹⁶⁷ The Supreme Court noted two main factors: (1) whether issue exhaustion should be required, including whether normal adversarial

¹⁵⁵ *Id.* at 1995 (Gorsuch, J. dissenting from denial of certiorari).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Francway v. Wilkie*, 940 F.3d 1304, 1307 n.1 (Fed. Cir. 2019).

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 1307.

¹⁶¹ *Id.* at 1308.

¹⁶² (Title Redacted by Agency), No. 13-18 403, BVA 21-009383, 2021 BVA LEXIS 12727 (Bd. Vet. App. Feb. 22, 2021).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Carr v. Saul*, 141 S. Ct. 1352 (U.S. 2021).

litigation applies to the proceeding, and (2) whether raising the issue at the agency would be futile.¹⁶⁸ The Court determined that although the administrative law judge (ALJ) process at the Social Security Administration (SSA) comprised of some adversarial aspects, the SSA was not adversarial enough to require issue exhaustion at the court.¹⁶⁹ The Court also recognized that agencies are not well-suited to address regulatory or constitutional challenges and that such arguments are futile when the agency cannot remedy the issue on its own.¹⁷⁰

The Veterans Court currently has discretion to allow new arguments on appeal; however, *Carr* may require the Veterans Court to accept newly raised arguments.¹⁷¹ Because no statutory or regulatory language requires issue exhaustion at the VA before going to court, the Veterans Court may be required to allow newly raised arguments relating to competency. Although the VA's process is non-adversarial, competency is not a constitutional or regulatory issue where such arguments would be futile at the agency. The way the Veterans Court and the Federal Circuit consider *Carr* and how it applies to VA adjudications about competency will be interesting.

For now, veterans must simply raise competency issues to the VA for qualifications of an examiner to be reviewed. Part IV(A) of this Article outlines how the implementation of Federal Rules of Evidence (FRE) 104(a) and 702(a) can ensure that qualified experts provide veterans with C&P examinations.

B. Adequacy of Examinations

Adequacy, unlike competency, relates to the heart of the examination itself. Under its duty to assist, the VA must provide an adequate examination.¹⁷² *Nieves-Rodriguez* is the leading case on the adequacy of C&P examinations.¹⁷³ In the case, the Veterans Court instructed the VA to use FRE 702 as a guide for determining the probative value of an examination.¹⁷⁴ A qualified expert may give expert testimony¹⁷⁵ when the testimony is based on sufficient facts or data, the testimony results from reliable principles and methods, and the expert witness applies the principles and methods reliably to the facts of the case.¹⁷⁶ The court instructed the Board to apply each element and to determine the probative value of the examination.¹⁷⁷

¹⁶⁸ *Id.* at 1360-61.

¹⁶⁹ *Id.* at 1361.

¹⁷⁰ *Id.*

¹⁷¹ See *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000).

¹⁷² See generally *Barr v. Nicholson*, 21 Vet. App. 303, 310 (Vet. App. 2007).

¹⁷³ See *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (Vet. App. 2008).

¹⁷⁴ *Id.* at 302.

¹⁷⁵ The Veterans Court looks to FRE 702(b)-(d) and seems to ignore 702(a) for adequacy purposes. Thus, in the discussion about adequacy, this Article will focus on those three prongs. In terms of competency, 702(a) will be important to implement.

¹⁷⁶ *Nieves-Rodriguez*, 22 Vet. App. at 302.

¹⁷⁷ *Id.*

1. Based on Sufficient Facts or Data

The first prong of the *Nieves-Rodriguez* test for examination adequacy is whether the testimony is based on sufficient facts or data.¹⁷⁸ The C&P examiner must be informed of the necessary facts on which base his opinion.¹⁷⁹ When asked to render an opinion, the C&P examiner receives the claims file, which contains all of the evidence that the VA has in its possession, including service records, medical records, and any statements that the veteran has provided to the VA.¹⁸⁰ Two major issues typically arise in the area of sufficient facts: (1) lay statements and (2) relying on an inaccurate factual premise.

Congress clearly indicated that veterans should be able to submit lay statements to support their claim for benefits.¹⁸¹ Lay statements are statements or affidavits by non-medical professionals that may include personal statements from the veteran or statements from fellow servicemembers, family, or friends who can testify or corroborate facts.¹⁸² The VA and the examiner, in its opinion, must consider lay evidence.¹⁸³ When an examiner disregards lay testimony, the VA may find the opinion non-probative and request a new opinion.¹⁸⁴

For example, if a veteran looks to increase his rating¹⁸⁵ for migraines, the VA must consider how often the veteran has had prostrating or prolonged attacks.¹⁸⁶ In addition to current medical evidence about the severity of the condition, the examiner must also consider the veteran's testimony or any other lay witness testimony about the severity of the condition.¹⁸⁷ In many instances, medical records explaining the severity or frequency of the veteran's migraines will be absent. Yet, statements from family members or co-workers may corroborate the frequency with which the veteran misses work or lies down in a dark room to mitigate the severity of the condition. If the examiner disregards these lay statements completely in her report, the examination must be considered inadequate because of the examiner's failure to consider all of the evidence in the file.

The second common issue with examinations occurs when the examiner relies on an inaccurate factual premise. In *Reonal v. Brown*, a doctor's opinion, which was based entirely on the veteran's account of his medical history and service background, did not reflect the veteran's service history.¹⁸⁸ The Court stated that an opinion based on an inaccurate factual premise has no probative

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 303.

¹⁸⁰ *Id.* at 301.

¹⁸¹ H.R. REP. NO. 100-963, at 11 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782, 5782.

¹⁸² See 38 C.F.R. § 3.159 (2021).

¹⁸³ Barr v. Nicholson, 21 Vet. App. 303, 311 (Vet. App. 2007).

¹⁸⁴ See generally Smith v. Wilkie, 32 Vet. App. 332 (Vet. App. 2020).

¹⁸⁵ VA rates disabilities based on severity and are codified in 38 C.F.R. pt. 4 (2021).

¹⁸⁶ 38 C.F.R. § 4.124a (2021).

¹⁸⁷ Miller v. Wilkie, 32 Vet. App. 249, 260 (Vet. App. 2020). The examiner must address the veteran's lay statements to provide the Board with an adequate medical opinion.

¹⁸⁸ Reonal v. Brown, 5 Vet. App. 458, 461 (Vet. App. 1993).

value.¹⁸⁹ The Court further acknowledged that it will correctly discount an opinion based on an inaccurate factual premise entirely.¹⁹⁰

For instance, in *Seelye v. Wilkie*, the veteran claimed that her exposure to petroleum caused her bladder cancer.¹⁹¹ The veteran testified that she was exposed to petroleum twenty-four hours a day as a petroleum specialist working on a fuel farm.¹⁹² Fellow servicemembers provided statements about showering in water that contained a high amount of diesel fuel and failing to use any protective gear other than gloves.¹⁹³ The Board accepted these statements as credible from Seelye and her fellow servicemembers.¹⁹⁴ The examiner, however, determined that the veteran's exposure to petroleum was minimal because it "would only be for 'a few hours daily' and accompanied by the use of protective gear."¹⁹⁵ The Veterans Court found that the examination was not probative because it was based on an inaccurate factual basis—that Seelye was exposed to petroleum only a few hours a day and she had sufficient protective gear.¹⁹⁶ Thus, the Court required that the VA provide a new examination due to the examiner's reliance on an inaccurate factual premise.¹⁹⁷

2. Reliable Principles and Methods

The second requirement of examination adequacy—that "the testimony is the product of reliable principles and methods"—is an important element when evaluating whether an examination is based on sound medical principles.¹⁹⁸ The VA does not typically set methods for diagnosing conditions for its C&P examiners to utilize, except in a few areas where regulations require as much.¹⁹⁹ For instance, the VA must conduct a Pulmonary Function Test (PFT) Pre and Post for pulmonary issues.²⁰⁰

For most other conditions, the VA does not require any type of test for diagnosing a condition.²⁰¹ For example, several psychometric testing protocols are

¹⁸⁹ *Id.*

¹⁹⁰ *Monzingo v. Shinseki*, 26 Vet. App. 97, 107 (Vet. App. 2012).

¹⁹¹ *See Seelye v. McDonough*, No. 19-7185, 2020 U.S. App. Vet. Claims LEXIS 2070 (Vet. App. Nov. 13, 2020).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (Vet. App. 2008).

¹⁹⁹ DMA C&P Disability Examination Clinician's Guide, 2021. Regulations cannot determine that medical testing is appropriate for a condition, but they can indicate that testing should be requested by VHA.

²⁰⁰ *Id.* The other conditions that require specific methods are heart issues, peripheral vascular disease, and an initial arthritis diagnosis.

²⁰¹ *Id.*

acceptable for PTSD diagnosis, including SCID,²⁰² CAPS-5,²⁰³ PSS-I-5, and SI-PTSD.²⁰⁴ A 1999 study suggested that PTSD was significantly underdiagnosed when unstructured clinical interviews were implemented compared to when psychometric testing, like SCID, was implemented.²⁰⁵

In 2011, a study found that fifty-nine percent of C&P examiners reported rarely or never using any of these accepted PTSD psychometric testing instruments, including standardized clinical interviews.²⁰⁶ Even more concerning, eighty-five to ninety percent of the participants did not use CAPS-5 or SCID—the most widely accepted psychometric testing methods—for C&P examinations.²⁰⁷ Unfortunately, most examiners preferred unstructured clinical interviews,²⁰⁸ and they did not believe CAPS-5 or SCID testing should be required in disability examinations.²⁰⁹

In a 2017 study, the VA determined that Black²¹⁰ veterans were not diagnosed with PTSD in C&P examinations as a result of the examiners' failure to use psychometric testing.²¹¹ VA examiners were "asked to determine whether veterans me[et] diagnostic criteria for PTSD as defined by the Diagnostic and

²⁰² Brian P. Marx et al., *The Influence of Veteran Race and Psychometric Testing on Veterans Affairs Posttraumatic Stress Disorder (PTSD) Disability Exam Outcomes*, 29 PSYCH. ASSESSMENT 713 (2017). SCID is a PTSD module of the Structured Clinical Interview for DMS-IV. SCID is a semi-structured interview that assesses diagnoses associated with DSM-IV and has demonstrated good psychometric properties in veteran samples.

²⁰³ Frank W. Weathers, et al., *The Clinician-Administered PTSD Scale for DSM-5 (CAPS-5): Development and Initial Psychometric Evaluation in Military Veterans*, 30 PSYCH. ASSESSMENT 383-95 (2018). CAPS-5 is an extensively validated and widely used structured diagnostic interview for PTSD.

²⁰⁴ U.S. DEP'T OF VETERANS AFFS., *PTSD: National Center for PTSD* <https://www.ptsd.va.gov/professional/assessment/adult-int/index.asp>.

²⁰⁵ Mark Zimmerman, *Is Posttraumatic Stress Disorder Under Diagnosed in Routine Clinical Settings?*, 187 J. OF NERVOUS & MENTAL DISEASE 420 (1999).

²⁰⁶ James C. Jackson et al., *Variation in Practices and Attitudes of Clinicians Assessing PTSD-Related Disability Among Veterans*, 24 J. TRAUMATIC STRESS 609, 610 (2011).

²⁰⁷ *Id.*

²⁰⁸ Karyn Dayle Jones, *The Unstructured Clinical Interview*, 88 J. COUNSELING & DEV. 220 (2020). <https://proficientexpertwriters.com/wp-content/uploads/2021/01/TheUnstructuredClinicalInterview.pdf>. Unstructured clinical interviews consist of questions posed by the counselor with the client responses and counselor observations recorded by the counselor. This type of interview is considered unstructured because there is no standardization of questioning or recording of client responses; it is the counselor who is "entirely responsible for deciding what questions to ask and how the resulting information is used in arriving at a diagnosis."

²⁰⁹ Jackson et al., *supra* note 208, at 612.

²¹⁰ Here, the author intentionally capitalizes the word "Black," and not the word white, following Kimberlé Williams Crenshaw's guidance in her piece, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1253 n.1 (2011). Professor Crenshaw shares her compelling reason: "[o]f the myriad differences is the fact that while white can be further divided into a variety of ethnic and national identities, Black represents an effort to claim a cultural identity that has historically been denied."

²¹¹ Brian P. Marx, et al., *The Influence of Veteran Race and Psychometric Testing on Veterans Affairs Posttraumatic Stress Disorder (PTSD) Disability Exam Outcomes*, 29 PSYCHOLOGICAL ASSESSMENT 710 (2017).

Statistical Manual for Mental Disorders.”²¹² However, the study noted that “there is no standard methodology required to conduct the [PTSD] examination.”²¹³ Seventy-five percent of examiners did not use evidence-based assessments during their examination, even though those tools decidedly lead to a more complete and accurate reflections of veterans’ symptoms and functional impairments.²¹⁴ Based on this study, 29.5% of examinations resulted in either a false negative or a false positive.²¹⁵ Thus, in nearly thirty percent of examinations, the C&P doctor reached an improper diagnosis.²¹⁶ The study found that when examiners did not use psychometric testing, discrepancies emerged favoring white veterans over Black veterans.²¹⁷ Black veterans were given false negatives at a much higher rate than their white counterparts.²¹⁸ Moreover, white veterans were given false positives at a much higher rate than their Black counterparts.²¹⁹ Because the VA instituted no standard for diagnosing PTSD in C&P examinations, Black veterans were denied significant benefits for PTSD.²²⁰ In these situations, a misdiagnosis is not simply a failure to diagnose a mental health condition. A misdiagnosis in the C&P examination can influence a veteran’s life in many ways, even impacting their likelihood of experiencing poverty and homelessness.²²¹ By allowing examiners to use unstructured clinical testing to determine PTSD diagnoses, the VA implicitly allows Black veterans to be improperly denied benefits.

Yet, methods or principles can still change in the future. Medicine and studies will evolve and show that specific conditions and diseases may be diagnosed more accurately with new testing. Accordingly, the VA should set and update standards, or at least recommend types of testing, as science evolves.

In another instance, the Veterans Court in *DeLuca* instructed the VA and its examiners to consider, when evaluating the severity of joint disabilities (like knees injuries), whether pain, flare-ups, or repetitive use limit the range of motion.²²² Thus, in every back, shoulder, knee, or ankle condition examination, the examiner should consider whether pain, flare-ups, or repetitive use impacts the limitation of that joint.²²³ By utilizing the *DeLuca* standard, the VA can understand the condition’s functional impairment on the veteran and properly rate that condition. Failing to rate an injury using the *DeLuca* standard can have significant monetary implications.²²⁴

²¹² *Id.* at 711.

²¹³ *Id.*

²¹⁴ *Id.* at 714.

²¹⁵ *Id.* at 713.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 714.

²¹⁹ *Id.* at 713.

²²⁰ *Id.* at 717.

²²¹ *Id.* at 716.

²²² See generally *DeLuca v. Brown*, 8 Vet. App. 202 (Vet. App. 1995).

²²³ *Id.*

²²⁴ The difference between ninety percent and one hundred percent is \$1,259.24. If a veteran is rated at ninety percent, utilizing the *DeLuca* standard could push their rating to one hundred percent.

Seven years after the court's ruling, sixty one percent of examinations failed to provide enough information that complied with the *DeLuca* standard,²²⁵ three out of five examinations for joint conditions were inadequate and did not comply with the law.²²⁶ Ten years after *DeLuca*, in 2005, the VA improved this rate to twenty two percent of examinations' failed to provide enough information.²²⁷ Even with the improvement, one in five examinations for joint conditions were still completed improperly.²²⁸ Unfortunately, even when the Veterans Court explicitly addresses legal adequacy of an examination to the VA, the VA is slow to implement these standards well.

Part IV(B) of this Article outlines how the implementation of FRE 702 can provide the VA with adequate examinations and ensure that examiners consider all evidence and use proper principles and methods to render their conclusions.

C. Other Prevalent Issues with C&P Examinations

C&P examinations face additional issues, such as (1) VA examiners' incorrectly opining on issues outside the scope of the examination and (2) biases that influence the examiner. These issues do not directly impact the core of competency or adequacy but are nonetheless important factors when considering whether the VA should rely on these examinations.

1. Opinions Outside the Scope of the C&P Examination

VA adjudicators provide C&P examiners with specific and discrete questions to answer, which may include whether the veteran has a diagnosis, the likelihood that the condition relates to an in-service occurrence, and/or the severity of the symptoms related to the condition.²²⁹ The examiner should not provide an opinion to questions outside of those requested. In particular, an examiner should not opine as to whether the in-service occurrence actually occurred. Instead, the examiner should only respond to the questions posed.

For instance, an examiner may be asked whether a veteran's PTSD was caused by a sexual assault in the military. The examiner's role is not to discuss whether the sexual assault actually happened; rather, the examiner must determine whether the veteran's PTSD stems from the claimed assault. To determine whether enough evidence exists to show that an assault occurred, the adjudicator must separately consider evidence, like pregnancy tests, sexually transmitted diseases, statements from family and friends, and evidence of behavior change.²³⁰ Evidence of a change in behavior can include a request to transfer duty stations, change in

²²⁵ U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-46, VA DISABILITY BENEFITS: VA COULD ENHANCE ITS PROGRESS IN COMPLYING WITH COURT DECISION ON DISABILITY CRITERIA (2005).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § A.

²³⁰ 38 C.F.R. § 3.304(f).

work performance, substance abuse, or social behavior changes.²³¹ The adjudicator must determine whether the veteran meets this legal standard to establish the in-service occurrence. The examiner's role is to opine as to a diagnosis, symptoms, and/or a nexus between the two. The C&P examiner may not understand the legal requirements of establishing an in-service personal assault. Unfortunately, in many instances, the C&P examiner defies the scope of the examination and finds no nexus because the examiner found that no incident occurred in service.

Additionally, some legal requirements in veterans law preempt a factual finding by the C&P examiner. For instance, when considering whether a condition was preexisting, a legal presumption of soundness may apply, and only clear and unmistakable evidence rebuts the presumption.²³² Simply, the presumption of soundness treats veterans as if they had no preexisting conditions, unless the VA can rebut as much. The VA must apply several rules when analyzing this type of claim. The VA must first inquire into whether the entrance physical noted the condition.²³³ Here, the term "noted" has a significant legal definition.²³⁴ The Veterans Court explained that a servicemember's giving his history of a condition does not fulfill this "noted" standard.²³⁵ Rather, the VA requires that the condition be shown on the entrance examination.²³⁶ If the condition is not noted on the entrance physical, the presumption of soundness applies.²³⁷ The VA can only rebut this presumption by clear and unmistakable evidence that the condition preexisted service.²³⁸ If the VA cannot rebut with clear and unmistakable evidence, the VA cannot claim the disability preexisted service.²³⁹

When the C&P examiner receives the examination request, she may not understand this legal requirement. Accordingly, the C&P examiners may ask the veteran questions about the condition to determine whether it arose in childhood, or they may rely on statements that the veteran made in the past. Even a statement from the veteran about childhood injury or disability would likely not suffice to show that the condition was preexisting under the clear and unmistakable standard.²⁴⁰ At this point, an examiner may provide an opinion that the condition preexisted, even though—legally—she has not rebutted the presumption of soundness by clear and unmistakable evidence.

Because adjudicators rely heavily upon, or even adopt, C&P examinations as their own reasoning, the adjudicators may abdicate their responsibility and rely on the C&P examiner's determination that an event did not occur in service or that a legal presumption has been rebutted. In these instances, the C&P examinations may unduly prejudice the veteran or confuse the adjudicator.

²³¹ *Id.*

²³² 38 U.S.C. § 1111.

²³³ *Id.*

²³⁴ *Crowe v. Brown*, 7 Vet. App. 238, 245 (Vet. App. 1994).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ 38 U.S.C. § 1111.

²³⁹ *Id.*

²⁴⁰ *See generally* *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

2. Implicit or Explicit Biases

One issue that may not be apparent or clear on the face of the C&P examination is the examiner's biases. An examination may be biased against a veteran for a variety of reasons, including race, sex, gender, sexual orientation, age, disability, or even veteran status. Explicit and implicit racial bias among health care providers is well documented.²⁴¹ For example, medical professionals fail to recognize the pain of women and Black patients, thus impacting the treatment doctors provide to Black women in childbirth.²⁴² When the VA rates veterans, the C&P examiner's findings of pain levels are imperative to determine entitlement to benefits and the proper ratings.²⁴³

For example, fibromyalgia is a condition presumptively related to Gulf War service;²⁴⁴ veterans who served in the Gulf and have a diagnosis of fibromyalgia are automatically service-connected for the condition once they file.²⁴⁵ Fibromyalgia is characterized as widespread chronic pain accompanied by fatigue, sleep, memory, and mood issues.²⁴⁶ Research shows that ninety-five percent of people with fibromyalgia are women.²⁴⁷ Additionally, women who suffer "from chronic pain face barriers to credibility, as their symptoms are read through gendered moral discourses that case women as hypochondriacs, and weaker, less rational, more emotional, and more likely to complain than men."²⁴⁸ Female patients recognize the implicit biases that affect their care, so they engage in moral boundary-work to present themselves as credible and "deserving" of disability benefits.²⁴⁹ In heightened moral boundary-work, "Black women reportedly had to deal with physicians' use of racialized stereotypes about opioid addiction; physicians' reluctance to document and substantiate a disability claim since '[Black people] are always applying for disability'; and physicians' mistaken belief that Black people feel less pain than white people."²⁵⁰ These stereotypes require Black women overcome an additional burden.²⁵¹

²⁴¹ Chloë FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, BMC MED ETHICS (2017).

²⁴² See Bani Suluja and Zenobia Bryant, *How Implicit Bias Contributes to Racial Disparities in Maternal Morbidity and Mortality in the United States*, 30 J. WOMEN'S HEALTH (2021).

²⁴³ See generally 38 C.F.R. pt. 4, *supra* note 2; Saunders v. Wilkie, 886 F.3d 1356 (Fed. Cir. 2018).

²⁴⁴ 38 C.F.R. § 3.317(a)(2)(B)(2).

²⁴⁵ *Id.* § 3.317.

²⁴⁶ MAYO CLINIC, *Fibromyalgia*, <https://www.mayoclinic.org/diseases-conditions/fibromyalgia/symptoms-causes/syc-20354780#:~:text=Fibromyalgia%20is%20a%20disorder%20characterized,process%20painful%20and%20nonpainful%20signals> (last visited Nov. 18, 2021).

²⁴⁷ Jane Pryma, "Even My Sister Says I'm Acting like a Crazy to Get a Check": Race, Gender, and Moral Boundary-work in Women's Claims of Disabling Chronic Pain, 181 SOC. SCI. & MED. 66 (2017).

²⁴⁸ *Id.*

²⁴⁹ Joanna Kempner, *Invisible People with Invisible Pain: A Commentary on "Even My Sister Says I'm Acting like a Crazy to Get a Check": Race, Gender, and Moral Boundary-work in Women's Claims of Disabling Chronic Pain*, 189 SOC. SCI. & MED. 152 (2017).

²⁵⁰ *Id.*

²⁵¹ *Id.*

If a Black woman claims fibromyalgia related to her service in the Gulf, the examiner may not believe she has fibromyalgia because of these racialized and gendered stereotypes.²⁵² Even if she is believed to have a diagnosis, the examiner may not find that her pain is constant enough for her to receive the highest rating—again, due to these stereotypes.²⁵³ As a result, the VA must adopt a heightened awareness of the effect of bias in an examination.

In *Baisden*, the veteran argued that her examination was inadequate because the examiner was biased.²⁵⁴ Baisden filed for fibromyalgia related to her service.²⁵⁵ She argued “that the examiner was biased because she acted in a rude and unprofessional manner when [the examiner] allegedly stated, inter alia, that Ms. Baisden was interested in an examination for monetary purposes and that ‘all veterans lie.’” “Ms. Baisden also asserted that other veterans had filed complaints alleging bias on the part of this examiner.”²⁵⁶ The Court found that the Board erred by not addressing those arguments.²⁵⁷ The Veterans Court required the Board to address the veteran’s contention that the examiner was biased when determining probative value.²⁵⁸

Part IV(C) of this Article discusses how the implementation of FRE 403 can ensure that confusing or unfairly prejudicial examinations are removed from the file and not relied upon in the future.

C&P examinations are an integral step in the VA benefits process but are nonetheless rife with problems. For the VA to adequately assist veterans, the Federal Rules of Evidence prove to be an important piece of the puzzle. The next section of this Article will discuss how the Veterans Court has used the Federal Rules of Evidence in the past. In the final section, this Article will explain the next steps that the VA, advocates, and the Courts can take to improve C&P examinations through the Federal Rules of Evidence.

III. VETERANS COURT’S USE OF FEDERAL RULES OF EVIDENCE

In crafting the VJRA,²⁵⁹ Congress worried that the VA would become adversarial and lose its veteran-friendly focus.²⁶⁰ The House report to the VJRA explained that “in such a *beneficial structure* there is not room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or

²⁵² *Id.*

²⁵³ 38 C.F.R. § 4.71a.

²⁵⁴ *Baisden v. Shinseki*, No. 09-0141, 2010 U.S. App. Vet. Claims LEXIS 1410 (Vet. App. Aug. 2, 2010).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at *2.

²⁵⁷ *See id.*

²⁵⁸ *Id.*

²⁵⁹ The VJRA is legislation that gave veterans the right to judicial review, after a Board of Veterans Appeals decision. Before the passage of the VJRA, opinions by the Board of Veterans Appeals lived in “splendid isolation” from judicial review and decision were final. *Brown v. Gardner*, 513 U.S. 115 (1994).

²⁶⁰ H.R. REP. NO. 100-963 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782, 5782.

strict adherence to burden of proof.”²⁶¹ “This material is incorporated into the official claims folder and becomes part of the record for review, without regard to any of the formal rules of evidence commonly found in courts.”²⁶² Additionally, “[a]ll hearings are informal, meaning that strict rules of evidence and procedure are not enforced, and non-adversarial, meaning that the VA has no advocate representing it at the hearing, it does not call witnesses, nor does it resort to cross examination.”²⁶³ Congress aimed to ensure veterans could navigate this system without barriers.

Early in its history, the Veterans Court set certain boundaries, using FREs to review the VA’s determinations. Within the scope of VA benefits adjudications, the Veterans Court has dismissed some of the FREs but embraced others. The Court uses FREs as a source of persuasive authority in establishing rules of procedural fairness to be applied in VA and Board proceedings.²⁶⁴ Thus, precedent allows FREs to be utilized throughout the process.

For example, the Veterans Court embraced FRE 106²⁶⁵ and 201(e) in *Thurber*.²⁶⁶ In its decision, the VA used pages of a medical treatise without notifying the veteran.²⁶⁷ The question before the court was two-fold.²⁶⁸ First, the Court addressed whether the claimant must have notice and an opportunity to respond before the Board uses a medical treatise.²⁶⁹ Second, it addressed whether the entire chapter from the medical treatise must be provided.²⁷⁰ For the first question, the Veterans Court considered FRE 201 to determine whether notification was required.²⁷¹ The court found that the Board “must provide a claimant with reasonable notice of such evidence and of the reliance proposed to be placed on it, and a reasonable opportunity for the claimant to respond to it.”²⁷²

For the second question, the Veterans Court consulted FRE 106 to determine whether the Board can, on its own, introduce individual pages of a treatise.²⁷³ The Veterans Court explained that the VA may introduce individual pages of a medical treatise. However, it must be in proper context, including

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Bielby v. Brown*, 7 Vet. App. 260, 268 (Vet. App. 1994).

²⁶⁵ *Thurber v. Brown*, 5 Vet. App. 119, 126 (Vet. App. 1993); FED. R. EVID. 106 (“If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.”).

²⁶⁶ *Thurber*, 5 Vet. App. at 126; FED. R. EVID. 201(e) (“On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.”).

²⁶⁷ *Thurber*, 5 Vet. App. at 120.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 126.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

literature that is both unfavorable and favorable to the veteran.²⁷⁴ The Veterans Court embraced these rules to provide basic considerations of procedural fairness.

In *Bielby*, the Veterans Court embraced FRE 703, which requires the expert to base their opinion on the facts or data in a particular case.²⁷⁵ In *Layno*, the Veterans Court accepted FREs 601 and 602, which relate to the competency of lay witnesses to observe and testify to those observations.²⁷⁶

On the other hand, in *Flynn*, the Court rejected a veteran's argument that hearsay evidence should not be allowed under the Federal Rules of Evidence.²⁷⁷ In this case, Dr. Goldstein diagnosed the veteran with diabetes and hypertension.²⁷⁸ Dr. Goldstein also wrote, "discussed the case with Dr. Wongsurat, an endocrinologist. It was his feeling that there were no kidney manifestations show[n] by the laboratory tests and the KUB that it was unlikely that the diabetes was the cause of the hypertension. He felt that it was more likely an essential hypertension."²⁷⁹

The Veterans Court allowed Dr. Goldstein's statement into the record, even though it was hearsay, because the Federal Rules of Evidence did not apply.²⁸⁰ Unfortunately, the Veterans Court was misguided on how it should apply FREs, such that it was inconsistent with Congress' intent to allow veterans to submit any evidence. Congress did not want the VA to use the lack of Federal Rules of Evidence, including hearsay, against veterans.²⁸¹ Yet, the VA and the courts took this idea too far by using the non-binding nature of FREs to protect the government. This decision is an abject failure in applying Congress's intent. Congress wanted to allow veterans to submit any evidence, regardless of FREs, but it did not seem to expect that the VA would use the lack of FREs to protect itself and impair veterans.²⁸²

As discussed in Part II of this Article, the Veterans Court has instructed the VA to utilize FRE 702 to determine the probative value of an expert opinion.²⁸³ Under FRE 702, expert testimony may be received from a qualified expert under the following conditions: the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the expert witness has applied the principles and methods reliably to the facts of the case.²⁸⁴ But the court only requires the VA to use FRE 702 under a probative value analysis and not for admissibility purposes.²⁸⁵ The next section will discuss the admissibility of

²⁷⁴ *Id.*

²⁷⁵ *Bielby v. Brown*, 7 Vet. App. 260, 268 (Vet. App. 1994).

²⁷⁶ *Layno v. Brown*, 6 Vet. App. 465, 469 (Vet. App. 1994).

²⁷⁷ *See generally Flynn v. Brown*, 6 Vet. App. 501 (Vet. App. 1994).

²⁷⁸ *Id.* at 502.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 504.

²⁸¹ H.R. REP. NO. 100-963 (1988), as reprinted in 1988 U.S.C.C.A.N. 5782, 5782.

²⁸² *Id.*

²⁸³ *Nieves-Rodriguez v. Peake*, 22 Vet App. 295, 302-04 (Vet. App. 2008).

²⁸⁴ FED. R. EVID. 702.

²⁸⁵ *Nieves-Rodriguez*, 22 Vet App. at 302-04.

examinations under FREs 104(a), 702, and 403 and how each rule can assist veterans in their pursuit of VA benefits.

IV. IMPLEMENTATION OF THE FEDERAL RULES OF EVIDENCE WILL PROTECT VETERANS

The purpose of the Federal Rules of Evidence is “to administer every proceeding fairly, eliminate unjustifiable expense and delay, and to promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”²⁸⁶ To ensure that the VA’s process is administered fairly to veterans, the VA should fully implement FREs 104(a), 702, and 403 and allow the excise of examinations from the record. For organization purposes, 702 is split into two different sections, as 702(a) reflects the qualification and competency of the examiner and 702(b)-(d) focuses on whether the examination itself is adequate.

Now, these rules do not work in a vacuum and should be used in concert with each other to ensure that the veteran receives a fair medical opinion. This section will describe the FREs, how the VA can adopt these rules, and, alternatively, how advocates can encourage the VA to adopt these rules. Although this Article provides an avenue for advocates to assist the VA in this process, the VA should implement these strategies on its own to ensure fairness for all veterans—not only those who can obtain representation.

A. Implementing Federal Rules of Evidence 104(a) & 702(a) to Determine Competency of an Examiner

Under FRE 104(a), a “court must decide any preliminary question about whether a witness is qualified.”²⁸⁷ FRE 702(a) allows an expert witness to testify when “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” The judge must determine whether an expert witness is qualified to testify on the issue.²⁸⁸ FRE 104(a) explains how to determine whether an expert is competent to opine on the matter, without consideration of the expert’s opinion itself.²⁸⁹ In *Huddleston*, the Supreme Court found that a preliminary finding by the court by a preponderance of the evidence is not called for under 104(a).²⁹⁰ The Court explains, “[t]his is not to say . . . that [a party] may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo.”²⁹¹

As discussed in Part II of this Article, the VA outsources its expert qualification determinations to VHA or third-party contractors.²⁹² In this non-

²⁸⁶ FED. R. EVID. 102.

²⁸⁷ FED. R. EVID. 104(a).

²⁸⁸ See FED. R. EVID. 104(a) advisory committee’s note.

²⁸⁹ See FED. R. EVID. 104(a).

²⁹⁰ See *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

²⁹¹ *Id.* at 689.

²⁹² See M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § D, topic 2. VA medical facilities, or

adversarial process, the VA must review the evidence it receives from VHA or contractors with an objective position and not a position of reliance. The VA adopts the examiner's rationale without questioning the credentials or merits.²⁹³ The VA adjudicators have abdicated their role as neutral adjudicators, by relying on C&P examiners. By requiring FRE 104(a) and 702(a), the adjudicator must determine whether the examiner is an expert before it allows the examination to be considered.

To enable the VA adjudicator to make this determination, the VA must request the examiner's CV, including their experience reviewing and understanding military records, their experience with the type of medical condition in which they are reviewing, and their research background. By asking these questions, the VA adjudicator at the Regional Office or the Board can determine whether this evidence should even be considered when weighing the evidence.

the medical examination contractor, are responsible for ensuring that examiners are adequately qualified. RO employees are not expected to routinely scrutinize or question the credentials of clinical personnel to determine acceptability of their reports, unless there is contradictory evidence in the record.

²⁹³ See Blair E. Thompson, *The Doctor Will Judge You Now*, 89 U. CIN. L. REV. 963 (2020).

Below is a non-exhaustive list of questions for the examiner that should be included with the request for examination:

1. Provide your CV, including your specialty or focus area.
2. List all relevant training and experience with [insert particular condition].
3. Identify any conferences or trainings that you have attended or conducted on this [insert particular condition]. Please provide your role.
4. Provide any research that you have been a part of that relates to [insert particular condition].
5. Have you published any articles related to [insert particular condition]? Please provide a citation(s) to all articles.
6. Explain your training and experience reviewing military personnel records.
7. Explain your training and experience reviewing service medical records.
8. How many years have you been in your current role as a C&P examiner?
 - a. How long have you been an employee of or contractor for the VA?
9. What kind of (and how many) training have you received regarding providing C&P examinations? When was your most recent training?
10. How many C&P examinations on [insert particular condition] have you completed?
11. Have any of your C&P examination on [insert particular condition] been deemed inadequate?
 - a. How many?
 - b. Why?²⁹⁴

If the VA does not incorporate these types of questions into the request, advocates must request information to implement 104(a) and 702(a). To ensure veterans receive a fair adjudication, the advocate must request all information available about the competency of the C&P examiner to understand whether the examiner is qualified to provide an opinion on the matter.

Advocates may implement two specific strategies to ensure that the VA provides everything necessary for the adjudicator to determine whether the examiner is competent. The first strategy is to supply the questionnaire before the examination is completed.

The first strategy would require the veteran/advocate to request the examiner's qualifications before an examination is scheduled, likely at the application stage. Unfortunately, the application forms (526EZ, Supplemental Claim) do not allow for much elaboration. Thus, the advocate should draft a letter to request the proposed expert's qualifications with the questions above. Because the primary goal of 104(a) and 702(a) is to determine whether someone is qualified to be an expert witness, the advocate should ask questions about the examiner's

²⁹⁴ Thank you to the veterans clinic listserv for offering your contribution to this list. Huge shout out to Jillian Berner, Caitlin Milo, John Brooker, Doug Rosinski, Michele Vollmer, and Samantha Kubek for refining this list.

education, skill, and training. The adjudicator must understand what type of formal (education and training), practical experience, and publications the examiner has for the VA to make an informed decision as to the competence of the examiner to form an opinion.

By requesting that the VA provide the examiner's credentials before the examination, the VA may provide such qualifications to the advocate, to which the advocate may respond, if necessary, with reasons why that examiner is not qualified. However, the VA will likely be reluctant to implement this strategy due to its current processes. More likely, these questions can be posed to the examiner, who will provide this information to the VA when they complete the examination. The VA has expressed hesitancy to provide credentials before the examination, as the VA has stated that such preemptive requests for examiner's credentials, by their very nature, are rooted in speculation rather than fact.²⁹⁵

A potential downside to presenting questions before the examination is a tense relationship between the examiner and the veteran, since the veteran may be perceived as questioning the examiner's expertise before the scheduled examination. Moreover, the examiner is on a tight deadline and may resent being required to answer more questions.²⁹⁶

The second strategy is much like the *Nohr*²⁹⁷ interrogatories to be implemented after the examination is completed. In *Nohr*, the veteran's advocate posed several questions to the examiner about the examiner's credentials and requested clarification of the examination.

The questions would be the same as those used in the first strategy. The benefit of using the *Nohr*-like interrogatories is the advocate can ask more targeted questions about the examination itself and pull in 702 types of questions for the examiner to explain what facts the examiner relied on, methods they used, and obtain further clarification on the examination.

²⁹⁵ See (Title Redacted by Agency), No. 09-19 856, 2014 BVA LEXIS 52635 (Bd. Vet. App. Dec. 1, 2014).

²⁹⁶ The VA expects seventy-five to eighty-five percent of examinations to be completed within twenty days from the date the examination scheduling request is accepted by the Contractor to the date the results are available to the VA. MED IDIQ Contract: 13.0 Performance Requirement Summary.

²⁹⁷ See *Nohr v. McDonald*, 27 Vet. App. 124, 128 (Vet. App. 2014). The veteran posed a variety of questions to the examiner regarding qualifications and explanation of the examination.

B. Fully Implementing Federal Rules of Evidence 702 to Determine Adequacy of an Examination

FRE 702 allows “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:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”²⁹⁸

These four requirements allow judges to determine whether the expert’s testimony is reliable and can assist the trier of fact to come to a conclusion.²⁹⁹ Before FRE 702, the Supreme Court established the *Daubert* standard, which required the court to determine (1) whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.³⁰⁰ Courts have found other factors to be important, including whether there is simply too great a gap between the data and opinion,³⁰¹ whether the expert has accounted for alternative explanations,³⁰² or whether the expert is being as careful as he would be in his regular professional work outside of paid litigation.³⁰³

The Committee on the Rules determined that the rejection of expert testimony is the exception rather than the rule.³⁰⁴ The committee reiterated “vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”³⁰⁵ In the VA’s system, however, there is no right to vigorous cross-examination.³⁰⁶ Because these rights do not exist, FRE 702 in the VA system should be stronger than its civilian counterpart. Meaning,

²⁹⁸ FED. R. EVID. 702.

²⁹⁹ *See id.*

³⁰⁰ *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

³⁰¹ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

³⁰² *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

³⁰³ *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

³⁰⁴ *See* FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

³⁰⁵ *Id.*

³⁰⁶ *See* Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

the rejection of expert testimony should not just be an exception, the VA should fully implement 702 into its process when reviewing the C&P examiner's opinion.

To fully implement FRE 702, the VA adjudicators must review the evidence as unbiased decision makers. Because veterans do not have this opportunity to cross-examine any opinion, the VA as a non-adversarial adjudicator must take on the role of cross-examiner when evaluating the C&P examinations. The adjudicator must insist that the C&P examiner provide the requirements under FRE 702. The C&P examiner must provide their scientific, technical, or other specialized knowledge that will help the trier of fact to understand the evidence or to determine a fact in issue. This may include the information that is required under 104(a) and any trainings, education, studies, or the like that they have been involved in. C&P examiners must provide the facts, evidence, or data that they relied on in their opinion, what evidence they discounted, and why they discounted the evidence. The C&P examiner should not be allowed to simply state they reviewed the C-File.³⁰⁷ This is not specific enough for any adjudicator to fully understand what pieces of evidence the examiner reviewed or failed to review. Further, they must fully explain why a relevant piece of evidence that the adjudicator tabbed³⁰⁸ is immaterial, conclusive, or why they discounted that evidence.

In many instances, C&P examiners will rely exclusively on service medical records but fail to address lay statements from the veteran. For instance, in *Smith v. Wilkie*, the Board originally remanded the case and instructed the examiner to accept the veteran's credible lay statements about his left shoulder injury.³⁰⁹ Still, the examiner provided a negative opinion based on the lack of service treatment records.³¹⁰ The Court determined that because the Board found the veteran's statements as credible, the examiner must rely on those as true.³¹¹ The previous two C&P examinations were inadequate and do not meet the 702 standards, because they disregarded credible lay evidence.³¹² Thus, the VA should simply remove these examinations from the file, once an examination is found to be inadequate.

Further, the C&P examiner must provide the studies, methods, or processes that they relied on in forming their opinion. Without this, the adjudicator cannot assess the reliability of the C&P examiner's opinion. When the C&P examiner violates FRE 702, the adjudicator cannot rely on that opinion, because it is unclear whether that opinion is based on medicine, science, or the evidence provided. As discussed in Part II, the C&P examiner should be explicit in terms of the types of tests they used for diagnosing the condition so the adjudicator can determine how reliable the diagnosis is.

³⁰⁷ C-File is the claims file that contains the entire record that the VA has collected in the adjudication process. This may include military personnel files, service treatment records, VA medical records, private medical records, all past C&P examinations, lay statements, and past decisions.

³⁰⁸ When an examination is requested, the adjudicator tabs specific pieces of evidence for the examiner to review. M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 3, § A.

³⁰⁹ *Smith v. Wilkie*, 32 Vet. App. 332, 335 (Vet. App. 2020).

³¹⁰ *Id.*

³¹¹ *See generally Smith*, 32 Vet. App. at 332-41.

³¹² *Id.*

Under *Nieves-Rodriguez*, FRE 702 has been used as guidance by the court for probative value.³¹³ The Court should, however, go a step further and require the VA to remove opinions that do not meet FRE 702 standards. If it is clear on its face, as it was in *Smith v. Wilkie*, that the C&P examiner ignored credible evidence, the VA should remove the opinion from the file. Such an examination is inadequate, and a new opinion would be necessary.

The VA, the Board, or the Veterans Court may ask about the importance of removing an opinion. By keeping an inadequate opinion in the file, a later adjudicator or C&P examiner may rely on it. For example, if a veteran received an inadequate examination and the Board remanded the case for a new examination. The veteran could obtain his own opinion from an expert and the VA would obtain another opinion from a different C&P examiner. Now, in the file, the adjudicator at the VA Regional Office may see two negative opinions, both C&P examinations, and one positive opinion. The adjudicator, not thinking about how the first opinion was inadequate, may weigh the two negative opinions against the one positive opinion from the veteran's expert. Additionally, the second C&P examiner may review the past C&P examination and determine that it is reliable and agree with it, without understanding why the VA found the old examination to be inadequate. For the process to be fair, the first examination should be removed completely, once the VA has considered it inadequate.

³¹³ *Nieves-Rodriguez v. Peake*, 22 Vet App. 295, 302-04 (Vet. App. 2008).

To implement 702, the adjudicators must pose questions about facts, data, and methods that the examiner used. Here is a non-exhaustive list of questions that the VA can incorporate into their examinations:

1. What methods or tests did you use to diagnose this veteran?
 - a. Are there other methods or tests to diagnose this condition? If so, why did you choose this method?³¹⁴
2. Are there any studies or articles that helped you come to your conclusion? Please explain why you relied on these studies or articles, with attachments of the studies or articles.
3. Are there any studies or articles relevant that you did not use? Please explain why you did not use those studies or articles.
4. What facts were most important when forming your opinion? Please explain.
5. Is there any evidence that you disregarded? If so, please explain.
6. Is there any evidence that you discounted? If so, please explain.
7. Did you review any lay statements? If so, how did they impact the formulation of your opinion?
8. Did you review service records? If so, how did they impact the formulation of your opinion?
9. Are there any other medical opinions in the file? Did you review those opinions? If so, please provide your assessment of those examinations & opinions.³¹⁵

Asking these questions of the examiner will help the adjudicator fully understand how the C&P examiner came to their conclusions. These questions can help adjudicators determine how a C&P examiner incorporated a fact into their opinion. For example, if the C&P examiner failed to discuss the credibility of lay statements, these answers could help illuminate whether the examiner did not understand the importance of lay statements or could clarify the C&P examiner's process in how and why they discounted those statements.

If the VA does not incorporate these questions into their examinations, advocates may be able to use these questions in *Nohr*-like interrogatories. Timing-wise, these *Nohr*-like interrogatories can be provided to the examiner before the examination or after the examination is complete, like 104(a). There are strategic reasons why an advocate may want to provide the interrogatories before. By requiring the interrogatories before the examination, the C&P examiner can answer those questions as they complete the examination. Everything will be fresh in the C&P examiner's mind when completing the questionnaire. This will give the veteran and the VA a full picture of the C&P examiner's opinion: what evidence they relied on, and what studies or methods they performed in coming to their conclusion. For instance, in a PTSD case, you may want to ask the C&P examiner

³¹⁴ The VA could be more specific here based on the condition itself. For example, the VA could ask whether the C&P examiner used psychometric testing when diagnosing the veteran for PTSD and if so, which test they used. If there are best practices in specific areas, the VA should ask the examiner whether they are using that best practice. As medicine evolves, it is likely that the VA would have to update the questions regarding methods and tests.

³¹⁵ See *supra* note 295.

what psychometric testing they used to diagnose the veteran. This will help the VA and the advocate understand whether the C&P examiner's results are reliable or whether there is a significant likelihood that the veteran did not receive a fair examination. The downside to asking several questions before the examination is the time that it may take the C&P examiner to fully answer the questions, or it may become repetitive.

On the other hand, the advocate may want to ask these questions after the examination is complete. By having the examination on hand, the veteran and their advocate can review the examination and determine whether the examiner missed a specific piece of evidence or did not provide clear methods. At this point, the veteran can home in on the questions posed to the C&P examiner. If the examiner implicitly dismissed a "buddy statement,"³¹⁶ the veteran can ask the examiner how he weighed the statement in his opinion.

Although FRE 702 is currently used as guidance, the VA should take the next step and fully remove inadequate opinions from the file, so no future adjudicator or C&P examiner relies on this opinion. There may be instances where the entire opinion is not inadequate. For example, you may have an examination that has the proper diagnosis but relies on inaccurate factual premises when determining a nexus. In circumstances like that, the VA could redact any inadequacies in the opinion, rather than completely excising the examination from the record.

C. Implementing Federal Rules of Evidence 403

Under FRE 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."³¹⁷ Courts have found that the legislative intent of 403 instructs courts to use this rule sparingly because it is a drastic remedy.³¹⁸ FRE 403 sets out an exhaustive list of factors with which the judge can balance against the probative value.³¹⁹ Under 403, the judge should be weighing whether the evidence confuses the issues or if there is unfair prejudice.³²⁰

Although this is a drastic remedy, the Veterans Court has used 403 in a non-precedential, memorandum decision.³²¹ In *Frazier*, "the Board rested its

³¹⁶ A "buddy statement" is another term for witness or lay statement in the VA. Buddy statements typically help corroborate incidents that happen in service or information about how a disability has impacted the veteran's life.

³¹⁷ FED. R. EVID. 403.

³¹⁸ See Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765, 778 n.84 (2011).

³¹⁹ *Id.* at 778 n.88, 779 n.89.

³²⁰ FED. R. EVID. 403.

³²¹ *Frazier v. Shulkin*, No. 16-2987, 2017 US App. Vet. Claims LEXIS 1638 (Vet. App. Nov. 13, 2017).

credibility determination . . . on perceived inconsistencies.”³²² The Court determined that the Board found inconsistencies about peripheral issues.³²³ The Board determined that the veteran stated that he had no disciplinary infractions, but had Article 15s³²⁴ in his file for being late and for possession of a controlled substance.³²⁵ The Board also cited the fact that the veteran stated he had no legal history but was “previously admitted being jailed some 13 times.”³²⁶ The Court found both inconsistencies were merely peripheral and should not be used to assess the credibility of his lay statements about his combat experiences.³²⁷ Using FRE 403, the Court excluded this otherwise relevant evidence, because it confused the issue.³²⁸

The VA should consider FRE 403 to exclude C&P examinations when the examiner opines outside the scope of the examination, or biases appear to have influenced the examiner. Each of these examinations could be relevant and even probative, however, they may confuse the issues, unfairly prejudice the veteran, or mislead the adjudicator.

A major concern arises when the examiner opines on an issue that is outside the scope of the examination. This issue typically presents itself when a C&P examiner decides on a factual issue, rather than a medical one. For instance, because of the veteran’s job in the service, the VA may concede “hazardous noise exposure.”³²⁹ It is not the role of the C&P examiner to determine that the hearing protection that he had in service was enough to protect against noise exposure, after the VA has conceded noise exposure. Although this aligns closely to inaccurate factual premises, as discussed in FRE 702, the VA should not allow the examiner to opine on an issue that the VA has not requested and outside the scope of the examination. Because the C&P examiner makes this “finding” that, an event did not happen in service, the adjudicator may rely on that determination, and it may unfairly prejudice the adjudicator from forming a different conclusion.

Additionally, the VA must remove biased opinions from the record, even if those opinions seemingly meet FREs 104(a) and 702. Bias may show itself in many ways, including both explicit and implicit biases. Like in *Baisden*, described in Part II of this Article, biases may explicitly show themselves—“all veterans lie.”³³⁰ Alternatively, a veteran may receive an implicitly biased examination. An examiner may discount pain described by the veteran, based on gendered stereotypes. An examiner may completely disregard statements about the severity of his symptoms, because of “credibility issues” that stem from racialized stereotypes. Biased opinions will not always be easy to identify, but the VA must

³²² *Id.* at *11.

³²³ *Id.*

³²⁴ Article 15 of the Uniform Code of Military Justice is a form of discipline in the military that does not rise to the level of a criminal charge.

³²⁵ *Frazier*, 2017 U.S. App. Vet. Claims LEXIS 1638 at *12.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ M21-1 MANUAL, *supra* note 14, pt. III, subpt. iv, ch. 4, § D.

³³⁰ *Baisden v. Shinseki*, No. 09-0141, 2010 U.S. App. Vet. Claims LEXIS 1410 at *2 (Vet. App. Aug. 2, 2010).

be aware of these potential biases and remove opinions if there is a likelihood that bias played a role in the examination.

In implementing FRE 403, the veteran or her advocate would ask the VA to remove the examination. Unlike FREs 104(a) and 702, 403 can be used at any point when a veteran sees an opinion that may unfairly prejudice her. FRE 403 is not necessarily going to require the veteran to obtain information from the C&P examiner. However, the veteran or advocate may want to show that there are inconsistencies in the file through medical evidence or lay statements. It may also be important to provide past studies on how bias may have played a role in the C&P examiner's opinion.

For example, a Black woman veteran wrote a statement to the VA regarding the severity of her migraines, explaining that she has migraines once a week that require her to retreat to a dark room and lie down to reduce the pain, a clear description of a prostrating migraine. In the C&P examination the examiner copies her language in the history section of his opinion, but states that the veteran only has prostrating migraines once a month. The VA should specifically ask the examiner to explain why the veteran's statements and examiner's findings are conflicting. This may raise the issue of credibility. The VA should consider why the examiner believed that the veteran is incredible. The veteran or advocate can also raise these issues by showing inconsistencies in the record and provide studies that show how medical professionals perpetuate gendered and racialized biases.

By utilizing FRE 403, the VA can help make the process equitable for all veterans by removing examinations that unfairly prejudice a veteran.

D. Veterans Court Enforcement

In theory, the VA could seamlessly implement FREs 104(a) and 702 into its process by requesting an examination using the aforementioned questions. The VA could remove C&P examinations from the electronic file if the examiner is unqualified, the examination is inadequate, or the examination confused the issues or unfairly prejudiced the veteran.

Even so, the VA is unlikely to change without Court enforcement. Thus, advocates may need to take more steps to ensure that the VA complies with their requests. An advocate may file a Writ of Mandamus to the Veterans Court when the VA fails to provide the examiner's qualifications or a full explanation of the examination. The Veterans Court has the authority to issue writs to compel the VA to provide what has been unreasonably withheld.³³¹ For the Court to grant a writ of mandamus, three requirements must be met: "(1) the petitioner must have no other adequate means to attain the desired relief; (2) the petitioner must show that the right to the relief is clear and indisputable; and (3) exercising its discretion, the issuing court must decide that the remedy is appropriate under the circumstance."³³² Advocates will have to show that they have no access to the

³³¹ 38 U.S.C. § 7261(a)(2).

³³² *Beaudette*, 34 Vet. App. 95, slip op., at *6 (quoting *Hargrove v. Shinseki*, 629 F.3d 1377, 1378 (Fed. Cir. 2011)); *Cheney*, 542 U.S. at 380-81.

credentials and experience of the examiner and that they cannot obtain this information without the VA's assistance. Additionally, for the veteran and the adjudicator to understand the opinion, they must be able to review the credentials of the examiner and methods in which the C&P examiner used. Without this information, a veteran cannot properly raise an issue of competency or adequacy if the VA fails to provide information. Finally, the Court would use its discretion to decide whether this remedy is appropriate. As with most writs at the Court, the VA will likely moot at least most of the requests by providing the credentials and responses to interrogatories. Advocates may need to implement this practice to create a class action at the Veterans Court and prevent the VA from evading review by the Court.³³³

V. CONCLUSION

The VA and C&P examiners have operated without restraint for far too long. When providing C&P examinations, the VA must assist veterans, rather than impair them by giving incompetent or inadequate examinations. To protect veterans, the Federal Rules of Evidence that focus on experts must be fully implemented. FRE 104(a) and 702(a) will allow the VA and the veteran to understand who provides the opinion and whether they are qualified to do so, also allowing the removal of an examination provided by an unqualified expert. FRE 702(b)-(d) will allow the VA and the veteran to understand what facts and methods the examiner utilized to form and remove opinions. Finally, FRE 403 will allow the veteran to advocate for the removal of an examination that unfairly prejudices him in the adjudication of his benefits. Without these protections, veterans will fall to the mercy of the VA and its prolonged appellate process.

³³³ Angela Drake, Yelena Duterte, & Stacey-Rae Simcox, *Review of Recent Veterans Law Decisions of the Federal Circuit*, 69 AM. U. L. REV. 1343, 1377 (2020) (citing *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017)).