

#### DEPARTMENT OF VETERANS AFFAIRS

# OFFICE OF INSPECTOR GENERAL

Office of Audits and Evaluations

VETERANS BENEFITS ADMINISTRATION

Decision Ready Claims Program Hindered by Ineffective Planning



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# **Executive Summary**

The Decision Ready Claims (DRC) program was established to streamline the processing of veterans' claims applications. To participate in the DRC program, veterans must work with an accredited representative, such as a veterans service organization (VSO) representative, who assists in gathering all the evidence needed for VA to decide the claim. Once all necessary evidence is gathered, the VSO representative can submit a claim for decision.

The Veterans Benefits Administration (VBA) developed the DRC program with a goal to complete claims within 30 days. If VBA could complete a large volume of DRC program cases within 30 days, this initiative would significantly contribute to its goal of reducing overall claims processing time from approximately 125 days to less than 60 days.

VBA piloted the DRC program in May 2017 and implemented it nationally by September 2017. VBA anticipated completing 25 percent of its disability compensation claims workload through the DRC program once it was implemented nationwide. However, from May 2017 through September 2018, VBA had only completed 1,803 claims. Since participation fell far short of VBA's expectations, the Office of Inspector General (OIG) focused this review on the planning and implementation of the DRC program.

#### What the Review Found

The OIG addressed two separate issues in this report. First, the OIG determined that VBA did not effectively plan the DRC program. VBA did not fully consider historical data from a similar program as a benchmark when defining program goals. Further, VBA did not obtain broad acceptance from key stakeholders, nor did it ensure information technology (IT) system functionality was in place to allow easier VSO access and to provide a self-service option for veterans. Second, VBA contravened the plain language of federal statutes and regulations by obligating and expending funds for contract medical examinations before an application for disability compensation benefits was submitted by the veteran.

# **VBA Ineffectively Planned the DRC Program**

VBA executive leadership should have used a more reliable and rigorous methodology to establish DRC program participation goals that considered relevant data from a similar program, such as the Fully Developed Claims (FDC) program. According to a senior VBA official, the initial goals for the DRC program were based simply on a percentage of the total number of claims VA received each month. Specifically, VBA predicted that 25 percent of its disability compensation claims workload would be completed through the DRC program as soon as it was implemented nationwide.

However, VBA considered the DRC initiative an extension of the FDC program because the FDC program also requires veterans to submit all relevant evidence at the time the application for benefits is submitted. As such, VBA should have put more emphasis on using the FDC program as a model to anticipate participation goals for the DRC program. Had VBA done so, it would have observed that it took nearly four years for the FDC program to reach the level of disability compensation claims processed that were expected of the DRC program immediately after implementation.

It also would have been beneficial for VBA to develop accurate estimates for participation to help drive sound business decisions and provide realistic expectations on how the DRC program would affect overall claims processing timeliness.

#### Minimal VSO Support

VSO representatives are trained to help veterans, servicemembers, dependents, or survivors apply for VA benefits. Support for the DRC program by VSO representatives was a critical part of the implementation plan because they helped veterans gather all required evidence and assisted with preparation of claims. However, VBA failed to fully obtain VSO support before implementing the program. In fact, VBA limited planning discussions to six national VSOs, and did not target outreach to state and county VSOs. Only one of the six national VSOs chose to support the DRC program. The OIG found that the lack of general acceptance of the DRC program by VSOs resulted in significantly lower participation than anticipated.

Also, the OIG found that the VSOs felt VA had not adequately explained the claims processing time to veterans. Following receipt of the application for benefits, VBA stated it would decide the claim within 30 days. According to VSOs, veterans did not realize the 30-day clock did not start when they initially contacted the VSO, but, instead, started when the claim was submitted to VBA.

In addition to the timeliness concerns, VSOs also complained of a lack of resources to support the program and of problems accessing the portal required to upload the claim and related documentation. The OIG interviewed national and local VSO representatives and found many of the VSO offices lacked the staff to interview veterans and file claims on their behalf. When implementing a program that relies heavily on the participation of others, it is important to ascertain their capabilities before launching the program. Had VBA done so in this situation, it would have learned that many VSOs did not have the resources needed to participate in the program.

VSO representatives who processed and submitted DRC program claims used VBA's Direct Upload Portal. This required VSOs to have the appropriate credentials and a personal identification verification card. One VSO representative reported that this process could take up to a year. Although VBA offered alternative methods to submit DRC program claims, such as by regular mail or fax, many VSOs chose not to process DRC program claims because of the lack of

access and credentials and a concern for the protection of veterans' personally identifiable information.

#### Lack of Veteran Self-Service Option and IT Enhancements

VBA should have examined expanding its submission policy and ensured IT system functionality was in place to allow self-service capability. This would mean that veterans could directly access the system to manage VA records and benefits. For example, the self-service capability would have allowed veterans to submit a DRC program claim, view and edit their profile information, and check the status of the claim after it was submitted. According to VBA officials, it was not until about the start of the DRC program nationwide implementation that VBA began discussing modernizing its intake system to allow a self-service option. In January 2018, Compensation Service requested that DRC functionality be added to the electronic systems used by VSO representatives and veterans to submit claims: the Stakeholder Enterprise Portal and eBenefits web portal. The addition of this IT functionality would have expanded access for more VSO representatives and provided self-service capability to veterans. This expansion was approved by VBA in April 2018.

However, following the confirmation of the new Under Secretary for Benefits in May 2018, the Executive Director of Office of Business Process Integration informed the OIG that VBA decided not to prioritize updating legacy systems such as eBenefits. Instead, they decided to focus resources on more long-term solutions, such as updating the "Vets.gov" website. As a result, IT enhancements that would have allowed veterans self-service access to the DRC program have not been made. Had VBA ensured adequate IT system functionality for the DRC program to allow self-service capability at the outset, it may have achieved a higher rate of program participation.

<sup>&</sup>lt;sup>1</sup> The Stakeholder Enterprise Portal provides VA partner organizations and external stakeholders access to the webbased systems they need to assist veterans and their dependents. The eBenefits web portal provides resources and self-service capabilities to veterans, servicemembers, and their families to research, access, and manage their benefits and personal information.

# VBA Obligated and Expended Funds on Contract Examinations in Direct Contravention of the Plain Language of Relevant Federal Law

The OIG found that VBA improperly completed medical examinations conducted by VA-paid contractors prior to submission of an application for benefits. Appropriations for medical examinations were only available if there was an entitlement to such an examination.<sup>2</sup> Under relevant federal laws, a veteran is entitled to an examination in the case of a "claim" for disability compensation.<sup>3</sup> VA regulation defines claim as an application submitted on an approved form.<sup>4</sup>

Under the DRC program, the application for benefits was not submitted until *after* all evidence was gathered, including any needed medical examinations. Because medical examinations were completed prior to submission of an application for benefits (or "claim"), there was no entitlement to such examinations under federal law. No appropriated funds were available for contract medical examinations without an entitlement. Accordingly, any such obligation and expenditure, would be an apparent violation of the Antideficiency Act.<sup>5</sup> Consequently, VBA potentially improperly obligated approximately \$9.6 million for a contract to assist VBA in determining whether medical examinations were necessary and expended about \$972,000 in examination costs.

#### What the OIG Recommended

On February 26, 2019, VBA provided the OIG with documentation stating that it discontinued the DRC program effective February 15, 2019. The documentation specified that VBA stopped accepting DRC program claims on February 15, 2019, and will adjudicate the remaining claims. Originally, the OIG intended to recommend that VBA

- Reexamine relevant data to set new goals for the upcoming year,
- Establish a plan to reengage with key stakeholders to determine whether adequate tools and resources have been established to warrant support,

<sup>&</sup>lt;sup>2</sup> See, e.g., Consolidated Appropriations Act, 2018, Div. J, Title II § 205, Pub. L. No. 115-141 (Mar. 23, 2018) (stating that appropriated funds may only be used for examinations of individuals "entitled" to such examination "under the laws providing benefits to veterans").

<sup>&</sup>lt;sup>3</sup> 38 U.S.C. § 5013A(d).

<sup>&</sup>lt;sup>4</sup> 38 CFR § 3.1(p) ("Claim means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary.")

<sup>&</sup>lt;sup>5</sup> 31 U.S.C. § 1341 (a)(1)(A) (The Antideficiency Act prohibits VA from making expenditures for more than the amounts available for an appropriation.)

- Reexamine a veterans' self-service option and other measures to improve veteran access, and
- Modify the DRC program to bring it into compliance with federal law.

However, since VBA decided to end the DRC program, the OIG no longer makes these recommendations.

The OIG does recommend the Under Secretary for Benefits work with the VA Secretary and Chief Financial Officer to determine whether any Antideficiency Act violation occurred, and if so, take necessary actions with respect to funds already obligated and expended for medical examinations under the DRC program.

#### **Management Comments**

The Under Secretary for Benefits concurred in principle with the OIG's finding that VBA ineffectively planned the DRC program. The Under Secretary also provided written comments, and the full text of those comments is included in Appendix C of this report. Since VBA decided to end the DRC program, the OIG did not make recommendations related to VBA's ineffective planning, and there will be no follow-up action.

The Under Secretary for Benefits did not concur with the OIG's finding that VBA obligated and expended funds on contract medical examinations in contravention of the plain language of relevant federal law. The Under Secretary provided voluminous written comments, which stated that the OIG's finding is based on a "dramatic oversimplification of the relevant law regarding claims initiation" and improperly relies on the term "entitlement."

With regard to the associated recommendation, the Under Secretary's comments state that, after consulting with the VA Office of General Counsel, the Under Secretary believes that the OIG's recommendation overlooked the "necessary expense" doctrine. In addition, the Under Secretary states that the OIG has misconstrued the VA appropriations statutes at issue.

# **OIG Response**

The OIG carefully considered the Under Secretary's written comments. The OIG disagrees with the Under Secretary's basis for his nonconcurrence. The OIG relied on the plain language of the relevant statutes and regulations, which neither oversimplifies nor is inconsistent with the relevant law regarding claims initiation. The Under Secretary argued that a claim may be considered filed as of the date an intent to file form is received. It is accurate that an intent to file form can be used as a placeholder for the effective date of a completed claim for certain purposes. Nevertheless, the intent to file form cannot be used to trigger an entitlement to a medical examination because—at the time of such examination—no claim existed. In the direct terms of the statutes and regulation, no claim exists prior to the filing of an application form. With regard to the recommendation, the OIG determined that the necessary expense doctrine

does not apply here and that the purpose of the VA appropriations law cannot be used to contravene its plain language. If the relevant statutes—in particular, the section of VA's appropriation that requires an entitlement to a medical examination (or reimbursement to the Medical Services account)—are inconsistent with Congress's intent, Congress may revise them. However, neither VA nor the OIG may disregard the plain language of the statutes.

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# **Abbreviations**

DRC Decision Ready Claims

ERPi Enterprise Resource Performance, Inc.

FDC Fully Developed Claims

FY fiscal year

IT Information Technology

OGC Office of General Counsel

OIG Office of Inspector General

VA Department of Veterans Affairs

VARO VA regional office

VBA Veterans Benefits Administration

VSO veterans service organization



### Introduction

The VA Office of Inspector General (OIG) conducted this review to determine whether the Veterans Benefits Administration (VBA) effectively planned and implemented the Decision Ready Claims (DRC) program to achieve its intended results.

#### Why the OIG Did This Review

The DRC initiative was established in response to former VA Secretary Shulkin's fiscal year (FY) 2017 priority to streamline and improve timeliness of disability claims processing.<sup>6</sup> From October 2017 through September 2018 (FY 2018), VBA completed processing approximately 1.4 million rating claims.<sup>7</sup> Under the traditional claims process, once an application for disability benefits is received, VBA staff assist veterans in gathering all the evidence needed to decide a claim.<sup>8</sup> In contrast, under the DRC process, a veteran works with an accredited representative to gather all evidence *prior to* submitting an application for benefits.<sup>9</sup> VBA advertised it would complete processing a claim received within 30 days after it received the application. At the time, the average for completing processing claims was about 99 days. VBA piloted the DRC program in May 2017 and implemented it nationally in September 2017. VBA anticipated completing 25 percent of its disability compensation claims workload through the DRC program once it was implemented nationwide.

### **DRC Program Details**

The DRC program was designed to expand upon VBA's Fully Developed Claims (FDC) program. The FDC program's processing model used a specific form for filing a claim and the simultaneous submission of private medical evidence and the identification of relevant federal records. In contrast, to participate in the DRC program, veterans were required to work with an accredited representative, such as a veterans service organization (VSO) representative, who assisted in gathering all the evidence needed for VA to decide the claim. This included federal records and relevant medical evidence, as well as medical examinations or medical opinions when necessary. Veterans had two options for obtaining medical examinations before submitting

<sup>&</sup>lt;sup>6</sup> FY 2017 refers to the period from October 1, 2016, through September 30, 2017.

<sup>&</sup>lt;sup>7</sup> In the context of this report, rating claims refer to the request for a determination of the disability or service-connected death benefit sought. The VBA decision will in turn help determine the amount of benefits for which the veteran or dependents are eligible. Rating claims can be an original claim, request for an increase in benefits (often due to a worsening condition), and requests to reopen a claim.

<sup>&</sup>lt;sup>8</sup> 38 CFR § 3.159 (c).

<sup>&</sup>lt;sup>9</sup> The benefits afforded a "veteran" in this report may also apply to a surviving spouse, or a servicemember with fewer than 90 days remaining on active duty. An "accredited representative" includes a veterans service organization, private attorney, or agent.

an application for benefits. They could either get a medical examination from their private treating physician, or their accredited representative could request a contract medical examination paid for by VBA. VBA anticipated that this process would allow VBA staff to decide claims within 30 days of receipt. Further, if VBA had completed a large volume of DRC program cases within 30 days, this initiative would have significantly contributed to VBA's goal of reducing overall claims processing time from approximately 125 days to less than 60 days. <sup>10</sup>

VBA secured the assistance of a contractor, Enterprise Resource Performance, Inc. (ERPi), to support the DRC program. The contractor was responsible for reviewing evidence submitted by the veteran and the veteran's VSO, as well as evidence already available in the veteran's record, and making a recommendation to VBA about whether a medical examination was necessary to decide the veteran's claim.

#### **DRC Program Implementation Timeline**

VA staff interviewed by the OIG reported the concept for the DRC initiative originated in early 2017 with the former Executive in Charge of VBA and the former Deputy Under Secretary for Disability Assistance. In April 2017, the Office of Disability Assistance transferred the program to VBA Compensation Service to execute. In May 2017, VBA piloted the DRC program at the St. Paul VA Regional Office (VARO), and expanded testing to the Waco and Houston VAROs in June 2017. Between July and September 2017, VBA implemented the program nationwide. The former Executive in Charge of VBA stated that VBA developed the rigid implementation timeline to achieve the former VA Secretary's goal of improving timeliness of claims processing. To achieve this goal, VBA wanted the program to be operational before the start of FY 2018. Figure 1 illustrates the implementation of each phase of the program during this period.

<sup>&</sup>lt;sup>10</sup> Overall claims processing timeliness includes the traditional claims process, as well as claims processed through the FDC and DRC programs.



 Phase 1: St. Paul VARO piloted the processing of claims under the DRC program.

- Phases 2 and 3: Waco and Houston VAROs piloted the processing of claims under the DRC program.
- Phase 4: Remaining VAROs began processing claims with nationwide implementation of the DRC program.

**Figure 1.** DRC program implementation May through September 2017 (Source: VBA's Decision Ready Claim Playbook, December 11, 2017)

VBA originally limited claims submitted under the DRC program to veterans seeking an increase in compensation related to disabilities for which they were already receiving benefits. In December 2017, VBA expanded the scope of eligible claim types to veterans and servicemembers filing direct, secondary, and presumptive service connection claims for disability compensation and to surviving spouses submitting original death claims.<sup>11</sup>

#### **VBA Staff Offices Involved with the DRC Program Implementation**

According to VA, implementation of the DRC program involved coordination among multiple staff offices. Table 1 describes the functions of each office involved with the DRC program.

<sup>&</sup>lt;sup>11</sup> The expansion of disability compensation claims included conditions that were incurred in or worsened by service, conditions that were related or aggravated by a currently service-connected condition and claims for conditions VA automatically presumes to be service connected.

**Table 1. Staff Offices and Descriptions** 

Name	Description	
Benefits Assistance Service	Facilitates outreach, electronic communications, and public contact services across VBA, oversees transition assistance, and ensures quality assurance and training for VBA employees who engage with the public through client services such as the National Call Center	
Compensation Service	Oversees delivery of disability compensation by	
	<ul> <li>issuing and administering procedural guidance on implementing initiatives and laws governing VBA benefits;</li> </ul>	
	<ul> <li>developing, facilitating, and overseeing employee training; and</li> </ul>	
	controlling and overseeing national quality assurance reviews.	
Office of Business Process Integration	Facilitates the design, development, and implementation of business systems and IT [information technology] to enhance claims processing. Ensures VBA's strategic needs and requirements for business and data systems are properly documented, integrated, and communicated.	
Office of Corporate Communication	Provides communications support to the Under Secretary for Benefits, each of VBA's business lines, and for initiatives as directed by VA.	
Office of Disability Assistance	Directs and oversees new initiatives, objectives, policies, and standards established to improve VBA services and programs.	
Office of Field Operations	Oversees operations at VBA's field offices to ensure effective and efficient delivery of benefits by	
	<ul> <li>monitoring, tracking, and evaluating workload using the National Work Queue;</li> </ul>	
	<ul> <li>developing performance measures to ensure timeliness, quality, and consistency of benefits; and</li> </ul>	
	<ul> <li>evaluating VARO and other field office performance.</li> </ul>	
Office of General Counsel	Provides legal advice and services to all organizational components of VA.	
Pension and Fiduciary Service	Administers VA's needs-based pension program for wartime veterans and their survivors, the parents' dependency and indemnity compensation (DIC) program for dependent parents, DIC program for the survivors of veterans who die as a result of service-connected disabilities, and burial benefits program for survivors and other individuals who paid for the burials or funerals of deceased veterans.	
Performance Analysis and Integrity	Performs data and information, performance analysis, and program integrity and internal control services for VBA.	

Source: VA 2017 Functional Organizational Manual, Version 4.0

### **Results and Recommendations**

### Finding 1: VBA Ineffectively Planned the DRC Program

From May 2017 through September 2018, VBA reported completing a total of 1,803 claims through the DRC program. This averaged about 106 cases per month, which fell far short of VBA's anticipated goals. The OIG determined that VBA did not effectively plan the DRC program. Without fully considering historical results of a similar program, VBA developed unrealistic participation goals for the DRC program. VBA did not maximize program participation by ensuring broad acceptance by VSO representatives prior to nationwide implementation. In addition, VBA did not ensure information technology (IT) system functionality was in place to provide veterans a self-service option.

#### What the OIG Did

The OIG reviewed VBA's reported workload data for the DRC program from May 2017 through September 2018. The review team conducted site visits at the VBA Central Office, as well as the VAROs in St. Paul, Minnesota and Seattle, Washington. During these site visits, the OIG interviewed VBA managers, staff, and both national and local VSO representatives. Appendix A provides additional details on the OIG scope of work and methodology.

The first OIG finding is based on the following:

- DRC program's low claims-processing results
- Insufficient analyses informing program goals
- Minimal VSO support
- Lack of veteran self-service option and IT system enhancements

# **DRC Program's Low Claims-Processing Results**

VBA reported completing approximately 1.4 million rating claims from October 2017 through September 2018 with an average timeliness of about 99 days. From May 2017 through September 2018, VBA completed 1,803 claims through the DRC program in an average of 15.2 days. Because this is less than one percent of the total number of completed claims processed, it did not have a significant impact on VBA's overall claims processing time. Figure 2 illustrates the number of DRC program claims VBA completed for each month during this period.



Figure 2. DRC program claims completed by VBA May 2017 through September 2018 (Source: VBA's Tableau Reports, Decision Ready Claim Dashboard, Full Detail Listing as of September 2018)

Although this figure shows an upward trend in DRC program participation, it is far short of the stated program goals. The OIG found that VBA did not effectively plan the DRC program. Specifically, VBA did not fully consider results of similar programs when developing DRC program goals, fully engage with VSOs to ensure significant participation, or implement self-service options with necessary IT system enhancements. In planning and implementing a new program, management is responsible for setting goals and expectations for programs, obtaining and acting on feedback from key stakeholders, and implementing changes to internal control systems as needed.

### **Insufficient Analyses Informing Program Goals**

VBA anticipated completing 25 percent of its disability compensation claims workload through the DRC program once it was implemented nationwide. According to Compensation Service officials, VBA's executive leaders directed this goal. The former VBA Executive in Charge stated the initial goals for the program were based on a percentage of the total population of claims received each month. However, VBA acknowledged these goals were unrealistic because the population included claims that were not eligible for the DRC program. Instead, VBA should have analyzed data from a similar initiative, such as the FDC program, to develop more accurate DRC program goals.

VBA established the FDC program in 2010 as a new claims processing model to expedite the decision-making process for disability compensation, pension, and dependency and indemnity

compensation claims. To participate in the FDC program, claimants must use a specific form and simultaneously submit all private medical evidence, additional forms, or treatment records, as well as identify any relevant federal records when they file their claim. VBA considered the DRC initiative an extension of the FDC program because it also required veterans to submit all relevant evidence at the time the application for benefits is submitted. As such, VBA should have put more emphasis on using the FDC program as a model to anticipate participation goals for the DRC program. Had VBA done so, it would have observed that it did not complete 25 percent of its claims inventory through the FDC program until June 2014—about four years after program implementation.

Although VBA relied on a percentage of all claims received as the basis for the DRC program participation goals, it should have used a more reliable and rigorous methodology that considered relevant data from a comparable program such as FDC. As a result, VBA's program goals were impractical and could not be achieved. It would have been in VBA's best interest to develop accurate estimates for participation to help drive sound business decisions and provide realistic expectations about how the DRC program would affect overall claims processing timeliness.

On February 26, 2019, VBA provided the OIG with documentation stating that VBA discontinued the DRC program effective February 15, 2019. The documentation specified that VBA stopped accepting DRC program claims on February 15, 2019, and will adjudicate the remaining claims. Originally, the OIG intended to recommend that VBA reexamine the data for the DRC program and set new goals for the upcoming year. However, since VBA decided to end the DRC program, the OIG no longer makes that recommendation, and there will be no follow-up action.

# **Minimal VSO Support**

VA did not ensure key stakeholders' acceptance before implementing the DRC program. Although the program allows any accredited representative to file a DRC program claim on behalf of a veteran, the vast majority of claims received were submitted by VSO representatives. Accredited VSO representatives have undergone a formal application and training process, and are recognized as being capable of assisting veterans with their affairs before VA. The DRC program relies on VSOs to work with veterans to gather evidence and submit claims. However, in planning for the DRC program, VBA did not ensure broad acceptance for the program by VSOs, which may have resulted in expanded participation in the program. An official with VBA told the OIG that they limited planning discussions to six national VSOs and did not target outreach to state and county VSOs. The VBA official also

<sup>&</sup>lt;sup>12</sup> As of January 2019, veterans represented by a non-VSO representative only accounted for eight DRC submissions.

<sup>&</sup>lt;sup>13</sup> The "Big Six" VSOs are Disabled American Veterans, Vietnam Veterans of America, Paralyzed Veterans of America, Veterans of Foreign Wars, the Military Order of the Purple Heart, and American Legion.

stated that representatives from only one of the six national VSOs, Disabled American Veterans, and only one state VSO, the Texas Veterans Commission, advocated for the DRC program. VSOs raised the following concerns with the DRC program:

- VSOs perceived the timeliness standard as misleading.
- Many VSOs lacked resources to perform expected services.
- VSO accessibility and credentialing processes were long and burdensome.

#### **VSOs Perceived Timeliness Standard as Misleading**

In September 2017, VBA published a promotional video stating a decision on a claim could be completed through the DRC program within 30 days by working with a VSO. However, VSO representatives noted that the video gave veterans a false impression related to the 30-day time period. Under the DRC program, all evidence-gathering was completed before an application for benefits was submitted. As a result, the time spent by veterans and VSOs gathering required evidence was not included in the 30-day calculation. Figure 3, which was not included in the September 2017 promotional video, illustrates the steps of the DRC process.

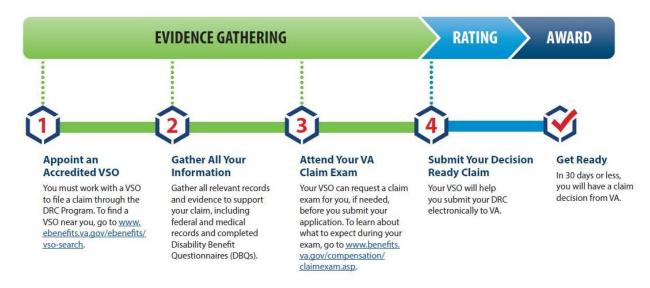


Figure 3: Steps for the DRC process

(Source: VBA website <a href="https://www.benefits.va.gov/COMPENSATION/docs/drc-poster.pdf">https://www.benefits.va.gov/COMPENSATION/docs/drc-poster.pdf</a>)

Various VSO representatives stated the processing time for the DRC program was misleading, and veterans did not fully understand how the time was calculated. The VSO representatives reported they had to explain to veterans that the 30 days did not begin at the time of initiating the process with their VSO, but rather, at the time VA received the application for benefits.

A local representative with Disabled American Veterans reported that there were delays associated with the DRC process prior to submitting an application for benefits. The

representative related that it could take up to two months to get a medical disability examination completed. This is supported by examination information collected by VBA that shows an average of approximately 42 days between the time a contract examination is requested and completed.

In December 2017, Veterans of Foreign Wars released a video featuring their Director of National Veterans Service explaining why VBA's promise of a decision on a claim in 30 days under the DRC program may be misleading and not always the best option. The video was developed to ensure veterans understood that the 30-day time period was measured from the date an application for benefits is submitted to VBA. Based on this and other VSO feedback, the OIG concluded that VBA's failure to explain to veterans that there may be a lengthy claim preparation period, including wait time for a medical examination, that was not included in the promise of a 30-day decision, was a contributing factor in the general lack of acceptance for the program.

### Many VSOs Lacked Resources to Perform Expected Services

The DRC program relied on VSOs' involvement and assistance. However, due to insufficient resources, many VSOs stated they did not participate in the program. The OIG interviewed national and local VSO representatives, such as the Military Order of the Purple Heart, American Legion, Disabled American Veterans, Vietnam Veterans of America, and Veterans of Foreign Wars.<sup>14</sup>

Through these interviews, the OIG learned that many VSO offices lacked the staff to conduct interviews with veterans wishing to file claims under the DRC program. These organizations also did not have enough staff to submit the data required to initiate a request for a medical examination or to submit a claim. Many VSOs stated the DRC process was more time consuming than assisting veterans with non-DRC program claims. In their view, they could do more to help veterans—in the same amount of time—with non-DRC program claims. For example, VSO representatives at the Seattle VARO informed the OIG it could take 30 to 50 minutes to conduct an interview with a veteran seeking to use the DRC program, review the evidence, and upload it to VBA. In contrast, they could conduct two non-DRC-related interviews during that same period. Another VSO representative told the OIG they only had one person in the office and have chosen not to participate in the DRC program because they lack the time to devote to the process.

<sup>&</sup>lt;sup>14</sup> The OIG did not interview representatives from Paralyzed Veterans of America because many of their members would not be eligible for the DRC program based on their level of disability. Generally, membership in Paralyzed Veterans of America is limited to veterans who suffered a spinal cord injury because of trauma or disease which resulted in paralysis of more than one limb. These conditions were not eligible for processing under the DRC program.

In April 2018, VBA created a messaging guide to address common issues and misperceptions about the DRC program. VA recognized that the level of support and capacity of VSOs varies, and that some organizations may have the ability to offer veterans more help than others. VA further stated that VSOs must determine how they can best support the veterans they serve based upon individual organization capacity. Although VBA recognized the capacity issues, the low level of VSO participation limited veterans' access to the DRC program.

# VSO Accessibility and Credentialing Processes Were Long and Burdensome

Veterans who chose to use the DRC program were required to work with an accredited representative, such as a VSO, to gather all evidence and submit their claims. VSOs then used the DRC Direct Upload Portal. According to the former Compensation Service Lead Program Analyst for Procedures, the current DRC process limits use to VSOs that have access to VBA's systems and credentials. Before a VSO representative can access VA systems, VBA must issue the representative a personal identification verification card. Figure 4 illustrates the multi-step access request process.

<sup>&</sup>lt;sup>15</sup> The DRC direct upload portal is a tool that allows VSOs to electronically submit claims and required documents to VBA.

<sup>&</sup>lt;sup>16</sup> According to VBA, this requirement applies to all types of claims and is not exclusive to claims processed under the DRC program.

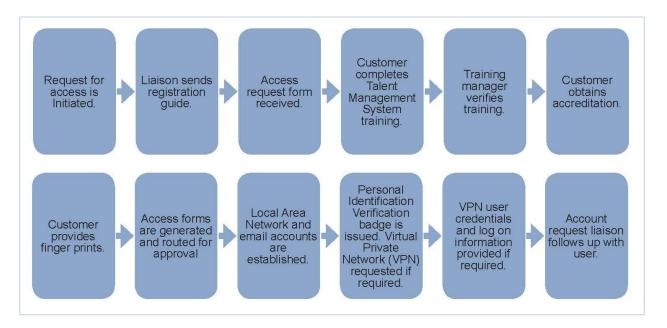


Figure 4: Access Request Process
(Source: Compiled from instructions published on the Indiana State Government website https://www.in.gov/dva/files/Indy CVSO PIV Instructions(1).pdf)

Interviews with the Minnesota and Washington Departments of Veterans Affairs, as well as the American Legion, revealed that these organizations have representatives in counties across their states who do not have the necessary VBA systems access and credentials to submit claims under the DRC program. During an interview with the Washington State Department of Veterans Affairs, a representative told the OIG that while VSOs can get personal identification verification cards, the process can be slow—taking on average at least six to 12 months. The VSO Liaison with VBA's Office of Corporate Communications related that county VSOs support the DRC program, but do not have the IT access or credentials to submit claims through the DRC Direct Upload Portal.

The Director of the Claims Division with the Minnesota Department of Veterans Affairs indicated that VBA advised them to send DRC information from their state-issued computers to a federal email address because they did not have VBA systems access and credentials. The DRC information could then be uploaded to the DRC Direct Upload Portal. The Director of the Claims Division with the Minnesota Department of Veterans Affairs stated that their email is unsecured and, if the DRC information, which includes sensitive personal information and medical evidence, was intercepted, it could expose the State of Minnesota to liability. As a result, VBA requested that VSO representatives without the proper access submit claims under the DRC program through regular mail or fax. Based on IT limitations and security issues, many VSOs chose not to use the DRC program. Because VSOs are critical to the DRC process, VBA should have ensured all VSOs had appropriate access and credentials to use the DRC Direct Upload Portal prior to its nationwide implementation.

Originally, the OIG intended to recommend that VBA reengage with key stakeholders, including VSOs, to determine whether tools and resources required for participation in the DRC program have been established. However, since VBA decided to end the DRC program, the OIG no longer makes that recommendation, and there will be no follow-up action.

#### Lack of Veteran Self-Service Option and IT System Enhancements

To reach the anticipated number of claims VBA intended to process through the DRC program, it needed to take additional steps to ensure maximum participation. To do so, VBA should have examined expanding its submission policy and ensured IT system functionality was in place to allow easier VSO access and provide a self-service option for veterans. This would have allowed veterans to directly access the system to manage VA records and benefits. For example, the self-service capability would have allowed veterans to submit a DRC program claim, view and edit their profile information, and check the status of a claim once it was submitted.

The former Compensation Service Lead Program Analyst for Procedures relayed that the DRC program did not initially offer a self-service option to veterans because VBA was concerned that such claims would be delayed or denied due to inaccurate or incomplete submissions because veterans do not regularly process claims. To help ensure veterans submitted what was needed for smoother DRC program claims processing, VBA decided to partner with VSOs to assist veterans in preparing their claims, including conducting an in-depth interview with veterans, because VSOs are an integral part of any program VBA delivers and have unique knowledge of VBA's business processes.

According to the Director of Compensation Service, the requirement that veterans go through an accredited VSO limited program participation. The Director commented that although 60 to 70 percent of veterans have a VSO representative, many do not actively use their VSO. Requiring veterans to work with a VSO to submit claims under the DRC program inhibited the unrepresented veterans or veterans who were not actively working with their VSO from participating.

The Executive Director of the Office of Business Process Integration stated that it was not until around September 2017—at the start of the DRC program nationwide implementation—that VBA began discussing modernizing its intake system to allow a self-service option for the DRC program. In January 2018, Compensation Service requested the DRC functionality be added to the electronic systems used by VSOs and veterans to submit claims through the Stakeholder Enterprise Portal and eBenefits.<sup>17</sup> This would expand access for VSO representatives and provide a self-service option to unrepresented veterans. The former Executive in Charge of VBA

<sup>&</sup>lt;sup>17</sup> The Stakeholders Enterprise Portal provides VA partner organizations and external stakeholders access to the web-based systems they need to assist veterans and their dependents. The eBenefits web portal provides resources and self-service capabilities to veterans, servicemembers, and their families to research, access, and manage their benefits and personal information.

and the Office of Information Technology agreed in April 2018 to modernize VBA's claims intake system to support DRC.

Following the confirmation of the new Under Secretary for Benefits in May 2018, the Executive Director of OBPI informed the OIG that VBA decided not to prioritize updating legacy systems, and focus resources on more long-term solutions, such as updating the "Vets.gov" website. As a result, IT enhancements that would have allowed veterans self-service access to the DRC program were not made. Had the VBA expanded its submission policy and improved its IT functionality for the DRC program to allow greater VSO access and veteran self-service capability at the outset, it may have achieved a higher rate of program participation.

Originally, the OIG intended to recommend that VBA and Office of Information Technology reexamine a self-service option and other measures to improve veteran access. However, since VBA decided to end the DRC program, the OIG no longer makes that recommendation, and there will be no follow-up action.

#### Conclusion

The OIG determined that VBA did not effectively plan the DRC program. As a result, the program participation was much less than anticipated. If VBA had conducted comprehensive analyses of data from other relevant programs, it would have set more realistic goals and expectations for the new program. The implementation of the DRC program also suffered because VBA did not have an adequate plan to ensure key stakeholders' buy-in, nor did it ensure that the VSOs had the tools and resources they needed to fully participate in the DRC program. When implementing a program that relies heavily on the participation of others, it is important to ascertain their capabilities before launching a program. Had VBA done so in this situation, it would have learned that many VSOs did not have the resources to participate. Further, adding IT system enhancements would have given veterans a self-service option and expanded VSO access. Since VBA decided to end the DRC program, the OIG did not make recommendations to address VBA's ineffective planning, and there will be no follow-up action.

### **Management Comments**

The Under Secretary for Benefits concurred in principle with Finding 1. The Under Secretary provided written comments, and the full text of those comments is included in Appendix C of this report.

The Under Secretary stated that VA had committed to processing decisions on DRC program claims in under 30 days, and that VA met that commitment by processing these claims within an average of approximately 15 days. The Under Secretary further stated that the scope of the type

<sup>&</sup>lt;sup>18</sup> Legacy systems refer to eBenefits and Stakeholders Enterprise Portal.

of claims eligible to be filed as DRC was narrow, and since program inception, only 2,312 claims were submitted. The Under Secretary stated that VA determined the best way forward was to refocus efforts on the FDC program. However, VA is retaining system functionality from the DRC program that will enable VSOs to designate a claim as complete and ready to be routed directly to a claims processing decisionmaker.

# Finding 2: VBA Obligated and Expended Funds on Contract Medical Examinations in Contravention of the Plain Language of Relevant Federal Law

The DRC program was designed to streamline claims processing and improve timeliness of processing claims submitted to VBA. Under the DRC program, a veteran working with an accredited representative, usually a VSO, gathered all evidence, including records from any medical examinations, to support the veteran's claim prior to submitting an application for benefits to VBA. To assist veterans with gathering the necessary evidence, VBA permitted veterans to obtain contract medical examinations paid for by VBA prior to submitting their applications for benefits.

Between July 2017 and September 2018, VBA reported that about 3,100 medical examinations were completed for 1,635 veterans who submitted claims through the DRC program. <sup>19</sup> VBA obligated approximately \$9.6 million for a contract to assist it in determining whether medical examinations were necessary and expended about \$972,000 in contract medical examination costs.

The plain language of relevant federal laws indicates that no appropriated funds were available for contract medical examinations for veterans before submission of an application for benefits. Appropriations for medical examinations were only available for veterans "entitled" to medical examinations. A veteran is entitled to a medical examination only "in the case of a claim for disability compensation." Current VA regulations define a "claim" as an application for benefits submitted on an approved form.

Under the DRC program, funds have been obligated and expended for contract medical examinations prior to the veteran's submission of an application. Relevant VA regulations provide that, absent an application for benefits, there is no "claim" for benefits and, accordingly,

<sup>&</sup>lt;sup>19</sup> The number of veterans does not equate to the 1,803 completed claims discussed in Finding 1, as not all DRC program claims required examinations, and some required more than one examination for an individual claim. The 3,100 refers to individual medical examinations, not examination requests.

<sup>&</sup>lt;sup>20</sup> Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Div. A, Title II § 205, Pub. L. No. 114-223 (Sept. 29, 2016), and the Consolidated Appropriations Act, 2018, Div. J, Title II § 205, Pub. L. No. 115-141 (Mar. 23, 2018).

<sup>&</sup>lt;sup>21</sup> 38 U.S.C. § 5103A(d). Although 38 U.S.C. §§ 5103A(a) and (g) permit VA to provide additional assistance to claimants, VA may defer its duty to assist veterans under §§ 5103A(a) and (g) until VA receives a "substantially complete" application. Since any assistance provided under these subsections would therefore be discretionary, it would not create an entitlement under the law. In the alternative, if VA's *duty* to assist under § 5103A(a) has been triggered, VA could not defer its obligation to assist the veteran in gathering necessary evidence and records, which—under the DRC program—it does not provide; relying instead on VSOs to assist veterans in gathering such information.

<sup>&</sup>lt;sup>22</sup> 38 CFR § 3.1(p).

no entitlement to a medical examination. No appropriated funds were available for contract medical examinations without an entitlement. Thus, any such obligation and expenditure would be an apparent violation of the Antideficiency Act.<sup>23</sup>

#### What the OIG Did

The second part of the review focused on the plain language of statutes and regulations related to obligating and expending funds for contract medical examinations before an application for disability compensation benefits was submitted by the veteran. The review team also conducted site visits at the VA Central Office and VBA Central Office. During these site visits, the review team conducted interviews with program staff, VBA managers, and attorneys in the VA Office of General Counsel (OGC).

This finding is based on an examination of the following:

- Federal laws and regulations related to medical examinations and VA appropriations
- Funds obligated and expended for contract medical examinations under the DRC program

#### **Federal Laws and Regulations**

The federal laws and regulations described in Table 2 apply to VA appropriations for medical examinations.

Table 2. Laws and Regulations Governing VA Appropriations for Examinations

Name	Description
31 U.S.C. § 1341 (a)(1)(A) (Antideficiency Act)	Prohibits VA from making expenditures for more than the amounts available in appropriations.
31 U.S.C. § 1301	Requires that appropriated funds only be applied to objects for which the appropriations were made.
Pub. L. No. 114-223 (Sept. 29, 2016); Pub. L. No. 115-141 (Mar. 23, 2018) <sup>24</sup>	Relevant VA appropriations statutes authorize appropriations for examinations only for individuals entitled to an examination under laws providing benefits to veterans.

<sup>&</sup>lt;sup>23</sup> 31 U.S.C. § 1341 (a)(1)(A) (The Antideficiency Act prohibits VA from making expenditures for more than the amounts available in appropriations.)

<sup>&</sup>lt;sup>24</sup> Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Div. A, Title II § 205, Pub. L. No. 114-223 (Sept. 29, 2016), and the Consolidated Appropriations Act, 2018, Div. J, Title II § 205, Pub. L. No. 115-141 (Mar. 23, 2018).

Name	Description
38 U.S.C. 5103A(d) <sup>25</sup>	Entitles a veteran to a medical examination "in the case of a claim for disability compensation…when such an examination or opinion is necessary to make a decision on the claim."
38 CFR 3.1(p) <sup>26</sup>	Requires that a "claim" be submitted on an application form prescribed by the Secretary.

Source: OIG analysis of relevant laws and regulations

# The Plain Language of Relevant Federal Laws Requires Submission of Benefits Application Prior to Obligating Funds for Examinations

The DRC program represented a change in how VBA previously processed disability compensation claims. Accordingly, on April 24, 2017, the Director of VBA Compensation Service requested clarification from VA OGC on whether VBA was authorized to pay for contract medical examinations through the DRC program before receiving an application for benefits.

The VA OGC Benefits Law Group provided guidance that was reviewed and approved by the VA Deputy General Counsel. This guidance noted that appropriations for medical examinations are only available for individuals entitled to an examination under the law and that a veteran is entitled to an examination "when such an examination or opinion is necessary to make a decision on the claim".<sup>27</sup>

The VA OGC's guidance concluded that an individual who has both submitted an intent to file (ITF) form<sup>28</sup> and is participating in the DRC program could be considered a "claimant" and was entitled to an examination.<sup>29</sup> VBA relied on this guidance to obligate and expend public funds on medical examinations before an application for benefits was submitted. The Benefits Law Group noted that there was a risk in this approach and that it was possible that a reviewing authority, such as a court or the OIG, could disagree with its interpretation.

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<sup>&</sup>lt;sup>25</sup> Other provisions of 38 USC § 5103A address assistance VA has a duty to provide claimants. *See supra* n. 21.

<sup>&</sup>lt;sup>26</sup> 38 CFR § 3.155 prescribes "how to file a claim"; however, given that "claim" is specifically defined § 3.1(p) and that nothing in § 3.1(p) is inconsistent with § 3.155, the OIG concluded that § 3.155 was not relevant to the analysis of what constitutes a "claim."

<sup>&</sup>lt;sup>27</sup> 38 U.S.C. § 5103A(d).

<sup>&</sup>lt;sup>28</sup> An intent to file allows veterans to provide minimal information related to the benefit sought and gives them up to one year to submit a complete claim. 38 CFR § 3.155(b). An intent to file form is not a claim, as indicated on the intent to file form itself.

<sup>&</sup>lt;sup>29</sup> The guidance also addressed permissible approaches for when examinations could be scheduled given that there is only an entitlement to a medical exam when "necessary to make a decision on a claim."

In the OIG's opinion, VA OGC's guidance disregarded the plain language of the relevant statute and a critical VA regulation. First, the statute states that a veteran is entitled to a medical examination only "in the case of a claim for disability compensation." Under the plain language of the statute, the existence of a claim is a prerequisite for an entitlement to an examination. Second, VA's current regulations, as revised in March 2015, require that a "claim" be "submitted on an application form prescribed by the Secretary." Under the plain language of this regulation, there is no "claim" for disability compensation until an application is submitted. The submission of an ITF form and participation in the DRC process does not constitute a "claim" for disability compensation under this regulation. The ITF form states on its face that it is "not a claim for benefits." Moreover, VBA's own website shows that a "Decision Ready Claim" is not submitted until step 4, *after* the contract examination is completed.<sup>32</sup>

VA OGC's guidance did not reference the definition of a claim at 38 CFR § 3.1(p). Rather, it relied on the definitions of "claimant" in 38 USC § 5100 and 38 CFR § 3.155, which provide that VA will deem the effective date of a later-filed claim to be the date an ITF form is submitted. In subsequent discussions with the OIG, OGC also drew support from caselaw predating the 2015 revision to VA's regulations. In the OIG's analysis, however, when VA revised its regulations in 2015, it clarified the definition of "claim," and continued reliance on other regulations and related caselaw to avoid the plain meaning of "claim" as defined by § 3.1(p) is inappropriate.

In the OIG's opinion, under the plain language of the relevant federal laws, there is no entitlement to a medical examination prior to submitting an application for benefits. Under the applicable appropriations statutes, appropriated funds may be used only to provide medical examinations to which an individual is entitled under the law.<sup>33</sup> The Antideficiency Act prohibits federal agencies from obligating and expending funds that are not available in their appropriation.<sup>34</sup> Thus, obligating and expending funds that are not available is a violation of the Antideficiency Act.

 $<sup>^{30}</sup>$  38 U.S.C.  $\S$  5103A(d). For the reasons discussed  $\it supra$  n. 25, 38 USC  $\S$  5103A(a) and (g) are also unavailing.

<sup>&</sup>lt;sup>31</sup> 38 CFR § 3.1(p) ("Claim means a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary").

<sup>&</sup>lt;sup>32</sup> VBA website, available at <a href="https://www.benefits.va.gov/COMPENSATION/docs/drc-poster.pdf">https://www.benefits.va.gov/COMPENSATION/docs/drc-poster.pdf</a> (Website accessed on January 22, 2018).

<sup>&</sup>lt;sup>33</sup> See, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (Mar. 23, 2018) (stating that appropriated funds may only be used for examinations of individuals "entitled" to such examination "under the laws providing benefits to veterans").

<sup>&</sup>lt;sup>34</sup> 31 U.S.C. § 1341(a)(1)(A).

#### **Contract Examination Expenses**

VBA informed the OIG that it obligated and expended funds for obtaining contract medical examinations for individuals before an application for benefits was submitted. When electing to participate in the DRC program, VSOs could gather and submit completed disability benefits questionnaires prepared by the veteran's private treating physician or request one or more contract examinations be performed. In August 2017, VBA obligated approximately \$9.6 million for a contract with ERPi related to the DRC program. Under the contract, ERPi was responsible for making a recommendation to VBA regarding whether an examination and/or medical opinion was necessary to substantiate the claim, and other related activities.<sup>35</sup>

As of September 2018, VBA reported that approximately 3,100 medical examinations were completed through the DRC program. The OIG requested that VBA provide the total cost of contract examinations completed for individuals under the DRC program. However, VBA only provided the cost invoiced for approximately 2,100 examinations from December 2017 through August 2018, which totaled nearly \$668,000. VBA did not account for approximately 970 additional examinations completed under the DRC program from July 2017 through September 2018. VBA acknowledged that more contract examinations were conducted but said it would require a concentrated and rigorous review to provide the OIG with the costs associated with these examinations. Based on the data VBA did provide, the OIG estimated that the additional examinations cost approximately \$304,000, for a total cost of about \$972,000.

### **Reasons for Potential Improper Expenditures**

VBA's Director of Compensation Service stated the former Executive in Charge ultimately made the decision to proceed with the DRC program despite the risk identified in VA OGC's guidance. As a result, VBA obligated and expended funds for examinations before an application for benefits was submitted. The OIG met with attorneys from the Benefits Law Group to discuss their guidance on the availability of funds for medical examinations under the DRC program. The attorneys confirmed the guidance did not consider the definition of "claim" under current VA regulations; however, the attorney who authored the guidance reiterated that there was risk identified in the advised approach.

<sup>&</sup>lt;sup>35</sup> The ERPi contract was intended to provide support services by reviewing evidence submitted by veterans and their VSO representatives, and recommending whether medical examinations were necessary. Because the primary focus of the contract was to assist VBA in making these determinations about medical examinations and related activities, the OIG included the total approximately \$9.6 million obligated for the contract.

<sup>&</sup>lt;sup>36</sup> 38 CFR § 3.1(p).

Originally, the OIG intended to recommend modification of the DRC program to align it with federal laws and regulations. However, since VBA decided to end the DRC program, the OIG no longer makes that recommendation, and there will be no follow-up action.

Recommendation 1 addresses the need for VBA to determine whether any Antideficiency Act violation occurred, and, if so, take appropriate action for funds already obligated and expended for contract examinations <sup>37</sup>

#### Conclusion

The OIG found evidence that VBA completed contract medical examinations for veterans who were not entitled to such examinations under the plain language of relevant federal laws and regulations. The existence of a claim is a prerequisite for an entitlement to a medical examination,<sup>38</sup> and a veteran participating in the DRC program does not submit a claim for benefits until after his or her contract examination is completed.<sup>39</sup> Under the applicable appropriations statutes, appropriated funds may be used only to provide medical examinations to which an individual is entitled under the law.<sup>40</sup> Thus, any obligation or expenditure of funds for an examination to which an individual is not entitled would be an apparent violation of the Antideficiency Act. Here, VBA obligated approximately \$9.6 million for a contract to assist it in determining whether medical examinations were necessary and expended about \$972,000 in contract medical examination costs for examinations to which individuals were not entitled under the law.

VBA chose to follow the guidance of VA OGC despite warnings that its position on the legality of providing medical exams under the DRC program could be interpreted differently by another authority such as a court or the OIG. This put the program at risk of violating the Antideficiency Act.

#### Recommendation

1. The Under Secretary for Benefits works with the VA Secretary and Chief Financial Officer to take steps required by OMB Circular A-11 to determine whether an Antideficiency Act violation occurred and, if so, take appropriate action for funds

<sup>&</sup>lt;sup>37</sup> See OMB Circular A-11.

<sup>&</sup>lt;sup>38</sup> 38 U.S.C. § 5103A(d).

<sup>&</sup>lt;sup>39</sup> Current VA regulations define a "claim" as an application for benefits submitted on an approved form. 38 CFR § 3.1(p).

<sup>&</sup>lt;sup>40</sup> See, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (Mar. 23, 2018) (stating that appropriated funds may only be used for examinations of individuals "entitled" to such examination "under the laws providing benefits to veterans").

already obligated and expended for medical examinations under the Decision Ready Claims program.

#### **Management Comments and OIG Response**

The Under Secretary for Benefits did not concur with finding 2 and the associated recommendation. The Under Secretary provided written comments, and the full text of those comments are included in Appendix C of this report. The OIG carefully considered those comments. The following provides a summary of VBA's comments, as well as the OIG's response to those comments.

In evaluating VBA's position on the existence of a claim, the OIG relied on the plain language of the relevant statutes and regulations, in accordance with well-settled canons of regulatory and statutory construction.<sup>41</sup> The Under Secretary states that this was a "dramatic oversimplification of the law regarding claims initiation."

First, the Under Secretary states that OGC's guidance relied on the definition of "claimant" in 38 U.S.C. § 5100. The term "claimant," however, does not appear in the section of Title 38 (38 U.S.C. § 5103(A)(d)(1)) at issue here. Rather, that section uses only the term "claim":

In the case of a *claim* for disability compensation, the assistance provided by the Secretary under subsection (a) shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the *claim*.<sup>42</sup>

Based on the plain language of this section, a prerequisite for a medical examination is the existence of a *claim*. A claim is defined in the relevant regulations as:

a written communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary.<sup>43</sup>

Thus, only when a veteran makes a written application for a determination of entitlement to the benefit—i.e., a claim—does the veteran become entitled to a medical examination.

<sup>&</sup>lt;sup>41</sup> See, e.g., Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.")

<sup>&</sup>lt;sup>42</sup> 38 U.S.C. §5103A(d)(1) (emphasis added).

<sup>&</sup>lt;sup>43</sup> 38 CFR § 3.1(p).

The Under Secretary states that the OIG's plain language interpretation of the relevant statute and regulation is inconsistent with 38 CFR § 3.155, in so far as § 3.155 provides that VA will consider a complete claim filed as of the date an intent to file form was received, if the claim is filed within one year of the receipt of the intent to file form.<sup>44</sup> The OIG disagrees. It is accurate that an intent to file form can be used as a placeholder for the effective date of a completed claim for certain purposes. Nevertheless, the intent to file form cannot be used to trigger an entitlement to a medical examination because—at the time of such examination—no claim existed. In the direct terms of the statutes and regulation, no claim exists prior to the filing of an application form.

As VA made clear in adopting changes to the applicable regulations in 2015, the revised rule "implements a procedure to *replace* the non-standard informal claims process in 38 CFR § 3.155."<sup>45</sup> Prior to adoption of the 2015 regulations, the "informal claim process allow[ed] non-standard submissions to constitute claims."<sup>46</sup> Specifically, provisions of § 3.157 allowed "various documents other than claims to constitute claims."<sup>47</sup> The informal claim process was replaced by the standardized claim process codified in the 2015 regulations. In lieu of the "informal claims" process, VA revised § 3.155 by "employing a standard form on which a claimant . . . can file an 'intent to file' a claim for benefits."<sup>48</sup> The purpose of the intent to file form is to secure an effective date placeholder while the formal application form is completed. The OIG is aware of no authority to indicate that, under the current regulatory scheme, submission of an intent to file confers any other pre-claim benefits upon the veteran, such as entitlement to a medical examination.

To be clear, the OIG does not take the position that the date of an intent to file form may not be used as a placeholder for the effective date of a completed claim for other purposes. Rather, the OIG concludes that—prior to filing an application form—no claim exists. This is consistent with VA's current regulations and its stated explanation of the changes encompassed in the current regulations. VBA's continued reliance on the "informal claim" process and caselaw that interpreted the prior regulations, as pro-veteran and well-intentioned as it may be, is contrary to VA's stated intent to "replace" the preexisting "informal claims" process with a standardized procedure.

<sup>&</sup>lt;sup>44</sup> While historically, this may have been referred to as an "informal claim" that is no longer the case. 38 CFR § 3.155(d) "describe[s] the manner and methods in which a claim can be initiated and filed" and how to determine the effective date of the claim *after* it is filed.

<sup>&</sup>lt;sup>45</sup> Standard Claims and Appeals Forms, 79 Fed. Reg. 57660 (2014) (emphasis added).

<sup>&</sup>lt;sup>46</sup> Standard Claims and Appeals Forms, 57676.

<sup>&</sup>lt;sup>47</sup> Standard Claims and Appeals Forms, 57660.

<sup>&</sup>lt;sup>48</sup> Standard Claims and Appeals Forms, 57660.

<sup>&</sup>lt;sup>49</sup> Standard Claims and Appeals Forms, 57665.

The problem inherent in the Under Secretary's argument is illustrated by the fact that thousands of veterans who submit an intent to file form never actually file a claim.<sup>50</sup> That group of veterans never become eligible for a VA-provided examination.<sup>51</sup> Yet, under the DRC program, VBA has incurred the cost of providing examinations for veterans who submitted intent to file forms but did not file a claim.<sup>52</sup> In the absence of a claim, VA's expenditure was in violation of its statutory authority.

Second, the Under Secretary's response critiques the OIG's recitation of the plain language of the appropriation statute, which requires an "entitlement" to a medical examination. The Under Secretary references instances in which Congress has "authorized" VA to provide assistance to claimants. VA may have authority to provide such assistance, however, that does not create an entitlement.

The Under Secretary states that the OIG's reliance on the statute's use of the term "entitlement" would put VA in the "untenable position" of being authorized by Congress to provide certain medical examinations, but unable to use appropriated funds to pay for those very examinations."<sup>53</sup> That is hyperbole. The issue is simply one of fulfilling necessary prerequisites—whether VA can provide examinations before a claim is filed or only after. Moreover, this illustrates the distinction between (1) "enabling" or "organic" legislation,<sup>54</sup> which provide an agency the authority to conduct a program or activity but "usually does not provide budgetary authority," and (2) appropriations,<sup>55</sup> which provide budgetary authority to the agency.<sup>56</sup> "It is only the appropriation . . . that permits the incurring of obligations and the making of expenditures."<sup>57</sup> Here, the appropriation requires an entitlement to a medical examination. To the extent that Congress believes that the plain language of the statute belies its

<sup>54</sup> The relevant "enabling" or "organic" legislation here includes 38 U.S.C. § 5103A, which authorizes VA to provide assistance to veterans in perfecting claims, including providing medical examinations, and the Veterans Benefits Act of 2003, Pub. L. No. 108-183 § 704(c) as amended by Pub. L. No. 115-141 § 529, which authorizes VA to provide contract examinations to applicants for disability benefits.

<sup>&</sup>lt;sup>50</sup> According to VBA's Tableau Workbook, in fiscal year 2018, over one hundred thousand intent to file claims expired, meaning that the veteran did not submit a substantially complete application within one year of the date an intent to file form was received. *See* the Manual Re-write (Claims Adjudication Manual) III.ii.2.C.3.e.

<sup>&</sup>lt;sup>51</sup> Indeed, VBA and OGC concede that an intent to file form is not a claim requiring adjudication. See App. C, n.20.

<sup>&</sup>lt;sup>52</sup> The OIG interviewed individuals at VSOs who reported that there were instances in which they did not submit claims for veterans who received contract examinations through the DRC program because the results of the examinations were not favorable.

<sup>&</sup>lt;sup>53</sup> See App. C, pg. 32.

<sup>&</sup>lt;sup>55</sup> The relevant appropriation statutes are the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Pub. L. No. 114-223 (Sept. 29, 2016), and the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 (Mar. 23, 2018).

<sup>&</sup>lt;sup>56</sup> GAO, Principles of Federal Appropriations Law, 4<sup>th</sup> ed., 2016 rev., ch. 2, § C.1, GAO-16-464SP (Washington, DC.: Mar. 2016).

<sup>&</sup>lt;sup>57</sup> Principles of Federal Appropriations Law, ch. 2, § C.2.c.

intent, it is free to revise the statute. However, the OIG is not at liberty to substitute its opinion for the plain language of the appropriations statute because it purportedly puts VA in an "untenable position."

Third, the Under Secretary states that the DRC program was properly legally vetted because it was based on guidance signed by the Deputy General Counsel. In response, the OIG removed language from the report that stated the DRC program was not legally vetted. However, the OIG maintains that because OGC's guidance noted there was risk in its interpretation of the law, VBA should have chosen to act more judiciously and to obtain further legal guidance prior to implementing the DRC program.

With regard to Recommendation 1, the Under Secretary states that the OIG overlooked the "necessary expense" doctrine and misconstrued the appropriations at issue. The OIG disagrees. First, the OIG did not overlook the "necessary expense" doctrine. The OIG concluded it does not apply here. As the Under Secretary states, the doctrine provides that if there is a reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated—*so long as the expenditure is not otherwise prohibited by law*—purchase of the object may be authorized as a necessary expense. Here, the expenditure of funds on medical examinations—without an entitlement or reimbursement—is otherwise prohibited by law. The relevant appropriation statutes state:

No appropriations in this title shall be available for . . . examination of any persons (except beneficiaries entitled to such . . . under the law providing such benefits to veterans . . .), unless reimbursement of the cost . . . is made to the "Medical Services" account ...<sup>59</sup>

VBA cannot rely on the "necessary expense" doctrine to expend funds in contravention of the appropriation statute.

The Under Secretary also notes that VBA is authorized to provide examinations in a wide variety of circumstances. <sup>60</sup> The OIG has only considered whether appropriations are available for medical examinations in the narrow set of circumstances presented by the DRC program. If VBA is paying or has paid for examinations in other contexts, without regard to applicable

<sup>&</sup>lt;sup>58</sup> See App. C, pg. 34 (citing Matter of: Commodity Futures Trading Commission—Availability of Appropriations for Inspector General Overhead Expenses, B-327003 (Sept. 29, 2015)) (emphasis added).

<sup>&</sup>lt;sup>59</sup> Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Div. A, Title II § 205, Pub. L. No. 114-223 (Sept. 29, 2016), and the Consolidated Appropriations Act, 2018, Div. J, Title II § 205, Pub. L. No. 115-141 (Mar. 23, 2018).

<sup>&</sup>lt;sup>60</sup> As discussed above, legislation that authorizes an agency to conduct a program is distinct from legislation that appropriates funds.

appropriations authority, the OIG recommends that VA determine whether an Antideficiency Act violation has occurred in those circumstances as well.

Second, the Under Secretary states that the OIG misconstrued the appropriations law and that the appropriation is not prescriptive because it provides that such expenditures may be permitted where "reimbursement of the cost . . . is made to the 'Medical Services' account." The Under Secretary recites the history and primary purpose of this section of the appropriation statute<sup>61</sup> and contends that because the funds used to pay for the contract medical examinations are paid out of the Compensation and Pension account, the limitation in the appropriation does not apply.

However, legislative history cannot be used to contradict the plain language of a statute. Here, the statute plainly states that no appropriations "in this title"—which includes all VA appropriations, including the Medical Services account and the Compensation and Pension account—are available for an examination unless there is an entitlement or reimbursement. The OIG notes that its interpretation is not inconsistent with the fact that Congress has appropriated funds for the pilot program to provide contract disability examinations as there are veterans who have submitted claims and, therefore, are entitled to examinations for which these funds may be used. If the plain language of the appropriation is inconsistent with Congress's intent, Congress is free to revise the appropriation to match its intent. However, neither VA nor the OIG may disregard the plain language of the statute.

<sup>&</sup>lt;sup>61</sup> Of note, VBA's reliance on VAOPGCPREC 2-2009 is misplaced. In that case, the service members had completed a VA claim form and, only after the service member submitted the claim to VA, was he or she provided a medical examination.

<sup>&</sup>lt;sup>62</sup> Principles of Federal Appropriations Law, ch. 2, § C.2.

<sup>&</sup>lt;sup>63</sup> Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Div. A, Title II, Pub. L. No. 114-223 (Sept. 29, 2016), and the Consolidated Appropriations Act, 2018, Div. J, Title II, Pub. L. No. 115-141 (Mar. 23, 2018).

# **Appendix A: Scope and Methodology**

#### Scope

The OIG conducted its review work from August 2018 through March 2019. The review assessed VBA's implementation of the DRC program.

### Methodology

To accomplish the review objective, the OIG identified and reviewed applicable laws, regulations, policies, procedures, and guidelines related to the DRC program. The OIG interviewed and obtained testimonial information related to the DRC program from managers and staff at VA and VBA Central Office, including program staff, VBA managers, and VA OGC. The OIG also interviewed VBA managers, staff, and national and local VSO representatives at two VAROs. The OIG team performed site visits at the St. Paul, Minnesota and Seattle, Washington VAROs in August and September 2018. In addition, the OIG conducted site visits at the VA and VBA Central Office, including VA's OGC, in August and October 2018. The team discussed the findings of the review with VBA leadership and included their comments where appropriate.

#### **Fraud Assessment**

The review team assessed the risk that fraud, violations of legal and regulatory requirements, and abuse could occur during this audit. The review team exercised due diligence in staying alert to any fraud indicators by taking actions such as these:

- Identifying laws and regulations related to the review subject matter
- Assessing previous reviews, audits, and inspections by VA OIG and other auditing organizations regarding VBA
- Completing the Fraud Indicators and Assessment Checklist
- Reviewing VA OIG's Hotline for reports of fraud in the area

The OIG did not identify any instances of fraud or potential fraud during this review.

# **Data Reliability**

To support the findings, conclusions, and recommendations for this review, the OIG used computer-processed data from VBA's Tableau Server. To test for reliability, the team determined whether any data were missing from key fields or were outside the time frame requested. The OIG also assessed whether the data contained obvious duplication of records, alphabetic or numeric characters in incorrect fields, or illogical relationships among data

elements. Furthermore, the OIG compared veterans' names, file numbers, Social Security numbers, VARO numbers, dates of claims, and decision dates as provided in the data received for a random sample of the data downloaded from VBA's Tableau Server.

Testing of the data disclosed that they were sufficiently reliable for the review objectives. Comparison of the data with information contained in the claims folders reviewed did not disclose any problems with data reliability.

#### **Government Standards**

The OIG conducted this inspection in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*.

# **Appendix B: Monetary Benefits in Accordance with Inspector General Act Amendments**

Source Information

Recommendation	Explanation of Benefits	Better Use of Funds	Questioned Costs
1	VBA improperly obligated funds for support services in obtaining contract medical examinations for individuals prior to the submission of a claim for benefits	\$9.6 million	
1	VBA improperly expended funds for contract medical examinations provided to individuals prior to the submission of a claim for benefits		\$972,000
	Total	\$9.6 million	\$972,000

# **Appendix C: Management Comments**

#### **Department of Veterans Affairs Memorandum**

Date: March 28, 2019

From: Under Secretary for Benefits (20)

Subj: OIG Draft Report – Review of VBA's Decision Ready Claims Program Hindered by Ineffective

Planning [Project No. 2018-05130-BI-0118]

To: Assistant Inspector General for Audits and Evaluations (52)

1. Attached is VBA's response to the OIG Draft Report: Review of VBA's Decision Ready Claims Program Hindered by Ineffective Planning.

2. Questions may be referred to R. Mitchum, Program Analyst, at (202) 632-8987.

(Original signed by)

Paul R. Lawrence, Ph.D.

Attachment

Attachment

# Veterans Benefits Administration (VBA) Comments on OIG Draft Report - Review of VBA's Decision Ready Claims Program Hindered by Ineffective Planning

VBA provides the following comments:

Finding 1: VBA Ineffectively Planned the DRC Program

Response: Concur-in-principle. The DRC program was launched nationwide in September 2017 to provide faster claims decisions by building upon the successful Fully Developed Claims (FDC) program. Claims filed as FDC were certified to be complete and did not require any additional evidence gathering other than for VA to obtain federal records, like Service Treatment Records, and to obtain necessary disability medical examinations. In FY 2017, almost 70 percent of claims filed were FDC. Under DRC, Veterans and surviving spouses consulted with VSOs to obtain ALL evidence, including federal records and necessary examinations, prior to formal claim submission. In turn, VA committed to process decisions on these claims in under 30 days. VA met that commitment by processing DRCs in an average of approximately 15 days. However, the scope of the type of claims eligible to be filed as DRC was narrow, and since program inception only 2,312 DRCs were submitted.

In the first quarter of FY 2019, VA held workshops with several different VSO representatives to assess the DRC program, including visiting VSO locations to observe the experience for the end user. Feedback gathered from VSO partners will enable VA to apply the lessons learned from the DRC program to enhance future claims processes. Based on the assessment and VSO feedback, VA determined that the way forward is to refocus efforts on the successful FDC program, which did not require the Veteran to obtain a pre-claim examination and/or federal records. However, VA is retaining system functionality from DRC within Direct Upload that will enable VSOs to still designate a claim as complete and ready to be routed directly to a claims processing decisionmaker.

Finding 2: VBA Obligated and Expended Funds on Contract Medical Examinations in Contravention of the Plain Language of Relevant Federal Law.

Response: Non-concur. After consulting with the Office of General Counsel (OGC) on this matter, VBA believes this finding is based on a dramatic oversimplification of the law regarding claims initiation. There is a wealth of relevant law on this topic that OIG summarily dismisses or completely disregards in its analysis.

First, it must be emphasized that OGC's guidance to VBA provided both statutory and regulatory support for its position on the permissibility of expending funds on DRC examinations. The guidance noted that the statutory definition of "claimant" in 38 U.S.C. § 5100 ("[T]he term 'claimant' means any individual applying for, or submitting a claim for, any [VA] benefit.") was not limited to those who had filed a complete claim for VA benefits, but included individuals in the process of "applying for, or submitting a claim for," VA benefits.¹ The guidance further noted that 38 U.S.C. § 5102(a) considers an individual to be "claiming" VA benefits even prior to obtaining an application form, much less submitting it to VA. And it noted that, while "claim" is not defined in statute, 38 C.F.R. § 3.155 recognizes the flexibility of that term by providing various ways in which "a claim can be initiated and filed." 38 C.F.R. § 3.155; see 38 C.F.R.

<sup>&</sup>lt;sup>1</sup> OIG does not dispute that all the DRC participants were "claimants" under the definition of 38 U.S.C. § 5100, since they all had submitted an "intent to file a claim" (38 C.F.R. §3.155(b)).

§3.155(a)-(d) (discussing a request for an application for benefits, an "intent to file a claim," an incomplete application, and a complete claim).

Given this explicit discussion of the definition of "claim" in OGC's guidance, it is curious that OIG in its report characterizes the guidance as having "failed to consider the definition of 'claim' under current VA regulations." *Ante* at 18. It is true that OGC's guidance "did not reference the definition of claim at 38 [C.F.R.] § 3.1(p)." *Ante* at 17. But, as OGC explained to OIG and VBA in subsequent correspondence, it is § 3.155—not § 3.1(p)—that historically has been and currently still is the primary regulation describing and governing claim initiation. *See* 38 C.F.R. § 3.155 (2014) (Informal claims); § 3.155 (2015) (How to file a claim).

While OIG posits that the law regarding claims begins and ends with § 3.1(p), an exclusive focus on one regulation is not appropriate in this complex area of veterans' law. See Rice v. Shinseki, 22 Vet. App. 447, 451-52 (2009) (addressing the complexities of determining what constitutes a "claim"). Section 3.1(p) is not the sole relevant regulation for determining what constitutes a "claim," and OIG errs in "conclud[ing] that § 3.155 [i]s not relevant to the analysis of what constitutes a claim." Ante at 15 n.21. In fact, as OGC informed OIG during this investigation, many of the essential judicial precedents defining what constitutes a "claim" address § 3.155 and do not even mention § 3.1(p). See, e.g., Akers v. Shinseki, 673 F.3d 1352, 1357 (Fed. Cir. 2012); MacPhee v. Nicholson, 459 F.3d 1323, 1325-26 (Fed. Cir. 2006); Moody v. Principi, 360 F.3d 1306, 1308 (Fed. Cir. 2004); Roberson v. Principi, 251 F.3d 1378, 1382 (Fed. Cir. 2002).

OIG mentions this caselaw in its report, but then asserts that it is "inappropriate" to continue to rely on these binding precedents after 2015 revisions to VA regulations. *Ante* at 17. OIG is incorrect. The 2015 revisions implemented new requirements that certain steps in the claim initiation process be taken on standard forms rather than in any written format. But, notably, the revisions *retained* the essential two-step claim-initiation model in effect since at least 1921. *See* Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,668-69, 57,677 (2014). Specifically, VA has historically considered the date of an "informal claim" as the "date of receipt of the application" for effective-date purposes if a "formal claim" was submitted within one year thereafter. 38 C.F.R. § 3.155(a) (2014); *see* 38 U.S.C. § 5110(a)(1). After the 2015 revisions, VA now considers the date of an "intent to file a claim" as the "date of receipt of the application" for effective-date purposes if a "complete claim" is submitted within one year thereafter. 38 C.F.R. § 3.155(b) (2015); *see* 38 U.S.C. § 5110(a)(1). Succinctly stated, while the names and formats for these filings have changed, the two-step claim-initiation model has not; and the aforementioned precedents' consideration of § 3.155 as the regulation governing claim-initiation is still good law.

Moreover, the statutory reasoning underlying this two-step claim-initiation model remains unchanged. As reflected above, this longstanding, pro-veteran practice of providing an effective date in accordance with a veteran's first filing ("informal claim" or "intent to file a claim") specifically hinges on VA considering the date of that first filing to be "the date of receipt of the application." 38 U.S.C. § 5110(a)(1). Thus, OIG's consistent declaration that DRC claimants received an examination before filing their "application," see ante at i, iii, iv, 14, 16, 17, 18, overlooks the fact that these DRC claimants had already filed their "intent to file a claim," which VA treats as the date the "application" is filed under this body of law. The fact that § 3.1(p) (2015) contains a definition for "claim" that requires submission on an "application form prescribed by the Secretary"—which is not so revolutionary, since 38 U.S.C. § 5101 and its predecessors have stated as much since 1958—does not change the fact that § 3.155 (2015) explicitly retains the framework

that a claim can be "initiated" before a complete claim is filed, as well as the notion that an "intent to file a claim" can serve as the claimant's "application" for effective-date purposes.<sup>2</sup>

Put another way, if OIG is correct that the date of an "intent to file a claim" cannot serve as a stand-in for the date an "application" is filed because it is not a complete claim, it is difficult to see why this reasoning would not invalidate the effective date lookback that has long been a pro-veteran feature of VA's claim initiation regulations. OIG has not supplied any reason why the law of claim initiation would be different for the question of whether assistance is authorized than it is for the question of whether payment of benefits based on a liberal effective date is authorized.

In sum, OIG's dismissal of § 3.155 as not relevant to this issue is misguided. And OIG's isolated focus on § 3.1(p) obscures the very real consequences that flow from a claimant's submission of an "intent to file a claim." If OIG had properly considered VA's longstanding, pro-veteran, two-step claim-initiation model, as historically and currently embodied in § 3.155, it would not have concluded that the "plain language of relevant federal laws" prohibits examinations for DRC claimants who had all initiated their claims.

Beyond its exceedingly narrow focus on § 3.1(p), OIG also incorrectly characterizes the law surrounding entitlement to medical examinations. Specifically, it is *not* the case that a claimant "is entitled to a medical examination only in the case of a claim for disability compensation." *Ante* at 14 (citing 38 U.S.C. § 5103A(d)). An examination can be required in the case of a pension claim, 38 C.F.R. § 3.326, a dependency and indemnity compensation claim, *Wood v. Peake*, 520 F.3d 1345, 1349 (Fed. Cir. 2008), or—if VA discerns the need to verify the continued existence or current severity of a disability—even where there is no pending claim at all, 38 C.F.R. § 3.327. Moreover, Congress has expressly authorized VA to provide assistance (to include medical examinations) beyond the strict confines of 38 U.S.C. § 5103A(d), see 38 U.S.C. § 5013A(g) (2017) (other assistance not precluded); *Wood*, 520 F.3d at 1347-50, to include claimants who have submitted incomplete applications, 38 U.S.C. § 5103A(a)(3)—i.e., claimants who (like DRC applicants) have initiated their claim, but not filed a "complete claim." *See* 38 C.F.R. § 3.155(c). The fact that 38 U.S.C. § 5103A(a)(3) explicitly authorizes VA to "defer" providing assistance to claimants who have not yet submitted an application containing essential information plainly reveals Congress's permission to provide such assistance.

Nevertheless, OIG simply repeats that there can be no examination "entitlement" without a "claim" and characterizes the assistance authorized in 38 U.S.C. § 5103A(a) and (g) (2017) as "discretionary" and "not creat[ing] an entitlement under the law." *Ante* at 14 & n.18. Adopting this approach, however, would put VA in an untenable position. VA would be authorized by Congress to provide certain medical examinations, but unable to use appropriated examination funds to pay for those very examinations. OIG's strict interpretation here would effectively obviate the aforementioned provisions of law.

Finally, it is unclear why OIG stated that the DRC program was not "properly legally vetted." *Ante* at 19. VBA requested guidance from OGC—the Department's chief legal officer—on its plan for DRC. See 38 U.S.C. § 311. OGC provided guidance, signed by the Deputy General Counsel, as to how a legally-permissible DRC program could be structured. The guidance provided statutory and regulatory support for its position, while also noting the risk that a court or OIG could view the law differently. The fact that OIG and OGC have a disagreement on this legal matter does not make the DRC program "[im]properly legally vetted." *Ante* at 19.

<sup>&</sup>lt;sup>2</sup> To be sure, an "intent to file a claim" is not a complete claim requiring adjudication, but it is a form of claim initiation. 38 C.F.R. § 3.155.

<sup>&</sup>lt;sup>3</sup> OIG never engages with the fact that this interpretation of the law cannot co-exist with 38 C.F.R. § 3.327.

The following comments are submitted in response to the recommendation in the OIG draft report:

Recommendation 1: The Under Secretary for Benefits works with the VA Secretary and Chief Financial Officer to take steps required by OMB Circular A-11 to determine if an Antideficiency Act violation occurred and, if so, take action as appropriate for funds already obligated and expended for medical examinations under the Decision Ready Claims program.

<u>VBA Response</u>: Non-Concur. After consulting with OGC on this matter, it appears that OIG's recommendation may have overlooked a proper interpretation of the Antideficiency Act, as well as the "necessary expense" doctrine. Further, we believe OIG has misconstrued the VA appropriations statutes at issue.

More specifically, while agencies may only make expenditures permitted by an appropriation, the Purpose Act (31 U.S.C. § 1301) does not require that every item of expenditure be specified in an appropriations act; rather, existing agency appropriations that generally cover the type of expenditure involved are available for expenses of new or additional duties. See Dept. of Health & Human Servs.—Risk Corridor Program, B-325630 (Sep. 30, 2014). Further, if there is a reasonable relationship between the object of the expenditure and the general purpose for which the funds were appropriated—so long as the expenditure is not otherwise prohibited by law—purchase of the object may be authorized as a necessary expense. See Matter of: Commodity Futures Trading Commission—Availability of Appropriations for Inspector General Overhead Expenses, B-327003 (Sep. 29, 2015). The "reasonable relationship" prong can be satisfied where the expense directly contributes to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available. See The Honorable Bill Alexander, House of Representatives, B-213137 (June 22, 1984); see also Decision of General Counsel Socolar, B-230304 (Mar. 18, 1988).

These fundamental tenets of appropriations law seem to eschew OIG's strict interpretation of the appropriations available for VA benefit examinations. VA is authorized to provide examinations to claimants in a wide variety of circumstances, *see*, *e.g.*, 38 U.S.C. § 5103A(a)(3), (d), (g); 38 C.F.R. §§ 3.326, 3.327, and has appropriated funds for those purposes. Given that the expenses for DRC examinations allowed VA to carry out its general function of providing examinations for claimants, it is difficult to discern how the expenses would not constitute an appropriated or necessary expense.

Further, the appropriations law statutes on which OIG relies do not bear the proscriptive effect OIG attributes to them. Sections 205 of the Consolidated Appropriations Act of 2018, Pub. L. 115-141, H.R. 1625, at 466, and the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Pub. L. 114-223, Div. A, 130 Stat. 857, 876,<sup>4</sup> provide, in relevant part:

No appropriations in this title shall be available for hospitalization or examination of any persons (except beneficiaries entitled to such hospitalization or examinations under the laws providing such benefits to veterans . . . ) unless reimbursement of the cost of such hospitalization or examination is made to the 'Medical Services' account at such rates as may be fixed by the Secretary of Veterans Affairs."

(Emphasis added.) The primary purpose of the provision is not to prohibit the use of appropriated funds for examinations of persons not "entitled" by law to such examinations but, rather, to require *reimbursement* to the Medical Services account for the cost of examinations provided to such persons in

<sup>&</sup>lt;sup>4</sup> OIG cites H.R. 244, 115<sup>th</sup> Cong., as the relevant appropriations act for 2017. However, H.R. 244, which was enacted as Pub. L. 115-31, does not contain VA's fiscal year 2017 appropriations. Rather, VA's fiscal year 2017 appropriations were provided in Pub. L. 114-223, Div. A, which originated from H.R. 5325, 114<sup>th</sup> Cong.

order to make the Medical Services account "whole." Contract examinations for purposes of VBA disability claims are not funded with amounts appropriated to the Medical Services account. Rather, Congress has expressly appropriated funds to the Compensation and Pensions account "[f]or the payment of compensation benefits to or on behalf of veterans and a pilot program for disability examinations as authorized by section 107 and chapters 11, 13, 18, 51, 53, 55, and 61 of title 38, United States Code." Pub. L. 115-141, H.R. 1625 at 458; Pub. L. 114-223, Div. A, 130 Stat. at 867. We do not believe that sections 205 of the two appropriations statutes, which are concerned with making the Medical Services account whole by requiring reimbursement for examinations provided by in-house VA medical providers, can reasonably be construed to prohibit the Secretary from using funds appropriated to the Compensation and Pensions account to acquire contract examinations under the pilot program for claimants.

For accessibility, the original format of this appendix has been modified to comply with Section 508 of the Rehabilitation Act of 1973, as amended.

<sup>&</sup>lt;sup>5</sup> As VA OGC discussed in greater detail in VAOPGCPREC 2-2009, "Use of VA Appropriations to Provide Medical Examinations for Service Members Enrolled in DES Pilot Program" (Feb. 2009), the legislative history of section 205 is consistent with the conclusion that Congress did not intend to preclude VA from expending appropriated funds on compensation and pension examinations for claimants. Provisions similar to the current section 205 have appeared in appropriations acts since fiscal year 1941. The legislative history reveals that the purpose of the provision was to prevent service to veterans being curtailed because funds appropriated to VA for medical services were being spent on employees of other federal agencies, such as the Post Office Department, the Civil Service Commission, and the Unemployment Compensation Commission, without reimbursement to VA. 86 Cong. Rec. 509-511 (1940); 30 Comp. Gen. 493 (1951).

<sup>&</sup>lt;sup>6</sup> The Medical Services account funds certain expenses of the Veterans Health Administration, including the provision of "in-house" VA claims examinations (as opposed to contract claims examinations, *see infra* at n.7).

<sup>&</sup>lt;sup>7</sup> Contract examinations for VA claims purposes are authorized by Pub. L. 104-275, § 504 (1996), as modified by Pub. L. 113-235, Div. 1, title II, § 241 (2014), which provides that such examinations are funded from "amounts available to the Secretary of Veterans Affairs for payment of compensation and pensions." Pub. L. 104-275, § 504(d); see 38 U.S.C. § 5101 note.

<sup>&</sup>lt;sup>8</sup> Congress has had numerous opportunities to add the "Compensation and Pensions" account to the reimbursement-requirement provision of section 205, but has not chosen to do so. The "pilot program for disability examinations" language has been included in the Compensation and Pensions account since the fiscal year 1998 appropriations act (P.L. 105-65).

# **OIG Contact and Staff Acknowledgments**

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