



DEPARTMENT OF VETERANS AFFAIRS  
**OFFICE OF INSPECTOR GENERAL**

*Office of Audits and Evaluations*

VETERANS BENEFITS ADMINISTRATION

The Veterans Benefits  
Administration Inadequately  
Supported Permanent and  
Total Disability Decisions

REVIEW

REPORT #19-00227-226

SEPTEMBER 10, 2020



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## Executive Summary

In fiscal year (FY) 2018, the Veterans Benefits Administration (VBA) paid over \$27 billion in annual benefits to more than 680,000 veterans receiving disability compensation at the 100 percent rate. The number of veterans receiving this level of disability compensation increased from about 260,000 in FY 2008, according to VBA’s FY 2008 and FY 2018 Annual Benefits Reports. VA’s disability compensation program, administered by VBA’s Compensation Service, pays veterans benefits for service-connected disabilities based on the degree of the disability. A service-connected disability is the result of a disease or injury that happened during or was made worse by active military service.

In addition to disability compensation, VA pays for a number of additional benefits for veterans who have been found permanently and totally disabled as well as for their eligible dependents. These additional benefits include healthcare coverage, payment for certain educational expenses, and dental benefits. In FY 2018, VA dedicated more than \$31 billion for these benefits and services. While these programs and payments were not made exclusively for veterans with permanent and total (P&T) disability status, the VA Office of Inspector General (OIG) found the increased population and high annual budget appropriations for these programs as reasons to review how VBA administers P&T determinations. Table 1 shows the approximate amounts appropriated for each program.

**Table 1. P&T-Related Benefits Reported Amounts**

Benefit	FY 2018 Budget Amounts*
Healthcare coverage for eligible dependents	\$1.7 billion
Assistance for educational expenses for eligible dependents	\$616 million
Dental care for eligible veterans	\$1.1 billion

*Source: VA FY 2020 budget submission includes FY 2018 funding for these benefits.*

*\* Numbers are rounded.*

To be considered for P&T status, the law requires veterans to have a “total disability permanent in nature.”<sup>1</sup> Veterans are considered to have total disability when they have a 100 percent disability rating due to service-connected disabilities or if their service-connected disabilities make them unemployable.<sup>2</sup> For the total disability to be permanent, the law requires the disability to be “based upon an impairment reasonably certain to continue throughout the life of

<sup>1</sup> 38 U.S.C. § 3501(a)(8). Within VBA, the terms “P&T,” “Dependents’ Educational Assistance or DEA,” and “Chapter 35” are often used interchangeably to refer to permanent and total status. For the purpose of this report, the OIG used the term P&T to signify permanent and total status.

<sup>2</sup> 38 C.F.R. § 4.15.

the disabled person.”<sup>3</sup> When VBA establishes P&T status for a veteran, the veteran is generally paid at the 100 percent disability compensation rate indefinitely.

Based on the significant cost of disability compensation benefits and other services for P&T veterans and their dependents, and the increasing number of veterans receiving these benefits, the OIG sought to determine whether VBA decision makers cited adequate medical evidence in rating decisions used to establish P&T status for veterans with at least one disability rated as 100 percent disabling.<sup>4</sup>

## What the Review Found

The OIG reviewed a statistical sample of 100 veterans’ rating decisions, from an estimated population of over 24,800 veterans with at least one disability rated at 100 percent as of August 20, 2018, and a P&T status decision issued from October 1, 2017, to September 14, 2018, to determine whether VBA decision makers cited adequate medical evidence to support establishing P&T status. The OIG found that 61 percent of the rating decisions did not cite adequate evidence showing the disabilities were permanent and estimated that VBA staff established P&T status for about 15,100 veterans without this evidence. VBA’s rating decisions also lacked a clear explanation of the benefits associated with establishing P&T status. VBA staff are not likely to reevaluate P&T status decisions because the decisions are effectively considered permanent with no controls for future examinations that may show a change in the disability. Furthermore, when a P&T status rating decision does not cite adequate medical evidence, ineligible veterans and their dependents may improperly receive benefits or services.

The statute guiding P&T disability decisions states the evidence must allow VA to be “reasonably certain” that a total disability is likely to continue throughout a veteran’s life.<sup>5</sup> The OIG found an inconsistency between the statute and the guidance regarding P&T status decisions in the adjudication procedures manual issued by VBA’s Compensation Service. The law requires VA to be “reasonably certain” that a veteran’s disabilities are unlikely to improve during his or her lifetime. Despite this, VA’s adjudication procedures manual does not use the legislatively required “reasonably certain” standard or a more likely than not standard, but states that a P&T disability exists when

Evidence at the time of evaluation does not specifically support that the total disability will continue for the remainder of the person’s life but does not show that the condition is likely to improve pursuant to 38 CFR 3.327(b)(2). In such cases, a future examination control is inappropriate, so the total disability rating is

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<sup>3</sup> 38 U.S.C. § 3501(a)(8).

<sup>4</sup> A rating decision is a document that explains VBA’s determination on a veteran’s claim.

<sup>5</sup> 38 U.S.C. § 3501(a)(8).

static; in the absence of reevaluation, total disability is likely to continue for the remainder of the person's life.<sup>6</sup>

This inconsistency contributed to many rating decisions where decision makers established P&T status for veterans without citing adequate medical evidence to support the conclusions.

Because the term "reasonably certain" is not defined in statutes or VA regulations, the OIG asked the VA Office of General Counsel for a definition. The Office of General Counsel told the OIG that the term "reasonably certain" generally means greater than 50 percent likelihood, or more likely than not. Compensation Service did not provide a definition of "reasonably certain" despite the long history of the term existing in the regulations. The OIG also asked the Compensation Service executive director for a definition. The executive director suggested "reasonably certain" was "reasonably intuitive" and a specific definition was not needed.

The OIG estimated that VA improperly paid about \$38 million in additional benefits related to P&T status between October 1, 2017, and December 31, 2019, to veterans under the age of 55. The OIG further estimated that VA may improperly pay more than \$84 million over the next five years in payments for these benefits based on P&T status decisions made without citing adequate medical evidence to show veterans are permanently disabled. These combined estimates of more than \$122 million are based on medical and education benefits paid to dependents, as well as dental payments for veterans, and do not include disability compensation paid to veterans with P&T status.

## What the OIG Recommended

The OIG recommended that the under secretary for benefits ensure the adjudication procedures manual is updated for consistency with all applicable laws, regulations, and policies for P&T status decisions; make certain that decision-making staff support P&T status decisions by describing the evidence used to make their conclusions; replace the title "Dependents' Educational Assistance under 38 U.S.C. Chapter 35" and the standardized language used in rating decisions to clearly state that P&T status is being considered; and ensure appropriate training is provided to decision-making staff based on the updated procedures, and monitor the effectiveness of that training.

## Management Comments

The under secretary for benefits concurred with recommendations 1, 2, and 4 and concurred in part with recommendation 3. The under secretary for benefits provided corrective action plans that are responsive to the intent of the recommendations. The OIG will monitor implementation of planned actions and close recommendations when VBA provides sufficient evidence

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<sup>6</sup> VA Manual 21-1, part 9, sub. 2, chap. 2, topic 1.j, "When a P&T Disability Exists," February 8, 2018.

demonstrating progress in addressing the recommendations and the issues identified. Appendix E provides the full text of the under secretary's comments.

The under secretary requested inclusion of the full text of the claims adjudication procedures manual guidance that the OIG found inconsistent with the law and regulations for P&T status decisions in the executive summary of the report. The OIG has done so. It should be noted that the full text of the inconsistent guidance was already included in the report on page 11.

Additionally, the under secretary's response takes issue with the OIG's calculation of potential monetary benefits as shown in appendixes C and D. He states that

OIG's report assumes that VBA would not make any improvements over the next five years, including those from implementing OIG's recommendations. VBA takes exception to this practice as this assumption is incorrect and misleading to the reader. Generally, agencies are required to complete final action on OIG recommendations within 12 months of publication. Assuming current practices will go unchanged is false, as VBA values OIG's vital oversight role and works diligently to implement recommendations to improve service to Veterans.

The OIG did not recommend reissuing P&T rating decisions as a corrective action and therefore did not factor this into the estimated monetary impact. The estimate is based on actual payments for P&T veterans and their dependents for healthcare coverage, certain educational expenses, and dental benefits made over more than a two-year period plus estimated payments for these benefits over an additional five years. The estimate would not be affected unless VBA reissues all P&T rating decisions issued during FY 2018 under updated policies and procedures.



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## Abbreviations

CHAMPVA	Civilian Health and Medical Program of the Department of Veterans Affairs
DEA	Dependents' Educational Assistance
FY	fiscal year
OGC	Office of General Counsel
OIG	Office of Inspector General
P&T	permanent and total
VBA	Veterans Benefits Administration
VHA	Veterans Health Administration



## Introduction

A service-connected disability is the result of a disease or injury that happened during or was made worse by active military service or qualifying reserve or national guard duty. Veterans are compensated for service-connected disabilities, and the amount paid is determined by the severity of the veterans' disabilities.

The Veterans Benefits Administration (VBA) considers certain veterans as permanently and totally disabled when their service-connected disabilities meet specific requirements. The disabilities must be permanent, or reasonably certain to continue for the rest of the veterans' lives.<sup>7</sup> The disabilities must also be totally disabling, which means VBA evaluated the disabilities as 100 percent disabling or the disabilities prevent veterans from securing and maintaining employment.<sup>8</sup> Veterans with permanent and total (P&T) status are entitled to payment at the 100 percent disability rate for life, and the status is not typically reevaluated.<sup>9</sup> The VA Office of Inspector General (OIG) conducted this review to determine whether VBA rating decisions to establish P&T status for veterans with at least one 100 percent disabling condition were adequately supported by cited evidence.<sup>10</sup>

The OIG noted a significant increase in the number of veterans receiving monetary disability benefits at the 100 percent rate. Based on VBA's fiscal year (FY) 2008 and FY 2018 Annual Benefits Reports, the number of veterans receiving disability benefits at this level more than doubled between FY 2008 and FY 2018, from about 260,000 to more than 680,000. Growth in the number of veterans rated disabled at the 100 percent level increased at a significantly higher rate than the total number of disability compensation beneficiaries for the same period.<sup>11</sup> As a percentage of all veterans receiving disability compensation payments, veterans with 100 percent disability evaluations accounted for 9 percent in FY 2008, increasing to 14 percent in FY 2018. In FY 2018, VBA paid over \$27 billion in annual benefits to veterans with 100 percent disability evaluations. This is more than a third of the approximately \$76.7 billion in total compensation paid to over 4.7 million disabled veterans in FY 2018.

In addition to the \$27 billion paid in disability compensation, VA dedicates funds for additional benefits available to P&T veterans and their dependents. These additional benefits include

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<sup>7</sup> 38 U.S.C. § 3501(a)(8); 38 C.F.R. § 3.340.

<sup>8</sup> 38 C.F.R. § 4.15.

<sup>9</sup> Within VBA, the terms "P&T," "Dependents' Educational Assistance or DEA," and "Chapter 35" are often used interchangeably to refer to P&T status. For the purpose of this report, the OIG used the term P&T to signify permanent and total status.

<sup>10</sup> A rating decision is a document that explains VBA's determination on a veteran's claim.

<sup>11</sup> Between FY 2008 and FY 2018, the total number of veterans in receipt of disability compensation increased from nearly three million to nearly 4.8 million veterans, or a 61 percent increase. For the same period, the number of 100 percent disabled veterans increased from about 260,000 to more than 680,000, or a 161 percent increase.

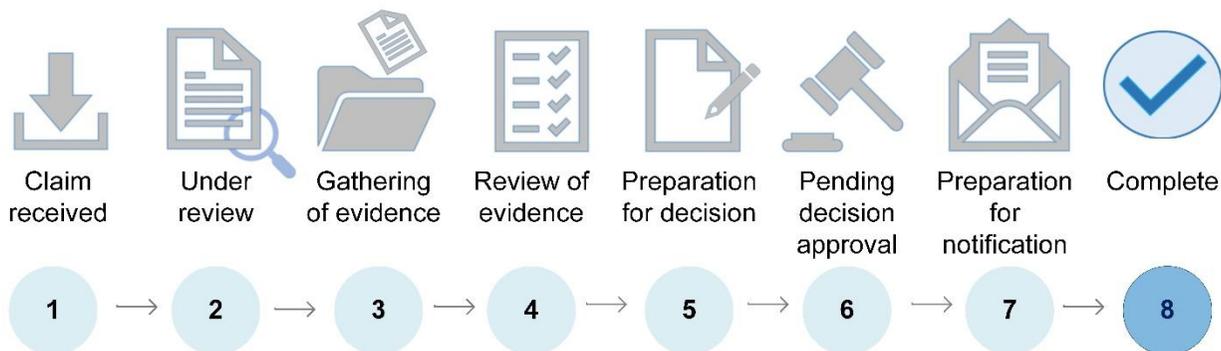
healthcare and educational expenses for dependents, as well as dental care for veterans. In FY 2018, VA received more than \$1.7 billion in appropriations to cover healthcare expenses for eligible dependents, more than \$616 million for educational expenses for eligible dependents, and more than \$1.1 billion for veterans' dental care.<sup>12</sup> Combined with disability compensation payments to veterans with 100 percent evaluations, VA dedicated more than \$31 billion for benefits and services for eligible veterans and their dependents in FY 2018. While these programs and payments were not made exclusively for P&T veterans, the OIG found the increased population and high annual budget appropriations for these programs as reasons to review how VBA administers P&T determinations.

## VBA Compensation Service

Compensation Service is the VBA program office responsible for administration of VA's disability compensation program. Compensation Service provides advisory reviews and guidance to field employees such as decision makers who have the authority to make formal decisions on veterans' claims, which include rating decisions establishing P&T status. Compensation Service also has staff offices that oversee training, quality assurance, systems administration and development, and other related program administration functions. Among its responsibilities is administering VA regulations, guidance, and procedures related to the compensation program.

## Disability Claims Process

Figure 1 shows the VA claim process.



**Figure 1.** The VA claim process.

Source: <https://benefits.va.gov/COMPENSATION/docs/claimexam-factsheet.pdf>, accessed on July 23, 2020.

VBA claims-processing staff develop claims by gathering all evidence necessary for a rating decision. Veterans typically do not submit claims requesting P&T status, though they may do so. Instead, VBA decision makers are required to consider P&T status any time a veteran becomes

<sup>12</sup> VA FY 2020 budget submission includes FY 2018 funding for these benefits.

entitled to receive disability compensation payments at the 100 percent rate.<sup>13</sup> Decision makers include rating veterans service representatives and decision review officers. When claims are ready for a decision, they are assigned to these decision makers to determine whether the evidence in the electronic claims folder shows the veterans’ disabilities meet benefit entitlements and to make a rating decision. This decision is VBA’s formal document sent to veterans and their representatives informing them of benefits-related determinations, including P&T status. The rating decision document is uploaded to the veteran’s VA electronic claims folder stored in the Veterans Benefits Management System.

Table 2 describes VBA’s requirements for the narrative components of the rating decision.

**Table 2. Narrative Components of a Rating Decision**

Section	Purpose
Introduction	Identifies the claimant and acknowledges the veteran’s qualifying service, including any special considerations relevant to the claim
Decision	Lists the specific outcome for each issue or disability addressed, such as the award or denial of service connection, an increased evaluation, or an ancillary benefit such as P&T status
Evidence	Lists each piece of evidence considered in the decision, such as private and VA treatment records and VA or contract examination reports
Reasons for Decision	Concisely cites and evaluates all relevant facts considered in making the decision
References	Refers the reader to applicable federal laws, as well as the VA website, for the laws regarding VA benefits

*Source: VA Manual 21-1, part 3, sub. 4, chap. 6, sec. C, “Completing the Rating Decision Narrative,” January 19, 2019.*

After all relevant evidence has been collected and reviewed, and a rating decision has been prepared, the claim is moved to VBA claims-processing staff for authorization, the final part of the claims process. The claims processor completes several actions, including generating an award document to summarize monetary benefits and preparing a notification letter. The final review actions in the claims process are for another VBA claims processor to (1) review the award and notification letter for accuracy, (2) authorize the award (which releases payments), and (3) release the rating decision and notification letter to the veteran and, if applicable, his or her representative. Once an award is authorized, changes to veterans’ benefits are updated in VA systems.

<sup>13</sup> VA Manual 21-1, part 9, sub. 2, chap. 2, topic 1, “Rating Determination for Dependents Educational Assistance (DEA) Under 38 U.S.C. Chapter 35,” February 8, 2018.

## **Additional Benefits Associated with Veterans' P&T Status**

When P&T status is established, veterans may be considered for additional VA benefit payments called “special monthly compensation,” or other benefits such as special home adaptation or an allowance to purchase a vehicle modified to meet their mobility needs. These veterans and their dependents also may be entitled to benefits from other programs that include

- Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA), which provides VA-funded health insurance coverage for eligible dependents;
- Dependents' Educational Assistance (DEA);
- Dental care for veterans;
- Waived premiums for life insurance policies issued through the Service-Disabled Veterans Insurance, for veterans who become totally disabled prior to age 65;
- Job counseling and employment services for spouses; and
- Possible reduction or exemption from property taxes and license fees in some states.

Several of these programs require a separate application before veterans or their eligible dependents can begin to receive benefits.

When VBA decision makers complete P&T status determinations, rating decisions are issued to veterans and, if applicable, to the veterans' representatives. VBA staff then update veterans' records in VA systems to show changes to veterans' benefits, including P&T status. While P&T status is a basic requirement for each of the VA-administered additional benefits programs, applications are handled by other VA program offices within VBA and the Veterans Health Administration (VHA). These offices are responsible for processing applications and establishing entitlement for CHAMPVA, DEA, and dental eligibility. Staff at these VA program offices rely on information in VA systems to determine entitlement to the additional benefits by verifying whether veterans have P&T status. Figure 2 shows how the CHAMPVA, DEA, and dental program eligibility processes depend on the accuracy of a P&T rating decision.

VBA's role in establishing P&T entitlement to veterans	Benefit	Step 1 Veterans/eligible dependents apply for additional benefit(s) to VA	Step 2 VA facility reviews application(s) and determines if eligibility is warranted	Step 3 Entitlement to the additional benefit(s) is granted to veterans/eligible dependents
VBA regional office issues rating decision establishing P&T status	CHAMPVA	Eligible dependents apply for CHAMPVA benefits	CHAMPVA applications are reviewed and processed by VHA Office of Community Care	Veterans' eligible dependents are entitled to receive CHAMPVA benefits and services
	DEA	Eligible dependents apply for DEA benefits	DEA applications are reviewed and processed by VA regional processing offices	Veterans' eligible dependents are entitled to DEA benefits
	Dental	Veterans apply for dental benefits at the nearest VHA facility	Dental applications are initially reviewed and processed by the VHA facility's Business Office staff	Veterans are entitled to receive comprehensive dental care

Figure 2. Relationship between P&T rating decisions and additional VA benefits.

Source: VA OIG analysis from multiple sources including VA-issued manuals, forms, and websites

### VHA Office of Community Care

The VHA Office of Community Care is responsible for administering VA’s programs that provide health care to veterans and eligible dependents by non-VA providers. These programs include the CHAMPVA program, which covers healthcare benefits for eligible dependents of veterans with P&T status. Dependents must complete an application to be considered for healthcare eligibility. To determine the eligibility of dependents for CHAMPVA, the Office of Community Care relies on data in VA systems showing whether VBA established P&T status for a veteran. When CHAMPVA eligibility is established, VA shares the cost of covered medical services and supplies with eligible beneficiaries worldwide.

### VBA Education Service

VBA Education Service’s Regional Processing Offices are responsible for processing DEA benefits. The DEA program provides educational assistance to veterans’ eligible dependents. For dependents to be eligible for educational benefits, the veteran must have P&T status. Eligible dependents submit an application to an education regional processing office, whose staff review basic eligibility and determine entitlement to educational benefits. The office staff use VBA programs to determine dependents’ eligibility for DEA by verifying the veterans’ evaluation and if the dependents’ names appear in VA systems. Once basic eligibility determinations are made, entitlement and payments begin based on the veteran’s P&T disability and when all criteria are met.

## **VA Dental Services**

VA Dental Services, administered by the VHA Dental Program, is responsible for operational oversight of the dental services authorized by VA. Veterans with P&T status are eligible for any needed dental care. To receive dental services, eligible veterans contact the nearest VA medical center and submit an application for treatment. Upon receiving an application from a P&T veteran, VHA staff review VA systems to ensure P&T status was established.

## Results and Recommendations

### **Finding: VBA Decision Makers Did Not Consistently Cite Adequate Medical Evidence in Rating Decisions to Support P&T Disability Status**

VBA decision makers established P&T benefits for an estimated 15,100 veterans without adequate medical evidence cited in the rating decisions to show permanence of their disabilities. The affected veterans were those receiving disability compensation for at least one disability rated at 100 percent as of August 20, 2018, and P&T status decisions made from October 1, 2017, to September 14, 2018. For the purpose of estimating the monetary impact, the OIG excluded any veteran age 55 and over from the larger population. Based on the population under age 55, the OIG estimated that VA may have improperly paid about \$38 million for benefits associated with P&T status between October 1, 2017, and December 31, 2019. The OIG also estimated that VA may improperly pay an additional \$84 million for the same benefits over the next five years. The OIG estimated that VA's combined improper payments could exceed \$122 million as a result of rating decisions establishing P&T status without citing adequate medical evidence.

The OIG reviewed a statistical sample of 100 veterans' rating decisions and found that 61 percent did not cite adequate evidence to support the conclusion that veterans' disabilities were permanent. In most instances, decision makers established P&T status without citing adequate medical evidence because Compensation Service procedures for P&T status decisions were inconsistent with the law and VA regulations requiring staff to be reasonably certain that veterans' disabilities are permanent.

Once P&T status is established, the low likelihood of reevaluation increases the risk of veterans being either overpaid or underpaid disability compensation benefits because the impairments may change over time.<sup>14</sup> Veterans' disabilities may improve or resolve over time as the result of new medical treatments; however, disability compensation benefits will likely continue to be paid at the 100 percent rate. When a P&T rating decision does not cite adequate medical evidence to support its conclusions, ineligible veterans and their dependents may receive benefits associated with P&T status such as CHAMPVA, DEA, and dental services. Beyond the about \$38 million already paid in additional benefits for P&T veterans with inadequately supported P&T status, the OIG estimated that VA could pay \$84 million to these veterans over the next five

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<sup>14</sup> 38 CFR § 3.350. Veterans may be eligible for additional VA benefit payments called special monthly compensation. Special monthly compensation is a higher rate of compensation paid to veterans due to special circumstances such as the need of aid and attendance by another person or by specific disability, such as loss of use of one hand or leg.

years. This is a result of VBA not citing adequate medical evidence in rating decisions to support permanence of the veterans' disabilities when P&T status was established.

## **What the OIG Did**

The scope of this review included over 24,800 living veterans with at least one service-connected condition evaluated at 100 percent as of August 20, 2018, and P&T status established from October 1, 2017, to September 14, 2018. The OIG used VBA's electronic systems, including the Veterans Benefits Management System, to review 100 veterans' rating decisions and evidence cited therein to assess whether VBA staff adequately supported P&T entitlement decisions. The OIG interviewed managers and staff at the VA regional offices in Cleveland, Ohio, and Nashville, Tennessee. The OIG also discussed review findings with officials from VBA and the VA Office of General Counsel (OGC). Appendix A provides additional details on the scope of work and the methodology used, and appendix C sets forth the statistical sampling methodology.

This finding discusses how P&T status was established for veterans without sufficiently supported decisions. This occurred for the following reasons:

- VBA guidance for P&T status is inconsistent with law and VA regulations.
- P&T rating decisions lacked clear explanations.

The finding concludes by observing that VBA is unlikely to reevaluate P&T status.

## **P&T Status Was Established Without Sufficiently Supported Decisions**

The OIG found 61 of the 100 rating decisions reviewed did not cite adequate medical evidence to support the decisions to establish P&T status. The medical evidence listed in 61 of the P&T rating decisions did not show impairments were permanent. In 60 of those 61 decisions, there was no evidence addressing the likelihood of improvement in the veterans' disabilities. The remaining decision cited medical evidence showing the veteran's disability was likely to improve, then concluded the veteran was eligible for P&T status.

The OIG provided Compensation Service with a list of all identified rating decisions in which the P&T status was issued without citing adequate medical evidence. Compensation Service reviewed each P&T status rating decision and did not concur with the OIG's review. The basis for Compensation Service's disagreement was that the rating decisions did not rise to the level of clear and unmistakable errors, which would require new P&T determinations. Because the rating decisions did not rise to this level, Compensation Service disagreed with all rating decisions considered insufficiently supported by the OIG, stating that P&T status was established based on the judgment of individual VBA decision makers. It also deferred to decision makers' judgment despite the lack of cited evidence or explanation in the decisions that established P&T status.

Regarding the OIG's assessment that P&T status rating decisions did not cite adequate medical evidence, Compensation Service provided the following response:

Agreement was reached that the discussion of the evidence relied upon in granting P&T Rating Decisions could have been stronger and/or more clearly cited to lead to consistent decisions of permanence. Specifically, the [decision maker] could have better supported the decision of P&T [status] by clarifying the medical evidence used to show the veteran's total disability was reasonably certain to be permanent and continue through their lifetime.

Despite Compensation Service's response, the OIG maintains that these rating decisions established P&T status without citing and describing adequate medical evidence to support their conclusions. To fully define the evidentiary requirements for P&T status, the OIG conducted a comprehensive review of applicable laws, regulations, decisional court cases, and appellate decisions issued by the Board of Veterans' Appeals. Through this review, the OIG concluded that VBA decision makers had access to review all evidence in veterans' VA records and reach conclusions regarding P&T entitlement determinations. However, these conclusions must be supported by citing and discussing medical evidence and demonstrating how decision makers reached their conclusions. Therefore, the OIG assessed rating decisions with the approach that medical evidence was needed to meet the United States Code's requirement for VBA decision makers to be "reasonably certain" that veterans have total disabilities, permanent in nature, that will continue throughout their lives.<sup>15</sup>

To illustrate this, the OIG identified the following examples where VBA decision makers sufficiently supported the P&T status with evidence cited in the rating decision.

### **Example 1**

*In 2018, a 32-year-old veteran with a 70 percent service-connected disability was increased to 100 percent, and P&T status was established. Evidence from an examining medical professional showed a worsening of the veteran's condition despite compliance with ongoing treatment. The medical professional stated that the veteran was permanently and totally disabled in terms of his occupational functioning. The OIG found VBA's decision to establish P&T status was accurate and sufficiently supported by the medical evidence.*

### **Example 2**

*In 2018, P&T status was established for a 73-year-old veteran with a 100 percent service-connected disability. Evidence reviewed by an examining medical professional showed the veteran was actively receiving treatment for an incurable*

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<sup>15</sup> 38 U.S.C. § 3501(a)(8).

*malignancy. The OIG found VBA's decision to establish P&T status was accurate and sufficiently supported by the medical evidence.*

The OIG also identified the following examples where VBA decision makers established P&T status without adequate medical support cited in the rating decision.

### **Example 3**

*In August 2017, a 42-year-old veteran was granted a 100 percent service-connected disability following discharge from active duty. In May 2018, VBA decision makers established P&T status based on evidence from a single VA medical examination, which discussed improvement of the veteran's condition since a prior examination. The examining medical professional stated the veteran was not currently involved in psychotherapy or prescribed any medications for treatment. The veteran was also considering a training program to restart employment in the future. The evidence from the examining medical professional did not support that the veteran's disability was reasonably certain to continue indefinitely.*

### **Example 4**

*A 54-year old veteran's service-connected disability was increased to 100 percent in a 2015 rating decision. The decision maker at the time determined, based on the available medical evidence, that the veteran's condition could improve, and established a date for a reexamination in the future. Generally, reexaminations are required if it is likely that a disability has improved, or if evidence indicates there has been a material change in the disability.<sup>16</sup> Before the reexamination occurred, however, another VBA decision maker established P&T status in 2018 with no new medical evidence to support permanence of the disability.*

Once P&T status is established, the low likelihood of reevaluation increases the risk of veterans being either overpaid or underpaid disability compensation benefits because the impairments may change over time. When this happens, VBA lacks an effective mechanism other than future reexaminations to reevaluate the residual disabilities of a resolved or significantly improved disability.<sup>17</sup> This risk is compounded through the lack of medical evidence cited to support the original P&T status decisions.

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<sup>16</sup> 38 C.F.R. § 3.327.

<sup>17</sup> Government Accountability Office, *VA Disability Compensation: Actions Needed to Enhance Information about Veterans' Health Outcomes*, GAO-20-26, December 2019. The Government Accountability Office identified similar concerns pertaining to VBA's disability reexamination process and made specific recommendations. Therefore, the OIG is not making additional recommendations about reexaminations at this time.

## **VBA Guidance for P&T Status Is Inconsistent with Law and VA Regulations**

The OIG identified key areas where the VA adjudication procedures manual is inconsistent with the law and VA regulations. One inconsistency identified was in the adjudication procedures manual scenario allowing decision makers to establish P&T status without relevant evidence. In addition, the OIG learned that Compensation Service did not always identify and refer legal issues to the OGC staff responsible for providing legal expertise for interpreting and applying the law and regulations. Another inconsistency identified was VBA procedural guidance that closely ties P&T status with regulations governing VBA's authority to conduct reexaminations to reevaluate veterans' disabilities.

### *Guidance Allows P&T Status to Be Established Without Relevant Medical Evidence*

Title 38 of both the United States Code and the Code of Federal Regulations provide the criteria for P&T status. For P&T status to be established, veterans' impairments from service-connected disabilities must be totally disabling and VBA decision makers are required to be "reasonably certain" these impairments are likely to continue for the rest of veterans' lives.<sup>18</sup> Relevant to the definition of reasonably certain, an OGC staff attorney told the OIG that reasonably certain generally means greater than a 50 percent likelihood, or more likely than not. Neither Compensation Service nor OGC could show that this term was defined in VA regulations.

The OIG attempted to identify the source of the "reasonably certain" evidentiary standard requiring VBA decision makers to be "reasonably certain" of permanence when establishing P&T status. The earliest version of regulations with this standard obtained by the OIG was published in 1930, the same year the Veterans Administration was created, and regulations with the "reasonably certain" standard appear to have never been substantively updated since. The Compensation Service executive director told OIG that the term was "reasonably intuitive" and a specific definition was not needed.

The VA adjudication procedures manual states that a P&T disability exists when specific fact patterns are shown, one of which is described below:

Evidence at the time of evaluation does not specifically support that the total disability will continue for the remainder of the person's life but does not show that the condition is likely to improve pursuant to 38 CFR 3.327(b)(2). In such cases, a future examination control is inappropriate, so the total disability rating is

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<sup>18</sup> 38 U.S.C. § 3501(a)(8); 38 C.F.R. § 3.340.

static; in the absence of reevaluation, total disability is likely to continue for the remainder of the person's life.<sup>19</sup>

The OIG found that this statement conflicts with the legal requirement to be reasonably certain that the veterans' totally disabling impairments are permanent because it describes a scenario in which decision makers are directed to establish P&T status without relevant evidence.<sup>20</sup> The OIG also found this manual statement improperly connects the criteria required for scheduling future examinations and P&T determinations.<sup>21</sup> As written, it allows VBA decision makers to establish P&T status without relevant evidence when they decide not to schedule a future examination to assess the level of veterans' disabilities. In this scenario, the OIG determined VBA decision makers cannot be reasonably certain veterans' impairments are permanent in the absence of relevant medical evidence in veterans' VA records.<sup>22</sup> The OIG reached this interpretation by applying OGC's explanation of the term "reasonably certain." Lastly, the OIG determined the above example contradicts the avowed purpose of the adjudication procedures manual, which is to summarize or restate applicable law in plain language.<sup>23</sup>

### *Compensation Service Does Not Always Refer All Legal Issues to OGC*

While Compensation Service is responsible for developing and determining policy for the disability compensation program, overall responsibility for ensuring that procedural guidance is compliant with the law is an OGC responsibility described in VA regulations.<sup>24</sup> These regulations state that OGC is responsible for providing "all interpretative legal advice involving construction or application of laws, including statutes, regulations, and decisional as well as common law." OGC is also responsible for providing "all legal services, advice and assistance required to implement any law administered by the Department of Veterans Affairs." OGC may also delegate this authority to meet its responsibilities.

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<sup>19</sup> VA Manual 21-1, part 9, sub. 2, chap. 2, topic 1.j, "When a P&T Disability Exists," February 8, 2018. The OIG found the current guidance has been in place since at least 2005, the date of the earliest available transmittal sheet for this adjudication procedures manual section.

<sup>20</sup> 38 U.S.C. § 3501(a)(8); 38 C.F.R. § 3.340.

<sup>21</sup> VA Manual 21-1, part 9, sub. 2, chap. 2, topic 1, "Rating Determination for Dependents Educational Assistance (DEA) Under 38 U.S.C. Chapter 35," February 8, 2018.

<sup>22</sup> 38 U.S.C. § 3501(a)(8), 38 C.F.R. § 3.340, *Jones v. Shinseki* (23 Vet. App. 382, 2010), *McLendon v. Nicholson* (20 Vet. App. 79, 2006), *Sharp v. Shulkin* (29 Vet. App. 26, 2017), [Title Redacted by Agency], Bd. Vet. App. 0820934, 2008 WL 3854144 at \*3 (2008), [Title Redacted by Agency], Bd. Vet. App. 0601894, 2006 WL 4412447 at \*\*4-5 (2006), [Title Redacted by Agency], Bd. Vet. App. 0000104, 2000 WL 34397093 at \*2 (2000), and [Title Redacted by Agency], Bd. Vet. App. 9929343, 1999 WL 33871700 at \*2 (1999). VA is broadly required to support P&T status determinations with competent medical evidence to show that totally disabling impairments from a service-connected disability are reasonably certain to continue for the rest of the person's life.

<sup>23</sup> VA Manual 21-1, *Adjudication Procedures Manual*, prologue, November 20, 2018.

<sup>24</sup> 38 C.F.R. § 14.500; "Office of General Counsel," VA website, accessed May 28, 2020, <https://www.va.gov/OGC>.

The OIG asked Compensation Service and OGC how potential inconsistencies between procedural guidance and applicable laws and regulations are identified and referred to OGC for legal interpretation. Both OGC and Compensation Service told the OIG that OGC relies on Compensation Service to identify issues and bring them to the attention of OGC. Therefore, the OIG determined that Compensation Service did not always involve OGC in reviewing or requesting feedback on new or updated guidance in the adjudication procedures manual.

### *Manual Is Not Consistent with Other Legal Requirements*

In addition to the scenario in the claims adjudication procedures manual that allowed VBA decision makers to establish P&T status without relevant evidence, the OIG found that VBA improperly tied regulations for establishing P&T status with regulatory guidance for when to conduct reexaminations of veterans' disabilities. The OIG reached this conclusion based on analysis of relevant federal laws, VA regulations, appellate decisions issued by both the Court of Appeals for Veterans Claims and the Board of Veterans Appeals, and a review of other citations in the claims adjudication procedures manual.<sup>25</sup>

The connection VBA has made between reexaminations and P&T status requirements is illustrated both in Compensation Service's response to the OIG's request for definitions for what constitutes "reasonably certain" and in the adjudication procedures manual. The response from Compensation Service referred the OIG to a section in the manual related to reexaminations. The OIG also found an example of procedural guidance where VBA claims staff are directed to return rating decisions to decision makers when P&T status was not addressed if the veteran did not have a reexamination set for a future date. Further, the section of the manual related to P&T status requirements also includes a cross-reference to a regulation related to future examinations.

Decision makers must determine whether veterans' 100 percent disabilities should be reexamined at a future date or issue a rating decision establishing P&T status. VA regulations and Compensation Service policy generally do not require veterans with P&T status to undergo reexamination of their disabilities. However, these regulations also show reexaminations are used as a control for VBA to ensure veterans' disabilities are assessed at the correct level. The OIG does not consider a veteran who qualifies for an exclusion from future reexamination as automatically meeting the requirements for P&T status.<sup>26</sup>

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<sup>25</sup> 38 U.S.C. § 3501(a)(8), 38 C.F.R. § 3.340, Jones v. Shinseki (23 Vet. App. 382, 2010), McLendon v. Nicholson (20 Vet. App. 79, 2006), Sharp v. Shulkin (29 Vet. App. 26, 2017), [Title Redacted by Agency], Bd. Vet. App. 0820934, 2008 WL 3854144 at \*3 (2008), [Title Redacted by Agency], Bd. Vet. App. 0601894, 2006 WL 4412447 at \*\*4-5 (2006), [Title Redacted by Agency], Bd. Vet. App. 0000104, 2000 WL 34397093 at \*2 (2000), and [Title Redacted by Agency], Bd. Vet. App. 9929343, 1999 WL 33871700 at \*2 (1999). VA is broadly required to support P&T status determinations with competent medical evidence to show that totally disabling impairments from a service-connected disability are reasonably certain to continue for the rest of the person's life.

<sup>26</sup> VA Manual 21-1, part 9, sub. 2, chap. 2, topic 1.j, "When a P&T Disability Exists," February 8, 2018.

Whether a veteran's disabilities should be subject to reexamination in the future is addressed in VA regulations, specifically 38 CFR § 3.327:

Reexaminations, including periods of hospital observation, will be requested whenever VA determines there is a need to verify either the continued existence or the current severity of the disability. Generally, reexaminations will be required if it is likely that a disability has improved, or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect.

The regulation also says that "following initial Department of Veterans Affairs examination, or any scheduled future or other examination, reexamination, if in order, will be scheduled within not less than two years nor more than five years within the judgment of the rating board, unless another time period is elsewhere specified."

This regulation goes on to list the following reasons "in which no future reexamination will be scheduled:

- i. When the disability is established as static;<sup>27</sup>
- ii. When the findings and symptoms are shown by examinations and hospital reports to have persisted without material improvement for a period of five years or more;
- iii. When the disability from disease is permanent in character and of such nature that there is no likelihood of improvement;
- iv. In cases of veterans over 55 years of age, except under unusual circumstances;
- v. When the rating is a prescribed minimum rating; or
- vi. Where the combined disability would not be affected if the future examination should result in reduced evaluation for one or more conditions."<sup>28</sup>

In conducting this review, the OIG considered if each of the six reasons above meets the requirements of establishing P&T status. Of these, reasons i and ii would result in reasonable certainty that veterans' disabilities will not improve during their lifetime. For reason iii, the OIG considered conditions to be P&T if VA's criteria as listed in the Schedule of Ratings showed the condition had no likelihood of improvement.

Reason iv is based only on the age of the veteran. While VA regulations allow for veterans' ages to be considered when assessing P&T status, age alone does not mean a veteran meets requirements for P&T status. There is still a requirement to show that P&T exists when such an impairment is reasonably certain to continue throughout the veteran's life.

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<sup>27</sup> Because the term static is not defined in the regulation, the review team considered static conditions to be those that persisted at the same level for five years or more, consistent with reason 2 of the regulation.

<sup>28</sup> 38 C.F.R. § 3.327(b)(2).

As for reasons v and vi, the OIG determined they did not pertain to the objective of the review, since the review only included single disability evaluations at 100 percent disabling that also had a likelihood of improving. None of the reasons listed in the regulation discuss VA's requirement that veterans' disabilities must be shown to be reasonably certain to continue for the rest of the veterans' lives.

Veterans do not meet requirements for P&T status based solely on whether VBA has the authority to conduct a reexamination.<sup>29</sup> To reach this interpretation, the OIG analyzed the guidance in the adjudication procedures manual for citing and addressing evidence in rating decisions. The manual allows for several types of evidence to be considered by VBA decision makers. This includes medical evidence, lay evidence such as a statement from a veteran describing his or her disabilities, and direct evidence. The manual defines direct evidence as "evidence capable by itself of proving a fact or issue." In the case of a veteran's age, the OIG considers this to be direct evidence establishing only the person's age. To assess whether the age of a person makes him or her more or less likely to meet P&T status requirements is a matter for VBA decision makers to address in a rating decision. The OIG did not consider a veteran's age when assessing the evidence cited in rating decisions establishing P&T status unless age was specifically addressed in the rating decision by the decision maker as a factor for establishing P&T status. Therefore, basing P&T status solely on a veteran's age is not applicable unless rating decisions address or cite medical evidence to show permanence in addition to the age of the veteran.

VA regulations state that when medical evidence accompanying the veteran's claim is not adequate for rating purposes, a VA examination will be authorized.<sup>30</sup> In other words, if an examination report or evidence in veterans' VA records does not contain sufficient detail, the decision maker should return the report as inadequate for evaluation purposes.<sup>31</sup>

Recommendations 1 and 4 address the need for VBA to update the adjudication procedures manual to ensure consistency with applicable laws and VA regulations related to P&T status decisions and train staff on the changes.

## **P&T Rating Decisions Lacked Clear Explanations**

Decision makers did not always explain the reasons why they established P&T status in the rating decisions as required. Without explanations, assessing the evidence used to support the decisions was difficult. The adjudication procedures manual requires decision makers to concisely cite and evaluate all relevant facts and list each piece of evidence considered to support

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<sup>29</sup> VA Manual 21-1, part 9, sub. 2, chap. 2, topic 1.j, "When a P&T Disability Exists," February 8, 2018.

<sup>30</sup> 38 C.F.R. § 3.326.

<sup>31</sup> 38 C.F.R. § 4.2.

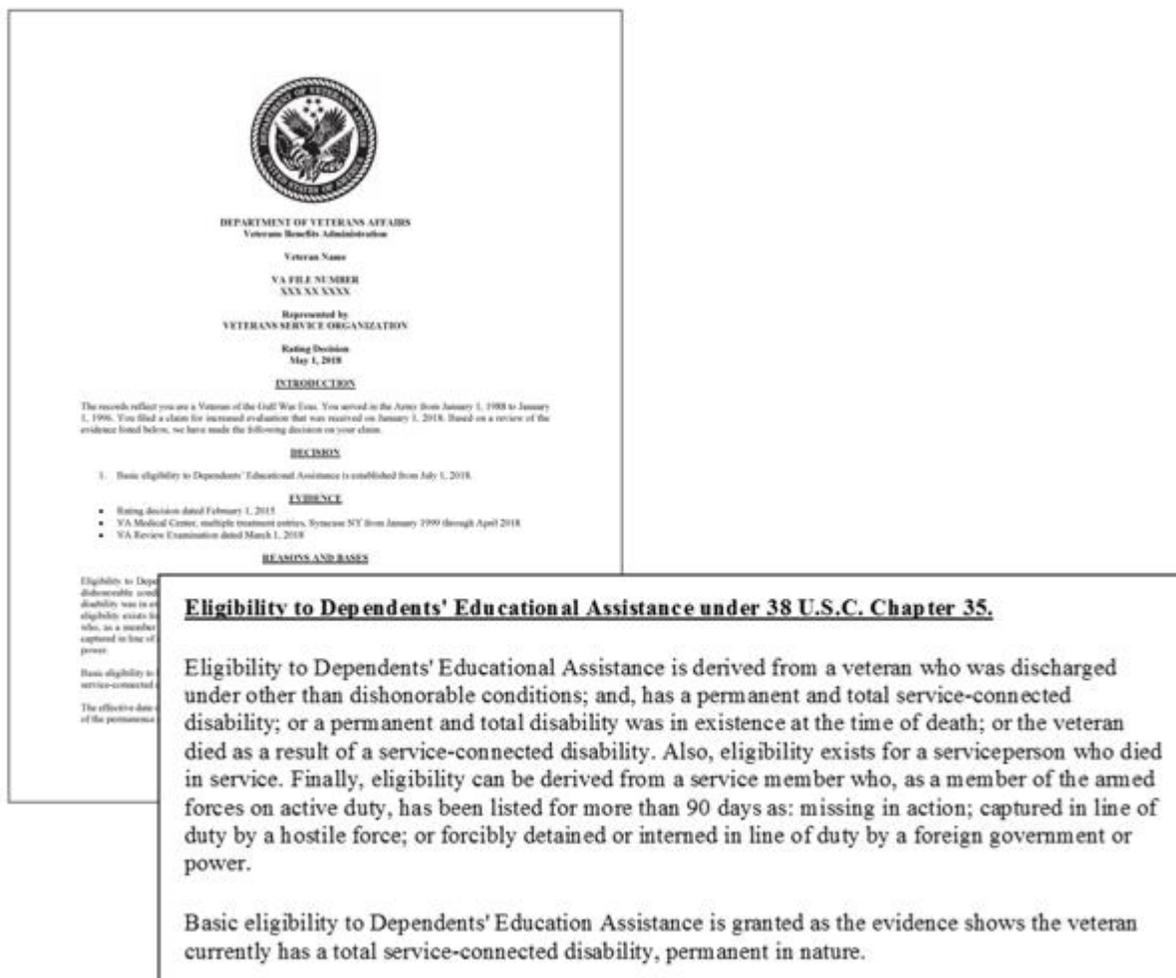
their rating decisions.<sup>32</sup> Sources of evidence may include VA medical examinations and VA treatment records, as well as private treatment records. While decision makers are authorized to review evidence and apply legal standards to conclude impairments are permanent, they must also have medical evidence to do so. Additionally, they must adequately explain each element of the decision, and state why they made the decision, concisely citing and evaluating all relevant facts considered in making the decision and informing the veteran of the formal determination.

Decision makers generate P&T rating decisions using standardized language to inform veterans of the entitlement. The standardized language currently addresses P&T status in the Reasons for Decision section of rating decision under the title *Eligibility to Dependents' Educational Assistance under 38 U.S.C. Chapter 35*. However, this standardized language does not address the specific benefit of P&T status or explain how the decision makers supported the decisions. Further, DEA is only one of many benefits that veterans and dependents may gain entitlement to when VBA decision makers establish P&T status.

Figure 3 is an example of the standardized language found in rating decisions that established P&T status.

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<sup>32</sup> VA Manual 21-1, part 3, sub. 4, chap. 6, sec. C, "Completing the Rating Decision Narrative," January 19, 2019.



**Figure 3.** Example of the standardized language (enlarged for readability) used in the Reasons for Decision section of P&T rating decisions.

Source: VBA rating decision establishing P&T status.

The OIG determined that this standardized language in the Reasons for Decision section does not meet requirements in the manual because decision makers are not adequately explaining each element of the decision. However, the OIG concluded if the Reasons for Decision section had a more descriptive title and decision makers adequately explained the evidence used for granting P&T status, this could lead to more consistent and informative rating decisions for veterans and their representatives. The OIG interviewed national veterans service officers who agreed that the language in the Reasons for Decision section could more clearly explain P&T status and its associated benefits to veterans. Compensation Service leaders agreed that the discussion of the evidence could be stronger or more clearly stated to support the P&T status decision. Due to longstanding procedural inconsistencies, decision makers will need training for supporting P&T status decisions to ensure successful implementation of revised procedures that are consistent with the law and regulations. Recommendations 2, 3, and 4 address the need for VBA to better

document and explain conclusions to support P&T status decisions, replace the decision title and standardized language in the rating decision, and train staff on updated procedures as well as monitor the effectiveness of the training.

## **VBA Is Unlikely to Reevaluate P&T Status**

In the context of the disability claims process, VBA decision makers have two choices when a veteran's disabilities become totally disabling: establish P&T status or schedule a future examination. These examinations are scheduled, at the discretion of the VBA decision makers, at the time an entitlement decision is made and are conducted not less than two years and no more than five years from the date VBA made the decision. All nine VBA decision makers interviewed agreed that if a future reexamination is not scheduled for a single 100 percent disability, they automatically establish P&T status. A subsection of the regulation addressing reexaminations states "no periodic future examinations will be requested where the disability from disease is permanent in character and of such nature that there is no likelihood of improvement."<sup>33</sup> Based on guidance from the claims adjudication manual, VBA interprets this regulation to mean that veterans are permanently disabled when they are not subject to a future examination. The OIG does not concur with VBA's interpretation and maintains this regulation means P&T status is among the reasons for not conducting future reexaminations, not that veterans are permanently disabled because VBA cannot schedule future reexaminations based only on veterans' age or other administrative reasons. VBA's interpretation is particularly concerning in light of VBA's policy of ordering reexaminations "only when absolutely necessary." Additionally, the regulation governing when veterans should or should not have a future examination does not address whether prohibitions against future reexamination require a P&T status decision.<sup>34</sup>

Once P&T status is established, veterans' disabilities are not likely to be reevaluated unless VBA receives a later claim or appeal and an error is discovered during its processing, the law or regulations change, benefits are found to have been fraudulently obtained, or VBA reviews veterans' P&T status rating decision as part of a special review.<sup>35</sup> When the OIG interviewed decision makers at VA regional offices, the majority agreed that if P&T status was erroneously established for a veteran, disability compensation payments may continue for the rest of the veteran's life without further medical reevaluation. The OIG also asked quality review specialists and managers the same question, and nearly all interviewees agreed there is a risk that veterans will be paid indefinitely.

The OIG also asked three consultants and four managers assigned to the Compensation Service Policy and Procedures staff whether incorrectly established P&T status may continue unchecked

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<sup>33</sup> 38 C.F.R. § 3.327(b)(2)(iii).

<sup>34</sup> 38 C.F.R. § 3.327.

<sup>35</sup> 38 C.F.R. § 3.105.

for the rest of veterans' lives. The consultants agreed that it is possible, particularly if veterans do not file a later claim or if the P&T rating decision was issued by an inexperienced decision maker. In contrast, two managers said

any answer to this question would be entirely speculative without being able to confidently state every future action that will be taken in a particular claim to include quality reviews, any future reviews that may be conducted, or any changes in laws, policies, or procedures.

The remaining two managers told the OIG they could not answer without specifics about a veteran's case. Based on the agreement from nearly all interviewees, the OIG determined that veterans with incorrectly established P&T status have a low likelihood of reevaluation and therefore may receive benefits indefinitely.

## Conclusion

VBA decision makers established P&T status in a manner inconsistent with law and VA regulation for about 15,100 veterans with at least one disability rated at 100 percent disabling. VBA needs to provide better documentation and explanations for P&T status decisions. Compensation Service leaders agreed that the discussion of the evidence by decision-making staff could be stronger to support the P&T status decisions. The OIG estimated that VA improperly paid about \$38 million in additional benefits related to P&T status between October 1, 2017, and December 31, 2019, and may improperly pay more than \$84 million over the next five years for these benefits based on determinations made without citing adequate medical evidence to show veterans are permanently disabled. These estimates of more than \$122 million are based on CHAMPVA, DEA, and dental care payments and do not include disability compensation paid to P&T veterans. Without corrective action, such as updating the adjudication procedures manual and providing training, VA will continue to pay for additional benefits associated with P&T status to veterans without adequate medical evidence to support the permanence of disabilities.

## Recommendations 1–4

The OIG made the following recommendations to the under secretary for benefits:

1. Ensure the adjudication procedures manual is updated for consistency with all applicable laws, regulations, and policies related to permanent and total determinations, in consultation with the Office of General Counsel.
2. Ensure decision-making staff support their permanent and total status decisions in the Reasons for Decision section of the rating decision by describing the evidence used to support their conclusions.

3. Replace the title and standardized language of “Dependents’ Educational Assistance under 38 U.S.C. Chapter 35” used in rating decisions to clearly state that permanent and total status is being considered.
4. Ensure appropriate training is provided to decision-making staff based on the changes made to permanent and total procedures related to recommendations 1, 2, and 3, and monitor the effectiveness of that training.

## Management Comments

The under secretary for benefits concurred with recommendations 1, 2, and 4 and concurred in part with recommendation 3.

In response to recommendation 1, the under secretary reported that VBA will consult with OGC in its review of guidance for P&T decisions in the adjudication procedures manual.

In response to recommendation 2, the under secretary reported that the Appeals Modernization Act included provisions that addressed the issue of P&T decisions made without citing sufficient medical evidence. The under secretary requested recommendation 2 be closed.

In response to recommendation 3, the under secretary concurred in part but disagreed with changing the title and narrative for P&T status in rating decisions. The under secretary reported that VBA will assess language options to make P&T disability status more readily apparent.

In response to recommendation 4, the under secretary reported that VBA will ensure that any procedural guidance changes and systems modifications implemented based upon the above recommendations are communicated to the appropriate regional office staff.

Appendix E contains the full text of the under secretary’s comments.

## OIG Response

The under secretary for benefits provided comments and corrective action plans that are responsive to the intent of the recommendations. The OIG will monitor implementation of planned actions and close recommendations when VBA provides sufficient evidence demonstrating progress in addressing the recommendations and the issues identified.

At the outset, the under secretary requested inclusion in the executive summary of the full text of the claims adjudication procedures manual guidance that the OIG found inconsistent with the law and regulations for P&T status decisions. The OIG has done so. It should be noted that the full text of the inconsistent guidance was already shown in the report on page 11.

Regarding the response to recommendation 2, this recommendation will remain open until VBA provides appropriate documentation, such as examples of P&T rating decisions that describe the evidence used by VBA decision makers to support their conclusions.

Regarding the response to recommendation 3, VBA concurred in part but disagreed with changing the title and narrative for P&T status in rating decisions. The under secretary for benefits stated a rating decision must retain this standardized language in other circumstances. The OIG notes that the circumstances in the response are unrelated to P&T ratings for living veterans. The report points out that DEA entitlement is not established solely by the P&T rating decision and only staff at VBA Education Service's Regional Processing Offices may adjudicate claims for DEA entitlement. The under secretary for benefits reported that VBA will assess language options to make P&T disability status more readily apparent. Recommendation 3 will remain open until rating decisions clearly show that P&T status is the issue being considered.

The under secretary also took issue with the OIG's calculation of potential monetary benefits as shown in appendixes C and D, stating

OIG's report assumes that VBA would not make any improvements over the next five years, including those from implementing OIG's recommendations. VBA takes exception to this practice as this assumption is incorrect and misleading to the reader. Generally, agencies are required to complete final action on OIG recommendations within 12 months of publication. Assuming current practices will go unchanged is false, as VBA values OIG's vital oversight role and works diligently to implement recommendations to improve service to Veterans.

The OIG did not recommend reissuing P&T rating decisions as a corrective action and therefore did not factor this into the estimated monetary impact. The estimate is based on actual payments for P&T veterans and their dependents for healthcare coverage, certain educational expenses, and dental benefits made over more than a two-year period plus estimated payments for these benefits over an additional five years. The estimate would not be affected unless VBA reissues all P&T rating decisions issued during FY 2018 under updated policies and procedures.

## Appendix A: Scope and Methodology

### Scope

The OIG conducted its review work from October 2018 through June 2020. The review included veterans in receipt of an active compensation award with at least one disability rated at 100 percent disabling as of August 20, 2018, with a favorable P&T decision made from October 1, 2017, to September 14, 2018.

### Methodology

To accomplish the review objective, the OIG undertook the following actions:

- Identified and reviewed applicable laws, regulations, federal case law, and procedures related to 100 percent disability evaluations with P&T benefits.
- Conducted site visits to VA regional offices in Cleveland, Ohio, and Nashville, Tennessee, in November 2018.
- Interviewed VBA employees, including Compensation Service executives, managers, and staff; veterans service center managers; quality review team coaches; rating quality review specialists; and rating veterans service representatives.
  - The OIG also interviewed officers of veterans service organizations.<sup>36</sup>
- Reviewed all disability conditions that reach the 100 percent level and excluded those that were unlikely to improve based on the severity of the condition. Examples of excluded conditions were double amputations, amyotrophic lateral sclerosis, residual disabilities from traumatic brain injuries, and certain lung conditions. Excluding these conditions as well as cases considered out of scope resulted in an adjusted population of over 24,800 veterans with at least one service-connected condition evaluated at 100 percent disabling as of August 20, 2018, and P&T decisions made from October 1, 2017, to September 14, 2018.
- Reviewed, in coordination with OIG statisticians, a random sample of 100 compensation rating decisions from the adjusted population.
  - The OIG then determined whether VBA staff adequately supported P&T entitlement determinations. If the cited medical evidence in the rating decision in any way addressed if a veteran's medical conditions were unlikely to improve, the OIG considered the P&T determination adequately

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<sup>36</sup> Veterans service organizations are congressionally chartered and recognized by the OGC for the purpose of preparation and presentation of claims under laws administered by the VA.

supported. The OIG concluded that other potential evidence was not considered by the VBA decision maker if it was not cited in the rating decision. The OIG also considered whether there were any indications that the level of impairment due to the veteran's disabilities had persisted at the same level for five years or more.<sup>37</sup> If so, the OIG considered those determinations to establish P&T status adequately supported. Appendix C provides more details on the statistical sampling methodology.

- The OIG used VBA's electronic systems, including the Veterans Benefits Management System and the Compensation and Pension Record Interchange, to review veterans' rating decisions and evidence cited therein.
- Obtained and reviewed, in collaboration with OIG database analysts and statisticians, records of payments for P&T veterans and their dependents under the CHAMPVA, DEA, and dental care programs from the VBA Data Warehouse, the VHA Corporate Data Warehouse, and the VA Financial Management System.
- Discussed the findings with VBA officials and included their comments where appropriate.

## Fraud Assessment

The OIG assessed the risk that fraud, violations of legal and regulatory requirements, and abuse could occur during this review. The OIG exercised due diligence in staying alert to any fraud indicators by completing the following actions:

- Identifying laws and regulations related to the review subject matter
- Considering previous reviews, audits, and inspections as reported by the OIG and the Government Accountability Office regarding VBA<sup>38</sup>
- Reviewing OIG hotline complaints and concerns for indicators
- Completing the Fraud Indicators and Assessment checklist

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

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<sup>37</sup> The reason the OIG considered evidence of consistent levels of impairment persisting for five years or more is because the period for which VBA has regulatory authority to conduct reexaminations is "not less than two years nor more than five years," per 38 C.F.R. § 3.327(b)(1). The same regulation states no reexamination will be scheduled "when the findings and symptoms are shown by examinations ... and hospital reports to have persisted without material improvement for a period of five years or more" preceding the decision (38 C.F.R. § 3.327[b][2][ii]). Based on this regulation, the OIG considered these P&T status determinations adequately supported when the medical evidence cited in the rating decision showed the impairment persisting for five years or more.

<sup>38</sup> The Government Accountability Office is an independent, nonpartisan agency that works for Congress.

## **Data Reliability**

The OIG used computer-processed data from VBA Data Warehouse, the VHA Corporate Data Warehouse, and the VA Financial Management System. To test for reliability, the OIG 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 data provided from VBA Data Warehouse, the VHA Corporate Data Warehouse, and the VA Financial Management System. For example, veterans' file numbers, names, dates of birth, and date of rating decision that established P&T status, were compared to information contained in the 100 VBMS electronic claims folders reviewed.

Testing disclosed the data were sufficiently reliable for the review objectives. Comparison of data obtained by the OIG to information contained in VA electronic systems did not disclose any problems with data reliability. Accordingly, the OIG believes the VBA computer-generated data were sufficiently reliable to support the project objectives, conclusion, and recommendations.

## **Government Standards**

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

## Appendix B: Applicable Laws and Regulations

Table B.1 lists examples of the pertinent criteria related to P&T status eligibility in order of precedence:

**Table B.1. Criteria Order of Precedence**

Term	Definition	Pertinent examples of P&T criteria identified by the OIG
Law	Federal legislation signed into law and published in the United States Code	38 U.S.C. § 3501
Regulation	Federal regulations promulgated by a federal agency in the Code of Federal Regulations	38 C.F.R. § 3.102 38 C.F.R. § 3.327 38 C.F.R. § 3.340 38 C.F.R. § 4.6 38 C.F.R. § 4.10 38 C.F.R. § 4.15 38 C.F.R. § 4.19
Federal case law	Provides guidance on how a specific law, statute, or regulation is applied in a given circumstance	<i>Sharp v. Shulkin</i> , Sep. 6, 2017, 29 Vet. App 26; <i>Jones v. Shinseki</i> , Mar. 25, 2010, 23 Vet. App 382; <i>McLendon v. Nicholson</i> , Jun. 5, 2006, 20 Vet. App 79; <i>Colvin v. Derwinski</i> , Mar. 8, 1991, 1 Vet. App 171
Procedures	Federal agency step-by-step process, which includes information in manuals and handbooks	VA Manual 21-1, <i>Adjudication Procedures Manual</i> , prologue and part 9, sub. 2, chap. 2, topic 1

Sources: As cited.

## **Appendix C: Statistical Sampling Methodology**

### **Approach**

To accomplish the objective, the OIG reviewed a statistical sample of veterans in receipt of an active compensation award with at least one disability evaluated at 100 percent disabling as of August 20, 2018, with a favorable P&T decision completed from October 1, 2017, to September 14, 2018. The OIG used statistical sampling to quantify the extent of cases where VBA decision makers established P&T status without citing adequate medical evidence on the rating decision to show permanence of disability.

### **Population**

The OIG analyzed every unique disability with a 100 percent evaluation and excluded veterans with conditions that had little or no likelihood of improvement, such as double amputations, residual disabilities from traumatic brain injuries, and certain lung conditions. After adjusting for excluded conditions, as well as for cases that the OIG determined to be outside the scope of the review, the remaining population was estimated to include over 24,800 veterans with active compensation payments with at least one disability rated at 100 percent disabling as of August 20, 2018, with P&T status established from October 1, 2017, to September 14, 2018.

### **Sampling Design**

The OIG selected a statistical sample of 100 cases from the population of veterans who had at least one disability evaluated at the 100 percent rate as of August 20, 2018, with a favorable P&T decision completed from October 1, 2017, to September 14, 2018. Sampling was performed using the simple random sampling methodology; therefore, all cases had the same probability of being selected.

### **Weights**

The OIG calculated estimates in this report using weighted sample data. Samples were weighted to represent the population from which they were drawn. The OIG uses the weights to compute estimates. For example, the OIG calculated the error rate point estimates by summing the sampling weights for all sample records that contained the error, then dividing that value by the sum of the weights for all sample records.

### **Projections and Margins of Error**

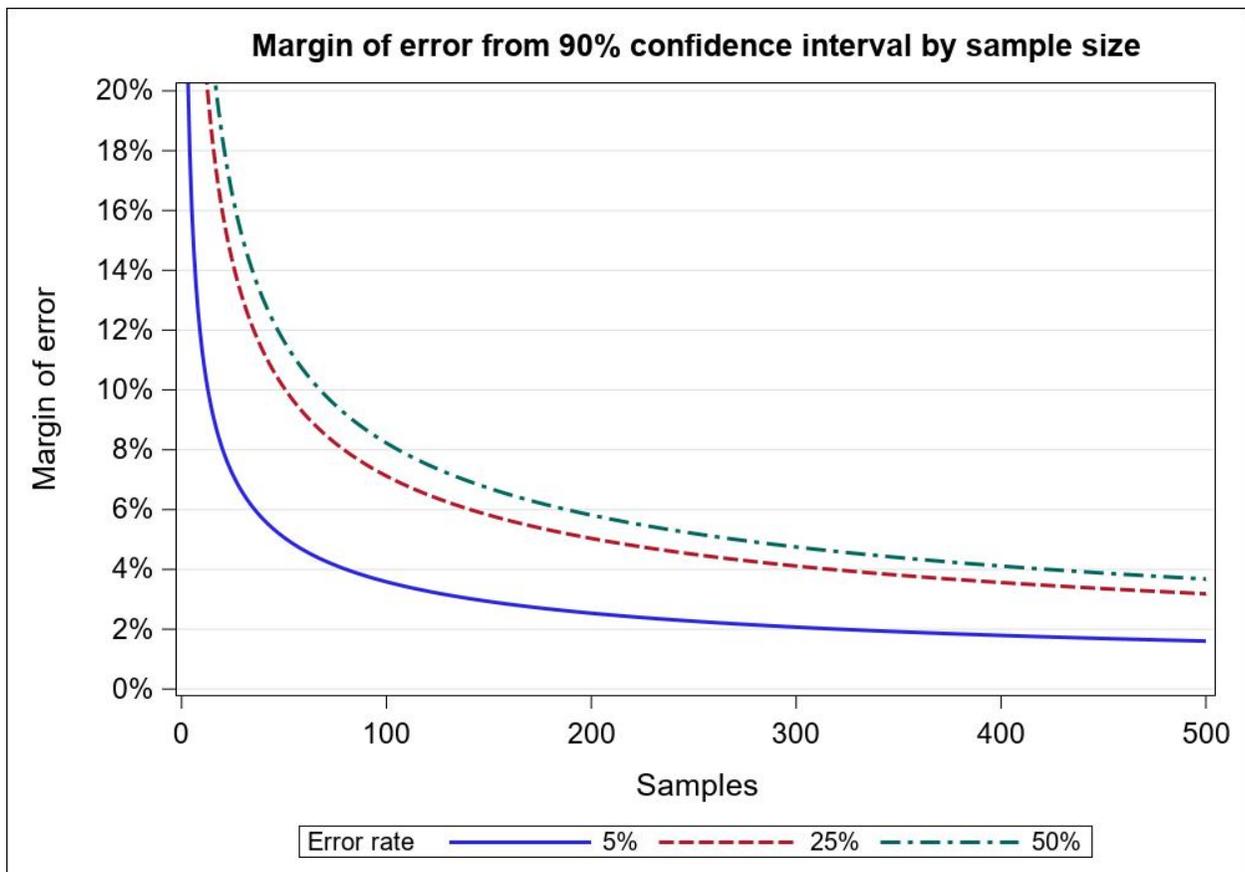
The point estimate (e.g., estimated error) is an estimate of the population parameter obtained by sampling. The margin of error and confidence interval associated with each point estimate provide a measure of the precision of the point estimate that accounts for the sampling

methodology used. If the OIG repeated this audit with multiple samples, the confidence intervals would differ for each sample but would include the true population value 90 percent of the time.

The OIG statistician employed statistical analysis software to calculate the weighted population estimates and associated sampling errors. This software uses replication methodology to calculate margins of error and confidence intervals that correctly account for the complexity of the sample design.

The sample size was determined after reviewing the expected precision of the projections based on the sample size, potential error rate, and logistical concerns of sample review. While precision improves with larger samples, the rate of improvement decreases as more records are added to the sample review.

Figure C.1 shows the effect of progressively larger sample sizes on the margin of error:



**Figure C.1.** Effect of sample size on margin of error.

Source: VA OIG statistician’s analysis.

## Monetary Impact of Inadequately Supported P&T Disability Decisions

The Office of Management and Budget defines federal payments as improper when they are

- Paid in the incorrect amount,
- Paid to an ineligible recipient, or
- Issued without adequate supporting documentation.

For veterans receiving disability compensation benefits, only the portion of payments that lack required documentation would be considered improper based on this definition. For example, if \$10 of a total payment of \$100 was paid without adequate documentation, only \$10 is considered improper. Because P&T status does not result in additional disability compensation payments, the OIG determined that disability compensation paid to veterans with inadequately supported P&T determinations would not rise to the level of improper payments for the purposes of this review. However, the additional benefits paid to veterans because they are considered P&T are payable only after VBA issues a P&T determination. When this determination is issued without citing adequate evidence to support VBA decision makers' conclusion that a veteran is both permanently and totally disabled, payments made through these additional benefits programs are made without adequate supporting documentation.

When evaluating the monetary impact of inadequately supported P&T determinations, the OIG considered three VA-administered programs associated with P&T status:

1. CHAMPVA healthcare
2. DEA educational assistance
3. Dental care

Basic eligibility for each program is contingent upon veterans being found by VBA to have P&T status. Once P&T status has been established, veterans or their dependents submit a separate application to another VA program office, which confirms eligibility criteria and approves payments. However, when a decision does not cite adequate evidence to support the P&T status, these program offices risk making payments for ineligible veterans or dependents. In addition to the direct monetary impact in VA-administered programs associated with P&T status, inadequately supported determinations may result in veterans being paid disability compensation at the 100 percent rate indefinitely without VBA follow-up. The effect of insufficiently supported P&T status decisions is that veterans may be paid at the 100 percent rate indefinitely even if their disabilities improve significantly, worsen significantly, or are cured. Over time, unsupported P&T status decisions may result in inaccurate disability compensation payments by either paying veterans too much or too little.

## Calculating Potential Monetary Impact

To calculate the monetary impact of inadequately supported P&T status determinations, the OIG considered the number of veterans receiving disability compensation for at least one disability rated at 100 percent disabling as of August 20, 2018, and P&T status decisions made from October 1, 2017, to September 14, 2018. To recognize current VBA business practices and to prepare an estimate, the OIG excluded any veteran age 55 and over from the larger population of about 24,800 in-scope veterans. The OIG also excluded veterans with 100 percent conditions unlikely to heal or improve, such as amputations.

As a result, the OIG narrowed the overall population from more than 680,000 veterans in receipt of disability at the 100 percent rate to about 11,700 and prepared its estimate. The OIG then extracted payment records for the CHAMPVA, DEA, and dental care programs from VA databases to identify payments issued on behalf of these veterans between the beginning of FY 2018, October 1, 2017, and the end of the first quarter of FY 2020, December 31, 2019. The first quarter of FY 2020 was the last full quarter available at the time the OIG extracted data from VA databases.

Table C.1 shows VA paid benefits in the following amounts for each associated program:

**Table C.1. P&T-Related Benefits Amounts Paid**

P&T-related benefit program	Amount paid
CHAMPVA healthcare	\$10,168,840.94
DEA educational assistance	\$25,011,030.75
Dental care	\$22,415,475.11
<b>Total payments</b>	<b>\$57,595,346.81</b>

*Source: VBA Data Warehouse, VHA Corporate Data Warehouse, and VA Financial Management System.*

Tables C.2–C.6 show OIG projections. From the population of about 11,700 veterans under age 55, the OIG projected the error rate based on its claim review. The error rate was nearly 66 percent or about 8,000 veterans. Based on this, the OIG estimated VA potentially made payments for ineligible veterans or their dependents of more than \$38 million in these VA-administered benefits associated with P&T status between October 1, 2017, and December 31, 2019. The OIG further estimated that VA may improperly pay more than \$84 million over the next five years for these same VA-administered benefits associated with P&T status. These combined estimates total more than \$122 million.

**Table C.2. P&T Error Projections for Entire Population**

Category	Samples in category	Count or percent	Projection	Margin of error	Lower limit 90% confidence interval	Upper limit 90% confidence interval
Errors	61	Count	15,145	2,182	12,963	17,327
		Percent	61%	8%	53%	69%
<b>Total</b>	<b>100</b>	<b>Count</b>	<b>24,828</b>	<b>1,397</b>	<b>23,432</b>	<b>26,225</b>

Source: VA OIG statistician's projection of estimated population. Data were obtained from the VBA Data Warehouse.

**Table C.3. P&T Error Projections for Under Age 55 Population**

Category	Samples in category	Count or percent	Projection	Margin of error	Lower limit 90% confidence interval	Upper limit 90% confidence interval
Errors	31	Count	7,697	1,953	5,744	9,650
		Percent	66%	12%	54%	78%
<b>Total</b>	<b>47</b>	<b>Count</b>	<b>11,669</b>	<b>2,158</b>	<b>9,512</b>	<b>13,827</b>

Source: VA OIG statistician's projection of estimated population. Data were obtained from the VBA Data Warehouse.

**Table C.4. P&T-Related Benefit Programs Monetary Impact for Payments Made between October 1, 2017, and December 31, 2019**

Description	Erroneously paid amount (projected)	Lower limit 90% confidence interval	Upper limit 90% confidence interval	Monthly paid amount (divided by 27 months)
CHAMPVA healthcare	\$6,711,435.02	\$5,491,174.11	\$7,931,695.94	\$248,571.67
DEA educational assistance	\$16,507,280.29	\$13,505,956.60	\$19,508,603.98	\$611,380.75
Dental care	\$14,794,213.58	\$12,104,356.56	\$17,484,070.59	\$547,933.84
<b>Total payments</b>	<b>\$38,012,928.89</b>	<b>\$31,101,487.28</b>	<b>\$44,924,370.51</b>	<b>\$1,407,886.26</b>

Source: VA OIG statistician's projection of estimated population. Data were obtained from the VBA Data Warehouse, VHA Corporate Data Warehouse, and VA Financial Management System.

**Table C.5. P&T-Related Benefit Programs Five-Year Monetary Impact for Payments from January 1, 2020, to December 31, 2024**

Description	Five-year projection (monthly paid amount times 60 months)	Lower limit 90% confidence interval	Upper limit 90% confidence interval
CHAMPVA healthcare	\$14,914,300.05	\$12,202,609.13	\$17,625,990.97
DEA educational assistance	\$36,682,845.10	\$30,013,236.90	\$43,352,453.30
Dental care	\$32,876,030.17	\$26,898,570.14	\$38,853,490.20
<b>Total payments</b>	<b>\$84,473,175.32</b>	<b>\$69,114,416.17</b>	<b>\$99,831,934.46</b>

Source: VA OIG statistician's projection of estimated population. Data were obtained from the VBA Data Warehouse, VHA Corporate Data Warehouse, and VA Financial Management System.

**Table C.6. P&T-Related Benefit Programs Monetary Impact Total Improper Payments**

Description	Five-year projection (monthly paid amount times 60 months)	Lower limit 90% confidence interval	Upper limit 90% confidence interval
Past improper payments (2.25 years or 27 months)	\$38,012,928.89	\$31,101,487.28	\$44,924,370.51
Projected improper payments (5 years or 60 months)	\$84,473,175.32	\$69,114,416.17	\$99,831,934.46
<b>Total improper payments</b>	<b>\$122,486,104.21</b>	<b>\$100,215,903.45</b>	<b>\$144,756,304.97</b>

Source: VA OIG statistician's projection of estimated population. Data were obtained from the VBA Data Warehouse, VHA Corporate Data Warehouse, and VA Financial Management System.

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

Recommendation	Explanation of Benefits	Better Use of Funds	Questioned Costs
1-4	The OIG estimated VA paid \$38 million in improper payments for additional benefits associated with P&T status to veterans under the age of 55 between October 1, 2017, and December 31, 2019.	\$0	\$38 million
1-4	The OIG estimated that VA could pay at least \$84 million in improper payments for additional benefits associated with P&T status to veterans under the age of 55 over the next five years, starting January 1, 2020, based on payment rates in effect at the time of this review.	\$0	\$84 million
	<b>Total</b>	<b>\$0</b>	<b>\$122 million</b>

## Appendix E: Management Comments

Department of Veterans Affairs Memorandum

Date: July 21, 2020

From: Under Secretary for Benefits (20)

Subj: OIG Draft Report – VBA Inadequately Supported Permanent and Total Disability Decisions  
[Project No. 2019-00227-BI-0001]

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

Attached is VBA's response to the OIG Draft Report: VBA Inadequately Supported Permanent and Total Disability Decisions.

OIG's report assumes that VBA would not make any improvements over the next five years, including those from implementing OIG's recommendations, and then proceeds to identify a corresponding estimated monetary impact. VBA takes exception to this practice as this assumption is incorrect and misleading to the reader. Generally, agencies are required to complete final action on OIG recommendations within 12 months of publication. Assuming current practices will go unchanged is false, as VBA values OIG's vital oversight role and works diligently to implement recommendations to improve service to Veterans. OIG has stated that they use a five-year estimate to emphasize the importance of taking corrective actions and to highlight the potential magnitude of identified issues if actions are delayed or never implemented. VBA takes OIG recommendations very seriously and has a rigorous recommendation follow up process. Therefore, VBA continues to believe this practice is incorrect and misleading to the reader.

*The OIG removed point of contact information prior to publication.*

(Original signed by)

Paul R. Lawrence, Ph.D.

Attachment

**Veterans Benefits Administration**

**Comments on OIG Draft Report**

**VBA Inadequately Supported Permanent and Total Disability Decisions**

The Veterans Benefits Administration (VBA) concurs with the findings in OIG's draft report and provides the following technical comment:

Page ii, paragraph 3, lines 5-8

"Despite the statutory requirement to be "reasonably certain" that a veteran's disabilities are unlikely to improve during his or her lifetime, VBA's adjudication procedures manual states that a "P&T disability exists when the evidence does not show that a veteran's disability is either permanent or likely to improve."

VBA Comment: This sentence is inaccurate and an incorrect citation of VBA's adjudication procedures manual. VBA's procedures manual does not state that a "permanent & total (P&T) disability exists when the evidence does not show that a veteran's disability is either permanent or likely to improve." Instead, VBA's adjudication manual, M21-1, IX.ii.2.1.j, notes that a "P&T disability exists when evidence at the time of evaluation does not specifically support that the total disability will continue for the remainder of the person's life, but does not show that the condition is likely to improve." VBA recommends replacement of the sentence in the draft report with the proper adjudication procedures manual citation. Therefore, VBA proposes the following revision:

"Despite the statutory requirement to be "reasonably certain" that a veteran's disabilities are unlikely to improve during his or her lifetime, VBA's adjudication procedures manual states that a "P&T disability exists when evidence at the time of evaluation does not specifically support that the total disability will continue for the remainder of the person's life, but does not show that the condition is likely to improve."

VBA provides the following comments in response to the recommendations in the OIG draft report:

Recommendation 1: The under secretary for benefits ensures the adjudication procedures manual is updated for consistency with all applicable laws, regulations, and policies related to permanent and total determinations in consultation with the office of general counsel.

VBA Response: Concur. VBA will review and update its procedural guidance, specifically, applicable sections within M21-1, Part IX, Subpart ii, relating to permanent and total (P&T) determinations. VBA will add regulatory references that define permanent and total disability. While VBA does not consult with the Office of General Counsel in its normal course of business in updating the Adjudication Procedures Manual, VBA will do so in this instance, based on OIG's specific direction.

Target Completion Date: October 30, 2020.

Recommendation 2: The under secretary for benefits ensures decision-making staff support their permanent and total status decisions in the Reasons for Decision section of the rating decision by describing the evidence used to support their conclusions.

VBA Response: Concur. OIG case reviews took place prior to the passage of the Veterans Appeals Improvement and Modernization Act of 2017 (commonly known as Appeals Modernization Act or AMA). AMA requires improved notification of VA decisions with "8-point notice" (see generally 38 U.S.C. § 5104). In compliance with AMA, each rating decision document includes an "evidence" section containing a summary of the evidence considered in arriving at the decision, generated and formatted in accordance with procedural guidelines. (See M21-1, Part III, Subpart iv, 6.C.4). The use of Veterans Benefits Management System-Rating generated language and its applicable embedded tools ensure compliance

with the essential elements of the decision notice requirements in AMA. (See M21-1, Part III, Subpart iv, 6.C.6.a). VBA has implemented standardized processes for ensuring the evidence used to support the decisions is appropriately documented.

VBA considers this recommendation fully implemented and requests closure of this recommendation.

Recommendation 3: The under secretary for benefits replaces the title and standardized language of “Dependents’ Educational Assistance under 38 U.S.C. Chapter 35” in rating decisions to clearly state that permanent and total status is being considered.

VBA Response: Concur in part. VBA disagrees with replacing the title and standardized language of Dependents’ Educational Assistance (DEA) because existing standardized language used in connection with awards of basic eligibility to DEA must be retained. This is required because entitlement to DEA may also be substantiated by death in service, service-connected death following service, or P&T disability status at the time of the Veteran’s death. However, VBA will consider language options to make P&T disability status more readily apparent in favorable DEA decisions when eligibility is established on that basis.

Target Completion Date: October 30, 2020.

Recommendation 4: The under secretary for benefits ensures appropriate training is provided to decision-making staff based on the changes made to permanent and total procedures related to Recommendations 1, 2 and 3, and monitor the effectiveness of that training.

VBA Response: Concur. VBA will ensure that any procedural guidance changes and systems modifications implemented based upon the above recommendations are communicated to the appropriate regional office staff. These changes may not warrant a full training course but may consist of a notification via a manual update, an email from the Office of Field Operations, or a notice in the Veterans Service Center Manager Call bulletin. VBA will determine the effectiveness of the communication distributed based on feedback and questions on the topics received from the regional office staff.

Target Completion Date: November 30, 2020.

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

## OIG Contact and Staff Acknowledgments

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<b>Contact</b>	For more information about this report, please contact the Office of Inspector General at (202) 461-4720.
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*Bruce Nielsen passed away recently. Bruce was a trusted advisor and a dedicated and affable colleague; his keen intellect and good judgment were greatly valued. He will be missed.*

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