



# US DEPARTMENT OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL

Office of Audits and Evaluations

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## VETERANS BENEFITS ADMINISTRATION

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# Inconsistent Disability Benefits Questionnaires May Lead to Inaccurate Mental Competency Determinations

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The Office of Inspector General (OIG) has released this management advisory memorandum to provide information on matters of concern that the OIG has gathered as part of its oversight mission. 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, excluding follow-up.

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DEPARTMENT OF VETERANS AFFAIRS  
**OFFICE OF INSPECTOR GENERAL**  
WASHINGTON, DC 20001



August 2, 2023<sup>1</sup>

**MANAGEMENT ADVISORY MEMORANDUM**

**TO:** Joshua Jacobs, Under Secretary for Benefits  
Veterans Benefits Administration (20)

**FROM:** Larry Reinkemeyer, Assistant Inspector General for Audits and Evaluations  
VA Office of Inspector General's Office of Audits and Evaluations (52)

**SUBJECT:** Inconsistent Disability Benefits Questionnaires May Lead to Inaccurate  
Mental Competency Determinations

While assessing an anonymous allegation against two fiduciaries under the jurisdiction of the fiduciary hub in Indianapolis, Indiana, the VA Office of Inspector General (OIG) discovered inconsistencies in the four disability benefits questionnaires used to elicit medical professionals' assessments of veterans' mental competency.<sup>2</sup> While 38 C.F.R. § 3.353(a) provides VA's regulatory definition of mental incompetency, only two of the questionnaires included this definition. Further, for all four questionnaires, *the question* asked to assess mental competency does not use the wording from VA's regulatory definition. The VA OIG found the wording of the competency question and its departure from the regulation language could have resulted in inconsistent decisions on veterans' competency.

The Veterans Benefits Administration (VBA) uses disability benefits questionnaires when inquiring about a veteran's capability to manage his or her own financial affairs. Each questionnaire elicits medical information needed to make decisions on claims and provides a standardized report format for medical examinations and opinions.<sup>3</sup> According to 38 C.F.R. § 3.353(a), "A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation."<sup>4</sup> The regulation also states that "unless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the

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<sup>1</sup> This memorandum was sent to the Veterans Benefits Administration on August 2, 2023, to provide the opportunity for review and comment. Following that period, their comments were given full consideration, and any requests for change supported by sufficient evidence were addressed before the report publication process was completed.

<sup>2</sup> VA OIG, *The Fiduciary Program Needs to Verify the Prompt Return of Deceased Beneficiaries' Funds to VA*, Report No. 22-03543-151, August 17, 2023.

<sup>3</sup> VA Manual 21-1, "Definition: DBQs," sec. IV. i.2.A. in *Adjudication Procedures Manual*, topic 3.a, updated March 1, 2021.

<sup>4</sup> 38 C.F.R. § 3.353(a).

responsible medical authorities.”<sup>5</sup> When a disability medical examiner responds to the mental competency question, the response is used as evidence and can influence a rating veterans service representative’s (RVSR) decision regarding that veteran’s ability to manage his or her own affairs, including benefit payments. Language discrepancies on the questionnaire can lead to inaccurate assessments and disparate outcomes for veterans. Consistency in the disability benefits questionnaires is imperative to ensuring appropriate and equitable outcomes.

This memorandum is meant to convey the information necessary for VBA to determine if additional actions are warranted.<sup>6</sup> The OIG is taking no additional steps at this time.

## **Two of Four Questionnaires Do Not Include VA’s Regulatory Definition of Mental Incompetency and Related Questions Varied**

The OIG reviewed all of VA’s disability benefits questionnaires and identified four questionnaires that address mental competency: (1) Initial Post Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire, updated April 15, 2020 (“initial PTSD questionnaire”); (2) Review Post Traumatic Stress Disorder (PTSD) Disability Benefits Questionnaire, updated April 1, 2020 (“review PTSD questionnaire”); (3) Mental Disorders (Other than PTSD and Eating Disorders) Disability Benefits Questionnaire, updated April 1, 2020 (“mental disorders questionnaire”); and (4) Examination for Housebound Status or Permanent Need for Regular Aid and Attendance, VA Form 21-2680, updated February 2023 (“housebound and aid and attendance questionnaire”).<sup>7</sup> Appendix A lists the four questionnaires and includes the relevant sections related to competency. Neither the initial PTSD questionnaire nor the housebound and aid and attendance questionnaire include any definition of mental competency. Only the review PTSD questionnaire and mental disorders questionnaire include the regulatory definition of mental incompetency, stating “[f]or VA purposes, a mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitations.”<sup>8</sup>

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<sup>5</sup> 38 C.F.R. § 3.353(c).

<sup>6</sup> This memorandum provides information that has been gleaned from OIG fieldwork and is provided to VBA to determine if it should take additional action on the apparent inconsistencies.

The OIG issues management advisory memoranda when exigent circumstances or areas of concern are identified by OIG hotline allegations or in the course of its oversight work, particularly when immediate action by VA can help reduce further risk of harm to veterans or significant financial losses. Memoranda are published unless otherwise prohibited from release or to safeguard protected information.

<sup>7</sup> If an eligible veteran, spouse, or surviving spouse or parent needs help with daily activities or is housebound, an additional amount in monthly VA compensation or pension benefits may be paid. Although the title of the housebound and aid and attendance questionnaire does not contain the words “disability benefits questionnaire,” the form is listed under “Other DBQs” on VA’s internal DBQ Switchboard. Accordingly, the VA OIG has grouped the housebound and aid and attendance questionnaire in the appendix for all DBQs.

<sup>8</sup> 38 C.F.R. § 3.353(a).

To assess competency, the initial PTSD questionnaire, review PTSD questionnaire, and mental disorders questionnaire all request disability medical examiners to answer the following question: “Is the veteran capable of managing his or her financial affairs?” For all four questionnaires, the question about mental competency is not modeled after VA’s regulatory definition.

Unlike the other three disability benefits questionnaires, the housebound and aid and attendance questionnaire poses a different question altogether, asking “[i]n your judgment, does the patient have the mental capacity to manage their benefit payments, or are they able to direct someone to do so?” This question varies from the VA regulation in potentially significant ways, given that it lacks mention of the veterans’ ability “without limitation” language and changes some of the other verbiage.

The legislative history of 38 C.F.R. § 3.353 demonstrates the importance of a consistent definition for mental incompetency. In 1993, VA amended 38 C.F.R. § 3.353 to ensure internal regulatory consistency regarding the definition of a mentally incompetent person.<sup>9</sup> Specifically, while 38 C.F.R. § 3.353(a) defined a mentally incompetent person as “one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation,” the version of 38 C.F.R. § 3.353(d) in effect at the time of the amendment “require[d] a presumption in favor of competency in situations where doubt arises as to whether a beneficiary is capable of *administering his or her funds*.... This provision assumes a less comprehensive definition of incompetency.”<sup>10</sup>

The supplementary information provided with the regulatory amendment explained that “internal inconsistency within the regulation... could lead to discrepancies in its application in individual cases” and that the changes would assist VA in making consistent determinations when the issue of incompetency arises.<sup>11</sup> The amendment codified at 38 C.F.R. § 3.353 was made so that the definition of mental incompetency was internally consistent throughout the regulation provisions.

To limit the risk of inconsistent or inequitable outcomes, all four disability benefits questionnaires should use standardized language. Specifically, all four questionnaires should ask a question that is directly modeled on the regulatory definition.

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<sup>9</sup> Supplementary Information, 58 Fed. Reg. 37,856 (July 14, 1993) (regulatory change codified at 38 C.F.R. § 3.353).

<sup>10</sup> Supplementary Information, 58 Fed. Reg. 37,856 (emphasis in original).

<sup>11</sup> Supplementary Information, 58 Fed. Reg. 37,856.

## Rating Veterans Service Representatives Rely on Disability Medical Examiners' Assessments Regarding Competency

VA regulation states that “[u]nless the medical evidence is clear, convincing and leaves no doubt as to the person’s incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.”<sup>12</sup>

VBA’s rating “activity” refers to a group of specially qualified employees vested with the authority to make formal decisions, called rating decisions, and take other actions on claims that require a rating decision.<sup>13</sup> VBA procedures state that if medical evidence suggests but does not clearly and convincingly show that the person is incapable of managing the VA benefit payment without limitation, RVSRs do not request additional information to substantiate or propose incompetency. Instead, RVSRs are instructed to state in the narrative of the rating decision that there was no clear and convincing evidence of incompetency.<sup>14</sup> If there is no other existing medical evidence that addresses mental competency, RVSRs rely on the disability medical examiner’s responses on the relevant disability benefits questionnaire. Accordingly, it is imperative that questionnaires use clear and consistent language to ensure disability medical examiners have the information to provide accurate assessments regarding competency.

The following are two examples involving examinations for housebound status or permanent need for regular aid and attendance using VA Form 21-2680. In both examples, the disability medical examiner responded that the veteran had dementia and received assistance from family to manage finances. Despite the veterans having the same basic circumstances, the disability medical examiners provided different responses to the question of mental incompetency, which led the RVSRs to reach different decisions.

### *Example 1*

*The disability medical examiner provided a “YES” response when asked whether the veteran could manage his benefits or direct someone else to do so, indicating the veteran’s daughter manages his finances because he is unable to do so. Based on the disability medical examiner’s response, the RVSR did not propose incompetency. Therefore, the veteran is considered competent.*

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<sup>12</sup> 38 C.F.R. § 3.353(c).

<sup>13</sup> VA Manual 21-1, “Definition: Rating Activity,” sec. V. i.1.A in *Adjudication Procedures Manual*, topic 1.a, updated June 30, 2020.

<sup>14</sup> VA Manual 21-1, “Considering Whether to Address Competency of a Veteran,” sec. X. ii.6.A in *Adjudication Procedures Manual*, topic 2.a, updated December 15, 2021.

## Example 2

*The disability medical examiner answered “NO” when asked whether the veteran could manage his benefits or direct someone else to do so, for the very reason that the family assists the veteran with managing benefit payments. Based on the disability medical examiner’s response, the RVSR proposed incompetency, and VBA ultimately determined that the veteran was incompetent.*

For both examples, the OIG team’s review could not independently determine whether the veterans were incompetent pursuant to 38 C.F.R. § 3.353(a). Based on the regulatory requirements of 38 C.F.R. § 3.353(c), the RVSRs’ decisions were not wrong because the decisions were consistent with the responses provided by the disability medical examiners. It is unclear whether the disability medical examiners would have responded differently or provided clarifying information if the wording of the questions about mental competency was specifically modeled after the regulatory definition. Because the language does not use the regulatory definition of mental incompetency, there is the risk that the wording was a factor in the inconsistent outcomes.

In sum, the lack of standardized questions on the disability benefits questionnaires can lead to inconsistent medical assessments. This, in turn, can cause inconsistency in the decisions made by RVSRs regarding a veteran’s mental competency.

## Requested Action

The OIG requested that VBA inform the OIG what action, if any, VBA takes to address the inconsistencies identified in this memorandum.

## VBA Comments

In response to its review of the VA OIG’s draft of this memorandum, VBA stated that it has taken action to include the regulatory definition found in 38 C.F.R. § 3.383 on the initial PTSD questionnaire. According to VBA, the updated questionnaire is scheduled for release in November 2023. VBA also provided technical comments on the draft management advisory memorandum. The full text of VBA’s comments appears in appendix B.

## OIG Response

To address the four technical comments, the OIG made minor editorial changes. In addition, the OIG clarified that an additional amount in monthly VA compensation or pension benefits may be paid if an eligible veteran, *spouse, or surviving spouse or parent* needs help with daily activities or is housebound. Instead of changing the appendix header as requested, the OIG also added a footnote to appendix A to clarify that although the title of the housebound and aid and attendance questionnaire does not contain the words “disability benefits questionnaire,” the form is listed

under “Other DBQs” on VA’s internal DBQ Switchboard. VBA did not specifically indicate whether it planned to take action to amend the relevant section related to competency on the housebound and aid and attendance questionnaire.





## Appendix B: Management Comments

### Department of Veterans Affairs Memorandum

Date: August 23, 2023

From: Under Secretary for Benefits (20)

Subj: Office of Inspector General (OIG) Draft Management Advisory Memorandum – Inconsistent Disability Benefits Questionnaires May Lead to Inaccurate Mental Competency Determinations [Project No. 2022-02194-AE-0095]

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

1. The Veterans Benefits Administration (VBA) has reviewed the OIG draft Management Advisory Memorandum — Inconsistent Disability Benefits Questionnaires May Lead to Inaccurate Mental Competency Determinations and provides the attached response.

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

/s/

Joshua Jacobs

Attachment

**Veterans Benefits Administration  
Comments on OIG Management Advisory Memorandum  
Inconsistent Disability Benefits Questionnaires May Lead to Inaccurate  
Mental Competency Determinations**

**The Veterans Benefits Administration (VBA) provides the following general comment in response to the OIG Management Advisory Memorandum:**

VBA is appreciative of the opportunity to review and comment on the OIG findings of inconsistencies as delineated in the memorandum. VBA has taken action to include the regulatory definition found in 38 C.F.R. § 3.383 on the Initial Post Traumatic Stress Disorder (PTSD) Disability Benefit Questionnaire (DBQ). The regulatory definition is already included on the Review PTSD DBQ and Mental Disorders DBQ. The updated Initial PTSD DBQ is scheduled for release in November 2023 and will be the final step in ensuring all three DBQs contain the same language regarding mental competency.

**VBA also provides the following technical comments:**

On page 1, second paragraph, second line from bottom, the phrase “benefits payments” should read “benefit payments.”

On page 3, top paragraph, line 4, the statement “without any further guidance or definition” is inaccurate. Under the Yes or No boxes there is a notation that says “(If “NO,” provide the disability(ies) that prevent them from performing this function and any rationale to support your conclusion in the space provided).” This guidance to the examiners is incorporated in several of the identified questionnaires.

Appendix A is titled “Competency Sections in Four Disability Benefits Questionnaires”. This Appendix should instead be titled, “Competency Sections in VBA Disability Benefits Questionnaires and Forms.” The rationale for this edit is that the fourth example listed is VA Form 21-2680, “*Examination for Housebound Status or Permanent Need for Regular Aid and Attendance*” which is a VA form, not a DBQ.

Additionally, throughout the document, it should be noted that VA Form 21-2680, *Examination for Housebound Status or Permanent Need for Regular Aid and Attendance*, applies to any claimant, whether it be a Veteran, dependent, or survivor.

## OIG Contact and Staff Acknowledgments

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<b>Contact</b>	For more information about this management advisory memorandum, please contact the Office of Inspector General at (202) 461-4720.
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