

**Department of
Veterans Affairs**

Memorandum

Date: February 10, 2009 VAOPGCPREC 2-2009

From: Acting General Counsel (022)

Subj: Use of VA Appropriations to Provide Medical Examinations for Service Members Enrolled in DES Pilot Program

To: Acting Assistant Secretary for Policy and Planning (008)

QUESTION PRESENTED:

Does the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. E, tit. II, § 205, 122 Stat. 3574, 3709 (2008), which provides that Department of Veterans Affairs (VA) appropriations may not be used for "examination of any persons" except certain groups, including "beneficiaries entitled to . . . examination under the laws providing such benefits to veterans," preclude the use of VA appropriations to provide examinations to active duty service members enrolled in the Disability Evaluation System (DES) pilot program?

Held:

Department of Veterans Affairs appropriations may be used to provide an examination to an active duty service member enrolled in the Department of Defense (DoD) Disability Evaluation System pilot program following referral to a DoD Medical Evaluation Board because of a potentially unfitting condition and completion of VA Form 21-0819, VA/DOD Joint Physical Evaluation Board Claim by the member.

Discussion:

1. On November 26, 2007, the Department of Defense (DoD) and VA began a pilot program in which a service member who is referred to a Medical Evaluation Board (MEB) by a medical care provider at one of three DoD Medical Treatment Facilities (MTFs) receives a single medical examination and a VA disability rating for use by DoD to determine fitness for duty and by VA to determine entitlement to Veterans benefits. See DoD "Policy and Procedural Directive-Type Memorandum (DTM) for the Disability Evaluation System (DES) Pilot Program," ¶¶ 2.1, 3.1 (Nov. 21, 2007) (DTM). Examinations of service members enrolled in the pilot program are performed by providers from a variety of sources, e.g., DoD, VA, TRICARE, and contractors, all of whom must meet VA

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certification requirements. Id. at ¶ 6.6.2. In order to implement the pilot program, DoD and VA signed a November 6, 2007, Memorandum of Agreement (2007 MOA), under which VA must ensure that "qualified Compensation and Pension (C&P) exam providers are available to support the DES pilot." 2007 MOA, ¶ 5.c. DoD agreed to provide funding, as needed, for the examinations for this pilot program. Id. at ¶ 5.a. The pilot program was expanded on October 1, 2008, to include service members referred to MEBs from additional MTFs.¹ See DoD/VA "Report to Congress on the Current Status of the Department of Defense and Department of Veterans Affairs Disability Evaluation System Pilot Program," 42 (Nov. 20, 2008). During negotiations on a MOA to supersede the 2007 MOA, the question arose as to whether VA appropriations may be used to provide examinations to service members enrolled in the DES pilot program without reimbursement from DoD.² As explained below, we conclude that VA appropriations may be used for such examinations.

2. Public funds may be used only for the purpose for which they were appropriated. 31 U.S.C. § 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."). If a proposed use of funds is inconsistent with the statutory language of the appropriations act, the expenditure is not permissible, "even if it would result

¹ In addition to the DES pilot, VA currently provides medical examinations to active-duty service members under the Benefits Delivery at Discharge (BDD) program, in which service members who have at least 60, but no more than 180, days remaining on active duty and have a known discharge date may file a VA Form 21-526, Veteran's Application for Compensation and/or Pension. Veterans Benefits Administration (VBA) Adjudication Procedure Manual Rewrite M21-1MR (M21-1MR), ¶¶ III.i.2.A.1.b., III.i.2.A.2.c., and III.i.2.B.4.e. BDD participants receive a "single cooperative examination," provided pursuant to a November 17, 2004, MOA between VA and DoD, "that meets VA disability examination requirements and DoD separation physical requirements." Id. at ¶ III.i.2.B.5.e. A VA rating decision on a BDD claim is processed following review of the rating decision by a veterans service officer and receipt of the DD Form 214, Certificate of Release or Discharge from Active Duty. Id. at ¶ III.i.2.B.7.i.

² Under the Economy Act, 31 U.S.C. §§ 1535 and 1536, an agency may purchase goods and services from another agency on a reimbursable basis. An interagency agreement is recorded as an obligation of the ordering agency at the time the ordering agency enters into the agreement. 31 U.S.C. § 1535(d). An interagency agreement may also be based on statutory authority other than the Economy Act, e.g., 38 U.S.C. § 513, which authorizes the Secretary of Veterans Affairs to enter into contracts with private or public agencies "for such necessary services (including personal services) as the Secretary may consider practicable."

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in substantial savings or other benefits to the government." 1 General Accounting Office, Principles of Federal Appropriations Law 4-7 (3d ed. 2004). The Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. E, title II, § 205, 122 Stat. 3574, 3709 (2008), making appropriations for VA programs for Fiscal Year 2009, states:

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

The term "beneficiaries" in section 205 is not defined in Pub. L. No. 110-329. The question posed by the statute, therefore, is whether or under what circumstances active-duty service members enrolled in the DES program may be considered "beneficiaries" for purposes of section 205 of Pub. L. No. 110-329.

3. It is well settled that the general principles of statutory construction apply to appropriations laws such as section 205 of Pub. L. No. 110-329. See Nevada v. Department of Energy, 400 F.3d 9, 16 (D.C. Cir. 2005). "[A]bsent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied." 1 Principles of Federal Appropriation Law 4-7. We therefore look first to the plain meaning of the term "beneficiaries." Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (starting point in interpreting a statute is its language); 2A Norman J. Singer, Statutes & Statutory Construction §§ 46.01-46.04 (6th ed. 2000). The word "beneficiary" refers generally to a person who "benefits from something," such as a government program. Merriam-Webster's Collegiate Dictionary 106 (10th ed. 2000). As a legal term, it is commonly used to refer to a person "designated . . . to receive something as a result of a legal arrangement or instrument" or a person "who is initially entitled to enforce a promise." Black's Law Dictionary 165 (8th ed. 2004). The term "benefit" generally refers to an "[a]dvantage," "privilege," or "[p]rofit or gain." Id. at 166. VA regulations define "benefit" in certain contexts to mean any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by VA pertaining to Veterans and their dependents and survivors. 38 C.F.R. §§ 14.627(e), 20.3(e). Viewed in isolation, the term "beneficiary" is not inherently limited to a person entitled to a particular type of benefit, such as VA disability compensation, but may include any person entitled to some advantage, status, or privilege.

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4. The statutory context in which the term "beneficiary" is used may also shed light on its meaning. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). The scope of the term "beneficiary," as used in a particular statute, may be given meaning by the surrounding language in the statute identifying the type of "benefit" to which the term refers. As explained below, this is reflected in the differing uses of the term "beneficiary" in title 38, United States Code.

5. Certain title 38 provisions employ the term "beneficiary" in a context that clearly refers only to persons who have established entitlement to a particular monetary benefit, as distinguished from claimants for such benefits. See 38 U.S.C. § 5112(b)(9) (referring to reduction or discontinuance of monetary benefits erroneously awarded based on acts of commission or omission by a beneficiary); § 5301 (referring to exempt status of payments to a beneficiary). Other provisions contain references to both "claimants" and "beneficiaries," which would be unnecessary if claimants generally were within the meaning of the term "beneficiaries." See 38 U.S.C. §§ 5506(1), 5905. Significantly, however, one provision employs the term "beneficiary" to include persons who receive VA compensation and pension examinations in connection with their pending claims for VA compensation or pension benefits. Section 111 of title 38, United States Code, captioned "Payments or allowances for beneficiary travel" authorizes payment of travel expenses to several categories of persons including "[a] veteran whose travel to a Department facility is incident to a scheduled compensation and pension examination." 38 U.S.C. § 111(b)(1)(F). Although section 111 employs the term "beneficiary" only in the section heading, we note that the term "beneficiary" was added to the section heading by the same public law that specified the classes of eligible persons, including, Veterans travelling to VA for compensation and pension examinations. Veterans' Benefits and Services Act of 1988, Pub. L. No. 100-322, tit. I, §§ 108(a)(2) and (e)(1), 102 Stat. 487, 496, 498. In considering legislation that became Pub. L. No. 100-322, Congress stated that its intent in 1976 in authorizing travel expenses for Veterans "receiving benefits for or in connection with a service-connected disability" was to include those "'being examined in connection with a compensation claim.'" S. Rep. No. 100-187, at 80 (1987) (quoting S. Rep. No. 94-1206, at 77 (1976)); Veterans Omnibus Health Care Act of 1976, Pub. L. No. 94-581, § 101(2), 90 Stat. 2842. Congress further explained that the phrase "compensation and pension examination" in section 111(b)(1)(F) refers to the examination "give[n] veteran claimants for disability benefits." Id. This history clearly indicates that Congress intended to refer to a claimant who receives a compensation and pension examination as a "beneficiary" for purposes of that section.

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6. Although section 111 appears to be alone in title 38 in treating claimants for VA compensation or pension benefits as "beneficiaries," we do not believe there is any inconsistency in the statutes. Rather, the differences in the scope of the term "beneficiaries" as used in different statutory sections reflect a distinction in the type of "benefit" that is the subject of those sections. The provisions of 38 U.S.C. §§ 5112(b)(9) and 5301 establish requirements relating to monetary benefits such as VA compensation and pension, and the reference to "beneficiaries" thus refers to persons entitled to such monetary benefits. In contrast, 38 U.S.C. § 111 establishes a travel allowance ancillary to the receipt of certain VA medical services, including a compensation or pension examination performed for purposes of a claim for VA monetary benefits. The "benefit" on which section 111 is based is thus the specified VA medical services, rather than the compensation or pension sought by an individual referenced in section 111(b)(1)(F). Accordingly, section 111 reasonably uses the term "beneficiary" to refer to persons receiving the specified VA medical services, including compensation and pension claimants who have been provided an VA medical examination.

7. As noted above, section 205 of Pub. L. No. 110-329 provides, by way of exception, that appropriated funds may be used to provide examinations to "beneficiaries entitled to such . . . examination under the laws providing such benefits to veterans." The context of this provision makes clear that one of the benefits to which section 205 refers is the benefit of a VA examination, as distinguished from VA monetary payments. Because the reference to "such benefits" is preceded by reference only to examinations and certain other medical services, such examinations and services necessarily are the "benefits" referenced in this provision. Accordingly, the term "beneficiaries" as used in section 205 is most reasonably construed to include persons entitled to examinations under the laws governing Veterans' benefits, including persons who receive compensation and pension examinations in connection with their claims for monetary benefits.

8. We believe that service members who receive a VA compensation and pension examination in connection with their claims for VA benefits under the DES program may be considered "beneficiaries entitled to such . . . examination under the laws providing such benefits to veterans" for purposes of section 205 of Pub. L. No. 110-329. Under 38 U.S.C. § 5103A(a), VA is obligated to assist a "claimant" in obtaining evidence necessary to substantiate the claimant's claim for Veterans benefits. VA's duty to assist includes a duty to obtain a medical examination or opinion when "necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1). Accordingly, claimants for VA benefits clearly may be "entitled to . . . examination[s] under the laws providing such benefits to veterans" within the meaning of section 205 of Public Law No. 110-329. Indeed, if section 205 were construed to authorize expenditures for examinations only of

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persons already receiving VA disability compensation, VA would be unable to fulfill its duty under section 5103A to provide examinations to claimants. In contrast, construing "beneficiaries" in section 205 to refer to persons receiving authorized VA examinations for purposes of their benefit claims properly gives effect to both statutes. See Posadas v. National City Bank of N.Y., 296 U.S. 497, 503 (1936) ("Where there are two acts upon the same subject, effect should be given to both if possible."); 2B Norman B. Singer, Statutes & Statutory Construction § 51.01 (6th ed. 2000) (the meaning and effect of statutes are to be determined with reference to other statutes on the same subject).

9. Service members enrolled in the DES pilot program may properly be considered "claimants" within the meaning of section 5103A. Under 38 U.S.C. § 5100, "the term 'claimant' means any individual applying for, or submitting a claim for, any benefit under the laws administered by the Secretary." The term plainly includes non-Veteran claimants. See H. Rep. No. 106-781, at 9 (2000) ("[t]he purpose of defining this term is to ensure that the Secretary will provide applications and assistance to persons whose status as a Veteran is not yet determined."); S. Rep. No. 106-397, at 22 (2000) (the purpose of section 5100 "is to ensure that VA assists all persons—including non-Veterans, e.g., survivors, who might be eligible for VA benefits, and persons claiming to be Veterans but who may have not yet proven that they are, in fact, Veterans—at the beginning of the claims process."). Service members enrolled in the DES pilot program constitute "claimants" under 38 U.S.C. § 5100. Service members referred to a MEB under the DES pilot must complete VA Form 21-0819, VA/DOD Joint Physical Evaluation Board Claim, with the assistance of a Medical Services Coordinator (MSC), who is a VA employee. After the service member completes the claim, the MSC provides the member with notice of the information and evidence necessary to substantiate the claim and assists in the development of the claim, including requesting a medical examination for the member. DTM, ¶¶ 6.9.2.1.-6.9.2.5. The results of the member's examination are provided to a VA rating board, which then rates the extent of disability attributable to the member's condition(s). Id. at ¶ 6.12.1. The VA rating is used by DoD to determine fitness for duty and by VA to determine entitlement to Veterans benefits once the member is discharged by DoD. Id. at ¶ 2.1. After a member is discharged and VA receives the member's DD 214, VA promulgates a rating decision, authorizes VA benefits in accordance with VA's effective-date statutes and regulations, and notifies the Veteran of an award within 20 days after separation. Id. at ¶¶ 6.12.4-6.12.7. Because VA Form 21-0819 serves as a claim by a service member for VA disability compensation following discharge and because the resulting rating provides the basis for a decision regarding entitlement disability compensation, we believe that the member qualifies as a "claimant" under 38 U.S.C. § 5100. See 38 C.F.R. § 3.1(p) (defining "claim-application" as a "formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit").

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10. The legislative history of section 205 of Pub. L. No. 110-329 and similar provisions in prior appropriations acts is consistent with the conclusion that Congress did not intend to preclude VA from expending appropriated funds on compensation and pension examinations for VA claimants. Language similar to section 205 first appeared in the Independent Offices Appropriation Act, 1941, ch. 107, § 1, 54 Stat. 111, 141 (1940). That Act stated that no VA appropriations "can be used for hospitalization or examination of persons other than veterans unless a reciprocal schedule of pay is in effect with the agency or department involved." The provision was amended by the Second Deficiency Appropriation Act, 1940, ch. 437, 54 Stat. 628, 635, to state that no VA appropriations could be used to provide examinations except for "beneficiaries entitled under the laws bestowing such benefits to veterans" unless VA was reimbursed for the cost. The purpose of the provision was to require reimbursement to VA of the cost of providing examinations to non-Veteran employees of other Government agencies, such as the Civil Service Commission, in order to avoid depletion of funds made available for medical and hospital services to Veterans. 86 Cong. Rec. 509-511 (1940); 30 Comp. Gen. 493 (1951) (VA not authorized to provide pre-employment examinations of appointees to positions in administration without charge). The Comptroller General interpreted this language as precluding VA from paying VA doctors while they participated in a privately operated project in civilian provincial hospitals in South Vietnam. 45 Comp. Gen. 196, 197 (1965). The Comptroller General also held that the appropriations language bars VA medical personnel from participating in intergovernmental assignment programs under the Intergovernmental Personnel Act of 1970, Pub. L. No. 91-648, 84 Stat. 1909, 1921 (1971),³ "whereby such personnel examine or provide hospital care for persons not entitled to VA benefits." Comp. Gen. B-157790 & B-103167 (Oct. 1, 1974). Congress clearly intended to preclude use of VA's appropriated funds for medical examinations for persons other than those to whom VA was authorized by law to provide benefits. Because compensation and pension examinations are provided under the DES program to persons who may establish eligibility for VA benefits, the expenditure of VA's appropriated funds on such examinations as part of the DES program would not contravene Congress' purpose in limiting the use of the appropriations.

11. Finally, as explained above, the DES pilot program began on November 26, 2007. Two months later, Congress enacted the Wounded Warrior Act, Pub. L. No. 110-181, tit. XVI, § 1644(b)(1), 122 Stat. 430, 468 (2008), authorizing DoD and VA to carry out a pilot program similar to the DES pilot program in which VA may "conduct an evaluation of [a service member with an

³ The Act provides, in pertinent part, that the head of a federal agency may arrange for the assignment of certain agency employees to a State or local government. 5 U.S.C. § 3372(a)(1).

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unfitting condition] for physical disability" and assign the member a disability rating that may be used by DoD. Section 1644(b)(2) of Pub. L. No. 110-181 also authorizes a pilot program in which DoD and VA would jointly evaluate the extent of disability caused by a member's unfitting condition. The goal of the pilot programs is to streamline the DoD and VA disability systems. 153 Cong. Rec. S9859 (daily ed. July 25, 2007) (statement of Sen. McCain); H.R. Rep. No. 110-477, at 1152 (2007).⁴ This statute further supports the conclusion that Congress intended participants in the DES program to obtain the "benefit" of a VA medical examination. The success of the pilot program authorized by Congress could be jeopardized if the term "beneficiaries" in section 205 of Pub. L. No. 110-329 pertaining to VA appropriations for examinations were construed to refer only to persons actually in receipt of VA disability-compensation benefits.

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Concur:

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⁴ Section 1612(c)(1) of the Wounded Warrior Act, 122 Stat. 443, requires the Secretaries of Defense and Veterans Affairs to submit a report to Congress "on the feasibility [sic] and advisability of consolidating the disability evaluation systems of the military departments and the disability evaluation system of [VA] into a single disability evaluation system."