

# TBI CLAIMS: VA'S FAILURE TO PROVIDE ADEQUATE EXAMINATIONS

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## HEARING BEFORE THE SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS OF THE COMMITTEE ON VETERANS' AFFAIRS U.S. HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

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## **TBI CLAIMS: VA'S FAILURE TO PROVIDE ADEQUATE EXAMINATIONS**

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**Wednesday, July 13, 2016**

U.S. HOUSE OF REPRESENTATIVES,  
COMMITTEE ON VETERANS' AFFAIRS,  
SUBCOMMITTEE ON DISABILITY ASSISTANCE  
AND MEMORIAL AFFAIRS,  
*Washington, D.C.*

The Subcommittee met, pursuant to notice, at 10:00 a.m., in Room 334, Cannon House Office Building, Hon. Ralph Abraham [Chairman of the Subcommittee] presiding.

Present: Representatives Abraham, Titus, Lamborn, Brownley, Zeldin, Ruiz, Costello, and Bost.

Also Present: Representative Walz.

### **OPENING STATEMENT OF RALPH ABRAHAM, CHAIRMAN**

Mr. ABRAHAM. Good morning. Welcome. This oversight hearing of the Subcommittee on Disability Assistance and Memorial Affairs will now come to order.

Before we begin, I would like to ask unanimous consent that our great colleague Representative Walz be allowed to sit in at the dais and ask questions.

Hearing no objection, so ordered.

I do again want to thank everybody for being here today. The hearing will focus on the finding the VA provided over 24,000 veterans with inadequate examinations for traumatic brain injury, also called TBI.

TBI is caused by trauma to the brain and can be mild or serious. It has been called the signature injury of Iraq and Afghanistan wars because so many servicemembers suffered TBI as a result of a nearby explosion or being struck in the head.

TBI is also referred to as the invisible disease, because it can be difficult to detect. Many patients look normal on the outside, but experience serious symptoms including headaches, mood changes, ringing in the ears, difficulty concentrating, and a reversal of sensory feeling. As a physician, I know it is imperative and often life-altering for patients to receive a correct diagnosis as soon as possible.

It seemed as though VA recognized the importance of a correct diagnosis too. In 2008, VBA instituted a policy that required initial TBI examinations be performed by a neurologist, psychiatrist, physiatrist, or neurosurgeon. VA refers to these specialists as the big four. However, contrary to its own policy, we recently learned that between 2008 and 2015, 24,000 veterans did not receive ade-

quate TBI exams because they were not evaluated by one of the big four and, even worse, VA only discovered the problem after a 2015 news report revealed that 300 veterans in Minnesota received exams conducted by unqualified medical professionals.

And this raises the obvious questions: Why didn't the VA ensure that veterans who filed TBI claims receive adequate examinations? Were disability examination contractors required to use the big four for initial TBI examinations? Why did the VBA issue conflicting guidance regarding TBI exams? What procedures has the VA implemented to ensure that disability examinations will be conducted by appropriate specialists? And finally, what steps has the VA taken to ensure impacted veterans have the opportunity to request a readjudication of their TBI claims?

Unfortunately, it is likely that some veterans with meritorious claims may have been denied benefits. And although I appreciate that the VA took the initiative and conducted a nationwide review after the problem was first uncovered in Minnesota, I am frustrated that the VA failed to implement procedures to ensure VBA policies were followed.

This failure likely caused affected veterans serious medical, financial and emotional hardships because they have not received medical care to heal them or compensation to assist them, all because the VA does not enforce compliance.

Committee staff hearings have been trying to get to the bottom of what happened and who is responsible, but even after four separate briefings the answers are not clear.

The only issue that is clear to me is that the VBA and the VHA created a royal mess by not communicating with each other in the way they should and that senior VA employees once again failed to hold subordinates accountable. I also remain concerned about other disability rating policies that VA could have been ignoring for years.

Although I am sure that the witnesses will be able to shed some light on the issue, I am not confident that even after this hearing we will completely understand how VA missed the problem for so long. I look forward to getting more information from the witnesses.

With that, I call on our distinguished Ranking Member, Ms. Titus, for her opening statement.

#### **OPENING STATEMENT OF DINA TITUS, RANKING MEMBER**

Ms. TITUS. Thank you very much, Mr. Chairman. Thank you all for being here. And I am delighted that we have Mr. Walz joining us, because he has been working on this for quite some time.

As you said, Mr. Chairman, traumatic brain injury is one of the signature injuries affecting our post-9/11 veterans. The primary causes of TBI for veterans from Iraq and Afghanistan are blasts, motor vehicle accidents and gunshot wounds.

The Department of Defense has diagnosed 350,000 servicemembers as having received at least one brain injury since 2000, yet the VA has granted only 75,000 disability claims in relation to TBI received in service. The disparity here is what is so very troubling. You have a great gap between the servicemembers

identified by the Department of Defense and the positive claims granted by the VA.

On the other hand, the VA is leading the way in the treatment and research for traumatic brain injuries and has said it will spend \$2.2 billion over the next ten years on treatment and research. It is important to remember that any one servicemember can have multiple brain injuries, so this kind of research is critical.

What troubles me about the subject of today's hearing is that accurate benefits adjudication is critical to ensuring our veterans have access to the VA health care they need. Without timely and accurate decisions, it is possible that veterans who need care are not receiving it through the VA. This is a common problem that we have had in this Committee: once again, we find ourselves examining issues related to access.

Now, we often hear from the veterans and even the recent Commission on Care that once veterans are able to get into the VA health care system, they receive care that is second to none, and that is especially true for TBI, but it is getting into the system that seems to be the problem.

We also know that TBI is linked to other things. It is linked to PTSD, chronic pain, substance abuse that can lead to homelessness, that can lead to suicide; it is just a downward spiral. So we need to get at this problem at the beginning, not at the end when recovery for the veteran becomes more and more complex.

VA programs and services relevant to TBI include screening and evaluation, acute and post-acute care provided through the VA, polytrauma, access to the TBI system of care, and long-term services and support.

So while the VA has the best treatment available in this specialized care that they are so recognized for around the world, we aren't getting out veterans into the system, we are not adequately processing their disability claims, and certainly this can have long-term ramifications and that is the problem that we are here to address today.

Now, I realize that the VA has made a response to these mismanagement problems and I appreciate that, but I am concerned that it is inadequate. When the VA sent a letter to veterans asking them to request a TBI examination, I wonder if they believed they received enough outcome from that sending just that letter, if they think that is enough to get to these veterans who may need their help. I don't think it is, and I am concerned for three reasons.

First, it took the VA two years to take action to fix the problem or to address the issue once it was discovered. Now, that is two years on top of the four years it took them to even recognize that there was a problem. So you have got veterans who have been denied access to care and benefits for a six-year period.

Second, I can't understand why the VA's quality control and oversight mechanisms didn't identify the issue for the four years, original four years. I hope that by the end of this hearing we will have a better understanding of what the problem was and what procedures have been put in place so that that doesn't happen again.

And thirdly, and most importantly, it was the VA that was in the wrong, not the veteran. The VA needs to put the onus of correcting

this problem on itself rather than on the veteran. Instead of sending a letter and asking the veteran to respond and ask for a new medical exam, and then maybe hoping they don't need it or say no, I think the VA needs to be more active in reaching out to schedule these TBI exams.

Now, such a course of action would ensure a higher percentage, perhaps the highest percentage of veterans who need this will take advantage of the opportunity and get that exam. It is the VA that dropped the ball, not the veteran, and the effect of that can be devastating.

So I believe that the VA thinks they have got the correct policy in place, so it is incumbent upon them to reach out and let veterans know what it is. Doing that will help to rebuild trust between the VA and our veterans, which has been a serious problem that we have talked about over the course of these hearings with this Committee.

So thank you, Mr. Chairman, I look forward to working with you on this.

Mr. ABRAHAM. Thank you, Ms. Titus.

I ask that all Members waive their opening remarks, as per this Committee's customs.

I would now like to welcome Mr. David McLenachen, who is the Deputy Under Secretary for Disability Assistance. He is accompanied this morning by Ms. Mary Glenn, Acting Deputy Director of the Operations, Compensation Services of VBA; and Ms. Patricia Murray, Chief Officer of the Office of Disability and Medical Assessment of VHA.

Mr. McLenachen, you are now recognized for five minutes to present the testimony of the VA.

#### **STATEMENT OF DAVID MCLENACHEN**

Mr. MCLENACHEN. Good morning, Mr. Chairman, Ranking Member Titus and Members of the Committee.

Thank you for the opportunity to review with you the Department of Veterans Affairs process for ensuring that all veterans are properly evaluated for traumatic brain injury. Mr. Chairman, as you said, that's known as TBI.

Since 2007, medicine around traumatic brain injury has been a rapidly evolving science. Recognizing that TBI is a signature injury of the conflicts in Iraq and Afghanistan, VA instituted a policy requiring one of four specialists, a psychiatrist, a physiatrist, a neurosurgeon, or a neurologist to complete initial TBI exams for disability compensation claims when VA does not already have a diagnosis.

VA selected these specialists because they have the most experience with the symptoms and effects of TBI, and to take extra steps to ensure that veterans seeking disability compensation for this complex disability receive the benefits to which they are entitled.

VA also updated its rating criteria in 2008 to keep pace with evolving understanding of TBI. Unfortunately, as more research became available, VA issued a series of guidance documents that inadvertently created confusion regarding this policy.

In October, 2014, the Minneapolis VA Medical Center reviewed initial TBI exams for disability compensation claims completed



since 2010 and identified approximately 300 veterans whose exams were not conducted by one of the four designated specialists. Thereafter, the Veterans Benefits Administration and the Veterans Health Administration initiated a nationwide review of initial TBI exams for disability compensation claims performed between 2007 and 2015.

The results of this review revealed that between 2007 and 2015 approximately 24,000 veterans received initial TBI exams for disability compensation claims that were not conducted by one of the four designated specialists.

Further, the review found that VHA conducted approximately 5300 of these exams while VBA contract examiners conducted approximately 19,000.

VHA facilities have certified that initial TBI disability compensation examinations are now being conducted by one of the designated specialists. In addition, VBA modified its exam contracts in 2013 and 2014 to clearly state that the initial TBI exams must be performed by one of the four designated specialists when no diagnosis is of record.

The recently completed national review confirmed that VBA contract examiners have been compliant with this requirement under the terms of the modified contracts.

VA regrets that these examinations were not completed by a designated specialist the first time. To minimize burden and ensure no financial harm to affected veterans, the Secretary of Veterans Affairs granted equitable relief to all of the more than 24,000 veterans on May 3rd, 2016. The relief authorizes VA to offer new TBI exams conducted by one of the four designated specialists to all identified veterans.

This equitable relief further enables VA to take action on any new examinations without requiring veterans to submit new claims and allows VA to award an effective date as early as the date of the veteran's original TBI claim and provide any retroactive benefits.

VBA has contacted all affected veterans via letter to notify them of the opportunity to receive new exams and have their claims reprocessed. These veterans can initiate reprocessing of their claims by either calling a dedicated phone number for this purpose or otherwise contacting VA. Affected veterans have one year from the date that they are notified of the grant of equitable relief in which to request new examinations.

Affected veterans are already receiving service-connected compensation for benefits at a ten-percent disability evaluation or higher and that number is about 13,000 that are all receiving compensation at that level.

VA has also clarified its guidance documents that may have created confusion regarding the policy. We have confirmed that TBI policy guidance is now clear, and VA is confident that examiners now comply with its TBI compensation examination policy.

Mr. Chairman, we understand the importance of an accurate exam to support veterans' disability compensation claims, and improving the medical exam experience is one of VA's 12 MyVA breakthrough initiatives that we have been working on.

Mr. Chairman, this concludes my statement. We would be happy to answer any questions that you or Members of the Committee have for us today.

Thank you.

[THE PREPARED STATEMENT OF DAVID MCLENACHEN APPEARS IN THE APPENDIX]

Mr. ABRAHAM. Thank you, Mr. McLenachen. And my first question will be addressed to you and you can certainly bring the other two people here with you.

What I worry about is the accountability issue, because we have this issue it seems over and over. Walk me through the, I will use the word, inadequate examinations. Who in the VBA was responsible for informing the VHA in 2008 that only the big four specialists were authorized to conduct initial TBI exams?

Mr. MCLENACHEN. Certainly. Let me clarify one point at the very beginning in answering your question.

VHA and VBA work very closely. This is not a situation where we are independently issuing guidance regarding these matters. Historically, both agencies have worked very close together in developing this policy, issuing it and implementing it. So I just want to make that point clear from the beginning.

In VBA, the compensation program, to include the policies regarding examinations and evaluating compensation claims, is issued by our Compensation Service, which is under—the Director of the Compensation Service reports to me as the Deputy Under Secretary for Disability Assistance, and I report to the principal Deputy Under Secretary and the Under Secretary.

Mr. ABRAHAM. So was the chain of command followed? Was there a break in the chain?

Mr. MCLENACHEN. No, sir, not that I am aware of.

And let me say that I have spent a lot of time on this issue, both preparing for conversations with the Committee's staff, looking into this matter myself, going back over time, and I must say that it is a matter of hindsight; I am going back and looking at what others have done before me.

And regarding your accountability question, all I can say at this point is, that those that you have to hold accountable are me and the other current leadership that need to address this problem.

Mr. ABRAHAM. Fair enough. So why weren't the disability examination contracts amended in 2008 to ensure that the veterans did receive adequate exam from the contractors?

Mr. MCLENACHEN. That is a real good question, because this is something that we are going to have to be very vigilant about going forward. And if you are aware of this, we have had authority since 1996 to use mandatory funding for contract exams and that authority has been expanded over the past few years to where in fiscal year 2017 we will have full authority to use mandatory funds for contract exams as much as possible, it is unlimited authority.

Mr. ABRAHAM. So I guess my more pointed question is, who actually made that call? Who made that decision, you know, that the disability examinations weren't by the book?

Mr. MCLENACHEN. The contracts are modified through a entirely different procedure than the issuance of policy. The administration

of the contract is done by Compensation Service as well and the point—

Mr. ABRAHAM. And I understand. You know, I guess I am looking for that person, because again, I think accountability here—and you stepped up on the last question and said, you know, you are the guy to look to, but I guess what is disconcerting to me is that in their attempt to explain away this problem, I hope it is clear, but it seems to me it is unclear that the VA officials understand that, you know, when we ask for accountability, personally, and I don't think anybody on this dias is trying to score any political points, we just want what is best for the veteran. We have got 24,000 that were affected by this mistake, but we need some real answers and we certainly need some real action.

So I want to just highlight that, and I know you guys understand that, but what we look for up here is accountability for that veteran, that is what we are here to do.

Why did the compensation and pension examination program issue a directive indicating that a generalist with special TBI training could conduct initial TBI exams when it was in direct contravention to the VBA policy?

Mr. MCLENACHEN. Again, I have gone back and looked at all the information I have to determine why that was specifically issued.

Mr. ABRAHAM. Do you know who issued that directive?

Mr. MCLENACHEN. That again would have been generated out of the Compensation Service.

Mr. ABRAHAM. Okay.

Mr. MCLENACHEN. But as far as looking at a record of why a specific decision was made in that regard, I don't know whether it was because of a lack of capacity, whether that was an issue at that particular time to the extent that there weren't enough of those specialists available, I do not know the answer to that question. Again, looking back, I looked for red flags that might indicate where there was a problem and should somebody have identified it, and I was not able to find anything like that.

Mr. ABRAHAM. And I have your word you are looking at this very closely?

Mr. MCLENACHEN. Yes, I assure you that I have.

Mr. ABRAHAM. Okay. Ms. Titus?

Ms. TITUS. Thank you, Mr. McLenachen.

I would like to go back to those gaps that I mentioned early on in my testimony. Since 2000, 350,000 servicemembers were identified by the Department of Defense as having at least one brain injury. Then after you recognized this as a problem in the VA in 2008, 170,000 applied. So there is that one gap. And then of the 170,000 who applied, only 75,000 have had their problem recognized and been compensated for it.

Can you give any kind of explanation for why you think that is the case?

Mr. MCLENACHEN. Yes, I have actually been thinking about that since you brought up that point in your introductory comments. And I think the one explanation I can provide is, when I looked back at this cohort of veterans and tried to find out, you know, what their current situation is, I discovered that 23,658 of them are already service-connected and receiving compensation, most of

them are receiving compensation. There are a couple thousand that are rated at zero percent, but otherwise the rest of them are currently receiving compensation.

So it may be the explanation, and I can try to find more specific information, that they are service-connected for something other than TBI as a result of the evaluation that was done. So that may be one explanation for that disparity in the numbers that you were seeing.

Ms. TITUS. I know you have to apply for this if you are the veteran, and that may help to explain some of the gap between those diagnosed by the Department of Defense and those who apply.

And then that brings me to the second problem, is, do you think sending one letter to veterans to let them know about this is enough? Don't we need more of a public information campaign or working with the VSOs or some other kind of follow-up? Is that adequate?

Mr. MCLENACHEN. You are absolutely correct. We have met with the VSOs and informed them of this. Yes, we sent an individual notice to each of the veterans identified, and we put out a press release. Whether that is adequate or not, you may be correct that it is not.

But I wanted to address the issue you raised about we should just go ahead and order the exams for all these veterans. In reality, we thought about that issue and determined that is probably not the best policy in this particular case, and that is because many of these veterans, in fact almost 14,000 are already service-connected for traumatic brain injury and many of them at, you know, the higher rates of evaluation.

So it could be misleading to go out to a veteran and suggest you need to come back to us and get another exam and in fact, we are going to schedule one for you without you making a choice. It could have a significant impact on their benefits. So as a matter of policy, we decided that the best option was to make contact with these veterans, fully inform them of what their options are, and let them make that choice. So we carefully considered the issue that you raised.

Ms. TITUS. Okay. Well, I am glad to hear that. Thank you.

I would also just ask you, now that you have evaluated the examination process for TBI, I wonder do you have any plans to continue to update that? Because new research comes about all the time. And also, what about other mental health conditions like PTSD? Because that is something that is similar to this, it might need updating as we go along.

Mr. MCLENACHEN. I assure you that we continuously work closely with VHA, Ms. Murray's staff and the Compensation Service to develop our policies in this area.

The main point that really jumped out at me is, for any situation where we have a specialist exam that is required, we need to make sure we have the procedures in place so that our adjudicators are identifying whether the exam report that they receive was done by a specialist. So that is a critical issue.

In fact, in 2015, one of the things that we did in this particular area was to change our adjudication procedures manual to require our adjudicators to check the DBQ information that they are get-

ting back, the disability benefits questionnaire information that they are getting back, to ensure that a specialist, one of the big four did it. So that is a 100-percent quality check that we put in place in our procedures manual.

And one of the things I would like to see is, do we need to do that with other specialist exams that are required.

Ms. TITUS. Yes, that is what I was getting at too. Well, thank you very much.

I yield back.

Mr. ABRAHAM. Mr. Walz?

Mr. WALZ. Mr. Chairman, I would defer to the permanent Member of the Subcommittee Ms. Brownley first, if she would like to go now.

Ms. BROWNLEY. Please, go ahead.

Mr. WALZ. Chairman, thank you for holding this. And to the Ranking Member, certainly our priority here is to make sure all our veterans get the care that they have earned, and make sure they get the compensation that is necessary. So I think there are two tracks here. I think the contracting issue is certainly one that needs to be addressed, but I think there is also benefit in looking at how this all unfolded, and kind of the history of it.

All too often here we get criticized for being reactive and not proactive, and I think it is important to note that it was on the 3rd of May, 2007 when H.R. 2179 was introduced on the floor, and that was the piece of TBI legislation that established the centers of excellence, that talked about how we did these exams and how we went forward. So over nine years ago people were thinking about this and starting to move that forward.

Fast forward now to the situation here. There are some—in the midst of an error and in the midst of something that shouldn't have happened, there are some positive take-aways on this. And I think it started, this was last summer we were starting to hear rumblings in Minnesota that they were not getting the right exams.

There was a tenacious, young journalist named A.J. Lagoe who did some really fantastic journalism, some really fair reporting and work at Minneapolis VA, turned up that this did happen. We thought the numbers were about 300. Immediately the director of that, the medical director of that facility Dr. Kelly went ahead and said, yes, we made a mistake, bring them all back in.

We were asked at that time, do you think if it happened here, it could have happened nationwide? And I said not only is it possible, it is probable. We asked for an IG report to go nationwide; they agreed to do that. That came out here in early May, and at that point in time, the Secretary took, I think you said, Mr. Under Secretary, that that was the first time equitable relief to across the board.

Mr. MCLENACHEN. What is really unique about this is, the Secretary has equitable relief authority, but usually it is done on a case-by-case basis. And so what is unique in this circumstance here, is he granted equitable relief for this entire cohort of veterans, and that is the first time I am aware of that happening.

Mr. WALZ. Yeah, us too. And I think those are positive things. And I think Ms. Titus brought up a great point was, is there were four years beforehand where it was not found and that people had

to wait. But this seemed to me and then I watched your interview on camera, where I have to say it should be shown for all people up there that there was a respectful humbleness that a mistake was made, we are trying to do everything possible to make it, we will do what we can do moving forward on that, and it just seemed somewhat refreshing on that.

So I think all of that up to this point, that is something we need to look at and see if there is something new happening there, but I think the questions being brought up about what is happening going forward are things that do need to be addressed.

So if I could ask and maybe from your opinion, sir, and I think it got asked, Ms. Titus was getting at it a little bit, has this episode had any broader effect on changing how we go after these things? Because it felt like on this one, once a problem was identified with the validation of some good journalism, with the congressional oversight stepping in, with the IG doing it, the responses in this seemed to lean towards the benefit of the doubt of the veteran. Again, I think you answered Ms. Titus' question. My question was too, is why you came to the conclusion of just sending the letter. But do you feel like there are some systemic lessons that can be learned by this? Because this is a different response, the way I see it, my colleagues will make up their own mind, than what we saw after Phoenix and some other ones, this is different.

I am not in any way thinking we are in any way done. We have got 24,000 people that need to be made whole the best we can, that is an ongoing issue, and we can bring some of those up. But maybe, Mr. Under Secretary, how do you see it? What has transpired since this?

Mr. MCLENACHEN. Very good points. And I would say that I can confirm that we have approached this somewhat differently than in the past, and the equitable relief is just a good example. In the past, where we would have maybe taken this on on a case-by-case basis, it is not the right thing to do in this situation when you know that there are a large number of veterans that are affected.

In this case, as I said, 16,000 of them are already service-connected for TBI, and many of them are already receiving disability compensation. So is it the right thing to do to kind of pass it by, or is it the right thing to do to do the fair thing, give everybody the opportunity to come in for another exam and an evaluation of their claim? This was the right thing to do. Our VA leadership pressed us to do this type of thing.

I would not go so far as to say that in the past, you know, we never cared about making things right for veterans, that is absolutely not true, but this approach, I think you are correct, is different than we have used before.

Mr. WALZ. Before I yield back, my final point on this though, is that it always seemed there was a bit of a bunker mentality. Who made the decision to let you go on camera and make an admission that an error was made and you are trying to fix it? That was different to me.

Mr. MCLENACHEN. We had a lot of discussions about that with our public affairs people and the suggestion was made that it would be a good thing to do to help get the word out, and state the Department's position, and I was happy to do it.

Mr. WALZ. Well, if I can second that. Transparency is something very refreshing and it did not go unnoticed here.

So thank you, Mr. Chairman. I yield back.

Mr. ABRAHAM. Thank you, Mr. Walz.

Ms. Brownley?

Ms. BROWNLEY. Thank you, Mr. Chairman. And I think I just probably have a few follow-up questions to the questions that have already been asked. But, you know, I still just want to go back to this issue of the appropriate outreach to the veterans who might not have received the services that they deserved.

And of course the 11,000 veterans who are not already receiving a service-connected compensation benefit, they seem to me to be in a special category, because they have never gone through this process before. And I agree with the Ranking Member that just one letter just doesn't seem to be enough, that we need to be much more aggressive and have a sequence of times in which we are going to contact veterans.

So first, you know, is there anything special that you will do vis-a-vis the 11,000 veterans who haven't received service-connected compensation? And, secondly, if you had a list and a breakdown, for example I would love to know the veterans in my congressional district, so that I can reach out to them personally to make sure that we are proactive. We spend a lot of time in my district office helping veterans with their benefits in a reactive way, it would be nice to be proactive in our office.

So if you could address those two things.

Mr. MCLENACHEN. We definitely have the information that you are looking for and will be happy to provide it to you. We have it broken down by state and by regional office, so state of residence by regional office, we can provide that data. We have provided most of it to the Committee staff, I believe, but I would be happy to make sure we get that to you.

Ms. BROWNLEY. So I think that I want that information. I think that information should be disseminated out across the country, so that, you know, the infrastructure of the VA across the country, regional centers and the like, can work to get this information out and follow-up with what has been done in the central office.

So I think that that is—I think would be a good step in terms of following up on what the central office has already done.

Mr. MCLENACHEN. And if I could just address your other point, which was—

Ms. BROWNLEY. Yes.

Mr. MCLENACHEN [continued]. —and actually Ranking Member Titus' point, is the letter and the outreach we have done so far enough? You may be perfectly correct that it is not enough.

We sent the letters out July 1st, we did a batch process. We will monitor the information that we are getting back. It may be that we need to look at doing other outreach, and we will certainly take a harder look at that.

Ms. BROWNLEY. Okay, very good.

And that leads me to another question just in terms of monitoring this program as you have reached out, the number of veterans coming back for reexamination, veterans coming for their first examination. And I always worry about, in many of these

hearings we talk about our staffing issues and our pipeline issues, and the fact that this program is built upon, you know, four specialties to make an appropriate diagnosis; do we have enough? Have you sort of estimated the amount of demand that is going to take place, and do we have the appropriate personnel to see these veterans in a timely way?

Mr. MCLENACHEN. We do believe that we have now, as I said, the contracts have been modified. And so with respect to VBA's contract examinations, the answer is yes.

And maybe I will defer to Ms. Murray to address VHA's capabilities in the area.

Ms. MURRAY. Thank you, Dave.

For VHA, we do have the capacity to see these veterans when the exam request is ordered. My office will be providing follow-up education and training to the VHA clinics on this. We have also sent out a certification that was signed by the network directors assuring us that all of their facilities are compliant. And then I will be setting up a monitoring tool within VHA to look at these periodically to ensure compliance.

Ms. BROWNLEY. Thank you, thank you very much.

And I guess in conclusion, I would just like to agree with my colleague Mr. Walz that an admission of a mistake goes a long way. And I think for all of us on the dias, you know, we know that we can't be perfect all of the time, we want to be in a mode of continuous improvement, but when we recognize we make a mistake, just admit it, and do our very best to fix it. So I appreciate those comments and appreciate your admission to a mistake in the past.

So with that, I will yield back.

Mr. ABRAHAM. Thank you, Ms. Brownley.

And I will start kind of a second line of questions here. And, again, I will echo Mr. Walz, as everybody up here, you know, we are appreciative of the VA cowboying up and, you know, coming up to the table, but we still have to address the issues that brought us to this point. We have still got veterans that didn't receive compensation that probably should have, they are having to use time and treasure to be reexamined.

So we still need to look deeply. I want you to continue your investigation; I know you will. But before we hold hands on the beach and sing "Kumbaya," we need some accountability here.

One last question or maybe two. When the VBA contracts were initially awarded in 2010, they required the big four to do the TBI exams. Now, in early 2011, that is when I think the contracts were modified to allow any doctor with TBI training to perform these exams.

So the question is, why was this requirement relaxed just a few months after awarding the contracts? And I understand that you weren't Deputy Secretary in 2010; is that correct?

Mr. MCLENACHEN. That is correct, I was not.

Mr. ABRAHAM. Who was?

Mr. MCLENACHEN. I do not recall who was at that time, but I could certainly get back to you with that information.

Mr. ABRAHAM. I appreciate that. Okay.



So why were those contracts amended just a brief time after they were specified that it had to be the big four that were to do the exams?

Mr. MCLENACHEN. Unfortunately, I don't have the answer to that question. Again, if I was to guess, I would be speculating, you know, when I mentioned the capacity issues.

I think, Mr. Chairman, what we can really look at here is the difference between the procedure for issuing new policy and acquisitions in the Federal Government. I mean, we have to go through the Federal acquisitions process to set up these contracts and to modify them, and there is not a neat connection between the policy process and the contracting process. And so I think that is where we really need the improvement here, is to make those two things link up.

Mr. ABRAHAM. All right. So when you went back and modified the contracts in 2014, is the way I understand it, I guess why didn't you take action then to go back and give some relief to the veterans?

Mr. MCLENACHEN. Well, you are correct, 2013 for one contractor, 2014 for the other. What I am able to see when I go back and look at this is, there were no red flags at that point to indicate that these exams were being done incorrectly. The prior contracts were not clear that this was a mandatory requirement, but we had no red flags, at that point that I can see, that were telling us that these exams weren't being done correctly.

The contracts did prescribe, as you mentioned, that they were done by one of the big four or by a generalist that has had some TBI training. Should somebody at that time have gone back and done the data analysis that was available at that time? I don't dispute that, maybe that should have been done at that time. But I just don't see any red flags telling us at that time that these exams were not being done correctly.

So the contracts were modified to be consistent with the policy guidance that was out.

Mr. ABRAHAM. Okay, thank you.

Ms. Titus, do you have further questions?

Ms. TITUS. Just a quick one. Thank you, Mr. Chairman.

You say there weren't any red flags, but there were problems. So I haven't really heard a good answer for why the quality control procedures failed, why it took so long to fix it, and what we have kind of learned from this experience going forward.

Mr. MCLENACHEN. Okay. One of the things that I learned was, in the past, our adjudication procedures were that our adjudicators were not to question whether the examiner had the credentials that were required because that was taken care of in the exam request and provision process. We have changed that, we changed that in 2015. As I said, a hundred-percent quality check. If it doesn't indicate on there that the exam was done by a specialist, one of these four specialists, the adjudicator is supposed to determine that it was an inadequate exam, and it should be returned and corrected by the contractor or any other examiner. So we did learn those things.

In addition to that, as we move into expanded mandatory contracting of exams in the Compensation Service, we are setting up

a new staff that is going to be led by a senior executive that is going to have oversight over this entire process to include expanded quality review, contract administration, all the things that you would think you would expect when you are administering these type of contracts that are providing these exams, that staff is in the process of being set up now. And I may ask Mary whether she has any additional information on where we are at on that.

Ms. GLENN. Thank you for the question.

Yes, ma'am, we are in the process of setting up a contract examination program office, which we will collaborate with VHA on all the policy/procedural type of things that we are doing. The staff is in the process of being set up, some of the people are already on staff, and have already taken some site visits to some VHA facilities and met with the C and P clinic directors there.

So we are hopeful that we will be fully staffed and ready to go within the next couple of months. And we will have oversight, as Mr. McLenachen said, of the policy and process of contract exam administration.

Mr. ABRAHAM. Mr. Walz?

Mr. WALZ. Well, thank you. And we are hitting on some of the bigger topics, and I do think that, again, I think Dr. Abraham and all these Members continuing to push on continuous improvement, the accountability, there are things here. I am reading a news story you probably saw, maybe, I don't know if you saw, Mr. Under Secretary, last night a veteran who waited seven years to get this cleared, and that is a lot of time and what we know about it. So I am still frustrated on some of this.

And I am still trying to get at this quality control piece, and I know you probably explained it, because I think about this. We had one of these incidents happen, and I know it is more difficult with mental health issues than it is with physicals, we had the contaminated colonoscopy scopes. And as it turned out what happened with those, when we were getting veterans that were getting hepatitis and other things from that, that they went back and looked at it, and it finally showed we had several different suppliers of those and one of them had a two-way valve on it, and there was no checklist for the cleaning of these things.

So what the VA did after that was instituted a checklist on that this has to happen when you clean a colonoscopy scope and this is how it goes back together.

Is that happening across the board? Because I am still hearing some of these folks that are still fighting to get this. This gentleman in Minnesota went to a private doctor, they said he had TBI. He came back three times and the VA kept telling him no. After this ruling, he came back again and this time they said yes.

So my question is, what were they missing in the diagnostic piece of this, not the administrative piece? What has changed in how we do that? And I know you kind of got at it, but there is a quality control gap here that allowed this to go undiagnosed.

Mr. MCLENACHEN. I am going to ask Ms. Murray if she can address the last part of your question about the criteria, but as far as the quality control piece, without a doubt improvement is needed in that area, and Ms. Glenn just described, you know, how we are going to beef that up.

When I look back at the quality review process that was used in the past, much of that is addressed in the contract regarding what the contractor needs to do, but also we had a quality review process that perhaps one could say was a little light. If you were taking a look at it you could say, well, yes, it is statistically significant that you were doing that number, but is this what should have been required at that time?

There is going to be additional staff addressing that in the future, as Ms. Glenn described.

So a quality check is very important, particularly if you have a requirement that a specialist has to do something. And to me, the best way to get at that is, we shouldn't be using an exam unless it was done by one of those specialist. So if our adjudicator gets an exam, information from an exam and does not see that it was done by a specialist, it should be an inadequate exam, and it should be returned. The contractor should fix it or VHA should clarify whether it was done by a qualified examiner and provide us a new one.

Mr. WALZ. What is the redress procedure for these folks to go back? Because this was a gentleman who went to the private sector and had medical bills there and things like that. I know some of these are going to be case-by-case, and I think it is what Ms. Brownley was asking, so all of us can get at this, because I have still got some of these 300 who have not received their payments yet.

And so what is their redress process?

Mr. MCLENACHEN. Right. So for the 317 or so in Minnesota, as far as I know, we have re-adjudicated every one of them. The one holdup was the equitable relief, to provide them their retroactive benefits.

And just for your information, approximately 55 or 56 or so, we were able to address right away without them coming back in, because it was still within the appeal period. For the others after that, out of the 317, I believe about 120, and I am using approximate numbers, it was about 120 came in. Of that number, I believe 56, 56 or 58 received service-connection that they didn't receive before.

So that is a pretty high number, whether that was because we were taking a fresh look at it, and it was not because of a diagnostic criteria change or anything like that, and we had to attribute that to the fact that it was done by the specialist rather than by a generalist. And that informed us on the need to do the nationwide review that you discussed.

Mr. WALZ. Right.

Mr. MCLENACHEN. So, I am very confident that we are going to address the quality issue that you have raised. We need to do better at that; in my view, that is going to be done at the adjudicator level.

And we have already seen, just for your information, in the data that we have, in 2015 there were only six contract exams that were not done with a specialist. So from 2014 when we changed the contract to 2015, it drops off to six.

In addition to that, in 2015 we instituted the new procedures on checking to make sure that a specialist at the adjudication level did one of the exams. I am hoping that that will address—

Mr. WALZ. So there is a checklist now? Just like the cleaning of that endoscope or whatever, now there is—

Mr. MCLENACHEN. There is. There is a procedure in our adjudication manual that says check it. If it is not done by a specialist, here is what you do with it. And we are actually looking whether we can beef that instruction up a little bit.

Mr. WALZ. Thank you.

I yield back. Thank you, Chairman.

Mr. ABRAHAM. Ms. Brownley.

Ms. BROWNLEY. In terms of moving forward, does the Choice Act apply in terms of—if a veteran has to wait longer than 30 days to be assessed by one of these specialty docs, can they go to their own community to get that?

Mr. MCLENACHEN. I will defer to Ms. Murray and see whether she can answer that question.

Ms. MURRAY. Sure. Thank you for the question.

The C and P exams at this time does not fall under the Choice Act and so—

Ms. BROWNLEY. Okay. That's what I thought, that's what I thought.

Ms. MURRAY. Yes.

Ms. BROWNLEY. And I just wanted to follow-up on the Los Angeles regional office. You might remember that in September of 2015, the VA Inspector General released a report about the Veterans Benefits Administration office in Los Angeles, and the report noted that staff was incorrectly processing TBI claims. And I just want to make sure, get your assurance, I feel pretty confident that there has been—that they are doing a good job now in Los Angeles, but I just wanted to hear from you that you also concur that things are moving well there?

Mr. MCLENACHEN. Yes. I am familiar with that report. Fortunately, it is unrelated to the topic we are discussing here. The IG in a routine benefits examination that they did at the office discovered that there was training and second-signature compliance issues, those were addressed. We did additional training, and we are ensuring compliance on the second signature. That is a quality check, as we have been discussing, that is being followed. The IG is confident that that is the case, and they closed the recommendation.

So I can assure you that we have addressed that.

Ms. BROWNLEY. Thank you very much.

And I yield back.

Mr. ABRAHAM. Oh, thank you so much and, you know, I appreciate you being here. And the changes that you are describing going forward, they sound good, and I will trust that you will follow-up.

I guess the only lingering or one of the lingering questions, I still don't have a name and a title of who is responsible for issuing that directive on the generalists getting TBI training that could give the exam, and I would like that.

And I am going to ask a rhetorical question in closing, because on the same thing, the VBA allowed any doctor with specialized training through the Disability Evaluation Management Office to conduct these exams, but the way I understand it that training just

entailed an online testing and online training. The certification didn't even exist yet in 2011 when VBA contracts first used it as a qualification. So the question, and I will use it rhetorically, because I think everybody up here knows the answer, how is that equivalent to a medical specialty? Well, an online training exam is not equivalent to a medical specialist. A medical specialty takes years of training, years of residencies, years of fellowships to get to that point.

But I look forward to working through the issues and follow-up with certainly my colleagues here and the Department of VA. And, again, thank you for your forthright statements and, you know, owning up and trying to do the right thing.

As initially noted, the complete written statement of today's witnesses will be entered into the hearing record.

I ask unanimous consent that all Members have five legislative days to revise and extend their remarks, and include extraneous material.

Hearing no objection, so ordered.

I thank the Members and the witnesses. The hearing is now adjourned.

[Whereupon, at 10:51 a.m., the Subcommittee was adjourned.]

# A P P E N D I X

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## Prepared Statement of Dave McLenachen

### Opening Remarks

Good morning, Chairman Abraham, Ranking Member Titus, and Members of the Committee. Thank you for the opportunity to review with you the Department of Veterans Affairs' (VA) process for ensuring that all Veterans are properly evaluated for Traumatic Brain Injury (TBI). Accompanying me today is Patricia Murray, Chief Officer, Office of Disability and Medical Assessment, and Mary Glenn, Acting Deputy Director, Operations, Compensation Service.

### Background

Since 2007, medicine around traumatic brain injuries (TBI) has been a rapidly evolving science. Recognizing that TBI is a signature injury of the conflicts in Iraq and Afghanistan, VA instituted a policy requiring one of four specialists – a psychiatrist, physiatrist, neurosurgeon, or neurologist – to complete initial TBI exams for disability compensation claims when VA does not already have a diagnosis. VA selected these specialists because they have the most experience with the symptoms and effects of TBI, and to take extra steps to ensure that Veterans seeking disability compensation for this complex disability receive the benefits to which they are entitled. VA also updated its rating criteria in 2008 to keep pace with the evolving understanding of TBI. Unfortunately, as more research became available, VA issued a series of guidance documents that inadvertently created confusion regarding the policy.

In October 2014, the Minneapolis VA Medical Center reviewed initial TBI exams for disability compensation claims completed since 2010 and identified approximately 300 Veterans whose exams were not conducted by one of the four designated specialists. Thereafter, the Veterans Benefits Administration (VBA) and the Veterans Health Administration (VHA) initiated a nationwide review of initial TBI exams for disability compensation claims performed between 2007 and 2015. The results of this review revealed that between 2007 and 2015 approximately 24,000 Veterans received initial TBI exams for disability compensation claims that were not conducted by one of the four designated specialists. Further, the review found that VHA conducted approximately 5,300 of these exams, while VBA contract examiners conducted approximately 19,000. VHA facilities have certified that initial TBI disability compensation examinations are now being conducted by one of the designated specialists. In addition, VBA modified its exam contracts in 2013 and 2014 to clearly state that initial TBI exams must be performed by one of the four designated specialists when no diagnosis is of record. The recently completed national review confirmed that VBA contract examiners have been complying with this requirement under the terms of the modified contracts.

### Corrective Actions Taken by VA

VA regrets that these examinations were not completed by a designated specialist the first time. To minimize burden and ensure no financial harm to affected Veterans, the Secretary of Veterans Affairs granted equitable relief to all of the more than 24,000 identified Veterans on May 3, 2016. The relief authorizes VA to offer new TBI exams, conducted by one of the four designated specialists, to all identified Veterans. Equitable relief is a unique remedy that allows the Secretary to correct an injustice to a claimant, where VA is not otherwise authorized to do so within the scope of the law.

This equitable relief further enables VA to take action on any new examinations without requiring Veterans to submit new claims, and allows VA to award an effective date as early as the date of the Veteran's original TBI claim and provide any retroactive benefits due. VBA has contacted all affected Veterans via letter to notify them of the opportunity to receive new examinations and have their claims repro-

essed. These Veterans can initiate reprocessing of their claims by either calling a dedicated phone number or otherwise contacting VA.

Affected Veterans have one year from the date they are notified of the grant of equitable relief in which to request new examinations. More than 13,000 of these affected Veterans are already receiving service-connected compensation benefits for TBI at a 10-percent disability evaluation or higher, which means that the diagnosis has already been established.

VA has also clarified its guidance documents that may have created confusion regarding the policy. We have confirmed that TBI policy guidance is now clear and VA is confident that examiners now comply with its TBI compensation examination policy.

**Closing Remarks**

VA takes very seriously its obligation to care for disabled Veterans, their families, and their survivors. VA understands the importance of an accurate exam to support Veterans' disability claims. VA is committed to improving the medical exam experience and has identified it as one of the Department's 12 MyVA Breakthrough Priorities.

This concludes my testimony, Mr. Chairman. I would be pleased to address any questions you or other Members of the Committee may have.

