## Chapter 5. Evaluating Evidence and Making a Decision

#### 1. Guidelines for Evaluating Evidence

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| Introduction | This topic includes information about the guidelines for evaluating evidence, including   * definition of evidence * definition of rules of evidence * definitions of findings of fact and conclusions of law * circumstances in which to evaluate evidence * attitude when evaluating evidence * overview of evaluating evidence * Rating Veterans Service Representative (RVSR) responsibility for reviewing evidence * provisions applied by the RVSR in evaluating evidence * effect of rating schedule readjustment * standards of evidentiary proof * reasonable doubt rule * understanding the entitlement criteria that must be proven * choosing between two levels of evaluation, and * role of presumptive provisions. |

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| **a. Definition: Evidence** | ***Evidence*** is every type of proof offered to establish a fact.  The table below describes the different types of evidence. |

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| **Evidence** | **Description** |
| testimonial | oral and written statements |
| documentary | documents |
| real | a tangible object, usually playing some role in an event, from which the fact finder may draw inferences  ***Example***: A prescription medicine container may prove evidence of a diagnosis or treatment. |
| demonstrative | evidence that illustrates testimony of a witness  ***Examples***: a map, diagram, or re-enactment |
| direct | evidence capable by itself of proving a fact or issue |
| circumstantial | evidence that may allow the fact finder to deduce a certain fact from other facts that can be proven |

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| **b. Definition: Rules of Evidence** | ***Rules of evidence*** are guidelines on evaluation of the evidence submitted or obtained in a case. These rules dictate whether evidence may be admitted or considered, when particular evidence can prove a matter, and when evidence is entitled to more value or less value than other evidence in the record.  A body of Department of Veterans Affairs (VA) regulations, directives, and court precedent exists on use of evidence in VA adjudication actions. The decision maker must apply these rules of evidence in reaching a decision on a case.  ***Notes***:   * The codified Federal rules of evidence used in Federal court proceedings do not apply in VA proceedings. * VA is a completely ex-parte system of adjudication, meaning the VA is responsible for fully and sympathetically developing the Veteran’s claim and resolving all issues by giving the claimant the benefit of any reasonable doubt, in the absence of such adversarial concepts as cross examination, best evidence rule, and strict adherence to burden of proof. * A VA General Counsel precedent opinion is considered an administrative issue for effective date purposes as indicated in [VAOPGCPREC 88-90](http://www.va.gov/ogc/opinions/1990precedentopinions.asp), [38 U.S.C. 5110(g)](https://www.law.cornell.edu/uscode/text/38/5110), and [38 CFR 3.114](http://www.ecfr.gov/cgi-bin/text-idx?SID=704391bf8839203461c283a9314ad491&mc=true&node=se38.1.3_1114&rgn=div8). * Generally, rules announced in precedent judicial decisions apply to all cases that are still open on direct review when the new rule is announced. Unless they state otherwise, statutes and regulations are presumed to apply prospectively (in the future).   ***Exception***: Precedential decisions that result in “genuinely retroactive effects” in which application of the new decision impairs rights the party originally had, increases the party’s liability for past conduct, imposes new duties with respect to prior transactions, or attaches new legal consequences to events that occurred before the enactment as indicated in [VAOPGCPREC 07-2003](http://www.va.gov/ogc/opinions/2003precedentopinions.asp).  ***Reference***: For more information on rules of evidence, see   * [*Flynn v. Brown,*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmf) 6 Vet.App. 500, 503 (1994), and * [*Manio v. Derwinski,*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm) 1 Vet.App. 140 (1991). |

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| **c. Definitions: Findings of Fact and Conclusions of Law** | ***Findings of fact*** are the true facts that a decision maker finds to exist after the analysis of all evidence of record. Findings of fact are necessary to making the conclusions of law.  ***Conclusions of law*** are the ultimate determinations made regarding whether key governing substantive and/or procedural legal requirements defined by the claim are proven. Every legal conclusion depends on finding certain facts. |

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| d. Circumstances in Which toEvaluate Evidenc | The decision maker will evaluate evidence after verifying that the claim has been properly developed and procedurally prepared for a decision but before a written decision on the issues is prepared.  Verifying that the claim is properly developed and procedurally prepared for a decision involves making sure that   * all issues were recognized * the duty to notify was discharged * the duty to assist was completed or otherwise appropriately discharged, and * the appropriate procedures were followed when any other due process requirement was implicated by the facts in the case.   ***References***: For more information on   * the Veterans Benefits Management System (VBMS), see the [*VBMS-User Guide*](http://vbaw.vba.va.gov/VBMS/Resources_Technical_Information.asp), and * Modern Awards Processing-Development (MAP-D), see the [*MAP-D User Guide*](http://vbaw.vba.va.gov/VetsNet/Claims_Docs/webhelp/Claim_Development1.htm). |

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| e. Attitude When Evaluating Evidence | When evaluating evidence and making decisions   * maintain objectivity * never allow personal feelings to enter into the decision making process, and * show fairness and courtesy at all times to claimants.   ***Example***: An antagonistic, critical, or even abusive attitude on the part of the claimant should not in any way influence the handling of the case.  ***Reference***: For more information on the attitude of the rating officers, see [38 CFR 4.23](http://www.ecfr.gov/cgi-bin/text-idx?SID=530e43d362df4d6c8747bcfa585b14f1&mc=true&node=se38.1.4_123&rgn=div8). |

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| **f. Overview of Evaluating Evidence** | ***Evaluating evidence*** refers to a series of analytical steps that must be performed by a VA decision maker in making findings of fact for the purpose of drawing conclusions of law on each aspect or criterion of the legal standard for entitlement to the benefit and on applicable procedural matters.  Follow the steps in the table below when evaluating evidence: |

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| **Step** | **Action** |
| 1 | Determine what facts are required and what standard of proof applies based on the criteria for entitlement to the specific benefit sought and the procedural issue (original, new, increase, reopen, presumption, proposed adverse action, and stabilization). |
| 2 | Discount any admitted evidence that is not ***material*** to (that does not relate to) the components of the entitlement standard or procedural issue at issue in the case. |
| 3 | Determine the probative value of evidence that bears on the entitlement standard or procedural issue. This means deciding to which extent those items of evidence are ***relevant*** in tending to make the matter more probable or less probable.  Discuss and apply VA guidance (including court precedents) on competency to determine whether the evidence from a particular source can establish a particular fact that requires the application of special expertise or first-hand knowledge of facts based on recollection or perception. *Evidence from a source not having the requisite competency to offer a particular type of evidence has no probative value*.  Discuss and apply VA guidance on credibility where there is a reasonable factual basis (for example, demonstrable bias or inconsistency) for questioning believability. *Evidence that is not believable does not have probative value.* |
| 4 | Resolve questions of relative weight or persuasiveness when there are various items of evidence that have been determined to have probative value in order to find facts (to determine what facts the evidence proves).  ***Note***: It is important to explain why certain evidence was accepted as more probative than other evidence, especially when giving less value to evidence tending to support the benefit sought by the claimant/beneficiary. |
| 5 | Apply the found facts to draw corresponding conclusions of law necessary to support the decision outcome for the benefit sought and procedural issue. Clearly explain in the rating decision why the evidence is found to be persuasive or unpersuasive. |

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| ***Reference***: For more information on evidentiary concepts of admissibility, credibility, and probative value of evidence, see M21-1, Part III, Subpart iv, 5.4. |

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| **g. RVSR Responsibility for Reviewing Evidence** | The Rating Veterans Service Representative (RVSR) is responsible for reviewing the evidence, including   * recognizing the need for evidence in relation to a claim, and * determining the * admissibility of the evidence * weight to be afforded evidence that is presented * need for additional evidence, and * need for a physical examination. |

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| h. Provisions Applied by the RVSR in Evaluating Evidence | When making decisions or taking action on claims that require a rating decision, the RVSR must apply the provisions of all pertinent   * laws * regulations * schedules for rating disabilities * policy statements * procedures * administrators’ decisions * Secretaries’ decisions * Court of Appeals for Veterans Claims (CAVC) precedents, and * other legal precedents governing VA. |

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| **i. Effect of Rating Schedule Readjustment** | When the rating schedule is readjusted, in no event shall the readjustment cause a Veteran’s disability rating in effect on the effective date of the readjustment to be reduced unless an improvement in the disability is shown to have occurred, even if the combined evaluation is not reduced, as indicated in [VAOPGCPREC 19-92](http://www.va.gov/ogc/opinions/1992precedentopinions.asp), September 29, 1992, and [38 U.S.C. 1155](https://www.law.cornell.edu/uscode/text/38/1155).  This precedent opinion also provided that when a Veteran is receiving the minimum evaluation for a condition at the time the rating schedule is revised, and the condition subsequently undergoes an exacerbation resulting in a higher evaluation, if the condition returns to the same, symptom-free status it was in at the time of the rating schedule change, a noncompensable evaluation under the new criteria will be assigned.  ***Note***: Revisions of criteria for rating psychiatric disorders are considered a liberalizing law/VA issue as indicated in [*Sabol v. Derwinski*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), U.S. Vet.App. No. 90-1123 (March 3, 1992), [38 U.S.C. 5110(g)](https://www.law.cornell.edu/uscode/text/38/5110), [38 CFR 3.114](http://www.ecfr.gov/cgi-bin/text-idx?SID=146f7c1f9831a1627289cc33bb649ebe&mc=true&node=se38.1.3_1114&rgn=div8), and [VAOPGCPREC 9-92](http://www.va.gov/ogc/opinions/1992precedentopinions.asp), March 25, 1992. |

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| **j. Standards of Evidentiary Proof** | Every substantive or procedural factual matter must have a ***standard of proof*** whether stated explicitly or not. Standard of proof specifies the degree of persuasion or confidence in the evidence with regard to the subject of the proof that is required in order to find a fact proven.  ***Note***: The application of standard of proof is qualitative, not quantitative. The question is weight or persuasiveness of the evidence and not the number of items of evidence. Evidence is not necessarily in relative equipoise when the number of acceptable items of evidence tending to support a fact is equal to the number of items tending to not support a fact.  The table below describes the different standards of evidentiary proof. |

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| **Standard** | **Description** |
| relative equipoise | Evidence must persuade the decision maker that the fact is as likely as not. |
| preponderance of the evidence | The greater weight of evidence is that the fact exists. The fact is more likely than not. |
| affirmative evidence to the contrary | The fact is unlikely; and the evidence against the matter is of greater weight. This standard is the opposite of the preponderance standard. |
| clear and convincing | The fact finder has reasonable certainty of the truth of a fact. This is a higher standard of proof than having to find a fact is more likely than not. |
| clear and unmistakable | The evidence must establish the fact without question. |

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| **k. Reasonable Doubt Rule** | The ***reasonable doubt rule*** means that the evidence provided by the claimant/beneficiary (or obtained on his/her behalf) must only persuade the decision maker that each factual matter is at least as likely as not.  It is the defined and consistently applied policy of the VA to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant.  In [*Gilbert v. Derwinski*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmg), 1 Vet.App. 49 (1990), CAVC noted that an equipoise decision is  *necessarily more qualitative than quantitative; it is one not capable of mathematical precision and certitude. Equal weight is not accorded to each piece of material contained in the record; every item of evidence does not have the same probative value*.  CAVC further likened the reasonable doubt rule as akin to the principle in baseball that the “tie goes to the runner.”  ***Reference***: For more information on the reasonable doubt rule, see   * [38 CFR 3.102](http://www.ecfr.gov/cgi-bin/text-idx?SID=ea513727c052ceaff09990d59f484fe1&mc=true&node=se38.1.3_1102&rgn=div8), and * [38 CFR 4.3](http://www.ecfr.gov/cgi-bin/text-idx?SID=ea513727c052ceaff09990d59f484fe1&mc=true&node=se38.1.4_13&rgn=div8). |

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| **l. Understanding the Entitlement Criteria That Must Be Proven** | In determining which fact findings are required to make a legal conclusion, *generally* if regulatory criteria are   * ***conjunctive*** (separated by “and”), all of the conjoined criteria must be met for the legal standard of entitlement to be met, or * ***disjunctive*** (separated by “or”), any one of the alternative criteria will support entitlement to the benefit.   ***Important***: Conjunctive language is *always* subject to the reasonable doubt principles in [38 CFR 3.102](http://www.ecfr.gov/cgi-bin/text-idx?SID=451dcd74588d4aa8acd200cd3853dd5c&mc=true&node=se38.1.3_1102&rgn=div8) when the evidence is in relative equipoise or when there is a question regarding degree of disability.  ***Reference***: For more information on the application of the Rating Schedule, see [38 CFR 4.21](http://www.ecfr.gov/cgi-bin/text-idx?SID=ea513727c052ceaff09990d59f484fe1&mc=true&node=se38.1.4_121&rgn=div8). |

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| **m. Choosing Between Two Levels of Evaluation** | [38 CFR 4.7](http://www.ecfr.gov/cgi-bin/text-idx?SID=ea513727c052ceaff09990d59f484fe1&mc=true&node=se38.1.4_17&rgn=div8) provides that where there is a question upon review of the evidence as to which of two evaluations shall be assigned, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. This means that the *preponderance of the evidence* should support the level of evaluation chosen.  ***Important***: [38 CFR 4.7](http://www.ecfr.gov/cgi-bin/text-idx?SID=ea513727c052ceaff09990d59f484fe1&mc=true&node=se38.1.4_17&rgn=div8) does not preclude application of the reasonable doubt doctrine. When the decision maker concludes that the facts equally (or approximately equally) support two levels of evaluation such that each is as likely as not warranted, the higher evaluation will be awarded.  ***Reference***: For more information on variable, cumulative, and successive rating criteria and when [38 CFR 4.7](http://www.ecfr.gov/cgi-bin/text-idx?SID=ea513727c052ceaff09990d59f484fe1&mc=true&node=se38.1.4_17&rgn=div8) applies, see   * M21-1, Part III, Subpart iv, 4.F.3.b, and * [*Camacho v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 21 Vet.App. 360 (2007). |

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| **n. Role of Presumptive Provisions** | Presumptive provisions alleviate part of the claimant’s burden of proof. Where certain facts are proven, a presumption arises that additional facts are true unless the presumption is rebutted by other evidence.  As noted by *Routen v. West,* 142 F.3d 1434, 1439 (Fed.Cir.1998), a presumption has evidentiary value, but it is not a form of evidence. It is a legal mechanism that relieves a party from having to produce evidence sufficient to establish the point at issue. As noted by the *Routen* analysis, when the predicate evidence is established, the remaining evidentiary gap is filled by the presumption.  VA presumptions may be rebutted. This means that when proof to the contrary of the evidentiary matter relieved by the presumption exists in the record, the presumption may be rebutted. When the presumption is rebutted, the burden shifts back to the claimant seeking the benefit to prove the facts with evidence.  VA presumptions include the presumptions of soundness, aggravation, and service connection.  ***References***: For more information on the   * presumption of soundness, see * [38 U.S.C. 1111](https://www.law.cornell.edu/uscode/text/38/1111), and * M21-1, Part IV, Subpart ii, 2.B.1.f * presumption of aggravation, see * [38 U.S.C. 1153](https://www.law.cornell.edu/uscode/text/38/1153), and * M21-1, Part IV, Subpart ii, 2.B.4, and * presumption of service connection, see * [38 U.S.C. 1112](https://www.law.cornell.edu/uscode/text/38/1112), and * M21-1, Part IV, Subpart ii, 2.B.2. |

#### 2. Evidentiary Concepts

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| Introduction | This topic contains information about evidentiary concepts, including   * admissibility of evidence * definition of ***credibility*** * definition of ***competent evidence*** * definition of ***probative value*** * determining the probative value of evidence * definitions of positive and negative evidence * court holdings on negative evidence, and * court holdings on negative evidence and the duty to assist. |

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| **a. Admissibility of Evidence** | Admissibility refers to whether offered evidence is accepted and made part of the official evidentiary record, which, for VA claims, is the claims folder.  With a few exceptions, all evidence submitted is admitted into the record. There are a few exceptions for unsworn or uncertified testimony and duplicate copies of records. |

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| b. Definition: Credibility | ***Credibility*** is a blanket term for the fact finding of whether evidence is believable or not believable.  Except in the case of claims to reopen, there is generally not a formal presumption of credibility. However, as a matter of policy, VA decision makers should accept evidence at face value unless called into question by other evidence of record or sound medical or legal principles. VA decision makers are expected to make credibility determinations when credibility is raised by the evidence available.  Factors to consider in making a fact finding of credibility include     * facial plausibility * consistency with other evidence submitted * internal consistency * demeanor of a witness (who is offering in person testimonial evidence), and * interest/bias.   ***Example***: Veteran submits a statement as part of his claim for service  connection that he injured his low back in the Air Force while loading cargo  onto a C-130 aircraft during an exercise in July 2002. Personnel records  reveal the Veteran served in the Air Force as a loadmaster and participated in  a military exercise in the Philippines in July 2002.    ***Analysis***: The Veteran’s statement, when viewed along with the evidence of  record, appears believable. Therefore, the statement is credible.  ***Example***: Veteran submits a statement along with his claim indicating he  injured his low back during multiple parachute jumps in the Army from 1980  through 1983. Personnel records reveal Veteran’s occupation during service  was “clerk.” There were no records indicating that the Veteran was involved  in parachuting operations.  ***Analysis***: The Veteran’s statement, when viewed with other evidence, is not  believable. Therefore, the statement is not credible.  ***Reference***: For more information on findings of credibility, see [*Caluza v.* *Brown*,](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc) 7 Vet.App. 508 (1995). |

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| **c. Definition: Competent Evidence** | ***Competent evidence*** refers generally to evidence offered from a qualified source. A determination of evidentiary competency involves analysis of whether a person offering evidence is qualified to establish a matter.  ***Competent medical evidence*** means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.  ***Competent lay evidence*** means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.  ***References***: For more information on   * competent medical evidence, see [38 CFR 3.159(a)(1)](http://www.ecfr.gov/cgi-bin/text-idx?SID=a546aa9f7d689727ad9552d053231594&mc=true&node=se38.1.3_1159&rgn=div8) * competent lay evidence, see [38 CFR 3.159(a)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=a546aa9f7d689727ad9552d053231594&mc=true&node=se38.1.3_1159&rgn=div8), and   medical treatises being used for definitional purposes for presumptive service connection, see M21-1, Part IV, Subpart ii, 2.B. |

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| d. Definition: Probative Value | Evidence has ***probative value*** if it   * makes a matter material to the determination more or less likely, and   has sufficient weight, either by itself or in combination with other evidence, to persuade the decision maker about a fact. |

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| **e. Determining the Probative Value of Evidence** | In determining the probative value of evidence, factors such as competency, credibility, thoroughness, precision, relevancy, and date of the evidence are important considerations.  Evidence that is incredible (not believable) does not have probative value and is not weighed against probative evidence in determining if the facts are proven. Evidence from a source that is not competent to establish a fact does not have probative value on that fact.  Consider the key elements listed below when evaluating the probative value and relative weight of medical evidence such as a diagnosis/assessment, prognosis, or opinion on etiology/onset   * physician’s qualifications * expertise/specialty, and * experience * physician’s knowledge of the relevant history * the accuracy or validity of history provided by the patient or examinee * review of records and other evidence, or * length of time the physician has treated the Veteran * context in which the medical evidence was created * treatment, or * substantiation of a medical disability claim * reasoning employed by the physician * theory * observation * practice * clinical testing * subjective report, and * conjecture * degree of specificity, and * degree of certainty. |

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| **f. Definitions: Positive and Negative Evidence** | Both positive and negative evidence may have probative value.  ***Positive evidence*** means actual items of evidence that affirmatively support a  claimant’s position.  ***Negative evidence*** means     * actual items of evidence that affirmatively disprove the claimant’s position, or * a negative inference taken from the absence of evidence on a matter supporting the claimant’s position. |

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| **g. Court Holdings on Negative Evidence** | The court cases listed below contained significant holdings regarding the consideration of negative evidence.   * The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held in [*Forshey v. Principi*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmf), 284 F.3d 1335 (Fed. Cir. 2002) (en banc) that all evidence bearing on a question, whether positive or negative, could be considered. The Federal Circuit concluded that it was permissible for VA to consider negative evidence tending to disprove the existence of a cause other than alcohol intoxication of a fatal accident (the road was dry, the weather was clear, the accident occurred during daylight, and there was no evidence of malfunction of the vehicle) to rebut the line of duty presumption under [38 U.S.C 105](https://www.law.cornell.edu/uscode/text/38/105). * The Federal Circuit held in [*AZ, AY v. Shinseki*](http://cafc.uscourts.gov/images/stories/opinions-orders/12-7046.Opinion.9-26-2013.1.PDF), 731 F.3d 1303 (Fed.Cir.2013), that the absence of a service record documenting an unreported sexual assault or a Veteran’s failure to have reported an alleged assault in service may not be treated as pertinent evidence that the assault did not occur. * The Federal Circuit held in [*Maxson v. West*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 12 Vet. App. 453, *aff’d sub nom* [*Maxson v. Gober*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 230 F.3d 1330 (Fed. Cir. 2000), that when rebutting the presumption of aggravation for a condition incurred during combat, [38 U.S.C. 1154(b)](https://www.law.cornell.edu/uscode/text/38/1154) permits consideration of the entire medical history, including a lengthy period of absence of complaint following service about the claimed condition. * The Federal Circuit held in [*Buchanan v. Nicholson*](http://cafc.uscourts.gov/images/stories/opinions-orders/05-7174.pdf), 451 F.3d 1331 (Fed. Cir. 2006), that the Board of Veterans’ Appeals (BVA) erred in determining that lay evidence lacked credibility merely because it was unaccompanied by contemporaneous medical evidence. Lay evidence may be rejected, when appropriate, due to such findings as possible bias or conflicting statements and BVA may also consider and weigh the absence of contemporary medical records against the lay evidence of record. However, this case found that the lack of contemporaneous medical records, in and of itself, does not render lay evidence incredible.   ***Important***: Do not use the absence of evidence as negative evidence in cases where the claimant has simply failed to prove an element of the claim by the applicable standard (typically relative equipoise). However, the absence of any positive evidence, such as medical evidence showing diagnosis or treatment, may be considered in determining whether the benefit may be awarded.  ***Reference***: For more information on the application of the concept of negative evidence to claims based on sexual assault, see M21-1, Part III, Subpart iv, 4.H. |

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| **h. Court Holdings on Negative Evidence and the Duty to Assist** | CAVC held in [*McLendon v. Nicholson*](http://www.uscourts.cavc.gov/documents/McLendon_04-0185.pdf), 20 Vet. App. 79 (2006), that medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits still triggers the duty to assist under [38 U.S.C. 5103A(d)](https://www.law.cornell.edu/uscode/text/38/5103A) regarding medical examinations/opinions if it indicates that the Veteran’s condition “may be associated” with service.  CAVC, in [*Trafter v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmt), 26 Vet.App. 267 (2013), held that VA is precluded from considering the absence of evidence as substantive negative evidence to decide that VA has complied with duty to assist provisions. |

#### 3. Evaluating Medical Evidence

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| Introduction | This topic contains information about evaluating medical evidence, including   * treating physician’s treatment background and probative value * definitions of types of medical assessments * medical assessments – history and policy applications * disability benefits questionnaires (DBQs) and acceptable clinical evidence (ACE) * basis for rejecting medical evidence * supporting medical conclusions with evidence in the claims folder * considering the former prisoner of war (FPOW) protocol examination reports * evaluating service treatment records (STRs) * statements from physicians as acceptable evidence for rating purposes without further examination, and * considering information in the claims folder**.** |

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| **a. Treating Physician’s Treatment Background and Probative Value** | VA does not apply the “treating physician rule,” whereby the evidence of a treating physician is generally entitled to more weight than evaluations made by consulting physicians or expert witnesses. However, a treating physician’s familiarity with the history of a disability may increase the probative value of any medical evidence/opinion.  ***Reference***: For more information on determining a physician’s expertise and experience, see [*Black v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmb)*,* 10 Vet.App. 279 (1997). |

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| **b. Definitions: Types of Medical Assessments** | The main types of medical assessments for VA purposes are diagnoses, opinions, examination, and history.  ***Diagnoses*** are medical assessments made typically to identify injury or disease. They are typically the end result of an examination and involve the application of the physician or examiner’s knowledge, experience, and judgment to a set of facts.  ***Opinions*** are medical assessments on questions such as etiology or onset. They may or may not be accompanied by a contemporaneous examination. However, like an examination, opinions involve the application of the examiner’s knowledge, experience, and judgment to a set of facts.  An ***examination*** for VA purposes involves the collection of relevant medical facts (history, clinical observations, or measurements and potentially lab testing) by a medical professional.  ***History*** is a verbal recounting or written record of relevant life events, habits, routine, symptoms, and/or treatment. It most often comes from the patient’s oral report and/or review of medical records. Other materials could also be relevant to a physician’s or examiner’s understanding of relevant medical or psychological history. |

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| **c. Medical Assessments – History and Policy Applications** | A key evidentiary concern in many VA claims is evaluating the probative value and weight of a diagnosis or opinion that relies upon a claimant’s history.  The claimant’s self-interest in the outcome of a medical assessment and his or her ability to recollect facts over time both raise concerns about whether history is accurate and, therefore, whether medical assessments are valid. However, as a general principle, unless the historical facts upon which a medical conclusion is based are dubious or untenable, the medical conclusion should be accepted as credible. The probative value of this medical evidence may be considered and weighed relative to other evidence of record.  In most cases, medical diagnoses and opinions are based to some degree on history provided by the patient or examinee. Medical assessments based on the claimant’s history generally shall be accepted as credible unless the evidence proves the medical history is inaccurate. However, an examiner’s conclusion that merely echoes the reported history of a claimant, without offering any medical rationale in support, cannot be deemed an adequate medical opinion and should not be assigned any probative value.  ***Reference***: For more information on claimant’s history in medical opinions, see   * [*Reonal v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr), 5 Vet.App. 458 (1993), and * [*Coburn v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmc), 19 Vet.App. 427 (2006). |

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| **d. DBQs and ACE** | Disability Benefits Questionnaires (DBQs) and Acceptable Clinical Evidence (ACE) constitute medical evidence that is sufficient for rating purposes unless the nature of the specific disability renders ACE review insufficient in providing an accurate and complete disability picture.  Under ACE, VA clinicians complete a DBQ by reviewing existing paper and/or electronic medical evidence and can supplement it with information obtained during a telephone interview with the Veteran. This alleviates the need for the Veteran to report to an in-person examination. The ACE process is not available for use by non-VA examiners because they do not have electronic access to VA treatment records.  The Veterans Health Administration (VHA) will determine whether use of the ACE process is appropriate, unless otherwise requested by Veterans Benefits Administration (VBA). Examples of situations in which the ACE process might be appropriate include, *but are not limited to*:   * existing medical evidence is sufficient as determined by VHA for a clinical assessment of the level of impairment. * a medical opinion is needed to determine whether a disability was incurred or aggravated in service, or related to a service-connected (SC) disability, or * an assessment is needed as to whether an SC disability caused or contributed to a Veteran’s death.   An in-person examination will be requested in lieu of ACE in the following circumstances   * it is determined that an in-person examination is required * a BVA remand ordered an examination * the disability at issue is a mental condition * the claim is a predischarge claim, or * the claim involves electronic medical records not available to VHA. |

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| e. Basis for Rejecting Medical Evidence | The RSVR may *not* rely upon his/her own unsubstantiated medical conclusions to reject expert medical evidence provided by the claimant.  ***Reference***: For more information on the basis for rejecting medical evidence, see   * [*Shipwash v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmc)*,* 8 Vet.App. 218 (1995), and * [*Colvin v. Derwinski*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmc)*,* Vet.App. 175 (1991). |

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| f. Supporting Medical Conclusions With Evidence in the Claims Folder | Support medical conclusions with evidence in the claims folder.  Cite medical information and reasoning to   * link or separate two disabilities, or * establish or refute prior inception or aggravation.   ***Note***: If evidence such as medical treatises or independent medical opinions were relied upon when the rating decision was made, explain this in the rating decision. |

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| g. Considering FPOW Protocol Examination Reports | Carefully consider former prisoner of war (FPOW) protocol examination reports because they may provide sufficient background information to relate the Veteran’s current symptomatology to the FPOW experience. |

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| h. Evaluating STRs | Service treatment records (STRs) are generally highly probative, but not necessarily determinative, in the resolution of service connection. A current disability and, in some cases, a nexus between the current disability and an injury or disease shown in service will be required to award service connection. |

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| i. Statements From Physicians as Acceptable Evidence for Rating Purposes Without Further Examination | A statement from any physician can be accepted for rating purposes without further examination if it   * is otherwise sufficient for rating purposes, and * includes clinical manifestations and substantiation of diagnosis by findings of diagnostic techniques generally accepted by medical authorities.   ***Examples***: Diagnostic techniques generally accepted by medical authorities include   * pathological studies * x-rays, and * appropriate laboratory tests. |

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| j. Considering Information in the Claims Folder | The information in the claims folder must support the medical conclusions.  Consider the following information in the claims folder   * applicable dates of events such as * treatment reports, and * hospitalizations * dates covered by the STRs, identifying at least the month and year * names of * VA and private medical facilities * private physicians, and * other information sources, and * items of evidence that were requested but not received. |

#### 4. Reviewing Hospital Reports for Sufficiency for Rating Purposes

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| Introduction | This topic contains information about reviewing hospital reports for sufficiency for rating purposes, including   * handling VA hospital reports that are insufficient for rating purposes * handling non-VA hospital reports that are insufficient for rating purposes, and * requesting clarification from private physicians. |

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| a. Handling VA Hospital Reports That Are Insufficient for Rating Purposes | Request the original clinical records, including the nurses’ and doctors’ orders, if a VA report of hospitalization is insufficient for rating purposes in cases involving either   * injury, aggravation of injury, or death as the result of * hospitalization * medical treatment * surgical treatment, or * examination, or * the death of a Veteran from non-service-connected (NSC) causes if * the Veteran had an SC neuropsychiatric disability that reasonably may have impeded, obstructed, or otherwise interfered with the treatment of the condition that caused death, and * the hospital report does not clarify this issue. |

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| b. Handling Non-VA Hospital Reports That Are Insufficient for Rating Purposes | Request clarification of any hospital report that is insufficient for rating purposes and is received from a   * State hospital * county hospital * municipal hospital * contract hospital, or * private hospital.   ***Important***: Authorize a VA examination if a satisfactory corrected report cannot be obtained within a reasonable period of time. |

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| **c. Requesting Clarification From Private Physicians** | VA, pursuant to [38 U.S.C. § 5103A(a),](https://www.law.cornell.edu/uscode/text/38/5103A) has a duty to return for clarification unclear or insufficient private examination reports or VA progress notes if it reasonably appears that a request for clarification could provide relevant information necessary to properly decide a claim that is otherwise not in the record and cannot be obtained in some other way. VA’s duty is limited to those instances in which the missing information is relevant, factual, and objective – not a matter of opinion – and bears greatly on the probative value of the private medical examination report.  If a private medical examination report reasonably appears to contain information necessary to properly decide a claim, but is unclear or not suitable for rating purposes and the information contained in the report otherwise cannot be obtained, VA has a duty to either   * ask the private examiner to clarify the report * request that the claimant obtain the necessary information to clarify the report, or * explain why clarification is not needed.   Any request for clarification to a private examiner or claimant should clearly indicate what further action needs to be taken to make the insufficient private examination report acceptable for VA consideration. If no response is received from the private examiner or claimant, continue adjudicating the claim.  ***References***: For more information on   * requesting clarification of medical reports, see * [38 CFR 4.2](http://www.ecfr.gov/cgi-bin/text-idx?SID=c0d5f5b8803a8ae8de09949fa6c869e5&mc=true&node=se38.1.4_12&rgn=div8), and * [*Savage v.* *Shinseki*,](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr) 24 Vet.App. 259 (2011), and * requesting non-Federal or private records, see M21-1, Part I, Subpart i, C.2. |

#### 5. Reviewing Testimony

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| Introduction | This topic contains information on reviewing testimony, including   * using testimony as proper evidence, and * handling unsworn or uncertified testimony. |

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| a. Using Testimony as Proper Evidence | To be admitted as proper evidence, certain types of testimony must be sworn under oath or properly certified.  ***Examples***: Evidence from court proceedings, depositions, and so on. |

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| b. Handling Unsworn or Uncertified Testimony | Make an exact copy of unsworn or uncertified testimony and return the original copy for notarization or certification to the   * claimant * representative, or * person testifying.   ***Note***: Return unsworn or uncertified testimony only if the RVSR or Decision Review Officer (DRO) considers the evidence material to a favorable determination of a claim.  ***Reference***: For more information on certifying testimony, see M21-1, Part III, Subpart iii, 1.B.8. |

#### 6. Lay Evidence

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| Introduction | This topic contains information about lay evidence, including   * acceptable lay evidence, and * when to use lay evidence. |

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| a. Acceptable Lay Evidence | Lay evidence is acceptable for the purpose of establishing service incurrence or aggravation, in the absence of STRs, for a combat Veteran or FPOW, if the evidence   * is satisfactory * is consistent with the circumstances, conditions, or hardships of combat or FPOW internment, and * can prevail in spite of the absence of official records showing incurrence or aggravation of the disease or injury during service.   ***Important***: Medical evidence of a link to a current condition is still needed to establish service connection.  A non-combat Veteran’s lay statements may be acceptable for establishing service incurrence or aggravation, but must be weighed against other evidence in the claims folder, including the absence of military records documenting or supporting the statements.  ***References***: For more information on   * considering evidence for combat-related disabilities, see M21-1, Part IV, Subpart ii, 2.B.3.d * considering lay evidence, see [38 U.S.C. 1154(a)](https://www.law.cornell.edu/uscode/text/38/1154) * a non-combat Veteran’s statements, see [*Bardwell v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmb), 24 Vet. App. 36 (2010), and * evaluating STRs, see M21-1, Part III, Subpart iv, 5.3.h. |

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| b. When to Use Lay Evidence | Lay evidence is generally afforded probative value if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.  The value accorded to other types of lay evidence depends on such factors as   * the accuracy or clarity of the individual’s memory * direct personal knowledge or experience * recency of the event, and * the competence of the reporting person.   A medically-untrained individual is not usually competent to offer a medical opinion regarding the etiology of disorders and such an opinion is generally assigned little probative weight.  ***References***: For more information on   * using lay evidence to support a claim, see [*Espiritu v. Derwinski*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmb)*,* 2 Vet. App. 492 (1992), and * definition of lay evidence, see [38 CFR 3.159(a)(2)](http://www.ecfr.gov/cgi-bin/text-idx?SID=e05a20cdd9805601c9123df74a4fa27d&mc=true&node=se38.1.3_1159&rgn=div8). |

#### 7. Requiring Further Development

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| a. When Development to Obtain Additional Evidence May Be Needed | Development to obtain additional evidence such as a medical examination or other records may be needed if   * it would provide a more complete picture of a question at issue, or * if the evidence of record is questionable or conflicting.   ***Note***:Decision makers may not arbitrarily or capriciously refuse to assign weight to a claimant’s evidence or develop with *the purpose* of obtaining evidence to justify a denial of the claim. Instead, decision makers must be able to support the determination that development is needed.   * ***References***: For more information on ordering further development in cases where uncorroborated lay evidence is presented, see [*Douglas v. Shinseki*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmd), 23 Vet.App. 19 (2009) * a Veteran’s submission of evidence and refusal to attend a VA examination, see [*Kowalski v. Nicholson*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmk), 19 Vet.App. 171 (2005), and * developing with the purpose of denying and explaining the need for development, *see* [*Mariano v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 17 Vet.App. 305 (2003). |

#### 8. Evidence From Non-VA Sources

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| Introduction | This topic contains information about evidence from non-VA sources, including   * evaluating evidence from non-VA sources, and * evaluating conflicting evidence. |

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| a. Evaluating Evidence From Non-VA Sources | When evaluating medical and lay evidence from non-VA sourcesaccept it at face value unless there is reason to question its competency or credibility.  Non-VA evidence does not have inherently less probative value than evidence originated by VA. Both VA and non-VA evidence are objectively weighed in determinations of competency, credibility, and probative value. |

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| b. Evaluating Conflicting Evidence | Use good judgment when evaluating conflicting evidence.  Consider   * whether witnesses have a personal interest in the issue * if there is a basis for bias * if one party had a better opportunity to know the facts, and * which version is more reasonable and probable. |

#### 9. Weighing the Evidence

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| Introduction | This topic contains information about weighing the evidence, including   * assigning weight to the evidence * questions to ask when weighing evidence * handling imbalanced evidence * handling evidence in equipoise * considering reasonable doubt * an example of evidence in equipoise, and * reaching a conclusion after weighing evidence. |

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| a. Assigning Weight to the Evidence | After assigning weight to the evidence   * review the evidence in its totality, and * determine the *balancing of scales*.   ***Note***: Do not assign weight unjustly or arbitrarily. |

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| b. Questions to Ask When Weighing Evidence | Below are examples of questions that should be asked when weighing evidence.   * Did the evidence originate in service or in close proximity to service? * Is the medical opinion supported by clinical data and review of medical records? * How detailed, clear, or persuasive is the opinion? * Is the opinion based on personal knowledge or on history provided by another person?   ***Reference***: For more information on weighing medical evidence/opinions, see   * [*Nieves-Rodriguez v. Peake*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr), 22 Vet.App. 295 (2008), and * [*Stefl v. Nicholson*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmr), 21 Vet.App. 120 (2007). |

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| c. Handling Imbalanced Evidence | If the evidence shows an overwhelming imbalance, then the evidence requires a decision in that direction, either for or against awarding the claim.  ***Note***: The claim must be awarded if all of the evidence is favorable.  ***Reference***: For more information on awarding benefits when all of the evidence is favorable, see   * [*Traut v. Brown*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 6 Vet.App. 495 (1994), and * [*Rose v. West*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 11 Vet.App. 169 (1998). |

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| d. Handling Evidence in Equipoise | As indicated at M21-1, Part III, Subpart iv, 5.1.k, resolve reasonable doubt in *favor* of the claimant if all procurable evidence, after being weighed, is found in approximate balance or equipoise. [38 CFR 3.102](http://www.ecfr.gov/cgi-bin/text-idx?SID=a08bfebd52a74aea7c0022ad43d360a2&mc=true&node=se38.1.3_1102&rgn=div8) dictates that the Veteran prevails when the evidence neither satisfactorily proves nor disproves an issue.  ***Reference***: For more information on applying reasonable doubt, see [*Alemany v. Brown*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bma), 9 Vet. App. 518 (1996). |

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| e. Considering Reasonable Doubt | Consider reasonable doubt *only* when the evidence is in equipoise, *not* when the evidence weighs either in favor or against the claimant.  ***Notes***:   * Per[*Fagan v. Shinseki*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmf)*,* 573 F.3d 1282, 1286 (Fed. Cir. 2009), a VA examiner’s statement that he/she is not able to render an opinion * provides neither positive nor negative support for the claim, and * does not trigger the application of reasonable doubt. * Do not characterize an examiner’s statement of being unable to render an opinion as “non-evidence.” Refer to such evidence in the decision narrative in such terms as having neither positive nor negative value.   ***Reference***: For more information on discussing the reasonable doubt rule, see   * [*Gilbert v. Derwinski*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 1 Vet.App. 49 (1990) * [*Ortiz v. Principi*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 274 F. 3d 1361 (Fed. Cir. 2001), and * M21-1, Part III, Subpart iv, 5.1. |

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| f. Example: Evidence in Equipoise | In the following example, there is no compelling justification to side with either expert:  Evidence supportive of the claim includes the July 1991 opinion of Dr. T., who treated the Veteran for several years prior to his death, that posttraumatic stress disorder (PTSD) had been the major factor in the Veteran’s suicide. Evidence against the claim includes the January 1992 opinion of the VA physician that the evidence did not point to PTSD as the actual cause of suicide and that the Veteran’s suicide had occurred in the setting of alcohol dependence, family breakdown, and depression.  An award of service connection for PTSD is warranted based upon the facts of this case as the evidentiary balance is in equipoise. |

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| g. Reaching a Conclusion After Weighing Evidence | After weighing the evidence to reach a conclusion,   * discuss the evidence in favor of the claim * discuss the evidence against the claim to include any negative evidence, and * explain that * one set of evidence outweighs the other set, or * the evidence is in equal balance for and against the claim.   ***Reference***: For more information on negative evidence, see   * [*Forshey v. Principi*](http://vbaw.vba.va.gov/bl/21/Advisory/CAVCDAD.htm#bmf), 284 F.3d 1335 (Fed. Cir. 2002) (en banc), and * [*Maxson v. Gober*](http://vbaw.vba.va.gov/bl/21/advisory/CAVCDAD.htm#bmm), 230 F.3d 1330 (Fed. Cir. 2000). |

#### 10. Decision Making Principles

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| Introduction | This topic contains information about decision making principles, including   * evaluation of evidence, and * decision making in a non-adversarial system. |

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| a. Evaluation of Evidence | When discussing the evaluation of evidence in a decision *Narrative*, VA decision makers are ***expected to be appropriately critical of the evidence (including assessing competency and probative value) and to make credibility determinations when credibility is raised by the available evidence.***  Decision makers must   * be objective and fair in the consideration of evidence * ensure that any inferences, findings, and conclusions made are supported under the facts and law * follow the evidentiary guidance in this chapter * be professional and courteous even when claimants are antagonistic, critical, or abusive * not allow any bias or personal feelings into the evaluation of evidence or the decision * not arbitrarily or capriciously refuse to assign weight to a claimant’s evidence, and * not adopt or express an adversarial position towards a claimant or beneficiary.   ***Important***:   * Do not refer to the claimant or beneficiary as a liar. Where evidence is not credible, say that and cite facts of record in support. * Do not minimize the weight of a treating physician’s opinion based upon the idea that he/she has become an advocate for the patient since doing so may appear adversarial and biased. |

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| **b. Decision Making in a Non-Adversarial System** | An ***adversarial system*** involves advocates representing contrary positions before an impartial decision maker. The VA system is ***non-adversarial***. There is no advocate on behalf of VA opposing claims and no policy to minimize or deny benefits.  Decision makers are expected to be impartial and liberally apply VA’s pro-Veteran policies, procedures, and regulations in accordance with any applicable VA guidance.  VA’s policy is to award benefits where supported under the facts and law or when the evidence is in relative equipoise or balance while denying only when we must under the facts and law.  ***Reference***: For more information on the attitude of the rating officers, see [38 CFR 4.23](http://www.ecfr.gov/cgi-bin/text-idx?SID=a08bfebd52a74aea7c0022ad43d360a2&mc=true&node=se38.1.3_1102&rgn=div8). |