## Section A. Evaluating Competency

#### Overview

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| In this Section | This section contains the following topics: |

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#### 1. Guidelines for Evaluating Competency

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| Introduction | This topic contains information on the guidelines for evaluating competency, including* [who has the authority to determine competency](#_a.__Who)
* [the effect of judicial findings on the rating activity](#_b.__Effect)
* [presuming competency](#_c.__Presuming)
* [making a finding of incompetency](#_d.__Making), and
* [considering the Veterans Service Center Manager’s (VSCM’s) opinion](#_e.__Considering).
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| Change Date | December 13, 2005 |

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| a. Who Has Authority to Determine Competency | The rating activity has sole authority to make determinations of competency and incompetency for Department of Veterans Affairs (VA) purposes.***Reference***: For more information determining incompetency, see* M21-1MR, Part III, Subpart v, 9, and
* [38 CFR 3.353(b)](http://www.benefits.va.gov/WARMS/docs/regs/38cfr/bookb/part3/S3_353.doc).
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| b. Effect of Judicial Findings on Rating Activity | Judicial findings of a court with respect to competency of a Veteran are not binding on the rating activity.However, if a Veteran is declared by a court to be incompetent, develop all necessary evidence for a rating determination. |

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| c. Presuming Competency | In the absence of clear and convincing evidence to the contrary, presume that a person is competent.***Reference***: For more information on presuming competency, see [38 CFR 3.353(d)](http://www.benefits.va.gov/WARMS/docs/regs/38cfr/bookb/part3/S3_353.doc). |

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1. Guidelines for Evaluating Competency, Continued

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| d. Making a Finding of Incompetency | A finding of incompetency cannot be made without a definite expression by a responsible medical authority, unless the medical evidence of record is* clear
* convincing, and
* leaves no doubt as to the beneficiary’s incompetency.

***Reference***: For more information on medical authority in a finding of competency, see [38 CFR 3.353(c)](http://www.warms.vba.va.gov/regs/38CFR/BOOKB/PART3/S3_353.DOC). |

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| e. Considering the VSCM’s Opinion | After development of information with regard to social, economic, and industrial adjustment, the Veterans Service Center Manager (VSCM) may be of the opinion that a beneficiary rated, or proposed to be rated, incompetent is actually capable of handling, without limitation, the funds payable. In this case, he/she will refer the evidence and finding to the rating activity.The rating activity should consider the VSCM’s finding as new evidence and, after any necessary additional development, prepare a rating based on the evidence of record.***Reference***: For more information on procedures related to evidence of incompetency, see M21-1MR, Part III, Subpart v, 9.B. |

#### 2. Considering Competency While Evaluating Evidence

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| Introduction | This topic contains information about evaluating the evidence and considering the competency of* [Veterans](#_a.__Considering)
* [helpless children](#_b.__Considering), and
* [other beneficiaries](#_c.__Considering).
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| Change Date | September 22, 2014 |

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| a. Considering the Competency of a Veteran | If the claimant is a Veteran, consider whether to put competency at issue in a decision whenever qualifying evidence raises a question as to the mental capacity to contract or to manage his/her own affairs, including disbursement of funds without limitation.The table below provides guidance on what action, if any, to take on the matter of competency:

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| If ... | Then ... |
| The evidence suggests but does not clearly and convincingly show that the person is incapable of managing the VA benefit payment without limitation | * Do not develop.
* Do not propose incompetency.
* State in the rating decision that there was no clear and convincing evidence of incompetency.
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| The evidence clearly and convincingly shows that the person is incapable of managing the VA benefit payment without limitation | Propose incompetency. |

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|  (continued) | ***Note***: In cases of mental disorders many of the specified symptoms for the 100 percent evaluation in the general rating formula – such as gross impairment in thought processes and communication – could cause inability to manage the VA benefit payment without limitation. However, the mere existence of a 100 percent disability from a mental disorder will not necessarily cause such inability. Carefully consider the facts in these cases to determine whether the regulatory standard warrants a proposal of incompetency, but do not automatically put competency at issue.***Exception:*** Exclude temporary total evaluations assigned during a qualifying hospitalization for a mental disorder under [38 CFR 4.29](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKC/PART4/S4_29.DOC) during which the total evaluation is assigned for hospitalization, not rating schedule symptoms, and the disability is expected to return to baseline.***References***: For more information on* the presumption of competency see M21-1MR, Part III, Subpart iv, 8.A.1.c
* the evidentiary standard for proposing incompetency, see M21-1MR, Part III, Subpart iv, 8.A.1.d, and
* subordinate issues and ancillary benefits, see M21-1MR, Part III, Subpart iv, 6.B.3.
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2. Considering Competency While Evaluating Evidence, Continued

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| b. Considering the Competency of a Helpless Child | If the claimant is a helpless child, the rating activity must resolve the issue of competency for a child over age 18, because entitlement depends upon permanent incapacity for self-support due to physical or mental disability. If incapacity is due to mental disability* consider competency a factor in determining whether the child is permanently incapable of self-support
* determine competency under the same criteria applicable to Veterans, and
* record the determination in a rating.

***References***: For information on* due process procedures in incompetency cases, see M21-1MR, Part III, Subpart v, 9.B.6, and
* conditions which determine permanent incapacity for self-support, see [38 CFR 3.356](http://www.warms.vba.va.gov/regs/38CFR/BOOKB/PART3/S3_356.DOC).

***Note***: Since the incompetency procedures referred to in M21-1MR, Part III, Subpart v, 9.B.6 are for payment purposes, do not apply those procedures except in cases where the child would receive direct payment in his/her own right. |

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| c. Considering the Competency of Other Beneficiaries | If there is evidence of incompetency and the claimant is another beneficiary, such as a surviving spouse, parent, or VA insurance beneficiary* consider competency a rating issue under [38 CFR 3.353](http://www.warms.vba.va.gov/regs/38CFR/BOOKB/PART3/S3_353.DOC) *except* when there has been a judicial determination of incompetency, and
* propose a rating on the issue or undertake any required development.

***References***: For more information on* rating actions required after judicial determinations of incompetency, see M21-1MR, Part III, Subpart v, 9.B.5.g, and
* development required with different determinations of competency, see M21-1MR, Part III, Subpart v, 9.B.5.f and M21-1MR, Part III, Subpart v, 9.B.6.
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#### 3. Process for Making Competency Determinations

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| Change Date | September 22, 2014 |

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| a. Process for Making Competency Determinations | The table below describes the actions involved in making competency determinations.***Reference***: For more information on due process in incompetency determinations, see M21-1MR, Part III, Subpart v, 9.B.6. |

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| Stage | Who Is Responsible | Action |
| 1 | Rating Veterans Service Representative (RVSR) | Prepares a rating decision proposing a finding of incompetency after receiving clear and convincing evidence that the payee is incapable of managing his/her own affairs, including disbursement of funds without limitation.***Note***: A rating is not necessary for any payee besides a Veteran, if there is a finding of incompetency by a court. For all payees, however, a court adjudication waives the due process requirement. |

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| Stage | Who Is Responsible | Action |
| 2 | Veterans Service Representative (VSR) | * Provides the payee notice of
* the proposed incompetency rating, and
* the opportunity for a hearing
* clears any pending end product (EP) that would normally be taken at this point
* establishes EP 600 to control the proposal of incompetency, and
* allows 65 days for a response.

***Notes***: * EP 600 controls the incompetency proposal in any claim, including an original claim for benefits.
* If a request for a hearing is received at any time before the final decision is prepared, it must be held prior to a rating decision of incompetency.
* At the hearing, allow the next of kin or any other person of the payee’s choice to participate and assist the payee.
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| Stage | Who Is Responsible | Action |
| 3 | RVSR | Makes a final decision based on all of the evidence of record. ***Reference***: For more information on the effective date of a determination of incompetency, see [38 CFR 3.400(x)](http://www.benefits.va.gov/warms/docs/regs/38CFR/BOOKB/PART3/S3_400.DOC). |
| 4 | VSR | * Clears EP 600 upon completing action on the final rating decision and notification on the competency issue
* establishes EP 290 to control the appointment of a fiduciary, and
* prepares *VA Form 21-592, Request for Appointment of a Fiduciary, Custodian, or Guardian*, for use by the fiduciary activity.
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| ***Note***: Stages 3 and 4 must both be completed within 21 calendar days following expiration of the due process period (60 days from the date of the due process notification except when a timely hearing request results in extension of that period as specified in Stage 2 above).  |

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4. Changing Competency Status

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| Introduction | This topic contains information about changing competency status, including* [proposing a loss of competency](#_a.__Proposing)
* [determining restored competency](#_b.__Determining)
* [limitations after competency is restored](#_c.__Limitations), and
* [evidence required to restore competency](#_d.__Evidence).
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| Change Date | August 3, 2009 |

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| a. Proposing a Loss of Competency | Issue a rating proposing a change in competency status if the evidence of record will result in a change in competency status from competent to incompetent.This proposal may be included in a rating addressing other issues, such as evaluation of a mental disorder.***Reference***: For more information on procedures to follow upon receipt of evidence of incompetency, see M21-1MR, Part III, Subpart v, 9.B. |

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| b. Determining Restored Competency | In any case in which the beneficiary has been rated incompetent, take necessary development and rating action to determine whether competency has been regained if so indicated in a * hospital summary
* report of release to or discharge from non-bed care, or
* report of other material change in condition.
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| c. Limitations After Competency Is Restored | Restored competency does not of itself* warrant a reduction in the evaluation of a Veteran’s disability, or
* establish that a parent or surviving spouse is no longer entitled to Aid and Attendance (A&A).
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4. Changing Competency Status, Continued

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| d. Evidence Required to Restore Competency | Any evidence showing the beneficiary may be capable of handling funds should be referred to the rating activity. The rating activity will consider this evidence, along with all other evidence of record, to determine whether competency should be restored.Under [38 CFR 3.353(b)(3)](http://www.warms.vba.va.gov/regs/38CFR/BOOKB/PART3/S3_353.DOC), a beneficiary is not required to undergo a psychiatric examination and/or field examination before his/her competency may be restored. However, a current psychiatric examination and/or field examination may be requested if needed to properly evaluate the beneficiary’s mental capacity to handle his/her own funds.  |

#### 5. Evaluating Competency in Special Circumstances

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| Introduction | This topic contains information about evaluating competency in special circumstances, including* [a competency rating after a decree by a court](#_a.__Competency), and
* [appropriate action after court adjudication](#_b.__Appropriate).
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| Change Date | September 22, 2014 |

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| a. Competency Rating After a Decree by a Court | Use the table below to decide how to proceed with a competency rating of payees who have been found incompetent by a court. ***Note***: Judicial findings of a court with respect to the competency of a Veteran are not binding on the rating activity. |

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| If determining the competency of … | Then … |
| non-Veteran beneficiaries such as a* parent
* surviving spouse, or
* helpless child
 | a rating is not required except under certain conditions.***Reference***: For more information on a child’s permanent incapacity for self-support, see M21-1MR, Part III, Subpart iii, 7. |

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| If determining the competency of … | Then … |
| a Veteran | * develop all necessary evidence for a rating activity determination, such as
* an examination
* hospital observation, or
* a field examination
* give great weight to a
* court decree of incompetency, and
* the inability to manage financial affairs, and
* do not make a rating of competency unless there is clear and convincing evidence of that fact.

***Important***: In the following cases a payee may be considered to have had notice and hearing under the laws of the state, so that additional notice and hearing are not required:* a payee held by a court of jurisdiction to be incompetent, or
* a payee for whom a court having jurisdiction has appointed a guardian by reason of incompetency.

***Note***: If the Veteran continues to be rated competent, mention that the court made a parallel determination (if that is the case). |

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5. Evaluating Competency in Special Circumstances, Continued

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| b. Appropriate Action After Court Decrees | Use the table below to determine the appropriate action after court decrees concerning competency.***Reference***: For more information on competency payment code award data, see [M21-1, Part V, 13.05](http://www.warms.vba.va.gov/admin21/m21_1/part5/ch13.doc). |

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| If a court decree … | Then … |
| declares a Veteran, previously rated incompetent, competent | * take the necessary development action, and
* prepare a new rating, prominently entering a notation of the court’s declaration on the rating, if incompetency is confirmed and continued.
 |
| applies to a non-Veteran beneficiary for whom a rating of incompetency is not required | request the VSCM to promptly certify the validity of the decree so that direct payments may be made to the beneficiary. |