

 **NVLSP**
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Establishing Service Connection by Chronicity and Continuity of Symptomatology

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 **NVLSP** 2

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To Do:

- Basics of Service Connection
- Chronic Condition
- Continuity of Symptomatology
- Advocacy Advice
- Lay Statements



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Elements of Service Connection

- 1. A current disability**
- 2. In-service incurrence of a disease, injury, or event**
- 3. Evidence that links the current disability to the precipitating disease, injury, or event in service**

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How can you establish Element #3 (Nexus)?

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5 Ways to Establish Nexus

- 1. Direct**
- 2. Aggravation of Preexisting Condition**
- 3. Presumption**
- 4. Secondary to SC disability**
- 5. Section 1151 (treated as if SC)**

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3 Ways to Establish Direct SC

- Delayed Direct SC:** medical opinion links current disability to service
- Chronicity:** chronic disease first diagnosed in service
- Continuity of symptomatology:** condition noted, but not diagnosed, in service and symptoms continue until post-service diagnosis of chronic disease

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Presumptive SC for Chronic Diseases

- Chronic disease first diagnosed and manifested to a compensable degree w/in post-service presumptive period**
- Condition first noted and manifested to compensable degree within post-service presumptive period, and symptoms continue until diagnosis of chronic condition**

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Important VA Regulations

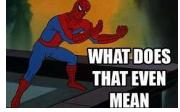


- 38 C.F.R. § 3.303(b): basic principles of how Vets can establish SC through a showing of chronicity or continuity**
- 38 C.F.R. § 3.307(a)(3): presumptive time periods for chronic conditions**
- 38 C.F.R. § 3.309(a): disabilities VA considers chronic and rules for presumptive SC of chronic conditions first diagnosed after service**

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What does “Chronic Condition” mean?



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What is a Chronic Condition?

important

If a condition is listed in **38 C.F.R. § 3.309(a)**, it **IS** considered a chronic condition by VA

If the condition is NOT listed in **38 C.F.R. § 3.309(a)**, it **IS NOT** considered a chronic condition by VA

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What Conditions Does VA Consider Chronic?

- More common chronic conditions:
 - Anemia, primary
 - Arteriosclerosis
 - Arthritis**
 - Cardiovascular-renal disease, including **hypertension**
 - Diabetes mellitus**
 - Epilepsies
 - Hodgkin's disease
 - Leukemia
 - Multiple sclerosis
 - Malignant tumors or tumors of the brain, spinal cord, or peripheral nerves
 - Paralysis agitans (Parkinson's disease)
 - Peptic ulcers
 - Psychoses
 - Other organic disease of the nervous system**
 - Sarcoidosis
 - Tuberculosis, active

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What Conditions Does VA Consider Chronic?

- **Less common chronic conditions:**

• Atrophy, progressive muscular	• Myasthenia gravis
• Brain hemorrhage	• Myelitis
• Brain thrombosis	• Myocarditis
• Bronchiectasis	• Nephritis
• Calculi of the kidney, bladder, or gallbladder	• Osteitis deformans (Paget's disease)
• Cirrhosis of the liver	• Osteomalacia
• Coccidioidomycosis	• Palsy, bulbar
• Encephalitis lethargica residuals	• Purpura idiopathic, hemorrhagic
• Endocarditis (all forms of valvular heart disease)	• Raynaud's disease
• Endocrinopathies	• Scleroderma
• Hansen's disease	• Sclerosis, amyotrophic lateral.
• Lupus erythematosus, systemic	• Syringomyelia
	• Thromboangiitis obliterans (Buerger's disease)

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Survey #1

- Which of the following conditions is an “organic disease of the nervous system”?
 - Carpal tunnel syndrome
 - Migraine headaches
 - Glaucoma
 - All of the above
 - None of the Above



QUIZ!

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Organic Diseases of the Nervous System

D

- “Organic Diseases of the Nervous System” include, but are not limited to:

• Carpal tunnel syndrome	• Progressive spinal muscular atrophy
• Migraine headaches	• Diseases of the cranial nervous system
• Sensorineural hearing loss	• Cranial nerve conditions
• Tinnitus	• Peripheral nerve conditions, such as peripheral neuropathy
• Glaucoma	

• Manual M21-1, V.iii.12.A.1.d
(change date Feb. 2, 2018)

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Organic Diseases of the Nervous System

- If there is uncertainty as to whether a claimed disability is an “organic disease of the nervous system,” RO staff should send the case to Compensation Service’s Advisory Review Staff for guidance
 - Manual M21-1, V.iii.12.A.1.d (change date Feb. 2, 2018)

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Chronicity Requirements

Requirements for establishing SC through “chronicity”:

1. Vet diagnosed with a chronic condition during service or within a presumptive period following separation from service; and
2. Vet currently has the chronic condition

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What are the Presumptive Periods for Chronic Conditions?

- Multiple sclerosis = 7 years
- Hansen’s disease (leprosy) and tuberculosis = 3 years
- All other chronic conditions = 1 year
 - 38 C.F.R. § 3.307(a)(3)



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Chronicity Example

- **1/1970 – 7/1972:** Vet served on active duty
- **12/1971:** Vet's STRs show diagnosis of hypertension
- **2/2022:** Vet, having never filed a VA claim before, filed a claim for SC for hypertension
- Vet's VA treatment records show Vet currently has hypertension

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Survey #2

- Should VA grant Vet's claim for SC for hypertension without obtaining a medical nexus opinion?
 - A. Yes
 - B. No
 - C. Maybe



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Chronicity Example



- Based on these facts, VA should grant Vet's claim for SC for hypertension without obtaining a medical nexus opinion
 - VA would still likely schedule a C&P exam to determine the proper evaluation

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Hypo

- **1/1970 – 7/1972:** Vet served on active duty
- **6/1973:** Private treatment records show diagnosis of hypertension
 - Vet's diastolic blood pressure was predominantly in the 90-99 mm. range (0% rating)
- **8/2022:** Private treatment records show Vet has a current diagnosis of hypertension w/ diastolic BP predominantly in the 110-119 mm. range (20% rating)
- **10/2022:** Vet filed SC claim for hypertension

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Hypo



- **38 C.F.R. § 3.309(a):** “The following diseases shall be granted service connection although not otherwise established as incurred in or aggravated by service if manifested to a compensable degree within the applicable time limits under § 3.307”

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Survey #3

- Will VA grant SC based on chronicity?
 - Yes
 - No
 - Maybe



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Answer

NO

- VA will not grant service connection based on chronicity, because the condition did not manifest to a compensable degree during the presumptive period
- But, Vet may be able to establish SC through a different theory of entitlement

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Reminder

- **Important distinction in chronicity cases:**
 - If a chronic condition is diagnosed **during service**
 - The in-service severity of the chronic condition doesn't matter (could be equal to a 0% rating)
 - If a chronic condition is first diagnosed **within the presumptive period**
 - The chronic condition must have manifested to at least a degree of 10% during the presumptive period

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Benefits of Establishing Service Connection through Chronicity

- **As long as Vet puts forth medical evidence showing Vet currently has the chronic condition**, a VA exam will not be necessary (except for evaluation purposes)
 - There is no need for VA to obtain a medical nexus opinion
- **Vet does not need evidence of continuity of symptoms since service to establish SC**

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Hypo

- **11/1986 – 4/1992:** Vet served on active duty
- **10/1991:** STRs refer to Vet having “chronic” left knee pain
- **8/2022:** Vet filed an SC claim for a left knee condition
- **10/2022:** VA examiner diagnosed Vet with left knee arthritis

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Survey #4

- Will VA grant service connection for the left knee based on chronicity?

A. Yes

B. No

C. Maybe



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Answer



- Vet only had left knee pain in-service, not a diagnosis of arthritis
- Just because a condition or symptom is referred to as “chronic” in a medical record does not make it a chronic condition for VA purposes

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Continuity of Symptomatology



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What does “Continuity of Symptomatology” Mean?



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Continuity of Symptomatology

- If Vet has a chronic condition listed in 38 C.F.R. § 3.309, but there is no clear in-service diagnosis, the Vet can establish SC by showing that the condition was “noted” in service and that there was continuity of symptoms after service
- Continuity of symptomatology means that the symptoms caused by the condition recurred regularly, without an intercurrent (intervening) cause, up to the date of the claim

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Continuity of Symptomatology

- What does “noted” mean?
 - No comprehensive definition in VA regs
 - Could include:
 - Symptom or complaint listed in STRs
 - Condition not diagnosed beyond legitimate question as a chronic condition listed in § 3.309
 - Retrospective post-service statement about symptom experienced in service
 - Must be found credible by VA

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Continuity of Symptomatology

- When should you raise this theory?
 - When a condition or symptom is noted in service (or w/in the presumptive period), but it is not shown to be chronic or the diagnosis may be questioned
 - If the condition or symptom first manifested w/in the presumptive period, it must have manifested to a compensable level (minimum of 10% under the applicable rating criteria)

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Survey #5

- What conditions can be service-connected through continuity of symptomatology?
 - Only conditions listed in 38 C.F.R. § 3.309(a)
 - Any condition
 - Not sure

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Answer

A

- Only those chronic conditions which are listed in 38 C.F.R. § 3.309(a)
- *Walker v. Shinseki*, 708 F.3d 1311 (Fed. Cir. 2013)

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Requirements for Establishing SC through Continuity of Symptomatology

1. **Evidence that a condition or symptom was “noted” during service or at 10% during the presumptive period after service**
2. **Evidence showing post-service continuity of symptomatology of the “noted” condition / symptom**
3. **Evidence of a current chronic disability listed in 38 C.F.R. § 3.309(a) that is associated with the continuous symptoms**

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Continuity of Symptomatology and Medical Evidence

- While medical evidence is not required in continuity of symptomatology cases, VA will be more likely to grant a claim with this evidence, without the need to appeal to BVA or CAVC
- So, try to obtain a medical opinion from a private doctor that addresses whether it is at least as likely as not that:
 1. **The current disability is related to the Vet’s continuing symptoms; and**
 2. **The current disability is related to an in-service event or injury (“delayed” direct SC)**

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Continuity of Symptomatology and Medical Evidence

- The main difference between medical opinions in continuity of symptomatology claims and “delayed” direct SC claims:
 - In a **delayed direct SC claim**, the nexus opinion addresses the link between Vet’s current disability and an in-service event, injury, or disease
 - In **continuity of symptomatology claims**, the nexus opinion addresses the link between Vet’s current disability and Vet’s continuing symptoms

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Continuity of Symptomatology Example

- **8/2011 – 8/2019:** Vet served on active duty
 - STRs document various complaints of back pain throughout Vet’s service
- **11/2021:** VA treatment records note Vet experiences back pain on most days
- **5/2022:** Vet filed SC claim for back condition

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Continuity of Symptomatology Example

- **6/2022:** Vet provided lay statement that she has experienced back pain ever since her time in service. She noted that she experienced occasional back pain beginning while she was in service. Over time, the back pain became more frequent and more intense.
- **12/2022:** Private doctor diagnosed Vet with DJD (arthritis) of the spine. This was the first diagnosis of a back condition.
- **What additional evidence is needed to grant the claim based on continuity of symptomatology?**

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Continuity of Symptomatology Example

- **NONE** – Vet's back pain was noted in service, there is evidence of post-service continuity of back pain, and Vet has current dx of a chronic back condition that causes back pain
- **This should be enough to grant the claim, but to make the claim stronger, Vet should submit:**
 - a medical opinion linking current disability to her continuing complaints of back pain (or stating back pain in service was the first manifestation of the current condition)
 - a statement from another person who had first-hand knowledge the continuing symptoms

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How to Handle the Absence of Evidence

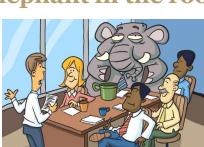
- Sometimes a claims file will not contain medical evidence of any symptoms in service or w/in the presumptive period
- If Vet contends that, despite the lack of documentation, he or she has experienced symptoms since service, a detailed statement describing the continuity of symptoms will be important

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How to Handle the Absence of Evidence

- If VA doesn't see medical documentation of the Vet's symptoms, it may find the Vet not credible
- The best thing to do in this situation is to address the elephant in the room



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How to Handle the Absence of Evidence

- Explain why there is no documentation of symptoms
 - Did Vet not think condition was severe enough to warrant seeing a doctor?
 - Does Vet avoid going to the doctor?
 - Did Vet receive treatment from a facility that is now closed and treatment records are unavailable?

Explain it!

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Conditions Capable of Lay Observation

- For chronic conditions that lay people are competent to observe and diagnose, medical evidence is not required to establish SC based on chronicity or continuity of symptomatology
- A notable chronic condition which can be diagnosed by a lay person is tinnitus, which CAVC found to be a chronic condition (when caused by acoustic trauma)
 - *Fountain v. McDonald*, 27 Vet. App. 258 (2015)

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Fountain - Facts

- Vet filed SC claim for tinnitus 30 years after service
- Vet did not report tinnitus during separation exam or in other STRs, or at VA exam in 1980
- He stated that his tinnitus began in service, and continued after service
- Explained he did not realize ear ringing was a disability, which is partially why it took so long for him to complain about it, and that he would only have one or two episodes of tinnitus a day, which would only last for about 30 seconds

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Fountain - Facts

- BVA denied claim, relying on negative VA nexus opinion and rejecting Vet's lay statements
- Found that a lay person was not competent to provide statements as to the etiology of tinnitus
- Found Vet's statements that tinnitus began in service were not credible due to the absence of in-service complaints and fact he took 30 years to file a claim
- Found Vet denied having tinnitus at VA exam in 1980

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Fountain - CAVC Decision

- CAVC vacated and remanded BVA decision
- Tinnitus is an organic disease of the nervous system when there is evidence of acoustic trauma
 - But VA treats tinnitus as a chronic condition even w/out evidence of acoustic trauma
- Vet's statements may be competent evidence establishing SC via continuity
 - *Charles v. Principi*, 16 Vet. App. 370 (2002) – “ringing in the ears is capable of lay observation”

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Fountain - CAVC Decision

- VA couldn't reject Vet's lay statements as not credible when Vet explained why he did not report tinnitus and file a claim earlier
 - There are reasonable explanations for why Vet may take several years to report tinnitus, such as:
 - Not being aware that tinnitus is a disability
 - Symptoms are not severe

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Takeaways from *Fountain*

- Make sure the RO or BVA does not mischaracterize the evidence
 - BVA said that Vet *denied* tinnitus in 1980
 - In actuality, the 1980 VA exam report only stated that Vet *“did not report”* tinnitus
- **There is a big difference between denying a condition and not reporting a condition**

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Continuity of Symptomatology and Non-Chronic Conditions

- Putting forth evidence of continuity of symptomatology can still be helpful to a claim, even if the condition is not chronic under § 3.303(b)
- Evidence of continuity of symptomatology may be sufficient to require VA to perform an exam under its duty to assist
- Such evidence can also make it easier for an examiner to provide a favorable nexus opinion

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Continuity of Symptomatology and Non-Chronic Conditions

- For example, sleep apnea is not a chronic condition under § 3.309(a)
- But, if a Vet who was diagnosed with sleep apnea 10 years after leaving service submits lay statements from in-service roommates describing loud snoring and breathing cessation while sleeping, and Vet’s spouse submits a statement that provides similar info about post-service period, it will be easier for an examiner to state that Vet’s current sleep apnea had its onset in service

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Advocacy Advice



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Advocacy Advice

- Both the RO and BVA frequently fail to address SC based on chronicity or continuity of symptoms when it is reasonably raised by the record
- Advocates should explicitly raise the issue to VA by stating in writing that Vet is seeking SC based on chronicity and/or continuity of symptomatology

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Advocacy Advice

- It is imperative that advocates assist Vets in developing evidence to support their claims
 1. This is particularly important to establish post-service continuity of symptomatology
 2. Advocates need to work with Vet to create a thorough lay statement that details the history of Vet's symptoms

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Developing Positive Evidence

- Advocates should first interview the claimant to get the full history of symptoms in as much detail as possible
- Initial draft of statement can be written by the Vet or advocate
 - If Vet drafts the statement, it should be reviewed (and if necessary, clarified) by the advocate

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Developing Positive Evidence

- Before submitting the statement, advocate should review the claims file to ensure that the statement does not contradict evidence already of record
 - If Vet contradicts self, VA will find the Vet not credible and will not assign any value to the statement

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Drafting Lay Statement

- Vet should provide VA with a detailed timeline of symptoms
- Unless Vet has medical expertise, Vet cannot make medical determinations or diagnoses, but is competent to describe symptoms and explain in practical terms how those symptoms affected the Vet's life

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Ethical Dilemma

- Vet Aaron is discussing his claim with Attorney Amy. Aaron was discharged in 2018. In 9/2022, Aaron was diagnosed with a peptic ulcer. He tells Amy that while he was only recently diagnosed, he has experienced discomfort ever since leaving the service and thinks it is related to his current ulcer.
- Amy goes to mayoclinic.org and prints a list of ulcer symptoms for Aaron to review. Aaron says he has experienced many of those symptoms since his discharge, and they include that info in a lay statement to VA.

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Survey #6

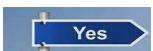
- Was it ethical for Amy to show Aaron the list of ulcer symptoms in the hope that he would state that he has experienced such symptoms since service?
 - A. Yes
 - B. No
 - C. Maybe



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Ethical Dilemma



- Not only was it ethical, it shows Amy is a good advocate
- When continuity of symptomatology may be a theory to establish SC, the advocate should visit a reputable medical website to learn about the condition's symptoms. The advocate should then ask if the Vet has experienced any of those symptoms since service.

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Other Supporting Lay Evidence

- In addition to the Vet's lay statement, statements from family members, friends, co-workers, and/or fellow service members describing the Vet's observable symptoms and complaints can help support a claim

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Sample Spouse Statement with Timeline

- In 2018, James returned from the service and I immediately noticed that his hearing seemed to have deteriorated. I found myself having to repeat myself sometimes because he had not heard what I said.
- In 2020, James started putting the TV on at a very high volume because he claimed he could not hear otherwise.
- Now I have to practically yell if I have any hope of James hearing what I say. He is looking into getting a hearing aid.

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Symptoms First Manifesting In Presumptive Period

- **REMEMBER:** If symptoms first manifest during the presumptive period, the disability must satisfy the criteria for a compensable rating within that period
- Try to present evidence showing that Vet had symptoms / impairment listed in the relevant diagnostic code to qualify for at least a 10% rating
- To do so, advocates should follow a two-step process:

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Symptoms First Manifesting In Presumptive Period

- **Step 1:** Go to a reputable medical website (ex. mayoclinic.org) and look up symptoms of the disability in question
- **Step 2:** Look at VA Rating Schedule and determine what is needed to obtain a compensable rating

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Example

- **2/2011 – 2/2015:** Vet served on active duty
- **5/2018:** Vet diagnosed with schizophrenia (a psychosis)
- **11/2022:** Vet wants to file a claim for SC for schizophrenia, and says that he had symptoms of the condition shortly after he left the service

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Example

- **Step 1:** According to the Mayo Clinic's website, symptoms of schizophrenia include:
 - Delusions
 - Hallucinations
 - Disorganized thinking and speech
 - Extremely disorganized or abnormal motor behavior
 - Neglecting personal hygiene
 - Lacks emotion
 - Losing interest in everyday activities
 - Socially withdrawn

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Example

- **Step 2:** Schizophrenia is rated under the General Rating Formula for Mental Disorders in 38 C.F.R. § 4.130
- 10% rating: Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or symptoms controlled by continuous medication
- If Vet had symptoms w/in presumptive period, Vet should explain to VA how those symptoms manifested to a compensable level

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Example

- “In the summer of 2014, a few months after my discharge, I started to hear voices. This would distract me while I was at work and it would prevent me from being able to focus on my job. Around the same time, I lost interest in activities I had previously enjoyed such as golfing and going to the movies. I stopped participating in social activities as I did not want to be around others. Within my first year following service, my symptoms of schizophrenia caused social and occupational impairment.”

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Joint Disabilities

- For joint conditions, a Vet can show symptoms manifested to a compensable level by submitting evidence of pain w/in one year of discharge
- Under 38 C.F.R. § 4.59, actual pain in joint = 10% rating for most joints, including knee, shoulder, and back (even if Vet has full ROM)
 - Objective evidence (corroboration by someone other than the Vet) might be required depending on the DC used to rate the disability

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Advocacy Advice

- If Vet's history of continuity of symptomatology is documented in medical records, this will be very helpful in proving the claim
- Advocates should create a "medical history timeline" that lists the pertinent medical treatment and documentation of that treatment which shows Vet's continuity of symptomatology since service
 - Will assist VA in locating relevant medical records
 - Should include where in VBMS the record can be found

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Advocacy Advice

- Example:
 - 3/13/2016: STRs show Vet had elevated blood pressure reading of 142/97 (located on p. 42 of STRs with VBMS receipt date of 6/27/2018)
 - 4/15/2018 and 4/30/2018: VA treatment records show blood pressure readings of 147/95 and 152/101 (located on pp. 294 and 298 of VA treatment records with VBMS receipt date of 5/15/2020)
 - 1/24/2021: VA treatment records show diagnosis of hypertension and blood pressure reading of 161/110 (located on p. 135 of VA treatment records with VBMS receipt date of 4/30/2021)

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Advocacy Advice

- Creating a medical history timeline can also make it more likely that an examiner will be able to provide a nexus opinion linking Vet's current disability to his or her post-service symptomatology

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NVLSP 76

LAY STATEMENTS

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NVLSP 77

Survey #7

- To establish SC through continuity of symptomatology, is continuity of treatment required?
 - A. Yes
 - B. No
 - C. Maybe



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NVLSP 78



- Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology
 - *Savage v. Gober*, 10 Vet. App. 488, 496 (1997)
- The regulation requires continuity of symptomatology, not continuity of treatment
 - *Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991)

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NVLSP 79

Survey #8

- If a VA examiner fails to address the Vet's lay statements regarding symptoms, is the VA exam adequate?
 - A. Yes
 - B. No
 - C. It depends

QUIZ!

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Answer

It depends...

• If VA does not find that the Vet's lay statements lack credibility, then VA cannot rely on a medical opinion that does not address the Vet's reports of symptoms

- See *Miller v. Wilkie*, 32 Vet. App. 249, 258 (2020); *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006); *Barr v. Nicholson*, 21 Vet. App. 303 (2007)

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NVLSP 81

NVLSP VA Benefit Identifier App

- Questionnaire/App: Helps Vets and advocates figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- **3 WAYS to Access:**
 - [NVLSP Website](#)
 - Download on the  App Store
 - ANDROID APP ON  Google play

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NVLSP

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NVLSP Training Opportunities

- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at richard@nvlsp.org

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