Identifying and Overcoming Common VA Errors: Inadequate VA Medical Examinations

Agenda

- When VA must provide a medical exam or opinion
- Common inadequacies in VA exams

When VA Must Provide an Exam or Opinion

NVLSP 4

VA Exams/Opinions

- VA is required in certain situations, under its duty to assist, to provide a claimant with a medical exam or opinion
  - 38 U.S.C. §§ 1168, 5103A(d); 38 C.F.R. § 3.159(c)(4)

NVLSP 5

POLL #1

- True or False? The requirements for triggering VA's duty to provide a medical exam/opinion are the same, regardless of the type of benefit or disability at issue.

NVLSP 6

VA Exams/Opinions

- Different requirements must be met to trigger VA's duty to provide a medical exam/opinion for claims for:
  - Disability compensation not involving TERA
  - Disability compensation involving TERA
  - DIC for death unrelated to COVID-19
  - DIC for death caused by COVID-19

NVLSP 7

VA Exams/Opinions

- VA **must** obtain a medical exam/opinion for a disability compensation claim not involving a TERA when:
  1) The record contains competent evidence that the Vet has a current disability, or persistent or recurrent symptoms of a disability;
  2) The record contains evidence establishing that an event, injury, or disease occurred in service;
  3) There is an **indication** that the disability or symptoms **may be** associated with Vet's active military, naval, air, or space service; and
  4) The record contains insufficient evidence for VA to make a decision on the claim
     - *McLendon v. Nicholson*, 20 Vet. App. 79 (2006)

NVLSP 8

VA Exams/Opinions

- Element 3 is a low threshold
- It can be satisfied by things such as:
  - Credible lay evidence of continuous symptoms since service
  - Speculative private medical opinion (e.g., disability *might* be related to service)
  - Medical treatise evidence
  - Paratrooper relating knee arthritis to multiple jumps in service

NVLSP 9

VA Exams/Opinions

- But, element 3 cannot be satisfied solely by a "conclusory generalized statement" that an in-service event, illness, or injury caused the current disability
  - Example: "My elbow arthritis is due to service"
    - *Waters v. Shinseki*, 601 F.3d 1274 (Fed. Cir. 2010)
- Make sure VA does not reject Vet's lay statements as conclusory or generalized if Vet provides additional info that meets low threshold, such as indication of continuity of symptoms
  - *Waters* should be interpreted narrowly, but VA sometimes applies it broadly

NVLSP 10

Common *McLendon* Error - Example

- Vet did not have diagnosis of a back disability, but pointed to multiple medical records that documented his chronic back pain, as well as mild limitation of motion of the back
- VA found that Vet didn't satisfy first *McLendon* element because there was no competent evidence that he had a diagnosed disability

NVLSP 11

Common *McLendon* Error - Example

- VA erred by failing to address other part of 1st *McLendon* element: whether there was competent evidence of persistent or recurrent symptoms of a disability
- VA also erred by conflating "disability" with "diagnosis"
  - Pain alone without an underlying diagnosis is a "disability" if it causes functional impairment
    - *Saunders v. Wilkie*, 886 F.3d 1356, 1363-64 (Fed. Cir. 2018)

NVLSP Court Win

NVLSP 12

VA Exams/Opinions: TERA

- VA must provide a medical exam and obtain a medical nexus opinion if Vet (not DIC claimant) submits a claim for SC and there is
  1. Evidence of a disability,
  2. Evidence of participation in a toxic exposure risk activity (TERA) during active service,
  3. An indication of an association between the disability and the TERA, and
  4. Insufficient evidence to GRANT service connection (lower threshold than *McLendon*)
     - 38 U.S.C. § 1168

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VA Exams/Opinions: TERA

SECTION VII - MEDICAL OPINION FOR TOXIC EXPOSURE RISK ACTIVITIES

Choose the statement that most closely approximates the etiology of this claimed condition.

☐ 7a. The claimed condition was at least as likely as not (likelihood is at least approximately balanced or nearly equal, if not higher) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the Veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran. Provide rationale in section C.

☒ 7b. The claimed condition was less likely than not (likelihood is less than approximately balanced or nearly equal) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the Veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran. Provide rationale in section C.

7c. Provide rationale:

The C-file was reviewed, including disability claims and examinations, BVA remand, lay statement, toxic exposure documentation, STRs, and VA and private treatment records. The Veteran served from 1993 to 1997, and is service connected for migraine, depressive disorder, bilateral plantar fasciitis, bilateral osteoarthritis of the knees, bilateral hip pain associated with osteoarthritis of the knees, low back pain associated with osteoarthritis of the knees, and right foot surgical scar, based on previous review. The treatment record shows the Veteran was diagnosed with obstructive sleep apnea in 2001, about 4 years after discharge from service. The earliest available post-service records from 4 months after diagnosis, July 11, 2001, showed obesity with BMI calculated at 35 based on the height and weight recorded that date. The available record is not found to document any significant toxic exposures which would be expected to result in the development of sleep apnea, and is not found to show symptoms suggestive of sleep apnea during service. Obesity, which was present in this Veteran at the time of diagnosis, is one of the best documented risk factors for obstructive sleep apnea (UpToDate, Clinical presentation and diagnosis of obstructive sleep apnea in adults, 2023). Based upon the available information, the claimed condition was less likely than not (likelihood is less than approximately balanced or nearly equal) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran.

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SECTION III – MEDICAL OPINION FOR DIRECT SERVICE CONNECTION

CHOOSE THE STATEMENT THAT MOST CLOSELY APPROXIMATES THE ETIOLOGY OF THE CLAIMED CONDITION.

☐ 3A. THE CLAIMED CONDITION WAS AT LEAST AS LIKELY AS NOT (LIKELIHOOD IS AT LEAST APPROXIMATELY BALANCED OR NEARLY EQUAL, IF NOT HIGHER) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

☐ 3B. THE CLAIMED CONDITION WAS LESS LIKELY THAN NOT (LIKELIHOOD IS LESS THAN APPROXIMATELY BALANCED OR NEARLY EQUAL) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

3C. RATIONALE:

SECTION IV – MEDICAL OPINION FOR SECONDARY SERVICE CONNECTION

☐ 4A. THE CLAIMED CONDITION IS AT LEAST AS LIKELY AS NOT (LIKELIHOOD IS AT LEAST APPROXIMATELY BALANCED OR NEARLY EQUAL, IF NOT HIGHER) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.

☐ 4B. THE CLAIMED CONDITION IS LESS LIKELY THAN NOT (LIKELIHOOD IS LESS THAN APPROXIMATELY BALANCED OR NEARLY EQUAL) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.

4C. RATIONALE:

SECTION V – MEDICAL OPINION FOR AGGRAVATION OF A CONDITION THAT EXISTED PRIOR TO SERVICE

☐ 5A. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

☐ 5B. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS CLEARLY AND UNMISTAKABLY NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

5C. RATIONALE:

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION

6A. CAN YOU DETERMINE A BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVALIABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition)?

☐ Yes ☐ No

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TERA EXAM ADVICE

- Often, VA relies on a negative TERA medical opinion to deny a claim, even when (1) there are other possible in-service events, diseases, or injuries that might have caused the current disability, and (2) the TERA exam doesn't address those non-TERA events, diseases, or injuries
- Remember: VA must also obtain an opinion addressing non-TERA in-service events, diseases, or injuries when the *McLendon* elements are met.

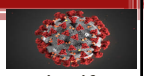
NVLSP 16

VA Exams/Opinions: DIC

- VA **must** obtain a medical opinion for a DIC claim:
  - Whenever such an opinion is necessary to substantiate the claim
  - *Unless* no reasonable possibility exists that it would aid in substantiating the claim
    - *Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008); 38 U.S.C. § 5103A(a)(1), (2)
- Make sure that the VA is using *Wood* analysis and not the *McLendon* analysis to determine if a medical opinion is needed for a DIC claim

NVLSP 17

DIC Medical Opinions: COVID-19



- VA must also obtain a medical opinion to determine if a SC disability was a principal or contributory cause of death when:
  - The death certificate ID's COVID-19, but not SC disabilities, as the principal or contributory cause of death, and
  - a SC disability was a condition more likely to cause severe illness from COVID (according to CDC), and
  - the claimant is not otherwise eligible under the total disability criteria for DIC (38 U.S.C. 1318), and
  - the evidence doesn't otherwise support a finding in favor of the claimant
    - Consolidated Appropriations Act, 2023, Division U - Joseph Maxwell Cleland and Robert Joseph Dole Memorial Benefits and Health Care Improvement Act of 2022, Pub. L. No. 117-328, § 202 (2022)

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VA Exams/Opinions

- Once VA undertakes the effort to provide an exam when developing a service connection claim, even if not statutorily obligated to do so, it must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided.
  - ***Barr v. Nicholson*, 21 Vet. App. 303 (2007)**

NVLSP 19

Inadequate Exams

- A VERY common reason for remands by BVA and CAVC is that VA failed to provide claimant with an adequate medical exam or opinion
- As an advocate, you can save your Vet a substantial amount of time in the claim process if you spot inadequacies in a VA exam and bring them to VA's attention immediately
- It is important to get your objection to the VA exam on record by submitting a written statement explaining why the exam is inadequate
  - Statement does not need to be long to be effective

NVLSP 20

What Advocates Should Do

- Advocates can use the following boilerplate language to state the general legal basis for why a new exam is required under the law:
  - "When VA provides a veteran with a medical exam, regardless of whether the exam is necessary, VA must ensure that the exam is adequate. *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). The [date] exam is inadequate; therefore, VA must provide the veteran with a new exam or medical opinion under its duty to assist. *See* 38 U.S.C. § 5103A(d)."

NVLSP 21

What Advocates Should Do

- Then the advocate should provide VA with the specific reason or reasons why the exam was inadequate
- Make any objections to the adequacy of an exam as soon as possible

NVLSP 22

COMMON INADEQUACIES IN VA EXAMS

NVLSP 23

Example

"I have reviewed the veteran's claims file, taken a medical history from him, and performed a physical examination. It is my opinion that the veteran's respiratory condition is not caused by or a result of his military service."

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- Why is this opinion inadequate?

NVLSP 25

Inadequate Supporting Rationale

NVLSP 26

Inadequate Supporting Rationale

The examiner did not provide adequate supporting rationale for the medical opinion

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Inadequate Supporting Rationale

- A conclusory statement without supporting rationale is not sufficient and should be returned to the examiner to explain the basis for the opinion
- A medical opinion must support its conclusion with an analysis that VA can consider and weigh against contrary opinions
  - *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007)
- Medical opinion must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two
  - *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008)

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Inadequate Supporting Rationale

- Boilerplate Example:
  - For a VA exam to be adequate, the examiner must provide supporting rationale for their conclusions. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008); *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007). The [date] examiner expressed their medical opinion in a conclusory statement without supporting rationale. Under *Stefl* and *Nieves-Rodriguez*, this examination is inadequate, and the VA must provide the veteran with a new examination or medical opinion.

NVLSP 29

Takeaway

- Attack adequacy of a negative VA opinion and argue that VA must obtain new exam or opinion if:
  - It lacks supporting rationale, or
  - There is a flaw in the rationale
- BUT, if you have a favorable private opinion, argue it is entitled to more weight than the inadequate VA opinion, and that VA should grant the claim

NVLSP 30

Example

- Jenna, an OEF Vet, applies for an increased rating for her SC anxiety disorder. VA orders a C&P exam. The examiner opines that her anxiety manifests as occupational and social impairment with reduced reliability and productivity (i.e., a 50% rating).
- The examiner's reasoning included the following statement: "Her treatment records do not show that she experienced suicidal or homicidal ideations."
- When reviewing CAPRI records, Jenna's VSO sees that she reported suicidal ideation occasionally to her VA psychologist.

POLL #2

- Should Jenna's VSO argue that this VA medical opinion is inadequate?
  - A) No, VA examiners are not required to read every treatment record
  - B) Yes, the opinion was based on incorrect info
  - C) Not sure

Inaccurate Factual Premise

Inaccurate Factual Premise

- Medical opinion based on an inaccurate factual premise has no probative value
  - *Reonal v. Brown*, 5 Vet. App. 458 (1993)
- If opinion based on an inaccurate factual premise, VA should discount it entirely
  - *Monzingo v. Shinseki*, 26 Vet. App. 97 (2012)

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Inaccurate Factual Premise

- Boilerplate Example:
  - A VA medical opinion that is based on an inaccurate factual premise is inadequate and has no probative value. *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993). In the [date] VA medical opinion, the examiner based their opinion on [state incorrect fact or facts]. However, as shown by the [state where in the c-file the "fact" is disproved], the examiner did not base their opinion on an accurate factual premise. This renders the opinion inadequate, and the veteran is entitled to a new examination or medical opinion.

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Advocacy Advice

- If the VA examiner gets the facts wrong, argue that the exam is inadequate because it is based on an inaccurate factual premise

NVLSP 36

Example

The Vet's hypertension is less likely than not proximately due to or the result of his service-connected diabetes. The Vet's hypertension preceded the diabetes diagnosis by many years. Therefore, it is evident the veteran's diabetes did not cause his hypertension.

NVLSP 37

POLL #3

- Assuming there is adequate supporting rationale, is this an adequate opinion?
  - A. Yes
  - B. No
  - C. Not sure

NVLSP 38

NVLSP 39

Failure to Address **Both** Theories of Secondary SC

NVLSP 40

Inadequate Secondary SC Exams

- In a secondary service connection claim, the examiner failed to address both whether the secondary condition was *caused by* the SC condition and was *aggravated* by the SC condition
- VA examiners generally must address both
  - **Causation**
  - **Aggravation**

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Inadequate Secondary SC Exams

- Examiners frequently fail to address both prongs (in most cases, aggravation is not addressed)
  - ***Allen v. Brown*, 7 Vet. App. 439 (1995):** A disability that is proximately due to or the result of SC disease or injury shall be service connected
  - **38 C.F.R. § 3.310(b):** Any increase in severity of NSC disease or injury that is proximately due to or the result of SC disease or injury, and not due to the natural progress of the NSC disease, will be service connected

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Inadequate Secondary SC Exams

- VA examiners are probably not automatically required to provide an opinion on aggravation in all cases. However, if the issue of aggravation is **reasonably raised** by the Vet or the evidence of record, such an opinion is required
  - ***El-Amin v. Shinseki*, 26 Vet. App. 136 (2013)**
- If examiner provides opinion on causation and aggravation, make sure rationale supports both theories, not just causation
  - **If not, opinion is inadequate**

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Inadequate Secondary SC Exams

- Boilerplate example:
  - The Veteran previously alleged in their [date] statement that [secondary condition] has been caused or aggravated by their service-connected [primary condition]. The [date] VA exam report, however, only addressed whether the Veteran's [secondary condition] was *caused* by [primary condition]. The examiner's failure to address whether the veteran's [secondary condition] was *aggravated* by [primary condition], renders the exam report inadequate, and a new opinion must be obtained. *See Allen v. Brown*, 7 Vet. App. 439, 449 (1995).

NVLSP 44

Advocacy Advice

- Medical expert must address each theory of entitlement **explicitly or reasonably raised**. Therefore, when filing a secondary SC claim (or at some point during the pendency of the claim), VSOs should explicitly raise the issues of both causation and aggravation by submitting the following statement to VA:
  - The veteran alleges that their [secondary condition] has been **caused** or **aggravated** by their service-connected [primary condition].
- By doing so, any VA exam that does not address both theories will likely be considered inadequate

NVLSP 45

Example

"It would be unusual for there to be an abrupt onset of symptoms during the short time of deployment to Qatar from May 2005 to July 2005, as described by the Veteran and his friends, with the added caution that the statements from friends were all written several years after 2005. In regard to these buddy statements that reported the Veteran's fatigue during deployment in June 2005, these statements were written more than six years after the deployment and included a lot of detail to be recalled from such a long time prior, which suggests prompting."

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- What is wrong with the previous statement from a VA examiner in a claim for service connection for sleep apnea?

NVLSP 47

The Examiner Makes His or Her Own Non-Medical Factual Determinations

NVLSP 48

Non-Medical Factual Determinations

- This issue was addressed in *Sizemore v. Principi*, 18 Vet. App. 264 (2004)
  - Vet's SC claim for PTSD was denied by BVA
  - BVA relied heavily on a 1998 VA examination

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Non-Medical Factual Determinations

- 1998 VA exam report:
  - The Vet's stressors in Vietnam apparently have not been substantiated and although it is likely he was involved in combat activities, it seems a bit unusual that an artillery man would have personally killed 11 enemy soldiers unless they were being overrun. In an action of that nature, I think it would probably have resulted in either some award being given to him or at least some documentation being discoverable with respect to that unit's heavy combat activity. When I asked him if he directly observed his 11 friends killed, he states that he did directly observe it. That seems to be a bit of either an exaggeration or a horrible experience which should again be discoverable through the records.

NVLSP 50

Non-Medical Factual Determinations

- The Court found that the psychiatrist overreached and the exam was tainted
  - "To the extent that the examining psychiatrist is expressing an opinion on whether the appellant's claimed in-service stressors have been substantiated, that is a matter for determination by the Board and not a medical matter."

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Non-Medical Factual Determinations

- Main lessons from *Sizemore*:
  - VA examiners should not make their own determinations or judgments about non-medical facts
    - That is the job of the RO adjudicator or BVA
  - If examiner makes a credibility determination on non-medical facts, it taints the exam

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Advocacy Advice

- Review exams to see if the examiner made an unfavorable credibility determination about non-medical facts
- If so, argue that the exam is inadequate

NVLSP 53

Example

- Vet files increased rating claim for diabetes, currently rated 20% disabling
- In order to obtain a 40% rating, Vet must require treatment of insulin, restricted diet, and regulation of activities
- Mar. 2021 Vet statement: "My treating physician informed me that my diabetes requires regulation of activities"
- Oct. 2021 VA exam: "The Vet's diabetes requires insulin and a restricted diet; however, the condition does not require him to regulate his activities"

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POLL #4

- Do you think this is an adequate opinion?

A. Yes

B. No

C. Not sure

NVLSP 55

Failure to Address Relevant Lay Statements

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Failure to Address Lay Statements

- Lay evidence is one type of evidence that must be considered, if submitted, when a Vet seeks disability benefits
  - *Miller v. Wilkie*, 32 Vet. App. 249 (2020)
  - *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006)
  - *Barr v. Nicholson*, 21 Vet. App. 303 (2007) (holding that an examiner's opinion was inadequate, in part, because he did not indicate whether he considered the Vet's assertions of continued symptomatology)

NVLSP 57

Example

- Back to the Hypo:
  - Examiner did not reference Vet's March 2021 statement
  - Exam should be considered inadequate because the examiner ignored a relevant lay statement that provided information material to the Vet's claim

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Failure to Address Lay Statements

- Boilerplate Example:
  - Lay evidence must be considered by VA and an exam should be deemed inadequate if the examiner did not consider the Veteran's prior medical history and address relevant lay statements. *See Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). In the [date] VA exam report, the examiner did not address the following relevant lay statements: [list relevant lay statements]. The examiner's failure to consider these lay statements that describe the Veteran's symptoms renders the exam inadequate, and the Veteran is entitled to a new exam or medical opinion.

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Take Aways

- Review statements in support of claim, hearing transcripts, treatment records, and the VA examiner's opinion to see if relevant lay statements are addressed
- If they were not discussed, argue that a new VA medical opinion is warranted
  - May need to also argue that statements are competent and credible evidence, if no favorable findings on these questions

KEY TERM ALERT

NVLSP 60

Example

- "I recognize my own personal limitations of knowledge in this area of medicine."
- "From a relative lay person's perspective of psychiatry, the veteran's treatment notes do not suggest that he has PTSD"
- A dermatologist or eye doctor providing a psychiatric examination

NVLSP 61

The Examiner Was Not Qualified to Provide a Medical Opinion on the Disability in Question

NVLSP 62

Unqualified Examiner

- The competence of a VA examiner is presumed and VA does not have to "prove" an examiner's qualifications, unless the claimant questions those qualifications or there is evidence to the contrary
- If Vet raises the issue or there appears to be an irregularity in the selection of an individual to perform an exam, the presumption of competence does NOT apply and the burden shifts to VA to prove examiner's qualifications
  - *Nohr v. McDonald*, 27 Vet. App. 124 (2014)
- Generally, an argument that an examiner is not competent or qualified to offer an opinion must be raised at the RO or BVA; the CAVC will not usually entertain that argument if raised for the first time at the Court—it is best to explicitly raise the issue as soon as possible

NVLSP 63

Unqualified Examiner

- Advocates should only challenge an examiner's qualifications if there is good reason to believe the examiner is not qualified, such as:
  - A statement made by the examiner that calls their own qualifications into question
  - The examiner's professional title or specialty (or lack thereof) raises concerns

NVLSP 64

Advocacy Advice

- If an examiner calls into question his or her credentials, request the examiner's qualifications from VA in writing and, if appropriate, argue the examiner is unqualified
- VA is not obligated to provide an examiner who specializes in the area at issue, but if the disability at issue seems far outside the examiner's specialty, ask for the examiner's qualifications
- If the examiner was unqualified, the exam will be deemed inadequate

NVLSP 65

When to Challenge Competency of VA Examiner

- For most claims, a specialist is not required
- But sometimes a specialist is needed:
  - Mental disability
  - TBI: physiatrist, psychiatrist, neurosurgeon, or neurologist
  - Meniere's disease: otolaryngologist or neurologist (proposed 2/15/22)
  - Dental
  - Eye
  - When required by BVA remand order!

NVLSP 66

When to Challenge Competency of VA Examiner

- Secondary SC claim may present a situation where VA examiner lacks competence if SC condition and the secondary condition are in different body systems
- In *Wise*, a cardiologist was asked to provide an opinion on whether PTSD caused or aggravated IHD
  - Cardiologist stated she had no formal training or background in psychiatry other than a required month-long rotation in med school that was over 25 years ago
  - Admitted her opinion came from a "relative lay person's perspective of psychiatry"

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When to Challenge Competency of VA Examiner

- Requesting CV of VA examiner
  - First, see if CV (or any other info about examiner's medical background) is available to public (Google search)
    - This allows advocate to review CV before it becomes part of Vet's record (if examiner's credentials are impressive, you do not want to add CV to record)

NVLSP 68

When to Challenge Competency of VA Examiner

- Requesting CV of VA examiner
  - If not publicly available, then request from VA
    - "Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by VA's duty to assist"
      - *Francway v. Wilkie*, 930 F.3d 1377, 1381 (Fed. Cir. 2019)

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Questions?

Identifying and Overcoming Other Common VA Errors

Presented by Liz Tarloski, Rick Spataro, Alexis Ivory, Renée Burbank, and Bart Stichman

Common VA Errors in Mental Health Condition Claims

Failure to Consider All Mental Health Conditions

- Even though Vet claims SC for one mental health condition (e.g., PTSD), VA may need to consider SC for other mental health conditions (e.g., anxiety disorder)
- VA must consider:
  1. Claimant's description of the claim
  2. Symptoms claimant describes
  3. Info claimant submits
  4. Info VA obtains
     - *Clemons v. Shinseki*, 23 Vet. App. 1 (2009)

Failure to Consider All Mental Health Conditions

- Vets still should be careful in how they characterize claimed disability
  - Claim SC for "acquired psychiatric disability"
  - But also list any disabilities Vet has been diagnosed with (or might have)
  - Ex: "an acquired psychiatric disability, to include PTSD and major depressive disorder"

Requiring Active "Suicidal Ideation"

- "Suicidal ideation" is an example of a symptom listed in the General Rating Formula for Mental Disorders that may cause social and occupational impairment at a level warranting a 70% rating (deficiencies in most areas…). There is no comparable symptom listed in criteria for lower ratings.
- VA cannot deny a 70% rating simply because Vet does not have "active" suicidal ideation. "Passive" suicidal ideation may also qualify a Vet for a 70% rating.
  - ***Bankhead v. Shulkin*, 29 Vet. App. 10 (2017)**
- "Suicidal ideation" simply means the process of forming thoughts of suicide, and covers everything from merely a wish that one would not wake the next morning, to actively carrying out a suicide plan

Misinterpreting "Suicidal Ideation"

- It is error for VA to find that a Vet's suicidal ideation is not severe enough to cause deficiencies in most areas just because Vet was not hospitalized
- VA can consider hospitalization if Vet was actually hospitalized, but can't consider the absence of hospitalization

Misinterpreting "Suicidal Ideation"

- VA can consider the likelihood of self-harm in determining whether a 70% rating is warranted, but can't require "persistent danger of hurting self," because that is a symptom in the 100% criteria

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Failure to Award SC for Substance Use Disorders Secondary to Mental Health Conditions

- Substance use disabilities are often caused or aggravated by SC mental health condition
  - Ex: Vet self-medicates SC PTSD with alcohol or drugs
- Make sure VA appropriately considers effects of alcohol and drug use when assigning disability rating

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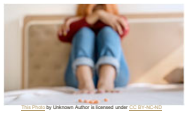
Failure to Award SC for Substance Use Disorders Secondary to Mental Health Conditions

- If Vet uses alcohol or drugs to self medicate a SC mental condition, a resulting disability should be SC
  - Ex: If Vet who uses alcohol secondary to SC PTSD develops cirrhosis of the liver due to alcohol use, Vet entitled to SC for cirrhosis
    - *See El-Amin v. Shinseki*, 26 Vet. App. 136, 138-39 (2013)



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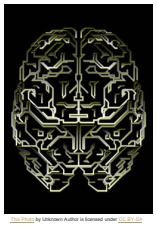
Relying on an Incorrect Diagnosis

- VA may deny a claim for SC for a mental health condition on the ground that the Vet is suffering from a congenital or developmental defect (usually a personality disorder), which is not considered a disease or injury for disability compensation purposes, instead an acquired mental disability subject to service connection, but…
  - Some Vets are misdiagnosed with a personality disorder, when they actually have an acquired mental health condition
  - Some Vets have both a personality disorder and an underlying acquired mental health condition



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Relying on an Incorrect Diagnosis

- "Personality Disorder" is a common diagnosis given to servicemembers to expedite separation from service, when in fact the servicemember was suffering from PTSD or TBI
  - Casting Troops Aside : The United States Military's Illegal Personality Disorder Discharge Problem. Prepared for VVA by YLSC, Yale Law School (2012)
- Because a personality disorder is considered a congenital defect, it cannot be service-connected
- Look for symptoms for SC conditions such psychoses or PTSD

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Psychoses – Background

- "Psychoses" are chronic conditions that can be service-connected without a medical nexus opinion under the theories of:
  - **Presumptive SC, if diagnosed or symptoms manifest w/in 1 year of separation from service (must be at least 10% disabling w/in that year)**
  - **Direct SC – chronicity, if first diagnosed in service**
  - **Direct SC – continuity of symptomatology, if symptoms "noted" in service, and later diagnosed as a psychosis**
    - 38 C.F.R. §§ 3.303(b), 3.307(a)(3), 3.309(a)

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Psychoses

- "Psychoses" are limited to the following DSM-5 diagnoses:
  - Brief psychotic disorder
  - Delusional disorder
  - Psychotic disorder due to another medical condition
  - Other specified schizophrenia spectrum and other psychotic disorder
  - Schizoaffective disorder
  - Schizophrenia
  - Schizophreniform Disorder
  - Substance/Medication-Induced Psychotic Disorder
    - 38 C.F.R. § 3.384

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Requiring Credible Supporting Evidence of a Stressor for Mental Health Conditions Other Than PTSD

- To establish SC for mental disabilities *other than* PTSD, Vet needs

1. Current DSM-5 diagnosis
2. Evidence of an in-service event, disease, or injury
3. A link/nexus, usually established by medical evidence, between current diagnosis and in-service event, disease, or injury
   - 38 C.F.R. § 3.303

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Requiring Credible Supporting Evidence of a Stressor for Mental Health Conditions Other Than PTSD

- To establish SC for PTSD, Vet needs

1. Current diagnosis of PTSD
2. Credible supporting evidence that a claimed in-service stressor occurred
   - Relaxed in some situations
3. A link/nexus, established by medical evidence, between current diagnosis and in-service stressor
   - 38 C.F.R. § 3.304(f)(5)

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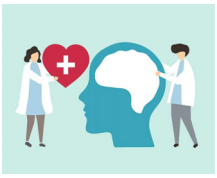
Requiring Credible Supporting Evidence of a Stressor for Mental Health Conditions Other Than PTSD

- Sometimes VA denies SC for a mental disability *other than* PTSD (anxiety disorder, MDD, etc.) claimed as due to traumatic event(s) in service, due to the lack of credible supporting evidence that the event(s) occurred
  - **Often occurs in claims involving MST**
- "Credible supporting evidence" of MST or other event is not required to establish SC for a mental disability *other than* PTSD
  - **Vet's statement about event, if found competent and credible by VA, is alone sufficient to establish the 2nd element of SC. No requirement for corroboration!**

Attributing Diagnosis to Non-Service Trauma

- **Some Vets have experienced multiple traumas or stressors that may make SC more difficult to establish**
  - Childhood physical and/or sexual abuse
  - Post-service domestic abuse
  - Other current stressors
    - **Death in family or other family situations**
    - **Financial situations**
    - **Co-morbid disorders**

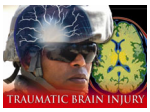


Attributing Diagnosis to Non-Service Trauma

- When it is not possible to determine what portion of the current disability is **related to service** and what portion is **related to pre- or post-service incident**, the entire disability must be attributed to service
  - ***Mittleider v. West*, 11 Vet. App. 181 (1998); *see* 38 U.S.C. § 5107(b)**

Incorrectly Rating TBI & Mental Disabilities

- Symptoms of PTSD and other mental conditions often overlap with symptoms of TBI, making it difficult to determine the cause of a symptom and for VA to rate the disabilities
- Where manifestations/symptoms are not separable, or attributable to both TBI and a mental condition, VA should compare DC 8045 w/ other appropriate DCs
- Under its duty to maximize benefits, VA should attribute symptoms to DC that will give Vet higher evaluation
- But, DC 8045, Note 1, might require different result…



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Incorrectly Rating TBI & Mental Disabilities

"…. If the manifestations of two or more conditions cannot be clearly separated, assign a single evaluation under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions…."

- 38 C.F.R. § 4.124a, DC 8045, Note 1

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Incorrectly Rating TBI & Mental Disabilities

- Additionally, the regulations instructs that when there is overlap between TBI symptoms and mental symptoms:
  - Don't assign more than one evaluation based on same manifestation
  - If manifestations clearly separable, assign a separate evaluation under separate DC
    - 38 C.F.R. § 4.124a, DC 8045, Note 1

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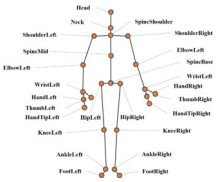
Incorrectly Rating TBI & Mental Disabilities

- When Vet has SC residuals of TBI and a separately diagnosed SC mental disability:
  - If none of Vet's symptoms can be clearly attributed to TBI or mental disability, argue that VA should assign the DC that provides Vet with the highest rating
  - If there are <u>any</u> symptoms that can be clearly attributed to the mental disability and different symptoms that can be clearly attributed to TBI, ensure Vet receives separate ratings
    - Argue that any remaining symptoms that can't be clearly attributed either disability should be attributed to the one that would result in the highest combined rating

Common VA Errors in Joint Disability Claims



Failing to Assign Minimal Compensable Rating for Painful Joint

- Limitation of motion is often a primary consideration when rating joint disabilities
  - The greater the limitation of motion, the higher the rating
- But, even if a SC joint disability does not cause loss of ROM, Vet is entitled to the minimum compensable rating for the joint if it's painful
  - 38 C.F.R. § 4.59

- Depending on the DC assigned, "objective" evidence of painful motion may be required (ex: DC 5003, degenerative arthritis)
  - *Petitti v. McDonald*, 27 Vet. App. 415 (2015)

Failing to Assign Minimal Compensable Rating for Painful Joint

- VA sometimes fails to assign a compensable rating for a joint disability that doesn't cause limitation of motion, even though the joint is painful
  - **Adjudicator erroneously fails to apply § 4.59**
  - **Adjudicator erroneously fails to address lay evidence of pain in the joint**
  - **Adjudicator erroneously rejects lay evidence of pain because it is not corroborated at all or not corroborated by a VA medical examiner**

Failing to Assign Minimal Compensable Rating for Painful Joint

- Obtain lay statement from Vet about pain in the joint
- Obtain lay statement from others who can describe their observation of Vet experiencing pain, especially if DC used to rate joint requires "objective" evidence
- If VA says painful motion may only be "objectively" established by VA examiner's findings on ROM testing, they are wrong!
  - ***Petitti v. McDonald*, 27 Vet. App. 415 (2015)**
    - "Objective" means "perceptible to persons other than an affected individual" – doesn't need to be a VA examiner

Failing to Adequately Consider and Develop Evidence of Functional Loss

- Functional loss = The inability to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. It may be caused by a number of factors, including pain.
  - 38 C.F.R. § 4.40
- The most common error related to VA's rating of joint disabilities is failing to properly address functional loss
  - Inadequate VA exams
  - Failure of VA adjudicators to properly address

Failing to Adequately Consider and Develop Evidence of Functional Loss

- Painful motion alone is NOT limitation of motion
  - **Pain throughout ROM does not mean Vet entitled to max rating**
  - **If Vet does not have actual limitation of motion for rating higher than 10%, pain must cause sufficient functional loss to get more than the minimum compensable rating under § 4.59**

Failing to Adequately Consider and Develop Evidence of Functional Loss

- When rating joint disabilities, VA is required to consider limitation of motion during flare-ups of pain and after repeated use over time
  - *DeLuca v. Brown*, 8 Vet. App. 202, 206 (1995); *Mitchell v. Shinseki*, 25 Vet. App. 32, 44 (2011)
- Accordingly, VA examiners must address whether there is significant additional limitation of motion:
  - **During flare-ups of pain**

    AND
  - **When the joint is used repeatedly over time (and after observed repetitions)**

Failing to Adequately Consider and Develop Evidence of Functional Loss

- If so, the examiner MUST QUANTIFY the additional loss of motion in terms of degrees
  - At what point in the ROM does Vet have functional loss due to pain, weakness, fatigue, etc.
- An examiner's opinion as to additional loss of motion or the point in ROM at which functional loss begins during flare-ups or after repeated use over time serves as the basis of Vet's disability rating
  - The most limited motion is used for the rating

Failing to Adequately Consider and Develop Evidence of Functional Loss

- Common errors:
  - Failing to assign the maximum rating based on limitation of motion when Vet unable to complete 3 repetitions
  - Failing to assign appropriate rating when there is "functional" ankylosis (Vet unable to move joint during flare-ups or after repeated use over time)
    - *Chavis v. McDonough*, 34 Vet. App. 1 (2021)
  - Failing to adequately address Vet's lay evidence of limitation of motion during flare-ups or after repeated use over time

Failing to Adequately Consider and Develop Evidence of Functional Loss

- VA exam inadequate because examiner fails/says it would be speculative to offer opinion on limitation of motion during flare-ups or after repeated use over time, simply because Vet not observed during flare-up or after repeated use over time
  - *Sharp v. Shulkin*, 29 Vet. App. 26 (2017); *Lyles v. Shulkin*, 29 Vet. App. 207 (2017)
- VA exam inadequate because opinion on limitation of motion during flare-ups / after repeated use over time inconsistent with Vet's lay statements

Failing to Adequately Consider and Develop Evidence of Functional Loss

- VA exam inadequate because any of the following tests, required by 38 C.F.R. § 4.59, were not conducted (and there is no indication they could not be conducted):
  - ROM tests in both passive and active motion
  - ROM tests in both weight-bearing and non-weight-bearing circumstances
  - The same ROM testing results for the opposite undamaged joint (presumably for comparison purposes)
    - *Correia v. McDonald*, 28 Vet. App. 158 (2016)

Failing to Assign Ratings Under Multiple DCs When Warranted

- A vet can't be compensated more than once for the same disability (rule against pyramiding)
  - 38 C.F.R. § 4.14
- But nothing precludes assignment of separate ratings for different conditions where none of the symptoms of the conditions overlap, such as:
  - Limitation of motion
  - Recurrent dislocation
  - Instability
  - Associated neurological conditions (particularly for spine disabilities)
  - Associated muscle disabilities

Failing to Assign Ratings Under Multiple DCs When Warranted

- VA recognizes that **knee** disabilities can be rated under multiple DCs
  - **DC 5260 - Limitation of flexion**
  - **DC 5261 - Limitation of extension**
  - **DC 5257 - Instability/recurrent subluxation**
    - VA OGC Precedential Opinion 23-97
  - **DC 5258/5259 - Meniscal condition**
    - Dislocated semilunar cartilage w/ frequent episodes of locking, pain, and effusion (DC 5258)
    - Symptomatic removal of semilunar cartilage (DC 5259)
      - *Lyles v. Shulkin*, 29 Vet. App. 107 (2017)

Failing to Assign Ratings Under Multiple DCs When Warranted

- Example: Vet has a SC knee disability, status post meniscectomy and repaired ACL tear, with symptoms of (1) pain, (2) swelling, (3) flexion limited to 40 degrees, (4) extension limited to 10 degrees, and (5) persistent instability with no prescription for an assistive device or brace. Vet should be rated:
  - **10% under DC 5260 for limited flexion**
  - **10% under DC 5261 for limited extension**
  - **10% under DC 5257 for ACL tear with instability**
  - **10% under DC 5259 for pain and swelling**

Failing to Assign Ratings Under Multiple DCs When Warranted

- **Hip** disabilities can also be rated under multiple DCs
  - **DC 5251 – limitation of extension**
  - **DC 5252 – limitation of flexion**
  - **DC 5253 – limitation of abduction, adduction, and/or rotation**
  - **DC 5254 – hip flail joint**

(a) Frontal section through the right hip joint (b) Anterior view of right hip joint, capsule in place (c) Posterior view of right hip joint, capsule in place

Failing to Assign Ratings Under Multiple DCs When Warranted

- **Shoulder** disabilities may be entitled to multiple ratings:
  - **DC 5201 – Limitation of motion**
    - Based on abduction (lifting from the side) OR elevation (lifting in front) (whichever is the most limited ROM)
  - **DC 5202 – Impairment of humerus**
    - Recurrent dislocation with guarding
    - Malunion with deformity
    - Loss of head (flail shoulder)
    - Nonunion, etc.

Failing to Assign Ratings Under Multiple DCs When Warranted

- **But don't forget the amputation rule:**
  - **Even if multiple ratings may be appropriately assigned to a single joint, the combined rating cannot exceed the rating for amputation at the elective level, were the amputation to be performed**
    - 38 C.F.R. § 4.68
    - Ex: Max rating for knee = 60%

Failing to Assign Ratings Under Multiple DCs When Warranted

- Common Errors:
  - **VA fails to assign DCs that compensate Vet for all symptoms of a knee disability, particularly when Vet has had a meniscectomy (total or partial)**
    - Any associated symptom not compensated under another DC will warrant assignment of a 10% rating under DC 5259
    - Limitation of motion and instability associated with meniscectomy often warrant ratings under different DCs
  - **VA fails to assign separate ratings for limitation of motion and recurrent dislocation of shoulder**

Failing to Discount the Ameliorative Effects of Medication

DC 8100 – MIGRAINES

- **50%:** Very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability
- **30%:** Characteristic prostrating attacks occurring on average once a month over last several months
- **10%:** Characteristic prostrating attacks averaging one in 2 months over last several months
- **0%:** Less frequent attacks

Hypo

- Vet took daily medication to manage the severity and frequency of her headaches
- She still had a prostrating headache about every other month
- VA found increased rating not warranted based on the frequency, severity, and duration of symptoms
- VA denied a rating higher than 10%, because Vet was able to properly manage symptoms with the use of medication and did not require any significant time off from work due to her disability

Poll #5

- Is VA's denial of a rating higher than 10% correct?

A. Yes

B. No

C. Not Sure

Failing to Discount the Effects of Medication

NO!

- VA may not deny entitlement to a higher rating on the basis of relief provided by medication when those effects are not specifically contemplated by the rating criteria
  - *Jones v. Shinseki*, 26 Vet. App. 56 (2012)

Failing to Discount the Effects of Medication

- If a DC does specifically contemplate the effects of medication, then VA can rate the condition based on its severity when Vet is medicated
  - **Ex: hypertension, most heart diseases, mental disabilities, GERD (new DC)**
    - *McCarroll v. McDonald*, 28 Vet. App. 267 (2016) – no requirement to discount ameliorative effects of medication when evaluating hypertension, because medication is referenced in rating criteria

Failing to Discount the Effects of Medication

- If a DC does not specifically contemplate the effects of medication, VA is required to discount the ameliorative effects of medication when assigning a rating
  - **Ex: migraines, musculoskeletal conditions**
    - *Ingram v. Collins*, 38 Vet. App. 130 (2025) NVLSP Court Win
      - Court applied *Jones* and *McCarroll* to the evaluation of musculoskeletal disabilities for which DC does not reference medication
      - BVA must discuss and discount the ameliorative effects of medication used to treat Vet's disabilities when evaluating severity

Failing to Discount the Effects of Medication

- VA often assigns ratings based on medical evidence obtained while Vet was medicated – Rx or OTC
  - **If evidence indicates that Vet regularly takes medication to treat a disability, unless examiner expressly states Vet was not medicated at time or exam or that findings reflect severity of condition when unmedicated, report should be considered to reflect the severity of the disability when medicated**
  - **If so and relevant DC does not mention medication, VA errs if it assigns rating based on findings in the exam report**

Advocacy Advice

- Review the DC at issue for any reference to medication
- If a DC does not specifically mention anything about medication, VA is required to discount the favorable effects of medication
- Argue that VA must rate condition based on how bad it would be w/out medication, and obtain a medical opinion if necessary
- Point to evidence in the record showing the severity when Vet is not medicated
- Submit lay statements about symptoms when Vet is off meds

Common VA Errors in TDIU Claims

Hypo

- 2018: Vet retired based on age
- 2025: RO grants SC for PTSD at 70%
- 2025: RO denied TDIU because Vet retired due to age and was not SC at time of retirement. RO also noted Vet was 80

Poll #6

- Is the TDIU denial correct?
  - A. No, all that matters is current severity
  - B. Yes, Vet not SC for PTSD in 2018
  - C. Yes, retirement not due to disability
  - D. Yes, he was 80

Answer

- All that matters is whether Vet can work now due to SC disabilities
- Age and reasons why he left employment are not relevant

Considering Factors That Are Off Limits

- Sometimes, when adjudicating a TDIU claim, VA will consider factors that it should not consider
- VA can consider:
  - The effect SC disabilities have on Vet's ability to work
  - Educational background
  - Occupational background

Considering Factors That Are Off Limits

- VA can't consider:
  - Vet's age

  - Effect of NSC disabilities on Vet's ability to work

Considering Factors That Are Off Limits

- VA can't consider (cont'd):
  - Reason Vet left prior employment
    - If Vet left prior employment because of retirement or other reasons unrelated to SC disabilities, VA cannot deny solely for that reason
    - Relevant inquiry is whether SC disabilities currently render Vet unemployable
      - *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993)

Failing to Consider Extraschedular TDIU

- Under 38 C.F.R. § 4.16(a), VA may assign TDIU when a Vet is unable to secure or follow a substantially gainful occupation as a result of SC disabilities, AND
- Vet has either:
  1) ONE SC disability rated 60% or higher; OR
  2) MULTIPLE SC disabilities, with at least one rated 40% or higher AND a combined rating of at least 70%

But that's not the only way a Vet can qualify for TDIU…

Failing to Consider Extraschedular TDIU

- If the percentage requirements of 38 C.F.R. § 4.16(a) are not met:
  - VA should consider Vet's eligibility for TDIU under § 4.16(b) – Extraschedular
  - All Vets who are unemployable because of SC disabilities shall be rated totally disabled

Denying Claim Because Vet Didn't File VA Form 21-8940

- VA Form 21-8940, Veteran's Application for Increased Compensation Based On Unemployability is a form Vet's can use to apply for TDIU
  - It elicits info about SC disabilities that cause unemployability, and employment and educational history
- VA sometimes denies TDIU solely because Vet didn't return VA Form 21-8940
- But even if that form is not returned, VA must still make a decision on TDIU based on the available evidence of record
  - *Rice v. Shinseki,* 22 Vet. App. 447 (2009)

Assigning Incorrect Effective Date for TDIU

- VA sometimes mechanically assigns the effective date for TDIU as the date it received Form 21-8940
- Effective date can be based on date of pending earlier claim for SC/increased rating, if the disability at issue in the claim at least in part prevented Vet from securing or following a substantially gainful occupation
  - Effective date should be the later of (1) the date of that claim or (2) the date the SC disability caused unemployability

Failing to Adjudicate Reasonably Raised TDIU Claim

- VA sometimes fails to address Vet's entitlement to TDIU when assigning an initial disability rating or adjudicating an increased rating claim, if Vet did not expressly claim entitlement to TDIU, even though the issue is reasonably raised by the record

Failing to Adjudicate Reasonably Raised TDIU Claim

- TDIU is part of any claim for a higher initial rating or an increased rating (or an initial SC claim) when evidence of unemployability related to the underlying condition is submitted during the pendency of the claim
  - ***Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)**
  - ***Rice v. Shinseki*, 22 Vet. App. 447 (2009)**

Failing to Adjudicate Reasonably Raised TDIU Claim

- TDIU claim may reasonably raised if Vet's c-file contains any of the following:
  - **Letter from a psychiatrist stating SC PTSD symptoms prevent Vet from getting and keeping a job**
  - **Statement from most recent employer that explains the reasons Vet was fired, and it is apparent those reasons are related to Vet's SC condition(s)**
  - **VA exam report stating Vet's SC condition(s) prevents Vet from working full-time**

Failing To Explain "Sedentary Employment"

- Vets are routinely denied TDIU based on VA medical opinions in which the examiner opines that Vet is capable of "sedentary" or "light" work
- But, the concept of sedentary work is absent from 38 C.F.R. § 4.16
- CAVC addressed this issue in *Withers v. Wilkie*, 30 Vet. App. 139 (2018)

Failing To Explain "Sedentary Employment"

- CAVC holdings in *Withers*:
  - **If Vet's ability to perform sedentary work is a basis for VA's denial of TDIU, the meaning of sedentary work must be determined from the medical opinion in which term is used. VA must explain:**
    - the meaning of sedentary work, if not apparent from the discussion of the opinion, and
    - how the concept of sedentary work factors into the Vet's overall disability picture and vocational history, and the Vet's ability to secure or follow a substantially gainful occupation

Failing To Explain "Sedentary Employment"

- CAVC noted:
  - **"Unless the concept of sedentary work is clarified through VA's regulatory process, the meaning and relevance of the term will have to be discerned on a case-by-case basis from the medical and lay evidence presented and in light of each veteran's education, training, and work history."**
    - *Withers v. Wilkie*, 30 Vet. App. 139 (2018)

Overlooking the Effects of Medication for SC Disabilities

- VA should assess the effects, or side effects, of medication for SC disabilities, on Vet's employability
  - *Moyer v. Derwinski*, 2 Vet. App. 289, 294 (1992)
- VA often fails to consider these effects, so be sure to explain to VA how meds impact Vet's ability to work

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Failing To Properly Consider SMC(s)

- Vet can be awarded SMC(s) based on:
  1. **ONE SC disability rated 100% (which could be one SC disability that alone warrants TDIU)**
     - *Bradley v. Peake*, 22 Vet. App. 280 (2008)

  AND

  2. **Additional SC disability (or disabilities) separate from the first disability that is (or are) independently rated at 60% or more (or that combine to a 60% rating or more)**

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Failing To Properly Consider SMC(s)

- VA sometimes grants TDIU based on multiple SC disabilities, without addressing whether one of the SC disabilities alone would warrant TDIU
- Other times, VA fails to address TDIU because Vet has a combined 100% rating
- In these scenarios, if one of Vet's SC disabilities alone might qualify for TDIU, and other SC disabilities combine to at least 60%, argue that VA should address whether a single SC disability qualifies for TDIU and SMC(s) is warranted
  - **If possible, obtain a supporting opinion from a vocational expert**

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Questions?

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NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Identifying and Overcoming Other Common VA Errors (Cont'd)

141

Renée Burbank

- NVLSP Director of Litigation
- VBM Author
- Former Clinical Teaching Fellow at Yale Law School's Veterans Legal Services Clinic
- Former DOJ Litigator

NVLSP 142

VA Errors: PCAFC and Other VHA Benefits

NVLSP 143

VHA ≠ VBA

Image by Lorie Shaull (CC 2.0 generic)

NVLSP 144

Representing Claimants for VHA benefits

1. **Not a uniform system**
2. **Obtaining decisions and records is harder**
3. **Lots of unanswered legal questions ripe for appeal**

NVLSP 145

Program for Comprehensive Assistance for Family Caregivers

NVLSP 146

PCAFC Eligibility

- **7 eligibility requirements:**
  1. **Veteran or service member** undergoing medical discharge
  2. **Serious injury** incurred or aggravated in the line of duty
  3. Needs in-person personal care services for at least **6 continuous months** b/c unable to perform ADL OR Need for supervision, protection or instruction
  4. **In best interest** of individual to participate
  5. Care would be provided by **family caregiver**
  6. Receives care **at home**
  7. Has **ongoing care from Primary Care Team**

NVLSP 147

Activities of Daily Living

- ***Inability to perform an ADL*** **means Vet or service member requires personal care services each time they complete one or more of the following:**
  1. Dressing or undressing oneself
  2. Bathing
  3. Grooming oneself in order to keep oneself clean and presentable
  4. Adjusting any special prosthetic or orthopedic appliance, that by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid)
  5. Toileting or attending to toileting
  6. Feeding oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition
  7. Mobility (walking, going up stairs, transferring from bed to chair, etc.)

NVLSP 148

Instrument Part A - ADLs:

EATING **(1) Eating:** The ability to use suitable utensils to bring food and/or liquid to the mouth and swallow food and/or liquid once the meal is placed before the person.	○ Independent ○ Setup or cleanup assistance ○ Supervision or touching assistance ○ Partial/moderate assistance ○ Substantial/maximal assistance ○ Dependent ○ Person refused ○ Not applicable – Person does not usually do this activity ○ Not attempted due to **short-term medical condition or safety concerns**
GROOMING **(2) (a) Oral Hygiene:** The ability to use suitable items to clean teeth. [Dentures (if applicable): The ability to insert and remove dentures into and from the mouth, and manage denture soaking and rinsing with use of equipment.]	○ Independent ○ Setup or cleanup assistance ○ Supervision or touching assistance ○ Partial/moderate assistance ○ Substantial/maximal assistance ○ Dependent ○ Person refused ○ Not applicable – Person does not usually do this activity ○ Not attempted due to **short-term medical condition or safety concerns**
(2) (b) Upper Body: The ability to [illegible] hands.	○ Independent ○ Setup or cleanup assistance ○ [illegible]

NVLSP 149

Supervision, Protection, or Instruction

NVLSP Court Win

- ***Veterans Warriors, Inc. v. Sec'y of VA*, 29 F.4th 1320 (Fed. Cir. 2022)**
  - invalidated part of regulation related to SPI definition – "personal safety" and "daily basis"
- No replacement language yet

NVLSP 150

Appeals

- ***Beaudette v. McDonough*, 93 F.4th 1361, 1369 (2024)**

NVLSP Court Win

  - "We conclude the Beaudettes and other similarly situated veterans and caregivers have an indisputable right to judicial review of Caregiver Program decisions that do not affect the furnishing of support or assistance."

NVLSP 151

Image: *Alice Through the Looking Glass* by Colin Smith (CC 2.0 Share Alike)

NVLSP 152

Where to file a claim?

Health Care
- VAMC enrollment coordinator
- Online or Health Eligibility Center

PCAFC
- VAMC CSP team
- Online or PCAFC-specific PO Box in Janesville

Reimbursements for Emergency Medical Care
- Previously Vet's VAMC; now VA Consolidated Payment Center
- No online option

NVLSP 153

Veteran Reimbursement

VA Form 10-320 (Sept. 2024)

OMB Control No. 2900-0940
Estimated Burden: 10 min
Expiration Date: 03/31/2027

Department of Veterans Affairs

VETERAN REIMBURSEMENT CLAIM FORM

VA BURDEN STATEMENT: An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current valid OMB control number. The OMB control number for this project is 2900-0940, and it expires 03/31/2027. Public reporting burden for this collection of information is estimated to average 10 minutes per respondent, per year, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate and any other aspects for reducing the burden, to VA Reporting Clearance Officer at VACOPaperworkReduAct@va.gov. Please refer to OMB Control No. 2900-0940 in any correspondence. Do not send your completed VA Form 10-320 to this email address.

PRIVACY ACT INFORMATION: The information requested on this form is solicited under authority of Title 38 U.S.C. and will be used to assist us in determining your entitlement to reimbursement for services rendered. It will not be used for any other purpose. The information collected will be part of the system of records identified as 24VA19 "Patient Medical Record - VA" as set forth in the Compilation of Privacy Act Issuances via online GPO access at: http://www.gpoaccess.gov/privacyact/index.html. Disclosure is voluntary. However, failure to furnish the information will result in our inability to process your claim. Your failure to furnish this information will have no adverse effect on any other benefit to which you may be entitled.

INSTRUCTIONS: Veterans may use this form to request reimbursement for out-of-pocket emergency prescription expenses from a pharmacy that is not in VA's network and for out-of-pocket expenses for unauthorized emergency care at non-VA facilities.

In addition to meeting certain clinical and administrative requirements, to receive payment, all individuals and entities must be enrolled as a vendor with the VA. Information on how to become a vendor and where to submit this completed form is available at: http://www.va.gov/COMMUNITYCARE/programs/veterans/File-a-Claim.asp

NVLSP 154

Where to send your claim

Send your signed form and supporting documents to the regional VA Consolidated Payment Center for your Veterans Integrated Service Network (VISN).

Find your VISN on our Veterans Integrated Service Networks website

If you're in VISN 1 to 8

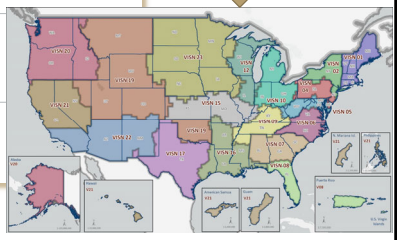
Eastern Region VA Consolidated Payment Center
ATTN 11 FB
PO Box 5005
Bay Pines, FL 33744

If you're in VISN 9 to 16

Central Region VA Consolidated Payment Center
PO Box 320394
Flowood, MS 39232

If you're in VISN 17 to 23

Western Region VA Consolidated Payment Center
PO Box 1004
Ft. Harrison, MT 59636



NVLSP 155

ADVOCACY ADVICE

- Document, document, document
  - You won't be able to check VBMS
- Double check before submitting
- Be prepared for turnaways
- Don't give up!

NVLSP 156

"I got a decision." Now what?

- Where is the decision?
- What is the record?
- What are your options?

NVLSP 157

VA Caregiver Support

[redacted] 2022

[redacted]

Dear [redacted]

Thank you for your interest in the Program of Comprehensive Assistance for Family Caregivers (PCAFC). We are unable to approve your application at this time.

During our conversation on [redacted] we discussed that you do not meet eligibility criteria for PCAFC because:

- The Veteran or Service member is not in need of personal care services for a minimum of six continuous months based on an inability to perform an activity of daily living (ADL), or a need for supervision, protection or instruction.

For more information on this determination, we encourage [redacted] to review their healthcare record.

If you disagree with a PCAFC decision

If you disagree with this decision, you have the right to request Veterans Health Administration (VHA) review, or appeal to the Board of Veterans' Appeals (Board). Enclosed is information about review and appeal options available to you, including your right to appeal to the Board.

Sample CG Decision*

*(no central template for older decisions)

NVLSP 158

Getting the Record

Blue Button Download My Data — Select Type of Report

VA Blue Button Report ›
View, print, and download the personal health information you want.

VA Health Summary ›
You can view, print, or download a health summary from your VA medical record. It includes allergies, medications, recent lab results and more. This is available in a standard file format that can be read by other computer systems.

VA Medical Images and Reports ›
Registered users with a Premium account can view, print, or download their VA Medical Images and Reports with My HealtheVet.

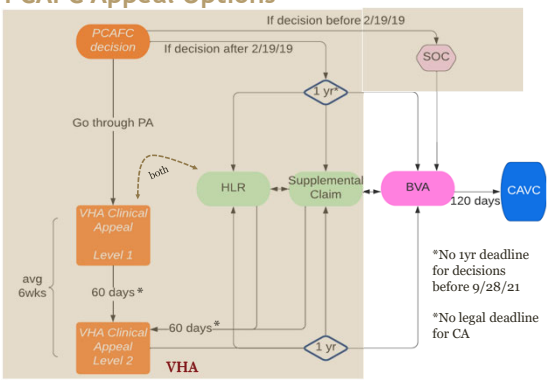
Electronic Record Sharing Options ›
Veterans with a Premium account can manage their options for sharing their electronic health record with participating non-VA community providers.

** CAPRI or My HealtheVet

- CAPRI requires individual authorization per client
- PCAFC decisions made in CARMA – no access for advocates
- Clinical appeals made in PATS-R – also no access

NVLSP 159

PCAFC Appeal Options



*No 1yr deadline for decisions before 9/28/21

*No legal deadline for CA

NVLSP 160

Substantive PCAFC Issues

NVLSP 161

Substantive PCAFC Issues

- Requiring "moderate assistance"
- Breaking down ADLs
- SPI: ¯_(ツ)_/¯
- Duty to Assist
- Benefit of the Doubt
- Looking at the whole record
- Appeals: joint claimants and deceased veterans

NVLSP 162

Inadequate Reasons or Bases for BVA Decisions

NVLSP 163

Inadequate "Reasons or Bases"

- BVA must provide a written statement of its findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record
  - 38 U.S.C. § 7104(d)(1)
- BVA errs when it doesn't provide an adequate explanation for how it made a finding or came to a conclusion
  - This is the most common type of BVA error

NVLSP 164

Common "R&B" Errors

1. BVA failed to explain why it overlooked, rejected or downgraded favorable evidence
   - Why unfavorable evidence is more probative than favorable evidence
   - Why it relied on an unfavorable medical opinion, including one that did not address a prior favorable medical opinion
   - Misrepresentation of favorable evidence

NVLSP 165

Common "R&B" Errors

2. BVA erred in its assessment of medical evidence
   - Rejected favorable opinion because examiner didn't review VA c-file
   - Rejected favorable opinion because it is based on history given by Vet
   - Rejected favorable opinion because it isn't clear examiner performed a certain test, knew a certain fact, etc., without seeking clarification from examiner
   - Relied on negative opinion that did not address relevant lay evidence

NVLSP 166

Common "R&B" Errors

3. BVA erred in its assessment of relevant lay evidence
   - Failed to state its reasons for finding that lay evidence was not credible or had little or no probative value
   - Rejected favorable lay evidence solely due to lack of contemporaneous documentary evidence
   - Failed to address lay evidence of continuity of symptomatology

NVLSP 167

Common "R&B" Errors

4. BVA failed to consider a claim or legal theory reasonably raised by the record
   - Secondary SC, TDIU, SMC, etc.
5. BVA rejected prior RO or BVA favorable findings for AMA claims without explaining why such findings were clearly and unmistakably erroneous
6. BVA failed to adequately define the rating criteria on which it relied in denying benefits

NVLSP 168

Common "R&B" Errors

7. BVA failed to explain why Vet is not entitled to a VA exam (or why RO didn't err by failing to provide one)
8. BVA failed to address the severity of a disability absent the ameliorative effects of medication, when the evidence relied upon reflects the severity while on medication and the DC does not contemplate medication

NVLSP 169

Overcoming R&B Errors

- When BVA provides inadequate R&B for its decision, the claimants can:
  - Appeal to CAVC w/in 120 days of BVA decision
    - Good option if Vet does not have strong new and relevant evidence
  - File supplemental claim w/in 1 year of BVA decision
    - Good option if Vet can get new and relevant evidence strong enough to outweigh negative evidence BVA relied on
  - Pursue both of the above options simultaneously

NVLSP 170

NVLSP

Effective Oral Advocacy Before the BVA

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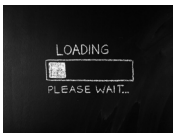
Types of Hearings – AMA

- Central Office, Virtual, and Video
- Average days pending for AMA BVA Hearing – 791 days (FY 2025)



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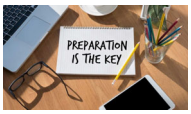
Prepare Ahead of Time!

- **Review relevant VBM sections**
- **Read relevant statutes, regs, court decisions, VA manual provisions**
- **Know the elements of the claim, so you can obtain effective testimony from the claimant**
- **Be familiar with the facts/evidence**
  - Review the file
  - Speak with the claimant



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Prepare Ahead of Time!

- **Talk to claimant:**
  - Explain how the hearing will work
  - Explain it is non-adversarial (and what that means)
  - Go over what you are going to ask
    - May or may not be specific questions, what to expect generally is important
  - Explain that this is NOT a time to discuss other issues— just those on appeal
  - Ask if they have additional evidence to submit

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Preparing Ahead of Time

- **Outline your hearing plan**
  - Write brief opening and closing statement (more on this later)
  - Write out questions you plan to ask, or list issues you want to address, based on what you learned from Vet during prep session
  - Plug in the relevant pieces of evidence you identified in the record
    - After Vet answers a question, you can support credibility by pointing out the corroborating evidence of record

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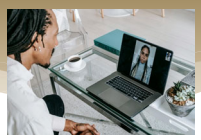
Virtual Hearing Preparation



- **Have claimant do a test run with BVA ahead of time**
- **The day before the hearing make sure claimant:**
  - Has the hearing link and possibly resend it
  - Knows to log on 15 minutes before the hearing
- **Have claimant's phone number handy in case you need to remind Vet to log in or Vet has technical difficulties**

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At The Hearing

- **Dress professionally (business attire), even for video/virtual hearing**
  - Shows you appreciate the importance of the hearing and respect the hearing VLJ
  - Will lend credence / weight to your words
  - Instills confidence in self
- **Encourage claimant to dress professionally**

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At The Hearing

- **Opening Statement**
  - State the issues – entitlement to SC / increased rating for what disabilities; other VA benefit
  - Briefly explain why the benefit is warranted
    - Discuss how elements of claim are met
    - Note prior favorable findings
    - Note relevant law
  - If evidence doesn't support award of benefits, explain why remand is required (AMA - correct RO DTA error; Legacy – additional development, etc.)

At The Hearing

- **Ask questions to elicit testimony in support of claim**
  - In-service event, incident, symptoms
  - Continuity of symptoms
  - Current symptoms, functional loss, effect on ability to work
- **Don't waste time on questions about issues for which VA already made favorable findings**
- **Ask leading questions**
  - Provide the relevant information in your question and have the claimant provide a "yes" or "no" response

At The Hearing

- **Have a concise summary for the VLJ**
- **Submit supporting documents or statements not already of record**
- **For AMA cases, Vet will automatically have 90 days after date of hearing to submit evidence**
  - For Legacy cases, ask to keep the record open (30 or 60 days) if you need time to submit additional evidence

At The Hearing

* **Read the following statement in your closing:**
  * "Section 3.103(d)(2) of Title 38 of the Code of Federal Regulations provides that: 'It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position.' Therefore, we request that if the evidence of record is not sufficient to grant the claim(s), you advise us if there is additional evidence the claimant should submit that would support their position."

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At The Hearing

* **Remember – you control the hearing**
* **Preparation is key – don't ask a question if you don't know the answer**
* **A hearing is not the place for the Vet to vent**
* **Be flexible. You may need to ask follow-up questions of Vet if Vet provides an answer harmful to their case**

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At The Hearing

* **Try to anticipate any questions the VLJ may ask the witness (ex. Why did you wait 30 years to file a claim?)**
  * Make sure Vet is prepared for these questions
  * If Vet has a good answer, then beat VLJ to the punch and ask the question first

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At The Hearing

- If it would support the claim, have other witnesses provide testimony (spouse, children, friends, etc.)
- If possible, talk to your witnesses ahead of time and prepare them for the types of questions you will ask
- Hearings do not have to be long to be effective

When to Avoid a Hearing

- If the issue at hand is purely a matter of law; no clarification of the facts is needed
- If you are concerned your witness may not present as credible (ex: in prior conversations, your client has contradicted themselves, easily gets off topic even after re-directing them)
- But, since the claimant has the right to a hearing, you must discuss it with them prior to withdrawing a hearing request

Other Considerations

- Under the AMA, the VLJ who conducts the hearing does not need to be the same VLJ who makes the decision and usually it is not
  - *Frantzis v. McDonough*, 104 F.4th 262 (Fed. Cir. 2024)
- This means the VLJ who makes the decision will be reading a transcript of the hearing

Other Considerations

- Wait times for decisions are SIGNIFICANTLY longer for hearing cases, stretching into years
- Vet has the right to record the hearing, but should let VLJ know before hearing begins
- If withdrawing a hearing, you can submit evidence within 90 days of the hearing withdrawal request