

The Presumptions of Soundness and Aggravation

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AGENDA




- * Presumption of Soundness
 - * 4 elements
 - * Rebutting the Presumption of Soundness
- * Presumption of Aggravation
- * Hypotheticals
- * Final Reminders

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THE PRESUMPTION OF SOUNDNESS

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THE PRESUMPTION OF SOUND CONDITION

* ... every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service **except** as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, **or** where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

* 38 U.S.C. § 1111 (emphasis added)

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PURPOSE OF THE PRESUMPTION



- * When no preexisting medical condition is noted on a veteran's induction exam, there is a rebuttable presumption that the Vet is sound in every respect
- * Presumption prevents VA from treating in-service medical problems as being part of a pre-service disease or disability and denying SC on that basis
- * *Kinnaman v. Principi*, 4 Vet. App. 20, 26-28 (1993)

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PURPOSE OF THE PRESUMPTION



- * Makes it harder for VA to say that a claimed disability is not service-connected because it existed prior to service
- * Provides a way to establish the “in-service disease or injury” element of service connection

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LIMITATIONS OF PRESUMPTION




- * Does **NOT** provide a mechanism for establishing the third element of service connection – nexus between service and current disability
- * Even if presumption of soundness applies and is not rebutted, Vet must still have evidence linking the in-service disease or injury to the current disability

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4 ELEMENTS OF THE PRESUMPTION OF SOUNDNESS

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Presumption of Soundness: 4 Elements



1. Former service member meets the statutory definition of “veteran”
2. There is evidence that the claimed disability existed in or was caused by service
3. An exam was performed at entrance
4. The claimed disability was not “noted” during the entrance exam

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ELEMENT 1: VETERAN STATUS



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ELEMENT 1:

VETERAN STATUS



* Claimant must meet the statutory definition of “veteran”

* Because 38 U.S.C. § 1111 uses the word “veteran,” it only applies to claimants who meet the definition of “veteran” under 38 U.S.C. § 101

* *Smith v. Shinseki*, 24 Vet. App. 40 (2010)

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13

ELEMENT 1:

VETERAN STATUS




* “Veteran”: person with “active military, naval, air, or space service”


* “Active military, naval, air, or space service”:

1. Regular active duty
2. Active duty for training (ADT) during which Vet incurred or aggravated an injury or disease
3. Inactive duty training (IADT) during which Vet incurred or aggravated an injury OR suffered a heart attack or stroke

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14

ELEMENT 1:

VETERAN STATUS




* Presumption of soundness can apply to periods of ACDUTRA and INACDUTRA, if:

- * Vet served on regular active duty at any time, or
- * Vet already SC for a disability incurred during period of ADT or IADT

* Other 3 requirements must still be met with respect to the particular period of service at issue

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ELEMENT 1:
VETERAN STATUS



* If Vet has **only** ADT and/or IADT, and has not already been awarded SC for a disability incurred in or aggravated by a period of ADT or IDT, Vet is not a “veteran” under 38 U.S.C. § 101 and cannot benefit from the presumption of soundness


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ELEMENT 2: EVIDENCE THAT THE
CLAIMED DISABILITY EXISTED IN
OR WAS CAUSED BY SERVICE



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ELEMENT 2:
EXISTED IN OR CAUSED
BY SERVICE




* There must be some evidence that the claimed disability existed in or was caused by something that happened in service

* “[B]efore the presumption of soundness is for application, there must be evidence that a disease or injury that was not noted upon entry to service manifested or was incurred in service.”

* *Gilbert v. Shinseki*, 26 Vet. App. 48 (2012)

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18


ELEMENT 2:
EXISTED IN OR CAUSED
BY SERVICE



- * Examples of evidence that shows that the claimed disability existed in or was caused by service:
 - * Vet's lay statements that she experienced symptoms of depression in service
 - * Even better if corroborated by lay statements from others
 - * STRs showing complaints of knee pain

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ELEMENT 2:
EXISTED IN OR CAUSED
BY SERVICE



- * Post-service medical opinion that Vet's back problems are related to MOS duties
- * DD Form 214 documenting that a Vet with ischemic heart disease served in Vietnam
- * In-service exposure to Agent Orange is considered an "injury"

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ELEMENT 3: AN EXAMINATION
WAS PERFORMED AT ENTRANCE



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ELEMENT 3:
EXAM PERFORMED AT ENTRANCE

* Only applies when Vet was actually examined at entrance

* “Plainly, the statute requires that there be an examination prior to entry into the period of service on which the claim is based In the absence of such an examination, there is no basis from which to determine whether the claimant was in sound condition upon entry into that period of service on which the claim was based.”

* *Smith v. Shinseki*, 24 Vet. App. 40 (2010)

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ELEMENT 3:
EXAM PERFORMED AT ENTRANCE

- * Some Vets are unlikely to have undergone an exam at entrance to service, so the presumption of soundness would not likely apply to them

* Vets who served on ACDUTRA or INACDUTRA

* Exams usually not performed at the beginning of these periods of service

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22

ELEMENT 3:
EXAM PERFORMED AT ENTRANCE

* Vets unlikely to have undergone an exam at entrance to service (cont'd)


* Reservists and National Guard members called to active duty in support of OIF/OEF, Desert Storm, etc.


* In many cases, their most recent periodic exams were sufficient for the military, so new exams were not provided at the beginning of active duty

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ELEMENT 3:

EXAM PERFORMED AT ENTRANCE






* What can you do in this situation?

- * Argue that the pre-deployment exams or most recent periodic exams should be considered in these cases
- * Closer in time to start of active service, the more likely to succeed

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35

SURVEY #1



* What if there was an entrance exam, but it was lost or destroyed?


- A. Yes – presumption applies
- B. No – presumption does not apply
- C. It depends – case by case basis



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ANSWER



A

- * The presumption of soundness **DOES APPLY** if there was an entrance exam, but it was lost or destroyed
- * “[T]he presumption applies even when the record of a veteran’s entrance examination has been lost or destroyed while in VA custody.”
- * *Quirin v. Shinseki*, 22 Vet. App. 390 (2009)

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ELEMENT 3:
EXAM PERFORMED AT ENTRANCE

- * Regardless of why STRs are missing (NPRC fire, VA negligence), be sure to have Vet submit statement that he or she was examined at entrance and was not found to have claimed disability

- * Lays the foundation for application of the presumption of soundness



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ELEMENT 4:
CLAIMED DISABILITY WAS NOT
“NOTED” DURING THE ENTRANCE
EXAM

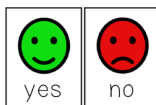


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SURVEY #2


* Is a “history” of a condition listed on an entrance exam report enough to be considered “noted”?



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ANSWER



- * Claimed condition not “noted” on entrance exam
 - * “History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception.”
 - * 38 C.F.R. § 3.304(b)(1)

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ELEMENT 4: CLAIMED DISABILITY NOT “NOTED” DURING ENTRANCE EXAM

- * Similarly, if Vet reports a history of disease at time of entrance, but examiner does not list current diagnosis of condition on exam report, the presumption of soundness applies
 - * Ex: Although Vet reported childhood asthma at the time of entrance, the examiner did not “note” a current diagnosis of asthma, so the presumption of soundness applied
 - * *Crowe v. Brown*, 7 Vet. App. 238 (1994)
- * However, Vet’s report may be considered in determining whether the presumption of soundness has been rebutted
 - * *Horn v. Shinseki*, 25 Vet. App. 231 (2012)


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SURVEY #3


- * If on an entrance exam a soldier is noted to have hearing loss, but it is not severe enough to meet VA’s definition of a hearing loss “disability,” is Vet presumed sound?



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ANSWER



- * Vet entitled to the presumption of soundness for hearing loss when hearing loss is found during the entrance exam, but it is not severe enough to meet VA's definition of a hearing loss "disability" under the VA rating schedule
- * *McKinney v. McDonald*, 28 Vet. App. 15 (2016)


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ELEMENT 4: CLAIMED DISABILITY NOT "NOTED" DURING ENTRANCE EXAM

- * A condition must actually be shown on exam or observed (if the condition is asymptomatic) for the condition to be considered "noted"
- * Presumption of soundness **did not apply** to Vet's claim for SC for bunions that were asymptomatic at the time of induction but were "noted" in the induction medical exam report and an accompanying orthopedic exam report
- * 38 U.S.C. § 1111 does not limit "defects... noted at the time of the examination, acceptance, and enrollment" only to conditions symptomatic at that time
- * *Verdon v. Brown*, 8 Vet. App. 529, 535 (1996)

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RECENT CASE: AMEZQUITA v. COLLINS



- * Facts
- * Prior to service, Vet had a Bankart repair surgery on his left shoulder to repair a labral tear caused by a motor vehicle accident
- * Eight months later, in June 2003, he underwent his service-entrance exam
- * Under the "summary of defects and diagnoses" section of the exam report, the examiner noted the repair surgery and that Vet was "completely asymptomatic" with "no physical limitations." Vet was cleared for service entry.

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RECENT CASE:
AMEZQUITA v. COLLINS



- * **Facts (cont'd)**
 - * Two days prior to his separation, VA evaluated Vet for an injury to his left shoulder because he reported feeling his shoulder pop while lifting a heavy bag
 - * Examiner diagnosed a left shoulder sprain
 - * VA later denied Vet SC for a left shoulder disability, finding that he had surgery on the shoulder prior to service and there was no evidence the left shoulder condition worsened due to service.

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RECENT CASE:
AMEZQUITA v. COLLINS



- * **Facts (cont'd)**
 - * BVA held that the presumption of soundness did not attach because, although Vet's shoulder was completely asymptomatic at entrance, the examiner noted the preexisting repair in the defects section of the entrance exam report. BVA further found there was no aggravation of the pre-existing disability.
 - * CAVC affirmed, concluding that BVA had a plausible basis for finding the Vet "unsound upon service entry."
 - * Vet appealed to Federal Circuit

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RECENT CASE:
AMEZQUITA v. COLLINS



- * **Federal Circuit's Holding:**
 - * **Affirmed CAVC decision and agreed with CAVC's prior holding in Verdon**
 - * There was no error in CAVC's interpretation that an asymptomatic condition can be noted as a preexisting defect under § 1111
 - * Nothing in 38 U.S.C. §§ 1110 or 1111 limits "defects ... noted at the time of the examination, acceptance and enrollment" to only conditions symptomatic at that time
 - * *Amezquita v. Collins*, 135 F.4th 1369 (Fed. Cir. 2025)

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ELEMENT 4: CLAIMED DISABILITY NOT “NOTED” DURING ENTRANCE EXAM



- * Notation of a **pre-service injury** is not necessarily notation of the **current disability/disease** for which SC is being sought
- * Vet fractured ankle prior to service. Ankle “fracture,” but not “arthritis,” was noted on entrance exam. Ankle “arthritis” was diagnosed in service.
- * Presumption of soundness applied to “arthritis,” because it was not noted on entrance exam report
- * *Lichtenfels v. Derwinski*, 1 Vet. App. 484 (1991)

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ADVOCACY ADVICE



- * Pay close attention to the specific condition noted on the entrance exam and the Vet's current diagnosis
 - * If current diagnosis differs from condition noted on entrance exam, even if similar or in the same area of the body, and VA finds presumption of soundness does not apply...
 - * Seek review, point out difference between conditions, and argue Vet should be presumed sound with respect to the currently diagnosed condition, citing *Lichtenfels*

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REBUTTING THE PRESUMPTION OF SOUNDNESS

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REBUTTING THE PRESUMPTION OF SOUNDNESS



- * VA can find that a condition pre-existed service, even if the presumption of soundness applies
- * BUT, it is VA's burden and is very difficult for VA to do
- * Must show **2 things**, both by **clear and unmistakable evidence**
 - * The condition actually pre-existed service; and
 - * The condition was **not** permanently aggravated by service

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43

REBUTTING THE PRESUMPTION OF SOUNDNESS



- * Usually, it is Vet's job to prove elements of a claim
- * **But it is VA's job to prove that the presumption of soundness has been rebutted**
- * This is called "burden-shifting"



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REBUTTING THE PRESUMPTION OF SOUNDNESS




- * VA must have **clear and unmistakable evidence**:
 - * A "formidable" burden
 - * VA's conclusion must be "undebatable"
 - * "Reasonable minds could only conclude" what VA concluded
 - * Evidence "cannot be misinterpreted and misunderstood"
 - * Much higher burden than "preponderance of the evidence" or "more likely than not"

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45


REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * If VA finds **clear and unmistakable** evidence that a disability **pre-existed service**, but **doesn't find** clear and unmistakable evidence that it was **not aggravated in service**, the **presumption of soundness is not rebutted**
- * If VA finds **clear and unmistakable** evidence that there was **no in-service aggravation of a disability**, but **doesn't find** clear and unmistakable evidence that the condition **pre-existed service**, the **presumption of soundness is not rebutted**

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * **If presumption of soundness is not rebutted, VA must treat case as if it is a direct service connection claim**
- * Even though there might be clear and unmistakable evidence condition pre-existed service, if there is not clear and unmistakable evidence that it was NOT aggravated by service, VA must treat *as if* condition did not pre-exist service
- * No reduction for level of disability at entrance; not treated as an “aggravation” case

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * Examples of clear and unmistakable evidence that a condition actually pre-existed service:
 - * Medical treatment records documenting pre-service diagnosis
 - * Clear admission of the veteran
 - * A well-reasoned, well-supported, post-service medical opinion that it is “clear,” “undebatable,” or “unmistakable” that a condition pre-existed service

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REBUTTING THE PRESUMPTION
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- * Other clear and unmistakable evidence that a condition actually pre-existed service:
 - * Educational records documenting pre-service condition
 - * Credible lay statements of others, if the condition was observable

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * “There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary.”
 - * 38 C.F.R. § 3.303(c)
 - * Ex: infectious diseases or chronic conditions that manifest so close to entrance, they could not have originated during service
 - * *Junstrom v. Brown*, 6 Vet. App. 264 (1994)

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * Evidence that does **NOT** constitute clear and unmistakable evidence of pre-existence:
 - * A check in a box on an MEB/PEB report indicating that a condition existed prior to service, w/out supporting discussion
 - * *Horn v. Shinseki*, 25 Vet. App. 231 (2012)
 - * An equivocal, unreasoned, or conclusory medical opinion stating that condition pre-existed service

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * VA's burden to prove that condition pre-existed service; Vet not required to prove that it did not pre-exist
- * But advocates should submit evidence that will make it difficult for VA to meet its burden
 - * Lay statements from friends and family that condition did not arise until service
 - * Pre-service treatment records that don't reflect diagnosis
 - * Conflicting medical treatment records/opinions

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * A showing of no aggravation requires VA to prove either:
 - 1) There was clearly and unmistakably no in-service increase in severity
 - OR
 - 2) Any in-service increase was clearly and unmistakably due to the natural progress of the disease
- * Similar to test for the presumption of aggravation
- * *Horn v. Shinseki*, 25 Vet. App. 231 (2012)

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REBUTTING THE PRESUMPTION
OF SOUNDNESS



- * Clear and unmistakable evidence of no aggravation:
 - * A well-reasoned, supported medical opinion that it is "clear," "undebatable," or "unmistakable" that condition did not permanently increase in severity in service
 - * Could be because any increase in symptoms were temporary flare-ups

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REBUTTING THE PRESUMPTION OF SOUNDNESS



* Clear and unmistakable evidence of no aggravation:

* A well-reasoned, supported medical opinion that it is “clear,” “undebatable,” or “unmistakable” that any in-service increase in disability was due to the natural progress of the disease

* Examiner must explicitly state that the increase represented the natural progress of the disease

* *Sondel v. West*, 13 Vet. App. 213 (1999)

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REBUTTING THE PRESUMPTION OF SOUNDNESS



* The absence of STRs showing an increase in symptoms is NOT clear and unmistakable evidence of no aggravation

* The absence of evidence is not negative evidence

* *Horn v. Shinseki*, 25 Vet. App. 231 (2012)

* Even though it's not Vet's job to prove in-service aggravation, Vet should submit lay statements describing in-service increase in symptoms

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56

PRESUMPTION OF SOUNDNESS – EXAMPLE



* Vet served from 5/1978 to 1/1979

* Vet reported “foot trouble” at entrance, but a doctor examined his feet and found no abnormalities

* STRs show persistent complaints of and treatment for foot problems, but no diagnosis of pes planus until 12/1978


* Vet separated for pes planus following MEB

* MEB report indicated with an “X” in a box that pes planus pre-existed service and was not aggravated by service

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PRESUMPTION OF SOUNDNESS –
EXAMPLE



- * 2/1979: Vet submitted claim for SC for pes planus
- * 7/1979: VA denied claim based on finding that pes planus pre-existed service
- * On 4/1978 enlistment exam, Vet showed that he had foot trouble and it is recorded in 5/1978 that Vet complained of pain in his right foot for months. In 11/1978, he had painful corns removed from 1st and 5th toes. 12/1978 exam resulted in diagnosis of bilateral symptomatic pes planus. MEB proceedings showed that pes planus existed prior to service and was not aggravated by active duty.

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PRESUMPTION OF SOUNDNESS –
EXAMPLE



- * 2005: Vet filed clear and unmistakable error (CUE) claim
- * BVA found no CUE in 1979 rating decision
- * Vet appealed to CAVC and argued that 1979 decision contained CUE because VA did not apply the law correctly
- * Pes planus not “noted” on entrance
- * No clear and unmistakable evidence that pes planus pre-existed service

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PRESUMPTION OF SOUNDNESS –
EXAMPLE




- * CAVC reversed BVA finding of no CUE in 1979 rating decision
- * MEB finding not “clear and unmistakable” evidence
- * No pes planus found until 12/1978, even though feet examined
- * Vet’s report of some unspecified “foot trouble” not clear and unmistakable evidence of pes planus

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PRESUMPTION OF SOUNDNESS –
EXAMPLE




- * Since VA could not show in 1979 that pes planus clearly and unmistakably pre-existed service, presumption of soundness could not be rebutted
- * No need to analyze aggravation prong
- * *Moye v. Gibson*, Vet. App. No. 13-0833 (June 9, 2014) (non-precedential) 

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THE PRESUMPTION OF
AGGRAVATION

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PRESUMPTION OF
AGGRAVATION



- * A preexisting injury or disease will be considered to have been aggravated by active military, naval, air, or space service, where there is an increase in disability during such service, **unless there is a specific finding that the increase in disability is due to the natural progress of the disease.**
- * 38 U.S.C. § 1153

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PRESUMPTION OF AGGRAVATION

*** Applies when:**

- * Condition is “noted” on entrance OR there wasn’t an entrance exam and condition more likely than not pre-existed service**

AND

- * There is evidence of an in-service increase in disability**

*** Does NOT apply if presumption of soundness applies**

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64

WHAT GOOD IS PRESUMPTION OF AGGRAVATION ?

- * Makes it harder for VA to deny a claim just because a condition pre-existed service**
- * Like presumption of soundness, provides a way to establish the second element of service connection: in-service disease or injury**

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WHAT DOES PRESUMPTION OF AGGRAVATION NOT DO?

- * Does NOT provide a mechanism for establishing the 3rd element of service connection: nexus between service and current disability**
- * Even if presumption of aggravation applies and is not rebutted, Vet still needs evidence linking the service-aggravated disease or injury to the current disability**

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66

WHEN DOES IT NOT APPLY?



- * Does **NOT** apply to periods of ADT and IADT
 - * Unless Vet previously awarded SC for a disability incurred during that same period of ADT OR IADT
 - * Then the period of ADT or IADT is considered "active military, naval, air, or space service" under 38 U.S.C. § 101
 - * *Smith v. Shinseki*, 24 Vet. App. 40 (2010)

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WHEN DOES IT APPLY?



- * Applies only if there is an in-service increase in disability
- * Initially, **Vet** must show that there was an in-service increase in disability
 - * Compare to presumption of soundness, where **VA** must show **no increase** in disability
 - * STRs are the best evidence to show an increase in disability

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HOW DO YOU SHOW AGGRAVATION?



- * Lay evidence may be used as long as Vet is competent to say that the condition got worse
 - * Headaches, tinnitus, depression are conditions a lay person may be competent to say got worse
 - * Heart disease, diabetes are conditions that a lay person might not be competent to say got worse
- * Otherwise, need a medical opinion

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69

WHAT STANDARD APPLIES?



- * Benefit-of-the-doubt rule applies to determination of whether there was an in-service increase in severity
- * Just like any other factual finding
- * Vet must show that it is as likely as not that there was an in-service increase; evidence for and against “nearly equal” at worst

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70

DO FLARE-UPS SATISFY PRESUMPTION?



- * Evidence of temporary flare-ups of symptoms is not sufficient to trigger the presumption of aggravation
- * Must be an actual/permanent increase in the severity of the underlying disability
- * Whether there was an actual increase or just a flare-up is usually a medical determination
- * *Hunt v. Derwinski*, 1 Vet. App. 292, 297 (1991)

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71

USUAL EFFECTS OF TREATMENT




- * “The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.”
- * 38 C.F.R. § 3.306(b)(1)
- * In other words, an increase in symptoms that are a usual effect of medical treatment for the pre-existing condition, such as a scar from in-service surgery to treat the pre-existing condition is not considered an aggravation of the pre-existing condition

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72


REBUTTING PRESUMPTION
OF AGGRAVATION



- * Once the presumption of aggravation attaches, the law steps in to presume that the disability was aggravated by service, **UNLESS** VA shows by **clear and unmistakable evidence** that the in-service increase was due to the natural progression of the disease
- * 38 C.F.R. § 3.306(b)
- * Burden shifts to VA to rebut the presumption

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73


REBUTTING PRESUMPTION
OF AGGRAVATION



- * VA must rely on an explicit medical finding in the claims file that the increase was due to natural progression to rebut the presumption
- * *Sondel v. West*, 13 Vet. App. 213 (1999)
- * Not Vet's job to show that the increase was not due to natural progress
- * But, always best for Vet to submit a medical opinion or treatise evidence showing that the increase was not due to the natural progress of the disease


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74

MAJOR DIFFERENCE BETWEEN
PRESUMPTIONS



- * If presumption of soundness applies and claim granted:
 - * Vet rated based on the whole disability
- * If presumption of aggravation applies and claim granted:
 - * Vet rated based on the degree of disability over the degree existing at time of entrance
 - * 38 C.F.R. § 4.22


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75



MAJOR DIFFERENCE BETWEEN PRESUMPTIONS


- * **Exceptions** to rule regarding ratings when presumption of aggravation applies
 - * If Vet totally disabled by aggravated condition, no deduction
 - * If the degree of disability at entrance can't be determined, Vet entitled to rating based on the disability as a whole
- * If evidence doesn't clearly show extent of disability at entrance, argue that condition should be considered 0% disabling at entrance, because Vet was accepted for service

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76



HYPOTHETICALS

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77




1

HYPO #1

- * Obstructive sleep apnea (OSA) not noted on entrance exam
- * BVA found clear and unmistakable evidence that Vet had OSA prior to service based on Vet's statements and pre-service medical records
- * BVA found that OSA was not aggravated by service, because STRs did not reflect a diagnosis, treatment, or claim of OSA or any sleep problems during service
- * BVA found presumption of soundness rebutted


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78

SURVEY #4




Is the Board's finding correct?


- A. Yes, there was nothing in the STRs about OSA
- B. No, the absence of evidence is not clear and unmistakable evidence of no aggravation
- C. Not sure



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ANSWER







* Relying on the absence of evidence in the Vet's STRs does not satisfy the requirement that VA show clear and unmistakable evidence that there was no in-service aggravation

* *Jordan v. Nicholson*, 401 F.3d 1296, 1297–99 (Fed. Cir. 2005)

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80




HYPO #2



- * Vet served 6/1972 to 6/1975 and 8/2004 to 1/2006
- * 1/2006: Vet filed claim for SC for hypertension
- * BVA conceded that Gov't lost part of Vet's SMRs, which may have included an entrance exam for second period of service
- * BVA found that the presumption of soundness did not apply to Vet's second period of service because there was no entrance exam of record, so there was no basis from which to determine whether the Vet was in sound condition upon entry into that period of service


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SURVEY #5



* Is the Board correct that the presumption of soundness cannot apply to his second period of service?


A. Yes
B. No
C. Maybe




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82

ANSWER





* The presumption soundness applies even when the Vet's entrance exam has been lost or destroyed while in VA custody


* *Quirin v. Shinseki*, 22 Vet. App. 390, 396 n.5 (2009)

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83

3

HYPO #3



* VA found there was clear and unmistakable evidence that a condition **not** noted on Vet's entrance exam pre-existed service


* But, VA found that the condition was aggravated by service and granted SC for condition

* When assigning the rating, VA reduced the current severity level of the disability by the level of disability at service entrance, such that Vet was only compensated for the part of his disability caused by service

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84

SURVEY #6



* Did VA properly evaluate the disability?

A. Yes

B. No

C. Maybe


YES

NO

MAYBE

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85

ANSWER




NO

- * Presumption of soundness not rebutted, because there was not clear and unmistakable evidence of no in-service aggravation
- * SC should be granted under theory of **direct SC** (not aggravation)
- * Rating should be based on current severity of disability, without any reduction to account for severity at service entrance


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86

TAKEAWAY FOR HYPO #3




- * If presumption of soundness is not rebutted, even if there is clear and unmistakable evidence that the disease pre-existed service, the claim is treated as a direct SC claim rather than an “aggravation” claim
- * If SC is granted, no deduction is made to the rating based on the severity of the disability at the time of entrance

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87




HYPO #4



- * In 1985, Vet fractured hip in a car accident
- * At service entrance in 1995, he disclosed the old hip injury, stating that it had resolved and had not caused any further problems
- * An orthopedic examiner found no hip abnormalities and concluded the Vet's past injury would not restrict his activities. Vet was found medically qualified for duty.
- * Vet's entrance exam notes the car accident and history of fractured hip, as well as the examiner's findings that Vet's musculoskeletal system was normal

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88


HYPO #4



- * In April 2008, four months after separating from service, Vet filed claim for SC for a hip disorder
- * Medical records revealed current diagnoses of hip strain and osteoarthritis
- * Vet reported having suffered intermittent hip pain when he wore full military gear and when he entered and exited vehicles during service

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89

HYPO #4



- * BVA denied SC for a hip disorder
- * BVA found that the presumption of soundness did not apply, because Vet's entrance exam "noted a history of a fractured right hip in a pre-service motor vehicle accident"
- * BVA found that "Given this notation by the examining physician, the Board finds that a right hip fracture preexisted active service; therefore, the presumption of soundness does not apply in this case."

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90

SURVEY #7



* Was BVA correct that the presumption of soundness does not apply?

- A. Yes – hip fracture noted at entrance
- B. No – it just noted a history, not current problems
- C. Maybe



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1

ANSWER



- * BVA's finding that Vet's current hip condition preexisted service merely because the entrance exam "noted a history of a fractured right hip in a pre-service motor vehicle accident" was erroneous

* CAVC found that BVA’s conclusion conflicts with 38 C.F.R. § 3.304(b)(1), which states that a mere “[h]istory of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions.”

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2

HYPO #4



* CAVC also stated that because the entrance exam merely noted the past hip fracture and did not find that the Vet had any problems at the time of the exam, the Board's conclusion also conflicts with § 3.304(b)'s provision that "[o]nly such conditions as are recorded in examination reports are to be considered as noted."

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HYPO #4

* CAVC continued: “merely noting a history of past injuries does not constitute a notation of a preexisting condition for purposes of the presumption of soundness, particularly where, as here, the past injuries healed without further complication, clinical evaluations at the time of induction showed no abnormalities, and the entrance examination found the relevant body systems were normal.”

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94

HYPO #4

* Additionally, BVA failed to:

- * Explain its apparent assumption that Vet’s childhood hip fracture is the same condition as his currently diagnosed hip strain and osteoarthritis
- * Explain why it found a connection between Vet’s past and current hip problems, or cite any medical evidence to support this medical determination
- * Address evidence that Vet began suffering hip pain in service

* *Alexander v. Wilkie*, Vet. App. No. 18-2757 (Oct. 21, 2019) (non-precedential)

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95

TAKEAWAYS FROM
HYPO #4

* If an entrance exam just notes a history of preexisting injury, it does not constitute a notation of a preexisting condition for purposes of the presumption of soundness


* This is especially true where the past injuries healed without further complications, clinical evaluation at induction showed no abnormalities, and the entrance exam found the relevant body systems were normal

* *Crowe v. Brown*, 7 Vet. App. 238 (1994); 38 C.F.R. § 3.304(b)

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96

FINAL REMINDERS



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DON'T FORGET



- * Presumption of aggravation does NOT apply if presumption of soundness applies, even if there is clear and unmistakable evidence a condition not noted on entrance exam pre-existed service
- * If disability NOTED on entrance exam, presumption of soundness CANNOT apply
- * If disability NOT NOTED on entrance exam, presumption of aggravation CANNOT apply

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DON'T FORGET



- * When the presumption of soundness applies and has not been rebutted, Vet still must demonstrate the existence of a current disability and a nexus between his current disability and the disease or injury in service.
- * *Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009); *Dye v. Mansfield*, 504 F.3d 1289, 1292-93 (Fed. Cir. 2007); *Horn v. Shinseki*, 25 Vet.App. 231, 236-237 (2012)

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