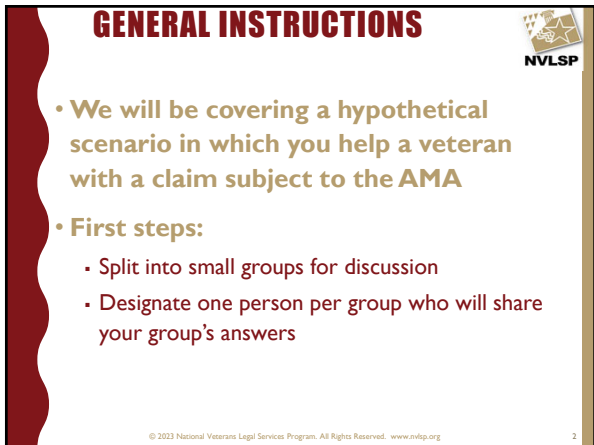


AMA SMALL GROUP PRACTICAL EXERCISE

NVLSP

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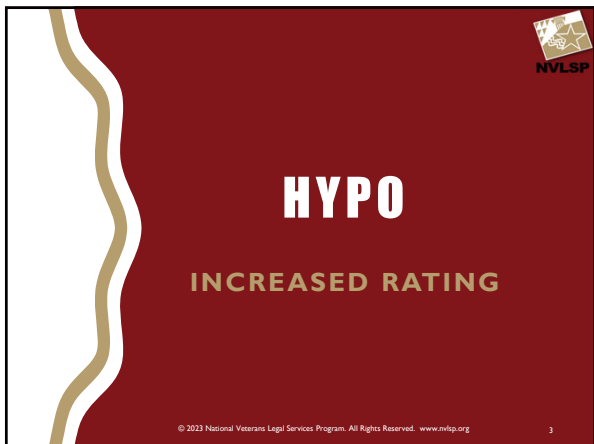


GENERAL INSTRUCTIONS

NVLSP

- We will be covering a hypothetical scenario in which you help a veteran with a claim subject to the AMA
- First steps:
 - Split into small groups for discussion
 - Designate one person per group who will share your group's answers

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HYPO

INCREASED RATING


NVLSP

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MEETING WITH CLIENT 


- **Bob – Air Force Vet, existing client**
- **Considering filing an increased rating for his SC PTSD, his only SC disability**
 - Rated as 50% disabling, effective 10/3/2011
 - Symptoms got worse in last few years
- **He is nervous that VA might decrease his rating if he applies for an increase**
 - “Should I just leave good enough alone?”

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SMALL GROUP BREAKOUT 

- **Is Bob protected from a rating reduction?**


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DISCUSSION 

- **Bob’s rating of 50% for PTSD has been in effect for more than 5 years**
 - It is stabilized under 38 C.F.R. § 3.344.
- **In order to reduce:**
 - All evidence must show “sustained improvement” in the disability
 - Improvement must be able to be maintained while Vet is working or actively seeking work; under the ordinary conditions of life
 - Any exam upon which reduction is based cannot be less thorough than the exam used to grant the rating

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FILING A CLAIM




- **Bob decides he wants to move forward with filing a claim for an increased rating**
- **You ask him more about his symptoms**
 - He is more irritable - punched a hole in the wall a few months ago, and an episode of “road rage” last year led to a ticket
 - Receiving mental health treatment at VA since 2012
 - Recently started seeing a therapist at a Vet Center
 - Admits some thoughts about suicide or wishing he was dead – “but I would never go through with it”

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FILING A CLAIM




- **You ask if he is working**
 - Says he works at an administrative job in the Social Security Administration
 - Says he was written up a couple times for conflicts with coworkers

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SMALL GROUP BREAKOUT




- **What form should Bob use to apply for an increased rating?**
- **What evidence will you advise Bob to obtain?**
- **How can you preserve Bob’s effective date while he is gathering evidence?**

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DISCUSSION



- An increased rating claim should be filed on VA Form 21-526EZ
- Advise him to gather:
 - Lay statements from him and his wife
 - VA and Vet Center treatment records – either get a copy himself or request VBA obtain the records under the duty to assist
 - Personnel records from work
- To preserve effective date, submit an ITF
 - He must submit the complete claim within 1 year

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DEVELOPING EVIDENCE



- On 12/1/2021, Bob files a VA Form 21-526EZ with supporting evidence
- VA continues to develop evidence under duty to assist
 - Provides a C&P exam
 - Obtains copies of medical records


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DEVELOPING EVIDENCE




- While waiting for a decision, you check the medical records and C&P exam
- CAPRI records:
 - Document passive suicidal ideation but a low risk for suicide
 - Psychiatrist wrote Schedule A letter in 2016 to help with job search

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DEVELOPING EVIDENCE 


- **C&P exam:**
 - VA examiner opined that Bob has “occupational and social impairment with reduced reliability and productivity” – which corresponds to 50% rating
 - VA examiner found he had some symptoms listed in the 70% rating criteria, including “impaired impulse control,” “difficulty in adapting to stressful circumstances (including work or a work-like setting),” and “suicidal ideation”

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DEVELOPING EVIDENCE 

- **You ask Bob about whether he used the Schedule A letter**
- **He says he used it in his application to work at the SSA and was hired under Schedule A authority in 2017**
 - OPM provides Schedule A hiring authority to hire disabled individuals through a non-competitive process


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DEVELOPING EVIDENCE 

- **This leads you to ask Bob more about his work performance**
- **You ask if he has any accommodations**
- **He tells you:**
 - He is allowed extra breaks during the day
 - He has a modified work schedule, working about 25 hours per week, with ability to flex hours when he needs to go to medical appointments

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SMALL GROUP BREAKOUT



- Based on this info, could Bob apply for TDIU?
- If so, what argument would you make?
- What form(s) should you submit?

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DISCUSSION



- Yes, he should apply for TDIU and argue he is employed in a protected work environment
 - 38 C.F.R. § 4.16
 - *Arline v. McDonough*, 34 Vet. App. 238 (2021)
- Use VA Forms 21-526EZ and 21-8940

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CHOOSING AMA LANE



- You help Bob file a claim for TDIU on 4/1/2022
 - You submit a lay statement and letter of support from his supervisor
- RO issues a rating decision, which continues PTSD rating at 50% and denies TDIU
 - Relies on VA examiner's finding that Vet has "occupational and social impairment with reduced reliability and productivity"
 - Finds Vet doesn't meet criteria for schedular TDIU and work isn't in protected environment

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SMALL GROUP BREAKOUT



• Which decision review option would you recommend for Bob and why?

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DISCUSSION




• Bob's best option will likely be to request **Higher-Level Review**

- More experienced adjudicator will look at the case
- You can submit written argument and/or present argument at informal conference
- Will get a quick decision

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DISCUSSION




• Drawbacks of the other options:

- **Supplemental Claim**
 - Bob does not have new evidence to submit
- **BVA Hearing and Evidence Lanes**
 - Bob does not have any new evidence to submit
 - Longer wait than HLR
- **BVA Direct Review**
 - Longer wait than HLR
 - You can continue appeal to BVA if HLR continues denials

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WRITING AN ARGUMENT



- Bob agrees to submit a Higher-Level Review request
- You decide to submit an argument to support his appeal

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SMALL GROUP BREAKOUT



- What arguments could you make that VA should increase Bob's PTSD rating to 70%?
 - Can you think of any CAVC cases that could support the claim?
- Should you argue that a 100% rating is warranted under the Schedule for Rating Mental Disorders

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DISCUSSION



- You should argue that Bob meets the criteria for a 70% rating
 - “[O]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgement, thinking, or mood”
 - List specific treatment notes and lay evidence in the record to give examples of impairment in each area
 - Highlight his symptoms that are listed in 70% rating criteria
- Argue that Bob's suicidal ideation entitles him to a 70 percent rating, even though it was “passive” and he was judged to be low risk
 - *Bankhead v. Shulkin*, 29 Vet.App. 10 (2017)

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DISCUSSION



- **Probably not worth arguing for 100% rating**
 - Vet's work, even in a protected environment, demonstrates that he does not have "total occupational impairment"
 - Vet does not have symptoms listed as examples in 100% rating criteria
 - Might lose credibility with adjudicator by making argument

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CHOOSING AN AMA LANE



- **HLR decision grants 70% rating for PTSD, effective 12/1/2021, but continues to deny TDIU**
- **Bob feels the 70% rating for PTSD is fair, but wants to appeal the denial of TDIU**

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SMALL GROUP BREAKOUT



- **What appeal option would you recommend to Bob and why?**

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DISCUSSION



- **Bob's best option will likely be to choose BVA Direct Review**
 - Evidence of record is strong, so Direct Review lane allows a quick review at BVA
 - For a complicated issue like protected work environment, he will probably have a better chance at BVA than the RO

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DISCUSSION



- **Exception - if Bob obtains additional evidence, such as buddy statements from coworkers or a favorable opinion from a vocational expert**
 - Supplemental claim or BVA evidence lane would be a good option

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NEW EVIDENCE



- **Bob chooses the BVA Direct Review lane and you submit an argument**
- **However, his PTSD symptoms increase even more while the TDIU appeal is pending at BVA and he loses his job**
 - It appears that his new symptoms would warrant a 100% schedular rating due to total occupational and social impairment

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SMALL GROUP BREAKOUT



- Can the Board consider the new evidence of Bob's condition worsening?
- What should Bob do to try to maximize his VA benefits?

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DISCUSSION



- BVA cannot consider new evidence
 - On Direct Review, BVA is limited to reviewing evidence of record at the time of the rating decision on appeal
 - New evidence also doesn't relate to the issue on appeal—whether TDIU was warranted as of the date of the rating decision on appeal—so no reason to switch lanes
- Bob should file a VA Form 21-526EZ seeking both an increased PTSD rating and TDIU, and a new VA Form 21-8940, w/in one year of increased symptoms
 - If 100% rating for PTSD granted, new TDIU claim will be moot

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RESOLUTION



- Bob submits new VA Forms 21-526 EZ and 21-8940 in Oct. 2023, along with medical records and a lay statement about his symptoms worsening over the summer, and evidence of his job loss
 - RO orders a VA exam
- Rating decision grants 100% schedular rating for PTSD with an effective date of July 1, 2023 (the date worsening is factually ascertainable in the record)

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RESOLUTION



- BVA issues a decision granting TDIU effective 12/1/2021, based on date of PTSD IR claim and evidence of employment in a protected environment during pendency of that claim

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Questions?



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