



NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Common VA Errors



Topics to Cover:

- **Top 5 Reasons VA Exams are Inadequate**
- **Consideration of Lay Evidence**
- **Effects of Medication**
- **Mental Conditions**



INADEQUATE VA EXAMS



VA Examinations

- VA is required in certain situations, under its duty to assist, to provide a claimant with a medical exam.
 - 38 U.S.C. § 5103A(d)

VA Examinations

- VA is **required** to obtain a medical exam if the following 4 elements are present:
 - 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;

VA Examinations

- 3) There is an indication that the disability or symptoms may be associated with the Vet's active military, naval, or air 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)***

VA Examinations

- 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)***

Inadequate Exams

- A VERY common reason for remands by the BVA and the CAVC is that the VA failed to provide the claimant with an adequate medical exam or opinion
- As an advocate, you can save your Vet a substantial amount of time in the VA claim process if you spot inadequacies in a VA exam and bring them to VA's attention immediately

What Advocates Should Do

- It is vital that you get your objection to the VA exam on record by submitting a written statement outlining why the exam is inadequate
 - **Statement does not need to be long to be effective**



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 an 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 [give date of exam] 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).”

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







Top 10 List: Number 1

“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.”



Top 10 List: Number 1

- Is this an adequate medical opinion?
 - Yes
 - No
 - Not Sure



YES



NO



MAYBE

Top 10 List: Number 1



Top 10 List: Number 1



Inadequate Rationale



Top 10 List: Number 1

The examiner did not provide an adequate supporting rationale for his or her medical opinion.



Number 1: Inadequate Supporting Rationale

- A conclusory statement without a supporting rationale is not sufficient and should be returned to the examiner to explain the basis for his or her opinion.
- A medical opinion must support its conclusion with an analysis that the VA can consider and weigh against contrary opinions.
 - *Steff v. Nicholson*, 21 Vet. App. 120, 124 (2007)

Number 1: Inadequate Supporting Rationale

- Boilerplate Example:
 - “For a VA exam to be adequate, the examiner must provide an adequate supporting rationale for [his/her] conclusions. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008); *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007). The [give date of exam] examiner expressed [his/her] medical opinion in a conclusory statement without any supporting rationale. Therefore, under the Court of Appeals for Veterans Claims’ holdings in *Stefl* and *Nieves-Rodriguez*, this exam is inadequate, and VA must provide the Veteran with a new examination or medical opinion.”

Takeaway

- Attack adequacy of a negative VA opinion and argue that VA must obtain new exam or opinion if:
 - It lacks any supporting rationale
 - 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





Top 10 List: Number 2

- Vet filed increased rating claim for left knee
- VA examiner stated: “The veteran experiences severe flare-ups of his knee every one to two months that last about three to seven days. These flare-ups cause significant limitation of motion with functional impairment.”



Top 10 List: Number 2

- Do you think this is an adequate opinion?
 - Yes
 - No
 - Not sure



Top 10 List: Number 2



Top 10 List: Number 2



Top 10 List: Number 2

Failure to Properly Address Functional Loss



Top 10 List: Number 2

- The examiner did not adequately describe functional loss, particularly the effects of pain or other impairments on the motion of the Vet's joint during flare-ups

Number 2: Failure to Properly Address Functional Loss

- In addition to addressing whether pain, weakness, fatigability, or incoordination significantly limit functional ability during flare-ups, the examiner must portray any such functional impairment in terms of the degree of additional range-of-motion loss, or explain why it is not feasible to provide such an opinion.
 - ***Mitchell v. Shinseki*, 25 Vet. App. 32 (2011)**
 - ***DeLuca v. Brown*, 8 Vet. App. 202 (1995)**

Number 2: Failure to Properly Address Functional Loss

- In the previous hypo, while the examiner did acknowledge that the Vet's knee flare-ups cause significant functional impairment, the examiner did not:
 - 1) Provide an estimate of ROM loss during flare-ups, **or**
 - 2) Explain why obtaining such findings was not feasible

Number 2: Failure to Properly Address Functional Loss

- Similarly, VA examiners must address whether pain, weakness, fatigability, or incoordination significantly limit functional ability with repeated use over a period of time, and express any such functional loss in terms of the degree of additional ROM loss
- If the examiner does not, he or she must adequately explain why it is not feasible to do so
- Otherwise, the exam is inadequate

Number 2: Failure to Properly Address Functional Loss

- Boilerplate Example:
 - In *DeLuca v. Brown*, the Court of Appeals for Veterans Claims held that where a Veteran's disability rating is based on a loss of range of motion, compliance with 38 C.F.R. § 4.40 requires the VA to ensure that it has obtained a medical opinion that addresses whether pain could significantly limit functional ability during flare-ups or when the joint is used repeatedly over time. 8 Vet. App. 202, 206 (1995); see *Mitchell v. Shinseki*, 25 Vet. App. 32, 44 (2011). In the [give date of exam] VA exam report, the examiner did not adequately describe the effects of pain on the Veteran's functional ability during flare-ups and after repeated use over a period of time. Because the VA examiner did not comply with the Court's holdings in *DeLuca* and *Mitchell*, the Veteran is entitled to a new medical examand opinion.”

Advocacy Advice

- Review VA joint exams to see if the examiner either:
 - Talks about functional impairment in terms of range of motion loss, OR
 - States why he/she cannot give a finding





Top 10 List: Number 3

- Vet is service-connected for a right knee disability
- A VA examiner was asked to opine whether pain, weakness, fatigability, or incoordination significantly limited the Vet's functional ability with repeated use over a period of time and with flare-ups. He responded that he was unable to say without mere speculation because it was not observed.

Top 10 List: Number 3

- Do you think this is an adequate opinion?
 - Yes
 - No
 - Not sure



Top 10 List: Number 3



What is wrong with this opinion?



Failure To Provide Rationale As To Why It Would Be Speculative To Provide an Opinion



Number 3: Mere Speculation

- A VA examiner must provide a rationale for the inability to provide a more conclusive opinion
 - Applicable to nexus opinions
 - Applicable to severity opinions

Number 3: Mere Speculation

- If an examiner fails to provide an opinion because doing so would require speculation:
 1. It must be clear that an examiner has “considered all procurable and assembled data” and
 2. The examiner “must explain the basis for such an opinion or the basis must otherwise be apparent in VA’s review of the evidence.”
- ***Jones v. Shinseki, 23 Vet. App. 382 (2010)***

Number 3: Mere Speculation

- It must be clear that no additional testing could be conducted or information obtained that would permit such an opinion.
- VA must ensure that the examiner performed all due diligence in seeking relevant medical information that may have bearing on the requested opinion, and the opinion was not the first impression of an uninformed examiner.

Number 3: Mere Speculation

- The main issue with these opinions is that they contain significant ambiguity:
 - Does the examiner lack the medical expertise to provide an opinion?
 - Could additional testing be performed that would give the examiner the information needed to provide an opinion?
 - Does “without resorting to mere speculation” reflect the limits of knowledge in the medical community?

Number 3: Mere Speculation

- An examiner need not directly observe a flare-up, or examine the Vet after repeated use over a period of time, in order to offer an opinion as to additional limitations.
- ***Sharp v. Shulkin, 29 Vet. App. 26 (2017)***
- ***Lyles v. Shulkin, 29 Vet. App. 107 (2017)***

Number 3: Mere Speculation

- Examiner must ascertain adequate info regarding flares and repeated use over time by alternative means, such as asking Vet to describe additional functional loss suffered during flares or after repeated use, and then estimate functional loss based on all evidence of record—including the Vet's lay info—or explain why she could not do so.

Number 3: Mere Speculation

- ❑ If necessary, examiner must ask Vet about:
 - ❑ Frequency
 - ❑ Duration
 - ❑ Severity
 - ❑ Characteristics
 - ❑ Extent of functional impairment

Advocacy Advice



- Fight the perception among VA examiners that they must examine a Vet during a flare-up or after repeated use over time to adequately address functional loss
- Examiner must elicit info about functional loss during flare-ups and after repeated use from Vet
- If VA examiner states he/she can not opine without mere speculation to the functional loss after flare-ups and repetitive use, then VA must determine if this inability is because of a personal lack of knowledge or experience and if a more qualified examiner could provide an opinion

Advocacy Advice

- Help Vet prepare statement re functional loss during flare-ups / after repeated use.
 - **Frequency**
 - **Duration**
 - **Causes**
 - **How much they can move the joint**
 - **Use percentages**
 - **Use other observable markers**



Advocacy Advice

- Tell Vet, when undergoing exam, to:
 - Show examiner how little he or she can bend the joint during a flare-up and after repeated use over time and ask the examiner to measure that limitation with a goniometer in order to quantify the loss of motion
 - Describe flare-ups to the examiner in as much detail as possible (similar to the written statement)



Top 10 List: Number 4

- Vet served from 1975 – 2005
- 1985 STR: Vet reported his foot hurt during marching



- Filed SC claim for foot condition in 2017

Top 10 List: Number 4

- Vet provided statements from himself and family that he had foot pain since service.

- May 2017 VA exam:
 - Current foot disability less likely than not related to service.

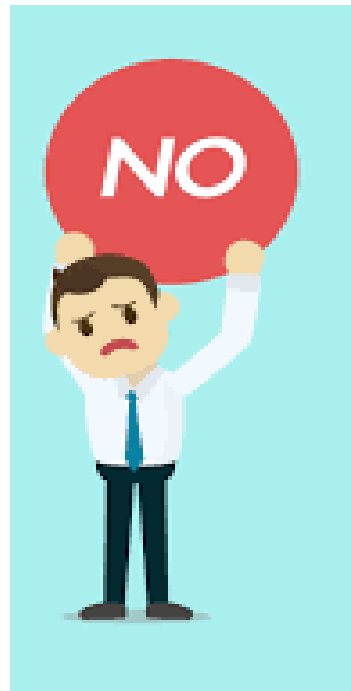
 - “According to the c-file, Vet did not complain of foot pain until he filed his claim for service connection.”

Top 10 List: Number 4

- Is this an adequate opinion?
 - Yes
 - No
 - Maybe



Top 10 List: Number 4



Top 10 List: Number 4



Inaccurate Factual Premise

4

Number 4: 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)

Number 4: 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 of exam] VA exam, the examiner based [his/her] opinion on [state incorrect fact or facts]. However, as shown by the [document showing the “fact” is disproved], the examiner did not base [his/her] opinion on an accurate factual premise. This renders the exam inadequate, and the Veteran is entitled to a new exam or medical opinion.”



Top 10 List: Number 5

- Vet files increased rating claim for diabetes, currently rated 20% disabling
- In order to obtain a 40% rating, the Vet must require insulin, restricted diet, and regulation of activities



Top 10 List: Number 5

- March 2012 Vet statement: “My treating physician informed me that my diabetes condition requires regulation of activities.”
- Oct. 2012 VA exam: “The Vet’s diabetes requires insulin and a restricted diet; however, the condition does not require him to regulate his activities.”



Top 10 List: Number 5

- Do you think this is an adequate opinion?
 - Yes
 - No
 - Not sure



Top 10 List: Number 5



Top 10 List: Number 5



Top 10 List: Number 5

Failure to Address Relevant Lay Statements



Number 5: Failure to Address Lay Statements

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

Top 10 List: Number 5

- **Back to the Hypo:**
 - Examiner did not reference Vet's March 2012 statement
 - Exam should be considered inadequate because the examiner ignored a relevant lay statement that provided information material to the Vet's claim



Number 5: Failure to Address Lay Statements

- Boilerplate Example:
 - “Lay evidence must be considered by the VA and an exam can 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 of exam] VA exam report, the examiner did not address the following relevant lay statements: [list 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.”

Takeaway

Read the VA examiner's opinion to determine whether relevant lay statements are considered in the opinion.



LAY EVIDENCE



Failure to Address Lay Statements

- Lay evidence is one type of evidence that must be considered, if submitted, when a Vet seeks disability benefits
 - *Buchanan v. Nicholson*
 - *Barr v. Nicholson*

Hypo

- Vet served 1979 to 1980 and 2003 to 2004
- STRs negative for complaints, tx, or dx of sleep apnea
- Feb. 2010 VA treatment record: Vet reported that during service:
 - He fell asleep easily during the day
 - His wife said he snored loudly
 - He was not sure if he stopped breathing while sleeping

Hypo

- July 2010: Vet filed SC claim for sleep apnea
- Feb. 2012: VA physician stated that, according to Vet's history, he had witnessed apneic events (pauses in breathing) while deployed in Iraq and he may or may not have had undiagnosed obstructive sleep apnea at that time

Hypo

- Mar. 2012 buddy statement:
 - Other soldiers had observed Vet having severe snoring problems while sleeping and waking up with shortness of breath
 - Fellow servicemen were concerned about Vet because they constantly had to wake him due to his pauses in breathing
- Snoring, pauses in breathing during sleep, and waking with shortness of breath are symptoms of sleep apnea

Hypo

- Jan. 2013: VA examiner stated that Vet's sleep apnea less likely than not had its onset during active duty due to the significant delay between discharge and subsequent dx of sleep apnea
 - Examiner noted buddy statement about in-service snoring, but said that “snoring in and of itself does not indicate sleep apnea”

Hypo

- RO denied claim:
 - Found Jan. 2013 VA examiner conducted a thorough exam and provided adequate rationale for opinion
 - While Vet reported symptom of sleep apnea in service (snoring), he was not competent to diagnose sleep apnea or give an opinion about the disease's etiology

What Do You Think?



Think. think. think.

HYPOTHESIS

- Possible arguments:
 1. Jan. 2013 VA exam inadequate because examiner ignored evidence of shortness of breath in service
 2. Lay people competent to report snoring, shortness of breath, and falling asleep during day
 3. Vet's snoring began in service and continued after he left service

Advocacy Advice

- ROs must consider lay statements that are relevant to a claim
- ROs often ignore or reject lay statement critical to a claim, because it is not documented in official records
 - Corroboration usually not required if Vet competent to provide the evidence



Advocacy Advice

- For VA to reject lay evidence, it usually must find it to be not credible
 - **Must adequately explain why, too!**
- If you receive a rating decision in which the rater ignored or erroneously rejected relevant lay evidence, request HLR or appeal to BVA

Advocacy Advice

- Lay evidence can be relevant to:
 - Establishing in-service incident
 - Establishing continuity of symptoms
 - Establishing current disability (ex: tinnitus)
 - Triggering duty to assist:
 - VA medical exam/opinion
 - Obtaining records
 - Severity of disability



EFFECTS OF MEDICATION



Hypo

- Issue:
 - Entitlement to a rating in excess of 10% percent for headaches.



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 his headaches
- He 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 found Vet able to properly manage symptoms with the use of medication and did not require any significant time off from work due to his disability

What do you think?



Medication

- 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)

Medication & *Jones*

- 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
- If a DC **does specifically** contemplate the effects of medication, then VA can rate the condition based on its severity when the Vet is medicated

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.



Advocacy Advice

- Argue that VA needs to 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 MENTAL DISORDER CLAIMS



Mental Conditions

- Failing to adequately consider treatment records and lay evidence
- Considering factors outside and in excess of the rating criteria
 - “passive” vs. “active” suicidal ideation

Symptoms & The Rating Criteria

- Symptoms listed in the rating schedule are examples of the type and degree of the symptoms, or their effects, that would justify a particular rating; analysis should not be limited to whether claimant exhibited the symptoms listed in the rating scheme.
 - *Mauerhan v. Principi*, 16 Vet.App. 436 (2002)
- Symptoms can be of similar severity, frequency, duration
 - *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013)

38 C.F.R. § 4.130

- 70%: Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: **suicidal ideation**; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships.

EXAMPLE

- In denying a 70% rating for PTSD, VA noted that the Vet did not suffer from a “severe level of suicidality or suicide ideation.”
- Is this an adequate reason to deny a 70% rating?

EXAMPLE



- Criteria noted by VA is not part of the criteria for a 70% rating or higher
- Only “suicidal ideation” is listed as a symptom representative of impairment consistent with a 70% rating

EXAMPLE

- In denying a 70% rating, VA found that the Vet “has not had difficulty with the law, has not been shown to be violent, has not made suicide attempts, and has not been shown to have a problem with alcohol and drugs.”
- Is this an adequate reason to deny a 70% rating?

EXAMPLE



- Suicidal ideation with intent or suicide attempts is not required under § 4.130
- The criteria for a 70% rating lists “suicidal ideation” without qualification
- Other reasons for denial not part of rating criteria

Consideration of Factors Not in Rating Schedule

- Rating schedule **does not**:
 - Distinguish between passive and active suicidal ideation
 - Discuss the “level” of suicidality
 - “Hospitalization” is not the standard for assessing the severity of that symptom

Consideration of Factors Not In Rating Schedule

- There is no requirement that Vet:
 - Have “continuous” suicidal ideation
 - Endorse suicidal ideation at every medical exam
 - Have a plan or intent to act on that ideation

Consideration of Factors Not In Rating Schedule

- Symptoms must cause “occupational and social impairment in most areas” for a 70% rating
- Suicidal ideation alone may cause that level of social and occupational impairment, since there is no comparable symptom listed in criteria for lower ratings
 - ***Bankhead v. Shulkin, 29 Vet. App. 10 (2017)***

Advocacy Advice

- If VA cites any of the above reasons when denying a 70% rating, appeal the decision
 - Argue that the rating criteria does not make those distinctions; it only states “suicidal ideation”



Questions?

