



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

Identifying Duty To Assist Errors: Reasons Why VA Examinations May Be Inadequate

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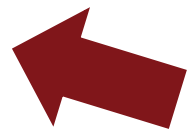
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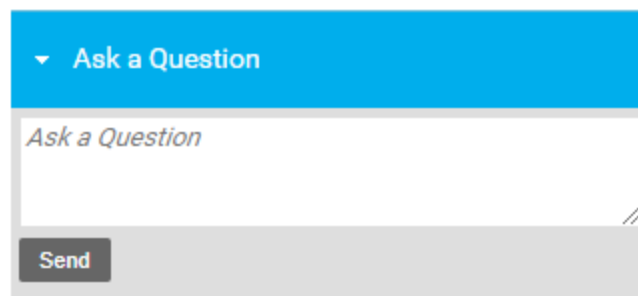
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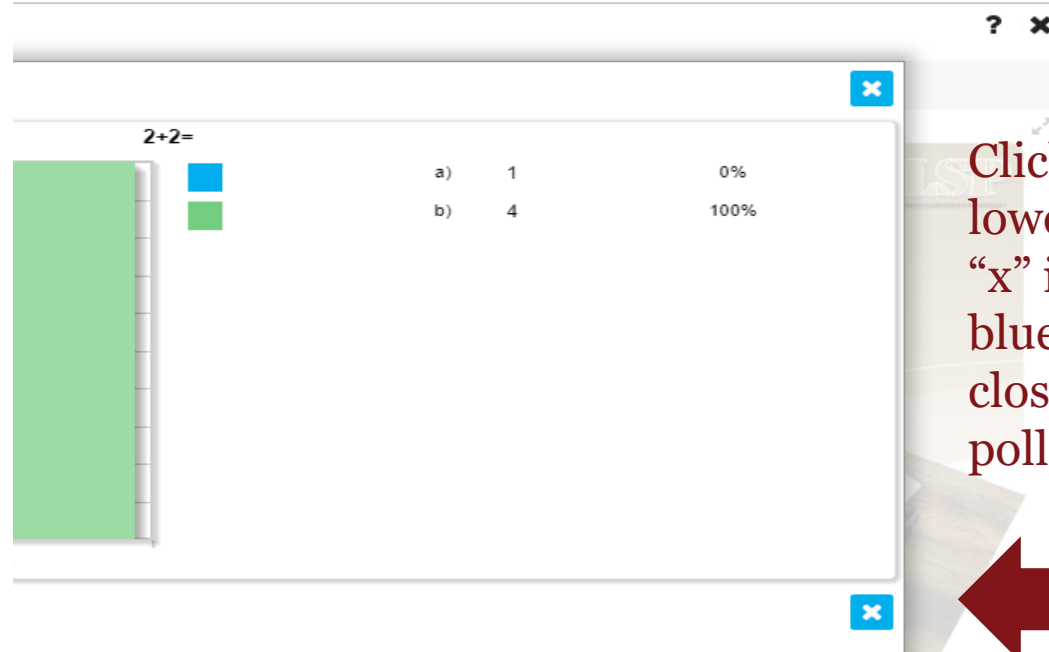
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Agenda

- **Overview**
 - *McLendon* Elements
- **Service Connection Cases**
- **Rating Claims**
- **Review Time**



Overview



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. § 5103A(d); 38 C.F.R. § 3.159(c)(4)

VA Exams/Opinions

- **VA must obtain a medical exam/opinion for a disability compensation claim 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;

VA Exams/Opinions

- 3) There is an indication that the disability or symptoms may be associated with 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 Exams/Opinions

- Element 3 (indication that disability or symptoms may be associated with service) is a low threshold
- It can be satisfied by things such as:
 - Credible lay evidence of continuity of 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

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)

VA Exams/Opinions

- *Waters* should be interpreted narrowly, but VA sometimes applies it broadly
 - It is not a blanket prohibition against the use of lay evidence to satisfy 3rd *McLendon* element
- Make sure VA does not reject Vet's lay statements as conclusory or generalized if Vet provides additional info, such as indication of continuity of symptoms or other info that meets low threshold

Common *McLendon* Error - Example #1

- 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 diagnosis of back current back disability

Common *McLendon* Error - Example #1

- 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)

Common *McLendon* Error - Example #2

- Vet testified that he:
 - injured his knee during an in-service motor vehicle accident
 - was taken off of duty as a result of the accident
 - left the military about a month or two after the accident
 - received treatment for his knees w/in a month of leaving service
 - had been treated since service, but never discussed with his doctors the possibility that his knee condition was related to service
 - believed his knee condition was related to service and not advanced age, because he experienced continuous pain ever since service

Common *McLendon* Error - Example #2

- BVA found that Vet wasn't entitled to an exam because the only evidence in his favor was his lay statements, which asserted "his belief that service generally and accidents in particular caused these disorders"
- BVA found that a lay person wasn't competent to diagnose an orthopedic disorder or determine its relationship to an incident in service
- BVA found Vet credible

Common *McLendon* Error - Example #2

- CAVC found that DTA exists precisely because Vets aren't always competent to diagnose their condition or offer nexus opinion associating condition with military service
- The proper inquiry is whether the evidence indicated that current disability may be related to the in-service event he described
 - He presented evidence of in-service event, pain and treatment since service, and had a diagnosis of arthritis.
 - BVA found him credible
- *McLendon* elements were satisfied

McLendon Take Aways

- **1st Element:** Current “diagnosis” not required
- **3rd Element:** Very low bar for indicating that disability or persistent or recurrent symptoms may be associated with service
 - But, general assertion that current disability is related to service not enough

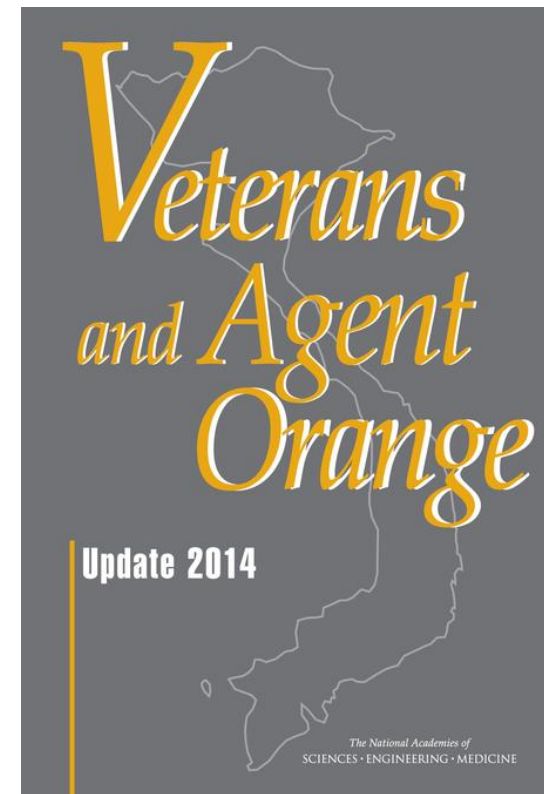
Euzebio v. Wilkie

31 Vet. App. 394 (2019)

- **1966-69:** Vet served in Vietnam
- **5/2011:** Vet filed a claim for SC for benign thyroid nodules
- **1/2017:** Vet testified to BVA that he believed thyroid was related to AO exposure
- **7/2017:** BVA denied claim w/out providing medical exam

Euzebio: Vet's Argument

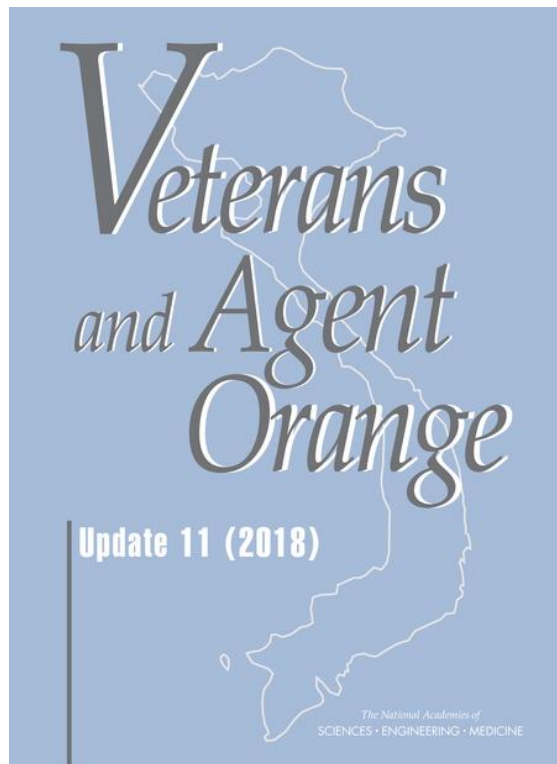
- BVA failed to address “all evidence and material of record and applicable provisions of law and regulation,” including NAS’s Veterans and Agent Orange: Update 2014
- NAS report would have satisfied the 3rd *McLendon* element
 - Found limited or suggestive evidence of an association between AO and hypothyroidism
- NAS report was constructively before BVA because VA knew of report’s content



Euzebio: Holding

- Veterans and Agent Orange: Update 2014 was not constructively part of the record as it did not have a “direct relationship” to client
- Board satisfied the duty to assist
- BUT, appealed to Fed. Circuit, so stay tuned

Euzebio: Take Aways



- Review NAS findings on Agent Orange and submit report to the RO/BVA, if relevant.
 - **Update 2018:**
<https://www.nap.edu/catalog/25137/veterans-and-agent-orange-update-11-2018>
- May satisfy 3rd McLendon element for bladder cancer, hypertension, hypothyroidism, Parkinsonism, stroke, MGUS
- Submit all relevant evidence to the RO/BVA, including VA generated evidence

VA Exams/Opinions

- VA **must** obtain a medical opinion for a DIC claim:
 - whenever such an opinion is necessary to substantiate the claimant's 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)

VA Exams/Opinions

- VA commonly errs by using *McLendon* analysis to determine if a medical opinion is needed for a DIC claim, rather than the *Wood* analysis
- It is much easier to satisfy the requirements for a medical opinion under *Wood*
 - A VA medical opinion in a DIC claim is almost always required
 - Appeal / seek review and cite *Wood* if wrong standard applied

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)

Inadequate Exams

- A VERY common reason for remands by the BVA and the CAVC is that 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 the VA provides a veteran with an examination, regardless of whether the examination is necessary, the VA must ensure that the examination is adequate. *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). The [give date of exam] exam is inadequate; therefore, the 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



Service Connection Claims

SC Example #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.”



Inadequate Supporting Rationale



Inadequate Supporting Rationale

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



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.
 - *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007)

Inadequate Supporting Rationale

- Boilerplate Example:
 - “For a VA examination 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. Under the U.S. Court of Appeals for Veterans Claims’s holdings in *Stefl* and *Nieves-Rodriguez*, this examination is inadequate, and the 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



SC Example #2

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



- Filed SC claim for foot condition in 2017

SC Example #2

- 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.”**

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)

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 [his/her] opinion on [state incorrect fact or facts]. However, as shown by the [state where in the claims file the “fact” is disproved], the examiner did not base [his/her] opinion on an accurate factual premise. This renders the examination inadequate, and the veteran is entitled to a new examination or medical opinion.”

SC Example # 3

- Vet filed service connection claim for hypertension, secondary to her service-connected PTSD
- Vet submitted medical articles that suggested a relationship between PTSD and hypertension
- VA examiner stated: “There is insufficient data in the medical literature to support that PTSD can aggravate or cause high blood pressure”

Failure to Address Medical Treatise Evidence

- This medical opinion is inadequate because it did not explain why the medical articles submitted by the Vet do not show that PTSD can cause or aggravate hypertension
- VA examiners frequently gloss over medical treatise evidence submitted by claimants. If an examiner provides a negative opinion, this can be a strong ground for challenging the adequacy of the exam.

Takeaway

- Advocates are **STRONGLY** encouraged to perform basic medical research and submit medical treatise evidence that supports a claim or shows flaws in a VA examiner's rationale.



McCray v. Wilkie

31 Vet. App. 243 (2019)

- Vet claimed SC for hearing loss
- In support of negative nexus opinions, VA examiners cited 2005 IOM report—*Noise and Military Service: Implications for Hearing Loss and Tinnitus*:
 - “The evidence from laboratory studies in humans and animals is sufficient to conclude that the most pronounced effects of a given noise exposure on puretone thresholds are measurable immediately following the exposure, with the length of recovery, whether partial or complete, related to the level, duration, and type of noise exposure. Most recovery to stable hearing thresholds occurs within 30 days.”

McCray v. Wilkie

31 Vet. App. 243 (2019)

- Vet submitted excerpts of IOM report showing the conclusions cited by the examiners had qualifying and contradictory aspects, which the examiners did not discuss:
 - “There is ***not sufficient evidence*** from longitudinal studies in laboratory animals or humans to determine whether permanent noise-induced hearing loss can develop much later in one’s lifetime, long after the cessation of that noise exposure. Although the ***definitive studies to address that issue have not been performed***, based on the anatomical and physiological data available on the recovery process following noise exposure, it is unlikely that such delayed effects occur.”
- BVA relied on the VA opinions to deny claim, but didn’t discuss qualifying and contradictory aspects of IOM report

McCray v. Wilkie

- CAVC found:
 - where the Vet's arguments concerning apparently qualifying or contradictory statements in the IOM report were of record when the Board made its decision, BVA was obligated to address the issue when assessing the probative value and adequacy of the VA medical opinions that relied on the IOM report

McCray v. Wilkie

- CAVC held:
 - If it is explicitly raised by the Vet or reasonably raised from review of the evidence of the record, BVA must address that issue and explain whether those aspects of the medical text diminish the probative value of the medical opinion evidence to render the opinion inadequate, and if not, why not

Advocacy Advice from *McCray v. Wilkie*

- Review any medical study / article / treatise that a VA examiner cites in support of a negative opinion to see if it fully supports the examiner's conclusion
 - If there is any qualifying or contradictory language that the VA examiner has not addressed, submit a copy to VA and point out the language

SC Example #4

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.



Poll

- Assume an adequate supporting rationale, do you think this is an adequate opinion?
 - A. YES
 - B. NO
 - C. NOT SURE



SC Example #4



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



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 *aggravated* by SC condition

Inadequate Secondary SC Exams

- There are two issues a VA examiner generally must address when providing a medical opinion on secondary service connection:
 - **Causation**
 - **Aggravation**

Inadequate Secondary SC Exams

- Examiners frequently fail to address both of these prongs (in most cases, aggravation is the prong they do not address).
 - ***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.

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)

Inadequate Secondary SC Exam Hypo

- Issue: SC for peripheral neuropathy (PN) of the right and left lower extremities, to include as secondary to SC meniscus tear of the right knee and early DJD
- Vet has never said his PN was aggravated by his knee condition, nor does any of the evidence of record indicate that the right knee disability has worsened the PN

Inadequate Secondary SC Exam Hypo

- VA Exam: Examiner found clinical evidence of PN in the bilateral lower extremities, most likely caused by diabetes mellitus, rather than the right knee disability

Poll

If the examiner provides a rationale for this opinion, is it adequate for secondary SC?

- A. No – aggravation opinion is needed
- B. Yes – Vet didn't claim aggravation
- C. Not Sure

Inadequate Secondary SC Exam Hypo



Vet did not allege that the SC knee condition aggravated his PN and the evidence did not raise the issue of aggravation

Inadequate Secondary SC Exam Hypo

- Issue: Entitlement to SC for sleep apnea, to include as secondary to SC PTSD
- Vet alleged in a Statement in Support of Claim that his sleep apnea was aggravated by PTSD
- VA Medical Opinion: Anxiety and PTSD, while co-morbid with sleep apnea, are not causal for sleep apnea, and the claimed condition is less likely than not proximately due to or the result of the Vet's SC PTSD

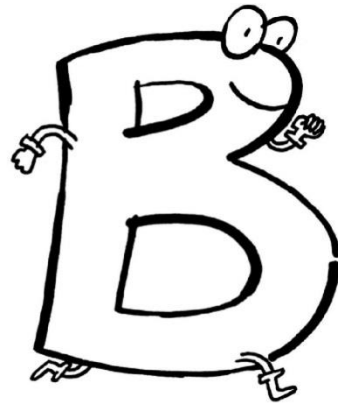
POLL

Is this VA opinion adequate for secondary SC?

- A. Yes, only needs to address causation
- B. No, an aggravation opinion is needed
- C. Yes, “result of” = aggravation
- D. Not Sure



Inadequate Secondary SC Exam Hypo



The issue of aggravation was explicitly raised by the Vet's statements, but the VA examiner only discussed causation.

Inadequate Secondary SC Exams

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

Advocacy Advice

- When filing a secondary SC claim (or at some point during the pendency of the claim), advocates should explicitly raise the issues of both causation and aggravation by submitting the following statement to VA:
 - “The veteran alleges that [his/her] [name of secondary condition] has been **caused** or **aggravated** by [his/her] service-connected [name of primary condition].”
- By doing so, any VA exam that does not address both theories will be considered inadequate

SC Example #5

“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.”

SC Example #5

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



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



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

Non-Medical Factual Determinations

- 1998 VA exam report:
 - The Vet's stressors in Vietnam apparently have not been substantiated and although it is likely that 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.

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.”

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 the examiner makes a credibility determination on non-medical facts, it taints the whole exam

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



POLL

Which of the following negative nexus opinion(s) apply the proper evidentiary standard?

- a) It is less likely than not that the Vet's current back condition is related to service
- b) It is at least as likely as not that the Vet's current back condition is not related to service
- c) It is not more likely than not that the Vet's current back condition is related to service
- d) It is not certain that the Vet's back condition is related to service

SC Example #6



Failure to Use Correct Evidentiary Standard



Incorrect Evidentiary Standard

- The examiner, in providing a negative nexus opinion, used an incorrect evidentiary standard
- The examiner unlawfully increased the standard of proof on the claimant if framing an opinion in terms stated in answers B, C, or D

Incorrect Evidentiary Standard

- Examiners sometimes erroneously provide a negative opinion because a nexus can't be shown “with a reasonable degree of medical certainty”
- Examiners also sometimes provide an opinion that it is at least as likely as not that a condition is “not” related to service
 - This leaves open the possibility that there is a 50/50 chance the condition is related to service, and should not be relied upon by VA to deny a claim

Advocacy Advice

- Even though VA examiners should be familiar with the “at least as likely as not” standard, they sometimes forget and hold the claimant to a higher evidentiary standard
- If an examiner expresses opinion in terms of standard of proof above 50% (as likely as not), challenge the adequacy of the exam.
- **FRIENDLY REMINDER:** when obtaining a private exam, make sure the examiner knows the evidentiary standard is only “at least as likely as not”

SC Example #7

- “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

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

NOT QUALIFIED

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
- 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
- Sometimes VA has an obligation to address competency of examiner because issue is raised by the record, but it is always best to explicitly raise the issue if appropriate

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

Advocacy Advice

- If an examiner calls into question his or her credentials, ask VA for the examiner's qualifications and argue that he or she is unqualified
- VA is not obligated to provide a Vet with an examiner who specializes in the area in question, but if the disability at issue seems far outside the examiner's specialty, ask for his or her qualifications
- If it is determined that the examiner was unqualified, the exam will be deemed inadequate



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SC Example #8

- “It is not possible to offer an opinion on the etiology of the veteran’s degenerative joint disease without resort to speculation.”

Poll

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



SC Example #8



Mere Speculation

- A VA examiner must provide a rationale for the inability to provide a more conclusive opinion
- *Jones v. Shinseki*, 23 Vet. App. 382 (2010)

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)**

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.

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?

Advocacy Advice

- If an examiner refuses to offer an opinion on whether a disability is at least as likely as not related to service because it would “be speculative” or “require resort to speculation,” ensure the examiner provides rationale for that inability, and if so, that the explanation satisfies the requirements of *Jones*

Rating Claims

Rating Example #1

- 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.”



Poll

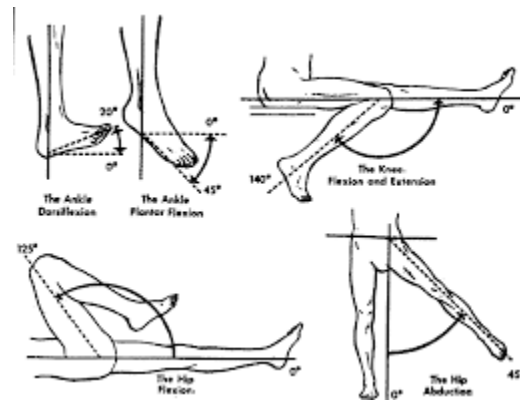
- Do you think this is an adequate opinion?
 - A. Yes
 - B. No
 - C. Not sure



Rating Example #1



Failure to Properly Address Functional Loss



Failure to Properly Address Functional Loss

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

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)

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

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

Failure to Properly Address Functional Loss

- Boilerplate argument:
 - “In *DeLuca v. Brown*, the U.S. 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 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*, 25 Vet. App. at 44. In the [date] VA examination 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 examination and opinion .”

Advocacy Advice

- Review joint examinations to see if the VA examiner either:
 - Talks about functional impairment in terms of range of motion loss OR
 - States why he/she cannot provide such an opinion



Rating Example #2

- 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 Vet not observed during flare-up or after repeated use over time.

Poll

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



Rating Example #2



Not Offering an Opinion on Functional Loss Because Vet Not Observed During Flare-Up or After Repeated Use Over Time

Speculation About Functional Loss

- 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)

Speculation About Functional Loss

- 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

Speculation About Functional Loss

- ❑ 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)

Rating Example #3

- 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



Rating Example #3

- 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.”



Rating Example #3

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



Failure to Address Relevant Lay Statements



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) (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).

Rating Example #3

- **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.



Failure to Address Lay Statements

- Boilerplate Example:
 - “Lay evidence must be considered by VA and an examination 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] VA examination 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 examination inadequate, and the Veteran is entitled to a new examination or medical opinion.”

POLL

What is the proper remedy by CAVC if a VA examiner does not address lay statements and BVA does not find that Vet is not credible or not competent to offer that lay evidence?

- A. Send case back to BVA for a credibility determination**
- B. Order BVA to get a new medical opinion**
- C. It does not matter – neither the VA examiner nor the Board have to address lay statements**
- D. Not Sure**

Miller v. Wilkie,
Vet. App. 18-2796 (Jan. 16, 2020)



- When examiner fails to address Vet's lay evidence and BVA doesn't find Vet not credible or not competent to offer that lay evidence, VA must obtain a new exam in which examiner addresses the lay evidence
- BVA has implicitly found Vet's statements credible and cannot change that finding before providing Vet with new exam
 - But medical findings in new exam can inform new credibility finding if case returns to BVA

Take Aways

- Read over the VA examiner's opinion to see if relevant lay statements are addressed
- If they are not considered and the Board did not make a negative credibility determination and did not find Vet not competent, then a new VA medical opinion is warranted
 - **NOT a remand for BVA to first make a credibility determination**





Reasons for Inadequate SC Exams

(some may also apply to IR Claims)

- 1. Inadequate Rationale**
- 2. Inaccurate Factual Premise**
- 3. Failure to Address Medical Treatise Evidence**
- 4. Failure to Address Both Theories of Secondary SC**
- 5. The Examiner Makes His or Her Own Non-Medical Determinations**
- 6. Failure to Use Correct Evidentiary Standard**
- 7. Examiner Not Qualified to Provide a Medical Opinion on the Disability in Question**
- 8. Failure to Provide Rationale As To Why It Would Be Speculative to Provide an Opinion**

Reasons for Inadequate Rating Exams

1. Failure to Properly Address Functional Loss
2. Not Offering an Opinion on Functional Loss Because Vet Not Observed During Flare-Up or After Repeated Use Over Time
3. Failure to Address Relevant Lay Statements
 - Could also apply to SC exams

Questions?



The New Wave of Veterans: Helping Post 9/11 Combat Veterans with TBI and PTSD

Upcoming VSO Webinars: May 19 or 20
Presented by: Helen Chong



Library of Past Webinars

Recorded Webinars are available here (can be viewed for only 72 hours after purchase):

<https://productsbynvlsp.org/webinars/>

Recorded Webinar topics include:

- The New VA Appeals System (Appeals Modernization)
- Modernized Claims and Appeals: Supplemental Claims and Recent Developments
- New Changes to VA's Non-Service-Connected Disability Compensation Program

NVLSP VA Benefit Identifier

- **Questionnaire/App:** Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to.
- **3 WAYS to Access:**

[NVLSP Website](#)



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