



NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Establishing Entitlement to Service Connection for Hearing Loss and Tinnitus

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Agenda





- ▶ **Hearing Loss**
 - ▶ Basics of service connection
 - ▶ Hearing loss disability
 - ▶ Presumption of soundness
 - ▶ In-service event/injury
 - ▶ Medical nexus/linkage
 - ▶ Things to keep in mind
- ▶ **Tinnitus**
 - ▶ Basics of service connection
 - ▶ Little known rules

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HEARING LOSS



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Proving Entitlement to SC

- ▶ Delayed Direct:
 - ▶ Current hearing loss disability
 - ▶ In service event / injury (acoustic trauma)
 - ▶ Medical nexus
- ▶ Continuity of symptoms (if “noted” in service)


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Proving Entitlement to SC 

- ▶ Chronic condition first diagnosed in-service
- ▶ Chronic condition diagnosed in 1st post-service year




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Showing Current Disability 

- ▶ Vet must have a current hearing disability
- ▶ The medical community recognizes:
 - ▶ Threshold for normal hearing is from 0 to 20 db
 - ▶ Higher thresholds indicate some degree of hearing loss
 - ▶ *Hensley v. Brown*, 5 Vet. App. 155, 157 (1993)
- ▶ VA has different standards for determining if hearing loss is a “disability”
 - ▶ 38 C.F.R. § 3.385

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SURVEY #1 

- ▶ How many ways are there to establish hearing loss disability under **38 C.F.R. § 3.385**?
 - A. One
 - B. Two
 - C. Three
 - D. Four

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Showing Current Disability



What is a hearing loss disability under **38 C.F.R. § 3.385**?

- ▶ Threshold for **any one** of frequencies 500, 1000, 2000, 3000, or 4000 Hz is **40 db or greater**
- ▶ Thresholds for **at least 3** frequencies 500, 1000, 2000, 3000, or 4000 Hz are **26 db or greater**
- ▶ Speech recognition score using the **Maryland CNC Test < 94 percent**

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Showing Current Disability



▶ What if there is no audiogram?

- ▶ Written descriptions of hearing acuity = specific audiogram scores
- ▶ Argue the descriptions meet the requirements under **§ 3.385** and at least trigger the need for an exam

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Showing Current Disability



- ▶ **Normal** = 25 db or less
- ▶ **Mild** = 26 to 40 db
- ▶ **Moderate** = 41 to 54 db
- ▶ **Mod. Severe** = 55 to 69 db
- ▶ **Severe** = 70 to 89 db
- ▶ **Profound** = 90+ db

▶ VA Clinicians' Guide, Chapter 5, Section 10

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PRESUMPTION OF SOUNDNESS

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Presumption of Soundness

- ▶ “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

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Presumption of Soundness

- ▶ **What does it do?**
 - ▶ Makes it harder for VA to say that a claimed disability is not SC because it pre-existed the Vet's service
 - ▶ Helps establish the second element of SC (in-service disease or injury)

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Presumption of Soundness

▶ **4 requirements** for presumption of soundness to apply (***ALL must be present***)

- 1) **Claimant must be a veteran**
- 2) **There is evidence that the claimed disability existed in or was caused by service**

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Presumption of Soundness

▶ **4 requirements (cont.):**


- 3) **An entrance exam was conducted**
- 4) **The claimed disability was not “noted” during the entrance exam**
 - ▶ We will focus on this requirement today

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What Constitutes a “Notation” on an Entrance Exam?

▶ History of preservice existence of conditions recorded at the time of exam 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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Rebutting Presumption of Soundness



► Once the presumption of soundness applies, VA can only rebut the presumption with:

► **Clear and unmistakable evidence** that the disability **pre-existed service**; **AND**

► **Clear and unmistakable evidence** that the disability was **not aggravated by service**

Presumption of Soundness - Hearing Loss Claims



► As explained earlier, Vet may have hearing loss recognized by the medical community, but which does not constitute a “disability” under VA regs

► What if non-disabling hearing loss is noted on an entrance exam? Does the presumption of soundness apply?


McKinney v. McDonald 28 Vet. App. 15 (2016)



► Vet served on active duty in the Navy from **April 1969 to April 1971**


► **Jan. 1969:** Vet underwent entrance exam that included audiometric testing:

	500 Hz	1000 Hz	2000 Hz	3000 Hz	4000 Hz
Right	5	5	5	n/a	35
Left	5	0	15	n/a	35

McKinney v. McDonald 


- ▶ **PULHES Report** is a military assessment done at entrance and separation
 - P—Physical Capacity / Stamina
 - U—Upper Extremities
 - L—Lower Extremities
 - H—Hearing / Ears
 - E—Eyes
 - S—Psychiatric
- ▶ Ratings are on a scale of 1 to 4, with 1 being the highest level of fitness

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McKinney v. McDonald 


- ▶ On entrance, Vet received a “1” on his PULHES report for his hearing
- ▶ In “Summary of Defects and Diagnoses,” nothing mentioned about Vet’s hearing
- ▶ Vet was not treated for hearing loss during service and audiometric testing was not conducted as part of separation exam

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McKinney v. McDonald 

- ▶ **Apr. 2009:** Vet filed claim for SC for bilateral hearing loss, stating that he was exposed to artillery fire in training missions and noise from helicopters
- ▶ **June 2009:** RO denied claim. Vet appealed
- ▶ **Jan. 2011:** Vet testified that he first noticed a change in his hearing during the 1970s


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McKinney v. McDonald 

► **May 2011 VA Examiner:**


- Reviewed 1969 audiology test results and stated that Vet had “a pre-existing hearing loss at 4000 Hz, bilaterally” and that “all other thresholds tested were within normal limits”
- Diagnosed Vet with sloping bilateral hearing loss at 2000 to 8000 Hz
- Stated that because no audio test was performed as part of Vet’s separation exam, she could not offer an opinion regarding a hearing loss, or hearing threshold shift bilaterally w/out resorting to speculation
- Did not address Vet’s statement about noticing his hearing change in the 1970s

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McKinney v. McDonald 

► **March 2012:** in an addendum to the May 2011 exam, the VA examiner reiterated her statement that she could not offer an opinion regarding the effect of in-service noise exposure on the Vet’s hearing without resorting to speculation


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McKinney v. McDonald 

► **April 2013 BVA decision:**


- Denied SC for bilateral hearing loss
- Vet not entitled to the presumption of soundness because his service entrance audiometric test showed that he had “some degree of preexisting hearing loss”
- Since VA examiner’s statement did not provide an opinion regarding aggravation or the etiology of the hearing loss, the statement “provides neither positive nor negative support for service connection”

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McKinney v. McDonald 

- ▶ **April 2013 BVA decision (cont.):**
 - ▶ Because there was no other competent medical evidence addressing the etiology of the Vet's hearing loss, his preexisting hearing loss was not aggravated by service
 - ▶ The Board found his statements that he was exposed to loud noise during service were competent, credible, and consistent with the circumstances of his service

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SURVEY #2 


- ▶ Do you think BVA was correct in finding that Vet had hearing loss that preexisted military service?
 - A. Yes
 - B. No
 - C. Not sure



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McKinney v. McDonald 


- ▶ Vet appealed to CAVC and argued that BVA erred when it found that his entrance exam showed he had preexisting hearing loss
- ▶ The degree of hearing loss noted on his entrance exam did not constitute a hearing disability under **38 C.F.R. § 3.385**

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McKinney v. McDonald 


- ▶ CAVC concluded that the 1969 audio testing showed that Vet had preexisting hearing loss and the test results constituted a “notation” of hearing loss
- ▶ But, the Court held that the presumption of soundness still applied

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McKinney v. McDonald 


- ▶ The Court held the term “defect” in the presumption of soundness regulation was defined narrowly
- ▶ Hearing impairment should only be considered a “defect” if it is severe enough to be a disability under **§ 3.385**
- ▶ Whether a defect is noted on an entrance exam is based on whether VA compensation benefits are available for the condition for which the Vet seeks benefits

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McKinney v. McDonald 

- ▶ The Court also found that the VA exam and addendum were inadequate because:
 - ▶ Although the examiner identified the evidence she needed to offer an opinion, it was unclear that the phrase "without resorting to speculation" reflected the limits of knowledge in the medical community at large or the limits of the examiner's knowledge
 - ▶ The examiner failed to consider the Vet's testimony that he first noticed a change in hearing during the 1970s

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Lessons Learned from McKinney 

- ▶ If preexisting hearing loss is shown on an audiometric test in an entrance exam, there does not need to be a contemporaneous medical opinion interpreting the significance of those thresholds
 - ▶ **Examiner does not need to state the Vet has hearing loss**
- ▶ If hearing loss is noted on the entrance exam, but does not meet the standards for a hearing loss "disability" under § 3.385, then it is not a "defect" for purposes of the presumption of soundness

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**IN-SERVICE
EVENT/INJURY** 



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In-Service Event / Injury NVLSP

- ▶ 3M earplugs
 - ▶ From 2003-2015, especially in Iraq and Afghanistan, military used 3M earplugs called Dual-Ended Combat Arms Earplugs Version 2 (CAEV2)
 - ▶ They were allegedly defective because they were too short to be inserted correctly



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In-Service Event / Injury NVLSP

- ▶ 3M earplugs (cont.)
 - ▶ 3M settled False Claims Act lawsuit alleging it sold defective earplugs to Defense Logistics Agency
 - ▶ More than 239K veterans suing 3M in lawsuits consolidated in N. Dist. of Florida
 - ▶ On 4/30/21, jury awarded first 3 plaintiffs \$7.1 million
 - ▶ For VA claim, note if Vet used these earplugs to help show in-service hazardous noise exposure, even if service records document use of hearing protection

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In-Service Event / Injury NVLSP

- ▶ Review STRs carefully for evidence of acoustic trauma or other evidence suggesting acoustic trauma
 - ▶ Ex: STR shows Navy Vet stationed in engine room seen for hoarseness because he was shouting so that he could be heard above the roar of engines



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In-Service Event / Injury NVLSP

- ▶ Review in-service exams
 - ▶ Whispered voice/spoken voice tests notoriously unreliable, so lay statements of in-service hearing loss may carry more weight than when audiogram used
- ▶ In-service audiograms might have been conducted under older ASA standards & need to be converted to newer ISO standards

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In-Service Event / Injury NVLSP

- ▶ Unless otherwise specified in the test results, assume ASA units if:
 - ▶ Military audiogram conducted prior to 1969
 - ▶ VA audiogram conducted prior to 1976
 - ▶ VHA C&P exams routinely converted ISO/ANSI results to ASA units until the end of 1975 because the regulatory standard for evaluating hearing loss was not changed to require ISO/ANSI units until 9/9/1975
 - ▶ See Manual M21-1, III.iv.4.D.2.c

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In-Service Event / Injury NVLSP

- ▶ To convert from ASA to ISO:
 - ▶ Add 15 db at 250 and 500 Hz level
 - ▶ Add 10 db at 1000, 2000, and 3000 Hz levels
 - ▶ Add 5 db at 4000 Hz level
 - ▶ Add 10 db at 6000 and 8000 Hz levels

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In-Service Event / Injury NVLSP

- ▶ Review entrance and separation audiograms to determine any threshold “shift” during service or “notch” that can represent HL
 - ▶ 10-15 db shift generally considered clinically significant
 - ▶ Positive nexus opinion more likely if such a threshold shift present in service, even if hearing loss “normal” at separation

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In-Service Event / Injury NVLSP

- ▶ Even if disabling HL not found during service, you are not precluded from establishing SC.
 - ▶ *Hensley v. Brown*, 5 Vet. App. 155 (1993)

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In-Service Event / Injury NVLSP

- ▶ If Vet denied hearing loss on separation exam, you may need to explain why, particularly if VA examiner uses this to support a negative nexus opinion, or a VA adjudicator cites this as a reason for denying claim
 - ▶ Vet may have been unaware of high frequency hearing loss - not always obvious
 - ▶ Vet may have been concerned about delaying separation
 - ▶ Denial of “hearing loss” on separation report of medical history is not evidence that the Vet did not experience “acoustic trauma”
 - ▶ Delayed onset hearing loss possible (we’ll discuss later)

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MEDICAL NEXUS/LINKAGE



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Establishing Linkage

- ▶ To show entitlement to SC for HL, you *usually* need a medical nexus opinion
 - ▶ SC for hearing loss may be granted where there is credible evidence of acoustic trauma due to significant noise exposure in service, post-service audiometric findings meeting the regulatory requirements for hearing loss disability for VA purposes, and a medically sound basis upon which to attribute the post-service findings to the injury in service (as opposed to intercurrent causes)
 - ▶ *Hensley v. Brown*, 5 Vet. App. 155 (1993)
 - ▶ “It is at least as likely as not that hearing loss is related to service / in-service acoustic trauma”

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Establishing Linkage

- ▶ Can also show entitlement to SC with continuity of symptomatology or chronicity
 - ▶ 38 C.F.R. § 3.303(b)
- ▶ SC by continuity of symptomatology and chronicity available for disabilities listed as “chronic” under 38 C.F.R. § 3.309(a)
 - ▶ *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013)
- ▶ Sensorineural hearing loss is considered by VA as an “organic disease of the nervous system,” which is a “chronic” disease
 - ▶ Manual M21-1, III.iv.4.D.1.a

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Establishing Linkage

- ▶ Continuity of symptoms is important for hearing loss claims
 - ▶ If condition “noted” in service, credible lay evidence of continuity of symptoms + current disability can be enough to grant SC, even if no nexus opinion
 - ▶ If condition not “noted” in service, continuity can still be useful for obtaining favorable nexus opinion
- ▶ Statements from Vet, family, friends, co-workers, etc. can help close gap between service and post-service diagnosis

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Establishing Linkage

- ▶ Other evidence, such as employment physical exams, can help support continuity of symptoms
- ▶ Statements related to post-service employment can help isolate noise exposure to military service




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Establishing Linkage

- ▶ Highlight if Vet had no significant post-service hazardous occupational and recreational noise exposure
- ▶ If there was post-service hazardous noise exposure, discuss mitigating factors (for example, use of hearing protection or short duration)


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Establishing Linkage

- ▶ Post-service Reserve or National Guard records showing even mild HL or threshold shift can help bridge gap to service
- ▶ Reserve or National Guard records can help substantiate claim that hearing loss is related to in-service injury during Reserve/National Guard service


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Establishing Linkage

- ▶ SC as a chronic condition under **38 C.F.R. § 3.303(b)**
 - ▶ If sensorineural hearing loss established / diagnosed in service, even if not present at time of separation, SC can be granted for current sensorineural hearing loss without nexus opinion


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Establishing Linkage

- ▶ Presumptive SC as a chronic condition under **38 C.F.R. §§ 3.307(a)(3); 3.309(a)**
 - ▶ Sensorineural hearing loss must manifest to a disabling degree of 10% or more within 1 year of separation
 - ▶ Difficult to prove w/out contemporaneous audiogram, but retrospective medical opinion may be able to establish entitlement


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Reviewing VA Exams

- ▶ Many VA examiners say that hearing damage ceases when hazardous noise exposure ends and reject the idea of “delayed onset” HL
- ▶ They rely on normal separation audiogram as precluding SC for HL, particularly if no in-service threshold shift
- ▶ They often rely on a 2005 report by the Institute of Medicine, *Noise and Military Service: Implications for Hearing Loss and Tinnitus*


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Reviewing VA Exams

- ▶ *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.

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Reviewing VA Exams

- ▶ *Noise and Military Service: Implications for Hearing Loss and Tinnitus (cont.):*
 - ▶ 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.

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Reviewing VA Exams



- ▶ This issue was addressed by CAVC in *McCray v. Wilkie*, 31 Vet. App. 243 (2019)
 - ▶ VA examiners cited IOM report in support of negative nexus opinions
 - ▶ Vet submitted excerpts of IOM report showing the conclusions cited by the examiners had qualifying and contradictory aspects, which the examiners did not discuss
 - ▶ BVA relied on the VA opinions to deny claim, but didn't discuss qualifying and contradictory aspects of IOM report

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Reviewing VA Exams



- ▶ CAVC held:
 - ▶ Where Vet's arguments concerning apparently qualifying or contradictory statements in the IOM report were of record when BVA 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
 - ▶ If it is explicitly raised by 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


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Reviewing VA Exams



- ▶ If a negative VA nexus opinion relies on the 2005 IOM study:
 - ▶ Argue that VA should not rely on the opinion because the IOM report contains qualifiers or contradictions that lessen the value of its conclusion
 - ▶ Submit relevant excerpts from the IOM report
 - ▶ Submit (or at least reference) studies listed on the following slides supporting theory of delayed-onset hearing loss


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Reviewing VA Exams

- ▶ More recent scientific articles suggest that the IOM's conclusion on delayed-onset hearing loss may be flawed, including the following by Harvard Medical School faculty:
 - ▶ Sharon G. Kujawa, M. C. Liberman, "Adding Insult to Injury: Cochlear Nerve Degeneration after 'Temporary' Noise-Induced Hearing Loss," 29(45) J. Neuroscience 14077, 14078-79 (2009)
 - ▶ Sharon G. Kujawa, M. Charles Liberman, "Synaptopathy in the Noise-Exposed and Aging Cochlea: Primary Neural Degeneration in Acquired Sensorineural Hearing Loss," 330(B) Hearing Research 191, 191-199 (2015)


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Reviewing VA Exams

- ▶ The **2009 Kujawa study** shows that despite a temporary return to normal hearing measurements after noise exposure, there is primary degeneration of cochlear neurons after noise exposure
- ▶ Therefore, normal hearing thresholds may mask neural degeneration
 - ▶ In other words, hearing damage resulting in degeneration years later may occur, despite "normal" hearing shortly post-exposure


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Reviewing VA Exams


- ▶ The **2015 Kujawa article** concludes:
 - ▶ The emerging work on hidden hearing loss makes it quite clear that the fundamental assumption that full threshold recovery indicates full cochlear recovery is severely flawed and thus that noise is much more dangerous than we have previously thought.

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REVIEWING VA EXAMS 


- ▶ When someone has either **no hearing loss or mild hearing loss up to 50 dB at the end of military service**, data from published studies show that exposure to high-level sounds that are encountered during military service **accelerates the progression of hearing loss after the exposure has stopped**
- ▶ No effect on or slowing of progression of hearing loss for frequencies where the hearing loss exceeds 50 dB
- ▶ Studies reviewed had limitations and further longitudinal studies are needed
 - ▶ Brian Moore, The Effect of Exposure to Noise during Military Service on the Subsequent Progression of Hearing Loss. *International journal of environmental research and public health*, 18(5), 2436 (2021)

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Reviewing VA Exams 

- ▶ Advocates should cite to the **Kujawa articles** and **Moore article** to show that damage to hearing may occur despite normal audiograms on separation from service
- ▶ An opinion in which the examiner flatly states there is “no such thing as delayed-onset hearing loss”—without referring to the **Kujawa articles and/or Moore article**—is inadequate and should be returned


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Reviewing VA Exams 

- ▶ A VA examiner may reject the **Kujawa articles and/or Moore article** because the studies are not “generally accepted in the medical community”
- ▶ However, VA “cannot demand a level of acceptance in the scientific community greater than the level of proof required by the benefit of the doubt rule”
 - ▶ *Wise v. Shinseki*, 26 Vet. App. 517 (2014)

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Reviewing VA Exams



- ▶ A Vet might have:
 - ▶ experienced damaging levels of noise while in service
 - ▶ experienced temporary HL
 - ▶ recovered for a substantial period of time
 - ▶ have normal audiogram results on separation
- ▶ but still have current hearing loss which is a long-term result of the in-service acoustic trauma

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Reviewing VA Exams



- ▶ Other areas to watch when reviewing exams:
 - ▶ Did examiner address the standards used in pre-1976 audiograms and properly convert ASA to ISO measurements?
 - ▶ Did examiner acknowledge lay evidence of continuity of symptomatology?

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Reviewing VA Exams



- ▶ Other areas to watch when reviewing exams (cont.):
 - ▶ Did examiner provide rationale for opinion?
 - ▶ Did examiner address all favorable evidence, including post-service noise exposure or lack thereof?
 - ▶ Is examiner's opinion consistent (or inconsistent) with the **Kujawa and/or Moore** articles?


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SURVEY #3




▶ Do you think BVA was correct in finding that Vet had hearing loss that preexisted military service?


- A. The exam is adequate
- B. The exam is inadequate, unless the examiner provides sufficient rationale for inability to provide an opinion
- C. Not sure



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 **Reviewing VA Exams**

▶ Exam is inadequate, unless the examiner provides rationale for the inability to provide an opinion, and from that rationale it is clear:

- ▶ The inability to provide an opinion is not the first impression of an uninformed examiner and is rather an assessment arrived at after all due diligence in seeking relevant medical information that may have bearing on the opinion
- ▶ Examiner considered all procurable and assembled data, by obtaining all tests and records that might reasonably illuminate the medical analysis
- ▶ *Jones v. Shinseki*, 23 Vet. App. 382 (2010)

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Some final things to keep in mind...

- ▶ Ensure that all hearing tests used to evaluate HL are conducted in accordance with VA requirements
 - ▶ Audiometric evaluations relied upon by VA should be for comp purposes, rather than just outpatient reports
- ▶ Ensure that all treatment records (VA and private) are associated with the claims file, and addressed by the VA examiner if relevant


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Some final things to keep in mind...

- ▶ RO and BVA can interpret audiogram results presented in graph form
 - ▶ Some adjudicators erroneously think they are prohibited from converting graphs into numerical values of hearing thresholds, and that only a medical expert can do so
 - ▶ *Kelly v. Brown*, 7 Vet. App. 471 (1995)

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Basics of Service Connection



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Service Connection for Tinnitus

- ▶ Delayed direct (38 C.F.R. § 3.303(d)):
 - ▶ Current evidence of tinnitus
 - ▶ In service symptoms, event, injury (acoustic trauma)
 - ▶ Medical nexus

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Service Connection for Tinnitus

What about...

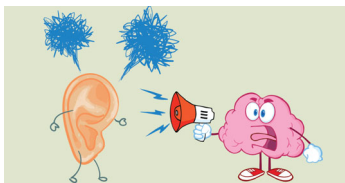
- ▶ Continuity of symptoms (if “noted” in service) (38 C.F.R. § 3.303(b))?
- ▶ Chronic condition first diagnosed in-service (38 C.F.R. § 3.303(b))?
- ▶ Chronic condition diagnosed in 1st post-service year (38 C.F.R. §§ 3.307(a)(3), 3.309(a))?

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Service Connection for Tinnitus



We'll see...



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Current Disability



- ▶ Under all theories of SC, Vet must establish a current diagnosis of tinnitus
- ▶ There is no objective testing available to determine if a Vet has tinnitus
- ▶ Doctors base diagnosis on Vet's report of symptoms
- ▶ Lay evidence of tinnitus is competent because ringing in the ears is capable of lay observation
- ▶ *Charles v. Principi*, 16 Vet. App. 370 (2002)

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Current Disability



- ▶ But, VA says medical professional must provide a **current diagnosis** of tinnitus:
 - ▶ A diagnosis of tinnitus is a medical determination
 - ▶ A layperson is not competent to render a diagnosis without appropriate medical training and/or background
 - ▶ Manual M21-1, III.iv.4.D.3.b
- ▶ Note: BVA sometimes concedes current diagnosis based solely on lay statement

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Other Elements of Service Connection

- ▶ Vet's lay statements alone (without confirmation by medical expert), if found credible by VA, can at least be sufficient to establish:
 - ▶ In-service disease / symptoms
 - ▶ Continuity of symptoms

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Delayed Direct SC: In-Service Event

- ▶ Need in-service disease, injury, or event
 - ▶ Acoustic trauma, hazardous noise exposure
 - ▶ In-service symptoms of tinnitus (ear ringing)
 - ▶ Ear infections, use of ototoxic medication, head injury/TBI, barotrauma, or other tympanic trauma
- ▶ Lay statements found credible by VA are sufficient
- ▶ Carefully review Vet's military duties for likelihood of acoustic trauma
- ▶ § 1154(b) combat presumption can help establish in-service sx or acoustic trauma

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Delayed Direct SC: Nexus

- ▶ Under this theory, you need a medical opinion that the current tinnitus is at least as likely as not:
 - ▶ caused by in-service noise exposure or other in-service event, injury, or illness
 - ▶ related to in-service symptoms, or
 - ▶ is a symptom of SC hearing loss (VA concedes tinnitus results from the same etiology as the HL, rather than being secondary to HL)

▶ Manual M21-1, III.iv.4.D.3.b

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Fountain v. McDonald
27 Vet. App. 258 (2015)

▶ Is tinnitus a “chronic” disability subject to service connection under theories of chronicity, continuity of symptoms, and as a chronic disease manifesting in the first post-service year?

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Fountain v. McDonald

▶ Vet filed claim for entitlement to SC for tinnitus 30 years after he left service

▶ Vet did not report tinnitus during his separation exam, in other STRs, or in many post-service exams, including 1980 VA exam

▶ He stated that his tinnitus began in-service and continued after service


▶ Explained he did not realize ear ringing was a disability, which is partially why it took so long for him to complain about it

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Fountain v. McDonald


▶ Vet underwent a VA audio exam in May 2009 which found that his tinnitus was less likely than not caused by or a result of his in-service acoustic trauma based on the STRs and VA exams conducted shortly after he left service that were silent for a complaint or diagnosis of tinnitus

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Fountain v. McDonald 


- ▶ BVA denied the claim and rejected Vet's lay statements
 - ▶ Found that a lay person was not competent to provide statements as to the etiology of tinnitus
 - ▶ Found Vet's statements that tinnitus began in service were not credible due to the absence of in-service complaints, the fact that it took him 30 years to file a claim, and "denial" of tinnitus in 1980 VA exam report

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Fountain v. McDonald 

- ▶ CAVC vacated the BVA decision and remanded the case
- ▶ Tinnitus is an organic disease of the nervous system *when there is evidence of acoustic trauma*
- ▶ When tinnitus is the result of acoustic trauma, tinnitus is a chronic disease under **38 C.F.R. § 3.309(a)**
 - ▶ VA's own pubs state that tinnitus originates from the central nervous system

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Takeaways from Fountain 

- ▶ As a chronic disease, SC for tinnitus may be established under:
 - ▶ Chronicity theory of SC
 - ▶ Continuity of symptoms theory of SC
 - ▶ Presumptive SC as a chronic condition first manifesting w/in 1 year of separation
 - ▶ 38 C.F.R. §§ 3.303(b), 3.307(a)(3), 3.309(a)

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Takeaways from *Fountain*



- ▶ Vet's statements may be competent evidence establishing SC via continuity
 - ▶ "ringing in the ears is capable of lay observation"
 - ▶ *Charles v. Principi*, 16 Vet. App. 370 (2002)



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Takeaways from *Fountain*



- ▶ While the CAVC only addressed whether tinnitus is an organic disease of the nervous system when there is evidence of acoustic trauma, it did not preclude tinnitus from being considered an organic disease of the nervous system in other situations
- ▶ In practice, VA considers tinnitus a "chronic" disability, even absent evidence of acoustic trauma

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Takeaways from *Fountain*



- VA can't reject Vet's lay statements as not credible without addressing Vet's explanation about why he didn't report tinnitus and file a claim earlier

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Takeaways from *Fountain*



- ▶ There are reasonable explanations for why a Vet may take several years (or decades) to report tinnitus, such as:
 - ▶ Not being aware tinnitus is a disability
 - ▶ If the symptoms are not severe (in this case, Vet only had 1 or 2 episodes of tinnitus a day and each episode only lasted about 30 seconds)

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Takeaways from *Fountain*



- ▶ Ensure VA does not mischaracterize evidence
 - ▶ In this case, BVA said that the Vet **denied** tinnitus at 1980 exam
 - ▶ Actually, the 1980 exam report only stated that the Vet “**did not report** tinnitus”
 - ▶ There is a difference between denying a condition and not reporting a condition

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Takeaways from *Fountain*



- ▶ For tinnitus claims, if Vet is also applying for SC for hearing loss or is already SC for hearing loss, a claim for SC for tinnitus as *secondary* to HL is considered “reasonably raised”
 - ▶ But, it can’t hurt to explicitly raise secondary SC argument

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Takeaways from *Fountain*



- The Court noted that VA Training Letter 10-02 said tinnitus is often caused by sensorineural hearing loss and required VA audiologists to "indicate whether tinnitus is as likely as not a symptom associated with hearing loss" if there "is a claim and/or current complaint of tinnitus" and "if hearing loss is present"

LITTLE KNOWN




Little Known Rules




- ▶ A claimant without medical training might interpret tinnitus as creating interference with normal hearing and thus file a claim for SC for "hearing loss"
- ▶ Claims for SC for "hearing impairment" or even just "hearing" are also ambiguous as to whether they concern reduced hearing acuity only or also tinnitus
- ▶ Accordingly, VA is required to sympathetically read hearing loss claims to determine if they encompass a claim for SC for tinnitus.

Little Known Rules



- If tinnitus is not claimed by Vet, but medical or lay evidence:
 - Raises the issue of tinnitus, and
 - Establishes entitlement to SC, then
 - Tinnitus is within the scope of the HL claim
 - Date of HL claim used for effective date purposes
 - Manual M21-1, III.iv.4.D.2.a



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Little Known Rules




▶ Issue of tinnitus likely raised in HL claim if Vet:

1. Makes later contentions about tinnitus,
2. Submits evidence of tinnitus, or
3. Reports tinnitus at a hearing exam, or
4. VA examiner diagnoses tinnitus and associates it with Vet's service or another SC disability

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Little Known Rules



▶ But, if Vet only claims SC for tinnitus, and evidence shows HL that may be related to service or an SC condition, VA must only solicit HL claim from Vet

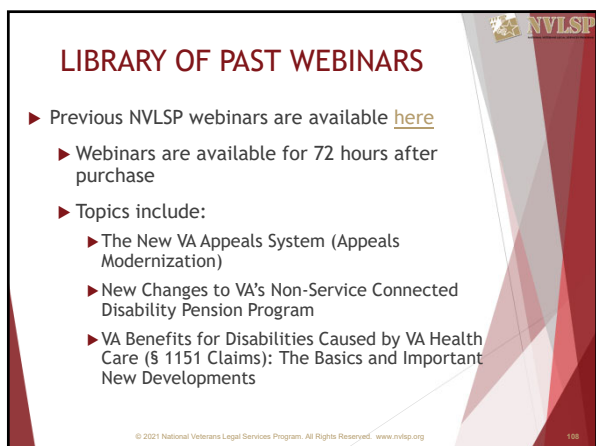
▶ Generally, VA will not consider tinnitus claim as encompassing a claim for SC for hearing loss

▶ Manual M21-1, III.iv. 4.D.3.a

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