Common VA Errors: Lessons Learned from NVLSP Cases That Can Help Veterans Advocates

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Intro Notes

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Intro Notes

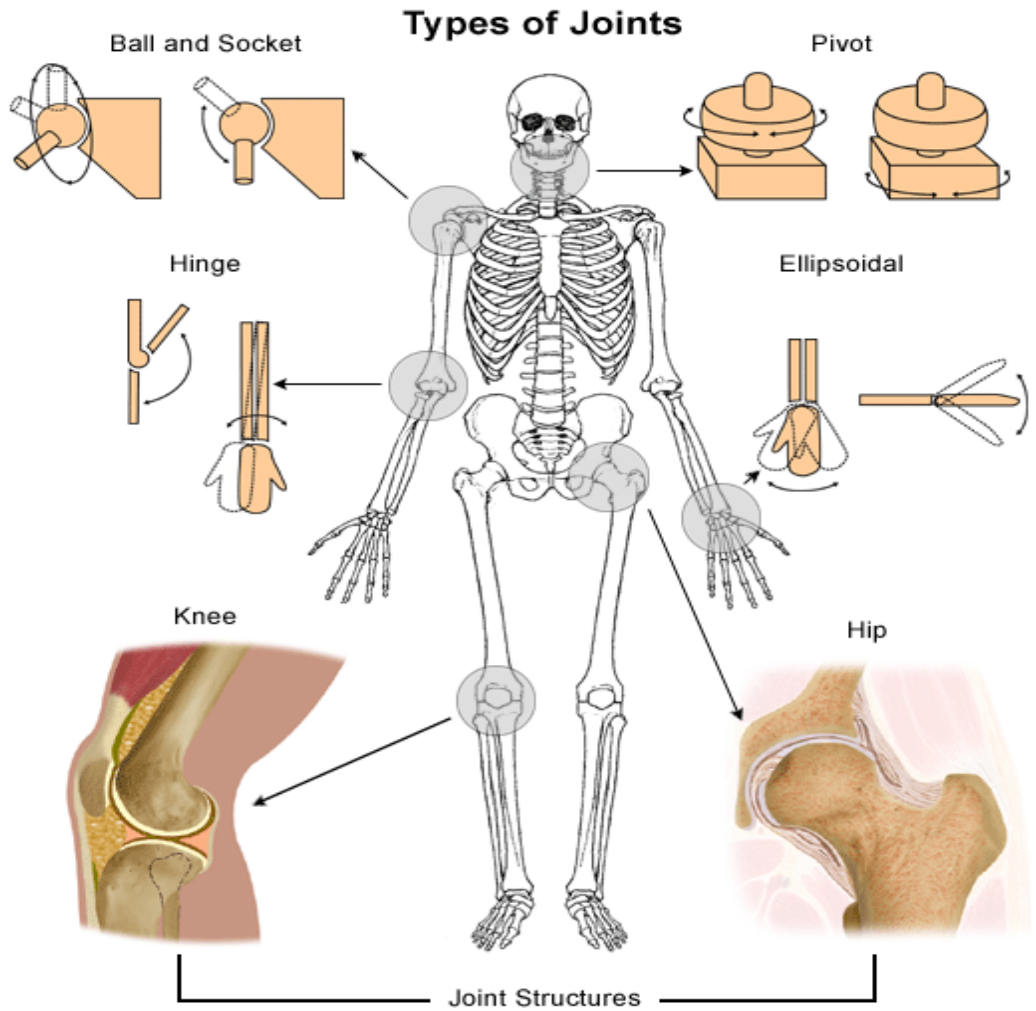
- We will also issue every participant a Certificate of Attendance after the completion of the webinar

- We are applying for 1.5 hours of CLE Credit with the Commonwealth of Virginia and will pass along the CLE certificate once we have been approved

Topics to Cover

- Joints
- Agent Orange
- Sleep Apnea
- Hearing Loss and Tinnitus
- Medicine and Ratings
- TDIU

Joints



Joints Sub Topics

- Flare-ups
- Mere Speculation
- Observable Painful Joints
- Weight Bearing

Background: Flare-ups

- Disability of the musculoskeletal system is primarily the inability . . . to perform the normal working movements of the body with *normal* excursion, strength, speed, coordination and endurance. 38 C.F.R. § 4.40.
  - Possible manifestations of "functional loss" may be caused by pain
  - Functional loss must be rated at the same level as if caused by some other factor that *actually* limited motion.
  - § 4.40 does not require *actual* limitation of motion
    - *Mitchell v. Shinseki*, 25 Vet. App. 32, 37 (2011)

Background: Flare-ups

- Where a Vet's disability rating based on a loss of ROM, VA must obtain a medical opinion that addresses whether pain could significantly limit functional ability during flare-ups or when the joint is used repeatedly over time

- When feasible, these determinations should be portrayed in terms of the degree of additional ROM loss due to pain on use or during flare-ups

  - *DeLuca v. Brown*, 8 Vet. App. 202, 206 (1995)

Background: Flare-ups

- VA must obtain medical opinions addressing whether pain could significantly limit functional ability:

  1. During flare-ups
  2. When joint used repeatedly over time

- Results of *DeLuca* / *Mitchell* testing are used to evaluate functional impairment of a joint due to pain

  - Manual M21-1, III.iv.4.A.1.j

Common VA Opinion:

- It is not possible without mere speculation to estimate either loss of range of motion or describe loss of function during flares because there is no conceptual or empirical basis for making such a determination without directly observing function under these circumstances.

Background – *Mere Speculation*

- If an examiner fails to provide a conclusive opinion because doing so would require speculation, it must be clear that an examiner has "considered all procurable and assembled data" and 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, 390 (2010)

Background – *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 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.

  - *See* Manual M21-1, III.iv.4.A.1.h

Sharp v. Shulkin

Vet. App. No. 16-1385 (Sept. 6, 2017)

- An examiner need not directly observe a flare in order to offer an opinion as to additional limitations.
- VA examiner must elicit information about the severity, frequency, duration, precipitating and alleviating factors, and extent of functional impairment of flares from Vet.
- VA must determine whether the examiner's inability is due to a personal lack of knowledge or experience, and if so, to attempt to obtain an opinion from a more qualified examiner.

Example # 1

- Dec. 1988 – Dec. 1998: Vet served on active duty
- May 2006: Vet filed increased rating claim for low back disability, then rated at 20%
- Nov. 2006 VA exam:
  - Vet reported severe flare-ups lasting a few hours every 5-6 months that limited motion 85-90% and made him unable to move

Example # 1

- Dec. 2009 VA exam:
  - Vet reported moderate flare-ups every 2-3 weeks that would last 1-2 days
- Sept. 2011 VA exam:
  - Vet described experiencing severe flare-ups every 2-3 weeks that would last 1-2 days

Example # 1

- Nov. 2012 exam request:
  - Consistent with *DeLuca* and *Mitchell*, opine as to whether any pain found in Vet's lumbar spine could significantly limit his functional ability during flare-ups or during periods of repeated use, and note the additional ROM loss during flare-ups

Example # 1

- Dec. 2012 VA exam:
  - Vet reported monthly flare-ups that were debilitating and included bad muscle spasms
  - Vet said he would have to go to bed during flare-ups
  - "Although this examiner appreciates the Court's concerns regarding issue, it would be speculative for this examiner to determine the loss of ROM during flare-ups unless the examiner were there to examine Vet's ROM during such flare-ups."

Example # 1

- Vet submitted various statements saying his symptoms included pain, swelling, spasms, and stiffness
- Vet's mother submitted a statement saying she witnessed Vet's back give out and that he would have to remain in bed for over a week

Example # 1

- BVA denied increased rating because:

1. There was no competent evidence that he was entitled to a rating in excess of 20%

2. There was no evidence of record suggesting that the vet specifically described motion loss during flare-ups

Example # 1

- BVA denial (cont'd):

3. "In sum, the evidence does not establish that flare-ups result in loss of range of motion more nearly approximating a higher rating. Again, pain alone is not sufficient to warrant a higher rating, as pain may cause a functional loss, does not itself constitute functional loss."

4. Another exam was not warranted because Vet had not reported flare-ups that resulted in additional limitation of motion

Example # 1

- JMR due to inadequate VA exams:
  - Medical evidence did not quantify the additional functional limitation due to flare-ups
  - Dec. 2012 VA examiner made no attempt to elicit any information about Vet's flare-ups, simply stating that without first-hand observation of a flare-up, she could not quantify any additional limitation
    - It is the job of VA examiner to try and quantify the level of disability caused by a flare-up

Example # 2

Issue: Whether a rating in excess of 20% for a thoracolumbar spine disability was warranted

Example # 2

- Apr. 2008 VA exam: Vet had functional loss that prevented him from walking, shopping, brushing his teeth, taking a shower, vacuuming, driving a car, cooking, climbing stairs, dressing himself, taking out the trash, gardening, or mowing his lawn.

- 4 more VA examiners found that function of the spine was additionally limited after repetitive use by pain, fatigue, and weakness; but the examiners failed to quantify additional functional loss in terms of degrees of motion lost.

Example # 2

- BVA denied higher rating:
  - Exam reports indicate no ankyloses, indicate normal posture and gait, and indicate full and normal muscle strength
  - Evidence shows he has had pain-free forward flexion of the thoracolumbar spine in excess of 30 degrees.
- BVA did not mention examiners' findings of flare-ups or functional loss after repetitive use

Example # 2

- JMR:
  - BVA erred in relying on exam reports because the examiners failed to *quantify*, or provide a rationale as to why they could not quantify, the point in the ROM at which weakness or pain caused functional loss during flare-ups or as a result of repetitive use.

Example # 2

- JMR (cont.):
  - VA Clinicians' Guide instructs examiners to inquire as to whether there are periods of flare-ups and, if there are, to state the severity, frequency, and duration; name the precipitating and alleviating factors; and estimate to what extent, if any, they affect functional impairment.
    - *Sharp v. Shulkin*, No. 16-1385 (Sept. 6, 2017); VA CLINICIANS' GUIDE § 0.1, ch. 11 (March 2002).

Example # 2

- JMR (cont.):
  - There is no evidence in these opinions that the examiners requested any additional information that would assist them in making these assessments as required by *Jones*.
  - BVA failed to provide any explanation as to whether there is any additional procurable information that would assist the examiners in rendering an opinion, in violation of *Jones* and *Sharp*.

TAKE AWAYS

- These cases highlights the importance of submitting SPECIFIC lay statements about impairment during flare-ups
- Loss of movement is quantifiable and lay people are competent to approximate level of movement during a flare-up
- Fight the perception among VA examiners that they must observe flare-ups to quantify their severity

TAKE AWAYS

- Examiner does not need to directly observe a flare in order to offer an opinion on additional limitations.
- 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 it this inability is because of a personal lack of knowledge or experience and if a more qualified examiner could provide an opinion.

38 C.F.R. § 4.59, Painful motion

- Painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. . . .
- It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. . . .
- The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

Pettiti v. McDonald, 27 Vet. App. 415 (2015)

- Under § 4.59, the terms "painful motion" and "actually painful joints" are synonymous, and a claimant who has painful motion is considered to have limited motion, even if the pain does not cause actually limited motion.

- Some DCs (5002, 5003, etc.) require "objective evidence" of painful motion, which includes confirmation of the Vet's testimony regarding joint pain by a medical examiner or a lay person.

Example # 3

- Vet was rated as 0% for right ankle tendonitis.
- In Sept. 2009 and Feb. 2010, Vet reported to doctors that he had limited ankle mobility and ankle pain.
- In July 2010, VA examiner noted that Vet still has pain sometimes with walking or with prolonged standing.
- Wife stated in a June 2011 letter that Vet is often not mobile because of his ankle pain

Example #3

- BVA acknowledged reports of ankle pain with walking and standing, but did not analyze whether Vet's ankle was actually painful and should be rated at the minimum compensable level under § 4.59.

Example # 3

- JMR :
  - BVA erred by not discussing the observable pain of Vet's ankle joint with walking.
  - BVA did not find that Vet and his wife lacked credibility.
  - BVA needed to discuss if there was objective evidence of painful joint warranting a 10% rating under § 4.59.

Example # 4

- Issue: Entitlement to an initial compensable rating for a cervical spine disability.

- Both June 2008 and Oct. 2013 VA exams showed that Vet reported neck pain since the time of a mortar blast in Iraq in 2006.

Example # 4

- BVA noted the provisions of § 4.40 and § 4.45 pertaining to functional impairment, but did not discuss § 4.59.
- BVA only applied the limitation of motion requirements from the rating schedule.
- BVA reviewed evidence of reported neck pain beginning in service, but noted that there was no evidence of objectively painful motion on exam.

Example # 4

- JMR:
  - BVA erred by failing to discuss § 4.59 and whether lay evidence of pain entitled Vet to minimum compensable rating.

TAKE AWAYS

- If Vet has 0% rating for a joint condition and there is evidence of painful motion, VA must discuss § 4.59 and credibility of lay statements about pain.
  - Some DCs require "objective" evidence of pain, which requires corroboration.
  - If appropriate, VA must award the minimum compensable rating under the DC under which Vet is rated.
- It is good to get statements from friends/family that discuss Vet's observable pain.

Correia v. McDonald, 28 Vet. App. 158 (2016)

- To be adequate, an exam of a joint must, whenever possible, include results of ROM testing described in the last sentence of § 4.59.
  - **"The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint."**
- There must be a specific notation about weight bearing.

Example # 5

- Vet testified he was unable to kneel or squat.
- Physical exam revealed:
  - Some patellofemoral crepitance on ROM
  - Full extension to 0 degrees
  - Flexion to 135 degrees
  - Repetitive ROM testing resulted in increased pain in knee, did not result in the loss of ROM or fatiguing of the knee itself

Example # 5

- JMR:
  - BVA must address whether VA exam report was adequate in light of *Correia*.
    - i.e., that knee was tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

TAKE AWAYS

- If a VA joints exam does not specifically state that the ROM testing was done in weight bearing and non-weight bearing, argue that it is not an adequate exam under *Correia.*

Agent Orange

Basic Principles: Hypertension and Agent Orange

- The IOM issued reports in 2006, 2008, 2010, 2012, and 2014 (*Veterans and Agent Orange: Update*) which found limited or suggestive evidence of an association between hypertension and Agent Orange.

Basic Principles: Hypertension and Agent Orange

- VA cited some of these reports in Federal Register:
  - Health Effects Not Associated with Exposure to Certain Herbicide Agents, 75 Fed. Reg. 32,540 (June 8, 2010)
  - Health Outcomes Not Associated With Exposure to Certain Herbicide Agents; Veterans and Agent Orange: Update 2008, 75 Fed. Reg. 81332 (Dec. 27, 2010)
  - Determinations Concerning Illnesses Discussed in National Academy of Sciences Report: Veterans and Agent Orange: Update 2010, 77 Fed. Reg. 47,924 (Aug. 10, 2012)
  - Determinations Concerning Illnesses Discussed in National Academy of Sciences Report: Veterans and Agent Orange: Update 2012, 79 Fed. Reg. 20,308 (Apr. 11, 2014)

Basic Principles: Hypertension and Agent Orange

- Despite the findings of the IOM, VA has determined that the available evidence does not establish a positive association between herbicide exposure and hypertension that would warrant a *presumption* of service connection.
- BUT, VA's Federal Register notices reflecting IOM's findings of "limited or suggestive evidence" of an association between hypertension and Agent Orange *indicate* that hypertension *may be* related to a Vet's Agent Orange exposure.

Basic Principles: Hypertension and Agent Orange

- VA must provide a medical exam/opinion when record contains:
  1. competent evidence of a current disability or persistent or recurrent systems of a disability, and
  2. evidence establishing that an event, injury, or disease occurred in service . . . and
  3. **an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Vet's service,**
  4. insufficient competent medical evidence for the Secretary to make a decision on the claim.
     - *McLendon v. Nicholson*, 20 Vet. App. 79 (2006)

Basic Principles: Hypertension and Agent Orange

- Recent VA study examined the hypertension risk in Army Chemical Corps Vets who sprayed defoliant in Vietnam
  - YS Cypel, "Herbicide Exposure, Vietnam Service, and Hypertension Risk in Army Chemical Corps Veterans" J Occup Environ Med, 2016 Nov; 58 (11): 1127-1136 (available at www.ncbi.nlm.nih.gov/pubmed/27820763)
- It concluded that there was a significant association between:
  - Hypertension risk and exposure to herbicides; and
  - Hypertension risk and military service in Vietnam

Example # 6

- Dec 1966- Nov. 1968: Vet served in Vietnam
- VA examiner:
  - It is less likely than not that hypertension began in or is related to active military service or manifested within one year of separation from service.
  - Rationale: Vet's blood pressure on entrance exam of 138/84 was an isolated reading and complied with the definition of normal blood pressure at that time. Subsequently, Vet's blood pressure was noted to be within normal limits.

Example # 6

- In Dec. 2015, BVA:
  - Denied SC for hypertension.
  - Discussed the IOM Update 2010.
  - Found that presumptive SC not warranted as due to Agent Orange exposure.
  - Found that Vet's current hypertension was not directly related to in-service blood pressure readings.

Example # 6

- BVA Decision (cont.):
  - The “limited or suggestive evidence of association” category for hypertension did not mean that a relationship as likely as not exists or that the evidence on this matter is in equipoise.
  - The record did not include any medical evidence relating Vet’s hypertension to his exposure to herbicides in Vietnam.

Example # 6

- JMR:
  - BVA failed to address whether it needed to obtain a medical opinion addressing whether Vet's hypertension was related to in-service herbicide exposure.
    - VA medical opinion only addressed the question of whether Vet's hypertension began during service

Example # 6

- JMR (cont.)
  - BVA required to address whether the Secretary's statements in the Federal Register satisfied *McLendon's* low threshold of indicating that Vet's hypertension may be related to in-service herbicide exposure and, if so, provide Vet with a medical nexus opinion to address that theory of causation.

TAKE AWAYS

- Information in the Federal Register is before VA even if a claimant does not cite it.
  - Just like relevant statutes, cases, and regulations, VA must considered such information.
- Advocates should cite to the IOM reports and recent VA study that suggest a link between hypertension and Agent Orange.
  - Advocates should submit copies of the relevant sections of the IOM reports and the VA study.

TAKE AWAYS

- Argue to VA adjudicators that the IOM reports and Federal Register notices are sufficient to trigger VA's duty to provide a medical nexus opinion regarding direct service connection.
- The IOM reports and the new VA study results can also support a private medical opinion linking a Vet's hypertension to Agent Orange exposure.

Sleep Apnea

Buchanan v. Nicholson 451 F.3d 1331 (Fed. Cir. 2006).

- Lay evidence may be enough to prove service connection on its own.
- VA cannot conclude that lay evidence is not credible solely due to the lack of contemporaneous medical evidence.

Example # 7

- DOS: Oct. 1979 to Jan. 1980; Feb. 2003 to June 2004
- Feb. 2010: Vet reported during VA medical treatment:
  - He was falling asleep easily during the day
  - His wife said he was snoring loudly
  - He was not sure if he stopped breathing while sleeping
- Vet competent to report all of these symptoms

Example # 7

- STRs were negative for complaints, treatment, or diagnosis of sleep apnea

- 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 while deployed in Iraq and he may or may not have had undiagnosed obstructive sleep apnea at that time

Example # 7

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

Example # 7

- 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 diagnosis of sleep apnea
  - Examiner noted the buddy statement indicating in-service snoring, but said that "snoring in and of itself does not indicate sleep apnea"

Example # 7

- BVA denied claim:
  - Found the 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

Example # 7

- NVLSP made the following arguments:

1. Jan. 2013 VA exam inadequate because the examiner ignored evidence of shortness of breath in service.

2. Lay people competent to report such symptoms as snoring, shortness of breath, and falling asleep during the day

3. Vet's snoring began in service and continued after he left the service

Example # 7

- CAVC accepted NVLSP's arguments and concluded that VA exam was inadequate
- "It is undisputed that the appellant had a severe, consistent snoring issue that began in service. The first time he went to be examined for this condition he was diagnosed."
- "The examiner appears to be suggesting without explanation that without a diagnosis of sleep apnea in service, there could be no positive nexus for the appellant's current sleep apnea, despite the fact that the appellant had symptoms of this condition during service."

Example # 7

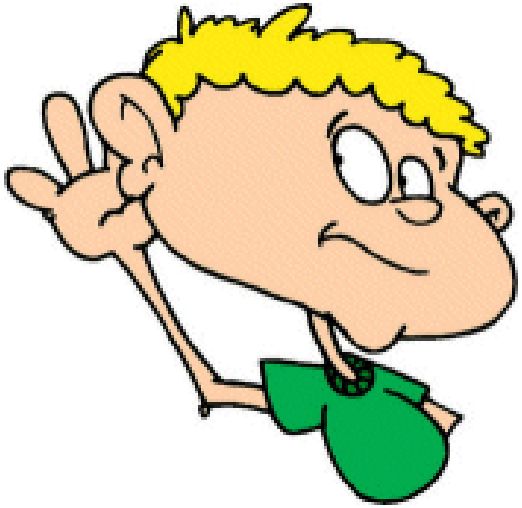
- VA's denial of this claim was specious, showing a bias against the Vet just because he did not have an in-service *diagnosis* of sleep apnea

- CAVC vacated the BVA decision and remanded the case to the BVA

TAKE AWAYS

- Even if sleep apnea is not documented in STRs, SC can still potentially be granted if there is credible and competent lay evidence that shows Vet had in-service symptoms of sleep apnea.

- The lack of contemporaneous medical evidence is not be an absolute bar to a Vet's ability to prove a claim of entitlement to disability benefits based on that competent lay evidence.



Hearing Loss and Tinnitus

Basic Principles

- The absence of evidence of a hearing disability during service (one meeting the requirements of 38 C.F.R. § 3.385) is not fatal to a service connection claim.
  - *Ledford v. Derwinski*, 3 Vet. App. 87, 89 (1992).

Basic Principles

- SC for hearing loss may be granted with:
  - credible evidence of acoustic trauma due to significant noise exposure in service;
  - post-service audiometric findings meeting VA's requirements for hearing loss disability; and
  - a medically sound basis upon which to link the post-service findings to the in-service injury.
    - *Hensley v. Brown*, 5 Vet. App. 155, 159 (1993)

Basic Principles

- SC may be presumed for sensorineural hearing loss and noise-induced tinnitus if they are disabling to a compensable degree within 1 year following separation from service.
  - 38 U.S.C. §§ 1101, 1112, 1113
  - 38 C.F.R. §§ 3.307, 3.309

Example # 8

- Vet testified that his hearing loss and tinnitus were due to his military service.
- MOS was field artillery battery man
- 12/77 Pre-Induction Exam hearing thresholds:
  - Both Ears – 5 db at 500, 1000, 2000, 3000, and 4000 Hz
- 6/81 Separation Exam hearing thresholds:
  - Both Ears –10 db at 500 Hz, 3000 Hz, and 4000 Hz; 5 db at 1000 Hz and 2000 Hz

Example # 8

- After filing VA claim, Vet testified:
  - Tinnitus began “a long time ago.”
  - He experienced tinnitus during service, but did not report it.
  - He currently had bilateral tinnitus.

Example # 8

- July 2009 VA exam:
  - Vet diagnosed with bilateral hearing loss and tinnitus.
  - Examiner opined that hearing loss and tinnitus were “not caused by, or a result of, military noise exposure.”

Example # 8

- VA examiner's rationale:
  - Entrance and separation exams showed normal hearing.
  - Comparison of entrance audiogram to separation audiogram did not reveal a standard threshold shift.
  - SMRs do not contain any complaint of tinnitus.
  - Tinnitus is consistent with noise-induced hearing loss and/or standard threshold shift. Neither was present at separation.
  - Vet reported a positive history of occupational and recreational noise exposure.

Example # 8

- BVA conceded in-service noise exposure and that Vet had current diagnoses of hearing loss and tinnitus, but denied SC because:
  - Symptoms of hearing loss and tinnitus were not chronic during active service.
  - STRs had no complaints or diagnoses of hearing loss or tinnitus.
  - Vet did not have any hearing loss at the time of his separation from service.

Example # 8

- BVA's rationale (cont.):
  - There was no treatment or complaints of hearing loss or tinnitus until the time of his claim in March 2009.
  - He filed other SC claims prior to March 2009, but did not mention hearing loss or tinnitus.
  - He had post-service noise exposure.
  - VA examiner found hearing loss and tinnitus were not linked to service.

Example # 8

- NVLSP and VA agreed to JMR because BVA erred by relying on an inadequate medical opinion.
- Agreed that Vet was entitled to a new VA medical nexus opinion.
- Noted that lack of a hearing loss disability during service did not mean that SC couldn't be granted

Example # 8

- JMR (cont.):
  - Vet testified that he experienced tinnitus during service.
  - A Vet is competent to testify to in-service acoustic trauma, in-service symptoms of tinnitus, and post-service continuous symptoms of tinnitus, because ringing in the ears is capable of lay observation.
    - *Charles v. Principi*, 16 Vet. App 370, 374-75 (2002)

Example # 8

- JMR (cont.):
  - VA examiner did not provide adequate rationale for opinion, because the simple recitation of facts is not reasoned analysis.
    - *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008)
    - *Stefl v. Nicholson*, 21 Vet. App. 120 (2007)

Example # 8

- JMR (cont.):
  - VA examiner also considered only the question of whether Vet's hearing loss and tinnitus began *during* service, but failed to provide rationale related to why those disabilities did not begin *after* service as a result of in-service noise exposure.

Example # 8

- JMR (cont.):
  - VA examiner noted that SMRs did not contain complaints of tinnitus, and BVA was persuaded that there was no indication that the Vet had tinnitus at service separation.
  - BVA and VA examiner improperly relied on the *absence* of evidence of tinnitus as *negative* evidence.

Example # 8

- JMR (cont.):
  - The absence of evidence is not negative evidence unless it is expected that the symptoms would be reported
    - *Buczynski v. Shinseki*, 24 Vet. App. 221 (2011)

TAKE AWAYS

- VA will often wrongly hold the absence of evidence of in-service treatment for a condition against the Vet, particularly in the context of hearing loss and tinnitus claims.

- Hearing loss and tinnitus can develop many years after service and still be subject to service connection.

  - *Ledford, Hensely*, 38 C.F.R. 3.303(d)

MEDICATION

Jones v. Shinseki, 26 Vet. App. 56 (2012)

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.

Background: *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.

Example # 9

Issue:

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

Diagnostic Code 8100

- **50%**: Migraine headaches with very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability
- **30%**: Migraine headaches with characteristic prostrating attacks occurring on average once a month over last several months
- **10 %**: Migraine headaches with characteristic prostrating attacks averaging one in 2 months over last several months
- **0%**: Migraine headaches with less frequent attacks

Example # 9

- BVA found that in considering the frequency, severity, and duration of the Vet's symptoms, an increased disability rating was not warranted.

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

Example # 9

- NVLSP and VA agreed to JMR.
  - BVA violated the Court's holding in *Jones*, since the rating criteria for headaches does not say anything about the effects of medication.
  - BVA could not consider the positive effects of medication when determining the appropriate rating.

Example # 10

Issue:

Entitlement to a back disability rating in excess of 10% prior to July 2009, and in excess of 20% thereafter.

General Rating Formula for Diseases and Injuries of the Spine

- **10%**: Forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees; or, combined range of motion of the thoracolumbar spine greater than 120 degrees but not greater than 235 degrees; or, muscle spasm, guarding, or localized tenderness not resulting in abnormal gait or abnormal spinal contour; or, vertebral body fracture with loss of 50 percent or more of the height

General Rating Formula for Diseases and Injuries of the Spine

- **20%**: Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees; or, the combined range of motion of the thoracolumbar spine not greater than 120 degrees; or, muscle spasm or guarding severe enough to result in an abnormal gait or abnormal spinal contour such as scoliosis, reversed lordosis, or abnormal kyphosis.

General Rating Formula for Diseases and Injuries of the Spine

- **40%**: Forward flexion of the thoracolumbar spine 30 degrees or less; or, favorable ankylosis of the entire thoracolumbar spine.
- **50%**: Unfavorable ankylosis of the entire thoracolumbar spine.
- **100%**: Unfavorable ankylosis of the entire spine.

Example # 10

- May 2012 VA examiner noted that Vet took Tramadol twice a day as needed and Meloxican daily.

- Oct. 2015 VA examiner:
  - Noted that Vet took Tramadol four times a day, which dulls the discomfort of his constant ache and pressure, occasional sharp, stabbing pains.
  - Did not indicate if exam was conducted or if findings were recorded absent the ameliorative effect of the medication.

Example # 10

- In denying higher ratings, BVA did not indicate if it analyzed the severity of Vet's back disability without considering the effects of medication.

- NVLSP and VA agreed to JMR for BVA to determine the severity of the back disability without medication and assign a rating accordingly.

TAKE AWAYS

- 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.

TAKE AWAYS

- Argue that VA needs to rate the condition based on how bad it would be without medication, and must conduct development / obtain a medical opinion on this question if necessary.

TDIU

Background: *TDIU*

- Unlike the regular disability rating schedule, which is based on the average work-related impairment caused by a disability, entitlement to TDIU is based on an individual's particular circumstances.
  - *Rice v. Shinseki*, 22 Vet. App. 447, 452 (2009)

Background: *38 C.F.R. § 4.16*

- Total disability ratings may be assigned, where schedular rating is less than total, when the disabled person is unable to secure or follow a substantially gainful occupation as a result of SC disabilities.

Background: *Marginal Employment* 38 C.F.R. § 4.17

- Marginal employment is not incompatible with a determination of unemployability, if the Vet is unable to secure or retain better employment due to SC disability.

Background: *Marginal Employment*

- Marginal employment may exist when a Vet's earned annual income does not exceed the amount established by the U.S. Bureau of the Census as the poverty threshold for one person.

Background: *Marginal Employment*

- Marginal employment may also be held to exist, on a facts found basis, such as employment in a protected environment, when earned annual income exceeds the poverty threshold.

Example # 11

- Vet was seeking TDIU.
- Jan. 2013: Vet told psychologist that he retired in 2006 after company moved its operations offshore.
- He stated that he now works at his son's company, where he helps with equipment, driving, and managing employees.
- He stated that he did not receive money from this job and "that he will not take money from his children."

Example # 11

- BVA denied claim for TDIU based on Vet's employment at son's company.
- BVA did not address whether employment was "marginal."

Example # 11

- NVLSP and VA agreed to JMR, because BVA erred by failing to discuss whether Vet's work at his son's company was "marginal" employment.
  - Vet was unpaid
  - Worked in a family business
- On remand, Vet's son wrote a statement that he just gave his dad a job to keep him busy, but he would not have hired anyone for this job because it was not needed and he did not pay his father.

TAKE AWAYS

- Just because a Vet is working, it does not automatically mean that Vet is not entitled to TDIU.
- Look to see if:
  - Vet's earned annual income does not exceed the poverty threshold
  - It is a protected environment, such as a family business or sheltered workshop
  - There is medical or lay evidence indicating Vet can only work part time / limited hours

Next NVLSP Webinar

- Establishing Service Connection based on Chronicity or Continuity of Symptomatology
- Presented by Mike Spinnicchia, Staff Attorney
- November 29 & 30, 2017
- Registration will open by the end of this week

Upcoming Webinars in 2018

- Stay tuned for a list of NVLSP webinars in 2018
- We will be hosting our first one in January

NVLSP Training Opportunities

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- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at rick_spataro@nvlsp.org