NORTH DAKOTA DEPARTMENT OF VETERANS AFFAIRS TRAINING

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OCTOBER 6, 2015
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Introduction – About NVLSP

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- National Veterans Legal Services Program (NVLSP)
- Nonprofit organization and Veterans Service Organization, founded in 1980.
- Has worked to ensure that the government delivers to our nation's veterans and active duty personnel the benefits to which they are entitled because of disabilities resulting from their military service to our country.

Introduction – About NVLSP
What we do

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- Lawyers Serving Warriors®
- Individual Representation at CAVC, Federal Circuit, other courts
- Class Actions
- Training/Mentoring
- Webinars
- Veterans Consortium Pro Bono Program
- Publications

Introduction – About NVLSP
What we do

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- Publications
  - Veterans Benefits Manual
  - Veterans Benefits Advocacy DVD
  - The Basic Training Course on Veterans Benefits
- Training
  - Webinars
  - In-person trainings
- More information at www.nvlsp.org

Introduction – About Mike Spinnicchia

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- Has been with NVLSP since 2014.
- Currently a Staff Attorney.
- Worked at the BVA prior to joining NVLSP.
- Graduated from Cornell University and American University Washington College of Law.

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The New VA Regulations Regarding Claims Forms and Submitting an Intent to File

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Overview

- The recent changes in VA regulations on how to initiate a claim for benefits
- How to submit an intent to file a claim
- How to submit a complete claim
- Advice on filling out the required VA forms
- NVLSP lawsuit challenging new VA regulations

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The Old Rules (Prior to March 24, 2015)

- Informal Claims
  - Claimants or representatives could initiate the claims process by writing a letter to the VA that stated the claimant's desire to apply for VA benefits
    - This letter did not have to contain any formal requirements other than an intent to apply for VA benefits and the letter could be written on letterhead, scrap paper, a napkin, the back of a take-out menu, etc.

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The Old Rules (Prior to March 24, 2015)

- Informal Claims
  - If the claimant's letter did not provide sufficient information for a claim, the VA would send the claimant the appropriate application form
  - If the application form was completed within one year of when VA sent the form to the claimant, the VA would consider the date of the original letter (the informal claim) as the date the claim was filed

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The Old Rules (Prior to March 24, 2015)

- Inferred Claims
  - Prior to the new regulations, the *VA Adjudication Procedures Manual, M21-1 Manual Rewrite*, Part III, subpart iv, 6.B.2 (Aug. 3, 2011 update) stated:
    - "When preparing a rating decision, the Rating Veterans Service Representative (RVSR) must recognize, develop, clarify and/or decide all issues and claims, whether they are expressly claimed issues, reasonably raised claims, or unclaimed subordinate issues and ancillary benefits."

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The Old Rules (Prior to March 24, 2015)

- Inferred Claims
  - Thus, a veteran could file a claim for a hangnail and if, while adjudicating the claim, the VA discovered that both of the veteran's legs were amputated while in service, the VA was obligated to treat that evidence as an inferred claim for his or her leg condition and adjudicate that claim as well

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The New Rules (For Claims Filed on or after March 24, 2015)

- Published on September 25, 2014
  - 75 Fed. Reg. 57,660-98
- Most significantly revises 38 C.F.R. §§ 3.155 and 3.160 and removes 38 C.F.R. § 3.157

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The New Rules (For Claims Filed on or after March 24, 2015)

- The new VA rules eliminate informal claims and all but eliminate inferred claims
  - However, as we will discuss later, VA should still recognize informal and inferred claims submitted prior to March 24, 2015

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The New Rules (For Claims Filed on or after March 24, 2015)

- Under the new rules, there are two main ways to initiate a claim and preserve the earliest possible effective date
  - Submitting an "intent to file a claim"
  - Submitting a complete claim on a VA standard form (21-526, 21-526EZ, 21-527EZ, 21-534, 21-534EZ, etc.)

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The Importance of Notifying Veterans of these New Rules

- Since the VA has changed the rules for how to initiate a claim into a more formal process, veterans advocates need to comply with the new rules and educate claimants about this new process

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The Importance of Notifying Veterans of these New Rules

- Veterans advocates should provide handouts containing the following statement to as many veterans as possible:

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The Importance of Notifying Veterans of these New Rules

- "The VA claims process has changed. As of March 24, 2015, the VA will no longer accept a letter from a veteran to start a claim. Claimants for VA benefits are now required to start a claim by either filing 'an intent to file a claim' or by sending a completed application form to the VA. (continued on next slide)

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The Importance of Notifying Veterans of these New Rules

- Because the date from which you will receive benefits is the date the VA receives an intent to file a claim or a completed claims form, it is highly recommended that you quickly contact an accredited representative, such as a service officer who works for a national or state veterans service organization and have them help you file a claims form. (continued on next slide)

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The Importance of Notifying Veterans of these New Rules

- Veterans service organizations provide free representation. If you do not have a representative, please contact [insert name of advocate, advocate's organization, and phone number]. If you cannot quickly get a service officer to help you file a claims form, you should file a VA Form 21-0966 or call 1-800-827-1000 to indicate an intent to file a claim and then obtain representation."

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The First Method for Initiating a Claim: Intent to File (ITF) a Claim

- Under 38 C.F.R. § 3.155(b), there are three ways to submit an intent to file a claim
  1. Electronically
  2. On a VA Form 21-0966 (Intent to File a Claim for Compensation and/or Pension, or Survivors Pension and/or DIC)
  3. Oral communication either through a telephone call or in-person at a Regional Office (RO) or other claim intake center
- Date of claim = Date of ITF (if a complete claim is submitted within one year of the ITF)

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Submitting an Intent to File Electronically

- An ITF can be filed when it is "electronically initiated and saved in a claims-submission tool within a VA web-based electronic claims application system" (38 C.F.R. § 3.155(b)(1)(i))
- 3 methods for electronically submitting an ITF:
  1. eBenefits (https://www.ebenefits.va.gov/ebenefits/homepage)
     - eBenefits is an online site provided by the VA and the Department of Defense which allows veterans to access personal information and file VA benefits claims

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Submitting an Intent to File Electronically

- 3 methods for electronically submitting an ITF:
  2. Stakeholder Enterprise Portal (SEP) (https://www.sep.va.gov/sep/web/guest/sep)
     - SEP allows VSOs, attorneys, and agents to file claims on behalf of veterans
  3. Digits-2-Digits (D2D) Resources (http://www.innovation.va.gov/program-d2d.html)
     - D2D is a VA software program that integrates claims submission with the VA's online databases, such as VBMS

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Submitting an Intent to File on a VA Form 21-0966

- The form can be found on the VA website
- Claimant must provide basic personal information

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Submitting an Intent to File on a VA Form 21-0966

- Must indicate the general benefit that the claimant intends to apply for:
  - compensation and/or pension; or
  - survivors pension and/or dependency and indemnity compensation (DIC)
- Can be signed and submitted by either the claimant or a representative with a valid power of attorney

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Submitting an Oral Intent to File

- Two ways to submit an oral ITF
  - Calling 1-800-827-1000
  - In-person interview at an RO or other claim intake center
- An oral ITF must be "directed to a VA employee designated to receive such a communication" (38 C.F.R. § 3.155(b)(1)(iii))
- Oral ITFs can be made by either the claimant or a representative with a valid power of attorney

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Potential Issues with the ITF

- While the new regulations require VA to send the claimant the appropriate VA form upon receipt of an ITF (38 C.F.R. § 3.155(b)), the Manual M21-1MR only states that VA will advise claimants of the specific forms to submit and provide claimants with the internet link to obtain the relevant forms (Part III, subpart ii, 2.C.1.h (last updated July 15, 2015))
- The VA will not recognize more than one ITF for the same general benefit (compensation, pension) at the same time (38 C.F.R. § 3.155(b)(6))

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Potential Issues with ITF – Example 1

- May 1, 2015: Vet filed ITF for a compensation claim
- June 1, 2015: Vet filed another ITF for a compensation claim
  - In this scenario, the VA will not recognize the ITF submitted on June 1, 2015
  - Thus, if the claimant waits until May 15, 2016 to submit a complete claim, the VA will consider May 15, 2016 to be the date of claim because more than a year will have passed since the May 1, 2015 ITF and the VA did not recognize the June 1, 2015 ITF

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Potential Issues with ITF – Example 2

- May 1, 2015: Vet filed ITF for a compensation claim
- June 1, 2015: Vet filed ITF for a pension claim
  - The VA will recognize both the May 1, 2015 ITF and the June 1, 2015 ITF because the two ITFs are for different general benefits. *See* 38 C.F.R. § 3.155(b)(6) ("VA will not recognize more than one intent to file concurrently for the same benefit (e.g., compensation, pension).").

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Potential Issues with ITF – Example 3

- May 1, 2015: Vet filed ITF for a compensation claim
- May 15, 2015: Vet submitted complete claim for hearing loss
- June 1, 2015: Vet filed another ITF for a compensation claim
  - The VA WILL recognize the June 1, 2015 ITF because there is no concurrent ITF for a compensation claim because the claim associated with the May 1, 2015 ITF had already been completed when the Vet submitted the June 1, 2015, ITF

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The Second Method for Initiating a Claim: Filing a Complete Claim on the Appropriate VA Application Form

- This option skips submitting an ITF and involves filing a complete claim on the correct VA Form (such as the 21-526, 21-526EZ, 21-527EZ, 21-534, 21-534EZ)
- Date of claim = date appropriate VA form is filed

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The Second Method for Initiating a Claim: Filing a Complete Claim on the Appropriate VA Application Form

- A complete claim must contain the following (38 C.F.R. § 3.160(a)):
  - Name of the claimant;
  - Relationship to the veteran, if applicable;
  - Sufficient service information for the VA to verify the claimed service, if applicable;
  - Signature of the claimant or a person legally authorized to sign for the claimant;

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The Second Method for Initiating a Claim: Filing a Complete Claim on the Appropriate VA Application Form

- A complete claim must contain the following (38 C.F.R. § 3.160(a)) (continued):
  - Identification of the benefit or benefits sought;
  - A description of any symptoms or medical conditions on which the benefit is based must be provided to the extent required by the VA form; and
  - For nonservice-connected disability or death pension and parents' DIC, a statement of income must be provided to the extent required by the VA form

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Should a Claimant Submit an ITF?

- If the claimant has all of the information available to submit a complete claim, then filing an ITF is unnecessary and the claimant might as well just submit a complete claim
  - One exception: if the representative is unsure if the complete claim will get to the VA by the end of the month, then an ITF should be filed (in this scenario, either electronically or orally because those are the fastest options for filing an ITF)

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Should a Claimant Submit an ITF?

- In most cases, NVLSP expects that it will make sense for the claimant or representative to file an ITF
  - Filing an ITF can be done relatively easily without the assistance of a representative
  - Once the ITF is submitted, the claimant and his or her representative can take their time to develop and gather evidence, knowing that they have one year to submit a complete claim in order to preserve the date of the ITF as the date of the claim

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Advice on Submitting an Electronic ITF

- If a claimant or representative has access to the internet, submitting an ITF electronically is probably the most efficient method for initiating the claims process
- Another benefit of submitting an ITF electronically is that the claimant or representative can receive immediate confirmation (via eBenefits) that the VA has processed the ITF
- So, if possible, NVLSP recommends using this method to submit an ITF

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Advice on Submitting an ITF on a VA Form 21-0966

- This is probably the least efficient method for submitting an ITF, but it is an important option particularly for claimants who do not have internet access or are uncomfortable using the internet and who do not have an advocate to assist them with their claim
- The form only asks for minimal information, most of which is basic personal information (name, address, social security number, etc.)

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Advice on Submitting an ITF on a VA Form 21-0966

- If the claimant is a veteran who thinks he or she may want to file a claim for both compensation and pension, the claimant or representative should make sure to check the boxes for compensation and pension in Section I of the form
- If the Form 21-0966 is submitted by mail, NVLSP recommends sending the form certified mail, return receipt requested

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Advice on Submitting an ITF on a VA Form 21-0966

- If the form is completed by a service officer who works in an RO, the service officer should submit the form to the RO in-person and ask for a VA date-stamped copy of the form
- If there is any uncertainty that the VA will receive the 21-0966 by the end of the current month, the claimant or representative should submit an ITF electronically or by a telephone call to ensure that the ITF is processed by the end of the month

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Advice on Submitting an Oral ITF

- Regardless of whether you are making a telephone call or having an in-person interview, the claimant or representative must first establish that he or she is speaking with a VA employee who is authorized to receive an oral ITF
- When making a phone call, the claimant or representative should follow the prompts to speak with a VA benefits counselor and once they get through to an actual person, the claimant or representative should state the following:

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Advice on Submitting an Oral ITF

- "My name is _____ and I am a [veteran, survivor of a veteran, or a veteran's authorized representative]. I would like to submit an oral intent to file a claim for [compensation, pension, both compensation and pension, survivors pension, or DIC]. Are you a VA employee who is authorized to receive an oral intent to file a claim?"

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Advice on Submitting an Oral ITF

- If the VA employee says they are not authorized to receive an oral ITF, ask to be transferred to an employee who is authorized
- Once the claimant or representative is on the phone with a VA employee who is authorized to receive an ITF, ask the employee for his or her name, office location, and operator number

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Advice on Submitting an Oral ITF

- Then provide the VA employee with sufficient information in order to process the ITF, such as:
  - The general benefit or benefits being sought (compensation, pension, survivors pension, DIC)
  - Claimant's name and social security number
  - Veteran's name and social security number (if different from claimant)

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Advice on Submitting an Oral ITF

- Then provide the VA employee with sufficient information in order to process the ITF, such as:
  - Veteran's date of birth and sex
  - Veteran's VA claim number (if applicable)
  - Claimant's current mailing address, telephone number, and email address
  - Name of claimant's representative (if applicable)

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Advice on Submitting an Oral ITF

- Before ending the phone call, make sure that the VA employee confirms that an ITF has been processed and ask that the VA send the claimant and representative a letter confirming that the ITF has been processed
  - If you do not receive a confirmation letter within two or three weeks, follow-up with the VA by calling 1-800-827-1000 to ask for an update on the status of the confirmation letter and/or check VBMS

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Advice on Submitting an Oral ITF

- NVLSP recommends that when making an ITF by telephone, the claimant or representative should keep a detailed record of the phone call, just in case a discrepancy arises with the VA disputing that an oral ITF was submitted. This record should include the following information:
  - Date and time of the phone call
  - The VA employee's name, office location, and operator number
  - Any other notable details from the conversation

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Advice on Submitting an Oral ITF

- If filing an oral ITF through an in-person interview at an RO or other claim intake center, the claimant or representative should ask for some form of documentation that acknowledges than an ITF has been processed
- In general, NVLSP discourages claimants from discussing their claims with VA employees outside the presence of their representative, but because submitting an oral ITF only requires minimal and basic information, NVLSP has no issue with claimants making these phone calls on their own

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Advice on Submitting an Oral ITF

- Potential delays when submitting an ITF through a phone call
  - At times, VA phone lines will be too busy and you will have to hang up and call back later
  - In some cases, there may be a long wait to speak with a VA benefits counselor, but the claimant or advocate can opt to have the VA call you back when a counselor becomes available, instead of waiting on hold

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Advice on Submitting an Oral ITF

- While a phone call is usually a good way to ensure that an ITF is submitted on the same day that you initially speak with a claimant, advocates should be aware of the potential delays due to busy VA phone lines. Thus, submitting an ITF electronically will usually be a more efficient method.

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Advice on Submitting a Complete Claim

- Applicable VA Forms for Filing a Complete Claim
  - Compensation: 21-526 or 21-526EZ
  - Pension: 21-526 or 21-527EZ
  - Survivors Benefits: 21-534 or 21-534EZ

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Advice on Submitting a Complete Claim

- NVLSP recommends using the EZ forms, even if the claimant does not want his or her claim to be processed under the Fully Developed Claims (FDC) program
  - The rationale for using the EZ forms is that it expedites the claims process by having the claimant waive his or her right to receive the Veterans Claims Assistance Act (VCAA) notice letter
    - This usually reduces the claims process by approximately three months

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Advice on Submitting a Complete Claim

- If the claimant uses the EZ forms to file a complete claim, but does not want the claim to be processed under the FDC program, it is imperative that the advocate make sure the appropriate box is checked on the form indicating that the claimant does NOT want their claim considered under the FDC program
  - Form 21-526EZ: the box in Question 25
  - Form 21-527EZ: the box in Question 32
  - Form 21-534EZ: the box in Question 44

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Advice on Submitting a Complete Claim

- If possible, claimants should receive the assistance of an authorized representative in filing a complete claim and the representative should *always* review the completed application form before it is submitted to VA
  - If a representative is unable to review the application form immediately, then an intent to file should be submitted in the interim to preserve the earliest effective date possible

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General Advice for Compensation Claims

- At the top of Question 11 on either the VA Form 21-526 or the VA Form 21-526EZ, the representative should write the following statement: "The VA is obligated to consider all theories of entitlement to service connection."

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General Advice for Compensation Claims

- If the claimant or representative plans to argue specific theories of entitlement to service connection (secondary SC, presumptive SC), other than direct SC, the representative should also include the following language at the top of Question 11:
  - "The VA should especially consider the theories of entitlement to service connection listed below."
- Then list the condition along with the theory of entitlement.

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General Advice for Compensation Claims

- For example:
  - "tinnitus, secondary to hearing loss"
  - "prostate cancer due to Agent Orange exposure"

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General Advice for Compensation Claims

- When listing medical conditions under Question 11, list the condition in general terms as opposed to a specific diagnosis.
- For example:
  - "back condition" instead of "degenerative disc disease"
  - "heart condition" instead of "coronary artery disease"
  - "mental condition" instead of "PTSD"

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General Advice for Pension Claims

- Unlike with compensation claims, filing a complete claim for pension requires that the veteran provide the VA with significant personal financial information (annual income, net worth, unreimbursed medical expenses, etc.).

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General Advice for Pension Claims

- Thus, in most cases, during an initial meeting with a client, it is unlikely the veteran will have all of the information needed to file a complete claim, so in practice, submitting an intent to file should be even more commonplace when filing a pension claim than it is for compensation claims.

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General Advice for Filing Both a Compensation and Pension Claim

- If the veteran wants to file a claim for compensation and pension, he or she could file a complete claim for both benefits on a single VA Form 21-526.

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General Advice for Filing Both a Compensation and Pension Claim

- However, NVLSP recommends that the veteran submit two separate forms (the Form 21-526EZ for the compensation claim and the Form 21-527EZ for the pension claim) so that the veteran can waive his or her right to receive the VCAA letter and reduce the claims process by approximately three months.
- If a single ITF was submitted (that marked both comp. and pension), make sure to submit the 21-526EZ and 21-527EZ together so if both benefits are granted, the effective date for both benefits will be the date of the ITF

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What Happens if a Claimant Submits an "Informal Claim" on or after March 24, 2015?

- If a claimant or representative "indicates a desire to file for benefits" through a communication or action to the VA (such as a letter, email, etc.) that does not meet the standards of a complete claim or of an ITF, the VA will notify the claimant and his or her representative of the information necessary to complete the application form. *See* 38 C.F.R. § 3.155(a).
  - However, this communication will not preserve an effective date for the claim

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What Happens if a Claimant Submits the Appropriate Application Form for a Complete Claim but Does Not Provide Sufficient Information to Constitute a Complete Claim?

- The VA will notify the claimant and his or her representative of the information needed to complete the application form. If the claimant submits a complete claim within one year of the submission of the incomplete application form, the VA will consider the date of claim to be the date the incomplete form was submitted. *See* 38 C.F.R. § 3.155(c).

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What Happens if a Claimant Submits the Appropriate Application Form for a Complete Claim but Does Not Provide Sufficient Information to Constitute a Complete Claim?

- Technically, submitting an incomplete application form is a third method for initiating a claim and preserving the earliest effective date possible
- Despite the availability of this alternative method, NVLSP still recommends initiating a claim through an ITF or a complete claim, as opposed to submitting an incomplete application form

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Lawsuit Filed by NVLSP and other VSOs

- NVLSP, The American Legion, AMVETS, Military Order of the Purple Heart, and the Vietnam Veterans of America filed a lawsuit challenging the new VA rules changing the process for how claimants can initiate the claims process
- Lawsuit was filed on March 20, 2015, in the U.S. Court of Appeals for the Federal Circuit
- The VSOs in this lawsuit are asking the Federal Circuit to declare these regulations unlawful

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Lawsuit Filed by NVLSP and other VSOs

- Major contention in the lawsuit is the elimination of informal claims and the severe limitation on the types of inferred claims the VA will adjudicate
- The VSOs in this lawsuit believe this new claims process will adversely affect potentially hundreds of thousands of disabled veterans and their families, especially elderly and impoverished veterans who do not have access to the internet

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Lawsuits Challenging the Required Use of the New NOD Form

- While the lawsuit NVLSP filed does not challenge the new VA regulation requiring the use of the new NOD form, some VSOs have filed lawsuits challenging that regulation as well

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Questions?

OMB Control No. 2900-0747
Respondent Burden: 25 minutes
Expiration Date: 11/30/2017

Department of Veterans Affairs

APPLICATION FOR DISABILITY COMPENSATION AND RELATED COMPENSATION BENEFITS

VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)

IMPORTANT: Please read the Privacy Act and Respondent Burden on page 10 before completing the form.

SECTION I: IDENTIFICATION AND CLAIM INFORMATION

1. VETERAN/SERVICE MEMBER NAME *(First, Middle Initial, Last)*

2. SOCIAL SECURITY NUMBER — – –

3. DATE OF BIRTH (MM,DD,YYYY) Month — Day — Year

4. SEX ☐ MALE ☐ FEMALE

5. HAVE YOU EVER FILED A CLAIM WITH VA? ☐ YES ☐ NO *(If "Yes," provide your file number in Item 6)*

6. VA FILE NUMBER

7A. ARE YOU CURRENTLY HOMELESS OR AT RISK OF BECOMING HOMELESS? ☐ YES ☐ NO *(If "Yes," complete Items 7B & 7C)*

7B. POINT OF CONTACT *(Name of person that VA can contact in order to get in touch with you)*

7C. POINT OF CONTACT TELEPHONE NUMBER *(Include Area Code)* ( )

8A. SERVICE *(Check all that apply)* ☐ ARMY ☐ NAVY ☐ MARINE CORPS ☐ AIR FORCE ☐ COAST GUARD

8B. COMPONENT *(Check all that apply)* ☐ ACTIVE ☐ RESERVES ☐ NATIONAL GUARD

9A. CURRENT MAILING ADDRESS *(Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)*

Number and Street *or* Rural Route, P.O. Box

Apt./Unit Number

City, State, ZIP Code

Country

9B. FORWARDING ADDRESS AND EFFECTIVE DATE

Number and Street *or* Rural Route, P.O. Box

Apt./Unit Number

City, State, ZIP Code

Country

Effective Date *(MM,DD,YYYY)*: Month — Day — Year

9C. PREFERRED TELEPHONE NUMBER ( )

10A. PREFERRED E-MAIL ADDRESS *(If applicable)*

10B. ALTERNATE E-MAIL ADDRESS *(If applicable)*

11. LIST THE DISABILITY(IES) YOU ARE CLAIMING *(If applicable, identify whether a disability is due to a service-connected disability, is due to confinement as a Prisoner of War, is due to exposure to Agent Orange, Asbestos, Mustard Gas, Ionizing Radiation, or Gulf War Environmental Hazards, or is related to benefits under 38 U.S.C. 1151).*

Please list your contentions below. See the following examples, for more information:

- Example 1: Hearing loss
- Example 2: Diabetes-Agent Orange (exposed 12/72, Da Nang)
- Example 3: Left knee - secondary to right knee

DISABILITIES	
1.	
2.	
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12. LIST VA MEDICAL CENTER(S) (VAMC) AND DEPARTMENT OF DEFENSE (DOD) MILITARY TREATMENT FACILITIES (MTF) WHERE YOU RECEIVED TREATMENT AFTER DISCHARGE FOR YOUR CLAIMED DISABILITY(IES) AND PROVIDE TREATMENT DATES:

A. NAME *AND* LOCATION	B. DATE(S) OF TREATMENT

13. NOTE: IF YOU WISH TO CLAIM ANY OF THE FOLLOWING, COMPLETE AND ATTACH THE REQUIRED FORM(S) AS STATED BELOW (VA forms are available at www.va.gov/vaforms).

For:	*Required Form(s):*
Dependents	VA Form 21-686c and, if claiming a child aged 18-23 years and in school, VA Form 21-674
Individual Unemployability	VA Form 21-8940 and 21-4192
Post-Traumatic Stress Disorder	VA Form 21-0781 and 21-0781a
Specially Adapted Housing or Special Home Adaptation	VA Form 26-4555
Auto Allowance	VA Form 21-4502
Veteran/Spouse Aid and Attendance benefits	VA Form 21-2680 or, if based on nursing home attendance, VA Form 21-0779

SECTION II: SERVICE INFORMATION

14A. DID YOU SERVE UNDER ANOTHER NAME?
☐ YES *(If "Yes," complete Item 14B)* ☐ NO *(If "No," skip to Item 15A)*

14B. PLEASE LIST THE OTHER NAME(S) YOU SERVED UNDER:

15A. MOST RECENT ACTIVE SERVICE ENTRY (MM,DD,YYYY)
Month Day Year

15B. SERVICE NUMBER *(Fill out this item only if assigned a service number)*

15C. RELEASE DATE OR ANTICIPATED DATE OF RELEASE FROM ACTIVE SERVICE
Month Day Year

15D. DID YOU SERVE IN A COMBAT ZONE SINCE 9-11-2001?
☐ YES ☐ NO

15E. PLACE OF LAST OR ANTICIPATED SEPARATION

16A. ARE YOU CURRENTLY SERVING OR HAVE YOU EVER SERVED IN THE RESERVES OR NATIONAL GUARD?
☐ YES ☐ NO *(If "Yes," complete Items 16B thru 16F)* *(If "No," skip to Item 17A)*

16B. COMPONENT
☐ NATIONAL GUARD
☐ RESERVES

16C. OBLIGATION TERM OF SERVICE
From: Month Day Year
To: Month Day Year

16D. CURRENT OR LAST ASSIGNED NAME AND ADDRESS OF UNIT:

16E. CURRENT OR ASSIGNED PHONE NUMBER OF UNIT *(Include Area Code)*
( )

16F. ARE YOU CURRENTLY RECEIVING INACTIVE DUTY TRAINING PAY?
☐ YES ☐ NO

17A. ARE YOU CURRENTLY ACTIVATED ON FEDERAL ORDERS WITHIN THE NATIONAL GUARD OR RESERVES?
☐ YES ☐ NO *(If "Yes," complete Items 17B & 17C)*

17B. DATE OF ACTIVATION: (MM,DD,YYYY)
Month Day Year

17C. ANTICIPATED SEPARATION DATE: (MM,DD,YYYY)
Month Day Year

18A. HAVE YOU EVER BEEN A PRISONER OF WAR?
☐ YES ☐ NO *(If "Yes," complete Item 18B)*

18B. DATES OF CONFINEMENT (MM,DD,YYYY)
From: Month Day Year
To: Month Day Year

SECTION III: SERVICE PAY

19A. DID/DO YOU RECEIVE ANY TYPE OF SEPARATION/SEVERANCE/RETIRED PAY?
☐ YES ☐ NO *(If "Yes," complete Items 19B and 19C)*

19B. LIST AMOUNT *(If known)*
$

19C. LIST TYPE *(If known)*

IMPORTANT: Submission of this application constitutes an election of VA compensation in lieu of military retired pay if it is determined you are entitled to both benefits. If you are entitled to receive military retired pay, your retired pay may be reduced by the amount of any VA compensation that you are awarded. VA will notify the Military Retired Pay Center of all benefit changes. Receipt of military retired pay or Voluntary Separation Incentive (VSI) and VA compensation at the same time may result in an overpayment, which may be subject to collection. However, if you do not want to receive VA compensation in lieu of military retired pay, you should check the box in **Item 20**. Please note that if you check the box in **Item 20**, you ***will not*** receive VA compensation, if granted.

☐ **20. I want military retired pay instead of VA compensation**

IMPORTANT: You may elect to keep the training pay for inactive duty training days you received from the military service department. However, to be legally entitled to keep your training pay, you must waive VA benefits for the number of days equal to the number of days for which you received training pay. In most instances, it will be to your advantage to waive your VA benefits and keep your training pay.

If you waive VA benefits to receive training pay by checking the box in **Item 21**, VA will adjust your VA award to withhold future benefits equal to the total number of inactive duty for training days waived and at the monthly rate in effect for the fiscal year period for which you received training pay. Your normal VA rate will be restored when the sufficient numbers of days' benefits have been withheld.

☐ **21. I elect to waive VA benefits for the days I accrued inactive duty training pay in order to retain my inactive duty training pay.**

SECTION IV: DIRECT DEPOSIT INFORMATION

The Department of Treasury requires all Federal benefit payments be made by electronic funds transfer (EFT), also called direct deposit. Please attach a voided personal check or deposit slip or provide the information requested below in **Items 22, 23 and 24** to enroll in direct deposit. If you do not have a bank account, you must receive your payment through Direct Express Debit MasterCard. To request a Direct Express Debit MasterCard you must apply at www.usdirectexpress.com or by telephone at 1-800-333-1795. If you elect not to enroll, you must contact representatives handling waiver requests for the Department of Treasury at 1-888-224-2950. They will encourage your participation in EFT and address any questions or concerns you may have.

22. ACCOUNT NUMBER *(Check the appropriate box and provide the account number, or simply write "Established" if you have a direct deposit with VA)*

☐ CHECKING ☐ SAVINGS ☐ I CERTIFY THAT I DO NOT HAVE AN ACCOUNT WITH A FINANCIAL INSTITUTION OR CERTIFIED PAYMENT AGENT

Account No.: _____ Account No.: _____

23. NAME OF FINANCIAL INSTITUTION *(Please provide the name of the bank where you want your direct deposit)*	24. ROUTING OR TRANSIT NUMBER *(The first nine numbers located at the bottom left of your check)*

SECTION V: CLAIM CERTIFICATION AND SIGNATURE

I certify and authorize the release of information. I certify that the statements in this document are true and complete to the best of my knowledge. I authorize any person or entity, including but not limited to any organization, service provider, employer, or government agency, to give the Department of Veterans Affairs any information about me, and I waive any privilege which makes the information confidential.

I certify I have received the notice attached to this application titled, ***Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits.***

I certify I have enclosed all the information or evidence that will support my claim, to include an identification of relevant records available at a Federal facility such as a VA medical center; **OR,** I have no information or evidence to give VA to support my claim; **OR**, I have checked the box in **Item 25**, indicating that I do not want my claim considered for rapid processing in the Fully Developed Claim (FDC) Program because I plan to submit further evidence in support of my claim.

ALTERNATE SIGNER: By signing on behalf of the claimant, I certify that I am a court-appointed representative; **OR**, an attorney in fact or agent authorized to act on behalf of a claimant under a durable power of attorney; **OR**, a person who is responsible for the care of the claimant, to include but not limited to a spouse or other relative; **OR**, a manager or principal officer acting on behalf of an institution which is responsible for the care of an individual; **AND**, that the claimant is under the age of 18; **OR**, is mentally incompetent to provide substantially accurate information needed to complete the form, or to certify that the statements made on the form are true and complete; **OR,** is physically unable to sign this form.

I understand that I may be asked to confirm the truthfulness of the answers to the best of my knowledge under penalty of perjury. I also understand that VA may request further documentation or evidence to verify or confirm my authorization to sign or complete an application on behalf of the claimant if necessary. Examples of evidence which VA may request include: Social Security Number (SSN) or Taxpayer Identification Number (TIN); a certificate or order from a court with competent jurisdiction showing your authority to act for the claimant with a judge's signature and date/time stamp; copy of documentation showing appointment of fiduciary; durable power of attorney showing the name and signature of the claimant and your authority as attorney in fact or agent; health care power of attorney, affidavit or notarized statement from an institution or person responsible for the care of the claimant indicating the capacity or responsibility of care provided; or any other documentation showing such authorization.

25. The FDC Program is designed to rapidly process compensation or pension claims received with the evidence necessary to decide the claim. VA will automatically consider a claim submitted on this form for rapid processing under the FDC Program. Check the box below **ONLY if you DO NOT want your claim considered for rapid processing** under the FDC Program because you plan on submitting further evidence in support of your claim.

☐ **I DO NOT want my claim considered for rapid processing** under the FDC Program because I plan to submit further evidence in support of my claim.

26A. VETERAN/SERVICE MEMBER/ALTERNATE SIGNER SIGNATURE (**REQUIRED**)	26B. DATE SIGNED

SECTION VI: WITNESSES TO SIGNATURE

27A. SIGNATURE OF WITNESS *(If veteran signed above using an "X")*	27B. PRINTED NAME AND ADDRESS OF WITNESS
28A. SIGNATURE OF WITNESS *(If veteran signed above using an "X")*	**28B. PRINTED NAME AND ADDRESS OF WITNESS**

SECTION VII: POWER OF ATTORNEY (POA) SIGNATURE

I certify that the claimant has authorized the undersigned representative to file this supplemental claim on behalf of the claimant and that the claimant is aware and accepts the information provided in this document. I certify that the claimant has authorized the undersigned representative to state that the claimant certifies the truth and completion of the information contained in this document to the best of claimant's knowledge.

NOTE: A POA's signature ***will not*** be accepted unless at the time of submission of this claim a valid VA Form 21-22, *Appointment of Veterans Service Organization as Claimant's Representative,* or VA Form 21-22a, *Appointment of Individual As Claimant's Representative,* indicating the appropriate POA is of record with VA.

29A. POA/AUTHORIZED REPRESENTATIVE SIGNATURE	29B. DATE SIGNED

PRIVACY ACT NOTICE: The form will be used to determine allowance to compensation benefits (38 U.S.C. 5101). The responses you submit are considered confidential (38 U.S.C. 5701). VA may disclose the information that you provide, including Social Security numbers, outside VA if the disclosure is authorized under the Privacy Act, including the routine uses identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. The requested information is considered relevant and necessary to determine maximum benefits under the law. Information submitted is subject to verification through computer matching programs with other agencies. VA may make a "routine use" disclosure for: civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration. Your obligation to respond is required in order to obtain or retain benefits. Information that you furnish may be utilized in computer matching programs with other Federal or State agencies for the purpose of determining your eligibility to receive VA benefits, as well as to collect any amount owed to the United States by virtue of your participation in any benefit program administered by the Department of Veterans Affairs. Social Security information: You are required to provide the Social Security number requested under 38 U.S.C. 5101(c)(1). VA may disclose Social Security numbers as authorized under the Privacy Act, and, specifically may disclose them for purposes stated above.

RESPONDENT BURDEN: We need this information to determine your eligibility for compensation. Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 25 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at **www.reginfo.gov/public/do/PRAMain**. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

The DSM-5: Important Changes Advocates Need to Know from the DSM-IV

WHAT IS THE DSM-5?

- The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*
- Published in May 2013

WHAT IS THE DSM-5?

- The DSM-5 classifies mental disorders with associated criteria and is designed to aid clinicians provide more reliable diagnoses of mental disorders
- The DSM-IV was published back in 1994

General Effects of the DSM-5 on Veterans Law

- In August 2014, VA (through an interim final rule) updated its regulations to replace outdated references to the DSM-IV
  - *See* 79 Fed. Reg. 45,093 (Aug. 4, 2014)
- These changes affected 38 C.F.R. §§ 3.384, 4.125, 4.126, 4.127, and the rating schedule under 38 C.F.R. § 4.130

General Effects of the DSM-5 on Veterans Law

- While some of these changes to VA regulations may appear cosmetic (changing DSM-IV to DSM-5 in the text of the regulations), the diagnostic criteria between the DSM-IV and DSM-5 may differ significantly
- **Note:** these regulatory changes *do not* mean the DSM-IV is no longer relevant

General Effects of the DSM-5 on Veterans Law

- VA published the final rule on March 19, 2015, which adopted the interim final rule
  - *See* 80 Fed. Reg. 14,308 (Mar. 19, 2015)
- The VA stated that the change from DSM-IV to DSM-5 does not change how mental disorders will be evaluated under the VA Rating Schedule and no disorders were removed from the Rating Schedule

Will the VA Apply the DSM-IV or DSM-5 to your Client's Case?

- This determination is based on the status of your client's case on August 4, 2014 (the date of the VA regulation change)
- DSM-5 applies to:
  - New claims filed on or after August 4, 2014
  - Claims pending before the Regional Office (RO) on or after August 4, 2014
    - This includes claims that were denied by the RO, a Notice of Disagreement and a VA Form 9 had been submitted, but the case had not yet been certified to the Board of Veterans' Appeals (BVA)

Will the VA Apply the DSM-IV or DSM-5 to your Client's Case?

- DSM-IV applies to:
  - Claims that had been certified to the BVA as of August 4, 2014
    - May need to look to the VA Form 8 to determine whether DSM-IV or DSM-5 applies
  - Claims that were pending appeal before the BVA, the U.S. Court of Appeals for Veterans Claims (CAVC), or the U.S. Court of Appeals for the Federal Circuit on August 4, 2014
    - The DSM-IV will still apply to these cases even if the BVA, CAVC, or the Federal Circuit eventually remands the claim and it goes back to the RO

VA Examinations

- From the *VA Adjudication Procedures Manual M21-1MR*, Part III, subpart iv, 3.A.6.e (last updated July 30, 2015):
  - New examination requests on or after August 27, 2014, must be performed using the DSM-5 criteria
  - If there is an exam of record that used the DSM-IV criteria, the VA should *not* request a new examination if the DSM-IV exam:

VA Examinations

- Is otherwise adequate for rating purposes;
- Renders an Axis I diagnosis of a mental disorder; and
- Supports a grant of the benefit sought in view of the evidence of record

- **For SC claims, a new examination under the DSM-5 criteria should be requested if the DSM-IV exam does not satisfy all three of these requirements (for increased rating claims, the DSM-IV exam only has to be otherwise adequate for rating purposes)**

Defining Mental Disorders

- DSM-IV
  - "[E]ach of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful syndrome) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

Defining Mental Disorders

- DSM-IV
  - In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual."

Defining Mental Disorders

* DSM-5
  * "A syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities."

Defining Mental Disorders

* DSM-5
  * "An expectable or culturally approved response to a common stressor or loss, such as death of a loved one, is not a mental disorder."
  * "Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above."

Major Changes in the DSM-5

1. No more Axes organizational system
2. No more Global Assessment of Functioning (GAF) scores
3. Posttraumatic stress disorder (PTSD) has been moved to a new category and changes have been made to PTSD's diagnostic criteria

No more Axes Organizational System

1. In the DSM-IV, there were 5 Axes that separated mental disorders into 5 larger categories
2. The 5 axes were:

   Axis I: Clinical Disorders
   Axis II: Personality Disorders
   Axis III: General Medical Conditions
   Axis IV: Psychosocial and Environmental Problems
   Axis V: Global Assessment of Functioning (GAF)

Axes Organizational System

1. The DSM-5 gets rid of this organizational structure – instead opting to group disorders together based on common symptoms

   Ex: Depressive Disorders, Dissociative Disorders, Obsessive-Compulsive and Related Disorders

2. Previously, all of these would have been found under Axis I: Clinical Disorders, instead of grouped together

No More GAF Scores

* Axis V in the DSM-IV was dedicated to Global Assessment of Functioning - a way to quantify a person's level of functioning
* It was a way to see how debilitating a person's symptoms were and how they affected day to day functioning
* The DSM-5 got rid of this Axis with the others, and instead created a section of the DSM called "Assessment Measures" where it offers multiple options for assessing a client's level of functioning

No More GAF Scores

* The 3 recommended options to assess functioning in the DSM- 5 are:

1. Cross-cutting symptom measures
   * This assessment measure is a more general medical review
2. Severity Measures
   * This assessment measure is more disorder specific
3. The World Health Organization Disability Assessment Schedule (WHODAS 2.0)

No More GAF Scores

* The WHODAS 2.0
  * Most similar to the GAF score, this assessment measures and assesses a patient's ability to perform functions in six areas: understanding and communicating; getting around; self-care; getting along with people; life activities (i.e. work, school, and household activities); and participation in society

PTSD is Now in a New Category

* In the DSM-IV, PTSD was categorized as an Anxiety Disorder which fell under "Axis I: Clinical Disorders"
* In the DSM-5, a new category has been created - "Trauma- and Stressor-Related Disorders"
  * PTSD is now listed under this category with other Trauma and Stressor induced Disorders – which are too specific to be considered general anxiety disorders

Changes to PTSD Diagnostic Criteria

* DSM-IV contained more vague language about what constituted a stressor
  * "a person's response to the stressor [must have] involved intense fear, helplessness, or horror"

Changes to PTSD Diagnostic Criteria

* DSM-5 eliminated this language in favor of a more explicit criteria
  * Individuals must have been exposed to actual or threatened:
    * Death;
    * Serious injury; or
    * Sexual violence
  * In one of more of the following ways:

Changes to PTSD Diagnostic Criteria

* (1) Directly experiencing the traumatic event(s),
* (2) Witnessing, in person, the event(s) as it occurred to others.
* (3) Learning that the traumatic event(s) occurred to a close family member or close friend. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.

Changes to PTSD Diagnostic Criteria

* (4) Experiencing repeated or extreme exposure to aversive details of the traumatic event(s) (e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse).

Changes to PTSD Diagnostic Criteria

* The DSM-IV only had three "symptom clusters" needed for a diagnosis of PTSD, but the DSM-5 has four "symptom clusters"
* Thus, under the DSM-5, the veteran must:
  * (1) re-experience the traumatic event or stressor (ex. in flashbacks or nightmares);

Changes to PTSD Diagnostic Criteria

* (2) demonstrate persistent avoidance of stimuli associated with the event or stressor (ex. avoiding reminders of the event);
* (3) suffer negative alteration in cognition or mood (ex. feelings of guilt); AND
* (4) exhibit marked alterations in arousal (ex. hypervigilance or aggression)

Is it Easier to Obtain a PTSD Diagnosis Under the DSM-IV or the DSM-5?

* It depends!
* The DSM-5's threshold in regard to stressors may be lower since it does not take into account the veteran's subjective response to the traumatic event
* The DSM-IV, however, only requires three symptom clusters as opposed to four in the DSM-5

Is it Easier to Obtain a PTSD Diagnosis Under the DSM-IV or the DSM-5?

* In summary, whereas the DSM-IV was more focused on the individual's immediate reaction to a traumatic event or stressor, the DSM-5 appears to be more focused on the symptoms of PTSD
* Only time will tell whether it is easier for veterans to establish a PTSD diagnosis under the DSM-5

Advocacy Advice

* If an exam was conducted using the DSM-IV criteria and the veteran was not diagnosed with PTSD, get a new exam under the DSM-5 criteria (preferably a private exam, but you can also request a VA exam)
* If the veteran was previously denied due to no PTSD diagnosis under the DSM-IV (and that decision is final), he or she can file a claim to reopen and the VA would have to reopen the claim if he or she could produce a PTSD diagnosis under the DSM-5

Advocacy Advice

* Advocates representing a veteran whose claim was previously denied due to no PTSD diagnosis under the DSM-IV can also contend that they do not have to produce new and material evidence, because they are submitting a new claim

Advocacy Advice

* "When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation."
    * *Spencer v. Brown*, 17 F.3d 368 (Fed. Cir. 1994)

Advocacy Advice

* Thus, advocates should argue that the VA significantly liberalized the stressor criteria applicable to a claim for service connection for PTSD by amending its regulations to incorporate the DSM-5
* Therefore, this is a new and distinct claim so the veteran is not required to submit new and material evidence

Caution! VA at Work

* On a recent veterans outreach trip to New Orleans, NVLSP staff spoke with a veteran who had a VA psychiatric exam (using the DSM-5 criteria) which rejected military sexual trauma (MST) as a stressor

Caution! VA at Work

* A reminder about the DSM-5's PTSD criteria
  * Individuals must have been exposed to actual or threatened death, serious injury, or *sexual violence*
  * In one of more of the following ways: [including] *directly experiencing the traumatic event . . .*

Caution! VA at Work

* The DSM-5 criteria is clear that MST constitutes a stressor
  * MST is *sexual violence* that the veteran *directly experienced*
    * Sexual violence includes abusive sexual contact
* If your client has a VA exam that states that MST is not a stressor under DSM-5, you should request a new exam and argue that the prior exam was inadequate or if you have a private exam that provides a diagnosis of PTSD, use this error to diminish the probative value of the VA exam

Questions?

Posttraumatic Stress Disorder Diagnostic Criteria 309.81 (F43.10)

- Note: For ages 6 and older

A. Need exposure to
   1. actual or threatened death,
   2. serious injury, or
   3. sexual violence

<u>in one (or more) of the following ways:</u>

1. *Directly experiencing* the traumatic event(s).
2. *Witnessing*, in person, the event(s) as it occurred to others.
3. *Learning* that the traumatic event(s) occurred to a close family member or close friend.

- In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental.

<u>Experiencing</u> repeated or extreme exposure to aversive details of the traumatic event(s)

Note: Criterion A4 does not apply to exposure through electronic media, television, movies, or pictures, unless this exposure is work related.

B. **Presence** of one (or more) of the following **intrusion symptoms** associated with the traumatic event(s), beginning after the traumatic event(s) occurred:
   i. Recurrent, involuntary, and intrusive distressing memories of the traumatic event(s).
   ii. Recurrent distressing dreams in which the content and/or effect of the dream are related to the traumatic event(s).
   iii. Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were recurring.
   iv. Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).
   v. Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic event(s).

C. **Persistent avoidance of stimuli** associated with the traumatic event(s), beginning after the traumatic event(s) occurred, as evidenced by one or both of the following:
   vi. Avoidance of or efforts to avoid distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).
   vii. Avoidance of or efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings about or closely associated with the traumatic event(s).

D. **Negative alterations in cognitions and mood** associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:
   - Inability to remember an important aspect of the traumatic event(s) (typically due to dissociative amnesia and not to other factors such as head injury, alcohol, or drugs).
   - Persistent and exaggerated negative beliefs or expectations about oneself, others, or the world
   - Persistent, distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others.
   - Persistent negative emotional state (e.g., fear, horror, anger, guilt, or shame).
   - Markedly diminished interest or participation in significant activities.
   - Feelings of detachment or estrangement from others.
   - Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).

E. **Marked alterations in arousal and reactivity** associated with the traumatic event(s), beginning or worsening after the traumatic event(s) occurred, as evidenced by two (or more) of the following:
   - Irritable behavior and angry outbursts (with little or no provocation) typically expressed as verbal or physical aggression toward people or objects.
   - Reckless or self-destructive behavior.
   - Hypervigilance.
   - Exaggerated startle response.
   - Problems with concentration.
   - Sleep disturbance (e.g., difficulty falling or staying asleep or restless sleep).

F. **Duration** of the disturbance (Criteria B, C, D, and E) is more than 1 month.

G. The disturbance causes **clinically significant distress** or impairment in social, occupational, or other important areas of **functioning**.

H. The disturbance is not attributable to the physiological effects of a substance (e.g., medication, alcohol) or another medical condition.

Diagnostic Features

- The essential feature of posttraumatic stress disorder (PTSD) is the development of characteristic symptoms following exposure to one or more traumatic events. Emotional reactions to the traumatic event (e.g., fear, helplessness, horror) are no longer a part of Criterion A.
- The directly experienced traumatic events in Criterion A include, but are not limited to,
- exposure to war as a combatant or civilian,
- threatened or actual physical assault (e.g., physical attack, robbery, mugging, childhood physical abuse), **threatened or actual** sexual violence
   - (e.g., forced sexual penetration, alcohol/drug-facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking),

    - being kidnapped,
    - being taken hostage,
    - terrorist attack,
    - torture,
    - incarceration as a prisoner of war,
    - natural or human-made disasters, and
    - severe motor vehicle accidents.

- A life-threatening illness or debilitating medical condition is not necessarily considered a traumatic event.
- Medical incidents that qualify as traumatic events involve sudden, catastrophic events (e.g., waking during surgery, anaphylactic shock).
- Witnessed events include, but are not limited to, observing threatened or serious injury, unnatural death, physical or sexual abuse of another person due to violent assault, domestic violence, accident, war or disaster, or a medical catastrophe in one's child (e.g., a life-threatening hemorrhage).
- Indirect exposure through learning about an event is limited to experiences affecting close relatives or friends and experiences that are violent or accidental (e.g., death due to natural causes does not qualify).
    - Such events include violent personal assault, suicide, serious accident, and serious injury. The disorder may be especially severe or long-lasting when the stressor is interpersonal and intentional (e.g., torture, sexual violence).

- The traumatic event can be re-experienced in various ways.
    - Commonly, the individual has recurrent, involuntary, and intrusive recollections of the event (Criterion B1).
    - Intrusive recollections in PTSD are distinguished from depressive rumination in that they apply only to involuntary and intrusive distressing memories.
    - The emphasis is on recurrent memories of the event that usually include sensory, emotional, or physiological behavioral components.
    - A common re-experiencing symptom is distressing dreams that replay the event itself or that are representative or thematically related to the major threats involved in the traumatic event (Criterion B2).
- Stimuli associated with the trauma are persistently (e.g., always or almost always) avoided.
    - The individual commonly makes deliberate efforts to avoid thoughts, memories, feelings, or talking about the traumatic event (e.g., utilizing distraction techniques to avoid internal reminders) (Criterion Cl) and to avoid activities, objects, situations, or people who arouse recollections of it (Criterion C2).
- Negative alterations in cognitions or mood associated with the event begin or worsen after exposure to the event.
    - These negative alterations can take various forms, including an inability to remember an important aspect of the traumatic event; such amnesia is typically due to dissociative amnesia and is not due to head injury, alcohol, or drugs (Criterion D1).

- Another form is persistent (i.e., always or almost always) and exaggerated negative expectations regarding important aspects of life applied to oneself, others, or the future.
- Individuals with PTSD may have persistent erroneous cognitions about the causes of the traumatic event that lead them to blame themselves or others.
- A persistent negative mood state (e.g., fear, horror, anger, guilt, shame) either began or worsened after exposure to the event (Criterion D4).
- The individual may experience markedly diminished interest or participation in previously enjoyed activities (Criterion D5), feeling detached or estranged from other people (Criterion D6), or a persistent inability to feel positive emotions (especially happiness, joy, satisfaction, or emotions associated with intimacy, tenderness, and sexuality) (Criterion D7).
- Individuals with PTSD may be quick tempered and may even engage in aggressive verbal and/or physical behavior with little or no provocation (e.g., yelling at people, getting into fights, destroying objects) (Criterion El).
- They may also engage in reckless or self-destructive behavior such as dangerous driving, excessive alcohol or drug use, or self-injurious or suicidal behavior (Criterion E2).
- PTSD is often characterized by a heightened sensitivity to potential threats, including those that are related to the traumatic experience (e.g., following a motor vehicle accident, being especially sensitive to the threat potentially caused by cars or trucks) and those not related to the traumatic event (e.g., being fearful of suffering a heart attack) (Criterion E3).
- Individuals with PTSD may be very reactive to unexpected stimuli, displaying a heightened startle response, or jumpiness, to loud noises or unexpected movements (e.g., jumping markedly in response to a telephone ringing) (Criterion E4). Concentration difficulties, including difficulty remembering daily events (e.g., forgetting one's telephone number) or attending to focused tasks.
- Problems with sleep onset and maintenance are common and may be associated with nightmares and safety concerns or with generalized elevated arousal that interferes with adequate sleep (Criterion E6).
- Some individuals also experience persistent dissociative symptoms of detachment from their bodies (depersonalization) or the world around them (de-realization).

HOW TO PROPERLY ANALYZE THE COMBINED IMPACT OF DISABILITIES TO OBTAIN TDIU

Introduction – What we will cover

- This training covers situations in which a veteran has more than one service-connected disability and is seeking a Total Disability Rating Based Upon Individual Unemployability (IU or TDIU).
- We will discuss two significant court cases regarding whether the VA must conduct a combined assessment examination/opinion in such cases.
- We will also provide advocacy advice as to how to analyze a TDIU claim involving multiple SC disabilities.

Relevant Law – *Geib* and *Floore*

- *Geib:* U.S. Court of Appeals for the Federal Circuit holds that VA is not required under the duty to assist to obtain a single medical opinion addressing the combined impact of all service-connected disabilities. 38 C.F.R. § 4.16(a).
- *Floore*: U.S. Court of Appeals for Veterans Claims (CAVC or Court) holds that although a combined-effects medical examination report/opinion is not required per se by statute, regulation, or policy, the Board of Veterans' Appeals (BVA or Board) is required to explain its decision regarding the combined effects of multiple disabilities.

GEIB v. SHINSEKI, 733 F.3d 1350 (Fed. Cir. 2013)

- WWII veteran
- Suffered from multiple disabilities connected to WWII service
  - Frostbite
  - Hearing loss (artillery shell exploded in close proximity)
  - Tinnitus
- Effective Feb. 2005 - vet's combined evaluation was **70%**

GEIB v. SHINSEKI BACKGROUND

- High school education and some industrial engineering courses between 1947 and 1951
- Before 1984: worked as a supervisor in the carpet industry
- Aug. 1984 – Aug. 1989: vet worked as a self-employed carpet consultant (prior to becoming disabled)
- April 2007: vet applied for TDIU

GEIB v. SHINSEKI BACKGROUND

- BVA remanded the case to the RO to provide the vet with medical exams and re-adjudicate the TDIU claim
- April 2010: RO ordered (1) a cold weather exam to address severity of vet's bilateral trench foot, and (2) an audiological exam to evaluate his hearing impairment
- RO requested that each examiner describe "the extent of functional impairment due to the veteran's service-connected **disability(ies)** and how that impairment impacts on physical and sedentary employment."

GEIB v. SHINSEKI
AUDIO EXAMINATION (May 2010)

- Audiologist confirmed vet suffered from hearing loss and tinnitus, with "poor" speech recognition in both ears
- Audiologist opined that vet's hearing loss and tinnitus **do not prevent** him from seeking or maintaining gainful physical or sedentary employment within his community

GEIB v. SHINSEKI
TRENCH FOOT EXAM (June 2010)

- At the trench foot exam, vet reported that his trench foot did not affect his prior job as a supervisor because he was able to sit at a desk, but that he was unable to **walk more than several miles** as a result of his condition.
- The medical examiner confirmed that vet suffered from trench foot and osteoarthritis.
- Examiner opined that the vet's employment would be affected by his trench foot, but he should be able to obtain and maintain gainful employment at a sedentary job.

GEIB v. SHINSEKI
RO DECISION

- Dec. 2010: RO increased vet's hearing evaluation from 50% to 80% based on audio evaluation
  - Vet's combined disability rating increased to 90%
- The RO denied the TDIU claim

GEIB v. SHINSEKI
BOARD OF VETERANS' APPEALS

- BVA determined that vet was not entitled to TDIU
  - The Board found that the medical evaluations indicated that vet "would be employable in the type of sedentary position that he had previously held"
  - Although it recognized that vet's disabilities "do affect his employability," the Board concluded that they "do not prevent him from being employed, and therefore entitlement to a TDIU is not warranted."

GEIB v. SHINSEKI
THE CAVC

- The CAVC affirmed the Board's decision
  - The Court rejected the vet's argument that the BVA was required to obtain a single medical opinion that addressed the impact of all his SC disabilities on employability
  - The Court further found that:
    - BVA provided an adequate rationale, and
    - BVA properly considered the combined effect of both medical evaluations when it concluded that the vet was capable of sedentary employment

GEIB v. SHINSEKI
THE CAVC

- The Court also found that the medical exams were adequate because they sufficiently described the impact of vet's hearing and trench foot conditions so as to allow the Board to make an informed decision regarding entitlement to TDIU.
- Vet appealed the CAVC decision to the Federal Circuit

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- *The Law:*
  - 38 C.F.R. § 4.15: VA may assign a total disability rating where the degree of impairment renders it impossible for the average person to maintain a substantially gainful occupation.
  - 38 C.F.R. § 4.16(a): Vet who suffers from 2 or more SC disabilities is entitled to be considered for total disability if at least 1 disability is 40% or more, and additional disability brings the combined rating to 70% or more.

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- *The Law-*
  - 38 C.F.R. § 4.16(b): vet who fails to meet these percentage standards may still qualify for an "extra-schedular" TDIU rating if the VA determines the vet is unable to secure employment by reason of his or her SC disabilities

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- *Vet's Argument-*
  - Vet argued that where a vet has multiple SC disabilities, VA must obtain a **single medical opinion** addressing the aggregate effect of all disabilities on employability
  - Vet argued VA must provide a "full statement as to the veteran's service-connected disabilities, employment history, education and vocational attainment, and all other factors having a bearing on the issue." 38 C.F.R. § 4.16(b)

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- *Vet's Argument-*
  - Vet contended that, when a medical opinion does not address all these factors, the VA may not fill in the gaps by providing its own "expert" opinion regarding the combined effect of the vet's disabilities.

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- The Federal Circuit agreed with the CAVC that the VA is **not** required to obtain a single medical opinion that addressed the impact of all SC disabilities on the vet's ability to engage in substantially gainful employment.
- Although the VA is expected to give full consideration to "the effect of combinations of disability," 38 C.F.R. § 4.15, **neither the statute nor the relevant regulations require the combined effect to be assessed by a medical expert.**

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- Applicable regulations place responsibility for the ultimate TDIU determination on the VA, not a medical examiner. *See* 38 C.F.R. § 4.16(a).
- VA is expected to give full consideration to "the effect of combinations of disability." 38 C.F.R. § 4.15.
- Where neither the RO nor BVA addresses the aggregate effect of multiple SC disabilities, the record is not adequate to enable the vet to understand the precise basis for the decision on a TDIU claim and facilitate review. *See Young v. Shinseki*, 22 Vet.App. 461, 466-68 (2009).

GEIB v. SHINSEKI
FEDERAL CIRCUIT DECISION

- In this case, the BVA's analysis was sufficient
  - The CAVC found the exams were adequate and the BVA considered both exams in assessing the combined effect of vet's disabilities.
- Vet failed to assert that it was clearly erroneous for BVA to conclude that both exams indicated that he would be employable in the type of sedentary position that he had previously held

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GEIB v. SHINSEKI
FEDERAL CIRCUIT'S CONCLUSION

- The Federal Circuit held that the CAVC correctly concluded that the BVA's decision was adequate to facilitate review and inform the vet of the reason for denying his TDIU claim
- The Federal Circuit did not perceive a legal error in the proceedings, and therefore affirmed

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FLOORE v. SHINSEKI
26 Vet.App. 376 (2013)

- Claim involved TDIU entitlement due to multiple service-connected disabilities.
- Vet served from Oct. 1963 – Nov. 1966, and had 90% combined rating due to multiple SC disabilities
- Vet argued that, for a claimant with multiple SC disabilities, a medical opinion addressing the combined effects of all SC disabilities is required.
- Vet also argued that BVA inadequately explained why it denied TDIU entitlement.

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FLOORE v. SHINSEKI
BVA DECISION ON APPEAL

- BVA found that vet met percentage rating requirements for TDIU in 38 C.F.R. § 4.16(a), but found that vet's SC disabilities did not render him unemployable.

FLOORE v. SHINSEKI
ARGUMENTS BEFORE CAVC

- Vet argued that combined-effects medical exam or opinion was necessary to render proper decision.
- Vet also argued that the BVA:
  - (1) provided no statement of reasons or bases for its determination that a combined-effects medical examination report was not required; and
  - (2) provided inadequate analysis as to why it determined that his SC disabilities did not prevent him from obtaining substantially gainful employment.

FLOORE v. SHINSEKI
CAVC ANALYSIS

- CAVC held that the need for a combined-effects medical examination report or opinion with regard to multiple-disability TDIU entitlement is to be determined on a case-by-case basis, and depends on the evidence of record at the time of decision by the RO or BVA

FLOORE v. SHINSEKI CAVC ANALYSIS

- A combined-effects medical examination report or opinion is not required per se by statute, regulation, or policy to properly decide entitlement to TDIU for a veteran with multiple service-connected disabilities
- However, the BVA must adequately explain how the evidence supports the finding that the combined effects of multiple disabilities do not prevent substantially gainful employment. 38 U.S.C. § 7104(d)(1); *Beaty v. Brown*, 6 Vet.App. 532, 537 (1994).

FLOORE v. SHINSEKI CAVC ANALYSIS

- Although the BVA recognized that cumulative effects of disabilities can prevent substantially gainful employment, the BVA addressed effects of vet's disabilities individually, and **never explained what the cumulative functional impairment of all his SC disabilities might be and why they do not prevent substantially gainful employment.**

FLOORE v. SHINSEKI CAVC ANALYSIS

- The CAVC remanded the matter for further adjudication with specific direction that BVA explain how the evidence of record supports findings regarding the cumulative effects of all of the vet's SC disabilities on his ability to obtain and maintain substantially gainful employment, or otherwise obtain the evidence necessary to do so.

FLOORE v. SHINSEKI
Judge Bartley Concurrence

- Judge Bartley wrote separately, stating that where there are multiple compensable disabilities, especially affecting different body systems, an expert opinion on overall functional impairment, including occupational impairment, caused by the combination of SC disabilities is necessary for an adequately reasoned decision regarding TDIU
- Judge Bartley cited 38 C.F.R. § 4.10, Manual M21-1MR (Part I, 1.C.7.c (last updated Mar. 28, 2011)), and VA Training Letter 10-07 (Sept. 14, 2010).

The Difference Between the Outcomes in *Floore* and *Geib*

- The CAVC remanded the appeal in *Floore* because the BVA never explained (1) what the cumulative functional impairment of all the veteran's service-connected disabilities might be, and (2) why they do not prevent substantially gainful employment.
- On the other hand, in *Geib*, the Federal Circuit found that the BVA's analysis was sufficient. Therefore, the Federal Circuit affirmed the CAVC's affirmance of the Board's denial.

Current State of the Law

- Unfortunately, Judge Bartley's interpretation in *Floore*, that a combined examination/opinion is necessary in all cases involving multiple service-connected disabilities (especially involving different body systems), did not carry the day.
- Knowing the legal landscape is not very veteran-friendly, what can an advocate do?

Advocacy Advice

ANALYZE THE CASE

- If a veteran has multiple service-connected disabilities, and believes that the combination of disabilities makes him/her unemployable, advocates can help.
- Advocates should review the medical and lay evidence of record and speak with the veteran to determine the combination of disabilities that render the veteran unemployable.
- The following slides will provide an example with advocacy tips.

Advocacy Advice

ANALYZE THE CASE - Example

- A veteran has a combined disability rating of 70 percent due to the following SC disabilities:
  1) PTSD – 50%
  2) Residuals of a left total knee replacement – 30%
  3) Tinnitus – 10%
  4) Hearing loss – 10%
- The veteran last worked in the ground crew at an airport.
- The tinnitus and hearing loss do not affect his ability to work (he wore noise-cancelling headphones on the job).

Advocacy Advice

ANALYZE THE CASE - Example

- However, the veteran's PTSD and knee problems prevented him from performing his job due to flashbacks and an inability to walk any long distances.
- The veteran is 65 years old and also suffers from non-service-connected medical problems (diabetes and arthritis of the cervical spine).

Advocacy Advice

ANALYZE THE CASE - Example

- What would you do – in this case (or in any combined-impact case)?

Advocacy Advice

OBTAIN LAY STATEMENTS

- Lay statements—from the veteran, friends, family members, former co-workers—addressing the combined impact of the veteran's disabilities on his/her ability to work, would be helpful.
- These statements help lay the foundation for a favorable medical/vocational opinion.
- Lay statements can be submitted with the VA Form 21-8940 (Veteran's Application for Increased Compensation Based on Unemployability).

Advocacy Advice

GET YOUR OWN MEDICAL OPINION

- Ideally, an advocate should obtain a private medical examination and opinion, *to include a vocational assessment*, addressing **whether the service-connected disabilities *alone*** render the veteran unable to perform substantially gainful employment.
- Advise the private doctor of the standard of proof (at least as likely as not), **and** that age and non-service-connected disabilities should **not** be considered in a TDIU claim.

Advocacy Advice

CAN'T OBTAIN A PRIVATE OPINION?

- If the advocate cannot obtain a private opinion, the advocate should ask the VA to obtain a combined-assessment medical opinion.
- Under the CAVC's decision in *Floore*, the VA is required to address whether a combined assessment examination/opinion is necessary.
- Therefore, asking for a combined-assessment medical opinion lobs the ball into the VA's court, and forces the VA to respond.

Advocacy Advice

BOILERPLATE

- If the advocate cannot obtain a private opinion, the advocate should submit a statement saying:

"I assert that the combined impact of my service-connected disabilities alone preclude me from working. I last worked in _____. Please obtain a vocational/ medical opinion addressing the combined impact of my service-connected disabilities on my ability to work."

Advocacy Advice

BOILERPLATE (continued)

- Add to this statement the citations relied upon by Judge Bartley in her concurrence in *Floore*:

  "*See* 38 C.F.R. § 4.10 and VA Training Letter 10-07 (Sept. 14, 2010)."

Questions?

Workshop: Effective Strategies for Written and Oral Advocacy Including Representation at Hearings

IRAC Strategy to Writing

- Issue
- Rule
- Analysis (or Application)
- Conclusion

 2

IRAC Strategy to Writing

- Issue
  - State the issue on appeal (ex. "Entitlement to service connection for tinnitus")
  - If the written submission is in the form of a brief, also mention years of service as well as any awards (ex. Purple Heart, CIB, Bronze Star with "V" Device, etc.)

 3

IRAC Strategy to Writing

* Rule
  * State the relevant statutes and/or regulations
  * This is one area of a written submission, where using boilerplate is okay

 4

IRAC Strategy to Writing

* Analysis
  * Apply the facts of the case to the law
  * Show why all 3 elements of service connection have been established or why the veteran meets the criteria for a higher disability rating
  * Make sure you address each element of a claim even if the claim is before the Board of Veterans' Appeals and the Regional Office conceded some elements

 5

IRAC Strategy to Writing

* Questions to consider in Analysis section
  * What elements have been proven/are undebatable?
  * Is there an element that has no supporting evidence?

 6

IRAC Strategy to Writing

* Questions to consider in Analysis section (cont.)
  * Is there an element with only negative evidence?
  * Is there an absence of evidence?
  * Is there an element where there is both positive and negative evidence?

 7

IRAC Strategy to Writing

* Conclusion
  * Summarize what it is you are asking the RO or BVA to do (ex. grant service connection, grant increased rating, remand for VA examination, etc.)
  * Can be as short as 1-2 sentences

 8

Writing Tips

* If possible, give multiple arguments
  * Consider different theories of entitlement
  * If there are multiple "good" outcomes, advocate for each outcome in order of what is the most preferable outcome (For example, you can argue that the vet is entitled to a 100% rating, but at the very least the VA should grant an increased rating of 70%; or you can argue that vet is entitled to service connection, but at the very least, the BVA should remand the case for further development)

 9

Writing Tips

- Remember who your audience is (RO raters, BVA attorneys and Veterans Law Judges)
- Make their job easy
- When you reference important evidence, be specific about where they can find it ("On page 12 of the November 12, 2013 VA examination, the examiner stated . . .")

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Writing Tips

- Avoid boilerplate language (except when citing statutes or regulations)
- A written submission that is mostly boilerplate is going to make the person reading it think either (1) you do not know what you are talking about; or (2) you do not think the claimant you are representing has a strong case
- When you do use boilerplate language, make sure it is relevant and correct

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Writing Tips

- If you cite to a medical treatise or other authority (ex: favorable BVA decision in nearly identical case), attach a copy of it to your written submission
- Do not mention statutes, regulations, U.S. Court of Appeals for Veterans Claims cases, or facts that are not relevant to the issues in your brief
- Proofread, check for correct spelling and grammar, and consider reading the statement out loud to see if it flows

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Writing Tips

- If there is positive and negative evidence, make sure to address why the evidence is at least in equipoise – remember the "benefit of the doubt" rule
- BE CONCISE
  - RO raters and BVA attorneys do not want to read a 10 page brief (especially if the same argument could have been made in 10 sentences)

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Hypothetical

- Facts:
  - Honorable service – one year in VN
  - SC for low back and leg conditions and getting TDIU because of these disabilities
  - Now vet suffers from the residuals of an MI (heart attack)
  - He has been diagnosed with ischemic heart disease

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Hypothetical

- Facts:
  - Make up additional facts (without changing the above facts) and then prepare a brief that argues for SC for the heart condition
  - Determine what the legal issues are and what evidence is needed
  - Do not make it more complicated than it needs to be

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Hearings

Best Practices

Best Practices

Prepare ahead of time!

- Check the Veterans Benefits Manual (VBM)
- Look at the appropriate statute or regulation; check the *VA Adjudication Procedures Manual M21-1MR* and VA Fast Letters if relevant
- Be familiar with the elements of the claim so you can obtain effective testimony from the vet
- Be familiar with the facts
  - Review the file and meet with the claimant

Best Practices

At the hearing:

- State the issues – SC / increased rating for what disabilities?
- Apply the facts to the rule/elements (do the symptoms fit?)
- Discuss the in-service event or incident
- Is there a diagnosis? Point this out to DRO or Board member
- Is there a link? Build your argument
  - Submit supporting documents or statements not already of record.
  - Ask to keep the record open (30 or 60 days) if you need time to submit additional evidence.
- Elicit description of symptoms / effect of disability on life and ability to work
- Have a concise summary for the DRO or Board member

Best Practices

- Remember – you control the hearing!
- Ask questions of your veteran that will yield a "yes" or "no" response.
- Preparation is key – don't ask a question if you don't know the answer!
- A hearing is **not** the place for the veteran to vent!

Best Practices

- Be careful of questions the DRO/Board member ask. You may need to ask follow-up questions of the veteran if he/she has answered in a way that is harmful to his/her case.
- Ex: DRO asks vet why he didn't receive treatment for PTSD for 25 years after service. Vet is nervous, shrugs his shoulders and fails to respond. On follow-up questioning, you ask the veteran, "isn't it true that you didn't seek treatment because you were in fear of losing your Police job?" This had been discussed previously, so the veteran says "yes" and the hearing is back on track.

Best Practices

- If the DRO/Board member begins to cross-examine the veteran, you may need to remind the DRO/Board member of the non-adversarial nature of VA proceedings, and possibly terminate the hearing. Hopefully you will never be in a situation where it comes to this, but you never know.
- While you want to come to a hearing well prepared, you also have to be flexible and be able to adapt if the hearing does not go exactly as planned (for example, the DRO may interrupt to ask questions you were not anticipating or a witness may get nervous and forget to provide important information)

Best Practices

- If it would support the claim at issue, have other witnesses provide testimony at the hearing (spouse, children, friends, etc.)
- If possible, talk to your witnesses ahead of time and prepare them for the types of questions you will ask them
- Leading questions are allowed and can sometimes be very useful in getting the witness back on track

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Best Practices

- Try to anticipate ahead of time any questions that the DRO or Board member may ask the witness (ex. Why did you wait 30 years to file a claim for PTSD?). Make sure the witness is prepared for these questions and if he or she has a good answer, then beat the DRO or Board member to the punch and ask the question first.
- Hearings do not have to be long to be effective

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Last Minute Hearing

- What if you find out at the last minute that you have a hearing for a case you were just assigned?
  - Talk to the claimant about the case
  - Review the pertinent evidence in the c-file
  - If you feel that you are inadequately prepared, ask to reschedule the hearing
  - If unable to reschedule the hearing, ask that the record be kept open for a further written submission

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When Not to Request a Hearing

- If you are concerned about your witness not coming off as credible (for example, in prior conversations, your client has contradicted himself), or is belligerent
- If the issue at hand is purely a matter of law; no clarification of the facts is needed
- But, since the claimant has the right to a hearing, you must discuss it with him/her prior to withdrawing a hearing request

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Hypo

- Veteran served from 1965 to 1968 (including 9 months in Vietnam)
- While in Vietnam, he engaged in combat and was frequently exposed to loud gun fire
- After leaving service, he became a high school teacher until he retired in 2010
- In his retirement, he makes furniture in his home workshop

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Hypo

- In 2015, the veteran, at the age of 70, filed a service connection claim for hearing loss and tinnitus
- Upon his separation from the military, the vet's hearing was normal and there are no complaints of tinnitus in his service records
- VA audiological examination shows that the veteran does have bilateral hearing loss which, if service-connected, would be noncompensable

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Hypo

* What questions would you ask the veteran at a hearing?

 28

Questions?

 29

1

How to Handle Informal and Inferred Claims Submitted Prior to March 24, 2015

2

Overview

- We will discuss:
  - The VA's changing policy regarding inferred claims
  - Handling informal and inferred claims submitted prior to 3/24/15
    - Including inferred claims that are ready to service-connect and rate and claims that need additional evidentiary development
  - Handling informal and inferred claims submitted on or after 3/24/15

3

The VA's Changing Policy Regarding Inferred Claims

- Over the years, the VA has changed its policy from what was once a liberal approach to inferred claims to the current policy which has practically whittled away the concept of inferred claims altogether

4

The VA's Changing Policy Regarding Inferred Claims

- From March 28, 1985 up until the early 1990s, the *VA Adjudication Procedures Manual M21-1* Section 46.02 stated: "All disabilities claimed will be given consideration as to service connection and [be coded as a disability rating on VA Form 21-6796.] [Any additional] disabilities [noted] will [be] coded, except:
  - Acute transitory conditions that leave no residuals
  - Noncompensable residuals of venereal disease

5

The VA's Changing Policy Regarding Inferred Claims

- Disabilities noted only on the induction examination, or conditions recorded by history only
- Disabilities found by authorization to have not been incurred 'in line of duty'"

6

The VA's Changing Policy Regarding Inferred Claims

- Before the VA's regulation change, the *VA Adjudication Procedures Manual M21-1MR* stated:
  - "When preparing a rating decision, the Rating Veterans Service Representative (RVSR) must recognize, develop, clarify and/or decide all issues and claims, whether they are expressly claimed issues, reasonably raised claims, or unclaimed issues and ancillary benefits."
- Part III, subpart iv, 6.B.2.a (last updated Aug. 3, 2011)

7

The VA's Changing Policy Regarding Inferred Claims

- The *Manual M21-1MR* also noted that:
  - "A claim, whether formal or informal, must show an intent to file for a benefit and identify the benefit sought."
- Part III, subpart iv, 6.B.2.a (last updated Aug. 3, 2011)

8

The VA's Changing Policy Regarding Inferred Claims

- After the regulation change, the *Manual M21-1MR* still said the VA must decide all claims, "whether they are expressly claimed, reasonably raised, or unclaimed subordinate issues and ancillary benefits"
- The VA, however, provided the following notes:
  - "A claim is defined as the submission of a Department of Veterans Affairs (VA) prescribed application, whether paper or electronic, that identifies the Veteran or claimant, if not the Veteran, as well as the specific benefit sought."

9

The VA's Changing Policy Regarding Inferred Claims

- VA notes continued:
  - "Reasonably raised issues encompass additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in 38 CFR Part 4"

10

The VA's Changing Policy Regarding Inferred Claims

- VA notes continued:
  - "VA will put at issue for adjudication any ancillary benefit(s) or other unclaimed subordinate issues not expressly raised by the claimant that are related and arise as a result of the adjudication of a claimed issue"
- *Manual M21-1MR*, Part III, subpart iv, 6.B.1.a (last updated June 30, 2015)

11

Informal Claims Filed Prior to 3/24/15

- The *Manual M21-1MR* explicitly states that the VA should still recognize an informal claim if it was received prior to March 24, 2015 (Part III, subpart ii, 2.C.1.a (last updated July 15, 2015))

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Inferred Claims Filed Prior to 3/24/15

- In contrast, neither the *Manual M21-1MR* nor the new regulations discuss whether an *inferred* claim should be adjudicated if the claim was filed prior to March 24, 2015
  - While the VA has not explicitly addressed how it will handle inferred claims that were received prior to 3/24/15, NVLSP thinks advocates should argue that the VA is obligated to treat inferred claims the way it treats informal claims

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Inferred Claims Filed Prior to 3/24/15

- Example
  - March 23, 2015: veteran submitted claim for tinnitus
  - July 2015: while adjudicating the tinnitus claim, the VA noticed that the veteran's service treatment records showed that both of his legs were amputated in service
  - Since this claim was submitted prior to March 24, 2015, the old VA rules and directives should apply and the VA should treat the veteran's legs condition as an inferred claim and grant service connection for his amputated legs

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Informal Claims and Inferred Claims Filed Prior to March 24, 2015

- Advocates need to be very cautious of situations like the previous example because it is likely that some VA adjudicators will fail to recognize (and fail to adjudicate) informal or inferred claims that were received prior to March 24, 2015
- Therefore, file a claim (expressly stating the disability mentioned in the informal or inferred claim) as soon as possible.
  - If the RO fails to grant the correct effective date, that decision should be appealed to the Board of Veterans' Appeals.

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Two Major Types of Inferred Claims

- Claims that are ready to service-connect and rate without any additional evidence
- Claims that are reasonably raised by the evidence of record, but need more evidence to service-connect and/or rate

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Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- Example
  - 2007: veteran was discharged
  - April 2010: veteran filed a claim for the residuals of a wound to her right arm
  - September 2010: RO granted service connection for the scar, but ignored the fact that the veteran's service treatment records showed that she lost both of her legs in-service

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Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- Example (continued)
  - April 2015: veteran filed a claim for her left elbow condition
  - July 2015: RO denied the claim for her left elbow condition and did not address the veteran's in-service loss of both legs

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Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- What should the advocate do?

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Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- What should the advocate do?
  - File a claim stating that the September 2010 rating decision should be revised based on clear and unmistakable error (CUE)
  - Under the regulations and directives that were in effect at the time of the September 2010 rating decision, the VA had an obligation to recognize the veteran's service treatment records as an inferred claim for her amputated legs

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Handling pre-March 24, 2015 Inferred Claims Where No Additional Evidence is Needed

- What should the advocate do? (continued)
  - The evidence was clear that but for the VA's failure to recognize these records as an inferred claim, she would have been granted service connection
  - Thus, the VA should grant the CUE claim and assign an effective date of April 2010 (the date of the veteran's scar claim) for her bilateral leg condition

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Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- Example
  - 2007: veteran discharged from service
  - April 2010: veteran applied for service connection for a left knee condition
  - September 2010: RO granted service connection for her left knee, assigning a 10% rating

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Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- Example (continued)
  - At the time this claim was adjudicated, the veteran's claims file included a statement from a doctor that he thought the veteran's left knee condition may have caused the veteran's current back condition
  - The VA never developed or adjudicated a back condition claim
  - April 2015: veteran applied for an increased rating for her left knee condition

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Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- What should the advocate do when he or she realizes that the VA never developed the claim for the veteran's back condition?

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Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- NVLSP recommends following a two-step process:
  - Step 1: file a SC claim for a back condition (either by immediately submitting an intent to file a claim followed by a complete claim within one year or by immediately submitting a complete claim on a VA Form 21-526EZ)

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Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- It is recommended that advocates do not make any effective date arguments until after the VA adjudicates the claim. The reason for this is that in most instances, any time the issue of retroactive benefits is raised, the advocate should be prepared for a fight from the VA, and this could ultimately hurt the veteran's chances of success on the basic claim.

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Handling pre-March 24, 2015 Inferred Claims that were Reasonably Raised but Needed Additional Evidence

- Step 2: if the VA grants the claim but does not award April 2010 as the effective date, the advocate should file an NOD arguing that the veteran is entitled to an earlier effective date for her back condition because the inferred claim has been pending since April 2010

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Informal Claims Submitted On or After March 24, 2015

- If a claimant or representative "indicates a desire to file for benefits" through a communication or action to the VA (such as a letter, e-mail, etc.) that does not meet the standards of a complete claim or of an intent to file a claim, the VA will notify the claimant and his or her representative of the information necessary to complete the application form. *See* 38 C.F.R. § 3.155(a).
  - However, this communication will **not** preserve an effective date for the claim

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Inferred Claims Filed On or After March 24, 2015

- For inferred claims submitted after the change in regulations, the key question for advocates to ask is:
  - Is the inferred claim **related** to the specific condition claimed by the claimant?

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Inferred Claims Filed On or After March 24, 2015

- If the inferred claim is related to the specific condition claimed, then the VA should still adjudicate the inferred claim (even under the new rules)
- If the inferred claim is not related to the specific condition claimed, then the VA has no obligation to do anything

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Inferred Claims Filed On or After March 24, 2015

- Example 1
  - Vet files service connection claim for hearing loss
  - Vet's STRs show complaints of tinnitus and VA treatment records show that the vet still complains of tinnitus (even though he did not formally file a claim for this condition)
  - *In this case, tinnitus is related to the vet's express claim of hearing loss so the VA should adjudicate a claim for tinnitus even though it was not specifically claimed*

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Inferred Claims Filed On or After March 24, 2015

- Example 2
  - Vet files service connection claim for hearing loss
  - While reviewing the vet's claims file, the VA notices both of the vet's legs were amputated in service
  - ***In most cases**, the vet's amputated legs will not be considered related to his or her hearing loss, so the VA will not have to adjudicate the inferred claim*

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Showing that an Inferred Claim is Related to the Specific Condition Claimed

- If the inferred issue was generated by the same event that caused the condition that is the subject of the specific claim, advocates should argue the inferred issue is related to the specific claim
  - In the prior example, if the vet's hearing loss and amputated legs were both caused by the same explosion, you should argue that his amputated legs are related to his claim for hearing loss

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Showing that an Inferred Claim is Related to the Specific Condition Claimed

- If the condition being inferred is arguably part of the specific condition claimed, then the VA should adjudicate the inferred condition as well
- Conditions secondary to the specific condition claimed should be adjudicated by the VA

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Advocacy Advice for Inferred Claims Filed on or after March 24, 2015

- If an advocate spots an inferred claim that is associated with a claim that was filed on or after 3/24/15, the advocate should file an ITF or a complete claim for the inferred condition immediately
- If the Regional Office assigns the incorrect effective date, appeal to the Board of Veterans' Appeals

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Advocacy Advice for Inferred Claims Filed on or after March 24, 2015

- For example:
  - April 2015: vet filed SC claim for hearing loss
  - July 2015: advocate noticed complaints of tinnitus in vet's STRs and immediately filed a claim for tinnitus
  - If the RO assigns an effective date of July 2015 for the vet's tinnitus, appeal to the BVA and argue that the vet's tinnitus is related to his hearing loss claim and thus, the effective date should be April 2015, because the claim has been pending since then

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Questions?

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The New Rules Requiring the Use of the NOD Form

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Overview

- We will discuss:
  - The old and new rules regarding submitting a Notice of Disagreement (NOD)
  - Advice on completing the NOD form
  - Reconsideration by the Regional Office (RO)

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Regulatory Changes to the Appeals Process

- In addition to VA's regulation changes as to how claimants are able to initiate a claim, the VA also made recent changes to the process for initiating an appeal
  - *See* 75 Fed. Reg. 57,660-98 (Sept. 25, 2014)

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The Old Rules (Pre-March 24, 2015)

- Requirements to constitute an NOD
  - A written communication from the claimant or his or her representative;
  - An expression of dissatisfaction or disagreement with the RO's decision; and
  - A desire for appellate review
- Claimants were not obligated to file an NOD on a particular form

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New Rules (Effective March 24, 2015)

- If the RO provided a VA Form 21-0958 (Notice of Disagreement) with the copy of its decision
  - The claimant MUST use the 21-0958 to file an NOD (38 C.F.R. § 20.201(a)(1))
- If the RO did not provide a copy of the 21-0958 with its decision
  - The old rules apply and the claimant can submit an NOD on any form or piece of paper as long as it expresses disagreement with the RO's decision and a desire for appellate review (38 C.F.R. § 20.201(b))

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New Rules (Effective March 24, 2015)

- Note: according to the Manual M21-1MR, Part I, 5.B.3.a (last updated July 24, 2015), these new rules DO NOT apply if the *decision notice letter* was sent prior to March 24, 2015; thus . . .
  - For a rating decision dated 3/20/15 and notice letter dated 3/23/15: old rules apply
  - For a rating decision dated 3/23/15 and notice letter dated 3/24/15: new rules apply

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New Rules (Effective March 24, 2015)

- The claimant still has one year from the date the Agency of Original Jurisdiction mailed its decision to file a timely NOD (38 C.F.R. § 20.302(a))

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Presumption Form was Provided

- As long as there is any indication whatsoever in the claimant's file that the NOD form was sent with the RO's decision, there is a presumption that the form was provided

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Advice on Completing VA Form 21-0958

- While the claimant is not required to use the Form 21-0958 if the RO did not provide him or her with a copy of this form, NVLSP encourages advocates to always use this form when filing an NOD (even when it is not required)
- Due to the before mentioned presumption, it is difficult to prove a negative (that the form was not provided)
  - Save your time and energy for more important fights and just use the form!

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Advice on Completing VA Form 21-0958

- As with filing a complete claim, advocates should be heavily involved in the completion of the NOD form and should always review the completed NOD before it is submitted to the VA

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Advice on Completing VA Form 21-0958

- Question 8 on the form asks whether the claimant would like to receive a telephone call from a representative at his or her local RO regarding the NOD
  - Advocates should check the "no" box for this question and state "Please call my representative"
  - It is recommended that claimants do not speak with RO employees about their claims without their representative present

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Advice on Completing VA Form 21-0958

- Question 10 on the form asks the claimant to list the specific issue of disagreement, the area of disagreement, and, if the area of disagreement involves the evaluation of a veteran's disability, the percentage evaluation sought
  - In Column C of this question which asks for the percentage evaluation sought, advocates should write: "the maximum evaluation available under the law"

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Advice on Completing VA Form 21-0958

- If a claimant puts an actual percentage amount in Column C (10%, 20%, 30%, etc.), he or she runs the risk of underevaluating the severity of the condition and, thus, not receiving all of the benefits to which he or she is entitled

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Advice on Completing VA Form 21-0958

- Question 11A allows the claimant to provide an explanation for their disagreement with the RO's decision
  - NVLSP recommends that the advocate write "please see attached brief" in response to this question and then attach a brief on letterhead or a VA Form 21-4138. If the advocate does not wish to attach a brief, he or she should at least use the space under Question 11A to express the claimant's arguments on appeal.

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Advice on Completing VA Form 21-0958

- Completion of Question 11A is not mandatory, but highly recommended.
- The brief or statement should include:
  - A full explanation as to why the RO's decision was incorrect
  - The errors of fact or law committed by the RO
  - The additional supportive evidence the advocate is submitting with the NOD form or will submit in the future

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Advice on Completing VA Form 21-0958

- If the claimant or representative is attaching any pages to the Form 21-0958, he or she must check the "yes" box for Question 11B and provide the number of additional pages that are being attached

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What Constitutes a Complete Appeals Form?

- Information identifying the claimant
- The claim to which the form applies

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What Constitutes a Complete Appeals Form? (continued)

- Any information necessary to identify the specific nature of the disagreement (ex. for compensation claims, is the disagreement over SC, a rating, or an earlier effective date?)
- Claimant (or representative's) signature
  - 38 C.F.R. § 19.24(b)(2)

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What if you Submit an Incomplete Appeals Form?

- If a claimant submits an incomplete appeals form, the VA will request clarification from the claimant
  - 38 C.F.R. § 19.24(b)(1)

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What if you Submit an Incomplete Appeals Form?

- After the VA sends its request for clarification of the NOD form, the claimant must file a completed version of the correct form within
  - 60 days from the VA's request for clarification; or
  - 1 year from the date the RO mailed its rating decision
  - Whichever is later
    - 38 C.F.R. § 19.24(b)(3)

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What if you Submit an Incomplete Appeals Form?

- In practice, advocates should never submit an incomplete NOD form
- The one exception is if a claimant comes to you on Day 364 or 365 of the appeal period and you do not have enough time to complete the form
  - In this case, submitting an incomplete NOD form will buy you some extra time

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Reconsideration at the RO

- After a claim has been denied by the RO, VA employees love to suggest to claimants that they request reconsideration of the decision (instead of filing an NOD)
- However, consider the following example:

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Reconsideration at the RO

- April 1, 2015: vet's claim for PTSD is denied
- May 1, 2015: vet requests reconsideration of the decision following the advice of an RO employee
- April 15, 2016: vet is informed that his claim is still denied after reconsideration

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Reconsideration at the RO

- In this scenario, the veteran's claim was not reconsidered by the RO until the one year appeal period had expired
- Because the vet did not file an NOD, the vet could not appeal the April 2015 rating decision after his request for reconsideration was denied

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Reconsideration at the RO

- Requesting reconsideration at the RO level ***does not*** preserve a claimant's right to appeal to the Board of Veterans' Appeals
- Therefore, if you do request reconsideration by the RO, you must be very mindful of when the one year period to file an NOD expires
- If the one year period is about to expire and the RO has not reconsidered and fully granted the claim, file an NOD

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Questions?

OMB Approved No. 2900-0791
Respondent Burden: 30 minutes
Expiration Date: 9/30/2017

Department of Veterans Affairs

NOTICE OF DISAGREEMENT

A CLAIMANT OR HIS OR HER DULY APPOINTED REPRESENTATIVE MAY FILE NOTICE EXPRESSING THEIR DISSATISFACTION OR DISAGREEMENT WITH AN ADJUDICATIVE DETERMINATION BY THE AGENCY OF ORIGINAL JURISDICTION. A DESIRE TO CONTEST THE RESULT WILL CONSTITUTE A NOTICE OF DISAGREEMENT (NOD.) WHILE SPECIAL WORDING IS NOT REQUIRED, THE NOD MUST BE IN TERMS WHICH CAN BE REASONABLY CONSTRUED AS DISAGREEMENT WITH THAT DETERMINATION AND A DESIRE FOR APPELLATE REVIEW. (AUTHORITY: 38 U.S.C. 7105)

TO FILE A VALID NOD, THERE IS A TIME LIMIT OF ONE YEAR FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT. FOR CONTESTED CLAIMS INCLUDING CLAIMS OF APPORTIONMENT, THIS TIME LIMIT IS 60 DAYS FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT.

(DO NOT WRITE IN THIS SPACE)
(VA DATE STAMP)

PART I - PERSONAL INFORMATION

1. VETERAN'S NAME *(First, middle initial, last)*

2. VA FILE NUMBER
C/CSS -

3. VETERAN'S SOCIAL SECURITY NUMBER
– –

CLAIMANT'S PERSONAL INFORMATION

4. CLAIMANT'S NAME *(First, middle initial, last)*

5. MAILING ADDRESS *(Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)*

Number and Street *or* Rural Route, P.O. Box

Apt./Unit Number

City, State, ZIP Code and Country

6. PREFERRED TELEPHONE NUMBER *(Include Area Code)*

7. PREFERRED E-MAIL ADDRESS

PART II - TELEPHONE CONTACT

8. WOULD YOU LIKE TO RECEIVE A TELEPHONE CALL OR E-MAIL FROM A REPRESENTATIVE AT YOUR LOCAL REGIONAL OFFICE REGARDING YOUR NOD?

☐ YES ☐ NO *(If you answered "Yes," VA will make up to two attempts to call you between 8:00 a.m. and 4:30 p.m. local time at the telephone number and time period you select below. Please select up to two time periods you are available to receive a phone call.)*

☐ 8:00 a.m. - 10:00 a.m. ☐ 10:00 a.m. - 12:30 p.m. ☐ 12:30 p.m. - 2:00 p.m. ☐ 2:00 p.m. - 4:30 p.m.

Phone number I can be reached at the above checked time: _____

PART III - SPECIFIC ISSUES OF DISAGREEMENT

9. NOTIFICATION/DECISION LETTER DATE

10. PLEASE LIST EACH SPECIFIC ISSUE OF DISAGREEMENT AND NOTE THE AREA OF DISAGREEMENT. IF YOU DISAGREE ON THE EVALUATION OF A DISABILITY, SPECIFY PERCENTAGE EVALUATION SOUGHT, IF KNOWN. PLEASE LIST ONLY ONE DISABILITY IN EACH BOX. YOU MAY ATTACH ADDITIONAL SHEETS IF NECESSARY.

A. Specific Issue of Disagreement	B. Area of Disagreement	C. Percentage (%) Evaluation Sought *(If known)*
	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	
	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	
	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	

(Continued on next page)

PART III - SPECIFIC ISSUES OF DISAGREEMENT *(Continued)*		
A. Specific Issue of Disagreement	**B. Area of Disagreement**	**C. Percentage (%) Evaluation Sought** *(If known)*
	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	
	☐ Service Connection ☐ Effective Date of Award ☐ Evaluation of Disability ☐ Other *(Please specify)*	

11A. IN THE SPACE BELOW, OR ON A SEPARATE PAGE, PLEASE EXPLAIN WHY YOU FEEL WE INCORRECTLY DECIDED YOUR CLAIM, AND LIST ANY DISAGREEMENT(S) NOT COVERED ABOVE:

11B. DID YOU ATTACH ADDITIONAL PAGES TO THIS NOD?

☐ YES ☐ NO *(If so, how many?)* _____

PART IV - CERTIFICATION AND SIGNATURE

CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

12A. SIGNATURE	12B. DATE SIGNED

PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.

The Battle of the Medical Experts

Nohr v. McDonald and Challenging a Negative Medical Opinion

Overview

- How to obtain a private medical opinion
- Discussion of *Nohr v. McDonald*
- Using *Nohr* to attack the credentials of examiners who give negative medical opinions
- Ensuring that the examiner who gives a positive medical opinion wins the Battle of the Medical Experts
- *Sizemore* violations

What do you do when you receive a negative VA medical opinion?

- Obtain a positive opinion from a private doctor
  - and/or
- Attack the probative value of the VA examiner's opinion

Obtaining a Private Opinion

- The best way to challenge a negative VA medical opinion is by obtaining a positive private opinion
- In most cases where there is a negative VA medical opinion, success on the claim will be highly unlikely without obtaining a positive medical opinion from a private physician

How to Obtain a Private Medical Opinion

- One word: networking!!!
- Talk to friends and family who are doctors or who can put you in touch with doctors
- Talk to other VSOs to see if they know of any doctors who would be willing to assist by examining the veteran
- Ask around at community centers, posts, etc.

How to Obtain a Private Medical Opinion

- Make an appointment to speak with someone at the closest medical school/teaching hospital
- Become involved in local organizations or clubs to expand your network
- Use social media (Facebook, Twitter, etc.)
- Make use of the claimant's network as well

Considerations in Choosing a Private Physician

- The physician's specialty
  - In many cases, general practitioners will be sufficient, but when dealing with a medical condition that is complex, try to get a specialist
    - If the veteran is claiming service connection for a heart condition, obtaining an opinion from a cardiologist is preferable to an opinion from an ear, nose, and throat doctor

Considerations in Choosing a Private Physician

- The physician's familiarity with the veteran
  - While the VA does not have a rule *requiring* the assignment of greater probative value to the opinion of a veteran's treating physician, the physician's familiarity with the veteran can be a factor for assigning more probative value to one opinion over another
    - An opinion from a veteran's treating physician can be particularly helpful when dealing with certain issues, such as continuity of symptomatology

Considerations in Choosing a Private Physician

- The physician's credentials
  - Education
  - Experience
  - Publications
  - Specialty

Before Obtaining a Private Exam

- Obtain a copy of the veteran's claims file
- Tab and label relevant documents in the claims file to make review of the file easier for the examiner
  - Make sure the examiner knows to note in his or her report that he or she reviewed the claims file

Before Obtaining a Private Exam

- Provide the examiner with a brief summary of the relevant facts and documents and explain your theory for why you think the veteran's condition is related to service or why he or she is entitled to an increased rating for a service-connected disability
- Provide the examiner with the relevant Disability Benefits Questionnaire (DBQ) or DBQs

Before Obtaining a Private Exam

- Provide the examiner with a list of questions to answer (ex. is it at least as likely as not that the veteran's current condition is related to his or her service?)
  - Tell the examiner to provide a detailed rationale for his or her opinion

Before Obtaining a Private Exam

- Explain to the examiner, in lay terms, the relevant law applicable to the case
  - Stress that the standard of proof is "at least as likely as not," NOT to a reasonable degree of medical certainty
  - For increased rating cases, provide the examiner with the relevant rating criteria
- If possible, provide the examiner with medical articles or treatises that support your theory of the case

Before Obtaining a Private Exam

- Talk with the veteran about the upcoming exam and possibly prepare a written statement (especially if the claimed condition is a mental disorder) for him or her to give to the examiner. This statement should include:
  - The in-service incident or onset of the condition;
  - The continuity of symptoms from service to the present; and
  - The current symptoms noted by the veteran that are believed to be related to the current disability

After Obtaining a Private Exam

- Before sending a private examination report to the VA, review the findings from the report and ensure that the information in the report is helpful to your client's claim
- Make sure that the examiner mentioned in the report that he or she reviewed the claims file

After Obtaining a Private Exam

- After reviewing the examination report, if anything in the report is unclear, if information is missing, or if the examiner did not provide a well-reasoned rationale for his or her opinion, the report should be returned to the examiner for clarification
- If the examiner has an impressive resume, provide the VA with a copy of the examiner's curriculum vitae in addition to the examination report

Battle of the Super Cars

Aston Martin

vs.

Bentley

Battle of the Medical Experts

- When a negative VA medical opinion is well-reasoned and well-supported, a claimant's best argument (after obtaining a positive, well-reasoned, and well-supported private medical opinion) may be citing to the benefit of the doubt rule (38 U.S.C. § 5107(b); 38 C.F.R. § 3.102)
- If possible, however, it is always preferable if you can find some way to diminish the probative value that the VA will place on the negative opinion
- In other words, make sure your private medical opinion is the Bentley in the Battle of the Medical Experts

The Presumption of Regularity/Presumption of Competence

- When providing a medical opinion, the VA is presumed to have chosen an individual with the proper qualifications to provide a medical opinion in that particular case
- If there appears to be an irregularity in the selection of the individual to perform the exam, the presumption of regularity does not apply and the burden shifts to the VA to prove the individual's qualifications
- For more on the presumption of regularity, see *Wise v. Shinseki*, 26 Vet.App. 517 (2014)

Nohr v. McDonald, 27 Vet.App. 124 (2014)

FACTS

- 1971: vet's enlistment exam did not identify any psychiatric disability so vet presumed sound upon entrance to service
- June 1972: SMR revealed vet complained of being tired, rundown, nervous, with decreased appetite and sleep, and incidental personal problems; had problems facing separation from home and isolation in service; no diagnosis
- June 1974: discharge exam noted frequent trouble sleeping, depression, and excessive worry related to "shift work"

Nohr Facts (cont'd)

- May 2003: VA exam diagnosed vet with dysthymic disorder (vet filed service connection claim in February 2003), ongoing since childhood; alcohol dependency and cocaine and polysubstance abuse, in full sustained remission since 1988
  - Examiner stated that vet's dysthymic disorder existed prior to enlistment and was not exacerbated by military service
- June 2003: Regional Office (RO) denied vet's claim
- May 2007: vet stated his lack of job satisfaction in the military probably led to his depression

Nohr Facts (cont'd)

- April 2007 and August 2009: Board of Veterans' Appeals (BVA) remanded claim for medical exam to determine whether there was a nexus between his psychiatric disorder and his service
- August 2010: BVA denied claim after an October 2009 VA exam, finding that the condition preexisted service but clearly and unmistakably was not aggravated by his service
- On appeal, the U.S. Court of Appeals for Veterans Claims (Court) granted the parties' Joint Motion for Remand (JMR) that stated the October 2009 VA opinion was insufficient to establish clear and unmistakable evidence that the vet's dysthymic disorder was not aggravated during service

Nohr Facts (cont'd)

- July 2011: Dr. Feng, a VA psychiatrist, stated after reviewing the vet's claims file, that the vet "had not endorsed any traumatic event other than his ordinary military duty" and that "there is obvious and manifest evidence that the vet's preexisting dysthymic disorder was not aggravated by service"
- October 2011: Board denied vet's claim again
- The Court then granted another JMR stating that Dr. Feng's opinion was not supported by an adequate rationale

Nohr Facts (cont'd)

- July 2012: Dr. Feng reaffirmed her opinion stating in an addendum that the vet's in-service complaints were typical of dysthymic disorder "running its own course"
- Dr. Feng concluded her addendum by stating: "Respectfully, while I recognize my personal limitation, the Board should seek for the next expert opinion if this examiner's report still is not satisfied by the Board review."
- The BVA provided the vet and his representative with a copy of the addendum opinion and informed them they had 60 days to respond with additional evidence or arguments

Nohr Facts (cont'd)

- The vet's representative timely responded and submitted 11 questions and requests for documents (the representative referred to these questions as interrogatories) from Dr. Feng. In the alternative, the representative requested that Dr. Feng appear at a personal hearing.

Nohr Facts (cont'd)

- Questions included:
  - Provide a copy of your most recent and up-to-date curriculum vitae
  - Provide a copy of the transcript from the July 2012 interview between you and the vet
  - Provide a copy of all handwritten notes made by you during your interview with the vet
  - Explain the phrase "personal limitation" referred to in your July 2012 opinion

Nohr Facts (cont'd)

- April 2013: BVA issued decision on appeal denying the claim and also denying the vet's request to have Dr. Feng respond to the interrogatories or appear at a hearing
  - The BVA said there is no VA regulatory authority for interrogatories and it refused to exercise its discretion to issue a subpoena
- The vet appealed to the Court and argued that the BVA failed to weigh or provide reasons or bases for rejecting favorable evidence (his affidavit in response to Dr. Feng's opinion)

Nohr CAVC Analysis

- The Court concluded that the vet's questions to Dr. Feng, reasonably raised the following issues:
  - Dr. Feng's competence and the adequacy of her opinion
  - VA's duty to assist

Nohr CAVC Analysis (cont'd)

- While there is a presumption that VA has chosen a person who is qualified to provide a medical opinion in a particular case, that presumption can be rebutted
- Dr. Feng's statement of some unspecified "personal limitation" can arguably read as suggesting there may have been some irregularity in the process of selecting Dr. Feng to provide the opinion
- The Court found this statement also raised an issue as to the adequacy of her opinion

Nohr CAVC Analysis (cont'd)

- The vet's request for Dr. Feng's curriculum vitae reasonably sought information necessary to overcome the presumption of competence generally afforded VA-selected physicians. The Court said this was not a "fishing expedition" on the part of the vet.
- At a minimum, the vet's request required a response from the BVA such as a statement of reasons or bases for why the vet was not entitled to answers to his questions

Nohr CAVC Analysis (cont'd)

- The vet's interrogatories included requests for documents held by Dr. Feng (a VA physician). See 38 U.S.C. § 5103A(a) ("The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit.")
- The Court was unclear why the vet's request for documents did not adequately identify "outstanding records that he wanted VA to obtain" and why VA was not obligated to make reasonable efforts to assist the vet in obtaining the records

Nohr CAVC Analysis (cont'd)

- The BVA's failure to address the substance of the vet's questions and whether the duty to assist obligated VA to attempt to obtain the requested records rendered the BVA's statement of reasons or bases, inadequate

Nohr CAVC Analysis (cont'd)

- The Court found that the BVA's errors were prejudicial to the vet since the BVA concluded that Dr. Feng's opinion was adequate without addressing the vet's questions which reasonably implicated Dr. Feng's competence and the adequacy of her opinion (especially since the BVA had the high burden of showing by clear and unmistakable evidence that the vet's disorder was not aggravated by his service)

Nohr CAVC Analysis (cont'd)

- If the vet received the requested evidence, he may have been better able to attack the probative value of Dr. Feng's opinion
- The Court vacated the BVA's decision and remanded the case for further evidentiary development so that the BVA could address the adequacy of Dr. Feng's opinion and whether the duty to assist requires VA to assist the vet in obtaining the documents he requested

Nohr Major Takeaways

(1) If an examiner (either VA or private) gives a negative opinion, advocates should feel free to question the examiner's competency *if* the examiner calls into question his/her own competency (however, this should only be done when you have reason to believe the examiner may not be fully competent; do not go on "fishing expeditions," but feel free to look into the examiner's credentials); and

Nohr Major Takeaways

(2) If an advocate thinks that an examiner has potentially favorable evidence that is not part of the claims file, advocates should request such evidence from the examiner.

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Advocates should ask the VA to provide an examiner's qualifications if there is an irregularity or some reason to call into question the examiner's qualifications
  - In other words, is there a red flag?

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Examples of irregularities
  - The examiner explicitly or implicitly questions their own qualifications or competence
    - The examiner in *Nohr* referencing her "personal limitation"
    - The examiner in *Wise* stated that she had a "relative lay person's perspective of psychiatry"
  -

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Examples of irregularities
  - The medical condition or conditions that the veteran claimed are outside of the examiner's specialty
    - A dermatologist providing an opinion on a heart condition
    - An eye doctor providing an opinion on PTSD

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Another instance where it will likely be beneficial to request the CV of a VA examiner is if you have obtained a positive private medical opinion from a very qualified expert
  - The VA examiner's qualifications will hopefully pale in comparison to your expert and you can argue that the positive medical opinion should be given more weight

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Be cautious when requesting information about a VA examiner's credentials
  - Advocates run the risk of adding information to the record that may bolster the examiner's credentials and, thus, increase the probative value that VA assigns to the examiner's opinion
    - Ex: the examiner graduated first in her class at Harvard Medical School or has written several articles on the subject matter of your client's claim that have been published in prestigious medical journals

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Before requesting information from the VA about the examiner, such as his or her CV, see if this information is public (do a Google search)
  - If this information is available on the internet or through some other public source, you can review it and then determine whether you want it added to the record
    - This way, evidence that may hurt your client's claim will not be added to the record

How to Request the CV of a VA Examiner

- Hand deliver or mail to the RO by certified mail, return receipt requested, a letter worded as follows:
  - "On behalf of [name of claimant and VA claims file number], I hereby request under the Freedom of Information Act (FOIA) that the VA send me at the address below a copy of the complete curriculum vitae of the following medical professional: [name of VA physician]. I request these documents for the following reasons: the claimant's VA claims file contains a medical opinion prepared by Dr. [name of VA physician] that is dated [date of opinion].

How to Request the CV of a VA Examiner

- Letter continued:
  - I would like to persuade the VA that in deciding the claimant's pending claim, it should not credit this opinion because the physician was not qualified to reach the medical conclusions made in that opinion. The case law places the burden on the claimant to explain to the VA why the physician was not qualified to give the medical opinion in the claimant's case. To assist me in making this argument, the VA is required by its duty to assist, by due process, and the FOIA to promptly disclose the requested records to me, as the claimant's representative on the claimant's pending claim. My name and address are as follows: . . . ."

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When one positive medical opinion and one negative medical opinion are of record:
  - Build up the positive medical opinion
    - Emphasize the detailed rationale and the support provided for the opinion
    - Discuss the examiner's impressive credentials
    - Discuss the examiner's familiarity with the veteran (if the examiner is his or her treating physician)
    - If the examiner provides a higher degree of certainty than "as likely as not" in his/her opinion, highlight that to the VA

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When one positive medical opinion and one negative medical opinion are of record:
  - Break down the negative medical opinion
    - Point out any inconsistencies or factual errors in the examiner's report
    - Address any legal or factual assumptions that the examiner made which contributed to his or her negative opinion (ex. *Sizemore* violations)
    - Attack the examiner's qualifications

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When one positive medical opinion and one negative medical opinion are of record:
  - Concluding argument
    - State that the positive opinion is of more probative value than the negative opinion so the VA should grant the claim
    - And at the very least, the evidence is even, and under the benefit of the doubt rule, the VA must grant the claim

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When there is only a negative medical opinion of record:
  - Attack the negative opinion in the same ways you would if there was also a positive opinion of record
  - Argue that the VA examination was inadequate and, therefore, the veteran is entitled to a new VA exam
    - *See Barr v. Nicholson*, 21 Vet.App. 303 (2007).

Sizemore Violations

- *Sizemore v. Principi*, 18 Vet.App. 264 (2004).
  - Vet's service connection claim for PTSD was denied by BVA
  - In a 1998 examination report, a VA examiner stated:

    "[The veteran'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 eleven enemy soldiers unless they were being over[]run.*

Sizemore Violations

- In a 1998 examination report, a VA examiner continued:
  - 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. Again, *that seems to be a bit of either an exaggeration or a horrible experience which should again be discoverable through the records.*" (*emphasis added*)

Sizemore Violations

- The Court found that the psychiatrist in this report 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."

Recent *Sizemore* Violation by the BVA

- Board denied vet's service connection claim for sleep apnea
- Vet submitted statements from his spouse and military friends which indicated that his onset of sleep apnea symptoms occurred while he was on active duty
- A VA examiner provided a negative opinion

Recent *Sizemore* Violation by the BVA

- The BVA decision contained the following quotes about the VA exam:
- "The examiner opined that it would be unusual for there to be an abrupt onset of symptoms, during the short time of deployment to Qatar from May 20, 2005 to July 1, 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."

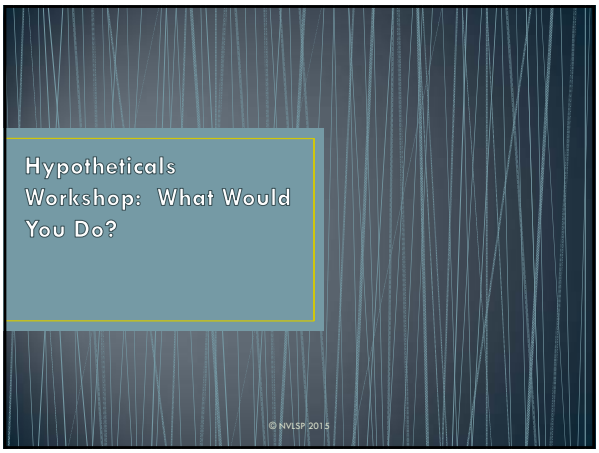
Recent *Sizemore* Violation by the BVA

- "Regarding the buddy statements regarding the Veteran's reported fatigue during deployment in June 2005, the examiner noted again that these statements were written more than six years after the deployment; she opined that the statements include a lot of detail to be recalled from such a long time prior, which suggests prompting."

Recent *Sizemore* Violation by the BVA

- "As the VA examiner noted, the recollections of symptoms in service were not reported until years after service (and given the time interval may not be accurate)."
- The examiner's credibility determinations and the Board's reliance on these determinations are in violation of *Sizemore*

Questions?



Introduction

- All of these hypothetical cases are based upon real cases that were decided by the U.S. Court of Appeals for Veterans Claims (CAVC or Court) in 2015.
- We will address each fact pattern in a "what would you do" manner and discuss them.

Hypo 1 Relevant Law (whether a debt was properly created)

- 38 U.S.C. § 5112 - **Effective dates of reductions and discontinuances**
  - (a) Except as otherwise specified in this section, the effective date of reduction or discontinuance of compensation, dependency and indemnity compensation, or pension shall be fixed in accordance with the facts found.

Hypo 1 Relevant Law (whether a debt was properly created)

- (b) The effective date of a reduction or discontinuance of compensation, dependency and indemnity compensation, or pension . . . . .
  - (4) by reason of
    - (A) change in income shall (except as provided in section 5312 of this title [38 USCS § 5312]) be the last day of the month in which the change occurred; and
    - (B) change in corpus of estate shall be the last day of the calendar year in which the change occurred;

Hypo 1 Relevant Law (whether a debt was properly created)

- (b)(9) by reason of an erroneous award based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, shall be the effective date of the award; and
- (b)(10) by reason of an erroneous award based solely on administrative error or error in judgment shall be the date of last payment.

Hypo 1 Facts (whether a debt was properly created)

- The vet served on active duty in the U.S. Navy from September 1974 to July 1977.
- On February 12, 2008, the vet submitted a VA application for compensation and pension.
- The vet indicated that, at that time, he was not receiving any recurring monthly income.
- In November 2008, the Regional Office (RO) awarded the veteran non-service-connected pension benefits in the monthly amount of $931, effective February 12, 2008, the date of his claim.

Hypo 1 Facts (whether a debt was properly created)

- The letter explained that the veteran was "responsible to tell [VA] right away if . . . [his] income or the income of [his] dependents changes (e.g., earnings, Social Security benefits, lottery and gambling winnings)."
- In January 2009, the veteran sent the RO a copy of a December 2008 Social Security Administration (SSA) decision awarding Supplemental Security Income (SSI) and indicating that the vet would receive Social Security Disability Insurance (SSDI) as well.
- The vet also sent the RO his VA pension check dated December 31, 2008, which he voided, and a letter explaining why he was returning that check.

Hypo 1 Facts (whether a debt was properly created)

- That letter stated:
  - I was instructed by the local VA office to send you this. As I understand it[,] I am only to receive the difference between the VA disability and my SSDI [(Social Security Disability Insurance)].
  - (I do not know how much of my SS[A] check is SSI and how much is SSDI.)
  - I believe though that I am only to receive from you [$]985 – [$]927 = $58.00 from your office. Please correct me if I am wrong. (I did not cash the check you sent me for January because I also received an SSA check.)

Hypo 1 Facts (whether a debt was properly created)

- VA did not respond to that letter until September 2009, and the veteran continued to receive and cash VA pension checks at the full, unadjusted rate following his return of the December 2008 VA check.
- Five months later, in June 2009, the RO alerted the VA Pension Management Center (PMC) that, according to an SSA "share screen," the veteran had been awarded SSI retroactive to December 2007, that he "switched" from SSI to another Social Security disability benefit in December 2008, and that he was subsequently paid a lump-sum amount of $24,484 in retroactive Social Security disability benefits.

Hypo 1 Facts (whether a debt was properly created)

- The RO indicated that the veteran had been receiving non-service-connected pension "with no income" since March 2008, and instructed the PMC to "take the appropriate steps in this case."
- "For current-law pension [(i.e., Improved Pension)] purposes, SSI income is considered to be income from welfare and is not countable." SSDI, however, is considered income that is countable. See 38 C.F.R. § 3.262(f) (2015).
- In September 2009, the PMC sent the vet a letter informing him that SSA benefits were considered countable income for VA pension purposes.

Hypo 1 Facts (whether a debt was properly created)

- The PMC proposed to substantially reduce his monthly non-service-connected pension payments effective January 1, 2009–the date that he began receiving monthly SSDI payments–and to stop pension payments altogether retroactive to May 1, 2009–the date that his total income exceeded the maximum allowable amount for pension payments by virtue of the April 2009 award of retroactive SSDI payments in the amount of $24,484.

Hypo 1 Facts (whether a debt was properly created)

- The PMC explained that this adjustment would result in an overpayment of benefits; that the veteran would subsequently be notified of the exact amount of the overpayment and be given information regarding repayment; and that, if he continued to accept pension payments at the current rate, he would have to repay all or part of those payments.

Hypo 1 Facts (whether a debt was properly created)

- The PMC did not, however, acknowledge that the veteran in January 2009 had informed the RO of an award of Social Security benefits or that the RO in June 2009 had accessed information directly from SSA regarding his benefits.
- The vet did not timely respond to the September 2009 PMC letter, and, in November 2009, the PMC contacted SSA to verify the amount of Social Security disability benefits that had been paid.

Hypo 1 Facts (whether a debt was properly created)

- The SSI calculation came to $8,201, which included a $7,951 lump-sum retroactive payment in December 2008 and an unexplained one-time payment of $250 in May 2009.
- In December 2009, the PMC implemented the reduction and discontinuance of VA pension benefits proposed in September 2009.
- The PMC also informed him that, as a result of this adjustment, he had "been paid too much" and would be contacted shortly regarding the amount of the debt and how to repay it.

Hypo 1 Facts (whether a debt was properly created)

- The next month, the veteran sent the PMC a letter disputing those reductions and the resultant debt. He stated that, in January 2009, he had voided and returned his December 2008 pension check and had contacted the RO to clarify whether he might receive concurrent payments from VA and SSA, but did not receive a response.
- He explained: "When I received another $985 check for January 2009, I figured I had been given the wrong information and that I was to receive both checks. . . . In retrospect[,] I did alert you when I received a check I did not think I was supposed to get. Your offices kept sending them."

Hypo 1 Facts (whether a debt was properly created)

- Later in January 2010, the PMC sent the veteran a letter notifying him that he had been overpaid $11,538 and needed to repay that debt.
- In February 2010, the veteran submitted a statement expressing disagreement with that debt. He recounted actions he took in January 2009 and his belief at that time that VA was only supposed to pay him the difference between his regular pension rate and the rate of his monthly Social Security disability benefits.

Hypo 1 Facts (whether a debt was properly created)

- He explained: My first check came at the end of December 2008. From the rumors I had heard I was only supposed to receive the difference between my SS disability and the VA check. Therefore I voided out the December check and returned it along with a letter explaining what I just said. The next month (the end of January 2009), I received another check. I figured the rumors I heard were wrong. The checks kept coming. I then received a letter dated September 1, 2009. I responded to that letter. It wasn't until December of 2009 that I received any more letters. At that time my checks stopped. He also stated that VA first alerted him of the payment error in September 2009 and asserted that he should only have to pay back the money paid after September.

Hypo 1 Facts (whether a debt was properly created)

- In September 2010, the RO issued an SOC determining that the overpayment debt was validly created
- The RO acknowledged the veteran's January 2009 letter and stated, "unfortunately the PMC did not process this information immediately, but instead processed it beginning on September 1, 2009, when the proposal letter was sent to you."
- Nevertheless, the RO concluded that he was indebted to VA because "income from [SSA] is countable income."

Hypo 1 Facts (whether a debt was properly created)

- The next month, the vet submitted a Substantive Appeal, which stated: Based on my current finances, I cannot repay the VA pension that I received. I called the VA when I was awarded my Social Security benefits and was told that I could keep both. I also called back and was told that I may keep the difference meaning if SS is greater than VA, then nothing, and if the VA is less than SS, then the VA would pay me the difference. I called the RO again and was convinced by the Call Center in St. Louis that I could keep both and for me to disregard everything else. Repaying the money back to the VA would be a hardship on me. Both benefits were granted the same month and I didn't want to do wrong, but the VA counselor told me it was ok.

Hypo 1 Facts (whether a debt was properly created)

- In August 2011, the vet attended a Travel Board hearing and testified that, when he began receiving SSA benefits, he asked representatives at a veterans service organization whether he may receive payment from VA and SSA at the same time and got "three different answers."
- The vet explained that, when the RO did not make an adjustment and instead continued to pay him at his regular pension rate, he assumed that he was entitled to full payment from both agencies. He also testified that he never received the check back from VA after he voided it and returned it to VA.

Hypo 1 Facts (whether a debt was properly created)

- In April 2013, the Board issued the decision currently on appeal, which found that a debt for overpayment of non-service-connected pension benefits was properly created.
- The Board focused solely on the validity of the debt because it explicitly found that it did not have jurisdiction at that time to address entitlement to waiver of the debt.
- The Board further acknowledged that the "exact amount of the overpayment" was not contained in the claims file.

Hypo 1 (whether a debt was properly created)

- What would you do?

Hypo 2 Facts (entitlement to service connection for tinnitus)

- February 1977 – July 1980: vet served in Army where he was a motor transport operator, driving large engine diesel trucks
- December 1980: RO granted service connection for bilateral hearing loss at noncompensable rating (upon his separation from service, vet had filed an application for VA benefits for a problem with his "hearing")
- January 2009: vet filed a claim for VA benefits for tinnitus and a claim for an increase in VA benefits for his bilateral hearing loss

Hypo 2 Facts (entitlement to service connection for tinnitus)

- He claimed his hearing loss and tinnitus were "due to noise exposure while [he was] assigned to transportation units in the Army" and stated that "while assigned to [Fort] Benning[,] GA, a practice round exploded directly in front of [his] face, blowing off [his] helmet, causing temporary deafness and considerable tinnitus."

Hypo 2 Facts (entitlement to service connection for tinnitus)

- May 2009: vet underwent VA audiological examination and audiologist opined that the veteran's tinnitus was less likely as not caused by or a result of in-service acoustic trauma
- The examiner's opinion was based on service treatment records and VA examinations conducted shortly after his separation from service that were silent for a complaint or diagnosis of tinnitus. The report stated that a 1980 VA audiological examination noted that the vet "did not report tinnitus."

Hypo 2 Facts (entitlement to service connection for tinnitus)

- The May 2009 audiologist noted that the vet's tinnitus was recurrent but not constant and that it occurred an average of at least once or twice a day for an average duration of 30 seconds per episode. The examiner also noted the vet's in-service noise exposure as well as a history of civilian occupational noise exposure.
- The vet told the examiner that his tinnitus began in-service when an explosive simulator went off in close proximity to the vet

Hypo 2 Facts (entitlement to service connection for tinnitus)

- May 2009: RO denied vet's increased rating claim for hearing loss and denied his service connection claim for tinnitus due to lack of nexus to service
- November 2010: vet filed claim to reopen tinnitus claim
  - In response to the suggestion that the vet did not report having tinnitus at his separation exam, he stated: "I do not recall ever being asked if I had tinnitus while in the service. I was not aware that tinnitus was actually a disability until recently. Tinnitus should have been granted because I was suffering from the disability while in service."

Hypo 2 Facts (entitlement to service connection for tinnitus)

- The RO denied his claim to reopen, finding that no new and material evidence on the issue of nexus had been submitted
- Vet appealed the RO's denial to reopen his claim and stated that his hearing problems began with an in-service explosion near his head and he had constant noise exposure while driving and servicing diesel engines

Hypo 2 Facts (entitlement to service connection for tinnitus)

- January 2013: BVA reopened, but denied the claim on the merits
  - The weight of the competent evidence was against there being a nexus between the vet's tinnitus and his service (BVA placed great probative value on May 2009 VA examination)
  - Lay person is not competent to provide statements on etiology of tinnitus
  - Vet's statements that tinnitus began in service were not credible due to the absence of complaints of tinnitus symptoms during service and for many years after his service, as well as failure to file a tinnitus claim until 2009

Hypo 2 (entitlement to service connection for tinnitus)

- What would you do?

Hypo 3 Facts (entitlement to service connection for Agent Orange-related diseases)

- Sept. 1971 – Feb. 1975: vet served in U.S. Navy
- Mar. 1972 – Sept. 1974: vet served aboard U.S.S. *Roark*
- According to deck logs, the U.S.S. *Roark* was anchored in Da Nang Harbor multiple times in 1972
- June 2007: vet applied for SC for multiple conditions including diabetes, bilateral neuropathy of the lower limbs, and heart disease

Hypo 3 Facts (entitlement to service connection for Agent Orange-related diseases)

- May 2008: RO denied neuropathy and heart disease claims (diabetes claim had been deferred)
- Feb. 2009: RO denied diabetes claim
- In both of these rating decisions, the VA stated that the vet had not served "on the ground" in Vietnam
- Vet appealed to the Board

Hypo 3 Facts (entitlement to service connection for Agent Orange-related diseases)

- To support his claim, the vet submitted a BVA decision in another vet's case that concluded that Da Nang Harbor is an inland waterway because it is well sheltered and surrounded on three sides by the shoreline of Vietnam
- Gray admitted that he never set foot on land in Vietnam
- Nov. 2013: BVA denied vet's claims for diabetes, heart disease, and neuropathy

Hypo 3 Facts (entitlement to service connection for Agent Orange-related diseases)

- BVA decision:
  - BVA rejected vet's argument that Da Nang Harbor is an inland waterway of Vietnam
  - BVA said it is the VA's stated policy that Da Nang Harbor is NOT an inland waterway of Vietnam, citing a December 2008 VA *Compensation & Pension Service Bulletin* and a September 2010 VBA Training Letter)

Hypo 3 Facts (entitlement to service connection for Agent Orange-related diseases)

- What would you do?

HYPOTHETICALS ANSWERS

Hypo 1 - Vet's Argument

- The vet argued that the Board erred in finding that the debt created by VA's overpayment of non-service-connected pension benefits was valid because "payments from January 2009 through September 2009 were the result of VA's administrative error."

Hypo 1 - Vet's Argument

- Specifically, he contended that:
  - (1) when he was initially granted pension, VA failed to notify him of the effect a subsequent award of SSA benefits would have on the amount of pension he was entitled to receive;
  - and
  - (2) in light of his actions in January 2009 to alert VA of a possible overpayment and VA's failure to address the situation for nine months thereafter, he should be given the benefit of the doubt and all fault should be ascribed to VA.

4

Hypo 1 - Vet's Argument

- In the alternative, the vet argued that the debt was valid only from April 9, 2009—the date that he received the lump sum payment of retroactive SSDI benefits—because, prior to that date, there is no evidence that he "should have known" that he was not entitled to his pension benefits.
- The vet asserted that, given his January 2009 letter, it was "VA's own administrative delay in addressing new information that created a debt in this case, not [his] failure to disclose material facts."

5

Hypo 1 – CAVC Analysis

- Under 38 U.S.C. § 5112(b)(4)(A), when reduction or discontinuance of a pension award is required because of an increase in income, the reduction or discontinuance is required to be made effective at the end of the month in which the increase occurred.
- Under 38 U.S.C. § 5112(b)(9), however, when reduction or discontinuance of a pension award is required because the "award" was erroneous based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge, the reduction or discontinuance shall be the effective date of the award.

6

Hypo 1 – CAVC Analysis

- Further, under 38 U.S.C. § 5112(b)(10), when reduction or discontinuance of a pension award is required because the "award" was erroneous based on administrative error or error in judgment, the reduction or discontinuance is required to be made effective on the date of last payment.
- It is undisputed that the appellant had a "change in income." The parties dispute, however, whether sections 5112(b)(9) and (10) are for consideration in circumstances **where, subsequent to the initial award of pension, there has been a "change in income"** and an assertion that VA made an "erroneous" payment of the "award."

7

Hypo 1 – CAVC Analysis

- The answer to this question depends on whether "award" in sections 5112(b)(9) and (10) refers to a running award (i.e., recurring payments made subsequent to an initial award) or is limited, as the Secretary suggests, to the initial award of pension. **The dispute, therefore, lies in the meaning of "award."**

8

Hypo 1 – CAVC Analysis

- The CAVC concluded that Congress intended that the latter two provisions apply to "the establishment **or continuation** of an award of payments which should not have been made" and to "an erroneous action"
- Accordingly, congressional intent garnered from those two provisions is that "award" includes not only the establishment of an award but also award payments made subsequent to the initial grant of the award.

9

Hypo 1 – CAVC Analysis

- In addition, there is nothing in the history of subsection (b)(4) of section 5112 that indicates an intent to carry a contrary definition of the term "award" or that precludes application of subsection (b)(9) or (b)(10) to running award payments made subsequent to a change in the beneficiary's income.

10

Hypo 1 – CAVC Analysis

- Thus, after employing traditional tools of statutory construction, the CAVC held that Congress has directly spoken to the precise question of the meaning of "award" and concluded that the term "erroneous award" as used in section 5112(b)(9) and (10) includes erroneous payments made subsequent to the initial award.

11

Hypo 1 – CAVC Analysis

- Accordingly, when erroneous payments of a pension award are made solely as a result of VA administrative error or error in judgment under section 5112(b)(10), no debtor overpayment is created because the reduction or discontinuance is required to be made effective on the date of the last payment. 38 U.S.C. § 5112(b)(10).

12

Hypo 1 – CAVC Analysis

- When the erroneous payments are not solely the result of VA error, a debt or overpayment is created because the reduction or discontinuance is required to be made effective either the last day of the month in which the increase in income occurred (38 U.S.C. § 5112(b)(4)) or the date of the erroneous award (38 U.S.C. § 5112(b)(9)), not the date that VA made the last payment to the beneficiary (38 U.S.C. § 5112(b)(10)).

13

Hypo 1 – CAVC Analysis

- An error resulting in an overpayment will not be classified as a VA administrative error or error in judgment if the error is "based on an act of commission or omission by the beneficiary, or with the beneficiary's knowledge." 38 U.S.C. § 5112(b)(9); *see* 38 C.F.R. § 3.500(b)(1).
- "Knowledge" is "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact."

14

Hypo 1 – CAVC Analysis

- The Court held that the Board did not err in concluding that VA was not solely responsible for the erroneous payments to the veteran and that the creation of an overpayment was valid.
- The Board found that the vet had knowledge in January 2009 that "the amount of his pension benefits would change" following an award of SSI, as evinced by his "appropriate action to inform VA" of that award.

15

Hypo 1 – CAVC Analysis

- The Board determined that the vet's knowledge precluded a finding of sole administrative error because "[s]ole administrative error . . . entails no knowledge or fault on the part of the debtor."
- In this case, the vet was notified at the time that he applied for pension that recurring monthly income from any sources "will be counted, unless the law says that they don't need to be counted" and that receipt of monthly benefits is used by VA to "determine the amount of benefits you should be paid."

16

Hypo 1 – CAVC Analysis

- VA included Social Security as a potential source of recurring monthly income that should be disclosed in order for VA to determine the amount of benefits he would be paid.
- The veteran was also notified when he was awarded non-service-connected pension benefits that a change in income may affect his entitlement and may result in an overpayment that is subject to recovery.

17

Hypo 1 – CAVC Analysis

- Although the vet was not specifically instructed to return any pension checks should his income increase, that was the logical action to take to avoid an overpayment and he did so.
- The cover letter enclosing the November 2008 RO decision granting pension benefits notified the veteran that he was awarded the benefit "because [he had] no income from February 12, 2008."

18

Hypo 1 – CAVC Analysis

- The cover letter further stated that it was his responsibility to inform VA right away if his "income or the income of [his] dependents changes (e.g., earnings, Social Security benefits, lottery and gambling winnings)" and if his "net worth increases (e.g., bank accounts, investments, real estate)."
-

19

Hypo 1 – Major Takeaway (*Dent v. McDonald,* __ Vet.App. __ (July 15, 2015))

- On this record, the Court could not say that the erroneous payments to the veteran were the result *solely* of VA administrative error, pursuant to section 5112(b)(10).

20

Hypo 2 - Vet's Arguments

- The BVA failed to provide an adequate statement of reasons or bases for rejecting the vet's testimony concerning the continuity of his symptoms since service
- The vet is competent to testify to the etiology of his tinnitus
- Tinnitus should be included under "other organic diseases of the nervous system" in 38 C.F.R. § 3.309(a), and thus, service connection can be granted based on the vet's continuity of symptomatology

21

Hypo 2 - Vet's Arguments

- The 2009 VA audiological examination and the BVA decision failed to address whether the veteran was entitled to service connection for tinnitus on a secondary basis due to the veteran's service-connected hearing loss

Hypo 2 - CAVC Analysis

- The Court found that the Secretary's position excluding tinnitus from an "organic disease of the nervous system" as expressed in VA Training Letter 10-02, was not persuasive for the following reasons:
  - (1) The Secretary's contention that tinnitus is a symptom, not a disability, is inconsistent with the VA Rating Schedule which treats tinnitus as an independent, stand-alone illness or disease

Hypo 2 - CAVC Analysis

- (2) The Training Letter is internally inconsistent because it says tinnitus is not an organic disease of the nervous system, but it says that tinnitus originates in the central nervous system. Also, the Training Letter defines sensorineural hearing loss (SHL) as an organic disease of the nervous system and states that SHL is the most common cause of tinnitus, yet the Training Letter does not provide persuasive reasons for its different treatment of the two conditions.
- (3) The Training Letter does not discuss the medical evidence upon which it relies for its various medical conclusions (for example, the Letter does not define what constitutes a "disease")

Hypo 2 - CAVC Analysis

- (4) Earlier VA pronouncements support treating tinnitus as an "organic disease of the nervous system." The 2003 Final Rule and VA General Counsel Opinion describe tinnitus as arising in the brain and as a central nervous condition.
- (5) A majority of BVA decisions considering this issue have determined that tinnitus is an organic disease of the nervous system which illustrates the lack of an established VA policy on this issue and the lack of persuasiveness of the VA's current position.

Hypo 2 - CAVC Analysis

- The Court concluded that tinnitus, *at least when there is evidence of acoustic trauma*, is an "organic disease of the nervous system"
- This interpretation is consistent with the following:
  - The beneficence inherent in veterans benefits law;
  - Tinnitus being a disability in the Rating Schedule;
  - VA's interpretation of "other organic diseases of the nervous system" as including SHL; and
  - VA's description of the nature of tinnitus in earlier VA pronouncements

Hypo 2 - CAVC Analysis

- The veteran is not precluded from seeking service connection benefits for tinnitus by way of the chronicity or continuity-of-symptomatology provisions of 38 C.F.R. §§ 3.303 and 3.309(a)
- The Court also found the BVA provided an inadequate statement of reasons or bases for its finding that the lack of medical evidence of a diagnosis of or treatment for tinnitus until many years after service weighed against the veteran's claim and credibility

Hypo 2 - CAVC Analysis

- The BVA did not provide the requisite foundation for considering the absence of documentation as evidence against the veteran's claim
  - The BVA did not analyze why the veteran would reasonably have been expected to report his symptoms to medical providers prior to 2009
  - The BVA did not discuss whether the tinnitus symptoms the veteran experienced during service were severe enough to make it reasonable to expect that he would have sought treatment

Hypo 2 - CAVC Analysis

- The BVA did not explain why the veteran would have been expected to have filed a tinnitus claim prior to 2009, especially in light of the veteran's statement that he had been unaware that tinnitus was a disability that could entitle him to compensation
- In weighing the evidence, the BVA mischaracterized evidence when it said the veteran *denied* tinnitus in a 1980 examination; the 1980 examination report simply stated that the "veteran did not report tinnitus"

Hypo 2 - CAVC Analysis

- The BVA did not provide an adequate statement of reasons or bases for its finding that "tinnitus is not the type of disorder that a lay person can provide competent evidence on questions of etiology"
  - 38 U.S.C. § 1154 requires VA to give due consideration to all pertinent medical and lay evidence
  - Competent medical evidence is not always required when the issue involves medical diagnosis or etiology. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009).
  - BVA did not adequately address why medical evidence was required in this case

Hypo 2 - CAVC Analysis

- The BVA erred by not addressing whether the veteran was entitled to service connection for tinnitus on a theory of secondary service connection due to the veteran's bilateral hearing loss
  - VA Training Letter 10-02 stated that if there is no record of tinnitus in service treatment records, but there is a claim of tinnitus, the audiologist should offer an opinion about an association to hearing loss
  - VA Fast Letter 08-10 required that in requesting an opinion about the etiology of tinnitus, if hearing loss is also present, the audiologist must provide an opinion on the association of tinnitus to hearing loss

Hypo 2 - CAVC Analysis

- Thus, secondary service connection was a theory of entitlement that was reasonably raised by the record and the 2009 VA examination was inadequate because it did not provide an opinion as to whether there is an association between the veteran's service-connected hearing loss and his complaints of tinnitus
- The January 2013 BVA decision was vacated and the case was remanded to the BVA

Hypo 2 – Major Takeaways (*Fountain v. McDonald*, 27 Vet.App. 258 (2015))

- Tinnitus is an organic disease of the nervous system *when there is evidence of acoustic trauma*, and thus, in these situations, tinnitus is a chronic disease under 38 C.F.R. § 3.309(a) and service connection may be established using the chronicity or continuity of symptomatology provisions of 38 C.F.R. §§ 3.303 and 3.309(a)
- While the Court 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 an organic disease of the nervous system in other situations (so the door has been left open)

Hypo 2 – Major Takeaways (*Fountain v. McDonald*, 27 Vet.App. 258 (2015))

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

Hypo 2 – Major Takeaways (*Fountain v. McDonald*, 27 Vet.App. 258 (2015))

- Make sure that the RO or BVA does not mischaracterize the evidence
  - In this case, the BVA said that the veteran **denied** tinnitus in 1980, but in actuality, the 1980 examination report only stated that the veteran "**did not report** tinnitus" (there is a big difference between denying that you have a condition and not reporting that you have a condition)

Hypo 2 – Major Takeaways (*Fountain v. McDonald*, 27 Vet.App. 258 (2015))

- The BVA must give due consideration to **all pertinent medical and lay evidence**
  - Especially in service connection claims for tinnitus, lay evidence can and often will be vital to the success of a claim
- For tinnitus claims, if a veteran is also applying for service connection for hearing loss or is already service-connected for hearing loss, you should also argue that the veteran is entitled to benefits for tinnitus on the theory of secondary service connection

Hypo 3 – Vet's Argument

- The Board's finding that anchoring in Da Nang Harbor does not constitute service on the inland waters of Vietnam is arbitrary and capricious

Hypo 3 – CAVC Analysis

- The CAVC concluded that the VA's interpretation of what constitutes an inland waterway was inconsistent with a VA regulation (38 C.F.R. § 3.307(a)(6)(iii)) and was irrational
- The CAVC noted that it appeared that VA designated Da Nang Harbor as blue water because it is an open deep-water harbor that is easy to sail into
- However, the main consideration should be the probability of exposure based on the use of Agent Orange

Hypo 3 – CAVC Analysis

- The Court stated that the VA offered no evidence that the depth or easy of entry was significant to the likelihood of exposure to Agent Orange
- The VA also did not offer any evidence indicating that the distinction it made between inland waterways and deep-water harbors was based on an assessment of herbicide use in and around these bodies of water

Hypo 3 – CAVC Analysis

- The Court also found that VA's "line-drawing" was applied inconsistently
  - The VA considered Da Nang Harbor blue water, but other harbors such as Quy Nhon Bay and Ganh Rai Bay were brown water
- The Court stated that these arbitrary and inconsistent results are not tolerable

Hypo 3 – CAVC Analysis

- "The Court notes that the Secretary stated that 'perhaps' Quy Nhon Bay was brown water because it was more narrow or more shallow than Da Nang Harbor without identifying any specific evidence or document for support, further suggesting that VA's policy is like a ship without an anchor: aimless and adrift from the regulation."
- "The Court appreciates that VA faces a difficult task. However, VA is not free to label bodies of water by flipping a coin, yet the outcomes here appear just as arbitrary."

Hypo 3 – CAVC Analysis

- The CAVC vacated the BVA decision on appeal and remanded the case "for VA to reevaluate its definition of inland waterways – particularly as it applies to Da Nang Harbor"

Hypo 3 – Major Takeaways (*Gray v. McDonald*, 27 Vet.App. 313 (2015))

- Many areas that were previously considered "blue water" may now be considered brown water
  - Ung Tau Harbor
  - Cam Ranh Bay
- VA will issue new guidance in the *VA Adjudication Procedures Manual M21-1MR*, but in the meantime, VA has to decide cases based on the available evidence
- Advocates should submit maps showing whether an area is surrounded by land
  - Makes the likelihood of spraying higher

Questions?

Update on NVLSP's Lawsuit Challenging the New VA Standard Forms Regulations

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Lawsuit Summary

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- NVLSP, The American Legion, AMVETS, Military Order of the Purple Heart, and the Vietnam Veterans of America filed a lawsuit challenging the new VA rules changing the process for how claimants can initiate the claims process
- Lawsuit was filed on March 20, 2015 in the U.S. Court of Appeals for the Federal Circuit

Lawsuit Summary

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- The VSOs in this lawsuit are asking the Federal Circuit to declare these regulations unlawful
- This lawsuit is only challenging the new VA regulations that require the use of a standard form to initiate a claim, not the regulations requiring the use of the Notice of Disagreement (NOD) form
  - Other VSOs, however, have filed lawsuits challenging the required use of the NOD form

Issues Addressed in Lawsuit

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- Whether the elimination of a veteran's long-recognized ability to establish the effective date for VA benefits through an informal submission is contrary to law, arbitrary, or capricious
- Whether the VA promulgated the Intent to File framework in violation of the Administrative Procedure Act's procedural requirements because the final rule is not a logical outgrowth of the proposed rule
- Whether the new rule's restrictions on the types of claims and benefits that VA deems "reasonably raised" by a veteran is contrary to law

VSOs' Arguments

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- For over 80 years, it has been established (and Congress has intended) that an informal submission can preserve an effective date for benefits, but these new rules get rid of this bedrock principle
  - The VA has stated that approximately half of claimants have used an informal submission to initiate a claim; thus these new rules may adversely affect hundreds of thousands of claimants
  - These new rules conflict with Congress' mandate that the veterans system be as informal as possible

VSOs' Arguments

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- VA has failed to provide an explanation for how these new regulations will improve administrative efficiency and adjudication wait times
  - The only "benefit" appears to be it will reduce the number of claims pending so it will improve VA's performance metrics

VSOs' Arguments

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- These rules go against the well-settled principle that VA is to address all potential claims raised by the evidence of record
  - By stating that the VA will only adjudicate disability conditions that are specifically identified by the claimant (and related complications from those conditions), these rules violate VA's duties to claimants
  - This also goes against the non-adversarial, pro-claimant nature of the VA claims adjudication process
- These new rules will especially affect elderly and impoverished veterans

The VA's Response

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- VA submitted its brief to the Federal Circuit on June 15, 2015

The VA's Arguments

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- The VA has the authority to specify how a claimant must initiate a benefits claim
  - 38 U.S.C. § 501(a)(2) gives the VA the authority to "prescribe all rules and regulations" governing application forms used by claimants
- The new regulations are *more pro-claimant* than the prior regulations
  - Submitting an intent to file through a phone call is less burdensome on the claimant than submitting an informal claim which had to be in writing
  - Unlike with an informal claim, an intent to file does not require the claimant to identify the specific benefit he or she is applying for

The VA's Arguments

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- "A system allowing claimants to hold an effective date with as little as a phone call that provides *zero* substantive information specific to the claim is hardly a 'trap for the unwary.'"
- "The fact that this process begins by filing a standard application form, or a placeholder communication later perfected by the filing of a standard application form, does not convert the process into an adversarial one."

- The VA had rational reasons for issuing these new regulations
  - VA is in "the best position to determine what efficiencies will improve the provision of benefits to the veteran community"

The VA's Arguments

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- Requiring standard forms will improve the VA claims system through ease of identification and repeatability
- These regulations reduce the amount of administrative work that needs to be done
  - VA will just have to check the standard forms when setting an effective date
  - The VA will not have to re-review and interpret informal written submissions when setting an effective date
- "By controlling the possibility that any document might contain an overlooked claim, adjudicators can focus on developing and deciding the claims before them."

The VA's Arguments

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- In disputing the contention by the VSOs that these new rules will have a particularly negative effect on elderly or vulnerable veterans, the VA stated that the informal claims process presented similar issues (such as obtaining the correct mailing address for veterans to submit their informal claims)
  - In its brief, the VA went on to say "the fact that VA did not design around the least common denominator does not render the final rule arbitrary and capricious"

The VA's Arguments

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- "The final rule reflects VA's interpretation, and implementation, of the relevant statutes. It also reflects VA's considered reconciliation of the sometimes competing fundamental interests in providing veterans with an accessible, informal, sympathetic and pro-claimant claims process, on the one hand, and efficiently producing an enormous volume of timely and accurate benefits decisions on the other."
- Response to VSOs' contention about inferred claims:
  - "Veterans do not approach the Veterans Benefits Administration . . . for any and every condition they may experience as they might their personal physician, but only for those disabilities that have a detrimental effect upon their employment."

The VA's Arguments

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- When members of the armed forces are discharged due to physical disability, they are informed of their right to make a VA claim for compensation or pension
- "The final rule will significantly improve the operation of the veterans' benefits system by introducing numerous processing efficiencies that will enhance VA's ability to monitor the procedural and substantive status of a claimant's entire file, thereby benefitting individual veterans and the veteran community as a whole."

The VSOs' Reply Brief

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- The VSOs filed a reply brief on June 25, 2015

Arguments in Reply Brief

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- In response to VA's contention that submitting an ITF by phone call makes the process easier for claimants:
  - The VSOs acknowledge the new rules may make it easier for *some* veterans in *some* cases, but in aggregate, these new rules will be burdensome and result in lost benefits for the large portions of veterans who are elderly and/or disabled
  - Submitting an ITF by phone call does not help veterans who suffer from hearing loss, brain injury, or other diseases that make telephone contact difficult or unrealistic

Arguments in Reply Brief

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- In response to VA's "least common denominator" comment
  - These final rules do not just adversely affect a few isolated veterans
  - It potentially affects
    - 9 million vets who are 65 years or older
    - 5.5 million vets who suffer from disabilities
    - 17% of disabled vets under the age of 65 who live below the poverty line

Arguments in Reply Brief

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- In response to VA's argument that members of the armed forces who are discharged due to physical disability are informed of their right to file a VA claim
  - Lapses in recordkeeping can make it difficult to verify that such veterans were advised of their rights to file a claim
  - The VA's argument does not address the countless situations where a veteran who was discharged due to a physical disability, files a claim for that disability, but does not mention unrelated psychiatric issues that are due to the veteran's service (even though these psychiatric issues are of record)

Questions?

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