

NVLSP  
National Veterans Legal Services Program

# CLAIMS FOR VA BENEFITS FOR MENTAL DISABILITIES

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## AGENDA

- Establishing Service Connection
- Disabilities Secondary to PTSD
- Mental Disabilities and Drugs/Alcohol
- Rating Principles
- Suicidal Ideation
- Mental Disabilities and TDIU



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# ESTABLISHING SERVICE CONNECTION FOR MENTAL DISABILITIES

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## SERVICE CONNECTION FOR MENTAL DISABILITIES



• 3 elements for SC for mental disabilities *other than PTSD*:

1. Current diagnosis
2. In-service event, injury, or disease
3. A link, usually established by medical evidence, between the current diagnosis and in-service event

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## SERVICE CONNECTION FOR PTSD



• 3 elements for SC for PTSD:

1. Current diagnosis of PTSD
2. Credible supporting evidence that a claimed in-service stressor occurred
  - Relaxed in some situations
3. A link/nexus, established by medical evidence, between current symptoms and in-service stressor

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## CURRENT DIAGNOSIS



• 38 C.F.R. §§ 4.125(a) & 4.130 both require a DSM-5 diagnosis as a precondition to compensate a mental condition

• Psychiatric symptoms alone do not constitute a disability

• *Saunders v. Wilkie*, 886 F.3d 1356, 1363 (Fed. Cir. 2018) does not apply to mental health cases

• *Martinez-Bodon v. McDonough*, 28 F.4th 1241 (Fed. Cir. 2022)

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## COMBAT VETERANS

- **Combat Vets have lower evidentiary burden for proving stressor**
- If evidence establishes Vet engaged in combat and the claimed stressor is related to that combat, Vet's lay statement alone enough to prove stressor
- **EXCEPTION:** clear and convincing evidence contradicts Vet's statements about stressor
- 38 U.S.C. § 1154(b); 38 C.F.R. § 3.304(f)(2)

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## HOSTILE MILITARY OR TERRORIST ACTIVITY

- **Vet's lay statement alone may establish stressor, if:**
- Stressor related to Vet's "fear of hostile military or terrorist activity"
  - Stressor consistent with Vet's service
  - No clear and convincing evidence to the contrary
- **AND, VA psychiatrist or psychologist confirms:**
  - Dx of PTSD
  - Stressor adequate to support dx, and
  - PTSD is related to stressor
    - 38 C.F.R. § 3.304(f)(3)

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## CREDIBLE SUPPORTING EVIDENCE

- **For other types of stressors, there must be some believable evidence that tends to support Vet's assertion**
- Vet's statement alone not enough
- **VA considers**
  - Plausibility
  - Consistency with other evidence in the case
  - Source

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## CHARACTERIZATION OF CLAIM



• Even though Vet claims SC for one mental disability, VA may need to consider SC for other mental disabilities

• VA must consider:

1. Claimant's description of claim
2. Symptoms claimant describes
3. Info claimant submits
4. Info VA obtains



• *Clemons v. Shinseki*, 23 Vet. App. 1 (2009)

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## CHARACTERIZATION OF A CLAIM



• Vets still should be careful in how they characterize claimed disability

• Claim SC for “acquired psychiatric disability”

• But also list any disabilities Vet has been diagnosed with (or might have)

• Ex: “an acquired psychiatric disability, to include PTSD and major depressive disorder”

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## DISABILITIES SECONDARY TO PTSD



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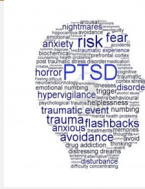
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## DISABILITIES THAT MAY BE SECONDARY TO PTSD



- Heart Disease
- Hypertension
- Headaches
- Erectile Dysfunction
- Female Sexual Disorders
- Sleep Apnea
- Gastrointestinal Disorders
- Chronic Pain



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## SECONDARY SC PRINCIPLES



- A "disability which is proximately due to or the result of a service-connected disease or injury shall be service connected"
  - 38 C.F.R. § 3.310(a)
- Secondary disability = "any additional impairment of earning capacity resulting from an already service-connected condition, regardless of whether or not the additional impairment is itself a separate disease or injury"
  - *Allen v. Brown*, 7 Vet. App. 439, 448 (1995)

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## HEART DISEASE / HYPERTENSION AND PTSD



- Some studies have shown that PTSD might cause or aggravate hypertension
- A study of Vietnam-era vets indicated early-age heart disease may be an outcome after military service among PTSD positive vets
  - *A Prospective Study Of PTSD And Early-age Heart Disease Mortality Among Vietnam Veterans: Implications For Surveillance And Prevention* by Boscarino JA (2008)

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## HEART DISEASE / HYPERTENSION AND PTSD



• Psychosocial factors, such as anger, anxiety, depression, hostility, type A behavior, and various measures of social support, have been associated with the occurrence or recurrence of cardiovascular disease (CVD). In addition, measures of cardiovascular physiologic reactivity have been correlated with CVD outcomes.

• Cecil Textbook of Medicine, p. 253 (22d Ed. 2004)

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## HEART DISEASE / HYPERTENSION AND PTSD



- When VA established hypertensive vascular disease as a presumptive disease in former POWs, VA relied on several studies finding that PTSD was a risk factor for hypertension
- VA cited a 2003 VA study that found a “statistically significant” increased incidence of hypertension and chronic heart disease among World War II Vets with PTSD
- VA also cited a 1997 study finding that Vietnam Vets diagnosed with PTSD had a significantly increased risk of circulatory disease many years after service
- Presumptions of Service Connection for Diseases Associated With Service Involving Detention or Internment as a Prisoner of War, 69 Fed. Reg. 60,083, 60,087 (Oct. 7, 2004)

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## HEART DISEASE / HYPERTENSION AND PTSD



- A 2019 study found that PTSD, by itself, does NOT raise the risk of heart disease in Vets, but
  - Vets with PTSD were 41% more likely to develop circulatory and heart disease than those without PTSD
  - Vets with PTSD had significantly higher rates of smoking, depression, anxiety disorders, sleep disorders, type 2 diabetes, obesity, high blood pressure, and high cholesterol than those without PTSD
  - A combination of physical disorders, psych disorders, and smoking, which are more common in patients with PTSD vs without PTSD, appear to explain the association between PTSD and developing CVD
- Jeffrey Sherrer, et al., Comorbid Conditions Explain the Association Between Posttraumatic Stress Disorder and Incident Cardiovascular Disease, Journal of the American Heart Association (Feb. 13, 2019)

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## HEART DISEASE / HYPERTENSION AND PTSD

- **This study can still be used to support a link between PTSD and hypertension and heart disease, but with an added step. For example:**
  - PTSD -> obesity -> HTN / heart disease
  - PTSD -> smoking (self medication) -> HTN / heart disease
  - PTSD -> sleep disorder -> HTN / heart disease
- **This study and others don't show causation, just higher incidence of these diseases in Vets**
  - Still need medical nexus opinion, but studies may be used to support a favorable medical opinion

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## HEART DISEASE AND PTSD

- **SC heart disease may even cause PTSD:**
  - A number of studies have shown that cardiovascular events can cause PTSD in more than 1 in 8 patients with acute coronary syndrome
  - A few small studies suggest that PTSD secondary to an acute cardiovascular event then places patients at increased risk for subsequent cardiovascular events and mortality
  - Edmondson D, Cohen BE. Posttraumatic stress disorder and cardiovascular disease. *Prog Cardiovasc Dis.* 2013 May-Jun;55(6):548-56. doi: 10.1016/j.pcad.2013.03.004. Epub 2013 Apr 6. PMID: 23621964; PMCID: PMC363948

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## ADVOCACY ADVICE

- **Submit to VA articles/studies that show connection between PTSD and HTN/heart disease**
  - PTSD Research Quarterly Vol. 28/No.1 2017, *Posttraumatic Stress Disorder and Cardiovascular Disease* – discusses different studies with excerpts
- **If the VA examiner does not discuss the studies, then argue the opinion is inadequate**
- **Submit private medical opinion that discusses these studies**

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## HEADACHES & PTSD



- Vet applied for SC for headaches secondary to PTSD
- A VA examiner opined that the headaches were a symptom of PTSD and not a separate disability
- BVA denied SC, stating that headaches are a symptom of PTSD and not a separate and distinct organic disability

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## SURVEY #1



- Is this an adequate reason to deny SC for headaches?
  - A. Yes, secondary disability must be a separate disease
  - B. No, "organic disability" is not required
  - C. Not sure



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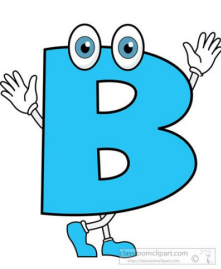
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## ANSWER





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## ADVOCACY ADVICE

- For a secondary SC claim, you do not need to prove there is a separately diagnosed disease
- You must prove there is a separate “disability” which causes additional impairment in earning capacity
- Multiple studies link PTSD and headaches. Submit them to VA so VA examiners and VA must discuss them

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## ARTICLES ABOUT HEADACHES AND PTSD

- Headaches were one of the “common medical disorders and physical health-related complaints” in Vietnam Vets with PTSD
  - Brett T. Litz, Terence M. Keane, Lisa Fisher, Brian Marx, and Valerie Monaco, “Physical Health Complaints in Combat-Related Post-Traumatic Stress Disorder: A Preliminary Report”, *Journal of Traumatic Stress*, 5(1): 131-41 (Jan. 1992)
- Headaches are the second most common pain complaints in patients with PTSD
  - Carrie-Ann Gibson, “Review of Posttraumatic Stress Disorder and Chronic Pain: The Path to Integrated Care”, *Journal of Rehabilitation Research & Development*, 49(5): 753-76 (2012)

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## ERECTILE DYSFUNCTION & PTSD

- Vet applies for SC for ED secondary to PTSD
- BVA denied claim because it is a “physiological manifestation of the Veteran’s psychological stress produced by PTSD and not an organic disease”
- This is not an acceptable reason to deny SC, because an organic disease is not part of secondary SC regulation



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## ADVOCACY ADVICE

- Look to see if a side effect of any psychiatric medication is ED
- Multiple studies link PTSD and ED. Submit some so that VA examiners and adjudicators must discuss them



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## PTSD AND ED STUDIES

- VA Institutional Review Board found the rate of ED was 85% in combat Vets w/ PTSD, and only 22% in those w/out PTSD
  - Daniel J. Cosgrove, et al., "Sexual Dysfunction in Combat Veterans with Post-Traumatic Stress Disorder", UROLOGY 60(5): 881-4 (Nov. 2002)
- Iraq and Afghanistan Vets w/PTSD were more likely to have a sexual dysfunction diagnosis, be prescribed meds for sexual dysfunction, or both, compared with Vets having a mental diagnosis other than PTSD or no mental health diagnosis
  - Benjamin N. Breyer, et al., "Sexual Dysfunction in Male Iraq and Afghanistan War Veterans: Association with Posttraumatic Stress Disorder and Other Combat-Related Mental Health Disorders: A Population-Based Cohort Study", Journal of Sex Medicine, 11(1): 75-83 (Jan. 2014)

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## PTSD AND ED STUDIES

- Data from four Institutional Review Board-approved studies involving Vets confirmed that both PTSD status and symptom severity were positively associated with sexual disorders such as ED
  - Amy Lehrner, et al., "Sexual Dysfunction and Neuroendocrine Correlates of Posttraumatic Stress Disorder in Combat Veterans: Preliminary Findings", PSYCHONEUROENDOCRINOLOGY 63: 271-75 (Jan. 2016)

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## PTSD AND ED STUDIES

- **Studies going back decades have shown prevalence of intimacy problems, particularly ED and other sexual disorders, in Vets with PTSD**
- **Over 70% of Vietnam Vets and their partners reported clinically significant levels of relationship distress compared to only about 30% of the non-PTSD couples**
- David S. Riggs, et al., "The Quality of the Intimate Relationships of Male Vietnam Veterans: Problems Associated with Posttraumatic Stress Disorder," *Journal of Traumatic Stress*, 11(1): 87-101 (1998)

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## PTSD & FEMALE SEXUAL DISORDERS

- **This includes women w/ PTSD**
- **A study indicates PTSD symptomatology may be a predisposing or perpetuating contributor to low sexual desire, and low sexual desire and PTSD may be related through an alteration in stress adaptability**
- O'Loughlin JI, Brotto LA. "Women's Sexual Desire, Trauma Exposure, and Posttraumatic Stress Disorder." *J Trauma Stress*. 2020 Jun;33(3):238-247. doi: 10.1002/jts.22485. Epub 2020 Mar 26. PMID: 32216146

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## PTSD & FEMALE SEXUAL DISORDERS

- **The presence of a PTSD diagnosis or higher PTSD severity is associated with higher overall sexual dysfunction in female service members/Vets**
- **PTSD may lead to arousal and lubrication dysfunction by contributing to higher depression severity and strained romantic relationships**
- Blais RK, Bird E, Sartin-Tarm A, Campbell SB, Lorenz T. "Mechanisms of the association between PTSD and sexual arousal and lubrication functioning among trauma-exposed female service members/veterans." *J Affect Disord*. 2022 Mar 15;301:352-359. doi: 10.1016/j.jad.2021.12.106. Epub 2021 Dec 26. PMID: 34965403

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**PTSD AND SLEEP APNEA  
HYPO**

- Vet applied for SC for sleep apnea secondary to PTSD
- VA examiner stated there was no evidence PTSD resulted in upper airway resistance leading to current sleep disorder
- VSO submitted three articles on possible link



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**PTSD AND SLEEP APNEA  
HYPO**

- BVA denied SC, noting the medical literature, but stating there was no competent evidence for secondary SC in this case
- BVA found the VA opinions more probative than the literature because “the examiners have expertise, reviewed the claims file, and provided reasoning for the expressed opinions that were specific to the Veteran’s case”
- VA later argued VA examiners are “presumed competent and qualified, and thus presumed to be up to date on the relevant medical literature”

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**PTSD AND SLEEP APNEA  
HYPO**

- BVA should have obtained a new medical opinion that adequately considered the articles
- While VA examiners are presumed competent, that presumption goes to their qualifications to render an opinion, rather than the adequacy of the opinion itself

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## PTSD & SLEEP APNEA STUDIES

- **A 2015 study found that OEF/OIF/OND Vets with PTSD have a higher risk for OSA**
  - Peter J. Colvonen, PhD; et al., "Obstructive Sleep Apnea and Posttraumatic Stress Disorder among OEF/OIF/OND Veterans," *Journal of Clinical Sleep Medicine*, 2015 Apr. 15; 11(5):513-8
- **A 2010 study found a higher prevalence of sleep disorders, including OSA, among service members who suffer from combat-related PTSD**
  - Darrel W. Dodson, MD, et al., "Sleep-Disordered Breathing in Combat Veterans With PTSD," *The Journal of the American College of Chest Physicians*, Oct. 2010, Volume 138, Issue 4, Supplement, Page 616

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## ADVOCACY ADVICE

- **While studies do not show causation, they do show that Vets with PTSD are more likely to have OSA**
- **Do research and submit studies so that VA is forced to obtain an opinion on causation/aggravation**
- **Get a private medical opinion that discusses causation/aggravation and specifically discusses studies**

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## PTSD & GI DISORDERS

- **A study of patients at a VAMC OEF/OIF/OND clinic revealed that 73.4% of patients who reported GI symptoms also had a positive screen for PTSD, which is indicative of a significant relationship**
- **A positive PTSD or depression screening was significantly associated with:**
  - Diarrhea
  - GERD
  - Abdominal pain
  - Constipation
  - IBS (PTSD only, not depression)
- Menon, Laila MD; Kelly, Leighann Litcher PhD; Brand, Douglas MD, FACC; Shaw, Robert MD, FACC. "PTSD, Depression, and Gastrointestinal Symptoms in Veterans of the Afghanistan and Iraq Conflicts: What's the Relation?": 1888. *American Journal of Gastroenterology* 108():p S571, Oct. 2013

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## PTSD & GI DISORDERS

- Possible mechanisms through which the association between PTSD and GI disorders is proposed to occur include changes in autonomic nervous system function that impact the gut, hypothalamic-pituitary-adrenal axis dysregulation and accompanying changes in cortisol levels, and behavior risk factors such as smoking, alcohol use and medications
- Gradus JL, Farkas DK, Svensson E, Ehrenstein V, Lash TL, Toft Sørensen H. "Posttraumatic Stress Disorder and Gastrointestinal Disorders in the Danish Population. Epidemiology". 2017 May;28(3):354-360. doi: 10.1097/EDE.0000000000000622. PMID: 28099266; PMCID: PMC5523445

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## PTSD & IBS STUDIES

- Among a sample of Vets with PTSD, rates of IBS and abdominal/belly pain are greater than the general population
- Although levels of constipation and bloating/gas are lower than the general US population, increased severity of PTSD was associated with increased GI symptoms
- Kearney, David J. MD; Kamp, Kendra J. PhD; Storms, Meghan MSW; Simpson, Tracy L. PhD. "Prevalence of Gastrointestinal Symptoms and Irritable Bowel Syndrome Among Individuals With Symptomatic Posttraumatic Stress Disorder." Journal of Clinical Gastroenterology 56(7):p 592-596, Aug. 2022. | DOI: 10.1097/MCG.0000000000001670

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## PTSD & CHRONIC PAIN

- 25% to 80% of Vets with PTSD experience chronic pain
- Jennifer L. Murphy, PhD, "Posttraumatic Stress Disorder and Chronic Pain" PTSD Research Quarterly, Vol. 33, No.2
- Remember, pain alone without an underlying diagnosis is a "disability," if it causes functional impairment
- *Saunders v. Wilkie*, 886 F.3d 1356, 1363-64 (Fed. Cir. 2018)

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## RESEARCH

- One place to conduct research is VA's National Center for PTSD, which publishes the PTSD Research Quarterly
- [https://ptsd.va.gov/publications/ptsd\\_rq.asp](https://ptsd.va.gov/publications/ptsd_rq.asp)
- You can also subscribe and receive information monthly and quarterly



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## ADVOCACY ADVICE

- Submit studies so that VA is forced to obtain an opinion on causation/aggravation
- Get a private medical opinion that discusses causation/aggravation and specifically discusses studies



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## MENTAL DISABILITIES AND DRUGS/ALCOHOL



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## WILLFUL MISCONDUCT

- Willful misconduct is an act involving conscious wrongdoing or known prohibited action that involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences
  - 38 C.F.R. § 3.1(n)
- If VA finds that an injury or disease was the result of willful misconduct, no VA benefits may be based on that disability
  - 38 C.F.R. § 3.301

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## GENERAL PRINCIPLES

- Alcohol and drug abuse are willful misconduct
- Alcohol abuse is the use of alcoholic beverages over time, or such excessive use at any one time, sufficient to cause disability to or death of the user
- If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct

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## GENERAL PRINCIPLES

- Drug abuse is:
  - Use of an illegal drug 
  - Use of a prescription drug illegally or illicitly obtained
  - Use of a prescription or non-prescription drug for a purpose other than the medically intended use
  - Use of a substance other than alcohol to enjoy its intoxicating effect

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## GENERAL PRINCIPLES

- Isolated and occasional use of drugs is not willful misconduct
- If Vet used drugs to enjoy or experience their effects and the use results in disability or death, such disability or death will be considered the result of willful misconduct
- Progressive and frequent use of drugs to the point of addiction is willful misconduct

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## 3 CATEGORIES OF DISABILITIES INVOLVING ALCOHOL AND DRUG ABUSE

- Primary alcohol or drug abuse disabilities that develop during service
  - SC NOT permitted (38 U.S.C. § 1110)
- Alcohol or drug abuse disabilities that develop secondary to SC condition
  - SC permitted
- Disabilities that result from or are aggravated by the secondarily SC alcohol or drug abuse disability
  - SC permitted

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## CATEGORY 2

- Alcohol or drug abuse disabilities are often caused or aggravated by SC mental disability
  - Ex: Vet self-medicates SC PTSD with alcohol or drugs
- Cannot get separate rating for alcohol or drug abuse, but effects would be considered with mental disability rating
  - *Allen v. Principi*, 273 F.3d 1368 (Fed. Cir. 2001)

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## CATEGORY 3

- If alcohol and drug abuse are SC, Vet entitled to SC for disabilities secondary to alcohol and drug abuse
- Ex: If Vet who abuses alcohol secondary to SC PTSD develops cirrhosis of the liver due to alcohol abuse, Vet entitled to SC for cirrhosis
- See *El-Amin v. Shinseki*, 26 Vet. App. 136, 138-39 (2013)

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## MENTAL DISABILITIES AND DRUGS/ALCOHOL HYPO

- Vet claims SC for hepatitis directly due to his MOS as a combat medic
- At a 2004 PTSD VAX, the examiner notes that Vet self-medicated with alcohol and illicit drugs for a number of years
- VA treatment records documented ongoing treatment for PTSD and substance abuse associated with PTSD symptoms
- Vet granted SC for PTSD, but did not list drug use as symptom

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## MENTAL DISABILITIES AND DRUGS/ALCOHOL HYPO

- 2011 VAX for hepatitis: Examiner noted risk factors:
  - Drug abuse, including marijuana, heroin, opium, hashish, cocaine-nasal, before and after Vietnam; currently smokes marijuana
  - Alcohol abuse, drinking anything he could, seldom drinks currently
  - Mental health issues, PTSD, depression
  - Occupational, worked as medic in Army, did not wear protective equipment
  - Tattoo post-service

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## MENTAL DISABILITIES AND DRUGS/ALCOHOL HYPO



- In a 2014 addendum opinion, the VA examiner opined that the primary causes of Vet's hepatitis were drug abuse and indiscriminate social behavior

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## MENTAL DISABILITIES AND DRUGS/ALCOHOL HYPO



- VA denied SC for hepatitis:
  - Acknowledged Vet's assertion that hepatitis was related to exposure to blood and bodily fluids as a combat medic
  - Denied SC because the service records established a history of in-service drug abuse
  - Relied on negative VA nexus opinion regarding in-service incurrence

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## SURVEY #2



- Is the BVA's decision correct?
  - A. Yes, only direct SC was on appeal
  - B. Yes, SC cannot be granted if due to drug abuse
  - C. No, VA did not discuss if drug abuse that likely caused Hep C was secondary to SC PTSD



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## ANSWER



**VA did not discuss if drug abuse that likely caused Hep C was secondary to SC PTSD**

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## ADVOCACY ADVICE

- If Vet uses alcohol or drugs to self medicate a SC mental condition, then the resulting disability should be SC
- Make sure VA appropriately considers effects of alcohol and drug use when assigning disability rating



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## GENERAL RATING PRINCIPLES FOR MENTAL DISABILITIES

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## RATING PRINCIPLES

- Rating criteria in 38 C.F.R. § 4.130 – General Rating Formula for Mental Disorders
- VA assigns the rating most closely reflecting the level of social and occupational impairment
- VA must consider work history & job difficulties
  - *Bowling v. Principi*, 15 Vet. App. 379 (2002)

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## RATING PRINCIPLES

- Vet doesn't need to have every symptom listed in schedule to get that rating
  - *Mauerhan v. Principi*, 16 Vet. App. 436 (2002)
- BUT, Vet may only qualify for a given disability rating by:
  - demonstrating particular symptoms associated with that percentage, or
  - others of similar severity, frequency, and duration

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## RATING PRINCIPLES

- Example (50% rating criteria):
  - Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short- and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships

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## RATING PRINCIPLES

- **Symptomatology should be the fact-finder's primary focus when deciding entitlement to a given disability rating. However, in the context of a 70 percent rating, § 4.130 requires not only the presence of certain symptoms but also that those symptoms have caused occupational and social impairment in most of the referenced areas**
- *Vazquez-Claudio v. Shinseki*, 713 F.3d 112 (Fed. Cir. 2013)

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## SPECIAL RATING CONSIDERATIONS: 38 C.F.R. § 4.129

- **If Vet released from service due to mental disability caused by highly stressful event, Vet should receive an evaluation of at least 50% and be examined within 6 months of discharge**
- **50% rating or higher must be maintained until VA exam provides a basis for reconsideration**

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## SUICIDAL IDEATION AND RATING MENTAL DISABILITIES

*Bankhead v. Shulkin*, 29 Vet. App. 10 (2017)

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## GENERAL RATING FORMULA FOR MENTAL DISORDERS



- 100%: Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes of communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name.

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## 38 C.F.R. § 4.130



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

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## BANKHEAD V. SHULKIN 29 VET. APP. 10 (2017)



- Primary issue before the Court:
- How must VA consider the symptom of “suicidal ideation” when assigning a rating for a metal disability?

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## BANKHEAD V. SHULKIN BACKGROUND



- Vet had SC major depressive disorder rated 30% disabling
- Vet frequently had thoughts of death ranging from passive (wishing he wouldn't wake up in the morning), to thinking of drinking antifreeze, and was so extreme at times that his wife removed guns from the house
- Other times, Vet denied suicidal ideation
- Treatment providers and examiners generally found him to be a low suicide risk

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## BANKHEAD V. SHULKIN BACKGROUND



- BVA increased rating to 50%, but not 70%, because:
  - Overall symptoms didn't cause deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood
  - He had been at sufficiently low risk of self-harm
  - He had been consistently treated on an outpatient basis and his treating sources considered his assurances that he would refrain from self-harm to be credible
  - He had not been hospitalized or treated on an inpatient basis or domiciliary care for suicidal thoughts

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## BANKHEAD V. SHULKIN CAVC HOLDING



- "Suicidal ideation" simply means the process of forming thoughts of suicide, and covers everything from merely a wish that one would not wake the next morning to actively carrying out a suicide plan
- § 4.130 identifies "suicidal ideation" as a symptom of the severity, frequency, and duration warranting a 70% rating
- VA can't deny a 70% rating simply because Vet does not have "active" suicidal ideation. "Passive" suicidal ideation may also qualify a Vet for a 70% rating.

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## BANKHEAD V. SHULKIN CAVC HOLDING



- Once VA finds that Vet suffers from the symptoms listed in the criteria for a particular rating (or symptoms of similar severity, frequency, or duration), VA must determine whether those symptoms cause the level of occupational and social impairment identified in the same criteria
- For a 70% rating, VA must determine if the Vet's symptoms cause occupational and social impairment with deficiencies in most areas
- Must consider actual effects of symptoms

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## BANKHEAD V. SHULKIN CAVC HOLDING



- Can't say suicidal ideation is not severe enough to cause deficiencies in most areas just because Vet was not hospitalized
- VA can consider hospitalization if Vet was actually hospitalized, but can't consider the absence of hospitalization
- VA can consider the likelihood of self-harm in determining whether a 70% rating is warranted, but can't require "persistent danger of hurting self," because that is a symptom in the 100% criteria

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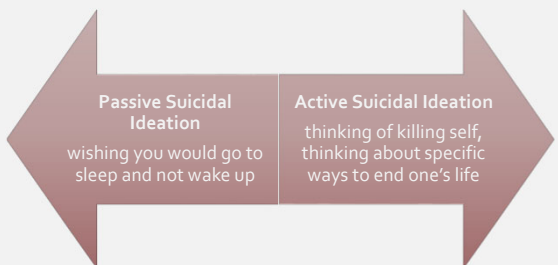
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## SUICIDAL IDEATION CONTINUUM



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## BANKHEAD TAKEAWAYS

- There are **NO** descriptors, modifiers, or indicators as to “suicidal ideation” in the 70% criteria, such as:
  - “Active” suicidal ideation
  - “Passive” suicidal ideation
  - Suicidal “intent”
  - Suicidal “plan”
  - Suicidal “preparatory behavior”
  - Hospitalization
  - Suicide attempts
  - Continuous or frequent suicidal ideation

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## BANKHEAD TAKEAWAYS

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

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## ADVOCACY ADVICE

- If Vet has any level of suicidal ideation, and VA denies a 70% rating because it wasn’t severe, seek review of the decision
  - Argue that there is no distinction between levels of “suicidal ideation” in rating schedule
- If possible, explain how Vet’s suicidal ideation and other symptoms cause deficiencies in work, school, family relations, judgment, thinking, or mood
  - *Post-Bankhead*, many raters / VLJs assign a 70% rating if there is any notation of suicidal ideation, without doing a detailed analysis of whether there are deficiencies in most areas

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## MENTAL DISABILITIES AND TDIU

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## MENTAL DISABILITIES AND TDIU

- A 100% rating under § 4.130 is difficult to attain
  - Even if unable to work, Vet may still have some social functioning
- If Vet is unable to work due to SC mental disability, VA must assign schedular rating under § 4.130 and consider entitlement to TDIU
- Common scenario: Vet assigned a 70% rating for PTSD and granted TDIU

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## WHAT CONSTITUTES A REASONABLY RAISED TDIU CLAIM?

- TDIU is reasonably raised if Vet's c-file contains info indicating that Vet is unable to work due to mental disability, such as:
  - Letter from a psychiatrist stating that PTSD symptoms prevent Vet from getting and keeping a job
  - Statement from most recent employer that explains the reasons he was fired, and it is apparent those reasons are related to PTSD
  - VA exam report stating Vet's PTSD would prevent him from working full-time

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## ADVOCACY ADVICE

- Find out if Vet is working in a substantial & gainful job
- If not, find out whether a case can be made that Vet is unable to obtain or maintain substantial gainful occupation due to SC conditions, including mental disabilities



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## QUESTIONS?



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