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NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Common VA Errors in Deciding Disability Claims

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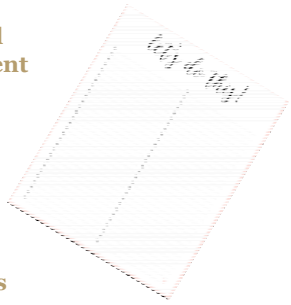
NVLSP

Topics to Cover:

- Failure to Address All Theories of Entitlement
- **Lay Evidence**
- Effects of Medication
- **TDIU**
- Inadequate VA Exams



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FAILURE TO ADDRESS ALL THEORIES OF ENTITLEMENT AND REASONABLY RAISED CLAIMS

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FAILURE TO ADDRESS ALL THEORIES OF ENTITLEMENT

- "Although there may be multiple theories or means of establishing entitlement to a benefit for a disability, if the theories all pertain to the same benefit for the same disability, they constitute the same claim"
  - *Robinson v. Mansfield*, 21 Vet. App. 545 (2007)
- VA sometimes fails to address and develop theories of entitlement

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5 THEORIES OF SERVICE CONNECTION

- Direct
- Aggravation
- Presumption
- Secondary
- Caused by negligent VA medical treatment, VR&E, or CWT

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FAILURE TO ADDRESS ALL THEORIES OF ENTITLEMENT

- **Continuity of Symptoms**
  - If symptoms of a chronic condition "noted" during service, but first diagnosed as chronic disease after service, SC warranted if continuity of symptoms from service to diagnosis
  - If lay person is competent to observe condition, medical evidence "noting" condition not required
  - Only for chronic diseases listed in 38 C.F.R. § 3.309(a)
    - 38 C.F.R. § 3.303(b)

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FAILURE TO ADDRESS ALL THEORIES OF ENTITLEMENT

- **Secondary SC**
  - Including secondary SC for a mental condition due to SC physical condition
  - Both causation and aggravation
    - *El-Amin v. Shinseki*, 26 Vet. App. 136 (2013)
- **Presumptive SC**
  - Ex: Denying claim of Vet who served in SW Asia due to lack of diagnosis, without addressing entitlement to presumptive SC for an undiagnosed illness

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FAILURE TO ADDRESS REASONABLY RAISED ISSUES / CLAIMS

- VA sometimes fails to address and develop reasonably raised claims/issues within the scope of the claim, as required by 38 C.F.R. § 3.155(d)(2), such as:
  - Unclaimed complications of claimed condition (secondary SC)
  - TDIU (especially extraschedular TDIU)
    - *Rice v. Shinseki*, 22 Vet. App. 447 (2009); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)
  - SMC(s)
    - Not developing TDIU based on 1 disability
  - SMC based on loss of use
  - High levels of SMC

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FAILURE TO ADDRESS REASONABLY RAISED ISSUES / CLAIMS

- Although VA is responsible for addressing all reasonably raised theories and related claims, you don't want to "hide the ball" from VA
  - Explicitly state each theory of entitlement
  - Alert VA to any matters related to the claim, such as possible entitlement to SMC or TDIU

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LAY EVIDENCE

NVLSP 11

FAILURE TO ADDRESS LAY STATEMENTS

- Lay evidence is one type of evidence that must be considered, if submitted, when a Vet seeks disability benefits
  - *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006)
  - *Barr v. Nicholson*, 21 Vet. App. 303 (2007): examiner's opinion inadequate because he did not indicate whether he considered Vet's assertions of continuous symptoms

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HYPO

- Vet served 1979 to 1980 and 2003 to 2004
- STRs negative for complaints, tx, or dx of sleep apnea
- 2/2010 VA treatment record: Vet reported that during service:
  - He fell asleep easily during the day
  - His wife said he snored loudly
  - He wasn't sure if he stopped breathing while sleeping

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HYPO

- 7/2010: Vet filed SC claim for sleep apnea
- 2/2012: VA physician stated that, according to Vet's history, he had witnessed apneic events (pauses in breathing) while deployed in Iraq and he may or may not have had undiagnosed obstructive sleep apnea at that time

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HYPO

- 3/2012 buddy statement:
  - Soldiers had observed Vet having severe snoring problems and waking up with shortness of breath
  - Fellow servicemen were concerned about Vet, because they constantly had to wake him due to his pauses in breathing
- Snoring, pauses in breathing during sleep, and waking with shortness of breath are symptoms of sleep apnea

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HYPO

- 1/2013: VA examiner stated that Vet's sleep apnea less likely than not had its onset during active duty due to the significant delay between discharge and subsequent dx of sleep apnea
  - Examiner noted buddy statement about in-service snoring, but said that "snoring in and of itself does not indicate sleep apnea"

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HYPO

- RO denied claim:
  - Found 1/2013 VA examiner conducted a thorough exam and provided adequate rationale for opinion
  - While Vet reported symptom of sleep apnea in service (snoring), he was not competent to diagnose sleep apnea or give an opinion about the disease's etiology

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WHAT DO YOU THINK?

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HYPO

- Possible arguments:
  - 1/2013 VA exam inadequate because examiner ignored evidence of shortness of breath in service
  - Lay people are competent to report snoring, shortness of breath, and falling asleep during day
  - Vet's snoring began in service and continued after he left service

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ADVOCACY ADVICE

- VA must consider lay statements that are relevant to a claim
- ROs often ignore or reject lay statements critical to a claim, because they are not documented in official records
  - Corroboration usually not required if Vet competent to provide the evidence

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ADVOCACY ADVICE

- For VA to reject lay evidence, it usually must find it to be not credible
  - Must adequately explain why, too!
- If you receive a rating decision in which the rater ignored or erroneously rejected relevant lay evidence, request HLR or appeal to BVA

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ADVOCACY ADVICE

- Lay evidence can be relevant to:
  - Establishing in-service incident
  - Establishing continuity of symptoms
  - Establishing current disability (ex: tinnitus)
  - Triggering duty to assist:
    - VA medical exam/opinion
    - Obtaining records
  - Showing severity of disability

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EFFECTS OF MEDICATION

NVLSP 23

HYPO

- Issue:
  - Entitlement to a rating in excess of 10% percent for headaches

NVLSP 24

DC 8100 – MIGRAINES

- **50%:** Very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability
- **30%:** Characteristic prostrating attacks occurring on average once a month over last several months
- **10%:** Characteristic prostrating attacks averaging one in 2 months over last several months
- **0%:** Less frequent attacks

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HYPO

- Vet took daily medication to manage the severity and frequency of his headaches
- He still had a prostrating headache about every other month
- VA found increased rating not warranted based on the frequency, severity, and duration of symptoms
- VA found Vet able to properly manage symptoms with the use of medication and did not require any significant time off from work due to his disability

NVLSP 26

WHAT DO YOU THINK?

NVLSP 27

MEDICATION

- VA may not deny entitlement to a higher rating on the basis of relief provided by medication when those effects are not specifically contemplated by the rating criteria
  - *Jones v. Shinseki*, 26 Vet. App. 56 (2012)

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MEDICATION & *JONES*

- If a DC **does not specifically** contemplate the effects of medication, VA is required to discount the ameliorative effects of medication when assigning a rating
  - Ex: GERD (hiatal hernia), musculoskeletal conditions
- If a DC **does specifically** contemplate the effects of medication, then VA can rate the condition based on its severity when Vet is medicated
  - Ex: hypertension, most heart diseases, mental disorders

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ADVOCACY ADVICE

- Review the DC at issue for any reference to medication
- If a DC **does not specifically** mention anything about medication, VA is required to discount the favorable effects of medication

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ADVOCACY ADVICE

- Argue that VA must rate condition based on how bad it would be w/out medication, and obtain a medical opinion if necessary
- Point to evidence in the record showing the severity when Vet is not medicated
- Submit lay statements about symptoms when Vet is off meds

NVLSP 31

TDIU

NVLSP 32

GENERAL PRINCIPLES

- TDIU may be assigned where Vet who fails to meet the criteria for a 100% rating under VA's Rating Schedule is unable to secure substantially gainful employment due to SC disabilities
  - 38 C.F.R. § 4.16
- Vets who receive TDIU get paid as if their disability rating is 100%, even though their schedular disability rating is below 100%

NVLSP 33

FACTORS VA CAN CONSIDER

- Effect SC disabilities have on Vet's ability to work
  - Sometimes because of the combination of SC disabilities
  - If so, VA must discuss the combined effects of Vet's multiple SC disabilities
    - *Floore v. Shinseki*, 26 Vet. App. 376, 381-82 (2013)
    - *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013)

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FACTORS VA CAN CONSIDER

- Educational Background
  - *Pederson v. McDonald*, 27 Vet. App. 276 (2015)
- Occupational Background
  - *Cathell v. Brown*, 8 Vet. App. 539, 544 (1995)

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FACTORS VA CANNOT CONSIDER

- Vet's age

- Effect of NSC disabilities on Vet's ability to work

NVLSP 36

HYPO

- 2015: Vet retired based on age
- 2022: RO grants SC for PTSD at 70%
- 2022: RO denied TDIU because Vet retired due to age and was not SC at time of retirement. RO also noted Vet was 80

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POLL

- Is the TDIU denial correct?
  - A. No, all that matters is current severity
  - B. Yes, Vet not SC for PTSD in 2015
  - C. Yes, retirement not due to disability
  - D. Yes, he was 80

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ANSWER

- All that matters is whether Vet can work <u>now</u> due to SC disabilities
- Age and reasons why he left employment are not relevant

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FACTORS VA <u>CANNOT</u> CONSIDER

- Reason Vet left prior employment
  - If Vet left prior employment because of retirement or other reason unrelated to SC disabilities, BVA cannot deny solely for that reason
  - Relevant inquiry is whether SC disabilities <u>currently</u> render Vet unemployable
    - *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993)

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SEDENTARY EMPLOYMENT

- Vets are routinely denied TDIU based on VA medical opinions in which the examiner opines that Vet is capable of "sedentary" or "light" work
- But, the concept of sedentary work is absent from 38 C.F.R. § 4.16
- CAVC addressed this issue in *Withers v. Wilkie*, 30 Vet. App. 139 (2018)

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SEDENTARY EMPLOYMENT

- CAVC holdings in *Withers*:
  - If Vet's ability to perform sedentary work is a basis for VA's denial of TDIU, the meaning of sedentary work must be determined from the medical opinion in which term is used. VA must explain:
    - the meaning of sedentary work, if not apparent from the discussion of the opinion, and
    - how the concept of sedentary work factors into the Vet's overall disability picture and vocational history, and the Vet's ability to secure or follow a substantially gainful occupation

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SEDENTARY EMPLOYMENT

- CAVC holdings in *Withers*:
  - When an examiner describes certain types of functional limitations and still opines that a Vet is capable of sedentary work, VA may need to determine whether a common-sense inference can be drawn that the concept of sedentary work, as understood by the examiner, does not encompass the physical or mental acts that the Vet is incapable of performing

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SEDENTARY EMPLOYMENT

- CAVC holdings in *Withers*:
  - Before VA can rely on an examiner's finding that a Vet is capable of sedentary work to deny TDIU, it must ensure that the finding is consistent with the evidence as a whole
  - If VA bases denial of TDIU in part on the conclusion that a Vet is capable of sedentary work, then it must explain how it interprets that concept in the context of that case, including how it squares with the Vet's educational and occupational history

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SEDENTARY EMPLOYMENT

- CAVC noted:
  - "Unless the concept of sedentary work is clarified through VA's regulatory process, the meaning and relevance of the term will have to be discerned on a case-by-case basis from the medical and lay evidence presented and in light of each veteran's education, training, and work history."

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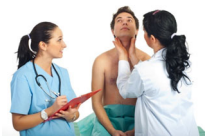
SEDENTARY EMPLOYMENT

- Takeaways:
  - Appeal/seek review if VA denies TDIU because Vet can perform sedentary work, but does not clearly:
    1. Explain what sedentary employment means in the context of the particular case
       - Meaning should be based on evidence of record
    2. Explain how Vet is capable of such sedentary employment based on Vet's educational and occupational history

ADVOCACY ADVICE

- Submit statements regarding possible educational or occupational limitations that could preclude sedentary or light work, such as lack of experience with computers, supervisory work, data entry, customer service, etc.
- Submit statements about difficulties caused by SC psychiatric and physical disabilities related to communication, interacting with others, remaining seated for periods of time, etc.

INADEQUATE VA EXAMS



VA Examinations

- Once VA undertakes the effort to provide an exam when developing a service connection claim, even if not statutorily obligated to do so, it must provide an adequate one or, at a minimum, notify the claimant why one will not or cannot be provided.
  - ***Barr v. Nicholson*, 21 Vet. App. 303 (2007)**

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Inadequate Exams

- A VERY common reason for remands by the BVA and the CAVC is that VA failed to provide the claimant with an adequate medical exam or opinion
- As an advocate, you can save your Vet a substantial amount of time in the VA claim process if you spot inadequacies in a VA exam and bring them to VA's attention immediately

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What Advocates Should Do

- It is vital that you get your objection to the VA exam on record by submitting a written statement outlining why the exam is inadequate
  - Statement does not need to be long to be effective

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What Advocates Should Do

- Advocates can use the following boilerplate language to state the general reason why a new exam is required under the law:
  - "When VA provides a veteran with an exam, regardless of whether the exam is necessary, VA must ensure that the exam is adequate. *Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). The [date] exam is inadequate. Therefore, VA must provide the Veteran with a new exam or medical opinion under its duty to assist. *See* 38 U.S.C. § 5103A(d)."

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What Advocates Should Do

- Then the advocate should provide VA with the specific reason or reasons why the exam was inadequate
- Make any objections to the adequacy of an exam, as soon as possible

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Reasons VA Medical Exams and Opinions are Inadequate

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NVLSP 55

Top 5 List: Number 1

"I have reviewed the veteran's claims file, taken a medical history from him, and performed a physical examination. It is my opinion that the veteran's respiratory condition is not caused by or a result of his military service."

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Top 5 List: Number 1

- Why is this opinion inadequate?

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Inadequate Rationale

NVLSP 58

Top 5 List: Number 1

The examiner did not provide adequate supporting rationale for the medical opinion.

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Number 1: Inadequate Supporting Rationale

- A conclusory statement without a supporting rationale is not sufficient and should be returned to the examiner to explain the basis for his or her opinion.
- A medical opinion must support its conclusion with an analysis that the VA can consider and weigh against contrary opinions.
  - *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007)

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Takeaway

- Attack adequacy of a negative VA opinion and argue that VA must obtain new exam/opinion if:
  - It lacks any supporting rationale
  - There is a flaw in the rationale
- BUT, if you have a favorable private opinion, argue it is entitled to more weight than the inadequate VA opinion, and that VA should grant the claim

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2

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Top 5 List: Number 2

- Vet filed increased rating claim for left knee
- VA examiner stated: "The veteran experiences severe flare-ups of his knee every one to two months that last about three to seven days. These flare-ups cause significant limitation of motion with functional impairment."

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Top 5 List: Number 2

- Why is this exam report inadequate?

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Top 5 List: Number 2

Failure to Properly Address Functional Loss

NVLSP 65

Top 5 List: Number 2

- The examiner did not adequately describe functional loss, particularly the effects of pain or other impairments on the motion of the Vet's joint during flare-ups

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Number 2: Failure to Properly Address Functional Loss

- In addition to addressing whether pain, weakness, fatigability, or incoordination significantly limit functional ability during flare-ups, the examiner must portray any such functional impairment in terms of the degree of additional range-of-motion loss, or explain why it is not feasible to provide such an opinion.
  - ***Mitchell v. Shinseki*, 25 Vet. App. 32 (2011)**
  - ***DeLuca v. Brown*, 8 Vet. App. 202 (1995)**

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Number 2: Failure to Properly Address Functional Loss

- In the previous hypo, while the examiner did acknowledge that the Vet's knee flare-ups cause significant functional impairment, the examiner did not:
  1) Provide an estimate of ROM loss during flare-ups, **or**
  2) Explain why obtaining such findings was not feasible

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Number 2: Failure to Properly Address Functional Loss

- Similarly, VA examiners must address whether pain, weakness, fatigability, or incoordination significantly limit functional ability with repeated use over a period of time, and express any such functional loss in terms of the degree of additional ROM loss
- If the examiner does not, he or she must adequately explain why it is not feasible to do so
- Otherwise, the exam is inadequate

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Advocacy Advice

- Review VA joint exams to see if the examiner either:
  - Talks about functional impairment in terms of range of motion loss, OR
  - States why he/she cannot give a finding

3

Top 5 List: Number 3

- Vet is service-connected for a right knee disability
- A VA examiner was asked to opine whether pain, weakness, fatigability, or incoordination significantly limited the Vet's functional ability with repeated use over a period of time and with flare-ups
- The examiner responded that he was unable to say without mere speculation, because it was not observed

Top 5 List: Number 3

- Why is this opinion inadequate?

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Failure To Provide Rationale As To Why It Would Be Speculative To Provide an Opinion

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Number 3: Mere Speculation

- A VA examiner must provide rationale for the inability to provide a more conclusive opinion
  - Applicable to nexus opinions
  - Applicable to severity opinions

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Number 3: Mere Speculation

- If an examiner fails to provide an opinion because doing so would require speculation:
  1. It must be clear that an examiner has "considered all procurable and assembled data" and
  2. The examiner "must explain the basis for such an opinion or the basis must otherwise be apparent in VA's review of the evidence."
     - ***Jones v. Shinseki***, 23 Vet. App. 382 (2010)

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Number 3: Mere Speculation

- It must be clear that no additional testing could be conducted or information obtained that would permit such an opinion
- VA must ensure that the examiner performed all due diligence in seeking relevant medical information that may have bearing on the requested opinion, and the opinion was not the first impression of an uninformed examiner

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Number 3: Mere Speculation

- The main issue with these opinions is that they contain significant ambiguity:
  - Does the examiner lack the medical expertise to provide an opinion?
  - Could additional testing be performed that would give the examiner the information needed to provide an opinion?
  - Does "without resorting to mere speculation" reflect the limits of knowledge in the medical community?

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Number 3: Mere Speculation

- An examiner need not directly observe a flare-up, or examine the Vet after repeated use over a period of time, in order to offer an opinion as to additional limitations
  - ***Sharp v. Shulkin*, 29 Vet. App. 26 (2017)**
  - ***Lyles v. Shulkin*, 29 Vet. App. 107 (2017)**

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Number 3: Mere Speculation

- Examiner must ascertain adequate info regarding flares and repeated use over time by alternative means, such as asking Vet to describe additional functional loss suffered during flares or after repeated use, and then estimate functional loss based on all evidence of record—including the Vet's lay info—or explain why she could not do so

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Number 3: Mere Speculation

- If necessary, examiner must ask Vet about:
  - Frequency
  - Duration
  - Severity
  - Characteristics
  - Extent of functional impairment

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Advocacy Advice

- Tell Vet, when undergoing a joint exam, to:
  - Show examiner how little he or she can bend the joint during a flare-up and after repeated use over time and ask the examiner to measure that limitation with a goniometer in order to quantify the loss of motion
  - Describe flare-ups to the examiner in as much detail as possible (frequency, duration, causes)

4

Top 5 List: Number 4

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

- Filed SC claim for foot condition in 2017

Top 5 List: Number 4

- Vet provided statements from himself and family that he had foot pain since service
- May 2017 VA exam:
  - Current foot disability less likely than not related to service.
  - "According to the c-file, Vet did not complain of foot pain until he filed his claim for service connection."

Top 5 List: Number 4

- Why is this opinion inadequate?

Inaccurate Factual Premise

4

Number 4: Inaccurate Factual Premise

- Medical opinion based on an inaccurate factual premise has no probative value.
  - *Reonal v. Brown*, 5 Vet. App. 458 (1993)
- If opinion based on an inaccurate factual premise, VA should discount it entirely.
  - *Monzingo v. Shinseki*, 26 Vet. App. 97 (2012)

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Advocacy Advice

- If the VA examiner gets the facts wrong, argue that the exam is inadequate because it is based on an inaccurate factual premise.

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Top 5 List: Number 5

- Vet files increased rating claim for diabetes, currently rated 20% disabling
- In order to obtain a 40% rating, the Vet must require insulin, restricted diet, and regulation of activities

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Top 10 List: Number 5

- 3/2022 Vet statement: "My treating physician informed me that my diabetes condition requires regulation of activities."
- 10/2022 VA exam: "The Vet's diabetes requires insulin and a restricted diet; however, the condition does not require him to regulate his activities."

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Top 5 List: Number 5

- Why is this opinion inadequate?

NVLSP 93

Top 5 List: Number 5

Failure to Address Relevant Lay Statements

NVLSP 94

Top 5 List: Number 5

- Remember - Lay evidence must be considered when a Vet seeks disability benefits
- Back to the Hypo:
  - Examiner did not reference Vet's March 2022 statement
  - Exam should be considered inadequate because the examiner ignored a relevant lay statement that provided information material to the Vet's claim

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Takeaway

Read the VA examiner's opinion to determine whether relevant lay statements were addressed by the examiner.

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Questions?