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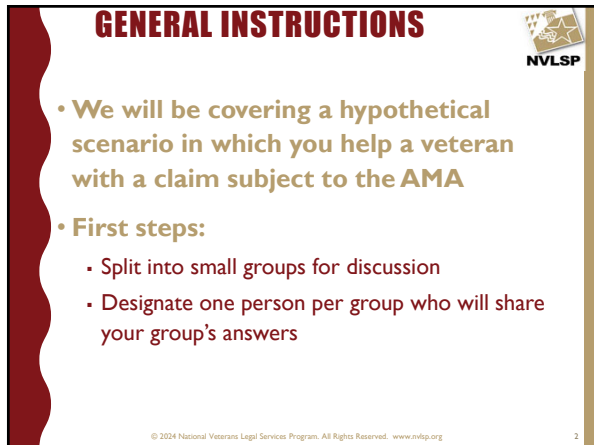
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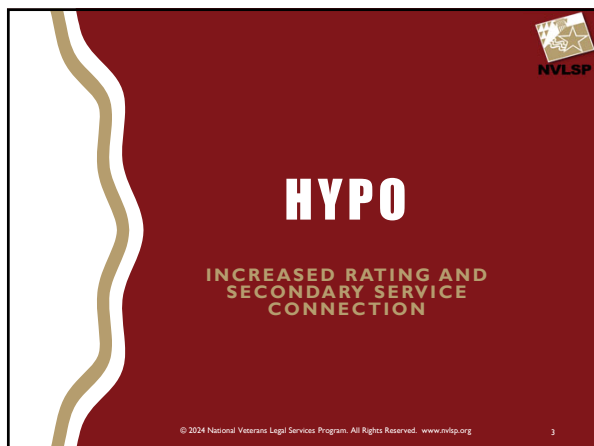
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## MEETING WITH CLIENT



- Randy – Army Veteran, existing client
- Considering filing an increased rating claim for his SC lumbar strain, one of three SC disabilities (the others are tinnitus – 10%, and hearing loss – 10%)
  - Low back disability (DC 5237) is rated 10% disabling under the General Rating Formula for Diseases and Injuries of the Spine, effective 1/15/2015
  - Back symptoms have gotten worse in last few years

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## MEETING WITH CLIENT



- He filed a claim for an increased rating of his back disability in 2019, which was denied in 2020, and he did not seek review of or appeal the denial
- Randy is nervous that VA might decrease his rating—and hence, his overall combined rating (which is currently 30%)—if he applies for an increase
  - “Should I just leave well enough alone?”
  - He receives additional compensation for his dependents (wife and two school-age children), so he doesn't want his benefits reduced

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## SMALL GROUP BREAKOUT



- Is Randy protected from a rating reduction?

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DISCUSSION



- Randy's rating of 10% for his lumbar strain has been in effect for more than 5 years, but less than 20 years
  - It is stabilized under 38 C.F.R. § 3.344, but can be reduced
- In order to reduce:
  - All evidence must show "sustained improvement" in the disability
  - Improvement must be able to be maintained while Vet is working or actively seeking work; under the ordinary conditions of life
  - Any exam upon which reduction is based cannot be less thorough than the exam used to grant the rating

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FILING A CLAIM



- Randy decides he wants to move forward with filing a claim for an increased rating
- You ask him more about his symptoms
  - He has some difficulty on the job – he drives a truck and needs to stop frequently to stretch, due to back stiffness
  - He has flare-ups every few days, particularly after heavy lifting
  - He experiences radiating pain and numbness into his left leg, but no loss of strength or muscle atrophy
  - He mostly takes Tylenol, which helps "take the edge off" his pain and allows him to work

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FILING A CLAIM



- Randy's symptoms (cont'd)
  - He admits that his back pain is "getting him down," since he used to be very active, and this has affected his family life. He began seeing a therapist for this.
  - He has been self-medicating with alcohol at home, which has not helped his depressed mood

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## FILING A CLAIM



- **You ask about his work**
  - He drives a truck for a local provision company, a job he has held for 10 years
  - He delivers to restaurants and taverns, and his work involves lifting and hauling
  - He has to ask the kitchen staff for assistance with heavy loads
    - His employer has written him up twice for late deliveries and his customers have complained to his company that they have to help Randy lift heavy items

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## FILING A CLAIM



- **You ask about his life at home**
  - He has difficulty performing yard work due to flare-ups
    - His neighbors have complained because of the unkempt lawn and excessive weeds
    - This has caused some tension in the household
  - When he has flare-ups of back pain, he has difficulty helping with other housework

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## FILING A CLAIM



- **Life at home (cont'd)**
  - Because of his back pain, Randy has had to cut back on recreational activities, like hiking/camping and coaching his daughter's soccer team
  - He feels depressed and rarely goes out except to work
    - He is constantly watching television and drinks 5-6 cans of beer each night

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## SMALL GROUP BREAKOUT



- What form should Randy use to apply for an increased rating?
- Should Randy apply for any other benefits?
- What evidence will you advise Randy to obtain?
- How can you preserve Randy's effective date while he is gathering evidence?

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## DISCUSSION



- An increased rating claim should be filed on VA Form 21-526EZ
  - An increased rating claim is a type of initial claim; it is not a supplemental claim, even if a claim for an increased rating has been denied in the past
- Explore filing claims for SC for (1) depression and (2) LLE radiculopathy, both as secondary to the back disability
  - LLE radiculopathy should be considered to be within the scope of the IR claim as a complication of the back disability, even if not expressly claimed. But it is better to list the condition on the claim form to ensure VA addresses it.
  - 38 C.F.R. 3.155(d)(2); General Rating Formula for Diseases and Injuries of the Spine, Note (1)

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## DISCUSSION



- Advise him to gather:
  - Lay statements from him and his wife
  - VA treatment records – either get a copy himself or request VBA obtain the records under the duty to assist
  - Personnel records from work
  - If possible, a medical opinion providing diagnoses of a mental condition and LLE radiculopathy, and linking them to his back disability
- To preserve effective date, submit an ITF
  - He must submit the complete claim within 1 year

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## DEVELOPING EVIDENCE



- On 6/1/2024, you file a VA Form 21-526EZ with supporting evidence for Randy
  - He seeks an increased rating for his low back disability, to include LLE radiculopathy
  - In the same application, he also seeks SC for depression, as secondary to chronic pain from his low back disability
- VA continues to develop evidence under duty to assist
  - Provides a C&P exam
  - Obtains copies of medical records

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## DEVELOPING EVIDENCE



- While waiting for a decision, you check the medical records and C&P exam
- VA records:
  - PT records show that Randy's trunk range of motion was limited to 50% of normal. He also had some radiating pain and numbness going into the left lower leg.
  - He reported flare-ups of low back pain 1-2 times per week, which was alleviated by Tylenol, Flexeril (when he's not working, since it causes drowsiness), and a heating pad
  - His treating psychiatrist diagnosed him with depression. There was no suicidal or homicidal ideation reported, but some "passive suicidal thoughts" in the past.

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## DEVELOPING EVIDENCE



- C&P exam (orthopedic):
  - VA examiner noted that ROM was abnormal, with forward flexion from 0 to 80 degrees, and that pain was noted on examination but it did not result in/cause functional loss
  - When asked about flare-ups, the examiner indicated that the exam was not conducted during a flare-up, but when asked to provide an estimate of functional loss due to flare-ups, she stated that she "could not provide an opinion without resort to mere speculation"
  - The examiner noted some mild numbness and tingling in the left lower extremity, finding some mild sensory deficit on neurological testing, with no other symptoms

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## DEVELOPING EVIDENCE



- **C&P exam (orthopedic):**
  - Earlier in the exam, the VA examiner noted that Randy used Flexeril, as well as Tylenol, along with heat, to alleviate the pain
  - Randy noted that he took Tylenol every day, because if he did not take it daily, he “wouldn’t be able to make his shift later on that day”

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## DEVELOPING EVIDENCE



- **C&P exam (psychiatric):**
  - Examiner diagnosed depression, opining that it is “as least as likely as not” that depression is related to his chronic low back pain
  - As for severity, the examiner noted that Randy has “occupational and social impairment with reduced reliability and productivity” (which corresponds to 50% rating)
  - VA examiner found he had some symptoms listed in the 70% rating criteria, including “impaired impulse control,” “difficulty in adapting to stressful circumstances (including work or a work-like setting),” and “fleeting suicidal ideation,” but Randy stressed “he would never act on it”

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## DEVELOPING EVIDENCE



- **The recent VA exams lead you to ask Randy more about his work performance**
- **You ask if he has any accommodations. He tells you:**
  - He has recently been allowed some extra breaks during the day
  - He has a younger “helper” with him to assist with deliveries
  - Starting in October 2024, he will be starting a modified work schedule, working only about 20 hours per week, with ability to flex hours when he needs to go to medical appointments
  - His boss told him that if he wasn’t a fellow Veteran, he would have fired him months ago

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## SMALL GROUP BREAKOUT



- Based on this info, should Randy apply for TDIU?
- If so, what argument would you make?
- What form(s) should you submit?

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## DISCUSSION



- He could apply for TDIU and argue he is employed in a protected environment
  - Marginal employment may ... be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned income exceeds the poverty threshold.
    - 38 C.F.R. § 4.16(a); *Arline v. McDonough*, 34 Vet. App. 238 (2021)
- Use VA Forms 21-526EZ and 21-8940

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## DISCUSSION



- However, the Court has found that income can be categorically too high to qualify as a “protected environment.”
  - *Labruzzo v. McDonough*, 37 Vet.App. 111 (2024)
  - CAVC found Vet’s annual income of \$198,147 in 2017 was categorically too high, but it was unclear what he earned in other years
- You would want to see what Randy earned during the year, and whether he had reductions in income (e.g., modified work schedule resulting in 20 hours/week, periods of Leave Without Pay)
  - If income reduced below the poverty threshold, that would help show marginal employment, even if not “protected”

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## CHOOSING AMA LANE



- You help Randy file a claim for TDIU on 10/15/2024
  - You submit a lay statement and letter of support from his supervisor
- RO issues a rating decision on 12/16/2024, which
  - Continues the low back disability rating at 10%
  - Grants SC for left lower extremity radiculopathy, with a 10% rating
  - Grants SC for depression and assigns a 50% rating
  - Denies TDIU. He now has a combined 70% rating effective 6/1/2024 (his previous combined rating was 30%)

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## CHOOSING AMA LANE



- RO rating decision (cont'd)
  - For low back, RO relies on VA examiner's finding that Randy has flexion from 0-80 degrees, therefore does not have ROM greater than 30 degrees but not greater than 60 degrees.
  - VA assigns a 10% rating for "mild incomplete paralysis" of the sciatic nerve, on the left, under DC 8520
  - For depression, VA finds that Randy has "occupational and social impairment with reduced reliability and productivity"
  - Finds Randy doesn't meet criteria for TDIU and work isn't in protected environment

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## SMALL GROUP BREAKOUT



- Would you recommend that Randy seek review of / appeal the rating decision?
- If so, which issues would you include in the appeal/review request?

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DISCUSSION



- You should recommend that Randy seek review of the RO's:
  - Denial of a rating higher than 10% for the back disability
  - Denial of a rating higher than 50% for depression
  - Denial of TDIU
- The rating assigned for LLE radiculopathy appears correct based on the current evidence of record

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SMALL GROUP BREAKOUT



- Presuming Randy does not have additional evidence to submit, which decision review option would you recommend for Randy for each issue and why?

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DISCUSSION



- Randy's best option for all three claims will likely be to request Higher-Level Review
  - More experienced adjudicator will look at the case
  - You can submit written argument and/or present argument at informal conference
  - Will get a quick decision

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DISCUSSION



- **Drawbacks of the other options:**
  - **Supplemental Claim**
    - Randy does not have new evidence to submit for any of the claims, but if he did, this might be the better option for the claim(s)
  - **BVA Hearing and Evidence Lanes**
    - Randy does not have any new evidence to submit
    - Longer wait than HLR
  - **BVA Direct Review**
    - Longer wait than HLR
    - You can continue appeal to BVA if HLR continues denials

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WRITING AN ARGUMENT



- Randy agrees to submit a **Higher-Level Review** request with respect to the back disability rating, depression rating, and TDIU
- You decide to submit written argument to support his appeal

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SMALL GROUP BREAKOUT



- What arguments could you make in support of Randy's claim for an increased low back disability rating?

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DISCUSSION



- You should argue that **VA** provided violated its duty to assist, because the **VA** exam was inadequate – the examiner failed to adequately address functional loss due to flare-ups
  - See *DeLuca v. Brown*, 8 Vet.App. 202 (1995); *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011)
- “Cannot render an opinion without resort to mere speculation” is not sufficient rationale for failing to provide an estimate of **ROM** loss during flare-ups
  - See *Jones v. Shinseki*, 23 Vet.App. 382 (2010); *Sharp v. Shulkin*, 29 Vet.App. 26 (2017)

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DISCUSSION



- Additionally, when assigning the back disability rating, the **VA** adjudicator erred by failing to discount the ameliorative effects of medication – e.g., the favorable effects of Flexeril and Tylenol
  - In other words, VA should have assigned the rating based on the severity of the symptoms if Randy was not on medication. To do so, it should have sought a clarifying opinion from the VA examiner, since the medical evidence of record doesn't appear to address the relevant symptoms when the Vet is unmedicated.
  - See *Jones v. Shinseki*, 26 Vet.App. 56 (2012); *McCarroll v. McDonald*, 28 Vet.App. 267 (2016)

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SMALL GROUP BREAKOUT



- What arguments can you make that **VA** should increase his depression rating to **70%**?
  - Can you think of any CAVC cases that could support the above claims?
- Should you argue that a **100%** rating is warranted under the Schedule for Rating Mental Disorders?

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## DISCUSSION



- **You should argue that he meets the criteria for a 70% rating for depression**
  - “[O]ccupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood”
  - List specific treatment notes and lay evidence in the record to give examples of impairment in each area
  - Highlight his symptoms that are listed in 70% rating criteria
- **Argue that Randy’s suicidal ideation entitles him to a 70 percent rating, even though it was “passive” and he was judged to be low risk**
  - *Bankhead v. Shulkin*, 29 Vet. App. 10 (2017)

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## DISCUSSION



- **Probably not worth arguing for 100% rating for depression**
  - Vet’s work, even if considered to be in a protected environment, demonstrates that he does not have “total occupational impairment”
  - Vet does not have symptoms listed as examples in 100% rating criteria
  - Might lose credibility with adjudicator by making argument

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## CHOOSING AN AMA LANE



- **HLR decision grants 70% rating for depression, effective 6/1/2024, but continues to deny TDIU**
- **HLR decision finds a duty to assist error in the low back evaluation, and returns the issue to the RO for another exam**
- **After providing Randy with another VA ortho exam that properly addresses functional loss and ameliorative effects of medication, the RO issues a rating decision increasing his low back disability rating to 30%, effective 6/1/2024**
  - His combined rating is now 90%

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## CHOOSING AN AMA LANE



- Randy is happy with the 30% rating for his low back, and also believes that the 70% rating for his depression is fair
- However, now with a 90% combined rating, he wants to appeal the denial of TDIU

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## SMALL GROUP BREAKOUT



- What appeal option would you recommend to Randy and why?

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## DISCUSSION



- Randy's best option is likely BVA Direct Review
  - Evidence of record is strong, so Direct Review lane allows a quick review at BVA
  - For a complicated issue like protected work environment, he will probably have a better chance at BVA than the RO
  - A grant will likely depend on a persuasive legal argument, rather than the submission of new evidence, but...

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DISCUSSION



- **Exception** – if Randy obtains additional evidence, such as buddy statements from coworkers or a favorable opinion from a vocational expert
  - BVA evidence lane would be a good option
  - Supplemental claim a possibility, but since protected employment is such a complicated issue, unless the new evidence is *extremely strong*, BVA appeal is probably the better option

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NEW EVIDENCE



- Randy chooses the **BVA Direct Review** lane and you submit an argument explaining why **BVA** should find that the **Vet** is employed in a protected environment
- However, his depression and low back symptoms increase even more while the **TDIU** appeal is pending at **BVA**
  - Randy loses his job following a dispute with a coworker on New Year's Eve – December 31, 2024
  - The job loss is a huge setback, and he soon moves out of the house and is isolated from his family and friends
  - It appears that these new symptoms would warrant a 100% schedular rating due to total occupational and social impairment

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SMALL GROUP BREAKOUT



- Can the Board consider the new evidence of Randy's condition worsening?
- What should Randy do to try to maximize his VA benefits?

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DISCUSSION



- **BVA cannot consider new evidence**
  - On Direct Review, BVA is limited to reviewing evidence of record at the time of the rating decision on appeal
  - New evidence also doesn't relate to the issue on appeal—whether TDIU was warranted as of the date of the rating decision on appeal—so no reason to switch lanes
- **Randy should file a VA Form 21-526EZ seeking both an increased rating for his depression and low back disability, and TDIU, along with a new VA Form 21-8940, w/in one year of increased symptoms**
  - If 100% rating for depression granted, new TDIU claim will be moot (but not TDIU appeal pending before BVA)

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RESOLUTION



- **Randy submits new VA Forms 21-526 EZ and 21-8940 in March 2025, along with medical records and a lay statement about his symptoms worsening over the fall, and evidence of his job loss**
  - RO orders a VA exam
- **Rating decision grants 100% schedular rating for depression with an effective date of December 31, 2024 (the date worsening is factually ascertainable in the record – the work dispute that led to his job loss)**

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RESOLUTION



- **BVA issues a decision granting TDIU effective 6/1/2024, based on date of the low back IR claim and depression SC claim and evidence of employment in a protected environment during the pendency of that claim**

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Questions?

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