

AMA SMALL GROUP PRACTICAL EXERCISE

GENERAL INSTRUCTIONS



- **We will be covering a hypothetical scenario in which you help a veteran with a claim subject to the AMA**
- **First steps:**
 - Split into small groups for discussion
 - Designate one person per group who will share your group's answers

HYP0

INCREASED RATING AND SECONDARY SERVICE CONNECTION

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**

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

SMALL GROUP BREAKOUT



- Is Randy protected from a rating reduction?

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

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

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

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

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

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

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?**

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)

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

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

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.

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

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”

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”

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

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?**

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

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”

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%)

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

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?**

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**

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?

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

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

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

SMALL GROUP BREAKOUT



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

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)

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)

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?**

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)

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

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%

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

SMALL GROUP BREAKOUT



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

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...

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

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

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?**

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)

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)

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**

Questions?