



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

COMMON VA ERRORS

AGENDA

- Failure to Address Continuity of Symptomatology
- TERA Exams
- VA Errors in Mental Health Condition Claims
- VA Errors in Joint Disability Claims
- Failing to Discount The Ameliorative Effects of Medication
- VA Errors in TDIU Claims



FAILING TO ADDRESS DIRECT SC BASED ON CONTINUITY OF SYMPTOMATOLOGY



FAILING TO ADDRESS CONTINUITY OF SYMPTOMATOLOGY



- **Requirements for Establishing SC through Continuity of Symptomatology:**
 - Evidence that a condition or symptom was “noted” during service or at 10% during the presumptive period after service
 - Evidence showing post-service continuity of symptomatology of the “noted” condition / symptom
 - Evidence of a current chronic disability listed in 38 C.F.R. § 3.309(a) that is associated with the continuous symptoms

FAILING TO ADDRESS CONTINUITY OF SYMPTOMATOLOGY



- VA often errs by:
 - Failing to address theory when reasonably raised
 - Finding condition not “noted” when not recorded contemporaneously. Condition or symptoms do not need to be recorded in writing to have been “noted” in service; the vet’s retrospective lay statements, if credible, can be sufficient
 - Denying due to lack of continuity of care. Only continuity of symptoms, not continuity of treatment or care, is required. Lay evidence can also establish continuity of symptoms.
 - *Savage v. Gober*, 10 Vet. App. 488, 496 (1997)

HYPOTHESIS

- **8/2013 – 8/2021: Vet served on active duty.**
 - **STRs document various complaints of back pain throughout service.**

- **12/2024: VA treatment records: Vet experiences back pain on most days**



- **5/2025: Vet filed SC claim for back condition**

HYPO

- **6/2024:** Vet provided lay statement that she has experienced back pain ever since her time in service. She noted that she experienced occasional back pain beginning while she was in service. Over time, the back pain became more frequent and more intense.
- **12/2024:** Private doctor diagnosed Vet with DJD (arthritis) of the spine. This was the first diagnosis of a back condition.
- **Must Vet submit additional evidence for VA to grant SC based on continuity of symptomatology?**

HYPOTHESIS



- **Vet's back pain was noted in service, there is evidence of post-service continuity of back pain, and Vet has current dx of a chronic back condition that causes back pain**
 - **But to make claim stronger, submit a medical opinion linking current disability to her continuing complaints of back pain (or in-service injury) and a statement from another person who had first-hand knowledge the continuing symptoms**

VA TERA EXAMS



VA EXAMS/OPINIONS: TERA

- VA must provide a medical exam and obtain a medical nexus opinion if Vet (not DIC claimant) submits a claim for SC and there is
 - Evidence of a disability
 - Evidence of participation in a toxic exposure risk activity (TERA) during active service
 - An indication of an association between the disability and the TERA, and
 - Insufficient evidence to GRANT service connection (lower threshold than *McLendon*)
 - 38 U.S.C. § 1168

VA EXAMS/OPINIONS: TERA

SECTION VII - MEDICAL OPINION FOR TOXIC EXPOSURE RISK ACTIVITIES

Choose the statement that most closely approximates the etiology of this claimed condition.

- 7a. The claimed condition was at least as likely as not (likelihood is at least approximately balanced or nearly equal, if not higher) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the Veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran. Provide rationale in section C.
- 7b. The claimed condition was less likely than not (likelihood is less than approximately balanced or nearly equal) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the Veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran. Provide rationale in section C.

7c. Provide rationale:

The C-file was reviewed, including disability claims and examinations, BVA remand, lay statement, toxic exposure documentation, STRs, and VA and private treatment records. The Veteran served from 1993 to 1997, and is service connected for migraine, depressive disorder, bilateral plantar fasciitis, bilateral osteoarthritis of the knees, bilateral hip pain associated with osteoarthritis of the knees, low back pain associated with osteoarthritis of the knees, and right foot surgical scar, based on previous review. The treatment record shows the Veteran was diagnosed with obstructive sleep apnea in 2001, about 4 years after discharge from service. The earliest available post-service records from 4 months after diagnosis, July 11, 2001, showed obesity with BMI calculated at 35 based on the height and weight recorded that date. The available record is not found to document any significant toxic exposures which would be expected to result in the development of sleep apnea, and is not found to show symptoms suggestive of sleep apnea during service. Obesity, which was present in this Veteran at the time of diagnosis, is one of the best documented risk factors for obstructive sleep apnea (UpToDate, Clinical presentation and diagnosis of obstructive sleep apnea in adults, 2023). Based upon the available information, the claimed condition was less likely than not (likelihood is less than approximately balanced or nearly equal) caused by the indicated toxic exposure risk activity(ies), after considering the total potential exposure through all applicable military deployments of the veteran and the synergistic, combined effect of all toxic exposure risk activities of the Veteran.

VA EXAMS/OPINIONS: TERA

SECTION III – MEDICAL OPINION FOR DIRECT SERVICE CONNECTION

CHOOSE THE STATEMENT THAT MOST CLOSELY APPROXIMATES THE ETIOLOGY OF THE CLAIMED CONDITION.

- 3A. THE CLAIMED CONDITION WAS AT LEAST AS LIKELY AS NOT (LIKELIHOOD IS AT LEAST APPROXIMATELY BALANCED OR NEARLY EQUAL, IF NOT HIGHER) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 3B. THE CLAIMED CONDITION WAS LESS LIKELY THAN NOT (LIKELIHOOD IS LESS THAN APPROXIMATELY BALANCED OR NEARLY EQUAL) INCURRED IN OR CAUSED BY THE CLAIMED IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

3C. RATIONALE:

SECTION IV – MEDICAL OPINION FOR SECONDARY SERVICE CONNECTION

- 4A. THE CLAIMED CONDITION IS AT LEAST AS LIKELY AS NOT (LIKELIHOOD IS AT LEAST APPROXIMATELY BALANCED OR NEARLY EQUAL, IF NOT HIGHER) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.
- 4B. THE CLAIMED CONDITION IS LESS LIKELY THAN NOT (LIKELIHOOD IS LESS THAN APPROXIMATELY BALANCED OR NEARLY EQUAL) PROXIMATELY DUE TO OR THE RESULT OF THE VETERAN'S SERVICE CONNECTED CONDITION. PROVIDE RATIONALE IN SECTION C.

4C. RATIONALE:

SECTION V – MEDICAL OPINION FOR AGGRAVATION OF A CONDITION THAT EXISTED PRIOR TO SERVICE

- 5A. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.
- 5B. THE CLAIMED CONDITION, WHICH CLEARLY AND UNMISTAKABLY EXISTED PRIOR TO SERVICE, WAS CLEARLY AND UNMISTAKABLY NOT AGGRAVATED BEYOND ITS NATURAL PROGRESSION BY AN IN-SERVICE INJURY, EVENT, OR ILLNESS. PROVIDE RATIONALE IN SECTION C.

5C. RATIONALE:

SECTION VI - MEDICAL OPINION FOR AGGRAVATION OF A NONSERVICE CONNECTED CONDITION BY A SERVICE CONNECTED CONDITION

6A. CAN YOU DETERMINE A BASELINE LEVEL OF SEVERITY OF (claimed condition/diagnosis) BASED UPON MEDICAL EVIDENCE AVAILABLE PRIOR TO AGGRAVATION OR THE EARLIEST MEDICAL EVIDENCE FOLLOWING AGGRAVATION BY (service connected condition)?

Yes No

TERA EXAM ADVICE

- Often, VA relies on a negative TERA medical opinion to deny a claim, even when (1) there are other possible in-service events, diseases, or injuries that might have caused the current disability, and (2) the TERA exam doesn't address those non-TERA events, diseases, or injuries
- Remember: VA must also obtain an opinion addressing non-TERA in-service events, diseases, or injuries when the *McLendon* elements are met



McLendon

- VA must obtain a medical exam/opinion for a disability comp claim not involving a TERA when:
 - 1) The record contains competent evidence that Vet has a current disability, or persistent or recurrent symptoms of a disability;
 - 2) The record contains evidence establishing that an event, injury, or disease occurred in service;
 - 3) There is an indication that the disability or symptoms may be associated with Vet's active military, naval, air, or space service; and
 - 4) The record contains insufficient evidence for VA to make a decision on the claim
 - *McLendon v. Nicholson*, 20 Vet. App. 79 (2006)

COMMON VA ERRORS IN MENTAL HEALTH CONDITION CLAIMS



FAILURE TO AWARD SC FOR SUBSTANCE USE DISORDERS SECONDARY TO MENTAL HEALTH CONDITIONS

- Substance use disabilities are often caused or aggravated by SC mental health condition
 - Ex: Vet self-medicates SC PTSD with alcohol or drugs
- Make sure VA appropriately considers effects of alcohol and drug use when assigning disability rating



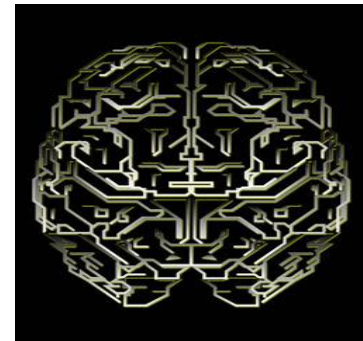
FAILURE TO AWARD SC FOR SUBSTANCE USE DISORDERS SECONDARY TO MENTAL HEALTH CONDITIONS

- If Vet uses alcohol or drugs to self medicate a SC mental condition, a resulting disability should be SC
 - Ex: If Vet who uses alcohol secondary to SC PTSD develops cirrhosis of the liver due to alcohol use, Vet entitled to SC for cirrhosis
 - *See El-Amin v. Shinseki*, 26 Vet. App. 136, 138-39 (2013)



RELYING ON AN INCORRECT DIAGNOSIS

- VA may deny a claim for SC for a mental health condition on the ground that Vet is suffering from a congenital or developmental defect (usually a personality disorder), which is not considered a disease or injury for disability compensation purposes, instead an acquired mental disability subject to service connection, but...
 - Some Vets are misdiagnosed with a personality disorder, when they actually have an acquired mental health condition
 - Some Vets have both a personality disorder and an underlying acquired mental health condition



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RELYING ON AN INCORRECT DIAGNOSIS

- “Personality Disorder” is a common diagnosis given to servicemembers to expedite separation from service, when in fact the servicemember was suffering from PTSD or TBI
 - Casting Troops Aside : The United States Military’s Illegal Personality Disorder Discharge Problem. Prepared for VVA by YLSC, Yale Law School (2012)
- Because a personality disorder is considered a congenital defect, it cannot be service-connected
- Look for symptoms for SC conditions such psychoses or PTSD

REQUIRING CREDIBLE SUPPORTING EVIDENCE OF A STRESSOR FOR MENTAL HEALTH CONDITIONS OTHER THAN PTSD



- To establish SC for mental disabilities other than PTSD, Vet needs
 - Current DSM-5 diagnosis
 - Evidence of an in-service event, disease, or injury
 - A link/nexus, usually established by medical evidence, between current diagnosis and in-service event, disease, or injury
 - 38 C.F.R. § 3.303

REQUIRING CREDIBLE SUPPORTING EVIDENCE OF A STRESSOR FOR MENTAL HEALTH CONDITIONS OTHER THAN PTSD

- To establish SC for PTSD, Vet needs
 - Current diagnosis of PTSD
 - Credible supporting evidence that a claimed in-service stressor occurred
 - Relaxed in some situations
 - A link/nexus, established by medical evidence, between current diagnosis and in-svc stressor
 - 38 C.F.R. § 3.304(f)(5)



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REQUIRING CREDIBLE SUPPORTING EVIDENCE OF A STRESSOR FOR MENTAL HEALTH CONDITIONS OTHER THAN PTSD



- Sometimes VA denies SC for a mental disability other than PTSD (anxiety disorder, MDD, etc.) claimed as due to traumatic event(s) in service, due to the lack of credible supporting evidence that the event(s) occurred
 - Often occurs in claims involving MST
- “Credible supporting evidence” of MST or other event is not required to establish SC for a mental disability other than PTSD
 - Vet’s statement about event, if found competent and credible by VA, is alone sufficient to establish the 2nd element of SC. No requirement for corroboration!

ATTRIBUTING DIAGNOSIS TO NON-SERVICE TRAUMA

- Some Vets have experienced multiple traumas or stressors that may make SC more difficult to establish
 - Childhood physical and/or sexual abuse
 - Post-service domestic abuse
 - Other current stressors
 - Death in family or other family situations
 - Financial situations
 - Co-morbid disorders



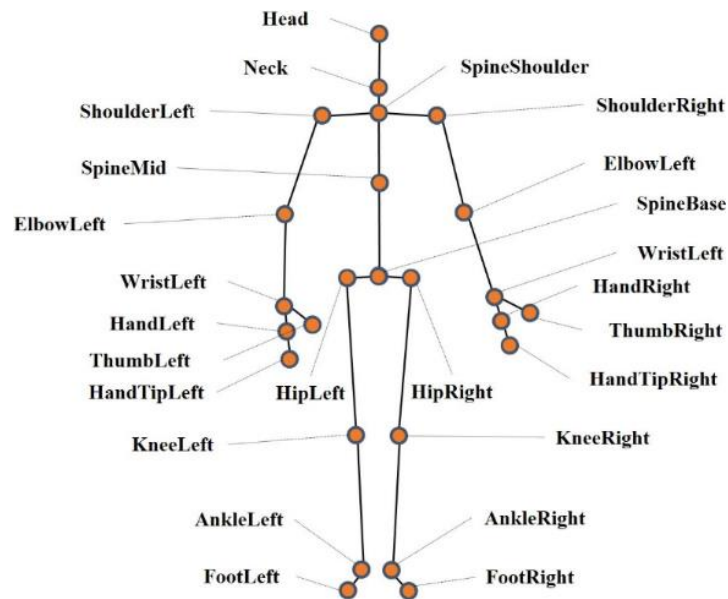
ATTRIBUTING DIAGNOSIS TO NON-SERVICE TRAUMA

- When it is not possible to determine what portion of the current disability is related to service and what portion is related to pre- or post-service incident, the entire disability must be attributed to service
 - *Mittleider v. West*, 11 Vet. App. 181 (1998); see 38 U.S.C. § 5107(b)



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COMMON VA ERRORS IN JOINT DISABILITY CLAIMS



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RATING CONSIDERATIONS

- Limitation of motion is often a primary consideration when rating joint disabilities
 - The greater the limitation of motion, the higher the rating
- What does the RO need to consider when rating a joint disability based on loss of range of motion?



RATING CONSIDERATIONS

- Major considerations when rating based on loss of ROM:

- Initial ROM

- Active ROM
- Passive ROM



- ROM after 3 repetitions

- Functional impairment causing loss of motion

- During flare-ups
- After repeated use over a period of time

- Pain in the joint

POLL

- If Vet has full ROM, but pain in the joint, what rating is warranted?
 - A. 0%
 - B. The minimum compensable rating for the joint
 - C. It depends if the DC is based on ROM
 - D. Not sure



FAILING TO ASSIGN MINIMUM COMPENSABLE RATING FOR PAINFUL JOINT

B

- If a SC joint disability does not cause compensable loss of ROM, but joint is painful on ROM, Vet is entitled to the minimum compensable rating for the joint
 - 38 C.F.R. § 4.59: “It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint.”
- Depending on the DC assigned, “objective” evidence of painful motion may be required (ex: DC 5003, degenerative arthritis)
 - *Petitti v. McDonald*, 27 Vet. App. 415 (2015)

PAINFUL MOTION

- Event if Vet has full ROM, Vet entitled to minimum compensable rating for joint
 - Painful joint = 10% rating for *most* joints
- 38 C.F.R. § 4.59 applies to all joint disabilities, not just arthritis
- Not a separate rating if Vet already has a compensable rating under a DC related to the joint, but ensures Vet gets the minimum compensable rating for joint, even with no symptoms other than pain

WHY VA FAILS TO ASSIGN MINIMAL COMPENSABLE RATING FOR PAINFUL JOINT



- VA sometimes fails to assign a compensable rating for a joint disability that doesn't cause limitation of motion, even though the joint is painful because
 - Adjudicator erroneously fails to apply § 4.59
 - Adjudicator erroneously fails to address lay evidence of pain in the joint
 - Adjudicator erroneously rejects lay evidence of pain because it is not corroborated at all or not corroborated by a VA medical examiner

HOW TO GET THE MINIMUM COMPENSABLE RATING FOR PAINFUL JOINT



- Obtain lay statement **from Vet** about pain in the joint
- Obtain lay statement **from others** who can describe their observation of Vet experiencing pain, especially if DC used to rate joint requires “objective” evidence
- If VA says painful motion may only be “objectively” established by VA examiner’s findings on ROM testing, they are wrong!
 - *Petitti v. McDonald*, 27 Vet. App. 415 (2015)
 - “Objective” means “perceptible to persons other than an affected individual” – doesn’t need to be a VA examiner

FAILING TO ADEQUATELY CONSIDER & DEVELOP EVIDENCE OF FUNCTIONAL LOSS



- **Functional loss = The inability to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. It may be caused by a number of factors, including pain.**
 - **38 C.F.R. § 4.40**
- **The most common error related to VA's rating of joint disabilities is failing to properly address functional loss**
 - **Inadequate VA exams**
 - **Failure of VA adjudicators to properly address**

TRUE OR FALSE

- If a Vet has pain throughout the ROM, they are entitled to the maximum rating.



FAILING TO ADEQUATELY CONSIDER & DEVELOP EVIDENCE OF FUNCTIONAL LOSS



- Painful motion alone is NOT limitation of motion
 - Pain throughout ROM does not mean Vet entitled to max rating
 - If Vet does not have actual limitation of motion for rating higher than 10%, pain must cause sufficient functional loss to get more than the minimum compensable rating under § 4.59

FAILING TO ADEQUATELY CONSIDER & DEVELOP EVIDENCE OF FUNCTIONAL LOSS



- VA is required to consider limitation of motion during flare-ups of pain and after repeated use over time when rating joint disabilities
 - *DeLuca v. Brown*, 8 Vet. App. 202, 206 (1995); *Mitchell v. Shinseki*, 25 Vet. App. 32, 44 (2011)
- Accordingly, VA examiners must address whether there is significant additional limitation of motion:

During flare-ups of pain

AND

When the joint is used repeatedly over time (and after observed repetitions)

FAILING TO ADEQUATELY CONSIDER & DEVELOP EVIDENCE OF FUNCTIONAL LOSS



- If so, the examiner **MUST QUANTIFY** the additional loss of motion in terms of degrees
 - At what point in the ROM does Vet have functional loss due to pain, weakness, fatigue, etc.?
- An examiner's opinion as to additional loss of motion or the point in ROM at which functional loss begins during flare-ups or after repeated use over time serves as the basis of Vet's disability rating
 - The most limited motion is used for the rating

FAILING TO ADEQUATELY CONSIDER & DEVELOP EVIDENCE OF FUNCTIONAL LOSS



• Common Errors:

- VA fails to assign the maximum rating based on limitation of motion when Vet unable to complete 3 repetitions
- VA fails to assign appropriate rating when there is “functional” ankylosis (Vet unable to move joint during flare-ups or after repeated use over time)
 - *Chavis v. McDonough*, 34 Vet. App. 1 (2021)
- VA and VA examiners both fail to adequately address Vet’s lay evidence of limitation of motion during flare-ups or after repeated use over time

FAILING TO ADEQUATELY CONSIDER & DEVELOP EVIDENCE OF FUNCTIONAL LOSS



• Common Errors cont'd:

- VA examiner fails/says it would be speculative to offer opinion on limitation of motion during flare-ups or after repeated use over time, simply because Vet not observed during flare-up or after repeated use over time
 - *Sharp v. Shulkin*, 29 Vet. App. 26 (2017); *Lyles v. Shulkin*, 29 Vet. App. 207 (2017)
- VA examiner's opinion on limitation of motion during flare-ups / after repeated use over time is inconsistent with Vet's lay statements (they ignore the lay statements)

POLL

- Veterans can only get one rating per joint.



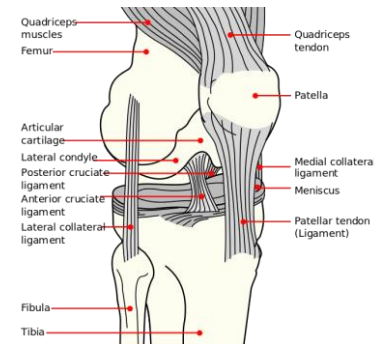
FAILING TO ASSIGN RATINGS UNDER MULTIPLE DCs WHEN WARRANTED



- Nothing precludes assignment of separate ratings for different conditions where none of the symptoms of the conditions overlap, such as:
 - Limitation of motion
 - Recurrent dislocation
 - Instability
 - Associated neurological conditions (particularly for spine disabilities)
 - Associated muscle disabilities

FAILING TO ASSIGN RATINGS UNDER MULTIPLE DCs WHEN WARRANTED

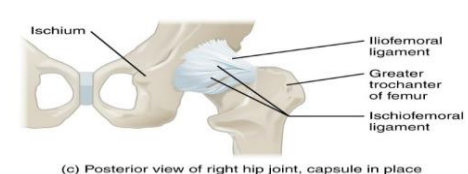
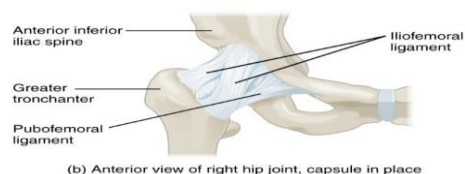
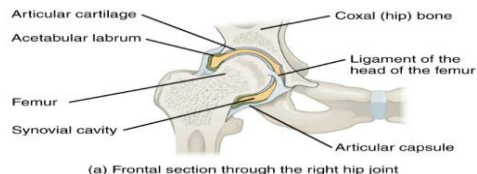
- Knee disabilities can be rated under multiple DCs
 - DC 5260 - Limitation of flexion
 - DC 5261 - Limitation of extension
 - DC 5257 - Instability/recurrent subluxation
 - VA OGC Precedential Opinion 23-97
 - DC 5258/5259 - Meniscal condition
 - Dislocated semilunar cartilage w/ frequent episodes of locking, pain, and effusion (DC 5258)
 - Symptomatic removal of semilunar cartilage (DC 5259)
 - *Lyles v. Shulkin*, 29 Vet. App. 107 (2017)



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FAILING TO ASSIGN RATINGS UNDER MULTIPLE DCs WHEN WARRANTED

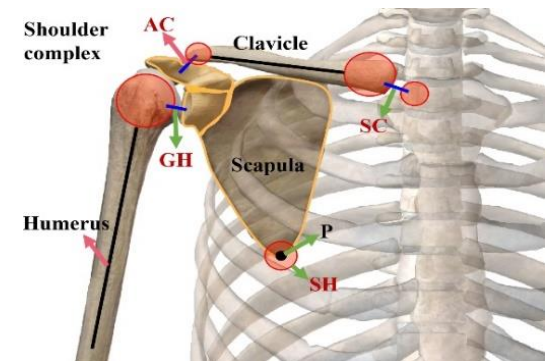
- Hip disabilities can be rated under multiple DCs
 - DC 5251 – limitation of extension
 - DC 5252 – limitation of flexion
 - DC 5253 – limitation of abduction, adduction, and/or rotation
 - BUT, if Vet has limitation of abduction, adduction, and rotation, Vet cannot be assigned 3 separate ratings under DC 5253
 - DC 5254 – hip flail joint



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FAILING TO ASSIGN RATINGS UNDER MULTIPLE DCs WHEN WARRANTED

- **Shoulder disabilities may be entitled to multiple ratings:**
 - DC 5201 – Limitation of motion
 - Based on abduction (lifting from the side) OR elevation (lifting in front) (whichever is the most limited ROM)
 - DC 5202 – Impairment of humerus
 - Recurrent dislocation with guarding
 - Malunion with deformity
 - Loss of head (flail shoulder)
 - Nonunion, etc.
- **These DCs generally don't overlap**
 - “Guarding” can possibly overlap with limitation of motion, if rating based on functional loss
 - But *deformity* does not overlap with limitation of motion



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FAILING TO ASSIGN RATINGS UNDER MULTIPLE DCs WHEN WARRANTED



- **Common Errors:**

- VA fails to assign DCs that compensate Vet for all symptoms of a knee disability, particularly when Vet has had a meniscectomy (total or partial)
 - Any associated symptom not compensated under another DC will warrant assignment of a 10% rating under DC 5259
 - Limitation of motion and instability associated with meniscectomy often warrant ratings under different DCs
- VA fails to assign separate ratings for limitation of motion and recurrent dislocation of shoulder

FAILING TO DISCOUNT THE AMELIORATIVE EFFECTS OF MEDICATION



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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**

HYPOTHESIS

- **Vet took daily medication to manage the severity and frequency of her headaches**
- **She 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 denied a rating higher than 10%, because Vet was able to properly manage symptoms with the use of medication and did not require any significant time off from work due to her disability**

POLL

• Is VA's denial of a rating higher than 10% correct?

A. Yes

B. No

C. Not Sure



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FAILING TO DISCOUNT THE EFFECTS OF 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)

FAILING TO DISCOUNT THE EFFECTS OF MEDICATION



- If a DC specifically contemplates the effects of medication, then VA can rate the condition based on its severity when Vet is medicated
 - Ex: hypertension, most heart diseases, mental disabilities, GERD (new DC)
 - *McCarroll v. McDonald*, 28 Vet. App. 267 (2016) – no requirement to discount ameliorative effects of medication when evaluating hypertension, because medication is referenced in rating criteria

FAILING TO DISCOUNT THE EFFECTS OF MEDICATION

- If a DC doesn't specifically contemplate the effects of meds, VA is required to discount the ameliorative effects of medication when assigning a rating
 - Ex: migraines, musculoskeletal conditions
 - *Ingram v. Collins*, 38 Vet. App. 130 (2025) 
 - Court applied *Jones* and *McCarroll* to the evaluation of musculoskeletal disabilities for which DC does not reference medication
 - BVA must discuss and discount the ameliorative effects of medication used to treat Vet's disabilities when evaluating severity

FAILING TO DISCOUNT THE EFFECTS OF MEDICATION



- **VA often assigns ratings based on medical evidence obtained while Vet was medicated – Rx or OTC**
 - If evidence indicates that Vet regularly takes medication to treat a disability, unless examiner expressly states Vet was not medicated at time of exam or that findings reflect severity of condition when unmedicated, report should be considered to reflect the severity of the disability when medicated
 - If so and relevant DC does not mention medication, VA errs if it assigns rating based on findings in the exam report

ADVOCACY ADVICE

- Review the DC at issue for any reference to medication
- If a DC doesn't specifically mention anything about medication, VA is required to discount the favorable effects of medication
- Argue that VA must rate condition based on how bad it would be w/out medication and obtain a medical opinion on that question 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

COMMON VA ERRORS IN TDIU CLAIMS



CONSIDERING FACTORS THAT ARE OFF LIMITS

- Sometimes, when adjudicating a TDIU claim, VA will consider factors that it should not consider
- VA can consider:
 - The effect SC disabilities have on Vet's ability to work
 - Educational background
 - Occupational background



CONSIDERING FACTORS THAT ARE OFF LIMITS

- VA can't consider:
 - Vet's age



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

CONSIDERING FACTORS THAT ARE OFF LIMITS

- VA can't consider (cont'd):
 - Reason Vet left prior employment
 - If Vet left prior employment because of retirement or other reasons unrelated to SC disabilities, VA cannot deny solely for that reason
 - Relevant inquiry is whether SC disabilities currently render Vet unemployable
 - *Van Hoose v. Brown*, 4 Vet. App. 361, 363 (1993)

FAILING TO CONSIDER EXTRASCHEDULAR TDIU

- Under 38 C.F.R. § 4.16(a), VA may assign TDIU when a Vet is unable to secure or follow a substantially gainful occupation as a result of SC disabilities, AND
- Vet has either:
 - ONE SC disability rated 60% or higher; OR
 - MULTIPLE SC disabilities, with at least one rated 40% or higher AND a combined rating of at least 70%
- But that's not the only way a Vet can qualify for TDIU...

FAILING TO CONSIDER EXTRASCHEDULAR TDIU

- If evidence indicates Vet can't work due to SC disabilities, but the percentage requirements of 38 C.F.R. § 4.16(a) are not met:
 - VA should consider Vet's eligibility for TDIU under § 4.16(b) – extraschedular TDIU
 - All Vets who are unemployable because of SC disabilities shall be rated totally disabled



ASSIGNING INCORRECT EFFECTIVE DATE FOR TDIU

- VA sometimes mechanically assigns the effective date for TDIU as the date it received Form 21-8940
- Effective date can be based on date of pending earlier claim for SC/increased rating, if the disability at issue in the claim at least in part prevented Vet from securing or following a substantially gainful occupation
 - Effective date should be the later of (1) the date of that claim, or (2) the date the SC disability caused unemployability

FAILING TO ADJUDICATE REASONABLY RAISED TDIU CLAIM

- VA sometimes fails to address Vet's entitlement to TDIU when assigning an initial disability rating or adjudicating an increased rating claim, if Vet did not expressly claim entitlement to TDIU, even though the issue is reasonably raised by the record



FAILING TO ADJUDICATE REASONABLY RAISED TDIU CLAIM

- TDIU is part of any claim for a higher initial rating or an increased rating (or an initial SC claim), when evidence of unemployability related to the underlying condition is submitted during the pendency of the claim
 - *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001)
 - *Rice v. Shinseki*, 22 Vet. App. 447 (2009)

FAILING TO ADJUDICATE REASONABLY RAISED TDIU CLAIM

- TDIU claim may reasonably raised if Vet's c-file contains any of the following:
 - Letter from a psychiatrist stating SC PTSD symptoms prevent Vet from getting and keeping a job
 - Statement from most recent employer that explains the reasons Vet was fired, and it is apparent those reasons are related to Vet's SC condition(s)
 - VA exam report stating Vet's SC condition(s) prevents Vet from working full-time

OVERLOOKING THE EFFECTS OF MEDICATION FOR SC DISABILITIES

- VA should assess the effects or side effects of medication for SC disabilities on Vet's employability
 - *Moyer v. Derwinski*, 2 Vet. App. 289, 294 (1992)
- VA often fails to consider these effects, so be sure to explain to VA how meds impact Vet's ability to work



FAILING TO PROPERLY CONSIDER SMC(S)

- **Vet can be awarded SMC(s) based on:**
 - ONE SC disability rated 100% (which could be one SC disability that alone warrants TDIU)
 - *Bradley v. Peake*, 22 Vet. App. 280 (2008)

AND

- Additional SC disability (or disabilities) that is (or are) independently rated at 60% or more (or that combine to a 60% rating or more)

FAILING TO PROPERLY CONSIDER SMC(S)

- VA sometimes grants TDIU based on multiple SC disabilities, without addressing whether one of the SC disabilities alone would warrant TDIU
- Other times, VA fails to address TDIU because Vet has a combined 100% rating
- In these scenarios, if one of Vet's SC disabilities alone might qualify for TDIU, and other SC disabilities combine to at least 60%, argue that VA should address whether a single SC disability qualifies for TDIU and SMC(s) is warranted
 - If possible, obtain a supporting opinion from a vocational expert

QUESTIONS?



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