

NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

The Battle of the Medical Experts

Challenging a Negative Medical Opinion

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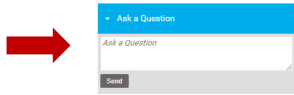
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OVERVIEW



- Common Scenarios
- Prevention Strategies
- Mitigation Strategies

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COMMON SCENARIOS

Example #1



- Diana, a Gulf War Vet, applies for SC for depression. She submits a private medical opinion in support of her claim from her psychiatric nurse practitioner. The opinion is adequate in all respects.
- The VARO orders a C&P exam, which results in a negative nexus opinion from the VA examiner.
 - Example of VA “developing to deny”

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COMMON SCENARIOS

Example #2



- Peter, a Vietnam Vet, submits a claim for an increased rating for his SC lumbar strain. VA orders a C&P exam and the VA examiner finds that flare-ups do not further limit his function.
- Peter’s VSO sees the exam in the claims file and encourages Peter to get more evidence. Peter submits a private exam from his chiropractor. The chiropractor finds that Peter’s range of motion is severely limited during his flare-ups.

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SURVEY #1



► Have you ever dealt with a battle of the medical experts in one of your cases?

A. Yes

B. No

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SOURCES OF CONFLICTING MEDICAL EVIDENCE



► Where can conflicting medical evidence come from?

► VA medical records

► Private medical records

► VA C&P exams

► Private exams

► Lay statements, where Vet is competent to report symptoms

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Prevention Strategy #1

SUBMIT A PRIVATE MEDICAL OPINION WITH AN INITIAL CLAIM

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PREVENTION STRATEGY #1 Private Medical Opinion



- Submit a private medical opinion with an initial claim
 - Submitting a good private opinion may prevent VA from getting its own, potentially preventing the creation of negative evidence
 - Can lead to a quick grant of benefits

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PREVENTION STRATEGY #1 Private Medical Opinion



- ▶ If you know you can get a private medical opinion, you may want to hold off on submitting the complete claim until you get the private opinion
 - ▶ But submit an ITF immediately!
- ▶ Once you get favorable private opinion, submit complete claim on the appropriate VA Form
- ▶ This may allow Vet to participate in FDC program and prevent VA from scheduling a C&P exam
- ▶ **Make sure 1 year period following filing of ITF does not expire!**


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SURVEY #2




- ▶ When is not usually helpful to get a private medical opinion?
 - To establish SC on a direct basis
 - To support a higher rating
 - To support a grant of TDIU
 - To establish SC for a presumptive condition

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REASONS FOR MEDICAL OPINIONS

- ▶ To establish service connection
- ▶ To support a disability evaluation, when rating criteria has some subjective elements
- ▶ To support a grant of TDIU
 - ▶ For TDIU, an opinion from a vocational expert may be preferable to an opinion from a doctor




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WHEN NOT TO GET A PRIVATE MEDICAL OPINION

- ▶ When current medical records are enough
 - ▶ Ex: presumptive conditions
- ▶ Example:
 - ▶ DD 214 shows Vet served in Vietnam
 - ▶ VA treatment records show Vet currently has active prostate cancer


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Prevention Strategy #2

INTERVENE WHEN VA DEVELOPS TO DENY


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PREVENTION STRATEGY #2

- VA is not supposed to develop to deny
 - *Mariano v. Principi*, 17 Vet. App. 305, 312 (2003);
Kowalski v. Nicholson, 19 Vet. App. 171 (2005)
- *But*, VA also has an affirmative duty to gather the evidence necessary to render an informed decision on the claim, even if that means gathering and developing negative evidence, provided VA does so “in an impartial, unbiased, and neutral manner”
 - *Douglas v. Shinseki*, 23 Vet. App. 19, 26 (2009)
- VA also has discretion to decide when additional development is necessary
 - *Shoffner v. Principi*, 16 Vet. App. 208, 213 (2002)

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PREVENTION STRATEGY #2

- Intervene when VA develops to deny
 - Look for situations where VA schedules a C&P exam or opinion when there is already an adequate medical opinion in the claims file
 - Argue that VA is violating its duty to assist and ask it to cancel exam
 - Make argument before VA obtains the medical opinion
 - VA has wide latitude in developing evidence, so argument may not be successful

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PREVENTION STRATEGY #2



Hypo

- John, a Korean War Vet, files claim for SC for arthritis in his left knee. He believes that a knee injury in bootcamp led to the development of arthritis.
- He submits a private medical opinion that says the following: "It is plausible that John's current left knee arthritis could be related to his knee injury in bootcamp."
- VA orders a C&P exam
- The VA examiner opines that the arthritis is not related to the in-service knee injury

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SURVEY #3



- Did VA impermissibly "develop to deny" when it ordered the C&P exam?


- A) Yes
- B) No

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No

- Speculative medical opinions are not adequate to decide a claim
 - Language like "could, might, possible, plausible"
 - Later, we will discuss what makes a good private medical opinion


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Mitigation Strategy #1
SUBMIT A PRIVATE MEDICAL OPINION

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MITIGATION STRATEGY #1
Private Medical Opinion



- The best way to challenge a negative VA medical opinion is by obtaining a positive private opinion
- In most cases where there is a negative VA medical opinion, success on the claim will be highly unlikely without obtaining a positive medical opinion from a private physician

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HOW TO OBTAIN A PRIVATE MEDICAL OPINION



- Network: talk to friends and family who are doctors or who can put you in touch with doctors
- Talk to other VSOs to see if they know of any doctors who would be willing to assist by examining Vet
- Make an appointment to speak with someone at the closest medical school/teaching hospital

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HOW TO OBTAIN A PRIVATE MEDICAL OPINION



- Make use of Vet's connections and ask if Vet knows anyone who may be able to assist
 - Vet's treating physician
- Search online for doctors who specialize in providing opinions for disability benefit claims (VA, SSA, etc.)
- Use social media (Facebook, Twitter, etc.)
- Become involved in local organizations or clubs to expand your network

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CONSIDERATIONS IN CHOOSING A PRIVATE PHYSICIAN



- Physician's specialty
 - A general practitioner is often sufficient, but when dealing with a complex medical condition, try to get a specialist
 - If Vet claiming SC for heart condition, a cardiologist is preferable to a general practitioner
 - But, opinion from a general practitioner is better than no opinion at all

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CONSIDERATIONS IN CHOOSING A PRIVATE PHYSICIAN



- Physician's familiarity with Vet
 - While VA does not automatically assign greater probative value to opinion of Vet's treating physician, familiarity with Vet can be a factor for assigning more probative value to one opinion over another
 - Helpful when dealing with continuity of symptoms
 - VA doctors (even treating physicians) are often unwilling to provide (or prohibited from providing) an opinion for purposes of comp benefits, but it doesn't hurt to ask!

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CONSIDERATIONS IN CHOOSING A PRIVATE PHYSICIAN



➤ Physician's credentials:

- Education
- Experience
- Publications
- Awards and Recognition



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CONSIDERATIONS IN CHOOSING A PRIVATE PHYSICIAN



- ▶ The only thing better than one good private medical opinion is two good private medical opinions
- ▶ If possible, get an opinion from:
 - ▶ Professor of medicine in the applicable specialty OR a specialist in that area; AND
 - ▶ Vet's treating physician

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BEFORE OBTAINING A PRIVATE EXAM



- Once you find a private examiner, the next step is to make sure you do everything possible to make it easy for the examiner to provide a favorable opinion
 - ▶ Your motto throughout this process should be "help me, help you"




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BEFORE OBTAINING A PRIVATE EXAM

- Obtain copy of Vet's claims file
 - If you have VBMS access (with printing capabilities), then print *relevant* documents for examiner or save as a pdf
- Tab and label relevant documents in c-file to make review of file easier for examiner
 - Make sure examiner knows to mention in report that c-file reviewed (or at least relevant parts)


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BEFORE OBTAINING A PRIVATE EXAM

- Most relevant records for examiner to review:
 - STRs
 - VA and/or private treatment records
 - VA exams and/or any medical opinions addressing issue(s) in claim
 - Lay statements from Vet and others addressing symptoms, continuity, etc.
 - Hearing testimony
 - Medical treatise evidence


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BEFORE OBTAINING A PRIVATE EXAM

- Examiner probably does not need to review:
 - VCAA letters 
 - Rating decisions, SOC's, etc.
 - Any documents not relevant to claim


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BEFORE OBTAINING A PRIVATE EXAM

- Try to limit the records the examiner must review to only those relevant to Vet's claim(s)
- If Vet has 2,000 pages of VA treatment records, but only 20 pages address claimed condition, only give examiner those 20 pages


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BEFORE OBTAINING A PRIVATE EXAM


- Talk with Vet about upcoming exam and prepare a written statement for Vet to give to examiner (especially if condition is a mental disorder)
- Statement should include:
 - ▶ In-service incident or onset of condition
 - ▶ Continuity of symptoms from service to present
 - ▶ Current symptoms noted by Vet that are believed to be related to current disability
 - ▶ Severity of Vet's symptoms

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BEFORE OBTAINING A PRIVATE EXAM

- ▶ Provide examiner with summary of relevant facts and documents and explain why you think Vet's condition is related to service or entitled to a higher rating
- ▶ Provide the examiner with the relevant DBQs:
 - ▶ www.benefits.va.gov/compensation/dbq_publicdbqs.asp




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BEFORE OBTAINING A PRIVATE EXAM

- Tell the examiner to state in the opinion that he or she reviewed the relevant records
 - CAVC has held that a claims file review is not a requirement for private medical opinions and VA may not prefer a VA medical opinion over a private medical opinion solely because the VA examiner reviewed the claims file
 - But, in practice, VA adjudicators often dismiss private medical opinions for this reason


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BEFORE OBTAINING A PRIVATE EXAM

- ▶ Explain to examiner, in lay terms, the relevant law applicable to the case
 - ▶ Make sure examiner addresses proper theories (direct SC, secondary causation, secondary aggravation, aggravation of preexisting condition)
 - ▶ Stress that standard of proof is “at least as likely as not,” NOT “a reasonable degree of medical certainty”


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BEFORE OBTAINING A PRIVATE EXAM

- Ask the examiner to provide an opinion using the exact language of the relevant legal standard
 - For SC: “Is it at least as likely as not (50% or greater probability) that the current condition is due to military service?”
 - For IR: provide relevant rating criteria
 - For TDIU: “Is it at least as likely as not (50% or greater probability) that the veteran is unable to maintain substantially gainful employment due to his/her service-connected disability?”


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BEFORE OBTAINING A PRIVATE EXAM


- Ask the examiner to explain the reasoning behind the opinion, as detailed and specific as possible
 - The most useful medical opinion describes pertinent facts in the medical history and provides sound analysis of how the facts led to the conclusion

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BEFORE OBTAINING A PRIVATE EXAM

- If possible, provide examiner with medical articles or treatises that support your theory of the case
 - Ask them to cite these texts and any other good medical article or treatises they find, and submit a copy of each with the opinion




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BEFORE OBTAINING A PRIVATE EXAM

- Include all of this info in a letter to the doctor
- See handout for sample letter to send to doctor


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AFTER OBTAINING A PRIVATE EXAM

- Following the exam, ask examiner if he or she can provide a favorable opinion
 - If examiner cannot provide a favorable opinion, tell him or her **NOT** to write an exam report
- Before sending a private exam report to VA, review the findings from the report and ensure that the info in the report is helpful to the Vet
- Make sure that the examiner mentioned in the report that he or she reviewed the claims file


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AFTER OBTAINING A PRIVATE EXAM

- ▶ **After reviewing the exam report**, if anything is unclear, if information is missing or incorrect, or if the examiner did not provide a well-reasoned rationale for the opinion, return the report to the examiner for clarification/correction
- ▶ If the examiner has impressive credentials, provide VA with a copy of the examiner's curriculum vitae

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HYPO

- ▶ Andrew, a WWII veteran who was SC for PTSD and hypertension, dies of a heart attack. Abby, his surviving spouse, applies for DIC based on SC cause of death. She shows her VSO the following letter from her husband's treating physician:
 - ▶ I was Andrew's physician for the past 10 years. I have reviewed the relevant records from his claims file.
 - ▶ In my professional opinion, it is possible that his PTSD and hypertension caused his heart attack.
 - ▶ I base this opinion on my personal observation of the patient and medical research that shows a connection between stress levels, high blood pressure, and heart problems. I have attached the relevant literature.

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SURVEY #4



- What advice should you give to Abby?
 - A. Send VA the medical opinion without changes
 - B. Ask the doctor to edit the opinion and use the “at least as likely as not” standard
 - C. Don’t submit the opinion unless VA obtains a negative opinion

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B

- ▶ Remember - Encourage private medical examiners to use the language of the relevant legal standard

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Mitigation Strategy #2

SUBMIT ARGUMENT ATTACKING VA EXAM'S ADEQUACY

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VA EXAM INADEQUACY



▶ Diminish probative value of negative opinion

- ▶ Best way is to show that VA exam is inadequate
- ▶ Where there is already an adequate favorable opinion of record, instead of getting a new VA exam, argue VA should just grant the claim
- ▶ Cannot develop to deny

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REASONS AN EXAM MAY BE INADEQUATE



➤ An exam may be inadequate if the examiner:

- #1 - Lacks Competence
- #2 - Decides Non-Medical Facts
- #3 - Gives Inconclusive Opinion without Explanation
- #4 - Uses Improperly High Evidentiary Standard
- #5 - Does Not Address All Legal Theories of Entitlement
- #6 - Provides Inadequate Supporting Rationale for Opinion
- #7 - Bases Opinion on an Inaccurate Factual Premise
- #8 - Fails to Address Lay Statements Material to the Claim
- #9 - Fails to Properly Address Functional Loss
- #10 - Fails to Address Qualifying or Contradictory Language in a Study
- #11 - Fails to Address Medical Treatise Evidence

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HYPOTHESIS



➤ Addendum opinion by VA psychiatrist:

- Vet's in-service complaints were typical of dysthymic disorder running its course
- "Respectfully, while I recognize my personal limitation, the VA should seek for the next expert opinion if this examiner's report still does not satisfy the VA."

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HYPOTHESIS



- What did examiner mean by “personal limitation”?
- Was this a reference to a limitation of expertise (or competency) on the examiner’s part?
- This raises questions about whether the presumption of competency applies

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ERROR #1



- The examiner lacks competence
 - VA presumes C&P examiners are competent to provide a medical opinion, unless there is evidence to the contrary
 - If Vet raises the issue or there appears to be an irregularity in the selection of an individual to perform an exam, the presumption of competence does NOT apply and the burden shifts to VA to prove individual’s qualifications
- *Nohr v. McDonald*, 27 Vet. App. 124 (2014)

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Nohr v. McDonald 27 Vet. App. 124 (2014)




- Challenging a VA examiner’s competence must first be done at RO or BVA
 - If not, it usually cannot be raised in Court
 - It is very important for VSOs to raise this issue when appropriate




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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER 

- Advocates should challenge the competency of a VA examiner if there is an irregularity or some reason to call into question the examiner’s qualifications
 - Is there a red flag?
 - Do not go on a fishing expedition




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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER 

- Examples of irregularities
 - Examiner explicitly or implicitly questions own qualifications or competence
 - Examiner referencing “personal limitation”
 - *Nohr v. McDonald*, 27 Vet. App. 124 (2014)
 - Examiner stated she had a “relative lay person’s perspective of psychiatry”
 - *Wise v. Shinseki*, 26 Vet. App. 517 (2014)


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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER 


- Examples of irregularities
 - The medical condition or condition is WAY outside of examiner’s specialty
 - Dermatologist providing opinion on heart condition
 - Eye doctor providing opinion on PTSD




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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER 

- For most claims, a specialist is not required
- But sometimes a specialist is needed:
 - Psych
 - TBI: physiatrist, psychiatrist, neurosurgeon, or neurologist
 - Meniere’s disease: otolaryngologist or neurologist (proposed 2/15/22)
 - Dental
 - Eye
 - When required by BVA remand order!




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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER 


- Secondary SC claim may present situation where VA examiner lacks competence if SC condition and the secondary condition are in different body systems
- In *Wise*, a cardiologist was asked to provide an opinion on whether PTSD caused or aggravated IHD
 - Cardiologist stated she had no formal training or background in psychiatry other than a required month long rotation in med school that was over 25 years ago
 - Admitted her opinion came from a “relative lay person’s perspective of psychiatry”

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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER 

- Requesting CV of VA examiner
 - First, see if CV (or any other info describing examiner’s medical background) is available to public (Google search)
 - This allows advocate to review CV before it becomes part of Vet’s record (if examiner’s credentials are impressive, you do not want to add CV to record)


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WHEN TO CHALLENGE COMPETENCY OF VA EXAMINER

- Requesting CV of VA examiner
 - If not publicly available, then request from VA
 - “Since the veteran is obligated to raise the issue in the first instance, the veteran must have the ability to secure from the VA the information necessary to raise the competency challenge. Once the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner. This is mandated by VA’s duty to assist”
 - *Francway v. Wilkie*, 930 F.3d 1377, 1381 (Fed. Cir. 2019)


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ERROR #2

- The examiner decides non-medical facts
 - VA examiners should not make their own determinations or judgments about non-medical facts
 - That is the job of the RO adjudicator or BVA
 - If examiner makes a credibility determination on non-medical matters, it taints the whole exam
 - Review exams to see if the examiner made a negative credibility determination about non-medical facts
 - Example: if Vet is seeking SC for PTSD and VA has not made a finding about whether the alleged stressor occurred, it is error for the medical examiner to conclude it did *not* occur

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ERROR #3

- A medical opinion is inadequate if the examiner claims to be unable to provide a nexus opinion without resorting to speculation, and
 1. the examiner fails to explain why any opinion would be speculative and
 2. the basis for this statement is not otherwise apparent from the record
- Explanation cannot be conclusory. It must be supported by adequate medical rationale.

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SPECULATIVE OPINIONS



- ▶ Speculative opinion does not fulfill the duty to assist where the record does not establish that the examiner has obtained all tests and records that might reasonably illuminate the medical analysis
- ▶ When the examiner identifies additional info that would facilitate a more conclusive opinion, the duty to assist requires that VA at least investigate the feasibility of providing that info

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ERROR #4



- ▶ Examiner uses too high of an evidentiary standard
 - ▶ Some examiners are unfamiliar with or don't properly address the "benefit of the doubt" standard
 - ▶ "DJD of the spine is not more likely than not related to service"
 - ▶ "It is at least as likely as not that PTSD is not caused by the in-service stressor"
 - ▶ "I cannot say with a reasonable degree of medical certainty that migraines were caused by the in-service injury"

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IMPROPERLY HIGH STANDARD



- ▶ In *Wise v. Shinseki*, 26 Vet. App. 517 (2014), a VA medical examiner opined that PTSD was not generally accepted in the medical community as a risk factor for cardiovascular disease. As a result, BVA disregarded studies supporting the idea that PTSD could be linked to cardiovascular problems.
- ▶ CAVC held that this was error because BVA, when evaluating that evidence, cannot demand a level of acceptance in the scientific community greater than the level of proof required by the benefit of the doubt rule

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ERROR #5



- ▶ The examiner fails to address all reasonably raised theories of entitlement
 - ▶ Sometimes the claimant or record raises the possibility of entitlement to SC under more than one theory
 - ▶ In these cases, a physician generally must address each theory of entitlement that is reasonably raised

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REASONABLY RAISED THEORIES



- In *El-Amin v. Shinseki*, CAVC found that an exam was inadequate where the examiner concluded that the Vet's alcoholism was *caused* by factors other than SC PTSD, but failed to opine on whether alcoholism was *aggravated* by PTSD, even though the claimant explicitly raised this theory
- When providing a medical opinion on secondary SC, a VA examiner generally must address:
 - Causation
 - Aggravation
- Medical expert must address each theory of entitlement explicitly or reasonably raised

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ERROR #6



- Examiner provided inadequate supporting rationale for opinion
 - ▶ *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (“a medical examination must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two”)
 - ▶ *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007) (“a mere conclusion by a medical doctor is insufficient to allow the [VA] to make an informed decision as to what weight to assign to the doctor's opinion”)

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HYPOTHESIS



- Jenna, an OEF Vet, applies for an increased rating for her SC anxiety disorder. VA orders a C&P exam. The examiner opines that her anxiety manifests as occupational and social impairment with reduced reliability and productivity (i.e., a 50% rating).
- The examiner’s reasoning included the following statement: “Her treatment records do not show that she experienced suicidal or homicidal ideations.”
- When reviewing CAPRI records, Jenna’s VSO sees that she reported suicidal ideation occasionally to her VA psychologist.

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SURVEY #5



- Should Jenna’s VSO argue that this VA medical opinion is inadequate?
 - A) No, VA examiners are not required to read every treatment record
 - B) Yes, the opinion was based on an incorrect info
 - C) Not sure

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ERROR #7



B

- Examiner’s opinion based on an inaccurate factual premise
 - *Reonal v. Brown*, 5 Vet. App. 458 (1993)

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ERROR #8



➤ Examiner failed to address lay statements that are material to the claim

- *Miller v. Wilkie*, 32 Vet. App. 249 (2020)
- *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006)
- *Barr v. Nicholson*, 21 Vet. App. 303 (2007)

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ERROR #9



➤ Examiner failed to adequately describe functional loss during flare-ups or after repetitive use

- *Mitchell v. Shinseki*, 25 Vet. App. 32 (2011)
- *DeLuca v. Brown*, 8 Vet. App. 202 (1995)

➤ Examiner cannot refuse to offer opinion on functional loss simply because Vet not being observed during flare-up or after repeated use

- *Sharp v. Shulkin*, 29 Vet. App. 26 (2017)
- *Lyles v. Shulkin*, 29 Vet. App. 107 (2017)

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ERROR #10



➤ Examiner failed to address qualifying or contradictory language in a study relied upon by the examiner in support of opinion

- *McCray v. Wilkie*, 31 Vet. App. 243 (2019)
- Review any medical study / article / treatise that a VA examiner cites in support of a negative opinion to see if it fully supports the examiner's conclusion
- If there is any qualifying or contradictory language the VA examiner has not addressed, submit a copy to VA and point out the language

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ERROR #11



- Examiner fails to address medical treatise evidence
 - VA examiners frequently gloss over medical treatise evidence submitted by claimants. If an examiner provides a negative opinion, this can be a strong ground for challenging the adequacy of the exam.
 - Example: Medical opinion inadequate because it did not explain why medical articles submitted by Vet do not show that PTSD can cause or aggravate hypertension

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Mitigation Strategy #3

SUBMIT EVIDENCE TO TRIGGER VA'S DUTY TO ASSIST

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WHAT IF YOU CAN'T GET A PRIVATE OPINION?



- ▶ When there is only a negative medical opinion of record:
 - ▶ If possible, argue the exam is inadequate and Vet is entitled to a new VA exam
 - ▶ *Barr v. Nicholson*, 21 Vet. App. 303 (2007)

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WHAT IF YOU CAN'T GET A PRIVATE OPINION?



- If the negative VA opinion appears adequate (assuming you can't obtain a favorable opinion)
 - See if there is an additional theory of SC that can be raised (e.g., secondary SC)
 - Search for medical treatise evidence that contradicts the VA examiner's opinion
 - Submit that evidence along with a legal argument stating that VA must obtain a new medical opinion because the prior opinions have not addressed all of the relevant and favorable evidence

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Bruner v. Wilkie, Vet. App. No. 17-0705 (Apr. 12, 2018) (non-precedential)



- VA examiner stated “there is no evidence to support Vet’s contention that his sleep apnea was caused or aggravated by his SC PTSD”
- After the exam, Vet submitted three medical journal articles linking sleep apnea to PTSD
- RO and BVA denied claim without providing new exam
- CAVC held Vet entitled to a new medical opinion because the opinions of record “didn’t address all the relevant and favorable evidence of record”; thus, they were inadequate for rating purposes

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Mitigation Strategy #4

SUBMIT ARGUMENT ABOUT HOW VA SHOULD WEIGH THE CONFLICTING MEDICAL OPINIONS

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WEIGHING PROBATIVE VALUE



- Build up probative value of positive opinion
 - Emphasize detailed rationale that private examiner provided for favorable opinion
 - Discuss examiner's impressive credentials
 - If treating physician, discuss examiner's familiarity with Vet
 - Point out if examiner provided higher level of certainty for opinion than "at least as likely as not"

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WEIGHING PROBATIVE VALUE



- Diminish probative value of negative opinion
 - Identify any errors
 - Point out any factors where VA examiner was less specialized than private examiner or less familiar with Vet's history

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WEIGHING PROBATIVE VALUE



- Remember: BVA (and ROs) may not rely on their own unsubstantiated medical opinion
 - BVA may consider only independent medical evidence to support findings. If the medical evidence of record is insufficient, or, in the opinion of the BVA, of doubtful weight or credibility, BVA is free to supplement the record by seeking an advisory opinion, ordering a medical exam, or citing relevant medical texts.
 - *Colvin v. Derwinski*, 1 Vet. App. 171 (1991)

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WEIGHING PROBATIVE VALUE



- When negative VA medical opinion is well-reasoned and well-supported, claimant’s best argument may be citing the benefit of the doubt rule
 - 38 U.S.C. § 5107(b); 38 C.F.R. §§ 3.102, 4.3
- Argue that opinions are, at worst, “nearly equal” and certainly the evidence is “not persuasively against the claimant”; thus, the benefit of the doubt should be given to claimant
 - *Lynch v. McDonough*, 21 F.4th 776 (Fed. Cir. 2021)

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Questions?



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