

# New and Material Evidence to Reopen a Claim

New Strategy to Determine if  
Evidence is New & Material

# **38 U.S.C. § 5108: Reopening Disallowed Claims**

- If new & material evidence presented or secured w/ respect to a disallowed claim, VA to reopen claim & review former disposition of claim

# What is “New” Evidence?

- 38 CFR 3.156 defines “new” and “material” evidence

New evidence =

- existing evidence
- not previously submitted to agency

# What is “Material” Evidence?

Material evidence =

- existing evidence
- by itself (or when considered with previous evidence of record)
- relates to unestablished fact necessary to substantiate claim.

# Additional Language in 3.156(a)

New and material evidence=

- not cumulative nor redundant of evidence of record at time of last prior final denial of claim sought to be reopened
- and must raise reasonable possibility of substantiating claim

# **38 C.F.R. § 3.159: VA assistance in Developing Claims**

- Upon receiving substantially complete claim, VA to make reasonable efforts to help claimant get evidence necessary to prove claim

# 38 C.F.R. § 3.159: VA duty to assist

- VA to give medical exam and/or opinion if necessary to decide claim
- Exam/opinion needed if not sufficient evidence to decide claim, and there is
  - lay/medical evid of current Dx or persistent or recurrent symptoms; **AND**
  - event/injury/disease in service, (or symptoms during presumptive period) ; **AND**
  - Disability/symptoms “may be associated” with event in service or with a SC disability
  - “may be associated” satisfied by evid showing post-service treatment or other association w/ service
  - duty applies to claim to reopen only if there is new and material evidence submitted first

# Facts of *Shade v. Shinseki*

- Vet served 10/65- 9/67
- tx for dermatitis in service 4/66 & 4/67
- 7/00 applies for SC for skin disorder
- 11/02 denied SC b/c no current diagnosis
- NOD filed & RO issued SOC denying b/c no current dx & no nexus opinion

# Facts of *Shade v. Shinseki*

- 2/24/06—filed claim to reopen
- Denied reopening b/c no current findings of skin condition assoc w/ service
- Vet submits 10/12/06 dr. report that said vet suffered from “chronic dermatitis” that had been “present for years”
- Vet testified that he suffered from skin disorder “over period of years”

# Facts of *Shade v. Shinseki*

- 9/08—BVA decision
- BVA said vet had not provided nexus opinion
  - evidence presented by vet was “new” b/c not previously of record
  - evidence not material b/c although he had current dx, did not have nexus between dx & service
  - did not meet requirement to submit N&M evidence to reopen

# Arguments in *Shade v. Shinseki*

- Vet:
  - Board application of reg not consistent with statute
  - Said statute 38 USC 5108 required that VA reopen previously denied claim when N&M evidence presented
  - Said he provided lay statement that he had skin disorder over period of years

# Arguments in *Shade v. Shinseki*

- VA:
  - affirm Board decision b/c no N&M evidence submitted
  - **Argued vet did not meet requirement that to reopen, evidence must raise reasonable possibility of substantiating claim.**
  - argued lay statements not enough to establish link to service

# Court on Reopening

- 2 exceptions to rule that cannot reconsider finally denied claim
  - Argue CUE
  - Reopen w/ N&M evidence
- The law, 38 USC 5108 is unchanged since 1988
  - If new and material evidence is presented or secured with respect to claim which has been disallowed, Secretary shall reopen claim and review former disposition of claim.

# Court on Reopening

- statute gives no explanation as to what new and material evidence is
- VA regs more fully define new and material evidence

# Pre-VCAA Reg on Reopening

- From 1991 to 2002, reg said N&M evidence is:
  - not previously submitted to agency
  - Bears directly and substantially upon matter under consideration
  - neither cumulative nor redundant,
  - by itself (or in connection with evid previously submitted) so significant must be considered to fairly decide claim

# Pre-VCAA Reg on Reopening

- 3 Important Cases
- *Colvin v. Derwinski* created
- “**Bright line**” rule that newly-submitted evidence must be determined to be new and material but also present reasonable possibility of changing outcome.

# Pre-VCAA Reg on Reopening

- *Colvin* in effect until 1998 Federal Circuit decision in *Hodge v. West*
- ***Colvin bright-line rule overturned.***
- *Hodge* found *Colvin* bright line rule invalid & likely inconsistent w/ purposes of veterans' benefits scheme

# Pre-VCAA Reg on Reopening

- *Elkins v. West* –said claimants still required to establish claim well-grounded before VA required to assist
- ***Elkins -- Hodge lowered bar for claims to reopen BUT let claimant submit N&M evidence to reopen but still have claim denied b/c not well-grounded***
- this existed until VCAA passed

# Reopening After VCAA

- VCAA clarified VA's duty to assist & removed well-grounded requirement before getting duty to assist
- 8/01--New reopening rule
  - New evid= existing evid not before submitted to VA **AND**
  - Material evid=existing evid that ***by itself or w/ previous evid, relates to unestablished fact needed to prove claim AND***

# Reopening After VCAA

- New and material evidence can be neither cumulative nor redundant of evidence of record at time of last prior final denial of claim sought to be reopened, and ***must raise a reasonable possibility of substantiating the claim.***

# Reopening After VCAA

- VA stated purpose of new 3.156(a)
- to clarify definition of 'new and material evidence'
- ***VA stated changes made to § 3.156(a) applied "same standard" to claims to reopen as VCAA applied to application of Secretary's duty to assist***

# Reopening After VCAA

- Court said VA's position is current reg designed to be consistent w/ VCAA
- Purpose of VCAA--lower bar to duty to assist
- *VA's response to those concerned over "must raise reasonable possibility of substantiating claim."*
- *VA: VCAA provides VA assistance unless no reasonable possibility would aid in substantiating claim.*
- *fair & reasonable to apply same standard—that there be reasonable possibility VA assistance would help prove claim—in deciding whether claim to be reopened, triggering VA's full duty to assist*

# Reopening After VCAA

- Court said language VA used in new reg:
- is capable of being interpreted in anti-veteran (may have opposite of pro-veteran result that the use of similar language has in VCAA)

# Reopening After VCAA

- Court: VA did not intend that result when reg changed
- Court: VA's interp of new reg specified *"there be a reasonable possibility that VA assistance would help substantiate the claim in determining whether a claim is to be reopened . . . ."*
- ***reg requires reopening if newly submitted evid combined w/ VA assistance & considering other evid, raises RP of proving claim***

# Reopening After VCAA

- **Court said that present version of reg must be read as creating a low threshold**, consistent with what VA said in Federal Register
- Court: statute does not require VA to assist if there is *no reasonable possibility* assistance would aid in substantiating claim

# Reopening After VCAA

- 3rd sentence of reg says need to show "reasonable possibility of substantiating the claim"
- that might be read as meaning that N&M evidence must affect merits outcome of claim
- ***But this must be read in light statute, which simply states that in order to reopen need new & material evidence***

# Reopening After VCAA

- ***Words "raise reasonable possibility of substantiating claim" cannot add a new requirement*** –otherwise Court would have to consider whether VA reg exceeds statutory authority

# Reopening After VCAA

- *"must raise a reasonable possibility of substantiating claim" does not create 3rd requirement to reopen*
- *provides guidance for VA in deciding whether evidence meets N&M requirement*
- *In deciding if evidence is N&M, VA to consider whether, if claim reopened, assistance would reasonably result in substantiation of claim*
- *deciding whether newly submitted evidence raises reasonable possibility of substantiating claim is a part of the question of what is new and material evidence --**not separate decision made after Board has found evidence N&M***

# Relationship Between Reopening & Duty to Assist

- VA stated: VA will not provide medical exam or medical opinion in attempt to reopen previously disallowed claim.
- did not want to spend limited \$\$\$ on 'fishing expeditions' to create evidence hoping it would be N&M
- if N&M evidence presented, VA will reopen disallowed claim & give medical exam/opinion

# Relationship Between Reopening & Duty to Assist

- VA could not intend that after vet submitted N&M it would deny reopening b/c medical linkage opinion not submitted
- claimant would have to submit medical op in all cases where VA's previous negative decision regarding link or current disability stood between vet & award of benefits
- promise of help in getting VA linkage opinion **illusory** if VA opinion not given unless vet 1st gets opinion on his/her own

# Applying Law to Mr. Shade's Case

- RO denied claim for lack of both current dx and nexus op
- vet submitted evid of current dx
- Vet provided testimony that treated by doctors "over a period of years"
- Dr. report that vet has current skin disorder is NEW b/c not cumulative & not previously submitted
- But BVA stated new evid related only to unestablished fact of current diagnosis, not to other unestablished fact of nexus,
- so BVA said evidence not N&M

# Applying Law to Mr. Shade's Case

- Court: BVA made 2 errors:
  - ***Board failed to consider newly submitted evidence in conjunction with evidence previously of record.***
  - ***Board imposed higher burden to reopening than required by § 3.156(a).***
- Evidence of record indicated vet suffered from skin disorder while in service.
- New evidence provided current dx
- Thus, vet established 2 of 3 elements of SC
- Court: remaining nexus element could be established if vet given VA medical exam.
- Therefore, there was reasonable possibility that assistance could aid in proving the claim

# Applying Law to Mr. Shade's Case

- interpreting words "raises a reasonable possibility of substantiating the claim" as requiring vet to submit medical link to reopen, even though he has submitted N&M evidence, forces vet to get linkage evid to reopen so that vet could be given linkage opinion by VA
- ***where nexus missing, if reg required claimant to submit nexus to reopen, then § 3.159(c)(4)(iii) meaningless***

# Applying Law to Mr. Shade's Case

- Section 3.159(c)(4)(iii) guarantees that, once N&M evidence has been presented, vet entitled to VA duty to assist, including medical nexus opinion if one is warranted
- purpose of requiring vet to present N&M evidence before receiving VA medical exam was to protect VA's "finite resources."

# Applying Law to Mr. Shade's Case

- words "reasonable possibility of substantiating the claim" were intended to mirror words used by Congress in VCAA.
- those words in context of claims to reopen was not intended to add a new, additional barrier to reopening claim
- Court held that phrase "raises a reasonable possibility of establishing claim" must be viewed as ***enabling rather than precluding reopening***
- words "reasonable possibility of substantiating the claim" results in pro-veteran standard for reopening—contemplates likely entitlement to nexus opinion if claim reopened

# Applying Law to Mr. Shade's Case

- Court ordered Board analyze issue of reopening as follows: determine whether there is N&M evidence alone and do not transform analysis into an outcome-based decision

# Applying Law to Mr. Shade's Case

- Court reversed BVA decision that doctor's report "does not relate to unestablished fact necessary to substantiate claim."
- BVA should have reviewed all evidence on issue of nexus
- BVA found lay statements cumulative but in 11/07 vet testified treated for skin over period of years & CAVC found this new & relevant to issue of nexus
- Court: credibility of new evid presumed in reopening

# Applying Law to Mr. Shade's Case

- vet's testimony not to be rejected as not material solely b/c he is lay person offering observations as to his skin condition
- *Davidson v. Shinseki*, 581 F.3d 1313, 1315-16 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (2007)
- vet provided testimony in attempt to establish nexus between in-service skin condition and present diagnosis
- reversed BVA decision & ordered claim reopened
- Board to consider merits of reopened claim for SC, including whether vet entitled to VA medical nexus exam applying low threshold

# Judge Lance Concurrence

- Judge Lance concurred to provide practical guidance for VA & advocates
  - main issue in case was relationship between standard to reopen claim and standard for triggering Secretary's duty to provide medical exam under 38 U.S.C. § 5103A(d).
- Stated that in cases where medical evidence is necessary to win entitlement, two standards are same.
- ***if VA determines new evidence, when viewed with the old evidence, sufficient to trigger medical exam, then evidence is sufficient to reopen and medical exam must be provided.***

# Judge Lance Concurrence

- if evid supporting claim not sufficient to trigger DTA when old & new evid considered together, N&M evidence standard not met & claim not reopened
- Makes perfect sense 2 standards are same in cases where both implicated
- many cases that do not turn on medical issue where duty to assist would be implicated--example, in reopening, issue could be credibility of claimant

# Judge Lance Concurrence

- Practical standard:
- N&M evidence is that which—if found credible—would entitle claimant to benefits or to further VA assistance
- did not believe case should exist where evidence could trigger reopening but not be enough to trigger DTA
- Reopening in that case would be Pyrrhic victory & any error in failing to reopen harmless
- Ask: "If I assume that this new evidence is credible, would all the evidence in file considered together be sufficient to at least trigger some further assistance?"

# Summary of *Shade*

- Current reg on N&M evidence:
  - Claimant may reopen finally adjudicated claim by submitting new and material evidence.
  - New evidence = existing evidence not previously submitted
  - Material evidence = existing evidence that, by itself or when considered with previous evidence of record, relates to unestablished fact necessary to substantiate claim.
  - N&M evid not cumulative or redundant & must raise reasonable possibility of substantiating claim

# Summary of *Shade*

- What does “must raise a reasonable possibility of substantiating the claim” mean?
- When VA changed rule, did not mean to make it harder to reopen
- VA said reasonable to apply duty to assist standard—that there be reasonable possibility that VA assistance would help substantiate claim—in determining whether claim is to be reopened
- That would trigger VA's full duty to assist w/ med exam/opinion

# Summary of *Shade*

- B/c "raise reasonable possibility of substantiating claim" not in statute, it cannot impose new requirement beyond statute language
- whether newly submitted evidence raises reasonable possibility of substantiating claim is part of issue of what is new and material evidence
- **NOT** a separate determination to be made after VA finds evidence N&M
- Promise of DTA **illusory** If after N&M evidence submitted VA denies reopening b/c medical nexus opinion not provided by claimant

# Summary of *Shade*

- reg does not require new and material evidence as to each previously unproven element of claim
- where nexus evidence missing, if reg required vet to submit nexus evidence then any promise to assist after reopening is meaningless
- If new evidence, when viewed with old evidence, sufficient to trigger medical exam, then evidence N&M & medical exam/duty to assist must be provided