Common VA Errors in Claims for Increase
Introduction

- The following rules are often not applied, or misapplied
  - These propositions discuss statutes and regulations that try to fill in gaps in VA rating schedule
- 38 C.F.R. § 4.21 states:
  - “[i]n view of the number of atypical instances it is not expected, especially with the more fully described grades of disabilities, that all cases will show all the findings specified.”
- In claims that fall into the gray areas, the following rules, derived from CAVC cases, may assist advocate in obtaining best possible disability rating for veteran
Rating Hearing Loss goes Beyond the Mechanical Application of Section 4.85

- The Secretary often argues speech recognition test required by hearing loss regs is sufficient despite:
  - 38 C.F.R. § 4.10 provides that "in addition to [furnishing] etiological, anatomical, pathological, laboratory and prognostic data required for ordinary medical classification," a VA medical examination must also include a "full description of the effects of disability upon the person’s ordinary activity."
  - VA Fast Letter 07-10 demanding VA audiologists “describe the effect of a hearing disability on a claimant’s occupational functioning and daily activities.”
Rating Hearing Loss goes Beyond the Mechanical Application of Section 4.85 (cont’d)

- While section 4.85 is mechanical, 3.321(b) is not
  - VA audiologist must fully describe the functional effects caused by a hearing disability to determine whether extraschedular consideration is proper

- Practical applications:
  - If applicable, ensure that the VA examiner discussed the effects on the “claimant’s occupational functioning and daily activities”
  - Ensure that the VA is aware of the need for extraschedular consideration
Section 4.7 Does have Meaning/
Why Symptoms Listed are not Exhaustive

- The failure to exhibit all symptoms listed for a particular disability rating is not necessarily fatal
- Scenario: S/C for hypothyroidism, at 10% seeks an increase.
  - Under DC 7903 a 30% requires “fatigability, constipation, and mental sluggishness.”
  - A 60 percent rating requires “muscular weakness, mental disturbance, and weight gain.”
  - Veteran has fatigability, mental sluggishness, and some evidence of weight gain
- VA declines to award a 30 percent evaluation. Was that the correct outcome?
  - No. VA ignored 38 C.F.R. § 4.7
Section 4.7 Does have Meaning/
Why Symptoms Listed are not Exhaustive (cont’d)

- Do not necessarily need to have all the criteria listed in the higher evaluation level in order to receive that evaluation
  - True even if the DC uses the word “and” between multiple symptoms
- Why?
  - DC for hypothyroidism listed different symptoms at each level.
  - The symptoms present at 10 percent were different than those present at 30 percent, which were different than those at 60 percent
  - Entirely possible that a veteran has symptoms from each level.
  - The VA must consider which level most accurately reflects the veteran’s symptoms

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VA continues to violate the spirit of 38 C.F.R. § 4.7, especially in claims for increase for mental conditions.

Diagnostic code for most psychiatric disorders follow a pattern:
- For certain rating, vet must suffer from occupational and social impairment at level A, due to such symptoms as B, C, D and E.

VA denies higher rating on absence of B, C, D, and E.

**BUT** symptoms listed in the diagnostic code are simply meant as guidance, not as an exhaustive list.
- Consider all of the evidence of record.
- “It is not the symptoms, but their effects, that determine the level of impairment.”
Section 4.7 Does have Meaning/
Why Symptoms Listed are not Exhaustive (cont’d)

- Practical applications:
  - Argue 38 C.F.R. § 4.7 if your client’s level of disability more closely resembles a higher evaluation, even if she or he does not suffer from all of the enumerated symptoms
  - Remember in a psychiatric rating, it is the language before the phrase “due to such symptoms as” which is most important
Functional Loss Must be Compensated

- VA regulations require that a veteran’s functional loss be adequately measured, but VA often declined to compensate a veteran for additional loss of motion.
- VA thinking - compensation for functional loss was either pyramiding or would not be in keeping with the diagnostic codes.
- This ignored section 4.40, and 4.45
  - Section 4.40 provides functional loss of motion is as important as actual loss of motion, weakness and pain affect person’s range of motion.
  - Section 4.45 examiners must test for: less movement than normal, more movement than normal, weakened movement, excess fatigability, incoordination, and pain with movement.
Functional Loss Must be Compensated (cont’d)

- Limitation of motion caused by pain is not included as part of the diagnostic codes.
- VA examination need to include all of the consideration of sections 4.40 and 4.45.
- Practical applications:
  - In every joint rating claim, look carefully to see whether the VA applied DeLuca and sections 4.40 and 4.45.
    - Ex. - Veteran can flex his knee up to 100 degrees, but pain at 60 degrees, perhaps he should be evaluated as if his flexion is limited to 60 degrees.
    - Ex. – Examiner notes movement up to 90 degrees, “with pain,” without further explanation claim should be sent back for clarifying examination.
Noncompensable Loss of Motion Doesn’t Necessarily Mean Noncompensable

- A compensable arthritis rating generally requires some loss of motion
  - Ex. - Arthritis of the lumbar spine under section 4.71a, DC 5242.
    - A 10 percent rating is warranted when “forward flexion of the thoracolumbar spine greater than 60 degrees but not greater than 85 degrees. . . .”
- VA’s inquiry cannot stop here
  - VA’s “intention to recognize actually painful, unstable, or malaligned joints . . . .” 38 C.F.R. § 4.59.
  - DC 5003, x-ray evidence of degenerative arthritis will be compensated even when the “limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic codes . . . .”
Noncompensable Loss of Motion Doesn’t Necessarily Mean Noncompensable (cont’d)

  - Conclusion was unavoidable, “painful motion of a major joint or groups caused by degenerative arthritis, where the arthritis is established by x-ray, is deemed to be limited motion and entitled to a minimum 10-percent rating, per joint, combined under DC 5003, even though there is no *actual* limitation of motion.” 1 Vet. App. at 488.

- Practical applications:
  - Whenever a veteran has x-ray evidence of arthritis, and evidence of painful motion, at least a ten percent rating should be assigned under DC 5003 and *Lichtenfels*.
Benefit of the Doubt Doctrine Applies to the Task of Divvying Up Symptoms

- Multiple conditions, S/C and Non-S/C can impact similar functions, or exhibit overlapping symptoms
  - To rate the VA must try to separate out the symptoms
  - Examiners unable to do so often state they cannot “without resort to speculation”
- VA interprets as cutting against the claim. This is error.
- If it is not possible to separate effects of service-connected condition and non-service-connected condition, VA must attribute all signs and symptoms to service-connected condition.
Benefit of the Doubt Doctrine Applies to the Task of Divvying Up Symptoms (cont’d)

- VA’s tends to limit application to psychiatric disorders. This too is error.

- Practical applications:
  - When Non-S/C and S/C condition have overlapping symptoms and;
  - Examiner is unable to separate the symptoms out,
  - The benefit of the doubt rule demands that the symptoms be assigned to the service-connected condition. 38 C.F.R. § 3.102.
VA’s Delay in Adjudication is not an Excuse to Assign the Wrong Rating

- “Staged Ratings” - entitlement to different disability ratings when condition fluctuates over time
  - Applicable to the time period during which a claim was pending if the condition has worsened, or improved during the pendency of the claim. *Fenderson v. West*, 12 Vet. App. 119 (1999).
- Must consider totality of the medical evidence
  - A single examination showing worse results may not be sufficient
- Practical applications:
  - VA’s citation to *Fenderson* does not mean the VA properly considered staged ratings.
  - Ensure that the VA is made aware of evidence demonstrating fluctuating levels of impairment, and specifically request staged ratings.
Compensation is Warranted for Different Manifestations of The Same Condition

- No veteran can be compensated twice for the same disability
- VA pressed this “anti-pyramiding” too far
- VA has sought an expansive view of what constitutes the “same disability” under section 4.14
  - Also tried to rate multiple manifestations of the same condition under a single diagnostic code
Compensation is Warranted for Different Manifestations of The Same Condition (cont’d)

  - Scenario - A veteran was service-connected for disfiguring, painful, facial scars that caused difficulty chewing
  - Each of these manifestations of disability was compensable under a distinct diagnostic codes
  - VA only rated under one DC because there was only one set of scars
- “The critical element is that *none* of the symptomatology for any one of these three conditions is *duplicative* of or *overlapping* with the symptomatology of the other two conditions.”
Compensation is Warranted for Different Manifestations of The Same Condition (cont’d)

- Practical applications:
  - Check for each possible manifestation of the veteran’s disability
    - Does the veteran’s back problem also cause radiculopathy?
    - Does the veteran’s gunshot wound cause limitation of motion and incontinence?
    - Are the veteran’s scars painful and disfiguring?
    - Does the veteran’s service-connected knee disability result in loss of range of motion and instability?
Analogous Ratings Must Match Symptoms & be Rated Accordingly

- Rating schedule does not cover everything
- If a condition is unlisted the VA rates by analogizing them to a disability that is in the rating schedule
  - Called “analogous ratings”
  - 38 C.F.R. § 4.20 – rate analogous to a disease or injury “in which not only the functions affected, but the anatomical localization and symptomatology are closely analogous.”
Analogous Ratings Must Match the Symptoms and be Rated Accordingly (cont’d)

- Helpful CAVC case law:
  - VA must choose the analogous DC that would result in the highest evaluation for the veteran, or at a minimum clearly explain why it has not done so. *Lendenmann v. Principi*, 3 Vet. App. 345 (1992).
    - Scenario - veteran suffered from a balance disorder caused by impaired blood flow to the brain
    - The VA assigned a non-compensable rating for labyrinthitis. The highest rating allowable for labyrinthitis is 30 percent.
    - Advocate argued should be rated as injury to blood vessels in the brain (DCs 8007-8009)
      - Highest rating would be 100 percent, and a minimum rating of 10 percent
Analogous Ratings Must Match the Symptoms and be Rated Accordingly (cont’d)

- Analogous DCs must be evaluated as if the veteran has the analogous condition. *Green v. West*, 11 Vet. App. 472 (1998)
  - Scenario - Claimed an increase for his service-connected lymphadenopathy rated under DC 7709. The VA conceded:
    - The condition was active;
    - Under DC 7709 a 100 percent evaluation is warranted during time of active disease or treatment;
    - Condition should be evaluated under the analogous DC 7709; and
  - Denied the claim for increase
  - Error - a 100 percent evaluation was proper because the veteran had met the criteria for a 100 percent scheduler rating under DC 7709
Analogous Ratings Must Match the Symptoms and be Rated Accordingly (cont’d)

- Practical applications:
  - Examine the rating schedule to be sure that the most analogous or closely related diagnostic code is assigned
  - Ensure that the VA applies the rating criteria as if the veteran suffered from the listed condition.
The Absence of Evidence is not Evidence of Absence

Scenario – A veteran seeks an increased rating for his service-connected skin condition of the ankles and feet.

- 50 percent requires that the condition be “extremely repugnant,” under 38 C.F.R. § 4.118, DC 7806
- VA denied because no medical evidence identified this characteristic
- Medical evidence does not reflect the condition as being “extremely repugnant” and
- The veteran will not receive a higher rating without evidence establishing that fact
- The VA denied the claim
The Absence of Evidence is not Evidence of Absence (cont’d)

- So where did the VA err?
  - VA used the lack of any evidence on the question of whether or not the veteran’s skin condition was “extremely repugnant,” as evidence that the condition was NOT “extremely repugnant.”
  - Problem in interpretation of the records’ silence

- Court overruled the VA
  - First “extremely repugnant” is not a medical term and thus there no reason for the examiner’s to described his condition in this way
  - Second, the evidence of record did not address the pertinent question and the VA was prohibited from interpreting this silence as evidence AGAINST the claim
The Absence of Evidence is not Evidence of Absence (cont’d)

- Small caveat
  - Silence can be taken as negative evidence in some circumstances

- Practical applications:
  - The absence of medical records on a particular subject is not necessarily evidence against the claim
    - Especially if the claim turns on a fact that the medical examiner would have no reason to note
Conclusion

- VA citation to a case or rule does not mean that the VA is applying it properly
- Make sure that the VA is reminded of these “gray areas” in rating