

# MEDICAL OPINIONS

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# MEDICAL OPINIONS

## OBJECTIVES

- What is a medical nexus opinion?
- What is the impact of a medical opinion?
- Medical opinion case law
- Significance of folder review
- Instructions for private medical opinion
- Preparing for VA Exam
- Summary of key points

# MEDICAL OPINIONS

## WHAT ARE MEDICAL NEXUS OPINIONS?

an opinion of a medical expert stating whether a medical condition is related to service.

# MEDICAL OPINIONS

## MEDICAL OPINIONS CAN BE FROM

- Private physicians/professionals
- VA physicians/professionals

# MEDICAL OPINIONS

## IMPACT OF MEDICAL OPINIONS:

- They provide evidence required in service connection claim to prove medical nexus element
- They provide evidence of current severity of service-connected disability per VA Rating Schedule

# MEDICAL OPINIONS

## VA/PRIVATE MEDICAL OPINIONS

- Must be credible and probative:
  - Credible = worthy of belief.
  - Probative = tending to prove or disprove.
- VA has duty to determine credibility and probative value and must give reasons for rejecting

# MEDICAL OPINIONS

## IMPACT OF PRIVATE MEDICAL NEXUS OPINIONS

- Establish key evidence based on facts most favorable to the veteran and give veteran best chance of winning
- Guides private physicians to develop positive medical evidence that can prevent VA from obtaining negative evidence and support a prompt grant of benefits
- Provide positive medical evidence in support of a claim and in the face of negative VA opinion can point out inconsistencies in VA's opinion

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## POTENTIAL IMPACT OF *GUIDED* VA MEDICAL OPINIONS

- Vet through NSO can submit lay/medical evidence into VA record or in person at exam (if allowed) which can be relied upon by VA examiner in making a positive medical nexus opinion
- If service-connected claim, veteran can submit private medical records into record for review of VA Dr. in support of higher rating

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## Leading Case Law

- *Kowalski v. Nicholson*: Court held that even though the Board may reject a medical opinion that is based on facts provided by the veteran when those facts have previously been found to be inaccurate or contradicted by other facts in the record, the BVA may not reject a medical opinion *solely* because the opinion was based on a history given by the veteran

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## Leading Case Law

- *Watai v. Brown* Court held that the Duty to Assist was specifically raised when the private physician expressed his inability to make a medical opinion due to his lack of access to the VA claims folder, and thus provided the private physician a copy of the VA claims folder

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## Leading Case Law

- *Nieves-Rodriguez v. Peake* held:
- That a “private medical opinion may not be discounted *solely* because the opining physician did not review the claims file” and that the “Board may not prefer a VA medical opinion over a private medical opinion *solely* because the VA examiner reviewed the claims file.”
- VA had no Duty to Assist in providing the VA claims file to a private physician unless the VA was put on notice that a private examiner was limited in making his opinion without the VA claim folder

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## Leading Case Law

*Nieves-Rodriguez v. Peake (continued):*

- For a private medical opinion to be probative, the private examiner must be qualified to provide an opinion and must be informed of the relevant facts pertinent to the case.
- Court stated that what is most important in a medical opinion is the physician's articulated, reasoned analysis based upon the relevant facts not bare statement that c-file reviewed.

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## Significance of C Folder Review

### ■ VA Medical Nexus Opinion:

- ◆ VA examiner must expressly note that C File was reviewed or advocate should return the case to VA based on inadequate exam

### ■ Private Medical Nexus Opinion:

- ◆ Even though *Nieves-Rodriguez* and *Kowalski* made clear review of VA C folder by private medical expert is not required, Courts pointed out that file is a record of the veteran's medical history and thus, contains many facts pertinent to the veteran's claim.

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## Significance of C Folder Review

- Needed where veteran's injury/disease is necessary to proving his/her claim
- Contains relevant documents over a period of time such as STRs, personnel and medical treatment history. Complete Medical and Lay history
- Reveals any negative medical and/or lay information contained in the VA claims folder

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## Instructions for Private Nexus Opinions

- Provide C file Copy (FOIA Request) Tab relevant docs
- Prepare Narrative of undisputed relevant facts
- Provide Legal Standards (i.e. direct, presumptive, combat rule, presumption of soundness)
- Explain “Medical Certainty” vs. “Benefit of the doubt”
- Magic Language
- Provide any available DBQs

# MEDICAL OPINIONS

## Instructions for Private Nexus Opinions

### Provide C file Copy

- Tab relevant docs because in many cases, voluminous and may contain docs irrelevant to making opinion.
- Tab STRs, relevant personnel, lay statements, medical treatment, VA exams and opinions

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## Instructions for Private Nexus Opinions

### Prepare Narrative

- Dates of service
- Combat veteran status
- All in-service and post service treatment for symptoms of the disorder.
- All evidence unique to claim (e.g. presumptive service connection)

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## Instructions for Private Nexus Opinions

List undisputed relevant facts

- List presumed facts setting forth their individual significance in proving the claim (*e.g.* combat rule/PTSD stressor)
- Essential to establish presumed facts for physician using combination and lay statements supporting all elements needed to support claim. *Kowalaski.* (*e.g.* presumptive/arthritis)

# MEDICAL OPINIONS

## **Instructions for Private Nexus Opinions**

Provide Relevant Legal Standards (i.e. direct, presumptive, combat rule, presumption of soundness)

- Instruct how legal standards work for your claim

## **Explain “Medical Certainty” vs. “Benefit of the doubt”**

- Non-VA doctors are usually trained to follow the “medical certainty” standard: much more stringent
- “Benefit of the Doubt”: light most favorable to veteran, 50% “as likely as not”, 51% or higher “more likely than not”

# MEDICAL OPINIONS

## Instructions for Private Nexus Opinions

### Magic Language and Specific Questions

- MD specifically notes review of VA claims folder or identifies evidence reviewed.
- S/C claim, MD use “as likely as not” or “more likely than not” language
- Increased rating claim, provide MD Rating Schedule language to use to describe level of disability
- Make sure MD is told not to provide a negative opinion

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## **Instructions for Private Nexus Opinions**

Provide any available DBQs

### What are DBQs?

- Disability Benefit Questionnaires (DBQs) are used to describe a medical disability following the VA Rating schedule
- May be used by private doc in lieu of VA doc

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## Requesting VA Medical Nexus Opinion

- Threshold for asking for VA opinion is low (*McLendon* case) to give rise to Duty to Assist
- For S/C claim, a vet's lay statement describing *persistent or recurrent* symptoms of disability *and* evidence shows condition may be linked to service.
- **Increased Rating Claims:** Vet's lay stmt describing current symptoms of increased severity **and** states condition has worsened since last VAX.

# MEDICAL OPINIONS

## Preparing Vet for Compulsory VA Exam

- Make sure evidence submissions to VA are made prior if elements of claim are missing in C file
- Take private treatment records and lay statements if VA doctor will accept. Provide DBQs by private doc
- Make sure Vet is scheduled for proper exams (e.g. new PTSD exam, Korea/Agent Orange)
- Coach and encourage Vet to be calm and forthcoming

# MEDICAL OPINIONS

## SUMMARY: NSO Advice: Inadequate VA Exams

- VA doc must provide reasons and bases for opinion
- VA doc must provide opinions on all areas of entitlement (e.g. aggravation, presumptive, etc.)
- VA doc must review C file

# MEDICAL OPINIONS

## **SUMMARY: NSO Advice:**

### **Inadequate VA Exams**

- VA must base opinion on relevant facts/law (e.g. combat rule, presumption of soundness)
- VA doc must apply current Case law (e.g. Hensley)
- VA doc must consider all evidence of record incl. lay evidence.

# MEDICAL OPINIONS

## **SUMMARY: NSO Advice:**

### **VA Opinion Chosen over Private Medical Opinion**

- VA may not automatically give greater weight to VA physician findings. *Nieves-Rodriguez*
- VA cannot reject private medical opinion based solely on basis that private physician relied upon veteran's undisputed factual history. *Kowalaski*

# MEDICAL OPINIONS

## **SUMMARY: NSO Advice:**

### **Inadequate VA Exams**

- VA cannot reject private medical opinion based solely on basis that C file not reviewed. *Nieves-Rodriguez*
- VA must state its reasons and bases for rejecting private medical opinion in favor of VA. *Nieves-Rodriguez*

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