

LAY STATEMENTS

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LAY STATEMENTS

OBJECTIVES

What are lay statements?

Impact of lay statements!

How lay statements can support claims!

LAY STATEMENTS

WHAT IS A LAY STATEMENT?

a statement from person who does not possess any special expertise as medical expert but can provide evidence of pertinent facts through first-hand knowledge or observation

LAY STATEMENTS

LAY STATEMENTS CAN BE FROM

- Claimant
- Comrades in arms
- Family
- Friends
- Co-workers

LAY STATEMENTS

IMPACT OF LAY STATEMENTS

They can help substantiate:

- Event or injury in service
- Symptoms of a condition
- Frequency of symptoms
- Severity of symptoms
- Effects of a condition on daily activities and employment

LAY STATEMENTS

IMPACT OF LAY STATEMENTS

- Helps establish history of the condition from service to present
- Best, if supported by evidence Vet. possesses during service:
 - e.g. letters, e-mails, or photographs

LAY STATEMENTS

IMPACT OF LAY STATEMENTS

- 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

LAY STATEMENTS

CAN SUPPORT OR PROVE

Elements of service connection

- Event/injury in service
- Aggravation of a pre-existing condition
- Nexus
- Current chronic disability

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

- Historically: Needed notation in STRs
- Today, veteran's lay statement supported by buddy statements may be enough to prove in-service incurrence or aggravation

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

- VA "cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence." *Buchanan v. Nicholson*
 - ◆ *NSO advice*: Buchanan is a good case to cite if no record of injury/medical treatment in STRs

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

- Most probative when issue relates to observable event, symptom, or condition *and*
- does not involve a medical question.
 - ◆ *Exception: When lay statements can prove medical condition in service*

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

- Lay statements have more weight when supported
 - ◆ by correspondence at time of event or
 - ◆ buddy/family statements that knew veteran at time of event or injury in service
- Combination may be enough to prove in-service incurrence or aggravation

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

- Writers of lay statements should describe personal observation or what was told to them by the veteran at the time.
- Writers should not give medical diagnoses!

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

- **Combat injury:** Veteran “engaged in combat” is given special consideration of what happened in the line of duty. 38 U.S.C.S. 1154(b)
- Combat medals recipients are shoe in 1154(b) as long as event or injury happened during combat.
- If combat medal not listed on DD-214,
- NSO should request VA to make a specific finding about whether a veteran engaged in combat.

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CAN SUPPORT OR PROVE

Event or Injury in Service

- Lay statements ref combat sufficient if
 - ◆ Satisfactory or credible;
 - ◆ Consistent with the conditions, circumstances, and hardships of service,
 - ◆ No clear and convincing evidence that in-service disease/injury/event didn't occur during service

LAY STATEMENTS

CAN SUPPORT OR PROVE

Event or Injury in Service

Even with the special consideration of the combat rule the advocate must be diligent in making sure that lay statements are not contradicted in the record.

LAY STATEMENTS

CAN SUPPORT OR PROVE

Aggravation

- **Best evidence:** Documentation of increase in severity in a veteran's STRs.
- **Second best:** lay statements can be used to support a claim for aggravation.
- **Key:** observations of worsening physical condition or of physical/mental complaints as opposed to language of medical diagnosis/condition

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CAN SUPPORT OR PROVE

Current Disability

- Rare that lay stmts. alone are sufficient to establish current disability, NSOs should get a medical DX.
- **However**, Courts have held that if a disability is the type that can be observed by a lay person, medical evidence may not be necessary to establish its existence, e.g., broken leg, lost limb

LAY STATEMENTS

CAN SUPPORT OR PROVE

Current Disability

- *Jandreau v. Nicholson* held Lay evidence can establish diagnosis when the individual
 - ◆ is competent to identify medical condition, or
 - ◆ is reporting contemporaneous medical diagnosis, or
 - ◆ describes symptoms at the time which is later supported by a medical diagnosis

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CAN SUPPORT OR PROVE Current Disability

- **Examples:** varicose veins, flat feet, broken leg, lost limb and ear fungus
- If lay evidence alone not sufficient to prove disability, NSO should argue lay statement gives rise to VCAA's Duty to Assist and Vet should be afforded VA exam

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CAN SUPPORT OR PROVE

Nexus

Davidson v. Shinseki (Fed Circ) rejected categorical statement that a medical opinion is required to prove nexus. Court held such determination must be made on case by case basis.

- Widow claimed vet committed suicide due to PTSD

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CAN SUPPORT OR PROVE

Nexus

NSO Advice: Prior to VA exam submit lay statements which link the condition to service. The lay statement may positively influence the medical opinion.

LAY STATEMENTS

CAN SUPPORT OR PROVE Continuity of Symptomatology

- A requirement when chronic condition is not shown during service. *See* 38 C.F.R. § 3.303(b)
- Provides VA evidence that condition was not acute and transitory but continued from service until formally diagnosed

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CAN SUPPORT OR PROVE

Continuity of Symptomatology

- Ideally, NSOs should submit medical *and* lay evidence showing continued medical treatment and symptomatology since service.
- Lack of or unavailability of medical records allows VA to quickly deny a claim for lack of evidence

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CAN SUPPORT OR PROVE Continuity of Symptomatology

- No need for Continuity of Symptomatology if:
 - ◆ chronic conditions shown in service
 - ◆ diseases with latent onset (e.g. PTSD, ALD)
 - ◆ Presumptive conditions 38 CFR 3.307 & 3.309

LAY STATEMENTS

NSO Advice: Assist veteran/comrades/relatives with first hand knowledge or recollection of Vet's condition as close to discharge as possible

- ◆ Statements should describe unique observations highlighting Vet's difficulty dealing with disability
- ◆ Statements should not conflict with Vet's statement, STRs, personnel records

LAY STATEMENTS

Remember *Buchanan*

VA cannot reject Vet's uncorroborated lay statements concerning his continuity of symptomatology merely because contemporaneous medical records are silent as to complaints, symptoms or treatment for the relevant condition.

LAY STATEMENTS

CAN SUPPORT OR PROVE Presumptive Service Connection

- Lay statements of presumed or undisputed facts are very important.
 - ◆ Ex.: Vet claiming S/C arthritis: statements of painful motion within a year of service separation as presumed fact in support of 10% manifestation under presumptive S/C theory

LAY STATEMENTS

CAN SUPPORT OR PROVE

New and Material (N&M)

- To reopen a denied SC claim you must provide N&M evidence to reopen. 38 C.F.R. § 3.156
 - ◆ required to show elements lacking in original claim.
 - ◆ In-service event, disability, nexus

LAY STATEMENTS

CAN SUPPORT OR PROVE

New and Material (N&M)

- *Fortuck v. Principi*. lay statements by themselves, presuming their credibility, or in connection with evidence previously assembled may be so significant that they must be considered in order to fairly decide the merits of the claim.
- *Shade v. Shinseki*. N&M evidence is evidence that would either entitle the claimant to benefits or to some further assistance from the Secretary in gathering evidence that could lead to the granting of the claim.

LAY STATEMENTS

CAN SUPPORT OR PROVE

Increased Evaluations

- If Vet provides detailed lay statement describing current symptoms of increased severity **and** states condition has worsened since last VA Exam, VA may have Duty to Assist in new VA Exam conducted more than a couple of years ago

LAY STATEMENTS

CAN SUPPORT OR PROVE

New S/C Claims and Duty to Assist (DTA):

- Lay statements alone may give rise to VA's DTA
 - ◆ If describes *persistent* or *recurrent* symptoms
 - ◆ evidence shows condition may be linked to service.
 - ◆ VCAA requires VA to provide VAX to assess whether Vet has a current disability.
 - ◆ *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006)

LAY STATEMENTS

CAN SUPPORT OR PROVE PTSD

- lay statements alone can help establish PTSD.
- If "consistent with the circumstances, conditions, or hardships of the veteran's service."
- VA has burden to rebut by clear and convincing evidence

LAY STATEMENTS

CAN SUPPORT OR PROVE PTSD Due to Personal Assault

- These types of cases have little or no evidence of assault
- Lay statements can help build claim - circumstantial evidence - to show traumatic event occurred.

LAY STATEMENTS

Conclusion

Lay Statements are an important NSO tool if they are

- Clear, concise & non-contradictory
- Used judiciously – quality v quantity
- Used to corroborate the claim/evidence

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