MEDICAL EXAMS

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MEDICAL EXAMS

CLASS OBJECTIVES

- Asking for VA examination
- Preparing DBQs
- Preparing veteran BEFORE exam
- Ensuring VA exam is adequate
- Private Exam tips.
MEDICAL EXAMS

IMPACT:

- Exams provide evid. required in S/C claim to prove nexus

- Exams provide evid. of current severity of service-connected disability per VA Rating Schedule
REQUESTING VA EXAM

New S/C Claims and Duty to Assist:
Lay stmts alone may give rise to VAX if:

• it describes persistent or recurrent sx of disability and evid. shows may be linked.

VCAA requires VA to provide VAX to assess whether Vet has a current disability. 
McLendon v. Nicholson
REQUESTING VA EXAM

Increased Rating Claims:

- If Vet provides lay stmt describing current symptoms of increased severity AND states condition has worsened since last VAX, VA may have Duty to Assist in new VAX conducted more than a couple of years ago.
REQUESTING VA EXAM

PTSD EXAMS

• If combat Vet or Vet under new rule, lay stmts alone can establish PTSD stressor occurred.

• See 38 U.S.C.S. 1154(b), 38 C.F.R. 3.304(f)(2) and New PTSD rule 3.304(f)(3). (The veteran must still show a current PTSD dx related to service stressor.)
REQUESTING VA EXAM

• **New & Material Cases**

• **If Vet previously denied S/C decision becomes final, Vet must provide N & M evidence to reopen.** 38 C.F.R. § 3.156

• **To reopen, Vet required to show 1 element lacking in original claim.**
REQUESTING VA EXAM

• **New & Material Cases**

• **Most often, evidence needed is medical evidence:** medical dx (i.e. current disability) or medical opinion (i.e. nexus)

• **If can't reopen, VA will not assist with VAX or medical nexus opinion.** 38 C.F.R. § 3.159(c)(4)(iii)
REQUESTING VA EXAM

- **USE LAY STATEMENTS!!!**
- May not be necessary in all cases to submit medical evidence of the lacking medical diagnosis or medical nexus in order to reopen a claim. *Fortuck v. Principi.*
- NSO should make sure there are lay statements of symptomatology and continuity.
Disability Benefit Questionnaires

What are DBQs?

• Disability Benefit Questionnaires (DBQs) are used to describe medical disability following VA Rating schedule

• May be used by private doc in lieu of VA exam
Disability Benefit Questionnaires

- DBQs are available on VA *intranet*
- **VERY IMPORTANT:** NSO should assist Vet in filing out Qs *before* exam.
- If Qs answered well, Vet will benefit from highest possible rating.
PREPARING FOR EXAM

Preparing Vet BEFORE exam

- Make sure evidence submissions to VA are made prior to exam if elements of claim are not in C file

- Make sure Vet is scheduled for proper exams (e.g. new PTSD exam, Korea/Agent Orange)
PREPARING FOR EXAM

Preparing Vet BEFORE exam

- Assist Vet in filing out DBQs. Ask Private Doctor to fill out DBQs.

- Take private tx recs and lay stmts if VA Dr. will accept.
PREPARING FOR EXAM

Have Vet call you before exam:

Advise Vet to attend:

- Wear normal clothing
- Give detailed complaints
- Be coherent
- Remain calm
ADEQUACY OF EXAM

WHAT TO LOOK FOR:
Did VA Exam EXPRESSLY NOTE C-Folder Review?

- IF S/C claim, VA Dr. must expressly note C File reviewed or advocate should return the case to VA based on inadequate exam. 
  Nieves-Rodriguez v. Peake.
ADEQUACY OF EXAM

Is Examiner APPROPRIATE expert?

- For opinion to be probative, the Dr. must be qualified to provide opinion and informed of relevant facts.

*Nieves-Rodriguez v. Peake*
ADEQUACY OF EXAM

Were body systems properly reviewed?

- Check applicable rating codes
- Check VA Clinicians Guide
- Ex.: If orthopedic condition, were Deluca factors discussed? (e.g. if painful motion, was it noted where pain began?)
ADEQUACY OF EXAM

Did VA provide correct law? Was it applied by VA Dr.?

- “as likely as not” standard
- Combat rule (e.g. PTSD cases)
- New and Material cases
- *Hensley* for hearing loss
- Presumptive conditions
ADEQUACY OF EXAM

Were there ADEQUATE REASONS and BASIS for opinion?

MOST IMP.: Dr.’s articulated, reasoned analysis based upon relevant facts not bare stmt c-file reviewed.

*Nieves-Rodriguez v. Peake*
ADEQUATE EXAM SUMMARY

VA Exams MUST:

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

Leading Case Law

- Duty to Assist is specifically raised when private Dr. *expresses* inability to make med. opinion due to lack of access to VA C-folder. VA must provide private Dr. VA C-folder copy. *Watai v. Brown*
PRIVATE OPINION TIPS

Leading Case Law

- A “private medical opinion may not be discounted solely because the opining physician did not review the claims file” Nieves-Rodriguez v. Peake citing Kowalski v. Nicholson

- “Board may not prefer a VA medical opinion over a private medical opinion solely because the VA examiner reviewed the claims file.” Nieves-Rodriguez v. Peake
PRIVATE OPINION TIPS

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
- Print and Assist answering any available DBQs
SUMMARY: PRIVATE OPINION TIPS

If 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 private Dr. relied on Vet’s undisputed factual hx. *Kowalaski*

• 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*