

Federal Jurisprudence Regarding VA’s Duty to Provide a Medical Examination: Preserving the Uniquely Pro-Claimant Nature of VA’s Adjudicatory System While Providing Timely Decisions

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INTRODUCTION

The Department of Veterans Affairs (VA) system of claims adjudication has long been viewed as “uniquely pro-claimant” in how it serves the needs of individual veterans who file claims for compensation.² This pro-claimant nature is most clearly exemplified by VA’s duty to assist the veteran in the development of his or her claim.³ At the same time, VA also strives to ensure that veterans receive timely decisions in the face of an ever-increasing volume of claims. For this latter purpose to be served, there must be reasonable restrictions put on the duty to assist in order to avoid expending resources on claims without potential merit; thus avoiding an increase in the time it takes to begin and complete development of potentially meritorious claims.

One particularly important part of VA’s duty to assist is the duty to provide medical examinations. Since the inception of the United States Court of Appeals for Veterans Claims (Court) in 1988,⁴ the statutory, regulatory and case law pertaining to the duty to provide such examinations has evolved. This in turn has affected how VA adjudicators, including those at the Regional Offices (ROs) and the Board of Veterans’ Appeals (Board), must proceed to ensure that all veterans receive necessary examinations and medical opinions and to ensure that claims

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² See *Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002); *Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000); *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000).

³ See generally 38 U.S.C. § 5103A (2000).

⁴ Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (providing for the establishment of the United States Court of Veterans Appeals); 38 U.S.C. § 7251 (Supp. 1998) (renaming the United States Court of Veterans Appeals as the United States Court of Appeals for Veterans Claims).

processing is not subject to unnecessary delay. This article examines how the law pertaining to the provision of VA examinations has evolved to its current state from the time that the Court came into existence. It concludes by delineating some basic precepts for adjudicators to follow when determining whether a VA examination or medical opinion is required.

I. STATUTORY AND REGULATORY BACKGROUND PERTAINING TO VA’S DUTY TO PROVIDE MEDICAL EXAMINATIONS

At the time the Court was established in 1988, the statutory provision outlining VA’s duty to assist indicated that:

Except when otherwise provided by the Administrator in accordance with the provisions of this title, a person who submits a claim for benefits under a law administered by the Veterans’ Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist such a claimant in developing the facts pertinent to the claim.⁵

The provision indicated that VA had a duty to assist the veteran in claims development and indicated that the claimant had to initially meet the threshold requirement of submitting a “well-grounded claim.” The plain language of this provision was obviously pro-claimant in that it provided for VA assistance. At the same time, the well-groundedness requirement appeared to limit the expending of VA resources to claims that had potential merit. On its face, however, the provision did not clearly stipulate whether VA would provide assistance with any claim for benefits or if it would only assist after a claim was found to be well grounded.

In interpreting this provision, the Court provided its own definition of well-groundedness. It noted that “[a] well grounded claim is a plausible claim, one which is meritorious on its own or capable of substantiation”⁶ and

⁵ 38 U.S.C. § 3007(a) (1988), recodified as 38 U.S.C. § 5107(a) (Supp. 1992) (substituting “Secretary” for “Administrator” and “administered by the Secretary” for “administered by the Veterans’ Administration”).

⁶ *Murphy v. Derwinski*, 1 Vet. App. 78, 81 (1990).

found that to be well grounded a claim must be accompanied by supportive evidence.⁷ In the context of service-connection claims, the Court required that “in order for a claim to be well grounded, there must be competent evidence of current disability (a medical diagnosis) (citations omitted); of incurrence or aggravation of a disease or injury in service (lay or medical evidence) (citations omitted); and of a nexus between the in-service injury or disease and the current disability (medical evidence) (citations omitted).”⁸

Later, the United States Court of Appeals for the Federal Circuit (Federal Circuit) upheld the Court’s resolution of the apparent statutory ambiguity as to when the duty to assist attached.⁹ The Federal Circuit explicitly held that the statute “requires a claimant to submit and establish a ‘well grounded’ claim before [VA] is required to provide assistance to [that] claimant in developing the facts underlying his or her claim.”¹⁰ Subsequent to this holding, the Court expanded on this reasoning in *Morton v. West*.¹¹ The opinion noted that the statute:

[U]nequivocally places an initial burden on a claimant to produce evidence that the claim is well grounded or . . . plausible. (citations omitted) [It] reflects a policy that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which - as well grounded - require adjudication Attentiveness to this threshold issue is, by law, not only for the Board but for the initial adjudicators, for it is their duty to avoid adjudicating implausible claims at the expense of delaying well-grounded ones.¹²

In response to the ruling in *Morton*, the United States Congress (Congress) enacted the Veterans Claims Assistance Act of 2000 (VCAA), the current statutory scheme outlining VA’s duty to notify and assist claimants in substantiating a claim for VA benefits.¹³ In so doing, United

⁷ See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995).

⁸ *Id.*

⁹ *Epps v. Gober*, 126 F.3d 1464 (Fed. Cir. 1997).

¹⁰ *Id.* at 1469.

¹¹ 12 Vet. App. 477 (1999) .

¹² *Id.* at 480.

¹³ Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 U.S.C. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (2000 & Supp. 2005); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2007).

States House of Representatives (House) proceedings noted that the “bill [would] restore the balance in the [system] [The VA system was] specifically designed to be claimant friendly. It is nonadversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits.”¹⁴ The proceedings also found that the decision in *Morton* and previous Court decisions “construing the meaning of [the well-grounded provision had] constructed a significant barrier to veterans who need assistance in obtaining information and evidence in order to receive benefits from VA.”¹⁵ Consequently, the legislation eliminated the requirement that a claim must be well grounded and the requirement that VA assistance could only attach to a claim that was well grounded.¹⁶

The passage of the VCAA resulted in the enactment of 38 U.S.C. § 5103A(d), which indicates the circumstances in which a VA examination or medical opinion is required to make a decision on a claim for service-connected compensation. An examination or opinion is necessary:

[I]f the evidence of record . . . taking into consideration all information and lay or medical evidence (including statements of the claimant)— (A) contains competent evidence that the claimant has a current disability, or persistent or recurrent symptoms of disability; and (B) indicates that the disability or symptoms may be associated with the claimant’s active military, naval, or air service; but (C) does not contain sufficient medical evidence for the Secretary to make a decision on the claim.¹⁷

In explaining the reasoning behind the new provision, United States Representative Evans noted that Committee staff had reviewed a number of cases where the record before VA claims adjudicators included “evidence of a current disability and an indication of a potential in-service incident or series of events which may have caused or aggravated the disability, but VA ha[d] failed to obtain a medical opinion concerning the relationship between the two.”¹⁸

¹⁴ 146 CONG. REC. H9912-01, H9913 (daily ed. Oct. 17, 2000) (statement of Rep. Stump).

¹⁵ *Id.*

¹⁶ *Id.* at H9914.

¹⁷ 38 U.S.C. § 5103A(d) (2000).

¹⁸ 146 CONG. REC. H9912-01, H9917 (daily ed. Oct. 17, 2000) (statement of Rep. Evans).

United States Representative Evans gave the example of a paratrooper who had made multiple jumps in service, had current arthritis of the knees, and had indicated that the current arthritis was due to the jumps.¹⁹ Representative Evans indicated his expectation that under the new provision a VA examination or opinion would be required prior to making a decision on such a paratrooper's claim.²⁰

The explanatory language contained in the House proceedings also provides specific comment on the new VA examination provision. The language indicates that it was the committee's intent that the term "disability" cover both injuries and disease, including symptoms of undiagnosed illness.²¹ It also indicates that the provision's description of the threshold requirement for obtaining a VA medical examination or opinion was based on an understanding that evidence must be "fit for the purpose for which it is offered."²² Thus, "[c]ompetent evidence would be evidence that is offered by someone capable of attesting to it [and] need not be . . . credible or sufficient to establish the claim."²³ The veteran could competently testify that he had knee pain since that testimony is fit for the purpose for which it is offered.²⁴ The veteran's assertion that he had a torn ligament, however, would not in and of itself constitute competent evidence as this is a medical finding "that would require more sophisticated information, such as the results of a medical examination or special medical testing."²⁵

United States Representative Filner noted that the new provision pertaining to VA examinations would redress problems veterans had experienced with the prior well-groundedness standard.²⁶ Specifically, veterans had been informed by VA that they needed to provide specific evidence of a nexus between service and their currently claimed disability before their claim would be considered well grounded.²⁷ Also, even if

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at H9915 (statement of Rep. Stump).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at H9917-18 (statement of Rep. Filner).

²⁷ *Id.*

veterans who had not produced such medical nexus evidence were being treated by a VA physician, VA would still not afford them a medical examination or opinion that might result in the production of such medical nexus evidence.²⁸ Thus, if such veterans hoped to proceed to the point where VA might make a decision on the merits of their claim by establishing well-groundedness, they would have to be able to “purchas[e] [a] medical opinion [] at their own expense.”²⁹

The VCAA also created a more general duty to assist provision.³⁰ In regard to this provision United States Representative Evans noted that:

[It] is intended to provide VA with the flexibility to make whatever reasonable efforts are needed in order to properly adjudicate the particular claim. If a pension applicant needs a medical examination to determine disability, [I] fully expect VA to provide a medical examination. If a medical evaluation or opinion is needed to resolve conflicts in the medical evidence related to a service-connected claim, [I] fully expect VA to obtain the requisite examination or opinion. The special provisions mandated for service-connected claims in some circumstances is not, and should not be interpreted by VA, as a license to ignore the general duty to assist provided in the same bill.³¹

Section 5103A(e) of the VCAA indicates that VA will create regulations to carry out the VCAA provisions governing required medical examinations for compensation claims under section 5103A(d).³² In response, VA promulgated 38 C.F.R. § 3.159(c)(4) which provides:

²⁸ *Id.* at H9918.

²⁹ *Id.*

³⁰ 38 U.S.C. § 5103A(a)(1) (“The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim for a benefit under a law administered by the Secretary.”); *id.* § 5103A(a)(2) (placing some limitation on the duty to assist, however, by indicating that “[t]he Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.”).

³¹ 146 CONG. REC. H9912-01, H9917 (statement of Rep. Evans).

³² 38 U.S.C. § 5103A(e).

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but: (A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability; (B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316 and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and (C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.³³

The regulation further defines competent lay evidence as “any evidence not requiring that the proponent have specialized education, training, or experience” and notes that “[l]ay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.”³⁴ On its face, the regulation furthers congressional intent as expressed in the House proceedings. Consistent with the concept that evidence be fit for the purpose for which it is offered, the regulation explicitly recognizes that lay evidence can be competent for purposes of demonstrating the existence of a current disability or symptoms thereof.³⁵ In keeping with the concern that veterans not bear the entire burden of producing medical nexus evidence, the regulation contemplates that in cases where the record contains evidence simply indicating an association between an established event, injury or disease in service and current disability, but does not contain evidence sufficient to decide the claim, a VA examination will be provided.³⁶ The

³³ 38 C.F.R. § 3.159(c)(4).

³⁴ *Id.* § 3.159(a)(2).

³⁵ *Id.* § 3.159(c)(4)(A).

³⁶ *Id.* § 3.159(c)(4).

remainder of this article will examine the case law directly interpreting 38 U.S.C. § 5103A(d) and 38 C.F.R. § 3.159(c)(4),³⁷ related case law pertaining to the competency and credibility of lay and medical testimony, and case law pertaining to the necessity of providing medical examinations or opinions for claims other than for direct service connection. The article will also provide commentary on the application of this legal authority.

II. CASE LAW PERTAINING TO THE NECESSITY OF VA'S DUTY TO PROVIDE A MEDICAL EXAMINATION UNDER 38 U.S.C. § 5103A(D) AND 38 C.F.R. § 3.159(C)(4)

In *Charles v. Principi*, the record contained a VA examination which diagnosed the veteran as having tinnitus and the veteran's testimony that he was exposed to acoustic trauma in service from various weapons systems and heavy equipment and that he had ringing in his ears since service.³⁸ Consequently, the veteran contended that he was entitled to

³⁷ In *Paralyzed Veterans of America v. Secretary of Veterans Affairs*, 345 F.3d 1334, 1355 (Fed Cir. 2003), the petitioner asserted that 38 C.F.R. § 3.159(c)(4) was inconsistent with 38 U.S.C. § 5103A(d). In particular, the petitioner argued that the regulation included a requirement not present in the statute—that is, an established event, injury, or disease in service. *Id.* at 1355. The Federal Circuit explicitly rejected this assertion:

[W]e can see no significant distinction between the statutory and regulatory language. . . . [Section] 5103A(d) states a general rule that a medical examination must be provided or medical opinion obtained when necessary to decide a claim, followed by a list of conditions or criteria sufficient to make an examination or opinion necessary to decide a claim. Section 3.159(c)(4)(i) does the same by mirroring the statutory criteria. Thus, we fail to see how the regulation contravenes the clear language of the statute or Congress's intent.

Id.

The Federal Circuit also noted that the added provision requiring evidence establishing an event, injury or disease in service “represents a reasonable way for VA to fill in the gaps left in the statute.” *Id.* at 1356. Under the VCAA, VA “is not required to provide assistance to a claimant, including a medical exam, if ‘no reasonable possibility exists’ that such assistance would aid in substantiating a claim.” *Id.* (citing 38 U.S.C. § 5103A(a)(2)). Thus, it was “not unreasonable” for VA to include a requirement that the evidence establish an event, injury or disease in service prior to providing assistance in the form of a medical examination or opinion. *Id.* at 1356. If the record evidence does not establish an in-service event, injury, or disease, no reasonable possibility exists that . . . providing a medical examination or opinion, would aid in substantiating the claim. This is so because a medical examination or opinion generally could not fill the gap [i.e., the lack of evidence establishing an event, injury or disease in service] left by the other evidence in establishing a service connection. *Id.*

³⁸ 16 Vet. App. 370, 371 (2002).

receive a VA medical examination or opinion to specifically determine whether there was a nexus between service and his current tinnitus.³⁹ The Court noted that while the veteran's claim was pending, Congress had enacted the VCAA, including the provision indicating when a medical examination was required. The Court then found that since the veteran had been diagnosed as having tinnitus, the record contained "competent evidence that [he] ha[d] a current disability."⁴⁰ Also, the veteran had reported that "he had experienced ringing in his ears (i.e., tinnitus) in service and that he ha[d] experienced such ringing ever since service" and was competent to make such report because "ringing in the ears is capable of lay observation."⁴¹ Accordingly, the Court concluded that because there was competent lay evidence of tinnitus from service until the present and a current medical diagnosis of tinnitus, there was sufficient evidence to "indicate that the [veteran's] disability . . . may [have been] associated with his active service."⁴² Thus, the first two elements of the statute had been satisfied. The Court then further found that there was insufficient evidence to decide the veteran's claim as there was no medical opinion of record indicating whether there was a nexus between his current tinnitus and his military service. The Court thus held that the veteran was "entitled to such a medical nexus opinion" under 38 U.S.C. § 5103A(d).⁴³

Subsequently, in *Wells v. Principi*, the Federal Circuit analyzed VA's duty to provide a medical examination or opinion.⁴⁴ In *Wells*, the veteran had submitted evidence from his private physician indicating that he had current disabilities including a hernia, degenerative disc disease, and residuals of injuries to both knees.⁴⁵ The veteran then essentially contended that "once a veteran shows that he is disabled . . . that triggers [VA's] obligation under § 5103A(d) of 'providing a medical examination or obtaining a medical opinion.'"⁴⁶ The Federal Circuit explicitly rejected this argument, noting that "[s]ince veterans' disability claims ordinarily are made only when the veteran contends that he is disabled, the effect of [the veteran's] contention would be to eliminate the specific limitations

³⁹ *Id.* at 373.

⁴⁰ *Id.* at 374.

⁴¹ *Id.*

⁴² *Id.* at 374-75.

⁴³ *Id.* at 375.

⁴⁴ 326 F.3d 1381 (Fed. Cir. 2003).

⁴⁵ *Id.* at 1382.

⁴⁶ *Id.* at 1384.

on [VA's] obligation to provide a medical examination or obtain a medical opinion in a large number of cases."⁴⁷ The Court then noted that since the record did not contain evidence that the veteran's disabilities were "associated with his service," a VA medical examination was not required.⁴⁸

In *Duenas v. Principi*, the veteran had in pertinent part claimed service connection for heart disease, poor vision, and hearing loss disability.⁴⁹ The record contained a service separation report noting an abnormality of the cardiovascular system - tachycardia - but no other pertinent abnormalities, and a statement from the veteran indicating that he currently experienced "difficulty in breathing, easy fatigability, and . . . [a] recurring rapid heartbeat," that these symptoms were manifestations of his claimed disabilities, and that he had experienced them since separation.⁵⁰ On appeal, the veteran argued that the Board had erred by not finding that he was entitled to a VA medical examination pertaining to all three of his claims.⁵¹

At the outset of the Court's analysis, it noted that when deciding whether a VA medical examination is necessary:

[T]he Board is required to provide a written statement of the reasons or bases for its conclusion. (citation omitted) That statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review [by the] Court. (citation omitted) To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. (citation omitted)⁵²

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 18 Vet. App. 512, 513 (2004).

⁵⁰ *Id.* at 514-15.

⁵¹ *Id.* at 515.

⁵² *Id.* at 517 (citing 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990); *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995)).

In regard to the veteran's claims for hearing loss and poor vision, the Court found that the Board had not provided adequate reasons and bases for finding that a medical examination pertaining to these two alleged disabilities was not necessary.⁵³ The Court found that such error was not prejudicial, however.⁵⁴ Specifically, the Court noted that "even assuming that [the veteran's] statement constitutes 'competent lay . . . evidence of . . . persistent or recurrent symptoms' of poor vision and a hearing-loss disability, it [did] not address, and there [was] no other evidence in the record that reflect[ed], that he 'suffered an event, injury [,] or disease in service' that may [have been] associated with those symptoms."⁵⁵ Thus, the Court concluded that there was no reasonable possibility that assistance in the form of a medical examination would have helped substantiate either of these claims.⁵⁶

Regarding the claim for heart disease, the Court also found that the Board had failed to provide adequate reasons and bases for finding that a medical examination was not necessary:

To support its conclusion properly, the Board was required to address (1) whether difficulty in breathing, easy fatigability, and a recurring rapid heartbeat are symptoms of heart disease; (2) whether Mr. Duenas's statement was competent evidence that he has experienced those symptoms since his separation from service (citation omitted); (3) what tachycardia is and whether the symptoms that Mr. Duenas has experienced since service may be associated with his in-service tachycardia (citation omitted); and (4) why 'no reasonable possibility' existed that an examination would aid in substantiating Mr. Duenas's claim.⁵⁷

The Court noted that the Board did not address any of these issues.⁵⁸

Further, because the record included "an in-service notation of tachycardia, which the examining medical officer noted as an abnormality

⁵³ *Id.* at 518-19.

⁵⁴ *Id.* at 519.

⁵⁵ *Id.* at 519 (quoting 38 C.F.R. § 3.159(c)(4)(i)).

⁵⁶ *Id.* at 519.

⁵⁷ *Id.* at 518.

⁵⁸ *Id.*

of the cardiovascular system,⁵⁹ along with the veteran's assertions that he had experienced cardiovascular symptoms from service to the present, the Court found it could not conclude that a medical examination could not have helped substantiate the veteran's claim. Thus, it could not find that the failure to provide adequate reasons and bases was non-prejudicial. Accordingly, the Court remanded the claim to the Board, apparently to make a specific determination as to whether a VA examination or opinion was warranted, and if not, to provide specific reasons and bases why such examination was not warranted.⁶⁰

The most intensive case law analysis of the VCAA medical examination provisions to date comes in *McLendon v. Nicholson*.⁶¹ In *McLendon*, the Court reviewed a Board decision that had denied service connection for low back disability and had found that a VA examination was not required to appropriately adjudicate the veteran's claim.⁶² On appeal, the veteran alleged that during his service in Spain in the mid-1960s he "was standing in a landing craft on the beach . . . when [he] fell back into the boat and landed on [his] back on a steel lifting ring."⁶³ He also submitted statements from two private physicians, both of which indicated the veteran had a current low back disability and that the disability could have resulted from his alleged injury in service.⁶⁴

In making a determination as to whether a VA medical examination was required, the Court first looked at what it referred to as the first element under 38 C.F.R. § 3.159(c)(4): "whether there [was] competent evidence of a current disability or persistent or recurrent symptoms of a disability."⁶⁵ The Court noted that satisfaction of this

⁵⁹ *Id.* at 519.

⁶⁰ *Id.*

⁶¹ 20 Vet. App. 79 (2006).

⁶² *Id.* at 80-81 (indicating the Board's overall conclusion that a medical examination was unnecessary *de novo* as it was a question of law subject to the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard of review). The Board's findings leading to this conclusion were reviewed through use of a "multifaceted" standard, however, as analysis pertaining to different elements of 38 C.F.R. § 3.159(c)(4) involved either questions of law, questions of fact or both. *Id.*

⁶³ *Id.* at 80

⁶⁴ *Id.*

⁶⁵ *Id.* at 81.

element does not require a “weighing of competing facts.”⁶⁶ Instead, it simply involves determining whether the record contains evidence of a current disability or of recurrent symptoms of a disability and if so, whether that evidence is competent.⁶⁷ The Court then found that this element had been satisfied as the Board had already affirmatively determined that it was clearly established that the veteran had a current low back disability.⁶⁸

The Court next looked to the second element, “whether the evidence establishes that the claimant suffered an in-service event, injury, or disease.”⁶⁹ The Court noted that this was “a classic factual assessment” that did entail weighing the facts.⁷⁰ The Court further noted that the Board could have found that the veteran’s allegation of his back injury in service was not credible. As the Board did not do this, however, but instead found that the veteran did incur an acute injury in service, this second element was satisfied.⁷¹

The Court then considered the third element, “whether evidence indicates that a disability, or persistent or recurrent symptoms of a disability, may be associated with the claimant’s . . . service, (citation omitted) or with another service-connected disability.”⁷² The Court found that this was a “low threshold” as it simply required that the evidence “indicates” that there “may” be a nexus between current disability and an injury in service.⁷³ For support of this finding, the Court specifically cited the example of the paratrooper indicating that his current arthritis was due to his multiple jumps back in service.⁷⁴ The Court also noted that some types of evidence that would meet the low threshold included evidence that “suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or credible evidence of continuity

⁶⁶ *Id.*

⁶⁷ *Id.* at 81-82.

⁶⁸ *Id.* at 82.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 83.

⁷³ *Id.* at 81-82.

⁷⁴ *Id.* at 83 (citing 146 CONG. REC. H9912-01, H9917 (daily ed. Oct. 17, 2000) (statement of Rep. Evans)).

of symptomatology such as pain or other symptoms capable of lay observation.⁷⁵ To emphasize this latter point, the Court cited *Charles* for the proposition that evidence of exposure to multiple sources of weaponry noise combined with the veteran’s credible testimony of ringing in the ears “ever since service” indicated that a hearing disability may have been associated with service.⁷⁶

Turning to the case at hand, the Court found that the veteran was “fully competent to testify to any pain he may have suffered” and that his allegations in this regard could only be rejected “if found to be mistaken or otherwise deemed not credible.”⁷⁷ The Court then found that the Board had not made a finding regarding the veteran’s credibility and noted that the Court could not make such a finding in the first instance.⁷⁸ Accordingly, the Court determined that “the evidence of [the veteran’s] in-service injury, testimony of pain since that injury (if ultimately deemed credible), and his current disability ‘indicate’ that his current disability ‘may be associated’ with his in-service injury.”⁷⁹

Addressing the first three elements did not end the analysis of whether a medical examination was required in an individual case. The fourth element, “if there is sufficient competent medical evidence on file for the Secretary to make a decision on the claim” also needed to be considered.⁸⁰ In this regard, the Court determined:

[W]hen a nexus between a current disability and an in-service event is ‘indicated,’ there must be a medical opinion that provides some nonspeculative determination as to the degree of likelihood that a disability was caused by an in-service disease or incident to constitute sufficient medical evidence on which the Board can render a decision with regard to nexus.⁸¹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 84.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 85.

As there was no such opinion of record, the Court found that the Board's determination "that there was sufficient competent medical evidence in the record to make a decision on the claim . . . [was] clearly erroneous."⁸² In reaching this finding, the Court noted that "having found that [the veteran] suffered an in-service back injury, the degree of that injury and whether any disabilities resulted therefrom are medical assessments that the Board is not competent to render in the first instance."⁸³

Based on the above analysis, the Court remanded the claim to the Board, to determine whether the third element had been satisfied.⁸⁴ If so, the Board was further required to "ensure that the [veteran was] provided a medical examination" as the other three elements of the regulation had already been met.⁸⁵

Subsequently, in *Locklear v. Nicholson*, the Court again found that the Board did not provide adequate reasons and bases for determining that a VA medical examination was not required.⁸⁶ In *Locklear*, the veteran's claim was for service connection for chest pain. The record contained "findings of chronic scarring of the lungs and a mild restrictive pattern upon pulmonary function testing"; the veteran's allegation of tear gas exposure during service; and two medical opinions that did not affirmatively find a connection between any gas exposure and the veteran's chest symptoms but noted unfamiliarity with the effects of such exposure.⁸⁷ The Court noted that the Board's entire analysis of whether an examination was required was limited to the following statement: "[an] examination was not necessary since there was no competent evidence of a chest disability or symptoms in service and there is no competent evidence of an association between the claimed chest disability and service."⁸⁸ The Court then found that this statement did not provide an explanation of why the veteran's "lung scarring and symptoms of chest pain could not

⁸² *Id.*

⁸³ *Id.* (citing *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)).

⁸⁴ *Id.* at 86.

⁸⁵ *Id.*

⁸⁶ 20 Vet. App. 410 (2006).

⁸⁷ *Id.* at 418-19.

⁸⁸ *Id.* at 418.

have been associated with his in-service exposure to tear gas.”⁸⁹ More specifically the Court stated that this “summary conclusion—with no analysis whatsoever—fails to meet the requirements articulated in *Duenas* and therefore frustrates judicial review.”⁹⁰ In making this finding the Court noted that although the Board had concluded that there was no competent medical evidence for purposes of granting service connection, such a conclusion ““does not mean necessarily that the evidence does not indicate that there may be an association between an in-service injury and a current disability.””⁹¹ The Court also noted the “low threshold” required to satisfy the “third element” espoused by *McLendon*.⁹² Accordingly, the Court remanded the case to the Board to either “afford [the veteran] a VA medical examination, obtain a medical opinion from a qualified expert, or explain with adequate reasons or bases why, in light of *McLendon*, *Duenas*, and the language of the statute and regulation, [the veteran] is not entitled to such [examination or opinion].”⁹³

In keeping with congressional intent, the above case law makes clear that under the statute and regulations the veteran is not required to affirmatively demonstrate the presence of a medical nexus prior to receiving a medical examination and that the veteran’s lay testimony and other lay evidence must be considered carefully prior to deciding whether an examination is necessary. It indicates that the veteran is competent to testify regarding whether he has symptoms of a current disability or even whether he has a current disability if the symptoms, or the disability, are capable of lay observation (e.g., pain).⁹⁴ It also indicates that he is competent to testify whether he incurred an injury in service and that he is capable of providing lay testimony that actually indicates that his current disability may be associated with service.⁹⁵ Thus, the Board should only dismiss such evidence outright if it finds that it is not credible. Such an emphasis is consistent with congressional intent that the evidence should be “fit for the purpose for which it is offered.”⁹⁶

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 419 (citing *McLendon v. Nicholson*, 20 Vet. App. 79, 84 (2006)).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Charles v. Principi*, 16 Vet. App. 370, 374 (2002); *McLendon*, 20 Vet. App. at 84.

⁹⁵ *Charles*, 16 Vet. App. at 374-75.

⁹⁶ 146 CONG. REC. H9912-01, H9915 (daily ed. Oct. 17, 2000) (statement of Rep. Stump).

Beyond creating an emphasis that is consistent with general congressional intent, the Court's jurisprudence offers specific instruction on how the Board must analyze whether a VA examination is necessary. The Board cannot simply make a blanket finding that an examination is not necessary but should instead provide specific reasons and bases, addressing the individual elements of the statute and regulation.⁹⁷ In determining whether there is competent evidence of a current disability or symptoms of a disability, the Board must appropriately consider any competent lay evidence, and if discounting such evidence, must address the credibility of the veteran or other individual providing it.⁹⁸ In determining whether an injury, event or disease was incurred in service, the Board must weigh any competing facts and again address the credibility of lay evidence if it is discounting it.⁹⁹ In determining whether there is evidence indicating that the current disability may be associated with an in service event, injury or disease, the Board must be cognizant that this is a "low [evidentiary] threshold"; that at minimum the "indication" can be established through medical evidence that suggests a nexus or credible evidence of continuity of symptomatology; and that the "indication" can be shown through lay testimony alone.¹⁰⁰ Additionally, if there is appropriate evidence of record pertaining to these first three elements, the Board must also determine whether there is sufficient competent medical evidence to decide the claim. In considering this fourth element, the Board must ensure that it does not attempt to render its own, impermissible medical judgment.¹⁰¹

It is important that the Board provide this specific Court-required analysis in the first instance. This avoids the increased delay in the final disposition of a claim appealed to the Court and remanded to the Board for failure to appropriately obtain an examination or for an inadequate statement of reasons and bases as to why one was not necessary. Also, although the initial adjudicator will likely not have time to provide the

⁹⁷ *Duenas v. Principi*, 18 Vet. App. 512, 517 (2004).

⁹⁸ *McLendon*, 20 Vet. App. at 84 (2006) (addressing the need for credibility determination in conjunction with discounting lay evidence indicating that the claimed disability may be associated with service, but the reasoning is equally applicable to lay evidence of the presence of a current disability or symptoms thereof, if the disability or symptoms are capable of lay observation); see also *Charles*, 16 Vet. App. at 374.

⁹⁹ *McLendon*, 20 Vet. App. at 82.

¹⁰⁰ *Id.* at 83-84; *Charles*, 16 Vet. App. at 374.

¹⁰¹ *McLendon*, 20 Vet. App. at 85 (citing *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)).

same level of detail as the Board in its written reasons and bases, the adjudicator should still carefully and appropriately analyze each statutory and regulatory element prior to determining whether an examination is necessary. This will avoid the fairly common occurrence of cases being remanded back to the agency of original jurisdiction for the purpose of providing a VA examination, which again results in increased delay in the final disposition of the veteran's claim.¹⁰²

The Court's reasoning as to when a VA medical examination is required emphasizes the critical importance of appropriate evaluation of lay testimony. Adjudicators must examine both the competence and the credibility of lay testimony and cannot dismiss such evidence as inherently not probative. The following section reviews pertinent case law regarding the evaluation of the competence and credibility of lay statements.

III. CASE LAW PERTAINING TO THE COMPETENCY AND CREDIBILITY OF THE EVIDENCE

In its early years, in *Espiritu v. Derwinski*, the Court differentiated lay evidence based on eye-witness accounts from evidence based on medical knowledge.¹⁰³ The Court explained that “[w]hen the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.”¹⁰⁴ Nevertheless, the Court held that “a lay person can certainly provide an eye-witness account of a veteran's visible symptoms.”¹⁰⁵

¹⁰² Recent Board statistics indicate that the most common reason for a remand from the Board to the Agency of Original Jurisdiction was the need for a VA medical examination. Of the total 44,469 reasons noted for Board remands between October 1, 2007 to June 11, 2008, over 8,000 appeals were remanded for a medical examination and approximately 800 were remanded for a VA medical opinion (without an examination). Of the appeals remanded for examinations, 6,704 were for service connection claims and of the appeals remanded for opinions, 554 were for service connection claims. Board of Veterans' Appeals Grand Rounds presentation by Laura Eskenazi, Chief Counsel for Operations (June 12, 2008) (on file with the authors).

¹⁰³ 2 Vet. App. 492 (1992).

¹⁰⁴ *Id.* at 495 (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

¹⁰⁵ *Id.* at 494.

Clear distinctions have been drawn between competent evidence and credible evidence. In cases such as *Layno v. Brown* and *Rucker v. Brown*, the Court set forth that competency is a legal concept which determines whether testimony may be considered by the trier of fact, whereas weight and credibility is a factual determination addressing the probative value of the evidence, which is made after the evidence is admitted.¹⁰⁶ Lay testimony evidence is competent if it is based upon knowledge and personal observations of the witness.¹⁰⁷ If the lay testimony addresses medical causation, that portion of the testimony is not competent.¹⁰⁸

In *Washington v. Nicholson*, the Court further asserted that credibility affects the weight to be given to lay testimony, and the Board has the responsibility of determining the appropriate weight.¹⁰⁹ Furthermore, in determining the competency and credibility of lay evidence, the Court emphasized that the purpose for which the evidence was introduced must be considered.¹¹⁰ In *Washington*, the veteran testified that he had experienced pain in his right hip and thigh during service, was placed on limited duty, and underwent physical therapy.¹¹¹ The Court found that he was competent to provide such testimony as he neither addressed the diagnosis or etiology of his current hip disability, but rather testified to factual matters of which he had first hand knowledge.¹¹²

The Court, in *Barr v. Nicholson*, continued to expand the conceptual definition of competent lay evidence and treated it with greater reverence.¹¹³ In this case, the veteran had active duty service from September 1965 to September 1967 and filed a claim for service connection for varicose veins in October 1996.¹¹⁴ He claimed he was treated for the condition in 1966.¹¹⁵ The veteran explained that he filed his claim thirty years after service because his pain had just started, although

¹⁰⁶ 6 Vet. App. 465, 469 (1994); 10 Vet. App. 67, 74 (1997).

¹⁰⁷ *Layno*, 6 Vet. App. at 469-470.

¹⁰⁸ *Id.* at 470.

¹⁰⁹ 19 Vet. App. 362, 368 (2005).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 21 Vet. App. 303 (2007).

¹¹⁴ *Id.* at 305.

¹¹⁵ *Id.*

his left leg in particular looked unsightly since 1966.¹¹⁶ The Board denied the veteran's claim based on a lack of convincing evidence that his current varicose veins had clinical onset in service.¹¹⁷

In referring to its previous cases, including *Layno* and *Falzone*, the Court pointed out that lay evidence is competent to establish observable symptomatology and "may provide sufficient support for a claim of service connection."¹¹⁸ The Court in citing to its earlier case, *Savage v. Gober*, emphasized that "symptoms, not treatment, are the essence of any evidence of continuity of symptomatology."¹¹⁹ *Barr* turned on whether varicose veins are a condition that a lay person is competent to observe and if so whether there was error in adjudication and consideration of the evidence.¹²⁰

As to the first question, it was held that due to the unique nature of varicose veins, the disability may be substantiated by lay testimony.¹²¹ The Court explained that although the symptoms of the initial stage of varicose veins do not appear to be capable of lay observation, veins that have become visibly tortuous or dilated are observable and may be identified by lay people.¹²² The Court relied on the ruling in *Falzone*, in which it was found that the veteran's description of flat feet was not a medical determination and lay testimony on its own may establish the presence of the condition.¹²³ Similarly, in *Bruce v. West*, the Court had held that the veteran was competent to testify about a condition which was within his knowledge and subject to personal observation, that he had dry, itchy and scaling skin.¹²⁴

As to the second question, the Court found that the Board erred when it refused to consider the veteran's assertions of in-service presence of varicose veins as competent evidence.¹²⁵ While the Court concluded that

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 306.

¹¹⁸ *Id.* at 307 (quoting *Layno v. Brown*, 6 Vet. App. 465, 469 (1994) (citing *Falzone v. Brown*, 8 Vet. App. 398, 405 (1995))).

¹¹⁹ *Id.* at 308 (quoting *Savage v. Gober*, 10 Vet. App. 488, 496 (1997)).

¹²⁰ *Id.*

¹²¹ *Id.* at 309.

¹²² *Id.*

¹²³ *Id.* (citing *Falzone v. Brown*, 8 Vet. App. 398, 405-06 (1995)).

¹²⁴ *Id.* at 309 (citing *Bruce v. West*, 11 Vet. App. 405, 410-11 (1998)).

¹²⁵ *Id.* at 309-10.

the Board may have been within its province to have made a credibility determination regarding whether the evidence supported a finding of service incurrence and continuity of symptomatology sufficient to establish service connection, the Board erred in dismissing the veteran's assertions as not competent; thereby, committing prejudicial error in not adequately considering material evidence favorable to the veteran's claim.¹²⁶

Recent Federal Circuit cases have further expanded the treatment of credible and competent lay evidence. In *Buchanan v. Nicholson*, the veteran served on active duty from January 1973 to December 1975 and from May 1980 to June 1982.¹²⁷ The veteran's second period of service was other than honorable.¹²⁸ Since the veteran filed his initial claim for service connection for a psychiatric disorder in 1986, the claim had been denied, reopened, remanded, and three VA examinations were afforded.¹²⁹ The veteran did not have evidence of any psychiatric condition during service or within the one-year presumptive period. Although three VA examiners indicated that it appeared the disorder began in service or prior to 1978, they essentially opined that based on lack of evidence of in-service treatment, it was not likely the veteran's onset of psychiatric symptoms was during service or during the first presumptive year after service.¹³⁰

The veteran submitted several affidavits from lay witnesses, including his sergeant, who described their observations of his symptoms during service and shortly thereafter.¹³¹ He also provided a medical opinion establishing a nexus between his psychiatric disorder and service.¹³² The Board relied on previous opinions and found this opinion to be unpersuasive because it relied on recollections provided in lay statements.¹³³ The Board denied the claim—holding that recollections of medical problems twenty years after separation from service lack credibility absent confirmatory clinical records.¹³⁴ On appeal, the Court

¹²⁶ *Id.* at 310.

¹²⁷ 451 F.3d 1331, 1332 (Fed. Cir. 2006).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1332-33.

¹³¹ *Id.* at 1333.

¹³² *Id.*

¹³³ *Id.* at 1333.

¹³⁴ *Id.*

affirmed the Board's decision finding it was not clearly erroneous as the Board considered lay and medical evidence and determined there was no credible evidence to indicate a psychiatric disorder during service or within the first post-service year.¹³⁵

On appeal, the Federal Circuit emphasized that under 38 U.S.C. § 1154(a), when adjudicating a service connection claim, due consideration should be given to lay and medical evidence, and under 38 U.S.C. § 5107(b), when there is an approximate balance of positive and negative evidence, the benefit of the doubt should be given to the claimant.¹³⁶ The regulations stipulate under 38 C.F.R. § 3.307(b) that “[t]he factual basis [for establishing a chronic disease] may be established by medical evidence, competent lay evidence or both Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period,” while 38 C.F.R. § 3.303(a) provides that each service connection claim “must be considered on the basis of . . . all pertinent medical and *lay evidence*.”¹³⁷ The Federal Circuit pointed out that neither regulatory nor the statutory provisions require both medical and competent lay evidence, rather they clearly articulate that competent lay evidence may be sufficient in and of itself.¹³⁸

Whereas the Court found the Board's decision to be not clearly erroneous as the Board found no competent evidence to support the veteran's claim that a psychiatric disorder began during service or within the first post service year, the Federal Circuit found that the Board's decision did not determine the competency of the lay statements and improperly determined that the lay statements were not credible merely because they were not corroborated by contemporaneous medical evidence.¹³⁹ The Federal Circuit held that while it is within the Board's discretion to weigh the evidence submitted by the veteran, the holding that lay statements are not credible absent confirmatory medical evidence reflects a “legally untenable interpretation” of statutory and regulatory provisions.¹⁴⁰ The Federal

¹³⁵ *Id.* at 1333-34.

¹³⁶ *Id.* at 1335.

¹³⁷ *Id.* at 1335 (emphasis in original).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1336.

¹⁴⁰ *Id.*

Circuit reiterated that lay evidence may be discounted when appropriate; the Board is obligated and justified in determining whether lay evidence is credible due to possible bias and conflicting information; and the absence of contemporaneous medical evidence may be considered by the Board and weighed against lay evidence.¹⁴¹ The lack of contemporaneous medical evidence, however, does not render lay evidence not credible.¹⁴²

In *Jandreau v. Nicholson*, the veteran had active service from 1957 to 1959, his service medical records were destroyed by fire in 1973, and he filed a service connection claim for residuals of a right shoulder injury in 1997.¹⁴³ The veteran submitted a lay statement from a fellow serviceman who reported that the veteran dislocated his shoulder during training.¹⁴⁴ The veteran also proffered medical reports and examinations dated in 2000, including a medical opinion that related the veteran's right shoulder pain to his dislocation.¹⁴⁵ The veteran's claim was denied due to a lack of continuity of treatment for the right shoulder since discharge from service.¹⁴⁶ The Board found the medical opinion not to be probative because it reported the veteran's contention that he dislocated his shoulder and did not diagnose the dislocation at the time of the claimed injury.¹⁴⁷ The Board rejected the lay testimonies finding that while the veteran and his fellow serviceman are competent to state their observations of the injury, they are not competent to establish an etiology of the disability.¹⁴⁸ The Court affirmed the Board's decision, holding that the Board was correct in rejecting the medical opinion as it was premised on the veteran's reported shoulder dislocation during service, which he was not competent to establish as dislocation of his shoulder required a medical diagnosis.¹⁴⁹

The Federal Circuit held that the Court's holding in *Jandreau* was inconsistent with *Buchanan*.¹⁵⁰ The Federal Circuit emphasized that the

¹⁴¹ *Id.* at 1336-37.

¹⁴² *Id.* at 1337.

¹⁴³ 492 F.3d 1372, 1373-74 (Fed. Cir. 2007).

¹⁴⁴ *Id.* at 1374.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1374-75.

¹⁵⁰ *Id.* at 1376.

Buchanan rule is particularly critical when service medical records have been destroyed, because unless lay evidence was allowed it would be impossible for a veteran to substantiate a service connection claim.¹⁵¹

Hence, in *Jandreau*, the Federal Circuit determined that lay evidence can be competent and sufficient to establish a diagnosis under the following circumstances: (1) the layperson is competent to identify the condition, such as a broken leg, (2) the layperson reports a contemporaneous medical diagnosis, or (3) the lay evidence describing symptoms during a particular time is later diagnosed by a medical professional.¹⁵² The Federal Circuit pointed out that while the Court limited the relevance of lay evidence to the third situation, it relates to all three scenarios.¹⁵³ Lastly, the Federal Circuit cautioned that the determination of competency of lay evidence is a factual issue which the Board must address rather than a legal issue to be addressed by the Court.¹⁵⁴

IV. CASE LAW PERTAINING TO OBTAINING AND WEIGHING INDEPENDENT MEDICAL OPINIONS

VA's duty to assist not only includes seeking medical examinations and opinions, but also to ensure that the evidence it obtains is objective and based on sound medical principles. The Court has provided guidance to the Board on drafting medical requests that will result in unbiased medical opinions which are not unduly prejudicial to the claimant.

The line of cases discussed above provides guidance to VA adjudicators as to how to appropriately address lay testimony as it relates to each element of 38 C.F.R. § 3.159(c)(4). In essence, lay testimony can be competent and sufficient to satisfy these elements; and thus, the lay testimony can trigger VA's duty to provide an examination. The rationale for the veteran's lay testimony being insufficient to substantiate any of these elements must be explicitly included in the discussion of the appeal, to include a finding that the testimony or other evidence from the veteran lacks credibility.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

The Court has articulated that evidence must be procured in an “impartial, unbiased, and neutral manner.”¹⁵⁵ In *Austin v. Brown*, the Board prefaced its request for a medical opinion regarding the etiology of the veteran’s death, by stating the veteran’s “inservice chest injury was not related to his fatal pulmonary emphysema”; the Court held that such a request did not ensure impartiality and demonstrated that the Board was not seeking evidence for the correct outcome, but for a predetermined outcome.¹⁵⁶

Similarly, in *Bielby v. Brown*, the veteran had active duty service from June 1956 to May 1958. His service medical records were destroyed, except for one entry indicating he was diagnosed and treated for infectious mononucleosis from April 1957 to June 1957.¹⁵⁷ In May 1982, he filed a claim for service connection for multiple sclerosis (MS), which was denied, and he attempted to reopen the claim in March 1987.¹⁵⁸ The Board drafted a request for an independent medical expert opinion (IME) and solicited an opinion on the “probability that the Epstein Barr virus was an etiological factor in the development of the in-service mononucleosis in 1957 and the subsequent development of multiple sclerosis, definitively diagnosed in 1982 with a reported history of symptoms including double vision, tinnitus, vertigo, and weakness in the early 1970s.”¹⁵⁹ The examiner reported that he could not conclude that there was any correlation between the infectious mononucleosis, shown during service in 1957, and the multiple sclerosis, which possibly started in the early 1970s.¹⁶⁰

In *Bielby*, the Court found the Board’s IME request was based on a flawed hypothetical question, as a hypothetical question may not suggest a conclusion or limit the expert in rendering an opinion.¹⁶¹ Instead, the request for an IME must pose a hypothetical question which fully and accurately presents the disability picture, to include “objectively demonstrated disabilities and subjectively claimed pain or other disability.”¹⁶² The Court stated the Board has discretion in the issues

¹⁵⁵ *Austin v. Brown*, 6 Vet. App. 547, 552 (1994)

¹⁵⁶ *Id.*

¹⁵⁷ 7 Vet. App. 260, 262 (1994).

¹⁵⁸ *Id.* at 262-63.

¹⁵⁹ *Id.* at 263-64.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 268.

¹⁶² *Id.*

it selects to be addressed in the IME, but it could not limit background information and prejudice the IME.¹⁶³ It was held that the hypothetical question in the IME incorrectly limited the possible date of onset of the claimed MS, thereby preventing the examiner from providing a completely informed and neutral opinion.¹⁶⁴

In more recent cases, the Court has continued to espouse the principle that the Board has discretion in determining the extent of necessary evidentiary development for service-connection claims; however, additional evidence should not be procured for the sole purpose of denying the veteran's claim. In *Shoffner v. Principi*, the veteran filed a service connection claim for a heart condition. In support of his claim, he submitted private medical letters indicating that if his in-service pneumonia was viral then his heart condition was possibly related to his pneumonia.¹⁶⁵

There were two VA examinations of record, the first indicated a possibility that if the veteran's pneumonia had been viral it could have contributed to his heart condition, while the second did not present a definite conclusion.¹⁶⁶ After the RO denied the veteran's claim, one of his private physicians submitted additional letters which contained conflicting opinions.¹⁶⁷ In two of the letters the physician concluded the veteran's viral cardiomyopathy was related to his in-service pneumonia, while in another letter the doctor stated the veteran's disability was "probable mycoplasma induced cardiomyopathy in addition to severe atherosclerotic coronary artery disease and an ischemic cardiomyopathy."¹⁶⁸ The physician did not reply to the RO's request for clarification of the etiology of the veteran's heart condition, and the RO proceeded to obtain an opinion from a VA specialist physician, who determined the veteran's cardiomyopathy was not due to his pneumonia.¹⁶⁹ Given the multiple etiologies of record, the Board requested an IME based on a comprehensive review of the evidence of record. The IME essentially concluded the veteran had ischemic cardiomyopathy due to coronary atherosclerosis, and the veteran had not

¹⁶³ *Id.* at 269.

¹⁶⁴ *Id.*

¹⁶⁵ 16 Vet. App. 208, 210 (2002).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 211.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 211-12.

had chronic viral myocarditis.¹⁷⁰ The Board found the IME to be more probative than the private opinions and denied the veteran's claim.¹⁷¹

The veteran appealed the Board's decision, contending that VA unlawfully overdeveloped his claim.¹⁷² The Court held that according to 38 C.F.R. § 3.304(c), VA has discretion in determining how much development is needed in adjudicating a service-connection claim. The Court found the Board did not act in an arbitrary or capricious manner in requesting an IME and the IME itself was a "clear and unequivocal opinion" based on a review of all the private opinions the veteran proffered.¹⁷³

In *Mariano v. Principi*, the veteran appealed an April 1997 rating decision, which continued the 10 percent disability rating for his service-connected left shoulder through-and-through gun shot wound.¹⁷⁴ His claims file included VA examinations dated in November 1996 and January 1998, and X-rays.¹⁷⁵ In August 1998, his case was remanded for another VA examination, resulting in the veteran undergoing a VA examination in December 1998.¹⁷⁶ The Court indicated that it was unclear from the record why the December 1998 VA examination was necessary given the un rebutted evidence then of record.¹⁷⁷ The Court cautioned that such additional development would be impermissible if the purpose was to secure evidence against the veteran's case.¹⁷⁸

Once medical opinions are secured, the Court also has elaborated on VA's duty to weigh the medical opinions and determine their probative values. The Court in its early years instructed that if medical evidence is insufficient, or in the Board's opinion "of doubtful weight or credibility," the Board is at liberty to seek supplemental advisory opinions, order medical examinations or cite to recognized medical treatises.¹⁷⁹

¹⁷⁰ *Id.* at 212.

¹⁷¹ *Id.*

¹⁷² *Id.* at 213.

¹⁷³ *Id.* at 214.

¹⁷⁴ 17 Vet. App. 305, 308 (2003).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 309.

¹⁷⁷ *Id.* at 312.

¹⁷⁸ *Id.*

¹⁷⁹ *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991).

The Court has continued to offer guidance as to how medical opinions should be weighed. In *Coburn v. Nicholson*, service treatment records were unavailable and the veteran filed a service connection claim for bilateral hip and leg injuries.¹⁸⁰ The Board rejected a favorable nexus opinion provided by a VA examiner, among other reasons, because it was based on historical references to service as reported by the veteran.¹⁸¹ The Court held that “reliance on a veteran’s statements renders a medical report incredible only if the Board rejects the statements of the veteran.”¹⁸² The Court reiterated its previously articulated tenet that when medical nexus evidence is rejected because it is confusing or incomplete, it may be sent for clarification or a new report should be secured.¹⁸³ In *Barr v. Nicholson*, the Court elaborated that part of the duty to assist in providing medical examinations or opinions includes obtaining adequate medical opinions that are based upon consideration of the veteran’s medical history and in sufficient detail describe the disability.¹⁸⁴ The Court further stated that even when a medical examination is not required by law, once it is undertaken, an adequate examination must be provided.¹⁸⁵ If no examination is afforded, the claimant must be notified why an examination is not provided.¹⁸⁶

At the time an appeal is before the Board, the appeal may involve a question or issue that would not be adequately resolved by obtaining a VA examination under 38 C.F.R. § 3.159(c)(4), or the VA and private examinations of record are conflicting. The Board can obtain an independent medical expert opinion to resolve such issues. VA law provides:

When, in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case, the Board may secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department.¹⁸⁷

¹⁸⁰ 19 Vet. App. 427 (2006).

¹⁸¹ *Id.* at 429.

¹⁸² *Id.* at 432.

¹⁸³ *Id.* at 433.

¹⁸⁴ 21 Vet. App. 303, 311 (2007).

¹⁸⁵ *Id.* at 311-12.

¹⁸⁶ *Id.*

¹⁸⁷ 38 U.S.C. § 7109 (2000); 38 C.F.R. § 20.901(d) (2007).

VA regulations provide that an opinion may also be obtained from an “appropriate health care professional in the Veterans Health Administration” on medical questions when, in the Board’s judgment, “such medical expertise is needed for equitable disposition of an appeal.”¹⁸⁸ VA law and regulations also provide that an independent medical opinion may also be obtained at the agency of original jurisdiction level under certain circumstances.¹⁸⁹

The Court’s decision in *Bielby* has already been discussed in the context that the request for an IME cannot suggest the answer or otherwise limit the possible answer. In addition, in this decision, the Court noted that the initial opinion provided by the IME in the veteran’s appeal was rendered without benefit of review of the veteran’s file.¹⁹⁰ After citing authority to include the Federal Rules of Evidence,¹⁹¹ the Court found that “[i]n order for an expert’s opinion to be based upon the facts or data of a case, those facts or data must be disclosed to or perceived by the expert *prior* to rendering an opinion, otherwise the opinion is merely conjecture and of no assistance to the trier of fact.”¹⁹² In this case, as the IME was not based on a review of the record, the IME “had no basis of fact or data upon which to render an expert opinion as to any etiological relationships involved in [the] appellant’s specific situation” and thus, the opinion was of no evidentiary value.¹⁹³ Thus, whether it is an opinion from a VA examination report obtained under 38 C.F.R. § 3.159(c)(4), or one from a report of an IME obtained under 38 C.F.R. § 20.901(d), the opinion provided in the report must be supported by the findings contained in the report and the report must indicate that the clinician had an adequate basis on which to render the opinion.

¹⁸⁸ 38 C.F.R. § 20.901(a).

¹⁸⁹ 38 U.S.C. § 5109; 38 C.F.R. § 3.328.

¹⁹⁰ *Bielby v. Brown*, 7 Vet. App. 260, 268 (1994).

¹⁹¹ *See* FED. R. EVID. 703.

¹⁹² *Bielby*, 7 Vet. App. at 268 (citing *Horton v. W.T. Grant Co.*, 537 F.2d 1215, 1218 (4th Cir. 1976)).

¹⁹³ *Id.* at 268.

V. CASE LAW PERTAINING TO OBTAINING EXAMINATIONS IN CLAIMS OTHER THAN FOR DIRECT SERVICE CONNECTION

The elements laid out in parts (A), (B), and (C) of 38 C.F.R. § 3.159(c)(4) are the elements of a basic service-connection claim: evidence of a current disability, evidence of an injury or disability in service, and evidence of a nexus between the current disability and the injury or disability in service.¹⁹⁴ Each part, (A), (B), and (C), outlines the threshold the evidence of record needs to substantiate for that element for purposes of VA's duty to assist to arise. The thresholds outlined in 38 C.F.R. § 3.159(c)(4), are obviously, lower than that required to substantiate the element for purposes of service connection.

Not all claims, however, neatly fit the outlines of the “three element” claim, and in other instances, the medical examination is required only to substantiate one element, as the evidence of record already substantiates the other elements. Once such instance occurs when medical or lay evidence establishes continuity of symptomatology of a disorder or disease from the time of service to the present, in such an instance, as the evidence of record already establishes that a disorder or disease began in service and the medical or lay evidence establishes that the veteran has continued to experience symptoms of the disorder or disease since the time of service, the only evidence needed to substantiate the claim is competent evidence of a nexus between the presently claimed disability and the symptomatology.¹⁹⁵

Service connection may also be provided for disabilities that are found to be secondary to a service-connected disability.¹⁹⁶ Moreover, “[a]dditional disability resulting from the aggravation of a nonservice-connected condition by a service-connected condition is also compensable under 38 C.F.R. § 3.310(a).”¹⁹⁷ For valid secondary service connection

¹⁹⁴ See *Boyer v. West*, 210 F.3d 1351, 1353 (Fed. Cir. 2000) (providing that service connection generally requires evidence of a current disability with a relationship or connection to an injury or disease or some other manifestation of the disability during service).

¹⁹⁵ See 38 C.F.R. § 3.303(b) (2007); *Voerth v. West*, 13 Vet. App. 117, 120 (1999).

¹⁹⁶ 38 C.F.R. § 3.310(a).

¹⁹⁷ *Libertine v. Brown*, 9 Vet. App. 521, 522 (1996); *Reiber v. Brown*, 7 Vet. App. 513, 515-16 (1995); *Allen v. Brown*, 7 Vet. App. 439, 448 (1995) (en banc).

claims, there must be (1) evidence of a current disability; (2) evidence of a service-connected disability; and (3) medical evidence establishing a nexus between the service-connected disability and the claimed disability.¹⁹⁸

There is no VA regulation, however, that clearly addresses when a VA examination should be provided in a claim for secondary service connection. 38 C.F.R. § 3.159(c)(4)(i)(C) states that when evidence “[i]ndicates” that a claimed disability or symptoms may be associated with “another service connected disability,” a VA examination or medical opinion should be obtained (assuming other parts of 38 C.F.R. § 3.159(c)(4) have been met), but does not define “indicates.” Most importantly, the Court has not addressed when a VA examination should be provided in such a claim. As with a claim for direct service connection, this determination is based on the evaluation of the medical and competent lay testimony of record. As discussed, the Court has found that this is a low threshold.¹⁹⁹ This question, however, is most often one of pure medical causation. The question is whether there is competent evidence that the two disabilities are related. In many cases, this evidence may be provided by treatise evidence of a connection or the adjudicator may believe that the disabilities are often connected.

Secondary service connection is also provided for a veteran who develops cardiovascular disease when service connected for certain types of amputation. Under 38 C.F.R. § 3.310(c), a veteran having a service-connected amputation of one lower extremity at or above the knee or service-connected amputations of both lower extremities at or above the ankles will be service connected for ischemic heart disease or other cardiovascular disease that he or she develops.²⁰⁰ This provision is illustrative of the medical examination evidence that is needed in specific cases. Here, the only evidence that is needed is evidence establishing that the veteran has the service-connected amputation and has been diagnosed as having heart disease. The presumption that the two disabilities are related satisfies the nexus requirement, and therefore, there is no need to acquire an examination regarding whether the two disabilities are related. Such a relationship is presumed by VA.

¹⁹⁸ Wallin v. West, 11 Vet. App. 509, 512 (1998).

¹⁹⁹ See McLendon v. Nicholson, 20 Vet. App. 79, 83 (2006).

²⁰⁰ 38 C.F.R. § 3.310(c).

VA regulations provide other presumptions that can alleviate the need to obtain a VA examination. In such cases, circumstances of the veteran's service, alone, provide the basis on which to find that a later developed disability is related to that service. Such cases include the presumption that type II diabetes is related to presumed herbicide agent exposure while serving in the Republic of Vietnam, the presumption that a psychosis is service connected for a veteran who was a prisoner of war, and that certain cancers are service connected for radiation exposed veterans.²⁰¹ The medical evidence must indicate that the veteran currently has the disability, but there is no requirement that nexus evidence be of record, as the nexus is provided by the presumption in the regulation. These presumptions, however, can be rebutted.²⁰²

Yet another instance in which nexus evidence is not required is in a claim for compensation for certain disabilities due to a qualifying chronic disability. VA will provide compensation, under certain circumstances, to a Persian Gulf veteran who exhibits objective indications of a qualifying chronic disability.²⁰³ The governing regulation, 38 C.F.R. § 3.317, provides in part, that compensation is warranted when the disability, “[b]y history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.”²⁰⁴

In *Gutierrez v. Principi*, the Court considered the appeal of a veteran that had claimed service connection for an undiagnosed illness and had service in the Southwest Asia theater during the Persian Gulf war.²⁰⁵ The veteran claimed that his disability was manifested by symptoms of joint and muscle pain, dizziness, fatigue, and decreased vision.²⁰⁶ There was no diagnosis made during a VA examination, and medical records in the claims file did not provide an etiology for the claimed symptoms.²⁰⁷ The Board denied the claim, finding

²⁰¹ See 38 C.F.R. §§ 3.307, 3.309. The finer points of presumptive service connection under 38 C.F.R. §§ 3.307, 3.309 are beyond the scope of this article. These provisions regarding presumptive service connection were discussed for purposes of showing that there are various instances in which a VA examination may not be required.

²⁰² *Id.* § 3.307(d).

²⁰³ *Id.* § 3.317.

²⁰⁴ *Id.* § 3.317(a)(1)(ii).

²⁰⁵ 19 Vet. App. 1 (2004).

²⁰⁶ *Id.* at 3.

²⁰⁷ *Id.*

that the veteran's complaints regarding these conditions, which were made over an extended period of time, were not credible and purely subjective.²⁰⁸ The Board concluded that the preponderance of the evidence failed to indicate that these disabilities were related to service or illness associated with service.²⁰⁹ The Court found that evidence of a connection was not required in such a case:

Congress has decided as a matter of policy, stemming at least in part from difficulty of proof, that, even though a Persian Gulf War veteran's symptoms may not at this time be attributed to a specific disease, the symptoms may nonetheless be related to conditions in the Southwest Asia theater of operations and, for that reason, are presumed to be service connected.²¹⁰

The Court vacated the Board's decision, as the Board had erred in requiring the veteran to provide evidence linking his current condition to events during service.²¹¹

This article, to this point, has discussed the law as it has developed regarding when VA is required to provide an examination in a claim asserting that a disability was incurred in or aggravated by service or linked to a service-connected disability. This discussion has focused on the Court's and Federal Circuit's decisions requiring VA's decisions to parse, with specificity, the evidence of record and to determine whether that evidence satisfies the elements of 38 C.F.R. § 3.159(c)(4). The application of 38 C.F.R. § 3.159(c)(4), however, is limited to claims asserting service connection for a disability. The following section analyzes the pertinent law and regulations regarding when an examination should be provided in other types of claims, namely, claims for increased ratings and service connection for the cause of the veteran's death.

There are two main regulations that are pertinent to claims for increased ratings, 38 C.F.R. § 3.326 and 38 C.F.R. § 3.327. VA regulation 38 C.F.R. § 3.326, entitled "examinations" provides, in pertinent part, under

²⁰⁸ *Id.* at 4.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 8.

²¹¹ *Id.*

section (a) that “[w]here there is a claim for disability compensation or pension but medical evidence accompanying the claim is not adequate for rating purposes, a [VA] examination will be authorized.”²¹² The regulation further reads “[p]rovided that it is otherwise adequate for rating purposes, any hospital report, or any examination report, from any government or private institution may be accepted for rating a claim without further examination.” This regulation also provides, however, that monetary benefits will not be denied to a former prisoner of war without having been offered a complete physical examination.²¹³ The regulation further reads that even a statement from a private physician may be accepted for rating a claim without further examination, “[p]rovided that it is otherwise adequate for rating purposes.”²¹⁴

VA regulation 38 C.F.R. § 3.327 provides, in part, that “[g]enerally, reexaminations will be required if it is likely that a disability has improved, or if the evidence indicates there has been a material change in a disability or that the current rating may be incorrect.”²¹⁵ The regulation also lists instances in which no periodic reexaminations will be scheduled, such as when the disability is established as static or when the veteran is over 55 years of age, except in unusual circumstances, but the regulation also provides that these guidelines “shall not be construed as limiting VA’s authority to request reexaminations, or periods of hospital observation, at any time in order to ensure that a disability is accurately rated.”²¹⁶

Unlike the regulation regarding providing a VA examination in a disability compensation claim, 38 C.F.R. § 3.159, regulation 38 C.F.R. § 3.326 was virtually unaltered by the enactment of the VCAA, and regulation 38 C.F.R. § 3.327 was not affected.²¹⁷

In determining whether a VA examination is warranted for increased rating claims, it is essential to consider whether there is a manifestation of material change in the service-connected disability since the last VA

²¹² 38 C.F.R. § 3.326(a) (2007).

²¹³ *Id.* § 3.326(b).

²¹⁴ *Id.* § 3.326(c).

²¹⁵ *Id.* § 3.327.

²¹⁶ *Id.* § 3.327(a)-(b).

²¹⁷ *See* Duty to Assist, 66 Fed. Reg. 45,620, 45,632 (Aug. 29, 2001) (removing the term “well-grounded” from the sentence, “[w]here there is a well-grounded claim for disability compensation or pension” in 38 C.F.R. § 3.326).

examination of record. In the recent case, *Hart v. Mansfield*, the concept of material change, as contained in 38 C.F.R. § 3.327, is well illustrated.²¹⁸ In this case, the veteran filed an increased rating claim for his left knee disability in May 2001.²¹⁹ His private examination of April 2001 showed he had ligament laxity and moderate chondromalacia patella.²²⁰ His VA examination of January 2002 reflected his complaints of his left knee popping and showed he had full flexion and extension, but no evidence of ligament laxity. His X-rays reported minimal degenerative joint disease.²²¹ On private examination in April 2002, the examiner again noted the veteran had laxity of the anterior cruciate ligament, popping of the knee, and degenerative joint disease in the left knee.²²² In May 2003, the veteran perfected his appeal to the Board. In March 2004, the RO received an October 2002 VA orthopedic report noting that X-rays suggested left knee osteoarthritis, and the veteran was given another VA examination in January 2005, which “found no effusion, and noted that ligament testing was negative.”²²³ The Board determined that the most recent evidence did not show moderate recurrent subluxation or lateral instability and denied the veteran’s claim for an increased rating higher than 10 percent for a left knee disability.²²⁴

The veteran appealed to the Court arguing that there was no evidence that his left knee disability materially changed to warrant the January 2005 VA examination.²²⁵ On appeal, the Secretary conceded that the 2001 and 2002 examinations were adequate; however, the veteran’s October 2002 VA orthopedic report indicated that his service-connected left knee disability materially changed so as to warrant the VA examination of January 2005.²²⁶ The Court interpreted 38 C.F.R. § 3.327 to stipulate that a contemporaneous examination is needed when the evidence indicates that a current rating may be incorrect.²²⁷ The Court found that given the October 2002 VA examination report, the passage of time and possibility of entitlement to

²¹⁸ 21 Vet. App. 505 (2007).

²¹⁹ *Id.* at 507.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 507-08.

²²⁶ *Id.* at 508.

²²⁷ *Id.*

a separate rating for arthritis, it was reasonable for the RO to schedule another VA examination to have a complete picture of the veteran's service-connected disability.²²⁸ The Court held that under the circumstances, VA did not act impermissibly in scheduling the rating examination.²²⁹

In an opinion issued prior to the enactment of the VCAA, the VA General Counsel addressed the question of whether the Board was required, pursuant to the duty to assist claimants in developing their disability benefit claims, to remand a case solely because of the passage of time since the otherwise adequate examination report was prepared.²³⁰ As this opinion was issued prior to the enactment of the VCAA, the General Counsel discussed prior Court decisions evaluating whether a claim for increase was well grounded and Court cases interpreting law that has been substantially altered by the VCAA. As discussed above, however, the VCAA did not substantively amend VA regulations regarding whether an examination is adequate for rating purposes and when a reexamination should be provided.²³¹ As such, this General Counsel opinion remains binding interpretation of VA law and regulations.²³²

In the opinion the General Counsel discusses at length pertinent case law and considerations regarding when a reexamination is required. The General Counsel opinion determined that the Board was not required “to remand an appealed disability-benefit claim solely because of the passage of time since an otherwise adequate examination report was prepared.”²³³ The opinion continues:

²²⁸ *Id.*

²²⁹ *Id.* at 509; *see also* Summary of Precedent Opinions of the General Counsel, 62 Fed. Reg. 63,603-04 (Dec. 1, 1997), DVA Op. Gen. Counsel Prec. 23-97 (July 1, 1997) (providing that separate ratings may be assigned for a knee disability under Diagnostic Codes 5257 and 5003 when x-ray evidence shows arthritis and there is recurrent subluxation or lateral instability); Summary of Prec. Ops. of the Gen. Counsel, 63 Fed. Reg. 56,703-04 (Oct. 22, 1998), DVA Op. Gen. Counsel Prec. 9-98 (Aug. 14, 1998).

²³⁰ DVA Op. Gen. Counsel Prec. 11-95 (Apr. 7, 1995).

²³¹ *See supra* Part E. (discussing 38 C.F.R. §§ 3.326, 3.327 (2007)).

²³² 38 U.S.C. § 7104(c) (2000) (providing that “[t]he Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department.”).

²³³ DVA Op. Gen. Counsel Prec., *supra* note 234.

Rather, an examination which was adequate for purposes of determination of the claim by the agency of original jurisdiction will ordinarily be adequate for purposes of the Board's determination, except to the extent that the claimant asserts that the disability in question has undergone an increase in severity since the time of the examination.²³⁴

The Court recently issued a decision discussing when an examination to determine the prior level of a disability may need to be obtained. In *Chotta v. Peake*, the question before the Court involved the assistance to be provided in a case where, on the basis of clear and unmistakable error (CUE), it had been determined that the veteran's post-traumatic stress disorder (PTSD) disability warranted an earlier effective date of September 27, 1947, instead of April 30, 1997.²³⁵ The Court determined that VA must solicit appropriate medical and lay evidence from the veteran.²³⁶ "Second, after all the evidence is gathered, the Board must assess whether the claim can be rated based on the available evidence."²³⁷ Next, "if a disability rating cannot be awarded based on the available evidence, [VA] must determine if a medical opinion is necessary to make a decision on the claim."²³⁸ Further, "[t]o determine if a medical opinion or examination is necessary, [VA] must consider whether there is competent medical or lay testimony that indicates that a higher disability rating may be appropriate, even though it was insufficient to grant such a rating in the second step."²³⁹

The Court concluded that "[i]f the record raises a question as to whether the appellant's symptoms were caused by the service-connected condition or something else, then an etiology opinion may be required."²⁴⁰ The Court found that this may include a "retrospective medical opinion."²⁴¹ Thus, certain cases may require significant assistance, to determine difficult factual questions, such as seeking to obtain a medical opinion to determine the severity of a disability decades prior.

²³⁴ *Id.*; see also *Snuffer v. Gober*, 10 Vet. App. 400, 403 (1997).

²³⁵ 22 Vet. App. 80 (2008).

²³⁶ *Id.* at 84.

²³⁷ *Id.*

²³⁸ *Id.* at 85; see also 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4).

²³⁹ *Chotta*, 22 Vet. App. at 85.

²⁴⁰ *Id.*

²⁴¹ *Id.*

The Federal Circuit has issued two recent decisions relevant to when VA must provide an opinion in a claim for service connection for dependency and indemnity compensation (DIC).²⁴² In *DeLaRosa v. Peake*, the Federal Circuit considered the case of a surviving spouse who contended that the veteran had PTSD due to combat service, and that the veteran's PTSD led to his suicide.²⁴³ The appellant submitted lay testimony from a daughter and a co-worker of the veteran, both of whom discussed the veteran's combat and post-service experiences.²⁴⁴ The appellant also submitted a medical opinion from an internist and geriatrician "stating that he believed that [the veteran] may have suffered from undiagnosed and untreated PTSD, which may have originated from his combat service and led to his violent behavior."²⁴⁵ This medical opinion was issued six years after the veteran's death, and was based upon prolonged discussions with the appellant.²⁴⁶

The appellant's claim was denied by the RO, and she appealed the decision to the Board. The Board denied the claim finding that the veteran had never been diagnosed as having a psychiatric disability during his lifetime, nor was there evidence during his lifetime that he had PTSD.²⁴⁷ The Federal Circuit noted the Board's conclusion that "the available evidence show[ed] that the most obvious reasons for the veteran's suicide [were] the bitter dispute with his wife and his killing of his own daughter."²⁴⁸ The Federal Circuit also noted that the Board had found that the medical opinion the appellant submitted was "entirely speculative" and without probative value, and that the lay statements that had been submitted were not competent medical evidence.²⁴⁹ The Federal Circuit observed that the Court confirmed the Board's decision, finding that VA was not required to obtain a medical opinion under 38 U.S.C. § 5103A, as

²⁴² See 38 C.F.R. § 3.5. Various other provisions of VA law and regulations are pertinent to DIC benefits.

²⁴³ 515 F.3d 1319 (Fed. Cir. 2008).

²⁴⁴ *Id.* at 1320.

²⁴⁵ *Id.* at 1320 (the appellant's contention was that the veteran had service-connected PTSD that led to his death. VA regulation 38 C.F.R. § 3.312 provides criteria under which DIC benefits will be granted due to the veteran's death being service connected).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 1320-21.

²⁴⁸ *Id.* at 1321.

²⁴⁹ *Id.*

there was no valid diagnosis of PTSD and the record contained no evidence of a connection between the veteran's service and his cause of death.²⁵⁰

The Federal Circuit agreed with both parties that the Court had erred by considering the appeal under the provisions of 38 U.S.C. § 5103A(d) as this provision is limited to disability compensation claims.²⁵¹ Instead, the proper law provision the appellant's claim was to be considered under was 38 U.S.C. § 5130A(a), which enunciates VA's general duty to assist. The provision provides in pertinent part that:

- (1) The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.
- (2) The Secretary is not required to provide assistance to a claimant under this section if no reasonable possibility exists that such assistance would aid in substantiating the claim.²⁵²

The Federal Circuit found that such assistance would not always require VA to provide a medical opinion or examination, as such an interpretation would make 38 U.S.C. § 5103A(d), regarding when to provide a VA examination or medical opinion in disability compensation claims, meaningless.²⁵³ The Federal Circuit concluded:

In light of the Board's finding that the even more restrictive § 5103A(d) did not require the Secretary to provide a medical opinion and our holding that § 5103A(a) does not always require the Secretary to obtain a medical opinion, we conclude that the Veterans Court's application of § 5103A(d) was harmless error.²⁵⁴

In an appeal decided a short time later, however, the Federal Circuit determined that an appeal for DIC benefits based on entitlement to

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1322.

²⁵² 38 U.S.C. § 5103A(a)(1)-(2) (2000).

²⁵³ *DeLaRosa*, 515 F.3d at 1322. It is also true that the Board may find that, in claims for entitlement to service connection for the cause of the veteran's death, the facts of the case require that VA obtain an opinion under 38 C.F.R. § 20.901—that is, an opinion from an independent medical expert or an opinion from the Veterans Health Administration.

²⁵⁴ *Id.*

service connection for the cause of the veteran's death had to be vacated and remanded, as in contrast to *DeLaRosa*, the record contained evidence that was "split and thus the medical facts [were] genuinely disputed."²⁵⁵ In this case the autopsy report and death certificate contained conflicting evidence regarding contributory causes of death.²⁵⁶ As the evidence was "split," the Federal Circuit found that it could not conduct an analysis to determine whether evaluating the appeal under 38 U.S.C. § 5103A(d) instead of 38 U.S.C. § 5103A(a) was harmless.²⁵⁷

Review of these two recent Federal Circuit decisions reveals that a VA opinion is not always required in claims for service connection for the cause of death. Adjudicators at the RO level and at the Board, however, must be careful to apply the right standard and address whether the general duty to provide assistance to the claimant requires that VA obtain an opinion.²⁵⁸

VI. LAW PERTAINING TO FAILURE TO REPORT FOR A VA EXAMINATION

The article will now address VA regulations regarding the effect of the veteran's failure to report for a VA examination. When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination, 38 C.F.R. § 3.655 provides the circumstances under which a claim will be adjudicated upon the evidence of record and the circumstances under which the claim will be denied, when good cause was not provided for the failure to report to the examination.²⁵⁹ In pertinent part, for purposes of the discussion here, the regulation provides that when an examination is "scheduled in conjunction with an original compensation claim, the claim shall be rated based on the evidence of record."²⁶⁰ In contrast, "in conjunction with any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied."²⁶¹

²⁵⁵ Wood v. Peake, 520 F.3d 1345, 1350 (Fed. Cir. 2008).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 1351-52 (Dyk, K., dissenting) (finding the decision in this case conflicting with the Federal Circuit's finding in *DeLaRosa*).

²⁵⁸ 38 U.S.C. § 5103A(a)(1)-(2); *see also* 38 C.F.R. § 3.159(c), (d).

²⁵⁹ 38 C.F.R. § 3.655.

²⁶⁰ *Id.* § 3.655(b)

²⁶¹ *Id.*

In *Kowalski v. Nicholson*, the Court considered an appeal in which the veteran asserted that the Board had erred in denying a claim for service connection for hearing loss when it found that the veteran had abandoned the claim by refusing to report for a VA examination; the veteran also asserted that the Board had erred in finding that a private audiologist's opinion was of no probative weight.²⁶² The Court held that the Board had incorrectly found that the veteran had abandoned the claim under 38 C.F.R. § 3.158(b), when the veteran refused to report for an examination.²⁶³ The Court found such a failure to report was more specifically addressed by 38 C.F.R. § 3.655(b). Therefore, the Court found that the appeal should be evaluated under this standard. The Court further found, however, that such failure to consider the appeal under 38 C.F.R. § 3.655(b) was harmless, as the Board had considered the merits of the appeal, as directed by 38 C.F.R. § 3.655(b) in a case of an original compensation claim.²⁶⁵ The Court vacated on other grounds.²⁶⁶

More recently, in *Turk v. Peake*, the Court noted that a claim for a higher initial rating stemming from a grant of service connection should be considered as a claim for service connection for purposes of 38 C.F.R. § 3.655.²⁶⁷ The record clearly indicated that the veteran failed to report for the examination even though he was present at the facility on the day he was to be examined.²⁶⁸ The Court found that it was not a "manipulation of the record" for a claimant to choose one option from among those presented by a VA regulation.²⁶⁹

²⁶² 19 Vet. App. 171, 173 (2005).

²⁶³ *Id.* at 176 (noting that 38 C.F.R. § 3.158(b) provides where "the veteran 'fails without adequate reason to respond to an order to report for [VA] examination within 1 year from the date of request and payments have been discontinued, the claim for such benefits will be considered abandoned.'").

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 177-78.

²⁶⁶ *Id.* at 180-81.

²⁶⁷ 21 Vet. App. 565, 569-70 (2008); *see also* *Fenderson v. West*, 12 Vet. App. 119, 125-26 (1999) (noting distinction between claims stemming from an original rating versus an increased rating).

²⁶⁸ *Turk*, 21 Vet. App. at 567.

²⁶⁹ *Id.* at 570.

CONCLUSION

The purpose of this article has been to outline the development of case law articulating when VA has a duty to provide a VA examination. The authors have attempted to synthesize the developing law regarding various types of claims, including service-connection claims, increased rating claims, claims that involve presumptions under the law, and DIC benefits. The authors are aware, however, that there are various other types of cases that involve special considerations regarding providing a VA examination that are not addressed in the article. For example, there are special considerations when the veteran is incarcerated²⁷⁰ and when VA proposes to reduce an evaluation.²⁷¹

Although much of the discussion focused on development since the enactment of 38 C.F.R. § 3.159(c)(4) under the enactment of the VCAA, the breadth of the discussion has been broader. Review of the different fact patterns that face VA adjudications makes clear that not all cases fit neatly into the elements outlined in 38 C.F.R. § 3.159(c)(4), that, in essence, there is a current disability, evidence of an injury or disability in service, and a connection between the two. Other law and regulations may come into play, requiring that a specific type of examination be provided or that an opinion be obtained. Or, the evidence of record may already establish certain elements of the claim. In short, just as the Court has continued to develop case law providing that VCAA notification letters must specifically address the contentions of the claim and be tailored to the claim,²⁷² the Court has indicated that an individual case, such as outlined in *Chotta*,²⁷³ may require a “tailored” examination.

The Court has become ever more comfortable and confident in its role of assuring that VA has provided the claimant every possible assistance

²⁷⁰ See *Bolton v. Brown*, 8 Vet. App. 185, 191 (1995) (providing assistance may require VA to obtain a fee-basis examination or to arrange for a VA examiner to perform the examination in the prison where the veteran is incarcerated).

²⁷¹ See *Brown v. Brown*, 5 Vet. App. 413, 421 (1993) (reductions require ascertaining “whether the evidence reflects an actual change in the disability and whether the examination reports reflecting such change are based upon thorough examinations.”).

²⁷² See, e.g., *Vazquez-Flores v. Peake*, 22 Vet. App. 37 (2008); *Hupp v. Nicholson*, 21 Vet. App. 342 (2007); *Kent v. Nicholson*, 20 Vet. App. 1 (2006).

²⁷³ *Chotta v. Peake*, 22 Vet. App. 80 (2008).

provided under the law, and the Federal Circuit has emphasized that VA's beneficiary system is both "paternalistic" and "uniquely pro-claimant."²⁷⁴ Since the founding of the Court, it has pressed the Board to provide, with particularity, the reasons and bases for each denial of benefits. Review of this case law demonstrates that the Court and the Federal Circuit will not allow to stand decisions that are conclusory in nature. The Board, and likewise the RO, must clearly and explicitly state the reasons and bases for finding that in a particular case VA was not required to provide an examination.

Thus, a greater understanding of VA's duty to assist in providing VA examinations is obtained by comprehending that the duty is part of VA law that is dynamic, and the ROs and the Board must react to multiple forces. Adjudicators at the RO and Board must ensure that the claimant has been provided notice specific to his or her claim (tailored) and has been assisted in obtaining all available evidence.²⁷⁵ The adjudicator must then evaluate both the medical and lay testimony to determine if the evidence is sufficient to grant the benefit sought.²⁷⁶ If there is not sufficient evidence on which to grant the claim, the adjudicator must determine whether the duty to assist the claimant by providing an examination has arisen. The adjudicator cannot simply find that there is no medical evidence of incurrence in service, for instance, but rather must carefully parse all credible and competent evidence. If, for example, the only evidence of service incurrence in regard to a claim for service connection for a knee disability is the veteran's testimony of a fall in service, the adjudicator cannot find that this evidence is without probative value without finding that the testimony is not credible.²⁷⁷

The adjudicator, especially at the Board level, must be cognizant that their decisions have multiple audiences. The decision must be written both for the claimant, who may not have a legal education, and for the Court and representatives, that with more regularity are lawyers.²⁷⁸ Thus, there is a pressure to write decisions that can be easily understood by the

²⁷⁴ See *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002); *Hensley v. West*, 212 F.3d 1255 (Fed. Cir. 2000); *Nolen v. Gober*, 222 F.3d 1356 (Fed. Cir. 2000).

²⁷⁵ See generally 38 C.F.R. § 3.159 (2007).

²⁷⁶ *Id.* § 3.102 (providing that all reasonable doubt will be resolved in favor of the claimant).

²⁷⁷ *Coburn v. Nicholson*, 19 Vet. App. 427, 432-33 (2006).

²⁷⁸ See *Accreditation of Agents and Attorneys; Agent and Attorney Fees*, 73 Fed. Reg. 29,852 (May 22, 2008) (implementing the new law providing that claimants for VA benefits may hire an attorney earlier in the claims process).

general population, but also to issue decisions that use technical and legal language to survive judicial scrutiny.

Although the existing case law does not indicate that VA must provide an examination as a matter of course, it does create an obligation for VA to adequately explain why there is no duty to provide an examination in a particular case. In attempting to meet this obligation, there will be instances where the adjudicator will find it impossible to provide such an explanation. In such instances, an examination should be obtained. The problem, however, is when the Board (or Court) finds that an examination needs to be provided well after the adjudicator at the RO level has found that an examination did not need to be provided. In such instances, a significant period of time (possibly years) is added to the duration of the appeal. Providing RO adjudicators with a clear and concise articulation of the legal requirements contained in 38 C.F.R. § 3.159(c)(4) - one that takes into consideration that most are not lawyers and must adjudicate an extremely high volume of claims - could prevent such delays, serving the interests of all.

VA is seeking ways to make the adjudication process more efficient and take less time.²⁷⁹ Based on the current state of the law, if an adjudicator at the RO level finds that there is some question as to whether an examination should be provided, the adjudicator should be cognizant that obtaining an examination at this stage of the process can avoid significant delay in the final adjudication of the claim should the claimant appeal.

Review of the developing case law of the Court and Federal Circuit and reflection on the case law's impact upon the adjudication of veterans' claims by VA provides insight into the forces that must be reconciled: VA's duty to provide assistance versus the institutional goal of deciding cases in a timely manner with the resources available.

²⁷⁹ See Board of Veterans' Appeals: Expedited Adjudication Initiative – Pilot Program, 73 Fed. Reg. 20,571 (Apr. 16, 2008).