Assessment of Department of Veterans Affairs Physical and Mental Health Examinations and the Department's Schedule of Rating Disabilities for Disability Compensation Claims Related to Military Sexual Trauma Meeting 2

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Roadmap

- Key legal principles
- Common issues with MST Exams
- Compounding issues
  - Adjudication issues at RO before and after exams
  - Language Dilemma
- Recommendations for the Committee

Key legal concepts for MST cases

- Requirements for service connection
- Requirements for service connection of PTSD
- Duty to assist
- Adequacy of the exam
- Presumption of soundness
- Benefit of the doubt

Military Sexual Trauma (MST)

38 U.S.C. §1720D(a)(1)

- Defined as "a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment."
- Sexual harassment is defined as "unsolicited verbal or physical contact of a sexual nature which is threatening in character." *Id*. at § 1720D(f).

Service connection criteria (including for psychiatric diagnoses other than PTSD)

(1) Medical evidence of a current disability;

(2) lay or medical evidence of in-service incurrence of a disease, injury, or event; and

(3) medical evidence that links the current disability to the precipitating disease, injury, or event in service.

38 C.F.R. § 3.303.

Service connection criteria for PTSD

(1) Medical diagnosis of PTSD;

(2) a link established by medical evidence between the symptoms and an in-service stressor; and

(3) credible supporting evidence that the claimed in-service stressor occurred.

38 C.F.R. § 3.304(f).

Personal assault stressor corroboration

Evidence from sources other than the veteran's service records may corroborate the stressor. These may include

- records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians;
- pregnancy tests or tests for sexually transmitted diseases;
- statements from family members, roommates, fellow service members, or clergy.
- Evidence of behavior changes . . . including transfer requests, deterioration in work performance, substance abuse, episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes. . . .

38 C.F.R. § 3.304(f)(5).

Secondary service connection

A "…disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition." 38 C.F.R. § 3.310.

- Even if a condition cannot be service-connected itself such as primary alcohol or drug use and obesity, it may be used to establish service connection as an intermediate step if it results from a service-connected condition.
  - E.g. Cirrhosis, sleep apnea, cardiovascular issues could be service-connected.

Duty to assist

- VA is required to undertake reasonable efforts to assist veterans in gathering evidence to support their claims for VA benefits. 38 U.S.C. § 5103A(a); 38 C.F.R. § 3.159(c).
- Can include:
  - VA medical records
  - Military service records
  - Other types of federal records (SSA records)
  - Private medical records
- VA's Duty to Assist may also require it to obtain additional, third party service records. *Molitor v. Shulkin*, 28 Vet.App. 397, 410–11 (2017); *see also* VA G.C. Prec. 05–14.

Duty to assist

- 38 U.S.C. § 5103A(d), VA's duty to assist includes obtaining a medical examination and opinion.
- Once the Secretary provides an examination or opinion, he must provide an adequate one. *Barr v. Nicholson,* 21 Vet.App. 303 (2007).
- "If a diagnosis is not supported by the findings in the examination report, or if the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes." 38 C.F.R. § 4.2.

Considerations re: adequacy of an examination

1) Examiner's opinion must be based on complete and accurate facts

- "An adequate medical report must rest on correct facts and reasoned medical judgment so as [to] inform the Board on a medical question." *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012).
- An opinion based on an inaccurate factual premise has *no* probative value. *Reonal v. Brown,* 5 Vet.App. 458, 460-61 (1993).
- An examiner must provide an opinion that is based upon the veteran's prior medical history and exams. *Roberson v. Shinseki*, 22 Vet.App. 358 (2009); *see also Cohen v. Brown,* 10 Vet.App. 128, 140 (1997).
- Examiner's opinion must sufficiently engage with the relevant lay statements of record to "provide the Board with an adequate medical opinion." *Miller v. Wilkie,* 32 Vet.App. 249, 259 (2020) (citing *McKinney v. McDonald*, 28 Vet.App. 15, 30 (2016)).

Considerations re: adequacy of an examination

2) Examiner's opinion must contain sufficient rationale for its conclusion

- "It is the factually accurate, fully articulated, *sound reasoning* for the conclusion . . . that contributes probative value to a medical opinion." *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008).
- "[A] mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision." *Stefl v. Nicholson*, 21 Vet.App. 120, 125 (2007).

Considerations re: adequacy of an examination

3) Absence of evidence is not affirmative evidence to the contrary

- Examiner cannot rely on gap in treatment or a lack of diagnosis in service as evidence that the condition is not related to service. *Cosman v. Principi*, 3 Vet.App. 503, 505 (1992).
- VA may not rely on the absence of service records documenting the alleged assault to conclude it did not happen, and VA also may not rely on the veteran's failure to report the assault as evidence that it did not occur. *AZ v. Shinseki,* 731 F.3d at 1318, 1322 (Fed. Cir. 2013).
- The absence of evidence cannot be taken as substantive negative evidence without "a proper foundation . . . to demonstrate that such silence has a tendency to prove or disprove a relevant fact." *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015) (citing *Horn v. Shinseki*, 25. Vet.App. 231, 239 (2012)); *See also*, *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011).

Considerations re: adequacy of an examination

4) Lay evidence should be considered

- "Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience" and "provided by a person who has knowledge of facts or circumstances." A veteran is competent to testify on matters of which she has personal knowledge, such as experiencing an event and recalling her reactions to it. *Layno v. Brown*, 6 Vet.App. 465, 469-70 (1994); 38 C.F.R. § 3.159(a)(2); *see Charles v. Principi*, 16 Vet.App. 370, 374-75 (2002).
- In PTSD cases, "credible supporting evidence" is not limited to service department records, and can be from any source. In this case, the Board's failure to discuss the written statement of appellant's sister was prejudicial error. *YR v. West*, 11 Vet.App. 393, 397-99 (1998).

Considerations re: adequacy of an examination

5) Cannot improperly reject lay evidence for lack of record corroboration

- "[L]ay statements are [not] inadequate in the absence of corroborating clinic records." *Buchanan v. Nicholson*, 451 F.3d 1331, 1335 (Fed. Cir. 2006).
- VA may not reject a competent lay statement of an in-service event simply in the absence of corroborating service records. *Jandreau* v. *Nicholson,* 492 F.3d 1372, 1377 (Fed. Cir. 2007).
- The veteran or lay observer need not corroborate every detail of the stressor event. *Suozzi v. Brown*, 10 Vet.App. 307, 311 (1997); *Pentecost v. Principi*, 16 Vet.App. 124 (2002).

Considerations re: adequacy of an examination

6) **Examiners cannot discuss adjudicatory issues** like the Veteran's credibility, whether their stressor should be corroborated, etc. - *See Sizemore v. Principi*, 18 Vet.App. 264, 275 (2004) (faulting a VA examiner for "expressing an opinion on whether the appellant's claimed in-service stressors have been substantiated, [which] is a matter for determination by the Board and not a medical matter.").

7) **Examiners must be qualified and appropriately trained -** *Wise v. Shinseki*, 25 Vet.App. 517, 530-31 (2014).

8) **Examiners must use the correct standard.** Examiners cannot require full medical certainty or use anything higher than the approximate balance standard - *Wise*, at 530-31.

Other important legal concepts

9) Lack of behavioral changes during service is not conclusive evidence against an occurrence. *Molitor v. Shulkin*, 28 Vet.App. 397, 410–11 (2017).

10) Medical opinions, even those made after the fact, can corroborate the occurrence of a stressor. *Menegassi v. Shinseki,* 638 F.3d 1379, 1382 (Fed. Cir. 2011).

11) A claim of entitlement to service connection for PTSD includes any mental disability that may reasonably be encompassed by the claimant's description of the claim, reported symptoms, and the other information of record. *Clemons v. Shinseki*, 23 Vet.App. 1 (2009).

Presumption of soundness

- "[E]very veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of . . . enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance . . . and was not aggravated by such service." 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b).
- The presumption of soundness still applies if something is noted at entry to service, but does not rise to the level of a "disability." *McKinney* v. *McDonald*, 28 Vet.App. 15 (2016).

Presumption of soundness

- If no preexisting defects or disabilities are noted at enlistment, "the government must show clear and unmistakable evidence of **both** a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness…" *Wagner* v. *Principi*, 370 F.3d 1089 (Fed. Cir. 2004).
  - Clear and unmistakable evidence requires affirmative evidence that "'cannot be misinterpreted and misunderstood, i.e., it is undebatable.'" *Horn v. Shinseki*, 25 Vet.App. 231, 234 (2012).

Benefit of the doubt

- The benefit-of-the-doubt rule is a unique standard of proof that requires VA adjudicators to award benefits to the claimant where the positive and negative evidence is in approximate balance. *Gilbert* v. *Derwinski*, 1 Vet.App. 49, 53–54 (1990). This is the "the tie goes to the runner" and benefits must be granted concept. *Id*. at 55.
- Approximate balance includes but is not limited to evidence in equipoise or 50/50. This means it could be 51/49, or perhaps even more. *Lynch* v. *McDonough,* 21 F.4th 776, 781 (Fed. Cir. 2021).
  - Note: This may not be consistent with the language used by VA whether it is "at least as likely as not."

Common exam errors

- Attributing psychiatric diagnosis to pre- or post-service event (ignoring the presumption of soundness)
- Stating there are no "markers," when there are
- Claiming the veteran's reports are inconsistent or not credible
- Failing to consider the full record, the favorable evidence of record, or the veteran's lay statements
- Stating that the medical literature does not establish the theory definitively or relying on an improper standard

Common exam errors

- Failing to offer rationale, to support their findings with sound analysis, or stating only conclusions
- Basing opinion on an inaccurate factual premise
- Relying on a large gap in treatment or lack of diagnosis in service
- Relying on the absence of medical evidence without explaining why
- Offering contradictory findings

Common exam errors

- Not accepting a PTSD diagnosis in the record, or focusing too narrowly on PTSD as a diagnosis and ignoring other psychiatric diagnoses the veteran may have in the record
- Arriving at a diagnosis other than PTSD, and failing to consider whether it is related to service
- Not considering physical conditions (orthopedic issues, reproductive issues, urinary/voiding issues, headaches, fibromyalgia, hemorrhoids, STDs, etc.) related to the MST
- Failing to consider non-psychiatric secondary condition(s)

Example 1

VA noted: “Markers exist in the evidence of record. STRs show the following markers: adjustment disorder w mixed anxiety and depressed mood, recurrent herpes viral infection, requested STD testing, reported unsafe sexual behavior while deployed, adult victim of sexual abuse documented during military service. CAPRI shows current counseling for MST.”

VAX Examples: SC PTSD

SECTION III – MEDICAL OPINION FOR DIRECT SERVICE CONNECTION

Choose the statement that most closely approximates the etiology of this claimed condition.

☐ 3a. The claimed condition was at least as likely as not *(50 percent or greater probability)* incurred in or caused by the claimed in-service injury, event, or illness.

☒ 3b. The claimed condition was less likely than not *(less than 50 percent probability)* incurred in or caused by the claimed in-service injury, event, or illness.

3c. Provide rationale:

Veteran was not diagnosed with PTSD or any other mental disorder due to trauma or personal trauma. VAMC records does diagnose Veteran with PTSD; however, stressor was reported to have been a "rape" in Jordon, but during the Initial PTSD exam, Veteran reporting having blacked out and did not report knowing he was assaulted. No MST markers were found also. Focus of VAMC treatment have been on coping with Veteran's multiple life stressors, primarily regarding custody issues and most recently on " threats made by his son's mother."

Veteran was diagnosed with "Adjustment Disorder mixed; R/O Depressive Disorder NOS" during service due to stressors of losing relationships. Veteran identified a former girlfriend with domestic violence history contacting him, loss of military friends and estrangement from father. Veteran reported concerns for lack of social support at the cause of his mood symptoms.

Veteran is not currently receiving any mental health treatment or diagnosed with any mental health condition due to loss of social support while in service. Therefore, Veteran's Adjustment Disorder while in service has resolved.

Example 2

- Veteran was diagnosed with Chlamydia in service. Lay statement describes incidents which occurred over the course of her assignment. She was the only female in her class, and was subjected to sexist remarks, was verbally sexually harassed by one of the crew chiefs, and had a soda can thrown at her while working. **While on temporary duty, she was sexually assaulted by an airman**.
- Examiner references some of the incidents listed in the veteran's lay statement, but left out her report of being sexually assaulted. The examiner diagnoses other specified anxiety disorder with panic attacks, and alcohol use disorder and finds the PTSD criteria not met.
- VA points out that the examiner noted no MST markers, but that MST markers were noted in c-file and were not recognized and/or considered by the examiner. They ask the examiner to consider the noted MST markers.

Example 2

Provider Response:

Good morning,
Evidence of record are not consistent with MST markers. She reported verbal harassment therefore back pain is not relevant.
Criterion A is not met.
Per August 2021 VES Newsletter:
Please note that, when MST is claimed but the stressor is pertaining to harassment in the absence of actual assault or threat of assault, criterion A will probably not be met.

MH treatment started 10 years after the discharge. The diagnoses that are made, with the exception of PTSD, could be and are related directly to her anxiety.
Even if Criterion A was met, criteria for PTSD are not met, as the vet does not endorse trauma related avoidance, reliving, hyperarousal or negative thoughts.

Common reasons exams are returned

- Exam is inadequate
  - Did not answer the question posed
  - Raising alternate diagnoses that then need further assessment as to relation to service.
- Did not get the information needed (right question was not asked or it was not answered) or additional information is required
- Adjudication issues before or after the exam
  - Did not properly identify markers
  - Duty to assist issues (records outstanding or failure to return inadequate exam)

Provider challenges

Congressional Research Service, *Veteran Disability C&P Exams*, 30 October 2024.

According to GAO and VA's Office of the Inspector General several challenges are:

- Shortages of physicians or specialists in a given geographic area.
- Lack of flexibility in scheduling veteran appointments with contractors.
- Ensuring the accessibility, safety, and cleanliness of exam facilities of contractors and subcontractors. VBA has initiated contract modifications to address concerns regarding standards and monitoring.
    - *See also* ***VA Office of Inspector General, Office of Audit and Evaluations, VBA, "Better Oversight Needed of Accessibility, Safety, and Cleanliness at Contract Facilities Offering VA Disability Exams," Report #23-01059-72, May 8, 2024***

Other issues with exams

- Medical Disability Examination Office (MDEO) reviews cases for quality control issues.
  - *See* Testimony of Elizabeth Curda, Director, Education, Workforce and Income Security, *VA Disability Exams Improvements Needed to Strengthen Oversight of Contractors Corrective Actions*, Testimony before the House Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs, September 18, 2024, pp. 5-6.
- It is not clear that examiners have access to the full file
- Lack of or untimely QR feedback for errant exams
  - Example - 2,700 of 12,152 (22%) of exams contained errors; of those errors, 2,000 had the potential to affect claims decisions (16% of total QR); 690 had errors that were not corrected before claims processors decided the claims (5.6%)
  - VA OIG estimated that errors were not corrected for 35% of potentially insufficient exams before claims processors decided these claims
    - VA Office of Inspector General, Office of Audit and Evaluations, VBA, "*Contract Medical Exam Program Limitations Put Veterans at Risk for Inaccurate Claims Decisions,*" Report #21-01237-127, June 8, 2022.

Other provider challenges

- Timeframes for implementing changes to the exam process
- Incomplete or disorganized information in medical files
- Large record, short exam
- Veteran confusion about what the exam is or why they are there
- Not understanding presumption of soundness and improperly classifying pre-service issues

Other issues with exams

- One of the methods providers are using to“streamline“ cases involves asking veterans to complete a questionnaire before their appointment.
  - Issues for MST survivors with retraumatization.
  - Form/paperwork fatigue
  - Frustration at being asked the same things over and over
  - Frustration with being asked to do VA‘s job (evidence gathering/compilation)
  - Representative is not looped in by examiner
  - Usually not in VA file, though it may be relied upon by the examiner. This is especially problematic if the examination is unfavorable.

Exam challenges for veterans

- Not enough advance notice for scheduling
- Unclear/vague contact prior to exam (sometimes excessive)
- Advocates not looped in for requests for questionnaires or exam scheduling by VA or contractors
- Exam fatigue
- Locations of contractors – not professional/clean/safe
- Deeply personal questions; rapport/trust important, but often report feeling not enough time or feeling rushed

Common reasons for multiple exams

- Prior Inadequate Exam(s)(see above)
  - Missed markers, diagnoses, and treatment
  - Failure to consider lay evidence
- Private evidence/expert reports conflict with exam data
- Adjudication issues before or after the exam
  - Did not properly identify markers
  - Duty to assist issues (records outstanding or failure to return inadequate exam)
  - Misapplication of legal standards such as presumption of soundness
  - Failure to consider full record evidence
  - Misassigned probative value to favorable evidence
  - Failure to properly resolve benefit of the doubt in the veteran's favor
  - Failure to consider relevant lay testimony

Issues at the RO contributing to errors on MST cases

- Failing to identify markers/obtain necessary evidence
  - If record is not well developed prior to sending for examination, the examiner and the veteran may be set up for failure
- Requesting unnecessary exams when the record is complete
- Unclear or incomplete/non-comprehensive exam requests
- Failing to reference or consider lay statements
- Failure to request all needed exams
- Misapplying the presumption of soundness when there is evidence the client was exposed to trauma prior to service
- Failure to ensure exam is full and complete (failure to get clarifying addendum)
- Incomplete questions in addendum
- Failure to explore alternate dx or secondary conditions
- Failure to properly weigh all evidence

The language dilemma

- Medical/scientific lens – causation, correlation, rule out diagnoses, genetic predisposition
- Administrative/legal lens – approximate balance, benefit of the doubt, presumption of soundness
- Challenge Posed: Examiners are asked to use their specific expertise, but to look through the administrative lens and tell us what they see.

The language dilemma

- VA's examination requests are often limited and limiting. They can be overly narrow, overbroad, or both.
- An examiner may be dinged through the QR process for not answering the specific question presented or answering questions not posed.
  - E.g. Questions posed: Does the veteran have PTSD, and, if so, is the veteran's PTSD at least as likely as not related to service? Examiner does not diagnose PTSD, but rather diagnoses bipolar disorder she believes began in service.
- Challenge Posed: If the examiner says it isn't PTSD, it is bipolar d/o. The request is limited to only evaluating PTSD, and not the other diagnoses. This creates inefficiencies.

Takeaways

- Issues persist with the VA Exam process for MST claims
- Veterans are still in a loop between adjudicator and examiner, caught in the middle
- Both examiners and adjudicators continue to:
  - Miss critical evidence in the file in veterans' cases
  - Apply too high of a standard to stressor and nexus requirements
  - Misapply the presumption of soundness to the detriment of favorable resolution in veterans' cases
- These issues result in multiple, often unnecessary, sometimes still inadequate, exams. Thus, veteran trauma victims are made to tell and retell/reexperience their trauma(s)

Recommendations for Committee consideration

Veteran focused improvements:

- Contractor location must be safe and clean
- Examiner contact with veteran must be appropriate both in scheduling and examination
- Reduce burden of work on veteran by eliminating pre-exam questionnaire (stressor statement already of record) for MST issues (at a minimum)
- Examiners and VA adjudicators may have numerical processing metrics and "timeliness standards" that are working to the detriment of the quality of the exam/adjudication. Improvements to the quality of the process from the perspective of the veteran must be highest priority. Inadequate examinations cause more churn and re-traumatization for veterans.

Recommendations for Committee consideration

Examiner and Adjudicator focused

- Examiners and VA adjudicators must receive regular and robust trauma-informed training to provide adequate examinations
- Consider holding joint trainings with VA adjudicators and examiners to help bridge the language gap and create efficiencies to reduce ineffective communication back and forth
- Adjudicators should provide clearer requests to VA examiners and leave open possibility for examiner to consider differing diagnoses and related secondary conditions' relation to service
- Examiners should be encouraged to consider the diagnoses they render (even if not the one requested) in relation to the link to service, level of disability, etc.

Recommendations for Committee consideration

- Increased reliance on record review exams, whenever possible (i.e. DX of record and the question is specific to nexus)
- Contractor should have the full file to be able to review all records including those potentially missed by the adjudicator, but relevant
- Ensuring timely QR feedback on exams to examiners and adjudicators

Questions

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