Advocacy Considerations in Board of Veterans' Appeals Practice

Vito A. Clementi
Veterans Law Judge

The views expressed here are the author's, and do not represent the policy of the Department of Veterans Affairs (VA) or the Board of Veterans' Appeals ("BVA" or "Board").

The Golden Rule of Advocacy and the target closing statement:

"The record is complete,
the evidence approximates balance
and the claim must be granted"

Consideration 1: The "Benefit of the Doubt" Doctrine under 38 U.S.C. 5107(b)

"When there is an ***approximate*** balance of positive and negative evidence regarding ***any issue material*** to the determination of a matter [VA] shall give the benefit of the doubt to the claimant"

Service Connection Elements

- Evidence of a current disability or disorder
- Evidence of an in-service event
- Evidence of a connection - "nexus"

Benefit of the Doubt Doctrine

☒ "Beyond a reasonable doubt" (99.9%)

☒ "The preponderance of the evidence supports the claim"(51%)

☑ Grant: "The evidence favoring and against the claim approximates balance" (49%? 45%? 42%? 40%?)

☑ "The preponderance of the evidence is against the claim"

Consideration 2:

The 3 Obstacles to a Grant
(why the claim is denied, typically)

- The UNRECALLED FACT – *i.e.,* when, where, who, why, how
- The UNSUBSTANTIATED fact or allegation
- The UNFOCUSED claimant, witness, physician, adjudicator

Consideration 3:

Dealing with the Unrecalled –
(Preparing the record and your case)

Dealing with the Unrecalled?

- **"Go to the attic:" In-service letters, certificates of appreciation, photographs, souvenirs, "unofficial" awards**
- **"Find the doctor:" post-service medical reports, bills, prescriptions, *post service employment medicals,* workman's compensation, social security disability records**
- **Current letters from family, friends, service "buddy statements"**

Consideration 4:

Dealing with the Unsubstantiated

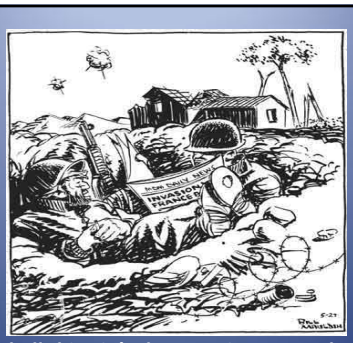
- **What is the reason for the for the denial ?**
- **Address the deficiency or deficiencies**
- **What do we do now? Control the case flow!**

Consideration 5

Focus the claimant, the physician and the adjudicator

Focus points

- **Non-VA medical opinions: ensure the physicians know the facts and the issue – read *Kowalski v. Nicholson,* 19 Vet.App. 171 (2005)**
- **Making the tactical decision: withdrawal of the non-meritorious issue or non-beneficial issue?**
- **Argue for a specific and realistic disposition – (*e.g.,* not "a higher rating," "a 40% rating)"**



"The hell this ain't the most important hole in the world – I'm in it!"

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"The record is complete, the evidence approximates balance, and the claim must be granted."

Service connection: (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *Davidson v. Shinseki, 581 F.3d 1313 (Fed.Cir.2009)*

Ratings: determined by examination of severity of symptom compared with criteria in VA's Schedule for Rating Disabilities, (based on average impairment in earning capacity). See 38 U.S.C. § 1155; 38 C.F.R. Part 4. When a question arises as to which of two ratings apply under a particular diagnostic code, the higher evaluation is assigned if the disability more closely approximates the criteria for the higher rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7 .

CONSIDERATION 1: UNDERSTANDING THE BENEFIT OF THE DOUBT DOCTRINE UNDER 38 U.S.C.§ 5107(b):

Effective advocates understand (1) the benefit of the doubt doctrine and (2) that the doctrine applies to each element of a claim.

The key language: " . . . When there is an approximate balance of positive and negative evidence regarding *any issue material* to the determination of a matter [VA] shall give the benefit of the doubt to the claimant."

"The tie goes to the runner." *read Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); *Alemany v. Brown*, 9 Vet.App. 518 (1996).

The benefit of the doubt doctrine is not applicable based on pure speculation or remote possibility. See 38 C.F.R. § 3.102.

One VLJ's view: The benefit of the doubt is not based on a numerical calculation – the key inquiry is whether there is an approximate balance of evidence that is (1) factually informed; (2) competent and (3) responsive to the issue.

CONSIDERATION 2: THE THREE OBSTACLES (SITUATIONAL ADVERSARIES?) TO A GRANT IN BVA PRACTICE

This is a non-adversarial practice. Claims are denied because of lack of probative evidence, unsubstantiated allegations, and unfocused participants. Effective advocates build the record, deal with evidentiary weakness, and assist the trier to find for their client.

- The UNRECALLED FACT OR SOURCE: when, where, who, why, how
- The UNSUBSTANTIATED: fact or allegation
- The UNFOCUSED: claimant, witness, physician, adjudicator

CONSIDERATION 3: DEALING WITH THE UNRECALLED – PREPARING THE RECORD

Effective advocates play a key role in developing the record, controlling case flow and expediting case disposition.

- Focus your client on the relevant– *e.g.*, service connection (source); rating (severity); reopenings (what's new and "substantiating?")
- "Open" record development with advisements on how to substantiate claims: (1) with application; (2) after Veterans Claims Assistance Act ("VCAA") notice; (3) with Notice of Disagreement generating appeal to BVA; (4) after receipt of Statement and Supplemental Statements of the Case; (5) during or after Regional Office hearing ((*Constantino v. West.* 12 Vet.App. 517 (1999) and 38 C.F.R. 3.103(c)(2)); (6) after certification to BVA; (7) after BVA hearing ((*Bryant v. Shinseki*, 23 Vet. App. 488 (2010)).
- The shared responsibility for record development by VA and the claimant: 38 U.S.C.A. § 5107(a) (VCAA) and the "not a one-way street" cite ((*Woods v. Gober*, 14 Vet.App. 214 (2000); *Hurd v. West*, 13 Vet.App. 449 (2000)).
- Sources of substantiation and information:
    - ✓ "Go to the attic:" then contemporaneous letters from/to family members and friends; old doctor's bills, records; souvenirs and photographs, military awards, decorations, the unofficial awards and "funny stuff"
    - ✓ Reserve and National Guard service?

- ✓ Out of business hospitals and physicians' offices: where are the records?
- ✓ Post-discharge employment and medical records?
- ✓ Current letters from family, friends, service colleagues?
- ✓ Social security disability?
- ✓ Workmen's compensation?

- Website use: be mindful of or avoid non-official sites; use reputable sites (*e.g.*, official government, foundations, and medical societies)
- No "rules" of evidence but Board must weigh evidence for probative value

CONSIDERATION 4: DEALING WITH THE UNSUBSTANTIATED

Effective advocates know the reason the claim was denied and are prepared to address the deficiency or deficiencies.

- Consider using arguments that the evidence is in "approximate" balance now – no need to remand the claim!
- Avoid arguments based on "secret records," the non-sensical allegation, and conspiracy theories
- Service connection:
  - ✓ 38 U.S.C. 1154(b): If veteran served in combat, account of what occurred in combat is presumed credible for purposes of development and adjudication of the claim.
  - ✓ 38 U.S.C.A. § 1154(a): VA must give "due consideration" to the places, types, and circumstances of such Veteran's service as shown by such Veteran's service record, the official history of each organization in which such Veteran served, such Veteran's medical records, and all pertinent medical and lay evidence.
- Increased and Initial Rating Cases:
  - ✓ Argue progression of the disorder – if last laboratory findings show worsening and are now close to schedular criteria for a higher rating, argue findings likely now approximate those for a higher rating

- ✓ Argue "recovery" time (especially in psychiatric and orthopedic disorders)

- ✓ Argue alternative rating codes: *Butts v. Brown*, 5 Vet. App. 532 (1993).

- If you have nothing else, attempt to control the flow of events: "bad news" up front and provide the VLJ with "what do we do now?" (explain, minimize, or argue insufficiency of negative evidence)

<u>CONSIDERATION 5</u>: FOCUS THE CLAIMANT, THE PHYSICIAN, AND THE ADJUDICATOR

Effective advocates will build their own case and be more successful by focusing on the disputed issue: *e.g.*, diagnosis? service event? nexus? clinical finding for next higher rating?

- Ensure your client knows the *specific* reason the claim was denied and assist her in getting the evidence in support. See the Statement and Statements of the Case

  Service connection: *No diagnosis? Nothing in service? No nexus?*

  Rating: What clinical (objective) finding or support for the subjective report?

  Reopening: What is now in the record that may "substantiate" the claim?

- Submitting medical opinions? Focus your physicians *on the facts of record and the disputed issue* to ensure factually informed, medically competent and responsive medical opinions

  ENSURE THAT PHYSICIANS KNOW THE FACTS!

  1. Generally, the degree of probative value which may be attributed to a medical opinion issued by a VA or private treatment provider is weighed by such factors as its thoroughness and degree of detail, and whether there was review of the veteran's claims file. *Prejean v. West*, 13 Vet.App. 444 (2000).

  2. Did the examining medical provider had a sufficiently clear and well-reasoned rationale, as well as a basis in objective supporting clinical data. *Bloom v. West*, 12 Vet.App. 185 (1999); *Hernandez-Toyens v. West*, 11 Vet.App. 379 (1998); *see also Claiborne v. Nicholson*, 19 Vet.App. 181 (2005) (rejecting medical opinions that did not indicate whether the physicians actually examined the

veteran, did not provide the extent of any examination, and did not provide any supporting clinical data).

3. A bare conclusion, even one reached by a health care professional, is not probative without a factual predicate in the record. *Miller v. West*, 11 Vet.App. 345 (1998).

4. In order for a medical opinion to be probative, the medical examiner must have correct information regarding the relevant facts of the case. *Nieves-Rodriguez v. Peake,* 22 Vet.App. 295 (2008), *Stefl v. Nicholson,* 21 Vet. App. 120 (2007); *Guerrieri v. Brown*, 4 Vet.App. 467 (1993) (observing that the evaluation of medical evidence involves inquiry into, inter alia, the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion that the physician reaches); *see Shipwash v. Brown,* 8 Vet.App. 218 (1995); *Flash v. Brown,* 8 Vet.App. 332 (1995) (regarding the duty of VA to provide medical examinations conducted by medical professionals with full access to and review of the veteran's claims folder); *but see D'Aries v. Peake*, 22 Vet.App. 97 (2008) (holding that it is not necessary for a VA medical examiner to specify review of the claims folder where it is clear from the report that the examiner has done so and is familiar with the claimant's extensive medical history).

5. When assessing the probative value of a medical nexus opinion, the Board must consider whether the medical opinion contains "such sufficient information that it does not require it to exercise independent medical judgment." *Stefl v. Nicholson,* 21 Vet.App. 120 (2007) ((citing *Colvin v. Derwinski*, 1 Vet.App. 171, 175 (1991)).

6. *Colvin v. Derwinski*, 1 Vet.App. 171 (1991) (the Board may not rely upon its own unsubstantiated medical opinion); *see Allday v. Brown*, 7 Vet.App. 517 (1995); *Godfrey v. Brown*, 7 Vet.App. 398 (1995); *Traut v. Brown,* 6 Vet.App. 495 (1994).

7. *D'Aries v. Peake,* 22 Vet.App. 97 (2008) (holding that the benefit of the doubt doctrine is a legal construct to be applied by VA adjudicators when the evidence is approximately balanced, not by a medical professional in the rendering of medical opinions).

8. *Guerrieri v. Brown*, 4 Vet.App. 467 (1993) (the evaluation of medical evidence involves inquiry into, inter alia, the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion that the physician reaches).

9. *Hood v. Shinseki,* 23 Vet.App. 295 (2009) (in claim alleging VA negligence in medical care, holding that where physician's opinion that it was "impossible, in retrospect" to reach medical conclusion of cause of claimant's illness in VA medical facility was "at best, equivocal" and insufficient to support such nexus); *see Polovick v. Shinseki*, 23 Vet.App. 48 (2009)(holding doctor's statement that veteran's brain tumor "may well be" connected to Agent Orange exposure was speculative);

10. *Bloom v. West*, 12 Vet.App. 185 (1999) (noting that the use of the term "could," without other rationale or supporting data, is speculative);

11. *Goss v. Brown*, 9 Vet.App. 109 (1996) (noting that the use of the phrase "could not rule out" was too speculative to establish medical nexus);

12. *Tirpak v. Derwinski*, 2 Vet.App. 609 (1992) (holding that medical opinions are speculative and of little or no probative value when a physician makes equivocal findings such as "the veteran's death *may or may not* have been averted").

13. *Kowalski v. Nicholson,* 19 Vet.App. 171 (2005) (holding that it is error to reject a medical opinion *solely* on the basis that the medical opinion was based on a history given by the veteran).

14. *Leshore v. Brown,* 8 Vet.App. 406 (1995) (the mere transcription of medical history does not transform the information into competent medical evidence merely because the transcriber happens to be a medical professional).

15. *Mariano v. Principi,* 17 Vet.App. 305 (2003) (observing that flawed methodology in creating medical report renders physician's opinion of "questionable probative value").

16. *Nieves- Rodriguez v. Peake,* 22 Vet.App. 295 (2008) (the probative value of a medical opinion depends upon whether it is factually accurate, fully articulated, and contains sound reasoning for the conclusion, not the mere fact that the claims file was reviewed).

17. *Polovick v. Shinseki,* 23 Vet. App. 48 (2009)(a medical opinion may be speculative when it uses equivocal language such as "may well be," "could," or "might").

18. *Sklar v. Brown*, 5 Vet.App. 140 (1993)(observing that a specialist's opinion as to a medical matter outside of his or her specialty to be given little weight).

19. *Wray v. Brown*, 7 Vet.App. 488 (1995) (in analysis of cases involving multiple medical opinions, each medical opinion should be examined, analyzed and discussed for corroborative value with other evidence of record).

- Consider making a tactical decision and focus on what contentions or claims have a plausible chance of success and which will benefit your client:

  - ✓ One or more unsubstantiated, meritless claims in multiple-issue appeals? Consider withdrawal of the likely denials – focus on the likely meritorious.

  - ✓ 100 percent ratings and total disability ratings based on individual unemployability (TDIU"); read *Herlehy v. Principi*, 15 Vet. App. 33 (2001) (finding request for TDIU moot where 100 *percent schedular rating was awarded for the same period).*

  - ✓ Service connection available for disabilities and disorders, not symptoms alone: read *Sanchez-Benitez v. Principi*, 239 F.3d 1356 (Fed. Cir. 2001) and *Sanchez-Benitez v. West*, 13 Vet.App. 282 (1999) (service connection may not be granted for symptoms unaccompanied by a diagnosed disability); *Brammer v. Derwinski*, 3 Vet.App. 223 (1992).

  - ✓ Ten percent maximum rating for bilateral or unilateral tinnitus: *Smith v. Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006).

- Argue or ask for a *specific and realistic* disposition – (*e.g.*, not "an increased rating" but "a 40 percent rating.")

- If needed, ask for a limited "record open" period - adequately identify the nature of the missing record and its location. *If and only if needed, request a remand.*

- Extensive records and record extracts?: helpful, but ensure new evidence is marked (consider waiver of RO consideration)