Evidence for VA Disability Claims

By Tod M. Leaven

When submitting a claim to the Department of Veterans Affairs, it is always highly encouraged that you also submit additional evidence which can support your claim. The problem is that the VA is not always clear as to what evidence would be the most helpful and how that evidence should be arranged. The law states that the VA must “consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits” and that each disabling condition for which a veteran seeks service connection “must be considered on the basis of all pertinent medical and lay evidence.” 38 U.S.C. §5107(B); 38 C.F.R. §3.303(a). This means that the VA cannot deny a claim without first considering both the lay and medical evidence, if submitted. Though the VA uses the term “Medical Evidence,” it would be more appropriate to use the term “Expert Evidence” since often the evidence needed does not come from a doctor but rather from a counselor, social worker, or someone else with particular and pertinent expertise. Not only must the VA consider this evidence, but it also must specify in its decision which evidence it finds to be persuasive or unpersuasive and why.

Competent lay evidence is evidence that does not require specialized education, training, or experience to observe and describe and is being reported by any person who has actual knowledge of the facts or circumstances being reported. 38 C.F.R. 3.159 (a)(2). For example, a spouse typically cannot state as competent lay evidence that her husband has Lyme's Disease. This is a complex and sophisticated condition requiring specialized education, training, or experience to diagnose. Usually, a medical doctor would need to diagnose this condition and it would be admitted into the file as Medical or Expert Evidence. However, a spouse can state as competent lay evidence that her husband's doctor told her that he had Lyme's Disease. She could also list the physical symptoms that she personally observed on her husband and when she witnessed these symptoms. The difference is that she is not making a diagnosis (which usually requires training) but rather she is simply stating what she personally observed, either the doctor’s statement or what she witnessed on her husband. Lay statements regarding medical symptoms may not be rejected simply because they are not accompanied by contemporaneous medical records. Under certain circumstances, a veteran might need to submit is lay evidence for the VA to grant his or her claim.

The courts have held that “[l]ay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional.” Jandreau v. Nicholson, 492 F.3d 1372, 1377 (Fed. Cir. 2007). Lay evidence can also be used to support a nexus between the current disability and an in-service event – in other words, lay evidence can support that a current disability was caused by or aggravated by something that happened while in service. A frequently relied upon example of when lay evidence can be used to show service-connection of a disease or injury is found in 38 U.S.C. § 1154(b) and includes the following:

In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-con-nection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran.

Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions.” 38 C.F.R. § 3.159 (a)(1). This includes “statements conveying sound medical principles found in medical treatises” and “statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.” Id. If the VA rejects medical evidence which supports a veteran’s claim, it must account for and explain its reasons. This includes when the veteran is a medical professional and offers a medical opinion supporting his or her own claim. This required explanation has to include an evaluation of credibility and probative value. Medical, or expert, opinions must meet certain thresholds to be credible and probative. The biggest three deficiencies which can invalidate a medical opinion (regardless if it’s an opinion supporting or attacking the veteran’s claim) are (1) the expert relied on inaccurate facts, (2) the expert did not address all legal theories of entitlement to service connection, and most commonly (3) the expert failed to provide a rationale for his or her conclusion.

A classic example of this first deficiency, relying on false facts, is when the VA conducts a C&P examination and the physician performs an incomplete records review. If the physician wrongly concludes that a veteran was not treated for an injury that he or she actually was treated for, the physician’s opinion would be based upon inaccurate facts. A classic example of a physician not addressing all legal theories of entitlement to service connection often occurs when a veteran files a claim for a condition and then raises multiple legal theories of causation. If a veteran files a claim for depression and lays out a claim for direct causation and a claim for secondary causation due to an in-service injury, a physician must opine on both theories. The most common failing is when a physician fails to provide a rationale for a conclusion. The Court is very clear that a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two. Stefl v. Nicholson, 21 Vet. App. 120, 124 (2007). “Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection or rating context if it contains only data and conclusions.” Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 304 (2008).

Regardless if the evidence is lay or expert, the VA must include in its decisions the precise basis for that decision, including a response to the various arguments advanced by the veteran.

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