Excerpted from

Navigating Legal Issues for Military Veterans: Leading Lawyers on Arguing Disability, Pension, and other Claims Before the VA (Inside the Minds)

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The Following is an excerpt from my chapter of "Navigating Legal Issues for Military Veterans: Leading Lawyers on Arguing Disability, Pension, and other Claims Before the VA (Inside the Minds). The publication was aimed at educating other attorneys on the issues surrounding the representation of veterans in claims for VA Compensation and Pension. The excerpt is reprinted with the permission of Aspatore Books.

Providing Legal Advice to Military Veterans

Veterans have always been considered an important part of American culture. This is true, not only because our veterans have contributed heavily to protecting our way of life, but also because our uniquely American brand of patriotism is worn on our sleeves, and paying tribute to those who served our country is in our DNA. For example, in June 2013, I was driving North on I-95 on my way home from a lunch at my sister-in-law's house in Baltimore. As soon as we crossed the Pennsylvania border from Delaware we saw, on every cross-street bridge over I-95, ladder arches and fire engines with flags hanging over the overpasses. It took a little digging to figure out what this was all about. My wife immediately went to work on her smartphone and eventually figured out that the call had gone out to local fire companies to set up on the overpasses a display to honor a group of WWII veterans returning home from a trip to Washington DC, organized by a local charity. This overwhelming show of admiration, gratitude, and honor is not uncommon in our country. That the largest integrated health care system in the country is the Veterans Health Administration (VHA) is no surprise.[1]

However, veterans are not immune from the difficulties of dealing with a large government bureaucracy when it comes to fighting for compensation and pension benefits. While many veterans' service organizations (VSOs) have long provided free advice to veterans trying to obtain benefits from the Veterans Administration (VA), increasingly veterans are turning to private attorneys to help them navigate the surprisingly complex veterans' benefits system.

Disability Compensation Claims

As a disability benefits attorney, my practice is focused on helping eligible veterans obtain service-connected disability compensation and pension benefits. As touched on previously, pension benefits

1 About the Veterans Health Administration (http://www.va.gov/health/aboutVHA.asp) (accessed on June 25, 2013).

are available for veterans with qualifying service who are totally and permanently disabled; aged sixty-five or older; receiving Social Security Disability or Supplemental Security Income; or in a nursing home. If your practice includes Social Security benefits, this is an important benefit to research for your client. Specifically, for 2013, a qualifying veteran without a spouse or child would be entitled to $12,465 a year in pension benefits. This is almost always a higher amount than Supplemental Security Income benefits. Accordingly, pension eligibility should always be explored if your disabled or elderly client may have had qualifying service. One important factor to consider: disability for pension purposes *does not have to be service-connected.*

Disability compensation benefits, on the other hand, are limited to injuries or illnesses that began during a period of active military service. One of the most commonly misunderstood characteristics of these benefits is that, unlike a workers' compensation injury, the illness or injury does not have to be directly caused by "line of duty," or activity directly related to a veteran's active duties. Instead, as long as the injury or illness began or was aggravated during a period of active service, it will qualify. Thus, a veteran who is playing a pick-up basketball game off-base and injures his knee will potentially qualify for disability compensation for that injury. Because of this somewhat lenient standard, it is important to carefully discuss these issues with your veteran clients, as many will not have considered that they might be eligible for these benefits if their injury was not line-of-duty-related.

Practice at the VA

An attorney new to the veterans' benefits system may be surprised at the dichotomy between what is, by mandate, one of the least adversarial systems, and, in practice, one of the most adversarial. I should begin with a disclaimer. There are many employees at the VA who put veterans first in everything they do. I have participated in Decision Review Officer (DRO) hearings that lasted only the time needed for the DRO to apologize to the veteran for having gotten things wrong to begin with. That said, as an attorney representing veterans at the administrative level, we face an uphill battle. It is important to realize from the outset that private attorneys are intentionally handicapped. Veterans Service Organizations (VSOs), which have represented veterans long before the law was changed to allow veterans to hire an attorney at the administrative level if they so choose, are provided with direct access to VA office space and systems that private representatives, as of this writing, are not. For example, the VA recently granted VSOs access to the Stakeholder Enterprise Portal (SEP), an electronic system allowing VSOs to submit evidence and documentation electronically on behalf of the veterans they represent. Private representatives have not yet been offered similar access.

In addition to the direct disadvantages of having an "Esq." at the end of your name, an attorney representing a veteran before the VA will quickly learn that there are also many employees who will actively encourage your clients to fire their attorney, disparage attorneys in general, and take every opportunity to remind the veteran that this is a "non-adversarial" process, and therefore, nobody should ever need an attorney in the first place. You will be faced with frustrating wait-times; a refusal to provide claim files (even when properly requested under the Freedom of Information Act/Privacy Act) without lengthy administrative appeals and the threat of lawsuits; and the feeling that you are

often standing alone against an enormous, monolithic agency, bent on your personal ruin. In short, it is a rush!

All that said, I share little of the cynicism of some of my colleagues. While there is, no doubt, an entrenched system, and the recent entry of attorneys to that system has been disruptive, representing clients before the VA is no different than any other advocacy—what you put in is what you get out. If you take the time to carefully review the issues in a particular case and cure whatever defects have prevented a fully favorable determination, you should ultimately be successful.

Types of Denials and Appealing a Rating Decision

In a claim for service-connected compensation, a veteran must have a current condition and evidence of a connection between that current condition and an illness, injury, or event which occurred in military service.[2] Based on these criteria, unfavorable decisions come in several forms. The most common unfavorable decisions include a denial of service-connection, that there is no current condition, or that there is a service-connected condition, but that it is non-compensable, or the VA may award an insufficient rating.

The first step in appealing a less than fully favorable decision is the filing of a Notice of Disagreement. This can be an informal document, indicating that the veteran disagrees with the decision, specifying what parts of the decision he or she disagrees with, and requesting administrative review. While there is no required format for a Notice of Disagreement, in February 2013, the VA issued a standard Notice of Disagreement Form (VA Form 21-0958). This form requests more specificity than is legally required, and does not provide a place to indicate the veteran's desire to elect review by a Decision Review Officer. Still, in some cases, it may be helpful to utilize this form to streamline the processing of appeals.[3]

A veteran has one year from the date of the Rating Decision to file this appeal. After this appeal has been filed, the VA Regional Office will issue a "Statement of the Case," which is a formal determination, including page after page of regulations relied on in arriving at the decision. Upon receipt of the Statement of the Case, the veteran has 60 days to file his or her formal appeal to the Board of Veterans Appeals, and to choose whether to request a hearing before a veterans' law judge.

There is an important choice to be made when filing the Notice of Disagreement: whether or not to request a de novo review by a Decision Review Officer, including the opportunity for a personal hearing. The DRO process assigns a VA employee with the power to change the decision, to review the claims file, including any additional evidence and arguments, and, if requested, conduct a personal hearing.[4]

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2 38 C.F.R. § 3.303

3 A copy of this form is available at http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf

4 38 C.F.R. § 3.2600

Attorneys are fairly split in their opinions as to the utility of the DRO process. There are, after all, significant "cons" to opting for a DRO review. It can add substantial time to a veteran's appeal (one local Regional Office I regularly work with has only one Decision Review Officer working on appeals). Likewise, just like pulling a "bad" judge, you may wind up with a DRO intent on shoring up the Regional Office's denial rate by demanding an additional examination with an unfavorable VA physician examiner to combat any favorable evidence you have already developed. However, absent evidence of "clear and unmistakable error," the DRO cannot resolve the claim in a manner less advantageous to the claimant than the original decision.

In my own experience, the "pros" often outweigh these risks. For one thing, the additional time may be critical if you come to a case late in the process and need to develop the record. More important, the DRO process is non-prejudicial. If the DRO is not able to issue a fully favorable decision, the veteran is free to continue on to the Board of Veterans Appeals. Most important, I have had an overwhelming amount of success with DRO reviews. It is a perfect opportunity to present new evidence, including the veteran's testimony, which is itself considered competent evidence, unless directly contradicted by other evidence. It is also, in my experience, your first, and often best chance, to argue your client's case to the person making the decision on the claim. With the opportunity to shortcut or totally avoid the need for the appeals process, it is hard to pass up an extra opportunity to argue your client's claim to anyone who will listen.

Tips for Representing a Veteran in a DRO Personal Hearing

The most important thing to remember about a personal hearing is that this is not "court." This is a matter of style, and it can be incredibly difficult advice, especially for a skilled litigator, to heed, but the less you come across like a capital "L" lawyer, the better. As already noted, in the minds of many VA employees, they have gotten by just fine without lawyers coming in and gumming up their system. If you show up at a personal hearing ready to argue against a devious adversary, that is exactly what you will do.

My advice is to realize that this really is an informal hearing. Testimony will be made under oath and recorded, but that is the full extent of the formality. The DRO is almost certainly not an attorney, and will likely not be interested in case law. He or she will be interested in a clean theory of the case, backed up by the evidence, and the relevant regulations. Point out, in as collaborative a way as you can muster, what your client is looking for, why the evidence supports it, and why no further development by way of an additional VA examination is necessary (unless, of course, you feel otherwise).

Testimony

When taking testimony, prepare your client to limit his or her testimony to the issues actually under review. It can be one of the most difficult things you do to prevent your client, especially a decorated veteran, from taking this moment to share a detailed personal history with the DRO. After all, for a majority of my clients the proposition is simple: they served our country honorably, were injured as a result, and now have to fight to obtain the compensation they need to make them whole. It is

completely understandable that a veteran would want to take this opportunity to explain why he or she *deserves* these benefits. Unfortunately, this kind of narrative will rarely provide the practical insight into a claim the DRO needs.

Instead, look to the testimony to fill any holes in the record. Specifically, a veteran's testimony is considered competent evidence when offered on fact issues of which the veteran has personal knowledge. For example, where service medical records are scarce, or lack a specific diagnosis or reported symptoms, the veteran can testify to the symptoms he experienced, and what he reported to doctors.[5] It is far too infrequent in the practice of law that our clients start with a presumption of competence, and therefore, it is an opportunity that cannot easily be passed up.

If the issue is whether an event occurred in service, prepare your client to testify as to the details of the event as specifically as possible. Limit the testimony to what knowledge your client actually has. For example, your client can testify that he hurt his knee while in the service when he was unloading a truck; the character of his pain; or the treatment he received. He can also testify to the way his knee gave out periodically over the years, or locked up every time it rained. Use this opportunity to fill in the gaps, rather than to present a complete direct examination on every aspect of the claim. If there is a lack of evidence on in-service occurrence, or evidence of a post-service injury, address those issues. In my experience, testimony is most effective when it is narrowly focused on those issues not already fully developed for a favorable disposition. Remember, if the DRO cannot grant all of the issues on appeal, you still have the opportunity for a hearing at the BVA.

Compromises

The personal hearing can also be an excellent time to offer a compromise, and I have had a high degree of success when doing so. When appropriate, a compromise can be a huge time saver for the DRO, and can help with an important part of the DRO mandate: cutting down on appeals to the BVA. There are only a few situations in which I will suggest a compromise. The compromise suggestion must be legally supported. I know this is obvious advice, but part of our job as counselors is to educate our clients as to what is and is not possible. We are not gatekeepers in charge of making the VA run efficiently, but we also should not be advancing meritless claims. It wastes everybody's time; most of all, our client's time. If a 50 percent rating for an impairment is the most the evidence could possibly support, explain to your client why; and with your client's consent, tell the DRO that an award of 50 percent would satisfy the veteran's appeal.

Sometimes, a compromise is merely technical. For example, if a veteran is entitled to an award of Total Disability secondary to Individual Unemployability, then it may make sense to agree to waive concurrent claims for increases on the veteran's three service-connected conditions, if the DRO agrees to award a total rating based on IU. This is a somewhat generalized example, as there can be clear

5 Relevant case law supports the unique weight given to lay evidence in this area, and the veteran's testimony specifically, in claims for VA benefits. See *Washington v. Nicholson,* 19 Vet. App. 362, 368 (2005); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007) (a lay person can be considered competent to identify a medical condition, and thus sufficient to establish a diagnosis, absent contemporaneous evidence); *Kahana v. Shinseki*, 24 Vet.App. 428 (2011).

benefits to advocating for the highest possible impairment ratings, regardless of whether a veteran is awarded a 100 percent rating based on Individual Unemployability. Note well that, while TDIU benefits are typically considered a permanent award, if the veteran returns to substantial work, these benefits may end. On the other hand, a rating awarded based on the appropriate schedule is ordinarily unaffected by work activity. Before making any offer of a compromise, make sure you have looked at all of the possible ramifications, and that your client fully understands the pros and cons of making or agreeing to an offer.

Is This a "Good" Practice Area?

The most common question I am asked, usually by other disability benefits attorneys, is whether this is a good practice area to get into. Dispensing with the inherent subjectivity as to what constitutes a "good" practice area, my answer is usually a qualified "yes." The qualifications are important though. I do not think this is a good practice area for a solo practitioner who needs to rely on income from these cases right away. While many practice areas can take a long time to see your first favorable outcomes, the VA's pace is glacial. Claims often take four to five years before seeing an award, and if you are building a reputation-based practice (which you should), it will take many more years to establish a network of satisfied referring clients. I was fortunate to already be part of a successful disability benefits practice when I decided to begin representing veterans. Because of this, I was free to take lower-value, high-merit claims, provide pro bono assistance to veterans filing claims for the first time, and could wait, without pressure, to begin earning fees on my cases. By doing so, I was also able to build a network of happy former clients who have, over the last few years, referred a substantial percentage of new clients to my law firm.

As I stated earlier, the VA can be a hostile place for attorneys. Signed-for certified mail gets ignored, and must be re-sent numerous times; VA employees will refuse to acknowledge your representation and repeatedly fail to copy you on, and send time-critical mail to your clients; and the failure of the VA to comply with Privacy Act and Freedom of Information Act (FOIA) regulations, giving you access to your client's file, or failing to adjudicate the claim in anything even somewhat resembling a timely manner, can all leave you feeling ineffective. Like most practice areas, managing your clients' expectations early on in the process is crucial to a sustained, positive relationship.

On the other hand, this is one of the most credible and satisfying client populations you can represent. Being the advocate who finally pushes an entrenched case along the finish line, and obtaining the often modest benefits a veteran has been fighting for, is an accomplishment that makes this more than a "good" practice area—it is a reason to get up for work in the morning.

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