RATINGS TREK: Navigating the Prime Directive of Obtaining Benefits for Veterans

Scope of Presentation

- Achieving Service Connection
  - Direct and secondary service connection
  - Applying presumptions
  - Service connection based on aggravation
- Ratings Issues
  - Basics of the Ratings Schedule
  - Diagnostic codes
  - How to dispute improper ratings

Direct Service Connection

To establish service connection, the Veteran must establish the following three elements:

#1 - a current disability

#2 - incurrence or aggravation of a disease or injury in service; and

#3 - a nexus between #1 and #2

Element #1 – Current Disability

- Evidence
  - Medical evidence of a current diagnosis
  - Lay evidence
    - Where a layperson is competent to identify the medical condition
    - Where the layperson is reporting a contemporaneous medical diagnosis
    - Where it described symptoms at the time that supports a later medical diagnosis

Element #1 – Current Disability

- "Current"
  - Manifest prior to filing a claim or at any time during pendency of the claim
  - The record contains a recent diagnosis

Note - Disabilities that have resolved prior to filing the claim and no longer impact earning capacity are not "current"

Element #1 – Current Disability

- "Disability"
  - 38 U.S.C. § 1110 defines "disability" in context of service connection claims as "impairment of earning capacity due to disease, injury, or defect, rather than to the disease, injury, or defect itself." *Allen v. Brown*, 7 Vet. App. 439, 448 (1995)
  - Congenital/Developmental diseases may be recognized as service-connected "disabilities" if capable of worsening

Element #1 – Current Disability

- "Disability" does NOT include:
  - A Congenital/Developmental defect
    - a static condition incapable of worsening
      - Ex. – personality disorders, refractive errors of the eye, mental deficiencies
    - But, if during service a congenital or developmental defect is subject to a superimposed injury or disease, service connection may be warranted. VAOPGCPREC 82-90 (July 18, 1990)

Examples

- *Robinson v. Wilkie*, 2018 U.S. App. Vet. Claims LEXIS 1451 (October 31, 2018)
- *Cousin v. Wilkie*, 905 F.3d 1316 (2018)
  - 'defect' is properly construed as excluding degenerative conditions

Element #2 – In-Service Incurrence

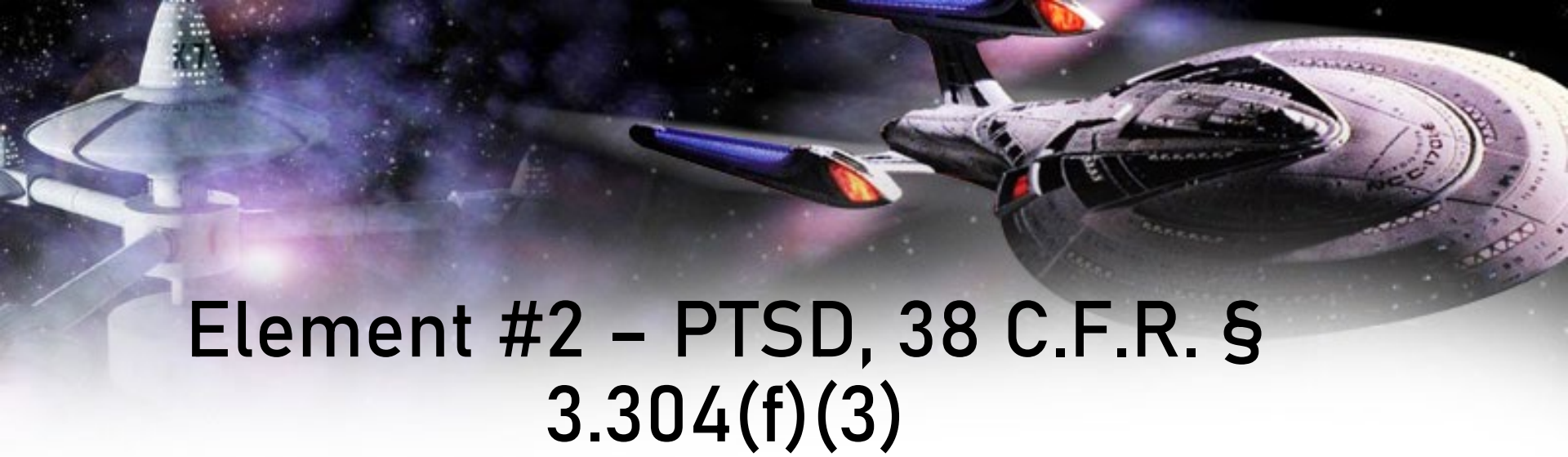
- Evidence must establish that an injury or disease was incurred in service. 38 C.F.R.§3.303(a)
- In-service diagnosis or treatment NOT required
  - The absence of evidence is NOT evidence

Element #2 – In-Service Incurrence

- Evidence of incurrence can include medical OR lay evidence
- 38 C.F.R.§3.303(a) also requires that a Veteran's claim "be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served"

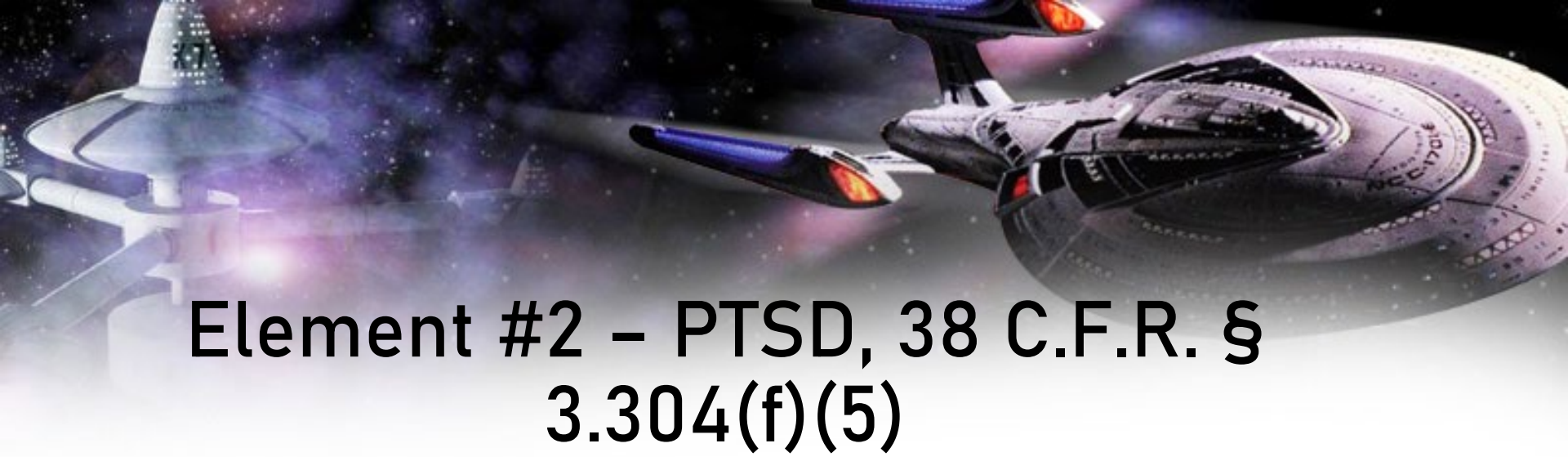
Element #2 – In-Service Incurrence

- The injury does NOT need to occur while performing service-related activities
- BUT, it cannot be the result of the Veteran's willful misconduct
  - Requires specific findings/inquiry



Element #2 – PTSD, 38 C.F.R. § 3.304(f)(3)

- Where a claim for PTSD is based on a Veteran's "fear of hostile military or terrorist activity", lay evidence alone may establish the occurrence of the claimed stressor if consistent with the places, types, and circumstances of the Veteran's service
- VA psychologist/psychiatrist must confirm that the reported stressor is adequate to support the PTSD diagnosis and that the symptoms are related to that stressor



Element #2 – PTSD, 38 C.F.R. § 3.304(f)(5)

- Where a claim for PTSD is based on a Veteran's "in-service personal assault" evidence from sources other than service records may corroborate
- "Markers" – law enforcement records; pregnancy/STD tests; statements from family members/fellow service members/clergy; evidence of behavior changes; evidence of substance abuse; unexplained economic/social changes

Element #2 – Combat Veterans

- Lay evidence that an injury or disease was incurred in service is sufficient if consistent with the circumstances, conditions, or hardships of such service, even in the absence of records supporting incurrence
- 38 C.F.R. § 3.304(d); 38 U.S.C. § 1154(b)

Element #3 – Nexus

- Was the Veteran's current disability "at least as likely as not" caused by or incurred in service?
- Can be established through:
  - Medical opinion
  - Or, in some situations, lay evidence

Secondary Service Connection

- Any disability "which is proximately due to or the result of a service-connected disease or injury shall be service-connected." 38 C.F.R. § 3.310(a)
- Also available for any *increase* in severity of a non-SC disability where that increase was caused by a SC condition (as opposed to the natural progression of the non-SC condition)

Secondary Service Connection

- Secondary SC can also be obtained for conditions that arise as a result of *treatment* for the SC condition
  - Ex. – Veteran has a SC back condition for which he takes high doses of NSAIDs for many years. Veteran develops GERD as a result of the NSAID use. GERD can be SC as secondary to the back condition

Secondary Service Connection

- Obesity is not a compensable disability for purposes of a VA compensation claim
- But, VAOPGCPREC 1-2017 clarifies that obesity can be an "intermediate step" in secondary SC claims. 3-part test:
  - Did the SC condition cause the obesity?
  - Was the obesity a "substantial factor" in causing the secondary condition?
  - Would the secondary condition not have occurred "but for" the obesity caused by the SC condition?

Presumptions of Service Connection

- Allows for service connection without need for a nexus connecting the current disability to an in-service incurrence
- Chronic diseases – 38 C.F.R. § 3.309(a)
- Radiation exposure - 38 CFR § 3.311
- Herbicide Exposure - 38 U.S.C. § 1116; 38 C.F.R. § 3.307(a)(6); *Procopio v. Wilkie*, 913 F.3d 1371 (2019); M21-1, Part IV, Subp. ii, Ch. 1,§H.5
- Gulf War Veterans - 38 C.F.R. § 3.317
- Camp Lejeune - 38 C.F.R. § 3.307(a)(7)

Aggravation

“A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.” 38 U.S.C. § 1153

Aggravation

- Presumption of Soundness
  - The Veteran will be considered to have been in sound condition when accepted for service, except:
    - Where a condition is “noted” upon entry into service, OR
    - Where there is “clear and unmistakable” evidence that BOTH the condition pre-existed service AND the pre-existing condition was not aggravated by service

Aggravation

- Presumption of Aggravation - 38 C.F.R. § 3.306
  - Where a preexisting condition is noted on the enlistment exam, the Veteran must show that the condition was aggravated by service
  - If the Veteran makes such a showing, the VA must then show that any increase in the severity of the noted condition was due solely to the “natural progression” of the condition

Ratings Issues

- VA Schedule for Rating Disabilities (VASRD)
  - 38 C.F.R. Part 4
  - Lists the disabilities for which Veterans can be service-connected and assigned a disability rating
  - Divided into 15 different categories representing different bodily systems
    - Four-digit diagnostic codes (DC) are listed within each category. 38 C.F.R. § 4.71a-4.150
    - Rating criteria are listed for each DC
  - Not every compensable disability is listed in the VASRD

Ratings Basics

- Ratings range from 0% to 100%
- What do ratings mean?
  - Reflect the severity of the condition
  - Severity based on the "average detriment to earning capacity" resulting from the disability or disease

Ratings Basics

- Many DCs have a maximum rating less than 100%
  - Ex. – tinnitus (10%), migraines (50%)
- Some DCs do not provide for a 0% evaluation. 38 C.F.R. § 4.31 allows a 0% to be assigned “when the requirements for a compensable evaluation are not met.”
- 38 CFR § 3.324 allows a 10% rating to be assigned where a veteran is suffering from two or more separate SC disabilities even though none of the disabilities may be of compensable degree under the VASRD

Ratings Basics

- The rate of compensation is based on the combination of the veteran's ratings. Current pay rates can be found at https://www.benefits.va.gov/compensation/resources_comp01.asp
  - Calculated using a descending efficiency scale
  - 38 CFR § 4.25 – Combined Ratings Table
  - Ratings are not "added" together. That would be too logical.
    - "Logic is the beginning of wisdom, not the end." –Mr. Spock

Ratings Basics

	10	20	30	40	50	60	70	80	90
19	27	35	43	51	60	68	76	84	92
20	28	36	44	52	60	68	76	84	92
21	29	37	45	53	61	68	76	84	92
22	30	38	45	53	61	69	77	84	92
23	31	38	46	54	62	69	77	85	92
24	32	39	47	54	62	70	77	85	92
25	33	40	48	55	63	70	78	85	93
26	33	41	48	56	63	70	78	85	93
27	34	42	49	56	64	71	78	85	93
28	35	42	50	57	64	71	78	86	93
29	36	43	50	57	65	72	79	86	93
30	37	44	51	58	65	72	79	86	93
31	38	45	52	59	66	72	79	86	93
32	39	46	52	59	66	73	80	86	93
33	40	46	53	60	67	73	80	87	93
34	41	47	54	60	67	74	80	87	93
35	42	48	55	61	68	74	81	87	94
36	42	49	55	62	68	74	81	87	94
37	43	50	56	62	69	75	81	87	94
38	44	50	57	63	69	75	81	88	94
39	45	51	57	63	70	76	82	88	94

Ratings Basics

- How to use the Combined Ratings Table:
  - Identify the highest individual rating in the left column of the chart. Next, identify the second highest rating in the top row of the chart. Where the row and the column intersect is the combined rating for those disabilities
  - Locate the combined value of the first two ratings (see above) on the left side of the chart. Then locate the next-highest rating on the top row. Where the row and the column intersect is the combined rating for those three disabilities
  - Repeat.

Ratings Basics

- A Veteran's overall rating is rounded up or down
  - Ex. – If the combined overall rating is 42%, the Veteran will be assigned a 40% rating and be paid at that rate. If the overall rating is 45%, the Veteran will be assigned a 50% rating and paid at that rate
  - Note: The higher a Veteran's overall rating, the harder it becomes to round up to the next highest rating

Ratings Basics

- Bilateral Factor – Where a Veteran has a disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides will be combined as usual, and 10 percent of this value will be added (*i.e.*, not combined) before proceeding with further combinations, or converting to degree of disability. 38 CFR § 4.26

Diagnostic Codes

Diagnostic Code numbers are “arbitrary numbers for the purpose of showing the basis of the evaluation assigned and for statistical analysis in the Department of Veterans Affairs, and as will be observed, extend from 5000 to a possible 9999. Great care will be exercised in the selection of the applicable code number and in its citation on the rating sheet . . . .”

BUT

"You never assume anything where Lwaxana Troi [OR THE VA] is involved.“ Counselor Troi, *Star Trek: The Next Generation*

Diagnostic Codes

- How can you tell what DCs the VA is applying to a Veteran's disabilities?
  - Look at the Ratings Codesheet
    - Dates claims were filed, as recognized by the VA
    - Exact names and DCs of each condition for which the Veteran is rated
    - Current ratings (and effective dates) for both SC and non-SC conditions
    - Veteran's current and historical overall combined rating
    - Conditions that were previously denied
    - Ancillary items – bilateral factor, SMC, TDIU

Rating Decision	*Department of Veterans Affairs* *Waco VA Regional Office*	

NAME OF VETERAN	VA FILE NUMBER	SOCIAL SECURITY NR	POA	COPY TO
			TEXAS VETERANS COMMISSION	

ACTIVE DUTY			
EOD	RAD	BRANCH	CHARACTER OF DISCHARGE
06/06/1973	06/30/1998	Air Force	Honorable

LEGACY CODES			
ADD'L SVC CODE	COMBAT CODE	SPECIAL PROV CDE	FUTURE EXAM DATE
	1		None

CLEAR AND UNMISTAKABLE ERROR - 38 CFR 3.105(a)

I hereby certify that the claims record of this veteran has been reviewed and that the following clear and unmistakable error has been identified: Rating decision dated January 11, 2000 granted a zero percent evaluation for tinnitus. The law changed effective June 10, 1999 to where a compensable evaluation could be granted if the condition was due to acoustic trauma. As tinnitus was granted based on acoustic trauma the 10 percent evaluation should have been awarded.

JURISDICTION: Claim for Increase Received 02/16/2016

ASSOCIATED CLAIM(s): 020; Claim for Increase; 02/16/2016

SUBJECT TO COMPENSATION (1.SC)

9411-9434	POSTTRAUMATIC STRESS DISORDER WITH MAJOR DEPRESSIVE DISORDER [PTSD - Non-Combat/Fear - Easing Standard] Service Connected, Gulf War, Incurred Static Disability 10% from 06/26/2006 100% from 04/13/2010
5242	LUMBOSACRAL STRAIN WITH DEGENERATIVE DISC DISEASE, L5-S1 Service Connected, Vietnam Era, Incurred Static Disability 40% from 02/12/2016
8511	RADICULOPATHY, RIGHT UPPER EXTREMITY (DOMINANT) ASSOCIATED WITH DEGENERATIVE DISC DISEASE, CERVICAL SPINE (PREVIOUSLY RATED AS RESIDUALS, CERVICAL STRAIN) Service Connected, Peacetime, Secondary Static Disability 40% from 02/12/2016

Rating Decision	*Department of Veterans Affairs* *Waco VA Regional Office*			
NAME OF VETERAN	VA FILE NUMBER	SOCIAL SECURITY NR	POA TEXAS VETERANS COMMISSION	COPY TO

7599-7522	PEYRONIES DISEASE WITH ERECTILE DYSFUNCTION Service Connected, Peacetime, Incurred Static Disability 0% from 07/01/1998 20% from 05/24/2010
5243	DEGENERATIVE DISC DISEASE, CERVICAL SPINE (PREVIOUSLY RATED AS RESIDUALS, CERVICAL STRAIN) Service Connected, Vietnam Era, Incurred Static Disability 20% from 02/12/2016
8520	RADICULOPATHY, LEFT LOWER EXTREMITY ASSOCIATED WITH LUMBOSACRAL STRAIN WITH DEGENERATIVE DISC DISEASE, L5-S1 Service Connected, Peacetime, Secondary Static Disability 20% from 02/12/2016
5323-5237	RESIDUALS, CERVICAL STRAIN Service Connected, Vietnam Era, Incurred Static Disability 10% from 07/01/1998 to 02/12/2016
6260	TINNITUS Service Connected, Gulf War, Incurred Static Disability 10% from 07/01/1998
6510	SINUSITIS Service Connected, Peacetime, Incurred 10% from 07/01/1998
5323-5237	LUMBOSACRAL STRAIN WITH DEGENERATIVE DISC DISEASE, L5-S1 Service Connected, Vietnam Era, Incurred Static Disability 10% from 07/01/1998 10% from 10/20/2003 to 02/12/2016
7525-7527	BENIGN PROSTATE HYPERTROPHY WITH EPIDIDYMITIS AND PROSTATITIS Service Connected, Gulf War, Incurred Static Disability 10% from 12/16/2009 Original Date of Denial: 04/23/2004
7336	HEMORRHOIDS Service Connected, Gulf War, Incurred 0% from 07/01/1998

7800 SCARS, RESIDUALS, EXCISION, NEVI, FACE
Service Connected, Vietnam Era, Incurred
0% from 07/01/1998

7805 SCARS, RESIDUAL, EXCISION, NEVI, BACK AND TORSO
Service Connected, Gulf War, Incurred
0% from 07/01/1998

COMBINED EVALUATION FOR COMPENSATION :

30% from 07/01/1998
40% from 06/26/2006
50% from 12/16/2009
100% from 04/13/2010

SPECIAL MONTHLY COMPENSATION :

K-1 Entitled to special monthly compensation under 38 U.S.C. 1114, subsection (k) and 38 CFR 3.350(a) on account of loss of use of a creative organ from 05/24/2010.

S-1 Entitled to special monthly compensation under 38 U.S.C. 1114, subsection (s) and 38 CFR 3.350(i) on account of posttraumatic stress disorder with major depressive disorder rated 100 percent and additional service-connected disabilities of tinnitus, radiculopathy, left lower extremity, residuals, cervical strain, lumbosacral strain with degenerative disc disease, L5-S1, Peyronies disease with erectile dysfunction, independently ratable at 60 percent or more from 02/12/2016.

EFFECTIVE DATE	BASIC	HOSPITAL	LOSS OF USE	ANAT. LOSS	OTHER LOSS
05/24/2010	01	01	00	00	1
02/12/2016	49	49	00	00	1

NOT SERVICE CONNECTED/NOT SUBJECT TO COMPENSATION (8.NSC Peacetime, Vietnam Era, Gulf War)

5257 RIGHT KNEE CONDITION
Not Service Connected, Not Incurred/Caused by Service
0%
Original Date of Denial: 11/08/2004

5257 LEFT KNEE CONDITION
Not Service Connected, No Diagnosis
0%
Original Date of Denial: 11/08/2004

Rating Decision	*Department of Veterans Affairs* *Waco VA Regional Office*			
NAME OF VETERAN	VA FILE NUMBER	SOCIAL SECURITY NR	POA TEXAS VETERANS COMMISSION	COPY TO

7101 HIGH BLOOD PRESSURE
Not Service Connected, Not Incurred/Caused by Service
0%
Original Date of Denial: 04/01/2010

7199-7114 LEFT LEG CONDITION
Not Service Connected, Not Incurred/Caused by Service
0%
Original Date of Denial: 11/24/2008

7305 PEPTIC ULCER DISEASE
Not Service Connected, No Diagnosis
0%

7307 GASTROENTERITIS
Not Service Connected, Not Incurred/Caused by Service
0%
Original Date of Denial: 04/23/2004

7806 DERMATITIS
Not Service Connected, Not Incurred/Caused by Service
0%
Original Date of Denial: 04/23/2004

Individual Unemployability Denied

ANCILLARY DECISIONS

Basic Eligibility under 38 USC Ch 35 from 12/05/2012

I certify that I have reviewed and electronically signed this decision. RVSR

Diagnostic Codes

- Common mistakes by the VA:
  - Combine separately ratable conditions or body parts/systems into one DC and rating
    - Ex. – “diabetes with diabetic retinopathy and bilateral lower extremity neuropathy” instead of separate ratings for “diabetes”, “left lower extremity neuropathy”, “right lower extremity neuropathy”, and “diabetic retinopathy.”
    - Ex. – A Veteran with dislocated or removed knee cartilage is given separate ratings under DC 5257 for instability and DC 5261 for limitation of extension but not a rating under DC 5258 or 5259 for dislocated or removed cartilage. *Lyles v. Shulkin*, 29 Vet. App. 107 (2017)

Diagnostic Codes

- Where two DCs or ratings might be appropriate, the VA should select the one that results in the higher rating
  - The VA has a duty to maximize benefits awarded to Veterans. 38 CFR § 3.103
  - Ex. – Veteran is diagnosed with SC intervertebral disc syndrome in his lumbar spine. It causes limitation of motion in his spine. He also has documented incapacitating episodes caused by his back condition, requiring bed rest for 4-6 weeks over the past 12 months.
    - RO assigns a 30% rating based on the limitation of motion in Veteran's spine
    - However, under DC 5243 (IVDS), incapacitating episodes lasting 4-6 weeks over 12 months results in a 40% rating. This would be the biggest benefit to the Veteran

Diagnostic Codes

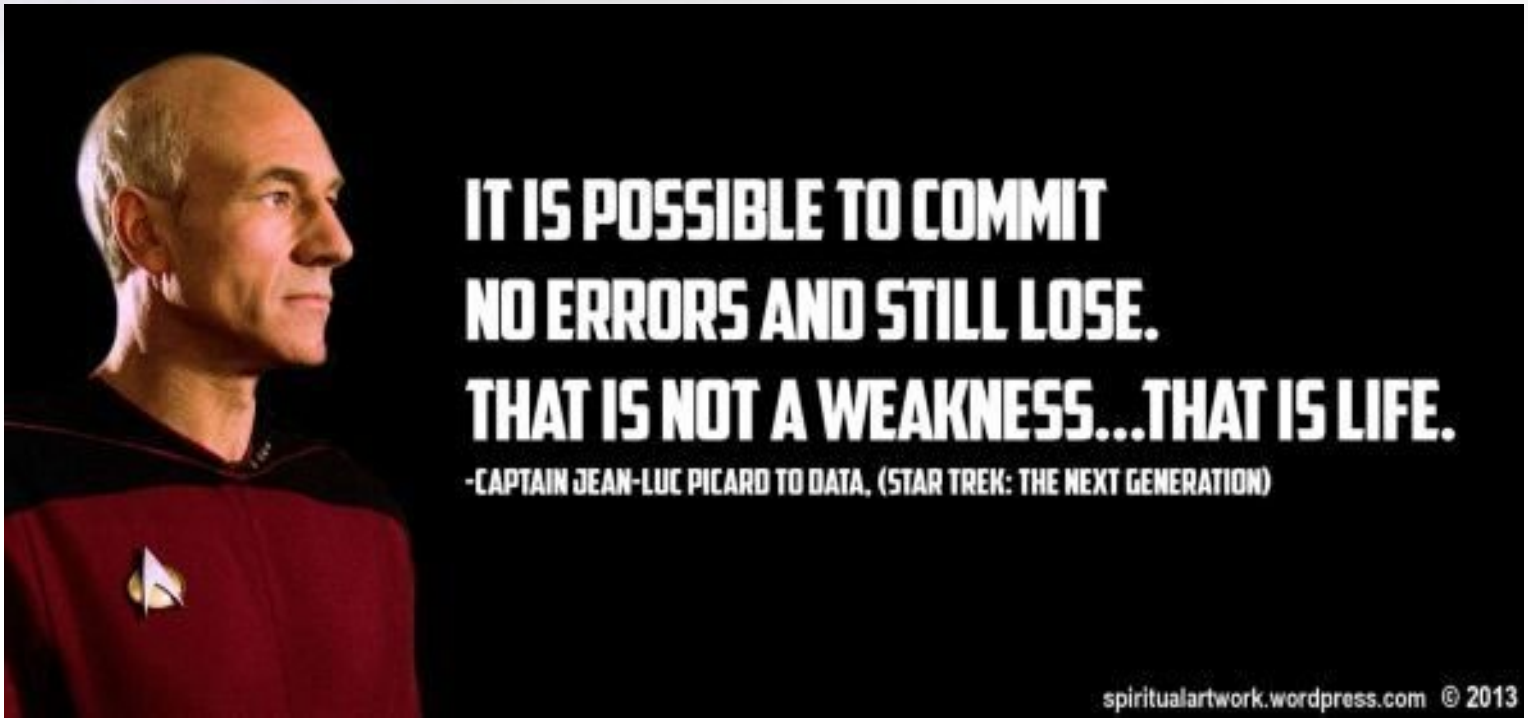
- However – VA cannot pyramid ratings.
- This is when a Veteran is SC for multiple diagnoses, but VA only uses the highest to determine his/her overall rating
- Evaluation of the same symptoms under various diagnoses is to be avoided. 38 CFR § 4.14. "[T]he rating schedule may not be employed as a vehicle for compensating a claimant twice (or more) for the same symptomatology; such a result would overcompensate the claimant for the actual impairment of his earning capacity" and would constitute pyramiding. *Brady v. Brown,* 4 Vet. App. 206 (1993)

Diagnostic Codes

- Ex. – *Esteban v. Brown*, 6 Vet. App. 259 (1994)
  - Veteran suffered a SC facial injury resulting in: 1) disfiguring scars, 2) painful scars, and 3) muscle damage causing mastication problems
  - Board found that the Veteran could be rated 10% disabling under any of the three residuals from the facial injury but could not receive separate ratings under DC 7800 (disfiguring scars, DC 7804 (painful scars) and DC 5325 (fascial muscle injury). A 10% rating under DC 7800 was granted
  - CAVC held that DC 7800 only compensated for cosmetic symptomology, not pain or muscle damage. The *symptomology* covered in the three distinct DCs did not overlap. Therefore, the Veteran could receive a separate rating for each DC

Diagnostic Codes

- Ex. – *Mental Health Conditions*
  - Will the VA give separate ratings for multiple SC mental health conditions?
    - Generally, no. Typically, symptoms of PTSD, depression, anxiety, etc., overlap and cannot be differentiated such that distinct ratings can be given
  - PTSD and TBI
    - Often, emotional and behavioral symptoms of TBI and PTSD overlap and can only be rated under DC for TBI or PTSD. BUT, TBI symptoms like cognitive deficits, irritability, and sleep impairment may be rated separately if solely attributable to TBI and not contemplated in the PTSD rating


IT IS POSSIBLE TO COMMIT
NO ERRORS AND STILL LOSE.
THAT IS NOT A WEAKNESS...THAT IS LIFE.
-CAPTAIN JEAN-LUC PICARD TO DATA, (STAR TREK: THE NEXT GENERATION)
spiritualartwork.wordpress.com © 2013

How to Dispute an Incorrect Rating

- With the implementation of the Appeals Modernization Act, how to dispute has become a much more complicated question
- Under the AMA, you have 3 main ways to dispute an incorrect Rating Decision
  - 1.) File a Supplemental Claim with new and relevant evidence
  - 2.) Request Higher-Level Review with a closed evidentiary record
  - 3.) Appeal to the Board
    - Direct Review (no new evidence, no hearing)
    - Evidence submission (90-days to submit additional evidence, no hearing)
    - Hearing with the VLJ (can also submit new evidence within 90 days after hearing)

How to Dispute an Incorrect Rating

Disclaimer – the following slides are our general guidance for how WE determine which lane to use to dispute Rating Decisions. The AMA is still relatively new (by VA standards) and we are constantly modifying our practice based on what we are learning about how the new system works in reality

To borrow the words of Captain James T. Kirk, we are truly exploring "strange new worlds" under the AMA….

How to Dispute an Incorrect Rating

- When do we file a Supplemental Claim?
  - When there are new and relevant treatment records, a private evaluation, or lay evidence tending to show the disability is worse than VA thinks

How to Dispute an Incorrect Rating

- When do we request Higher-Level Review in response to an incorrect rating?
  - If we submit new and relevant evidence to the VA via the supplemental claim lane, but it is rejected
  - When there is an obvious, glaring piece of evidence missed by the prior rater

How to Dispute an Incorrect Rating

- When do we appeal to the Board?
  - If we obtain a good IMO or vocational opinion that conflicts with an unfavorable C&P exam
  - If the issue is something that we just *know* we will have to argue at the Board
  - This is probably our most-used choice
  - Longer decision time but more likelihood of a correct decision

Other Important Concepts

- Analogous Ratings - 38 CFR § 4.20
- Disability benefits for "pain" – *Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018)
- "Flare-ups" – *DeLuca v. Brown*, 8 Vet. App. 202 (1995); *Mitchell v. Shinseki*, 24 Vet. App. 32 (2011); *Sharp v. Shulkin*, 29 Vet. App. 26 (2017)
- Extraschedular Ratings - 38 CFR § 3.321(b)(1)
- Special Monthly Compensation (SMC) - 38 CFR § 3.350

Questions?

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