



**CHALLENGING UNFAVORABLE
C&P EXAMINATIONS**

RESOURCE GUIDE

This Guide Contains:

- 9 Effective Principles to Challenging Unfavorable C&P Exams
- Common defects found
- Ways to exploit these deficiencies

Including:

- Actual C&P Reports
- Effective Legal Arguments to Challenge Unfavorable Exam Reports



Principle #2:
Mere Speculation
The Jones Principle

EXAMPLE:

From an actual case file

2) Are the headaches etiologically related to or aggravated by any service connected disability?

Again, due to lack of documentation, I would have to mere speculation to answer this question. The veteran states that when his neck pain and stress levels elevate, so do his headaches.

CHALLENGING ARGUMENT:

A VA examiner cannot summarily conclude that he/she cannot provide an opinion without *resorting to speculation*. Before coming to this conclusion, the physician must fully review the veteran's medical records, perform all necessary medical tests and analyze the relevant medical literature. *Jones v. Shinseki*, 23 Vet.App. 382, 389 (2010)



Principle #3:

Veteran has Service and Non-Service Connected Disabilities: Benefit of the Doubt Doctrine

EXAMPLE:

From an actual case file

The veteran's subjective complaints with clinical findings of mild loss of motion with pain can be produced by both conditions; therefore I cannot separate out the symptomatology between these two conditions without reporting to mere speculation.

CHALLENGING ARGUMENT:

If a claimant has overlapping symptoms caused by both service-connected and non-service-connected disabilities, all the symptoms or functional loss will be considered service-connected if the VA examiner cannot separate or distinguish which symptoms belong to which disability.
Mittleider v. West, 11 Vet.App. 181, 182 (1998)



Principle #4: Pain with Motion and Flare-Ups: The *DeLuca* Principle

EXAMPLE:

From an actual case file

Range of motion by goniometry

Flexion +10-30 – Pain began at 30

Hyperextension -10-5 Pain began at 5

Lateral Bending R 0-5 L 0-5 Pain began at 5 bilaterally

Rotation R 0-5 L 0-5 Pain began at 5 bilaterally

The patient has flare ups of increase pain and stiffness

CHALLENGING ARGUMENT:

A medical examiner and the rating specialist MUST consider the effect of pain on a veteran's range-of-motion. This means that the examiner must take into consideration whether flare-ups or repetitive motion cause additional loss of motion, and normally, this loss is measured at the point of motion where the veteran experiences pain.

As for flare-ups (not usually present during the examination), the examiner must ask the veteran to describe the additional effect of a flare-up.

DeLuca v. Brown, 8 Vet.App. 202 (1995)



Principle #5: Medical Opinion Not Supported By Adequate Analysis

EXAMPLE:

From an actual case file

Personality Disorder: Claimant has a long history of impaired impulse control, of inconsistent work that predates the military. He is deceitful, manipulative, describes irritability with aggression tied to it (hitting or throwing things, thinking of harming the other person). He is covertly threatening towards others when he doesn't get his way. He has a sense of entitlement, is exploitive of others. He has grandiose fantasies about himself and his history and his abilities. He has limited empathy for others.

CHALLENGING ARGUMENT:

Neither a VA medical examination report nor a private medical opinion is entitled to any weight in a service-connection or [increased] rating context if it contains only data and conclusions.”

Nieves-Rodriguez v. Peake, 22 Vet. App. 295, 304 (2008).

Nieves-Rodriguez says that bare medical conclusions are not entitled to any weight. VA physicians often make unsupported conclusions, frequently overlooked in the clutter of lengthy medical histories and summaries. For example, a VA physician's bald opinion that the veteran's aging caused his degenerative disc disease is inadequate, if there is no supporting analysis or medical literature.



Principle #6: **Tainted Medical Opinion** **Influence by an Ratings Examiner/DRO**

EXAMPLE:

From an actual case file

Special Psychiatric Exam Required. Opinion Needed! The veteran is claiming S/C for schizophrenia-schizo-affective disorder while on active duty he was treated for emotionally unstable personality manifested by drug abuse, manipulative behavior and inability to function in a structured environment. Review file and provide an opinion as to whether it is at least as likely as not that the veteran's in service drug abuse and character disorder is related to his current mental condition. Provide GAF score.

CHALLENGING ARGUMENT:

The Rating Specialist or DRO may not unfairly influence a VA examiner's opinion by suggesting a negative answer. Typically, VA staff will send an engagement letter or memorandum to the VA physician performing the C & P examination. Assume, for instance, that the claimant submitted a favorable opinion from his treating physician. A VA engagement letter to the examining C & P physician cannot state: "Feel free to refute the treating physician's opinion." Such an engagement letter unfairly invites a negative response.

Bielby v. Brown, 7 Vet. App. 260, 268-69 (1994)

Nor may a VA engagement letter slant the facts. For instance, the letter to the physician may not highlight the unfavorable evidence in the claims file and omit mention of favorable evidence. In short, the letter must be fair and balanced.

Principle #7: Incomplete Medical Examination Reports

EXAMPLE:

A C&P Report that doesn't mention whether or not pain exists when measuring movement. VA Ratings Examiner should ask for clarification if it is not reflected in the report. They CAN'T just conclude pain doesn't exist.

CHALLENGING ARGUMENT:

The absence of evidence does not necessarily constitute substantive negative evidence. See *Buczinski v. Shinseki*, 24 Vet.App. 221, 224 (2011) "When assessing a claim, the Board may not consider the absence of evidence as substantive negative evidence."); *McLendon v. Nicholson*, 20 Vet.App. 79, 85 (2006); see also *Forshey v. Principi*, 284 F.3d 1335, 1336 (Fed. Cir. 2002) (en banc) (Mayer, C.J., dissenting) ("Negative evidence, actual evidence which weighs against a party, must not be equated with the absence of substantive evidence.")



Principle #8: **Ambiguous or Unclear VA Opinions**

EXAMPLE:

A VA physician states in his report that the claimant did not report any symptoms of his disability, this comment is unclear because the physician could mean that the claimant did not complain of symptoms on the date of the examination or that the claimant in general does not complain of symptoms.

CHALLENGING ARGUMENT:

Some VA examination opinions are ambiguous and for that reason are inadequate for rating disabilities. An opinion is ambiguous if the physician's findings are susceptible of two or more reasonable, but different, interpretations. In such cases, the VA should seek clarification. *Daves v. Nicholson*, 21 Vet.App. 46, 51 (2007)



Principle #9: Medical Opinion Based Upon Incorrect Factual Premise

EXAMPLE:

VA physicians frequently misstate the circumstances leading to the injury or disability and, for increased-rating issues, VA physicians often omit or misstate important symptoms of a service-connected disability. This is an important principle for service-connection issues, (i.e., causation issues).

CHALLENGING ARGUMENT:

An opinion based upon an inaccurate factual premise has no probative value. *Reonal v. Brown*, 5 Vet.App. 458, 461 (1993)



IN SUMMARY:

- Have the Veteran Obtain a Copy of the C&P Exam Report
- Review the Report w/ These Principles in Mind
- Consider a Hearing

ADDITIONAL RESOURCES:

Case Specific Questions (for VSO):

Mark R. Lippman (mlippman@veteranslaw.com)

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Case Referrals (for veterans):

<http://www.veteranslaw.com/consultation-request>

Toll Free: (888) 811 - 0523

General Resources:

<http://www.veteranslaw.com/>