VLG

THE VETERANS LAW GROUP

Establishing A Case When Lacking "Medical Evidence"

RESOURCE GUIDE

This Guide Contains:

- Lay Evidence
  - Buchanan Rule
  - Colvin Rule
- Buddy Statements
- Duty to Assist, VA Examinations

Including:

- Extended Detail

Competent Lay Evidence

Defined: any evidence not requiring specialized education, training or experience in medicine

How: Usually provided through testimony or written statements

In order to be competent: he/she must have knowledge of facts/circumstances which can be readily observed and described

COMPETENT LAY EVIDENCE:

The Buchanan Rule

Citation: *Buchanan v. Nicholson*, 451 F.3d 1331 (2006)

A Lay Statement alleging an in-service injury and/or symptomatology need not be corroborated by medical records to be considered competent and credible.

SUMMARY:

*"If the Board concludes that the lay evidence presented by a veteran is credible and ultimately competent, the lack of contemporaneous medical evidence **should not be an absolute bar** to the veteran's ability to prove his claim of entitlement to disability benefits based on that competent lay evidence." 451 F.3d at 1337*

APPLICATION:

CREDIBILITY IS KEY

- *Veteran's testimony or written statement MUST be consistent and he/she must come across as believable.*
- *Ask the questions BEFORE the hearing.*
- *Get a feel for how he/she answers the questions about their condition.*

COMMON SCENARIOS:

Veteran hurts back in service, refuses medical treatment, at the time.	Sucks it up. Doesn't like to complain
Condition worsens	Several years out of service, files claim for back condition claiming ongoing symptoms since injury
C&P Exam: examiner notices absence of any medical treatment in service or soon after and therefore provides adverse opinion	Relying on the examiner's opinion the adjudicator (Rating Specialist, DRO or VLJ) denies back claim
Under *Buchanan*, rating specialist/DRO must make their own determination as to the credibility of the allegations with regards to the in-service injury and ongoing symptomatology.	It is for the adjudicator NOT the medical examiner to determine credibility. *Jones v. Shinseki*, 23 Vet.App. 382, 392 (2010)
If the adjudicator finds the veteran's allegation of in-service injury or ongoing symptomatology credible, this finding may make up for any lack of verifying service medical records.	If the veteran's allegations are found credible, the examiner would be required to assume, as fact, that the veteran had an in-service injury and ongoing symptomatology.

The Buchanan Rule:
Extended Detail

In *Buchanan v. Nicholson*, 451 F.3d 1331 (2006), the Federal Circuit held that a lay statement alleging an in-service injury and/or symptomatology need not be corroborated by medical records to be considered competent and credible. The *Buchanan* court explained: "If the Board concludes that the lay evidence presented by a veteran is credible and ultimately competent, the lack of contemporaneous medical evidence should not be an absolute bar to the veteran's ability to prove his claim of entitlement to disability benefits based on that competent lay evidence." 451 F.3d at 1337.

The rule of *Buchanan* has broad applications. Above all, *Buchanan* highlights the importance of a veteran's credibility, that is, the credibility of his/her statements and testimony. Let's take a common factual scenario. A veteran slips and falls in service, injuring his back. For the next several weeks, his back is sore but he refuses to seek medical treatment. Like many veterans, he is the stoic type and grins and bears the pain without complaint. After leaving the service, the back pain continues off and on, until after a few years, it becomes so unbearable that he sees a physician. He files a claim for service-connected back disability, alleging an in-service back injury and ongoing symptomatology, resulting in his current back disability. In connection with his claim, the claimant undergoes a C & P examination. In reviewing the records, the VA examiner takes note of the absence of any medical treatment in service or soon thereafter and, on that basis, writes an adverse opinion. Relying upon this opinion, the VA rating specialist or decision review officer denies the back claim.

Under *Buchanan*, the VA adjudicator has erred by not making his/her own independent credibility determination of the veteran's allegations of an in-service injury and ongoing symptomatology. It is for the VA adjudicator, not the medical examiner, to determine whether the veteran's allegations are believable. *See Jones v. Shinseki*, 23 Vet.App. 382, 392 (2010) (finding that the Board was required to resolve a credibility issue so as to establish a factual foundation for an examiner's opinion). If, for example, a rating specialist, decision review officer or Board of Veterans' Appeals veterans law judge finds the veteran's allegation of in-service injury or ongoing symptomatology credible, this finding may make up for any lack of verifying service medical records. If the veteran's allegations are found credible, the VA examiner would be required to assume, as fact, that the veteran had an in-service injury and ongoing symptomatology.

COMPETENT LAY EVIDENCE:

The Colvin Rule

Citation: *Colvin v. Derwinski*, 1 Vet.App. 171 (1991)

VA adjudicators "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion."

SUMMARY:

VA adjudicators cannot use their own judgment or common sense to make ***medical findings.*** *These findings must be based upon an independent medical opinion specifically addressing the issue, not upon the adjudicator's extrapolation of various medical records.*

EXAMPLES:

- Veteran has multiple gaps in treatment for his chronic back disability.
- VLJ denied case stating: [T]he Board finds it reasonable that, if the [v]eteran suffered from a continuity of symptomatology such that he was required to seek treatment up to 43 times in one calendar year (1976), he would not have gaps of several years between treatments; he does.
- **Improper reasoning:** VLJ is making a medical determination as to the relative severity, common symptoms, prognosis and usual treatment of the claimed back injury w/out citing to medical evidence to corroborate that determination

The Colvin Rule:
Extended Detail

The *Buchanan* principle often dovetails with the holding in *Colvin v. Derwinski*, 1 Vet.App. 171 (1991). *Colvin* says that VA adjudicators "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion." *Id.* at 172. In other words, VA adjudicators cannot use their own judgment or common sense to make medical findings. These findings must be based upon an independent medical opinion specifically addressing the issue, not upon the adjudicator's extrapolation of various medical records.

VA adjudicators and BVA judges frequently get this wrong. For instance, in one case, the veteran had multiple gaps in treatment for his chronic back disability. The BVA denied service-connection, reasoning:

> [T]he Board finds it reasonable that, if the [v]eteran suffered from a continuity of symptomatology such that he was required to seek treatment up to 43 times in one calendar year (1976), he would not have gaps of several years between treatments; he does.

That line of reasoning, the Veterans Court ruled, is improper because it amounts to the Board making a medical determination as to the relative severity, common symptoms, prognosis, and usual treatment of the claimed back injury without citing to medical evidence to corroborate that determination. *See Kahana v. Shinseki*, 24 Vet.App. 428, 434 (2011) (holding that the Board erred in finding the veteran not credible based on a lack of SMRs corroborating an in-service knee injury where the Board reasoned that, had he sustained such an injury in service, it would have required treatment and thus would have appeared in his SMRs); *See Dalton v. Nicholson,* 21 Vet.App. 23, 29 (2007) (holding that the Board's finding that any in-service back injury "was transient in nature" is a "medical conclusion the Board is not competent to make").

The court went on to explain:

> Because the Board "must consider only independent medical evidence to support [its] findings rather than provide [its] own medical judgment in the guise of a Board opinion," *Colvin v. Derwinski*, 1 Vet.App. 171, 172 (1991), it may not, as it did in this case, make a credibility finding based on its own unsupported conjecture as to the expected treatment for a claimed injury.

Veteran Service Officers must keep in mind that large gaps in a veteran's medical treatment history are not necessarily fatal to his/her claim. There are plausible explanations for not seeking medical treatment. For instance, 1) the veteran might have been worried that treatment (recorded in medical records) might later jeopardize future employment opportunities, 2) the veteran might not have been able to afford medical care post-service (no-insurance), or 3) the veteran assumed that medical treatment would not improve his/her disability or symptoms.

A variation on the *Buchanan/Colvin* theme occurs when VA adjudicators make a negative credibility determination based upon the veteran's late filing of a disability claim. In other words, adjudicators conjecture that a veteran, laboring under certain symptoms, would normally file a claim as soon as the disability became symptomatic. But again, this issue involves a medical question of the severity and chronicity of the disability. Without a medical opinion specifically addressing this issue, VA adjudicators may not speculate on the likely reasons for the timing of the veteran's filing of his/her claim.

Gaps in Medical Treatment:
NOT Automatically Fatal to Claim

YOU DO:
Need to provide plausible explanations for lack of treatment/records

Examples:

1. Veteran might have been worried that treatment (recorded in medical records) might later jeopardize future employment opportunities

2. Veteran might not have been able to afford medical care post-service (no-insurance)

3. Veteran assumed that medical treatment would not improve his/her disability or symptoms.

Negative Credibility Determination due to Veteran's Late Filing of Disability Claim

Where adjudicators argue in a denial that a veteran, if laboring under such severe symptoms, would normally file a claim as soon as the disability became symptomatic.

This issue involves a medical question of the severity and chronicity of the disability. Without a medical opinion specifically addressing this issue, VA adjudicators may not speculate on the likely reasons for the timing of the veteran's filing of his/her claim.

Medical Opinions:
Must be done by a medical examiner

Credibility Determinations:
Must be done by the adjudicator
(ratings specialist, DRO, VLJ)

Buddy Statements:

BUDDY STATEMENTS ARE:

- Supportive written statements from someone with first-hand knowledge of the critical facts
- Usually come from fellow service members, family members or friends
- Can be an important, (if not the best), substitute for corroborating medical records

EXAMPLES:

- A veteran who injured his back during an in-service accident but did not seek medical attention
- A fellow soldier who witnessed the accident or was told by the veteran about the accident and his back pain may submit a written statement alleging what he saw or heard
- If the veteran had ongoing back pain and other symptomatology but little or no medical treatment, a family member or friend could submit a buddy statement alleging what symptoms they observed or heard concerning the veteran's disability
- The credibility of a buddy statement, just like that of a veteran's own lays statements, must be determined by the VA adjudicator
- If the adjudicator finds the buddy statement credible as to the veteran's in-service injury or ongoing symptomatology, this finding may make up for any lack of verifying service medical records

Buddy Statements:
Tips

BEST PRACTICES:

- Buddy Statements need to include full name and contact info of the "Buddy"
- If he/she served in same unit, it is helpful to provide their DD214
- Should include "Attestation" language (same as on the bottom of the 21-4138)

  I CERTIFY THAT the statements herein are true and correct to the best of my knowledge and belief.

RECOMMENDED WEBSITES:

to locate former service members

- http://www.militarylocator.com/
- http://www.archives.gov/veterans/locate-service-members.html
- http://www.armylocator.com/

Please remember that while referred to as "Buddy Statements", we use the same for family members that have observed symptoms etc.

Buddy Statement:
Extended Detail

A *buddy statement* is a supportive written statement from someone with first-hand knowledge of the critical facts. Buddy statements usually come from fellow service members, family members or friends. A buddy statement can be an important, (if not the best), substitute for corroborating medical records. Take, for example, a veteran who injured his back during an in-service accident but did not seek medical attention. A fellow soldier who witnessed the accident or was told by the veteran about the accident and his back pain may submit a written statement alleging what he saw or heard.

And post-service, if the veteran had ongoing back pain and other symptomatology but little or no medical treatment, a family member or friend could submit a buddy statement alleging what symptoms they observed or heard concerning the veteran's disability. The credibility of a buddy statement, just like that of a veteran's own lays statements, must be determined by the VA adjudicator. If a rating specialist, decision review officer or Board of Veterans' Appeals veterans law judge finds the buddy statement credible as to the veteran's in-service injury or ongoing symptomatology, this finding may make up for any lack of verifying service medical records.

For buddy statements, we know that it may not be easy to locate former fellow soldiers, especially if it has been decades since the veteran last had contact with them. In such cases, we recommend using the following websites to locate former service members: http://www.militarylocator.com/; http://www.archives.gov/veterans/locate-service-members.html; http://www.armylocator.com/.

Duty to Assist:
VA Examinations

38 CFR 3.159(a)(4) requires the VA to provide a medical examination report or medical opinion if the record satisfies the following three elements:

1. *Competent lay* or medical evidence of a current diagnosed disability or *persistent or recurrent symptoms of disability*;

2. An event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

3. That the claimed disability or symptoms *may be associated* with the established event, injury, or disease in service or with another service-connected disability.

We generally think of lay statements as evidence to prove entitlement to service-connection.

But consider:

Lay statements, those of the veteran or his/her buddies, can be critical to triggering the VA's duty to obtain an examination report under the duty-to-assist.

Duty to Assist:
VA Examinations

Lay Statements MUST satisfy all three elements and be found to be credible by the adjudicator:

1. **A lay statement showing persistent or recurrent symptoms (capable of lay observation) of a disability is sufficient.**

2. **Showing an in-service event or injury, the second element, maybe established by a lay statement from the veteran or buddy.**

3. **Finally, the nexus element, (evidence which *indicates* a connection between the in-service event/injury and the present symptoms of a disability), is a very low standard.**

***McLendon v. Nicholson*, 20 Vet.App. 79 (2006), credible lay statements are sufficient to satisfy this element: The types of evidence that 'indicate' that a current disability 'may be associated' with military service include[s] . . . medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or *credible evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation*.**

Remember, these elements are just to establish the VA's responsibility to schedule an exam, doesn't assure service connection.

Duty to Assist:
Extended Detail

We generally think of lay statements as evidence to prove entitlement to service-connection. But lay statements, those of the veteran or his/her buddies, can be critical to triggering the VA's duty to obtain an examination report under the duty-to-assist.

In relevant part, Section 3.159(a)(4) of the regulations requires the VA to provide a medical examination report or medical opinion if the record satisfies the following three elements:

1. *Competent lay* or medical evidence of a current diagnosed disability or *persistent or recurrent symptoms of disability*;
2. An event, injury or disease in service, or has a disease or symptoms of a disease listed in § 3.309, § 3.313, § 3.316, and § 3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and
3. That the claimed disability or symptoms *may be associated* with the established event, injury, or disease in service or with another service-connected disability.

Lay statements may satisfy all three elements, assuming the VA adjudicator finds them credible. As for the first element, a lay statement showing persistent or recurrent symptoms (capable of lay observation) of a disability is sufficient. Showing an in-service event or injury, the second element, maybe established by a lay statement from the veteran or buddy. Finally, the nexus element, (evidence which *indicates* a connection between the in-service event/injury and the present symptoms of a disability), is a very low standard. As explained in the Veterans Court's case *McLendon v. Nicholson*, 20 Vet.App. 79 (2006), credible lay statements are sufficient to satisfy this element:

> The types of evidence that 'indicate' that a current disability 'may be associated' with military service include[s] . . . medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or *credible evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation*.

Id. at 83 (italics added).

IN SUMMARY:

- Lacking Medical Evidence doesn't automatically discredit a claim
- Seek testimony/buddy statements of CREDIBLE witnesses
- In reviewing opinions, make sure the credibility judgment is made by the adjudicator and medical opinions by examiners
- If denied an exam, try getting lay statements to trigger DTA

ADDITIONAL RESOURCES:

Case Specific Questions (for VSO):

Mark R. Lippman (mlippman@veteranslaw.com)
Amanda L. Mineer (amineer@veteranslaw.com)

Case Referrals (for veterans):

http://www.veteranslaw.com/consultation-request
Toll Free: (888) 811 - 0523

General Resources:

http://www.veteranslaw.com/