



Lesson 12

Arguing the Presumption of Sound Condition

The American Legion DSO School

March 2022

Lesson 12 Learning Objectives

Learn how to submit effective claims on behalf of a Veteran arguing for service connection based upon the **presumption of sound condition** under 38 C.F.R. § 3.310(b):

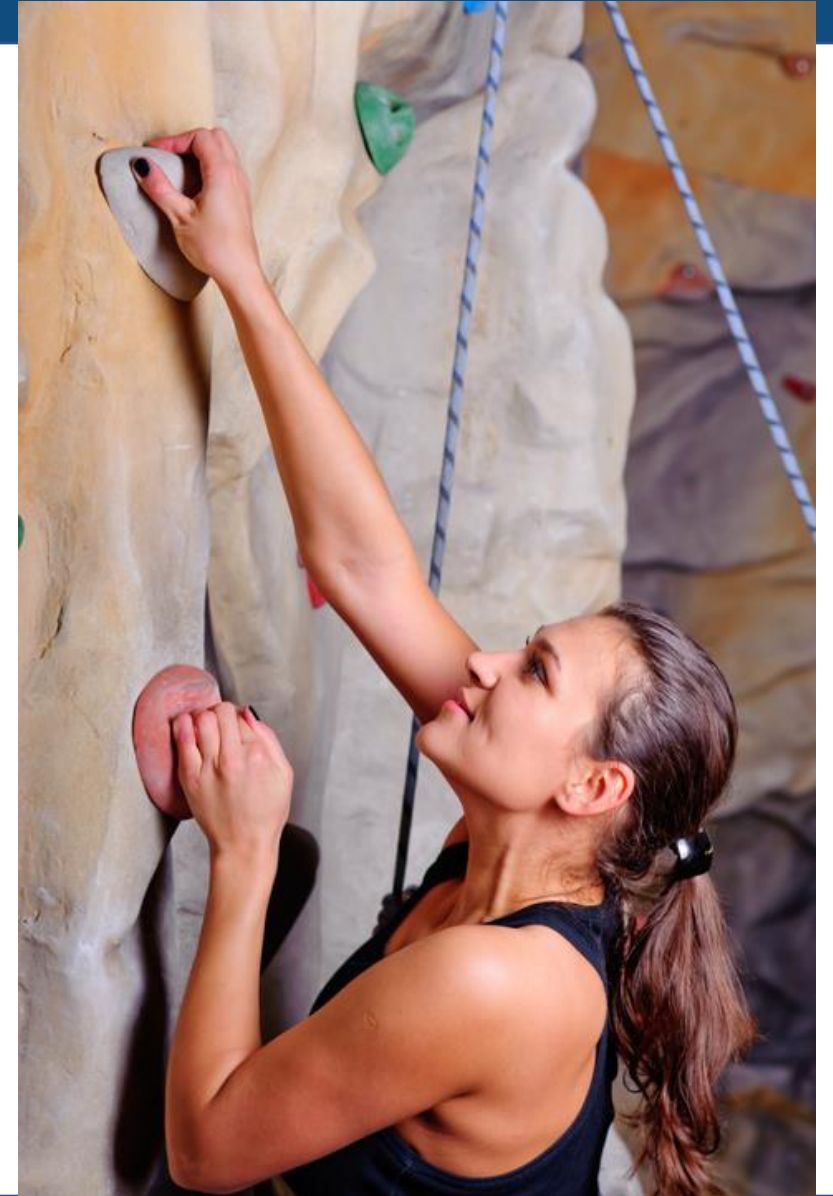
- Learn key points related to the presumption that a service member is in sound condition upon entering military service.
- Learn key points related to the presumption that a preexisting condition was aggravated by service.
- Review key elements of an application package in support of a claim based upon the presumption of sound condition.

Presumption of Soundness

- Why focus on the presumption of soundness in a VA claim?

The presumption of sound condition is incredibly favorable for Veterans!

- If the presumption is triggered, then it is very hard to lose,



When Does the Presumption Apply?



- The presumption of soundness is relevant when a condition permanently worsened in service.
 - It does not matter if the condition pre-existed service
 - Temporary flare-ups are not sufficient.

Presumption of Soundness Summary

Applies when the condition is not noted during the entrance exam.

Then, the burden shifts to VA, and VA must prove:

a. The condition preexisted service.

and either b or c:

b. The condition did not get worse in service, **or**

c. Any worsening was the natural progress of the disease.

VA must prove both prongs by clear and unmistakable evidence.

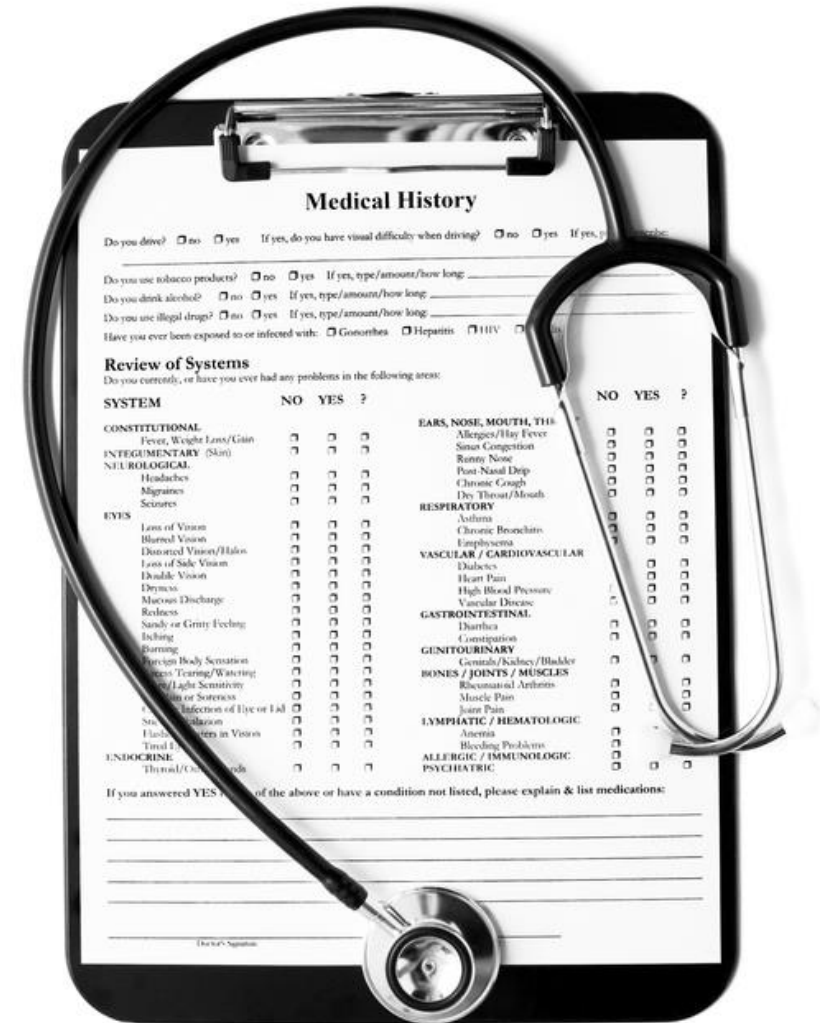
Clear and Unmistakable Evidence

- Clear and unmistakable evidence means that the evidence “cannot be misinterpreted and misunderstood, i.e., it is **undebatable.**” *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009).
- If expert opinions disagree or if they express any doubt, then the standard has not been met.



The Sound Condition Prong

- Applies when condition is not noted on entrance physical.
- VA can still find condition pre-existed service.
 - Evidence must be clear and unmistakable.
 - A Veteran's admissions that a condition pre-existed service *may* be sufficient.



Quiz

Click the **Quiz** button to edit this object

Michael is seeking service connection for asthma. His entrance physical has "history of asthma" written on it. Does this count as having the condition noted on his entrance physical? (This question does not count towards your grade.)

- No
- Yes

The entrance examination

- **No.**
- These are the facts of *Crowe v. Brown*, 7 Vet.App. 238 (1994).
- A Veteran's report of their medical history is not the same as a physician "noting" that the condition existed at the time of entrance into service.



Photo: U.S. Air Force Enlistment

Advocacy Tip: The presumption of sound condition for a VA claim still applies if the military enlistment exam contains only history.

Hearing Loss



- Hearing loss is a special case.
- 38 C.F.R. § 3.385 applies.
- Hearing loss documented at entrance must qualify as a disability for VA purposes to be considered a pre-existing condition.

McKinney v. McDonald, 28 Vet. App. 15 (2016)

The Aggravation Prong

- VA must show that the pre-existing condition either:
 - Did not get worse, or
 - Worsening was the natural progress of the disease.
- Evidence must be clear and unmistakable.



Advocacy Tip: VA raters and physicians frequently overlook the clear and unmistakable standard on as to the second prong.

Quiz

Click the **Quiz** button to edit this object

Veteran Dale's entrance examination does not note any preexisting condition. After three weeks of basic training, he complained of hip pain. He admitted that he was diagnosed with Legg-Perthes disease prior to service. He was discharged as medically unfit. The medical evaluation board (MEB) report contains a check box indicating that the condition existed prior to service and was not aggravated by service and is signed by three doctors. The report contains no other details.

Is this MEB report sufficient to prove that his condition was not aggravated by service? (This question does not count towards your grade.)

- Yes
- No

MEB reports

No!

- These are the facts of *Horn v. Shinseki*, 25 Vet.App. 231 (2012).
- Unexplained checkboxes on a form cannot be clear and unmistakable evidence.
- As with any other medical opinion, the value of a Military Evaluation Board (MEB report) comes from its analysis of the facts.

OMB Approved No. 2900-0704
Respondent Burden: 15 minutes
Expiration Date: 7/31/2021

Department of Veterans Affairs

**VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)**

DoD REFERRAL TO INTEGRATED DISABILITY EVALUATION SYSTEM (IDES)

INSTRUCTIONS: This form is to be completed by the Military Treatment Facility that is referring the Service member to the Integrated Disability Evaluation System (IDES).

SECTION I - SERVICE MEMBER'S INFORMATION

1. SERVICE MEMBER'S NAME (First, Middle Initial, Last)

2. SOCIAL SECURITY NUMBER

3. VTA CASE ID

4. DATE OF BIRTH (MM/DD/YYYY)
Month Day Year

5. GENDER
 MALE FEMALE

6. TELEPHONE NUMBER (Include Area Code)

7. E-MAIL ADDRESS (Optional)

8. CURRENT MAILING ADDRESS (Number and Street or rural route, P.O. Box, City, State, ZIP Code Country)
No. & Street
Apt./Unit Number City
State/Province Country ZIP Code/Postal Code

9. COMPONENT
 ACTIVE GUARD RESERVE

10. DUTY STATUS
 ON ACTIVE DUTY NOT ON ACTIVE DUTY

11. GRADE

12. UNIT ADDRESS

SECTION II - MEDICAL EVALUATION BOARD (MEB) INFORMATION

13. ASSIGNED PHYSICAL EVALUATION BOARD LIAISON OFFICER (PEBLO) (First, Middle Initial, Last)

14. TELEPHONE NUMBER (Include Area Code)

15. DATE OF REFERRAL TO MEB (MM/DD/YYYY)
Month Day Year

16. REFERRING MILITARY TREATMENT FACILITY

17. MEDICAL CONDITIONS TO BE CONSIDERED AS THE BASIS OF FITNESS FOR DUTY DETERMINATIONS
(List only conditions referred by physician; continue on page 2 if necessary)

1. 6.

Presumption of Soundness Claims

- Use appropriate service-connection claim forms
- Include:
 - Argument invoking presumption
 - Statement from Veteran
 - Medical opinion from private provider if possible.

OMB Control No. 2900-0747
Respondent Burden: 25 minutes
Expiration Date: 09/30/2022

Department of Veterans Affairs

APPLICATION FOR DISABILITY COMPENSATION AND RELATED COMPENSATION BENEFITS

IMPORTANT: Please read the Privacy Act and Respondent Burden on page 12 before completing the form.

1. SELECT THE TYPE OF CLAIM PROGRAM/PROCESS (Check the appropriate box) (See instruction pages 1-3 for definitions of the Fully Developed Claim (FDC) Program (Optional Expedited Process) or the Standard Claim Process. (See instruction page 5 for the definition of a Benefits Delivery at Discharge (BDD) Program Claim)

FULLY DEVELOPED CLAIM (FDC) PROGRAM STANDARD CLAIM PROCESS

IDES (Select this option **only** if you have been referred to the IDES Program by your Military Service Department)

BDD Program Claim (Select this option only if you have been referred to the BDD Program by your Military Service Department)

(If claimant is a dependent, complete this section only after processing of the form.)

NOTE: You may either complete this form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

2. VETERAN/SERVICE MEMBER NAME (Last, First, Middle Initial)

3. VETERAN'S SOCIAL SECURITY NUMBER

6. DATE OF BIRTH (MM/DD/YYYY)

9. BDD CLAIMS ONLY: PROVIDE THE RELEASE FROM ACTIVE DUTY (MOS) NUMBER

11. CURRENT MAILING ADDRESS (Last, First, Middle Initial)

OMB Control No. 2900-0075
Respondent Burden: 15 minutes
Expiration Date: 06/30/2024

Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Before completing this form, read the Privacy Act and Respondent Burden on page 2. Use this form to submit a statement to support a claim. For more information you can contact us through Ask VA: <https://ask.va.gov/>. Or call us toll-free at 800-827-1000 (TTY: 711). VA forms are available at www.va.gov/vaforms. After completing the form, mail to: Department of Veterans Affairs, Evidence Intake Center, P.O. Box 4444, Janesville, WI 53547-4444.

SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION

NOTE: You may complete the form online or by hand. If completed by hand, print the information requested in ink, neatly and legibly, and insert one letter per box to help expedite processing of the form.

1. VETERAN/BENEFICIARY'S NAME (First, Middle Initial, Last)

2. VETERAN'S SOCIAL SECURITY NUMBER

3. VA FILE NUMBER (If applicable)

4. VETERAN'S DATE OF BIRTH (Month - Day - Year)

5. VETERAN'S SERVICE NUMBER (If applicable)

6. TELEPHONE NUMBER (Include Area Code)

7. E-MAIL ADDRESS (Optional)

8. MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

SECTION II: REMARKS
(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary)

Presumption of Soundness Arguments



- Invoke the presumption.
- Emphasize VA's burden applies to both prongs.
- Discuss the entrance examination.
- Identify the evidence of the Veteran's worsening condition.
- Don't be afraid to admit the condition preexisted service.
- Address MEB report if one exists.

Presumption of Soundness Statements

- Tell the Veteran's complete story about the condition, starting from the beginning.
- Admitting the condition preexisted service will **not** affect the Veteran's compensation.
- Describe the worsening in service.
- Address lack of contemporaneous records if needed.



21-4138 for Presumption of Sound Condition Claim

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary)

Service Connection for Knee

I injured my right knee playing football in high school. I had knee surgery at the time.

By the time that I entered service, I was not having any knee symptoms.

Within a few months of beginning basic training, I had my first instance of the knee locking. By the time of separation, I was having at least one or two episodes a month of locking and the problems have continued to this time.

21-4138 Template Argument

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary)

Service connection for [x]

I experienced [x] injury/disease before service.

I had [x] symptoms at the time that I joined the service.

My condition became permanently worse in service. By the end of service, my symptoms included [x].

Presumption of Soundness Opinions



- Normal medical opinion requirements apply
 - Complete factual foundation
 - Analysis that connects the dots
- Does not need to use the at-least-as-likely-as-not standard

- This presentation is complete.
- A PDF version of these slides will be provided to you at the conclusion of the course for future reference.