

NATIONAL GULF WAR RESOURCE CENTER



Veterans Helping Veterans

www.ngwrc.org



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Topics

- **Intent To File**
- **21-526EZ**
- **21-4138**
- **Notice of Disagreement**
- **VA Form 9**
- **VA Form 646**
- **Substitution Cases at the Board**
- **Hearings**
- **BVA Decisions/Remands**



Some References

- 38U.S.C § § 1117, 1118
- 38 CFR § 3.317
- Federal Register / Vol. 60, No. 23 / 2-3-1995
- Federal Register / Vol. 68, No. 111 / 6-10-2003
- M21-1
- Gutierrez v. Principi (Vet. App. 2004)
- Stankevich v. Nicholson (Vet. App. 2006)
- Eisenet al., 2005
- Kang et al 2000. JOEM Volume 42, Number 5, May 2001
- Dursa et al 2016 JOEM Volume 58, Number 1, January 2016



38 CFR § 3.317 Claims

You cannot file a claim for “Gulf War Illness”

The VBA will send a letter asking what symptoms you are claiming.

You need to respond or your claim may be denied.

Read the NGWRC guide please.



What Caused UDX, CMI

As far as your claim goes **STOP!**

- Under the law for VBA
 - UNKNOWN Cause for claim
 - 30 + Toxins research has not proven
- “Presumed” cause by your service If
 - 1. You are there
 - 2. Have the illness as per the law --



38 CFR § 3.317 Claims

CFR § 3.317 : Unless for (a)7

- During active duty in the Southwest Asia theater of operations during the GW, or
- To a **degree of 10 percent** or more within a presumptive period following service in the Southwest Asia theater of operations



Key in Any Good Claim

You Need

- Records showing reporting illness
- Forms fill out right
- A good 21-4138
- Good VSO
- Understanding the Appeals



VA “Standard Claim Forms”

- All claims **must be** submitted on “New” standard
- VBA Added “Intent to File” March-2015 AND
- Removed informal claims

Remember the wrong forms or not filled out right =

If not the VA will see it as a request for the form. It will not hold the date of file. The same thing for a form not filled out right.



Required Forms

All claims must be submitted on prescribed forms:

- VA Form 21-526EZ, *Application for Disability Compensation, Reopen a Claim, add secondary, increase.*
- VA Form 21-686c, *Declaration of Status of Dependents*
- VA Form 21-4138 (PTSD has a different form)
- VA Form 21-4142a Release of your non- VA medical records



Way to get Service Connection

- Direct Service Connection § 3.303 , § 3.304
 - Need to be in your STR Or
 - Need good 4138 and C&P Exam/ doctor nexus
- Secondary § 3.310
 - You need a nexus from a doctor, W/rationale why
 - Research, + nexus from a doctor
- Presumption under §3.307, § 3.309, §3.317, §3.318

Remember 38 U.S.C § 1113 Presumptions rebuttable



§ 1113 Presumptions rebuttable

- Where there is affirmative evidence to the contrary, or evidence to establish that an intercurrent injury or disease which is a recognized cause of any of the diseases or disabilities within the purview of section [1112](#), [1116](#), [1117](#), or [1118](#) of this title, has been suffered between the date of separation from service and the onset of any such diseases or disabilities, or the disability is due to the veteran's own willful misconduct, service-connection pursuant to section [1112](#), [1116](#), or [1118](#) of this title, or payments of compensation pursuant to [section 1117 of this title](#), will not be in order.



§3.317(b) Symptoms or CMI

NGWRC Guide page 19

Presumptive SC for objective indications of a qualifying chronic disability (by history, physical examination, and laboratory tests) cannot be attributed to any known clinical diagnosis. These signs and symptoms may include:

Fatigue

Skin issues

Headache

Muscle pain

Joint pain

Neuro Signs/Symptoms

Neuropsychological S/S

Upper/Lower Respiratory

Sleep disturbances

Gastrointestinal

Cardiovascular

Abnormal weight loss

Menstrual disorders



We covered Diagnosed CMI

- So far we covered the CMI and what it takes to be diagnosed for them.
- CFS became final in the VBA in 1994
- Fibromyalgia was final in 1999
- Remember that if the VA can say the UDX symptom is a part of a DX illness -----
- your claim as a symptom will be denied. You do know how to us research and the laws with some claims.
 - Resolution of Reasonable Doubt



Not a Diagnosis of a CMI

- Something like
- Chronic Fatigue
 - Please note it does not have one word
- similar to a fibromyalgia
- Might be IBS



38 CFR § 3.317 Claims

Remember that PTSD, Fibromyalgia, CFS and IBS combined would account for some of the UDX symptoms.

~~Fatigue~~

Skin issues

~~Headache~~

~~Muscle pain~~

~~Joint pain~~

~~Neuro Signs/Symptoms~~

~~Neuropsychological S/S~~

Upper/Lower Respiratory

~~Sleep disturbances~~

~~Gastrointestinal~~

~~Cardiovascular~~

~~Abnormal weight loss~~

Menstrual disorders



Partially Explained Etiology

CMI of a partially explained etiology can rule all out UDX and might rule out CMI such as;

- Diabetes
- Multiple Sclerosis

Source

- Federal Register / Vol. 68, No. 111 / 6-10-2003



New 38 CFR 3.155

- Request for Application (38 CFR 3.155(a))
 - Any communication or action expressing a desire to file for benefits under the laws administered by VA that does not meet the standards of a complete claim
- Intent to File (3.155(b))
 - Written, oral, or electronic notice to VA of an intent to file a claim for compensation, pension, or survivors benefits (see slides 8 and 9 for details)
- Incomplete application (3.155(c))
 - Any submission on a prescribed form that is not a complete claim as defined in 3.160(a)



38 CFR 3.157 Effective Date

- Changes to effective date rules allow VA to pay retroactive benefits as early as the date of treatment if, within one year of treatment, VA receives:
 - a complete claim, or
 - an ITF and, within one year after the ITF is received, a complete claim for the corresponding benefit



Intent to File (ITF) VA Form 21-0966

- You can only have one active ITF going at a time!
- It applies to the first claim received by the RO
 - It gives you one year for the RO to receive the claim
- Methods of filing an ITF:
 - Paper VA Form 21-0966, *faxed, given to VSO or in-person interview at a VA regional office or other claim intake center*
 - First-time “Save” of online application eBenefits
 - Telephone call to 1-800-827-1000 (not a good way)



What to Use

- If you what to file BUT---
- Do not have all of the document & /or
- Have a test in 2+ months OR
- Need to send for some records
- Use the ITF



Spend Time Wisely

- Work on your 21-4138 read the NGWRC Guide
- Find your records, get what you only to prove claim
- Get reports from work
- Spouse statement
- If need to show Dr. studies/get Nexus
- DD214, divorce, marriage, kids
- Check again for a DX.
- Fill out forms



21-0526EZ

List the items to point

Sleep Apnea – secondary SEE 21-4138

Migraine – Secondary – See 21-4138

Fibromyalgia – Reopen under 3.317 see 21-4138



Department of Veterans Affairs		VA DATE STAMP (DO NOT WRITE IN THIS SPACE)	
APPLICATION FOR DISABILITY COMPENSATION AND RELATED COMPENSATION BENEFITS			
IMPORTANT: Please read the Privacy Act and Respondent Burden on page 10 before completing this form.			
SECTION I: IDENTIFICATION AND CLAIM INFORMATION			
1. VETERAN/SERVICE MEMBER NAME (First, Middle Initial, Last) Desert S t r o m			
2. SOCIAL SECURITY NUMBER 0 0 0 - 0 0 - 0 0 0 0		3. DATE OF BIRTH (MM/DD/YYYY) Month: 0 7 Day: 0 4 Year: 1 7 7 6	
		4. SEX <input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE	
5. HAVE YOU EVER FILED A CLAIM WITH VA? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," provide your file number in Item 6)		6. VA FILE NUMBER 0 0 0 0 0 0 0 0 0 0	
7A. ARE YOU CURRENTLY HOMELESS OR AT RISK OF BECOMING HOMELESS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete Items 7B & 7C)		7B. POINT OF CONTACT (Name of person that VA can contact in order to get in touch with you) My VSO:	
		7C. POINT OF CONTACT TELEPHONE NUMBER (Include Area Code) (1 2 3) 5 5 5 - 0 0 0 1	
8A. SERVICE (Check all that apply) <input checked="" type="checkbox"/> ARMY <input type="checkbox"/> NAVY <input type="checkbox"/> MARINE CORPS <input type="checkbox"/> AIR FORCE <input type="checkbox"/> COAST GUARD		8B. COMPONENT (Check all that apply) <input checked="" type="checkbox"/> ACTIVE <input type="checkbox"/> RESERVES <input type="checkbox"/> NATIONAL GUARD	
9A. CURRENT MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country) Number and Street or Rural Route, P.O. Box: 1 6 0 0 m a i n S t City, State, ZIP Code: H o m e T o w n K S 6 6 6 2 2 Country:			
9B. FORWARDING ADDRESS AND EFFECTIVE DATE Number and Street or Rural Route, P.O. Box: Apt./Unit Number: City, State, ZIP Code: Country: Effective Date (MM/DD/YYYY): Month: Day: Year:			
9C. PREFERRED TELEPHONE NUMBER ()			
10A. PREFERRED E-MAIL ADDRESS (If applicable)		10B. ALTERNATE E-MAIL ADDRESS (If applicable)	



21-0526EZ

- Box 12 List all VA's Do Not "ASSUME"
- Add Continued on 21-4138
- After active duty DOD treatment serve places
- This is very important help with the Constructive Notice of VA Medical Records if there is a CUE later.
 - Bell v. Derwinski, 2 Vet. App. 611 (1992)



11. LIST THE DISABILITY(IES) YOU ARE CLAIMING (If applicable, identify whether a disability is due to a service-connected disability, is due to confinement as a Prisoner of War, is due to exposure to Agent Orange, Asbestos, Mustard Gas, Ionizing Radiation, or Gulf War Environmental Hazards, or is related to benefits under 38 U.S.C. 1151).

Please list your contentions below. See the following examples, for more information:

- Example 1: Hearing loss
- Example 2: Diabetes-Agent Orange (exposed 12/72, Da Nang)
- Example 3: Left knee - secondary to right knee

1.	Joint pain - 38 CFR 3.317 Gulf War
2.	Muscle pain - 38 CFR 3.317 Gulf War
3.	Sleep Disturbance - 38 CFR 3.317 Gulf War
4.	Fatigue - 38 CFR 3.317 Gulf War
5.	Memory problem - 38 CFR 3.317 Gulf War
6.	Sinusitis - Gulf War
7.	Migraine Gulf war
8.	IBS - 38 CFR 3.317 Gulf War
9.	Skin disorder - 38 CFR 3.317 Gulf War
10.	
11.	
12.	
13.	
14.	
15.	
16.	
17.	
18.	
19.	
20.	

12. LIST VA MEDICAL CENTER(S) (VAMC) AND DEPARTMENT OF DEFENSE (DOD) MILITARY TREATMENT FACILITIES (MTF) WHERE YOU RECEIVED TREATMENT AFTER DISCHARGE FOR YOUR CLAIMED DISABILITY(IES) AND PROVIDE TREATMENT DATES:

A. NAME AND LOCATION	B. DATE(S) OF TREATMENT
Topeka VA, Kansas City VA, St. Paul MN See 21-4138	06/19/1992 09/22/2016
Houston, TX VAMC Gulf War client Washington DC VA	06/01/1994 09/30/1996
East Orange NJ VA WRIISC Continued on 21-4138	05/01/2005 01/01/2012
	01/01/2011 12/30/2012



256EZ Box 16-17

- PAST and Current Guard and Reserve
- Fill these out completely
- Printout you medical Report / Profiles
- Common ERROR is not giving
 - CURRENT OR LAST ASSIGNED NAME AND ADDRESS OF UNIT leads to lost records



Guard and Reserve

- If the you are a member of the National Guard or Reserves, you must submit copies of their service treatment records and any relevant personnel records along with their claim in order to be eligible for the FDC program.
- If the VA determines that relevant records are in the custody of the your units, the claim will have to be removed from the FDC track.



21-4138

- Used to direct the adjudicator
- Address evidence you turned in
- Describes your symptoms
 - 38 C.F.R. § 3.159(a)
- Tells of time lost from work



Lay Statement

- Lay persons are competent to report objective signs of illness. See *Gutierrez v. Principi*, 19 Vet. App. 1, 8-9 (2004).
- See 38 C.F.R. § 3.317(a)(5)
- see also *Stankevich v. Nicholson*, 19 Vet. App. 470 (2006)



Your Statement

- If missing most UDX claim are unsuccessful
- Poorly written rating could be lower
- Will effect the date of Claim
- To much information leads to problems



Lay Evidence, other

Federal Register / Vol. 60, No. 23 / 2-3-1995

Gutierrez v. Principi (Vet. App. 2004)

- Other examples of lay evidence:
 - Employment records showing increased absenteeism;
 - Medical treatment for symptoms without diagnosis;
 - Relevant observations of appearance, physical abilities or mental/emotional state.



4138 Example

2010 case:

Claimant file for diarrhea, and joint pain, muscle pain and fatigue

The Claimant was rated for PTSD at the time

The veteran sent in a 41138 that said:

“ I suffer form diarrhea it might be IBS”

“ I have pain and fatigue I think it is CFS”

This is better than those with no statement.



Better example

Sleep Apnea Secondary

My doctor that see me and maintains my medicines has provided a letter on how the side effect causes my weight gain combined with my other rated problems. It is attached and also in my VA file dated May 12, 2014

The argument that is that my sleep apnea is secondary to the medications taken for my diagnosis of PTSD and Fibromyalgia. My PTSD requires specific medications which leads to weight gain and my fibromyalgia causes me the inability to exercise. I have attempted many times to lose the weight but the pain I suffer from affects my ability to exercise on a regular basis.

Many conditions are believed to cause or result in sleep apnea syndrome. PTSD and depression have clear correlations with increased rates of sleep of sleep apnea.

A major study large scale of veterans linking mental health disorder and sleep apnea was published in the journal Sleep in 2005. SEE Attached

Two later studies conducted built on this. One was conducted at Madigan Army Medical Center in Tacoma, WA and published in the journal Sleep. The other was conducted at Walter Reed Army Medical Center in Bethesda, MD and published in the journal Chest. The Walter Reed researchers found that 73% of patients with PTSD also had sleep apnea. SEE Attached



4138 secondary Handout

- Did not leave it to just one illness
- Pointed out dated
- Showed MSG to doctor
- Used the new law on EED



Department of Veterans Affairs		STATEMENT IN SUPPORT OF CLAIM	
<p>PRIVACY ACT INFORMATION: The VA will not disclose information collected in this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine use (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 38 U.S.C. 2225, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN without information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide us or our SSNs unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine accurate benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.</p> <p>RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 201(a) and (d)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot obtain or sponsor a collection of information without a valid OMB control number in the box. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.omb.gov/publicdo/BIAmain. If desired, you can call 1-800-423-1000 to get information on where to send comments or suggestions about this form.</p>			
FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)		SOCIAL SECURITY NO.	VA FILE NO.
Desert Storm			QCSS-12332112
The following statement is made in connection with a claim for benefits in the case of the above-named veteran:			
<p>I am filing for incontinence as secondary to IBS (that is still in appeals) and also to my Service connected condition. I have had the problem with both fecal and urine leakage for about 15 years. All of my conditions are posted on progress notes dated [redacted] and back to 2000. As the VAMC records clearly show I suffer these issues for 15 or more years. VA need to consider all means of service connection. If this claim is not granted with the issues of a bladder/lower GI condition, I will keep working the claim as secondary to the IBS that should have been granted under 3.317 and not worked under 3.307.</p> <p>From my understanding of the new VA regulation, 38 CFR section 3.157, a claim can go back one year from the date of file when there is evidence in the medical records year. My medical records clearly does show I have been having this problem for more than one year before I filed.</p> <p>The issues of a bladder/lower GI condition for which I am rated creates two issues - urine being soaked into my clothing and the smell of urine. This makes it hard for me to be around those I work with.</p> <p>The other condition of incontinence that the doctors said is caused by IBS. Look at my doctor's notes dated [redacted]. This is where my PCP went the test report of [redacted] giving me again the DX of incontinence. I have contacted my PCP via E-Benefits to try to get some type of depends from the VA as I know that other veterans get their supplies there. I am embarrassed about getting my supplies up town and was hoping to have the VA send them to me. My new doctor stated that he know of product for IBS.</p> <p>There are two issues I deal with - unable to hold bowel movements and diarrhea flowing from my sphincter. Both can cause issues in certain social settings. In addition, I have been diagnosed by an outside contractor, that the VA hospital in ----- sent me to under the Choice program, that being Endoscopy Center of -----whose findings are in my records.</p>			
I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.			
SIGNATURE		DATE SIGNED	
[redacted]		[redacted]	
ADDRESS		TELEPHONE NUMBERS (Include Area Code)	
[redacted]		DAYTIME	EVENING
[redacted]			
PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.			

VA From 21-4138
Secondary



4138, UDX “like IBS”

- Vet could not get a clear DX from the doctors
- Been denied a few time since service
- A number of scopes
- Helped his lawyer and him with this



Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than who has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.276 for outside uses (i.e., used in criminal law enforcement, congressional investigations, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and name, and personnel administration) as identified in the VA system of records, 38VAC21.2222. Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN allows us to identify the disability of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and will in effect. The requested information is considered relevant and necessary to determine insurance benefits under the law. The responses you submit are considered confidential (138 U.S.C. 5301). Information gathered in support of verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, fill the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if the OMB number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.omb.gov/pubs/foi/foi.html. If desired, you can call 1-800-877-1000 to get information on when to send comments or suggestions about this form.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)	SOCIAL SECURITY NO.	VA FILE NO.
Desert Storm Veteran		C/CSS- 000000000

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I am claiming my symptoms of chronic diarrhea and constipation a presumptive under 38 C.F.R. § 3.317(a)(2)(B)(3) Functional gastrointestinal disorders with a presumptive date ending on 31 Dec. 2016. As my DD214 shows I did service in Iraq and this is for anyone that was in the area.

Background:

I have been seen by my VA PCP and received extensive testing and so far they can't explain what is causing my debilitating symptoms. I've been tested for Celiac Disease, UC and Crohns but all labs and biopsies come back negative. My GI doctor thinks it might be something called IBS.

Symptoms description:

1. I have severe abdominal cramps and bloating when I eat basically any food. I'm up 3 hours during the night with the bloating, watery Diarrhea with severe intestinal cramps going 5 to eight times on the toilet with watery Diarrhea. These attacks of diarrhea and constipation with abdominal pain happen usually 3 to 4 times weekly. The doctor have not found what is triggering these alternating diarrhea and constipation episodes. After each occurrence it is usually 2 days before I have another bowel movement. This illness is seriously affecting my personal and social life due to I can't go out and eat fearing I will get sick.

See addition information on page 2 of this 21-4138 form.

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

SIGNATURE	DATE SIGNED
	08/31/2016
ADDRESS	TELEPHONE NUMBERS (Include Area Code)
	DAYTIME
	EVENING

PENALTY: The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.



The following statement is made in connection with a claim for benefits in the case of the above-named veteran.

Also my employment has been affected due to the stress of lack of sleep I keep falling asleep at work, leaving meetings or calling in sick because I'm still having the severe cramps and diarrhea preventing me going to work. I have been eating a vegetarian diet with no red meats, milk etc. I haven't drank milk for two years and staying away from anything with lactose in it in hopes it would help. Lactose intolerance doesn't cause the alternating severe diarrhea and constipation for days on end with a regular vegetarian diet. The symptoms haven't changed whether I was on a regular diet or vegetarian diet it mostly is the same symptoms. Currently I'm undiagnosed with a specific cause and testing is still on going at the VAMC

Attachments:

1. VAMC Medical records that relate to this matter.
 2. VBA-21-4138 from my spouse on my symptoms.
- DD-214's, all medical documentation, combat service proof awards given

VAMC Medical records

VA From 21-4138
NOD Page 2
UDX Chronic
Diarrhea



VA Examinations as changed due to NGWRC

- Required for the (GWI);
- M21-1.IV.ii.1.E.2.j. **Notice to Examiners**
- If, after examining the Veteran and reviewing the claims file, you determine that the Veteran's disability pattern is either (1) an undiagnosed illness; or (2) a diagnosable but medically unexplained chronic multisymptom illness of unknown etiology, **then no medical opinion or rationale is required as these conditions are presumed to be caused by service in the Southwest Asia theater of operations.**



VA cannot impose a Nexus Once you meet the law

Gutierrez v. Principi (2004) the Court ruled-

- Lay statement to be used
 - Statement of symptoms by wife is to be used
 - Does not have to prove the exposurer
 - Every VSO **MUST** know this case law.
-
- The Veteran may in some cases need a nexus.



The Rating Decision

- Step back and cool down
- Work with your VSO /Agent
- Look over everything and plan out your reply
- Use the VA regulations to win
- Back you what you say with the regulation
and CASELAW
- You need to address things early and before it goes
to the VBA.

Time—Do not wait to long!!!!!!



VA has a Duty to Max Benefit

- When determining the proper evaluation for a vet's disability, VA is required to consider all possibly related Diagnostic Codes (DC), especially those that may yield a higher rating.
 - See *Vogan v. Shinseki*, 24 Vet. App. 159, 164 (2010)

Look at the DC given and % at time it may be wrong
VA gave a 0% when the reg was 10%



VA has a Duty to Max Benefit

- 38 C.F.R. § 4.25(b)
 - All disabilities arising from a single disease (or injury) are to be rated separately

But Remember

- 38 C.F.R. § 4.14 Avoidance of Pyramiding
- You can't be compensated more than once for the same disability or symptom
 - That is you cannot be paid for memory problem in PTSD and Gulf War 3.317



General Rating Considerations

- 38 C.F.R. § 4.3 Resolution of Reasonable Doubt
 - “It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.”



What Constitutes an Appeal

- A timely Notice of Disagreement.
- VA issued a Statement of the Case.
- A timely filed VA Form 9.

38 CFR 20.200



The Notice of Disagreement (NOD)

- Must be a 21-0958.
(claimant or their accredited representative)
- Must be filed within one year of when the decision letter was mailed. 38 CFR 20.302(a)
 - The date of letter is considered the date mailed
- Must express disagreement



VA Form 21-0958, NOD

- Work with one issue or related issues
- Be careful in asking for a %
- Do not relate a secondary to only one issue
- Remember to work with a GOOD VSO, Agent or Lawyer as they point out of caselaw & regulations



UDX Appeal

Stankevich v. Nicholson 2006

- Decision must explain why one diagnostic code was selected v. another.
- Diagnostic code must take into account the nature of an undiagnosed illness.
- Inappropriate to require “objective evidence of a diagnosed disability” for 10% (x-ray evidence of arthritis)



Examples

Hand out (B)

Service connection for a disease or disability characterized by joint pain, elbows and knees, to include as claimed due to exposure to Gulf War environmental hazards.

The available service treatment records show no treatment or diagnosis of any chronic disease or disability associated with joint pain. There is no other competent medical or

other evidence to show such a condition is currently diagnosed and either began during military service or was caused by service.



NOD

- This claim was denied as not in service
- The veteran did not have symptoms in the exam
- Did not complain of having any problem



Department of Veterans Affairs		NOTICE OF DISAGREEMENT												
<p>A CLAIMANT OR HIS OR HER DULY APPOINTED REPRESENTATIVE MAY FILE NOTICE EXPRESSING THEIR DISSATISFACTION OR DISAGREEMENT WITH AN ADJUDICATIVE DETERMINATION BY THE AGENCY OF ORIGINAL JURISDICTION. A DESIRE TO CONTEST THE RESULT WILL CONSTITUTE A NOTICE OF DISAGREEMENT (NOD). WHILE SPECIAL WORDING IS NOT REQUIRED, THE NOD MUST BE IN TERMS WHICH CAN BE REASONABLY CONSTRUED AS DISAGREEMENT WITH THAT DETERMINATION AND A DESIRE FOR APPELLATE REVIEW. (AUTHORITY: 38 U.S.C. 7105)</p> <p>TO FILE A VALID NOD, THERE IS A TIME LIMIT OF ONE YEAR FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT. FOR CONTESTED CLAIMS INCLUDING CLAIMS OF APPORTIONMENT, THIS TIME LIMIT IS 60 DAYS FROM THE DATE VA MAILED THE NOTIFICATION OF THE DECISION TO THE CLAIMANT.</p>		<p>(DO NOT WRITE IN THIS SPACE) (VA DATE STAMP)</p>												
PART I - PERSONAL INFORMATION														
<p>1. VETERAN'S NAME (First, middle initial, last)</p> <p>G u i l f W e t e r a n</p>														
<p>2. VA FILE NUMBER</p> <p>CICSS - 1 2 3 0 0 0 0 0 0</p>														
<p>3. VETERAN'S SOCIAL SECURITY NUMBER</p> <p>1 2 3 - 0 0 - 0 0 0 0</p>														
CLAIMANT'S PERSONAL INFORMATION														
<p>4. CLAIMANT'S NAME (First, middle initial, last)</p> <p>G u i l f W e t e r a n</p>														
<p>5. MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)</p> <p>Number and Street or Rural Route, P.O. Box: 1 2 3 4 5 M a i n S T</p> <p>City, State, ZIP Code and Country: R o m e T o w n D S 0 0 0 0 1</p>														
<p>6. PREFERRED TELEPHONE NUMBER (Include Area Code)</p> <p>0 0 0 0 0 0 0 0</p>														
<p>7. PREFERRED E-MAIL ADDRESS</p>														
PART II - TELEPHONE CONTACT														
<p>8. WOULD YOU LIKE TO RECEIVE A TELEPHONE CALL OR E-MAIL FROM A REPRESENTATIVE AT YOUR LOCAL REGIONAL OFFICE REGARDING YOUR NOD?</p> <p><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If you answered "Yes," VA will make up to two attempts to call you between 8:00 a.m. and 4:30 p.m. local time at the telephone number and time period you select below. Please select up to two time periods you are available to receive a phone call.)</p> <p><input type="checkbox"/> 8:00 a.m. - 10:00 a.m. <input type="checkbox"/> 10:00 a.m. - 12:30 p.m. <input type="checkbox"/> 12:30 p.m. - 2:00 p.m. <input type="checkbox"/> 2:00 p.m. - 4:30 p.m.</p> <p>Phone number I can be reached at the above checked time: _____</p>														
PART III - SPECIFIC ISSUES OF DISAGREEMENT														
<p>9. NOTIFICATION/DECISION LETTER DATE</p> <p style="text-align: center;">02/28/2016</p>														
<p>10. PLEASE LIST EACH SPECIFIC ISSUE OF DISAGREEMENT AND NOTE THE AREA OF DISAGREEMENT. IF YOU DISAGREE ON THE EVALUATION OF A DISABILITY, SPECIFY PERCENTAGE EVALUATION SOUGHT, IF KNOWN. PLEASE LIST ONLY ONE DISABILITY IN EACH BOX. YOU MAY ATTACH ADDITIONAL SHEETS IF NECESSARY.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 40%;">A. Specific Issue of Disagreement</th> <th style="width: 30%;">B. Area of Disagreement</th> <th style="width: 30%;">C. Percentage (%) Evaluation Sought (If known)</th> </tr> </thead> <tbody> <tr> <td style="padding: 5px;">Irritable Bowel Syndrome (IBS)</td> <td style="padding: 5px;"> <input checked="" type="checkbox"/> Service Connection <input checked="" type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify) </td> <td style="padding: 5px;">30 % MAX</td> </tr> <tr> <td style="padding: 5px;">Incontinence per March 2015 regulation change</td> <td style="padding: 5px;"> <input checked="" type="checkbox"/> Service Connection <input checked="" type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify) </td> <td style="padding: 5px;">80%</td> </tr> <tr> <td style="padding: 5px;"></td> <td style="padding: 5px;"> <input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify) </td> <td style="padding: 5px;"></td> </tr> </tbody> </table>			A. Specific Issue of Disagreement	B. Area of Disagreement	C. Percentage (%) Evaluation Sought (If known)	Irritable Bowel Syndrome (IBS)	<input checked="" type="checkbox"/> Service Connection <input checked="" type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	30 % MAX	Incontinence per March 2015 regulation change	<input checked="" type="checkbox"/> Service Connection <input checked="" type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	80%		<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	
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	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)													



PART III - SPECIFIC ISSUES OF DISAGREEMENT (Continued)		
A. Specific Issue of Disagreement	B. Area of Disagreement	C. Percentage (%) Evaluation Sought (If known)
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	
<p>11A. IN THE SPACE BELOW, OR ON A SEPARATE PAGE, PLEASE EXPLAIN WHY YOU FEEL WE INCORRECTLY DECIDED YOUR CLAIM, AND LIST ANY DISAGREEMENT(S) NOT COVERED ABOVE:</p> <p>If the VARO cannot resolve this, I request a formal personal hearing with the DRO.</p> <p>I am filing this notice of disagreement (NOD) for the rating decision of Irritable Bowel Syndrome (IBS) that the VA was to adjudicate 38CFR 3.317 as a presumptive illness due to my service in the Gulf War.</p> <p>The statements I turned in on 3/21/2010 when I filed my claim does clearly showed how bad my diarrhea and constipation is and that I have abdominal pains all the time and my medical records show it never did get better. This Court has said that the you cannot reject my evidence that is favorable to my claim without discussing that evidence. Daves v. Nicholson, 21 Vet.App. 46, 51 (2007) (citing Meyer v. Brown, 9 Vet.App. 425, 233 (1996)). The Examiner was told the same things and but did not read my statements. My wives statements was never taken into account by the examiner or the adjudicator.</p> <p>The courts have held I am competent to describe my the symptoms of diarrhea and constipation as found in Gutierrez v. Principi, 19 Vet.App. (2004). 38 CFR §3.159 (2)</p> <p>As my first 21-4138 shows, I have daily abdominal pain and alternating diarrhea and constipation and I soiled my self from time to time. According to § 4.114 - DC 7319, and applying 38 C.F.R. § 3.102 Reasonable doubt it is clear I more closely appreciate the 30% rating. I should have been given incontinence as a secondary to the diarrhea and constipation or IBS too as per the statements of 2010 (per March 2015 regulation change)</p> <p>When applying 38 C.F.R. § 3.102 Reasonable doubt my symptoms does more closely match 30% of the rating guide than that of 10%</p> <p>As this is a timely NOD the effective date is still the date I first file for IBS.</p>		
<p>11B. DID YOU ATTACH ADDITIONAL PAGES TO THIS NOD?</p> <p><input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If so, how many?) _____</p>		
<p>PART IV - CERTIFICATION AND SIGNATURE</p>		
<p>CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.</p>		
12A. SIGNATURE		12B. DATE SIGNED
<p>PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.</p>		



NDO IBS, FM and Migraine

- Remember to address the exam in each part
- Address the secondary each time
- You can fight the route of SC on many paths at the same time



VA From 21-0958
Fibromyalgia

PART III - SPECIFIC ISSUES OF DISAGREEMENT (Continued)		
A. Specific Issue of Disagreement	B. Area of Disagreement	C. Percentage (%) Evaluation Sought (If known)
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	
	<input type="checkbox"/> Service Connection <input type="checkbox"/> Effective Date of Award <input type="checkbox"/> Evaluation of Disability <input type="checkbox"/> Other (Please specify)	
<p>16A. IN THE SPACE BELOW, OR ON A SEPARATE PAGE, PLEASE EXPLAIN WHY YOU FEEL WE INCORRECTLY DECIDED YOUR CLAIM, AND LIST ANY DISAGREEMENT(S) NOT COVERED ABOVE:</p> <p>The adjudicator did not apply the 38 C.F.R. § 3.317 a) (2) (B) (2) Fibromyalgia as per the laws on presumptive illness under under 38 U.S.C. §§ 1117 & 1118 as it pertains to these claims.</p> <p>The rating specialist erred relying on an inadequate medical opinion as the examiner failed to follow to follow the notice to the examiner as M21-1.IV.ii.1.E.2.j. "Notice to Examiners". The M21-1 clearly show that no nexus is to be given that stated my Fibromyalgia did not start in the service or was caused by my time in the service.</p> <p>The DBQ showed that I am diagnosed with Fibromyalgia and that the tests show normal. I have had all of the other test needed as well. I am on medication and I am still in pain most all of the time. As per the rating guidelines I have met the 40% rating.</p> <p>As per the doctors notes my migraines are caused by my Fibromyalgia. Also the other paperwork shows how migraines and tension headaches are caused by Fibromyalgia. As per the 1999 final rule on Fibromyalgia, we are able to file for the associated illness of Fibromyalgia that have their own codes like depression and headaches.</p> <p>I am filled for my headaches under DC 8100- Migraine as that is what they are diagnosed as and my doctor say they are a caused by my Fibromyalgia.</p> <p>This denial is in error, as it did not take into account the fact that IBS is a presumptive illness under U.S.C title 38 Section 1117 as passed by congress in 2001 and is a part of the FGID as in CFR 38 section 3.317(a) (2) (B) (3) FGID.</p> <p>I was diagnosed by my GI doctor 2 years before this C&P exam. The C&P exam is inadequate as the examiner stated I should have lost a lot of weight with my illness. This statement show that the examiner did not understand IBS or read even the VA exam guidelines 6.19 on IBS. These guidelines clearly states "Usually there is a well-nourished appearance despite a history of frequent loose stools daily. Physical examination is often completely normal." I ask for a 2nd opinion by a GI doctor trained in IBS.</p>		
<p>16B. DID YOU ATTACH ADDITIONAL PAGES TO THIS NOD?</p> <p><input checked="" type="checkbox"/> YES <input type="checkbox"/> NO (If so, how many?)</p>		
PART IV - CERTIFICATION AND SIGNATURE		
I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.		
17A. SIGNATURE	17B. DATE SIGNED	
PENALTY: THE LAW PROVIDES SEVERE PENALTIES WHICH INCLUDE A FINE, IMPRISONMENT, OR BOTH, FOR THE WILLFUL SUBMISSION OF ANY STATEMENT OR EVIDENCE OF A MATERIAL FACT, KNOWING IT TO BE FALSE.		



38 CFR §§ 3.303, 3.307, 3.317

38 USC § 5107(b) Benefit of the Doubt

Eisenet al., 2005 is a GERD at a much higher rate.

Kang et al. 2000 VA long term study. Showing much higher rates of migraines, sinusitis, secures, COPD and some other illnesses.

Dursa et al 2016VA long term study. Showing much higher rates of migraines, sinusitis, secures, COPD and some other illnesses.



Follow Up Study of a National Cohort of Gulf War and Gulf Era Veterans

Gulf War Veterans reported significantly higher prevalence of the following conditions

- Gulf War Illness
- Chronic fatigue syndrome
- Gastritis
- Neuralgia
- Fibromyalgia
- Tachycardia
- Dermatitis
- Rheumatoid arthritis
- Arthritis
- IBS
- Functional dyspepsia
- Seizures
- Coronary heart disease
- Migraine headaches
- Hypertension
- Asthma
- COPD
- Post traumatic stress disorder
- Major depressive disorder
- Anxiety Disorder

Toxins in Desert Storm

(A) The following organophosphorous pesticides:

- (i) Chlorpyrifos.
- (ii) Diazinon.
- (iii) Dichlorvos.
- (iv) Malathion.

(B) The following carbamate pesticides:

- (i) Proxpur.
- (ii) Carbaryl.
- (iii) Methomyl.

(C) The carbamate pyridostigmine bromide used as nerve agent prophylaxis.

(D) The following chlorinated hydrocarbons and other pesticides and repellents:

- (i) Lindane.
- (ii) Pyrethrins.
- (iii) Permethrins.
- (iv) Rodenticides (bait).
- v) Repellent (DEET).

(E) The following low-level nerve agents and precursor compounds at exposure levels below those which produce immediately apparent incapacitating symptoms:

- (i) Sarin.
- (ii) Tabun.

(F) The following synthetic chemical compounds:

- (i) Mustard agents.
- (ii) Volatile organic compounds.
- (iii) Hydrazine.
- (iv) Red fuming nitric acid.
- (v) Solvents.

(G) The following sources of radiation:

- (i) Depleted uranium.
- (ii) Microwave radiation.
- (iii) Radio frequency radiation.

(H) The following environmental particulates and pollutants:

- (i) Hydrogen sulfide.
- (ii) Oil fire byproducts.
- (iii) Diesel heater fumes.
- (iv) Sand micro-particles.

(I) Diseases endemic to the region such as:

- (i) Leishmaniasis.
- (ii) Sandfly fever.
- (iii) Pathogenic escherichia coli.
- (iv) Shigellosis.

(J) Time compressed administration of multiple live, “attenuated”, and toxoid vaccines.



Example Research Helping

- Claim File Migraine as UDX under 3.317
- Veteran has year of medical records
- Claim is denied not a UDX
- No record in STR Denied
- NGWRC helps out



NOD write up migraine

There is no doubt that the issue by the claimants C&P exam and medical report does show the diagnosis of the claimed migraine type headache disorder, a diseases of the nervous system, that the claimant suffers from migraine.

That the claimants DBQ does shows prostrating migraines that the examiner stated preclude or interferes with the claimant being able to work. Thus under C.F.R. § 4.71a, DC 8100 Migraine a rating of 50% is met as causing one not to work would show the migraines are producing economic inadaptability on the claimant.

As for the issue of the migraine not cause by service on a direct or presumptive of service as a matter of law, when the evidence does not preponderate one way or the other, it sits in relative equipoise." See Gilbert v. Derwinski, 1 Vet.App. 49, 54 (1990) ("a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail"), and the benefit of the doubt must go to the veteran, see Ortiz v. Principi, 274F.3d 1361, 1365 (Fed. Cir. 2001) Migraines are type of headache and also a disease of the nervous system. As such, migraines are a chronic disease under 38 CFR §3.309 (a) Chronic diseases.

The claimants neurologists provided a nexus relating the migraine disorder to the claimants service (see VBMS report dated--) with a rationale. The rationale used the VA's own studies that was provided by the agent. A Neurologist is the expert in the field as they are the doctors trained in diagnosing and treating disorders and diseases of the brain, spinal cord, nerves and muscles. Neurologists examine and treat the nerves in the head and neck as well as diagnose problems with memory, balance, speech, thinking and language.

The study of Kang, Han K, et al (2000) that is date stamped received by the -RO on DATE, that was conducted by the Veterans Health Administration, Department of Veterans Affairs, Washington DC, by Kang, Han K, et al, titled "Illnesses among US veterans of the Gulf War: A population-based survey of 30,000 veterans", JOEM, Vol 42 No. (5), May 2000 "Gulf War veterans reported many chronic medical conditions significantly more frequently than those who did not serve in the Gulf....The five most frequently reported conditions were migraines, sinusitis, secures etc." This study did not find a cause from the list of over 30 toxins.

The VA follow-up study by Erin K. Dursa, PhD, MPH with a population-based survey of 30,000 veterans, Dursa et al 2016, JOEM Volume 58, Number 1, January 2016 still found "Gulf War veterans reported a significantly higher prevalence of chronic illnesses, including cardiopulmonary diseases (obstructive pulmonary disease, tachycardia, coronary heart disease, hypertension, asthma) and neurological diseases (neuralgia, seizures, migraine headaches)."



Traditional Review

A review by someone in the Appeals Team at the regional office, but it is not a De-novo review. The reviewer, sometimes a Rating Specialist, reviews any additional evidence received with the NOD and either grants the benefit sought or if any issues(s) continues to be denied, prepares a Statement of the Case.

38 CFR 3.2600(f)



De novo Review

A review by a Decision Review Officer (DRO) starting at the original rating decision for the issue(s) on appeal. It should be a thorough review of all the evidence and decisions up to the last decision making sure the decisions were correct.

Any additional evidence sent with the NOD will also be taken into consideration when the DRO makes a decision after the De novo review.

38 CFR 3.2600 (a)



De novo or Traditional review

If the Notice of Disagreement is sent in, the VA will send a letter to the claimant, and give them 60 days to make a selection of a De novo or Traditional review.

If the claimant fails to make a selection within 60 days from the date of the letter, VA will proceed with the Traditional Review.
38 CFR 3.2600(b)

Q: So what's the difference and why would you chose one over the other?

A: A De novo review is much more thorough and a DRO could use Difference of Opinion to change the rating.



Decision Review

The DRO can change the decision based on the record if he/she believes that the better rating practice would be to grant. The DRO cannot reverse a decision with which he/she just disagrees. 38 CFR 3.2600 (a)

- Difference of opinion does not require new medical evidence to change the previous decision.
- The Decision Review Officer is the only person in the Regional Office who can change a rating based on difference of opinion.



Administrative Review Request

- Request by VSO prior to SOC for review by VA Central Office.
- Very unique circumstances.
- Not every VSO has established procedures for AR requests.



What Happens to the NOD?

The file is reviewed along with any additional arguments or evidence included with the NOD.

The DRO or Appeals Team member will then either grant the benefit sought or if any issue(s) continues to be denied, prepare a Statement of the Case.



What's a Statement of the Case (SOC)

- It's a detailed description of the facts, laws, regulations, and reasons used by the RO in reaching their decision.
- It's intended to help the claimant understand the laws and regulations for the RO decision.
- It's also intended to help the claimant with their appeal.

38 CFR 19.29



VA Form 9

- Included with the SOC is a VA Form 9, “Appeal to Board of Veterans’ Appeals”. It’s also called a Substantive Appeal.
- Once the claimant has reviewed the SOC, the VA Form 9 must be completed and returned to the VA timely so that BVA will review the issues being appealed. The claimant should make a comment on each issue on appeal.



Form-9

- Must include a selection of personal hearing versus no hearing request
- Must identify the issues being pursued on appeal
- Must include some discussion of the each issue



HEARINGS

- **Ask for a hearing to be held before a Decision Review Officer at the RO before sending in the From-9.**
- **Once the appeal has been certified to the Board, any hearing requested on the appealed issues will be held before a BVA Judge .**



BVA Types of Hearings

1. In person at the Board in Washington, D.C.
2. Locally before a Travel Board of the BVA.
3. Video teleconference hearing before a BVA Board member.

The quickest way to get a hearing?

Probably a video hearing



Time Limits, VA Form 9

#1 – 60 days from the date the SOC is mailed **or** the remainder of the one year period following the date of the original decision *whichever is greater.*

38 CFR 20.302 (b)

#2 – 60 days from the date the SSOC is mailed **or** the remainder of the one year period *whichever is greater.* 38

CFR 20.302 (b)(2)



Time Limits, Form 9 cont.

Remember, the time is measured from the day the VA mailed the notice of the decision being appealed. The date of the letter is considered the date it's mailed.

- However, the law does guarantee an claimant not less than 60 days to review a SOC or SSOC.



VA Form 9

Page 1

Department of Veterans Affairs		APPEAL TO BOARD OF VETERANS' APPEALS	
IMPORTANT: Read the attached instructions before you fill out this form. VA also encourages you to get assistance from your representative in filling out this form.			
1. NAME OF VETERAN (Last Name, First Name, Middle Initial) Veteran Desert Storm		2. CLAIM FILE NO. (Include prefix) 0000012	3. INSURANCE FILE NO., OR LOAN NO.
4. I AM THE: <input type="checkbox"/> VETERAN <input type="checkbox"/> VETERAN'S WIDOWER <input type="checkbox"/> VETERAN'S CHILD <input type="checkbox"/> VETERAN'S PARENT <input checked="" type="checkbox"/> OTHER (Specify) Claims Agent			
5. TELEPHONE NUMBERS: A. HOME (Include Area Code)		B. WORK (Include Area Code)	
7. IF I AM NOT THE VETERAN, MY NAME IS: (Last Name, First Name, Middle Initial) Bunker, James A.		8. MY ADDRESS IS: (Number & Street or Post Office Box, City, State & ZIP Code) Topeka, KS 66604	
8. OPTIONAL BVA HEARING: IMPORTANT: Read the information about this block in paragraph 6 of the attached instructions. This block is used to request a Board of Veterans' Appeals hearing. DO NOT USE THIS FORM TO REQUEST A HEARING BEFORE VA REGIONAL OFFICE PERSONNEL. Check one (and only one) of the following boxes: A. <input type="checkbox"/> I DO NOT WANT A BVA HEARING. B. <input checked="" type="checkbox"/> I WANT A BVA HEARING BY LIVE VIDEOCONFERENCE. C. <input type="checkbox"/> I WANT A BVA HEARING IN WASHINGTON, DC. D. <input type="checkbox"/> I WANT A BVA HEARING AT A LOCAL VA OFFICE.* <small>*Due to travel requirements for BVA personnel, selecting Option D may result in a longer waiting period for the hearing than the other options. (This option is also not available at the Washington, DC, or Baltimore, MD, Regional Offices.)</small>			
9. THESE ARE THE ISSUES I WANT TO APPEAL TO THE BVA: (Be sure to read the information about this block in paragraph 6 of the attached instructions.) A. <input type="checkbox"/> I WANT TO APPEAL ALL OF THE ISSUES LISTED ON THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENTS OF THE CASE THAT MY LOCAL VA OFFICE SENT TO ME. B. <input checked="" type="checkbox"/> I HAVE READ THE STATEMENT OF THE CASE AND ANY SUPPLEMENTAL STATEMENT OF THE CASE I RECEIVED. I AM ONLY APPEALING THESE ISSUES: (List below.) 1. Fibromyalgia increase and effective date 2. IBS effective date due to CUB.			
10. HERE IS WHY I THINK THAT VA DECIDED MY CASE INCORRECTLY: (Be sure to read the information about this block in paragraph 6 of the attached instructions.) 1. The only requirement for a rating of fibromyalgia is widespread musculoskeletal pain and tender points, as per the VA final rule Federal Register / Vol. 64, No. 116 / Thursday, June 17, 1999 / Rules and Regulations §4.71a—DC 5025 Fibromyalgia 1999. A 40% rating is where the symptoms that are constant, or nearly so, and refractory to therapy as the claimant are. The regional office has increased the requirement for the 40% rating that the claimant needs with fibromyalgia by adding that the claimant must have a history of "sore throat, low grade fever, exudates and adenopathy." All symptoms of CFS and not listed under §4.71a—DC 5025. The regional office in denying the increased rating also stated that the claimant never had Raynaud's syndrome. In accordance to the regulation as per the final rule the symptoms may or may not have to happen, but is not required for a rating or a diagnosis.			
(Continue on the back, or attach sheets of paper. (You need more space).)			
11. SIGNATURE OF PERSON MAKING THIS APPEAL	12. DATE (MM/DD/YYYY) 09/07/2016	13. SIGNATURE OF APPOINTED REPRESENTATIVE, IF ANY (Not required if signed by appellant. See paragraph 6 of the instructions.)	14. DATE (MM/DD/YYYY) 09/14/2016



EXAMPLE PAGE 2

2. The Examiner clearly stated the claimant was painful at all tender points and all muscles, joints too. That is all parts of the body. That the claimant also has fatigue and headaches. The AOJ wrote it was a reason not to give the higher award when it would be a reason.

3. Earlier effective date. This claim stems from reopening the wrongfully denied 2005 claim. In 2005 the AOJ did not use the claimants VAMC records that they was informed of by the 21-526. This was a reopen of the denied claim of 1994 as of the law changing the 2 year presumptive time and also adding the CMI.

As the AOJ in not applying General Counsel Opinion VAOPGCPREC 12-95 in M21-1MR, Part III.iv.1.3.b Constructive Notice of Medical Records (December 13, 2005) did thus causing the CUE as the AOJ did not use the claimants records in 2005 and denied the claim. The decision at the time does show no C&P was done with the claim even when the claimant had years of treatment in his file.

Thus effective date should be on the original claim that was denied in 2005. Court of Veterans Appeals instituted the constructive notice rule in Bell v. Derwinski, 2 Vet. App. 611 (1992) and Russell v. Principi, 3 Vet. App. 310, 314 (1992) in this case.

IBS effective date.

The claimant filed to reopen the claim for IBS in 2005 after it was denied in 1994, the AOJ did not use his VAMC medical records showing the DX and treatment of the illness. This is shown by the 2005 decision evident list. In the decision the AOJ does state the claimants symptoms did start in the service but he was not seen since. The 1994 claim decision also does not list the veterans VAMC treatment records. If the claimant records was used in the earlier claims the would have been given relief before now.

The claim for IBS was reopened on a CUE from a 2005 denial that did not follow the regulation of 3.317 as of the law change adding IBS as per Federal Register / Vol. 68, No. 111 / 6-10-2003. While claimant won this claim we ask for the effective date of the claim to be set back to the filing in 2005 that was reopened on the cue. the AOJ in not applying General Counsel Opinion VAOPGCPREC 12-95 in M21-1MR, Part III.iv.1.3.b Constructive Notice of Medical Records (December 13, 2005) did thus causing the CUE as the AOJ did not use the claimants records in 2005 and denied the claim. Court of Veterans Appeals instituted the constructive notice rule in Bell v. Derwinski, 2 Vet. App. 611 (1992) and Russell v. Principi, 3 Vet. App. 310, 314 (1992) in this case.



The BVA Docket

- Except as otherwise provided, the Board will consider and decide appeals in date order according to each appeal's place upon the docket. – **38 CFR §20.900**
- The docket number is assigned based on the date the Substantive Appeal (VA Form 9) is received at the regional office.

Q: When should you submit a VA Form 9?

A: As early as possible after the SOC is issued, to lock in the earliest docket date possible.



90 DAY RULE

The claimant has 90 days after the appeal is received at the Board to:

- Request a change in representation.
- Request a personal hearing.
- Submit additional evidence.

The claimant will receive a letter from the Board explaining this regulation when the appeal is received at the Board.

38 CFR 20.1304



VA Form 646
Page 1

Department of Veterans Affairs	
STATEMENT OF ACCREDITED REPRESENTATIVE IN APPEALED CASE	
<p>RESPONDENT BURDEN: The information requested on this form is solicited under Sections 7105(a) and (b)(2), Title 38, United States Code. This form, when completed, is a vehicle which you may use to present information concerning the appeal of the individual whom you represent to the Board of Veterans' Appeals. It is used by VA and the Board in processing the appeal and by the Board in deciding the appeal. Public reporting burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Completion of the form is voluntary. VA may not conduct or sponsor, and the respondent is not required to respond to this collection of information unless it displays a valid OMB Control Number. Send comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing this burden, to VA Clearance Officer (005E3), 810 Vermont Avenue, NW, Washington, DC 20420. PLEASE DO NOT SEND APPLICATIONS FOR BENEFITS TO THE VA CLEARANCE OFFICER.</p>	
<p>PRIVACY ACT NOTICE: The information may be disclosed outside of VA as permitted by law and as stated in the notices pertaining to VA's systems of records which are periodically published in the Federal Register in accordance with the Privacy Act of 1974. Examples of situations in which the information included in this form might be released to individuals outside of VA include release to the United States Court of Appeals for Veterans Claims, should the Board of Veterans' Appeals' decision in this case later be appealed to that court; disclosure to a medical expert outside of VA, should VA determine that a request for an opinion from such an expert under the provisions of Sections 5109 or 7109, Title 38, United States Code is appropriate; disclosure to law enforcement personnel and security guards in order to alert them to the presence of a dangerous person; disclosure to law enforcement agencies should a violation of law be indicated; disclosure to a congressional office in order to answer an inquiry from the congressional office made at your request or the request of the appellant whom you represent; and disclosure to Federal government personnel who have the duty of inspecting VA's records to make sure that they are being properly maintained. See the Federal Register notices described above for further details.</p>	
TO REPRESENTATIVE James Bunker SMW	DATE 11/26/2015
LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN Veteran, Desert S.	FILE NO. 000000000
<p>All evidence in connection with this appeal has been considered. Please complete and return the statement below on or before the date indicated. If we do not receive either the statement or a request for extension by that date, it will be necessary for us to certify the appeal to the Board of Veterans' Appeals on the present record.</p>	
REPLY REQUESTED BY (Date) 01/21/2016	NAME AND MAIL ROUTING SYMBOL OF ORGANIZATIONAL ELEMENT MAKING REQUEST
TO BE COMPLETED BY ACCREDITED REPRESENTATIVE	
<p>NOTE: Section 7105(a) and (b)(2), Title 38, United States Code, give the claimant the right to be represented and give the accredited representative the right to file claims for the claimant. The presentation of an argument by the accredited representative is voluntary and not necessary for completion of the appeal. The opportunity or argument is given the accredited representative in order to accord the claimant the right of full representation at his stage of the appellate process. Failure to file this form may delay the appellate process.</p>	
<p>I HEREBY CERTIFY that a statement of the case was furnished; that appellate review is desired on the evidence now of record; and that the issues for consideration by the Board of Veterans' Appeals are clearly defined.</p> <p> <input type="checkbox"/> I REST THE APPEAL ON THE ANSWER TO THE STATEMENT OF THE CASE AND THE HEARING ON APPEAL (if conducted), AND I HAVE NO FURTHER ARGUMENT. <input checked="" type="checkbox"/> I WISH TO MAKE THE FOLLOWING ARGUMENT TO SUPPLEMENT THE ANSWER TO THE STATEMENT OF THE CASE AND OTHER ARGUMENT OF RECORD: </p> <p>At Issue: Entitlement to Chronic Fatigue Syndrome (CFS) as presumptive under 38 C.F.R. § 3.317(a)(2)(B)(1) Chronic Fatigue Syndrome. (2011)VBA TL 10-01 "</p> <p>SEE PAGE 2.</p>	
(ATTACH ADDITIONAL SHEETS, IF NECESSARY)	
SIGNATURE AND TITLE OF REPRESENTATIVE Agent of Record SMW	DATE 11/26/2015



VBA policy is to consider all claims sympathetically or liberally by generously construing the evidence and resolving any ambiguities in the claimant's favor, irrespective of whether the claimant is pro se (unrepresented) or represented by a Veterans Service Organization or private attorney. M21-1.1.5.D.2.b.

Due process requires that an SOC cite the evidence pertinent to the issues raised by the disagreement; however, --- M21-1.1.5.D.2.d.

We ask that the Board look sympathetically or liberally by generously construing the evidence at the evidence that the AOJ did not address in the SSOC of DATE 1 as listed on the Form 9, and the DRO hearing transcript of DATE 2 and to apply the 38 CFR § 4.7. We also ask that the Board also apply 38 CFR § 3.102 Reasonable doubt.

We ask the Board to remember that CFS as added as a presumptive in 38 C.F.R. § 3.317 as per the Federal Register/Vol. 68, No. 111/Tuesday, June 10, 2003/ Rules and Regulations 34539 the CMI that are the newly added do not to need a nexus to the environmental hazards during service. As quoting the FR. with the Congress intent "The Joint Explanatory Statement also said, "The Committees do not intent [sic] this definition to assert that the cited syndromes can be clinically or scientifically linked to Gulf War service--"

We ask the Board to look at the VBA TL 10-01 used at the time. That as per the VBA training letter 10-01 in effect and the "Notice to the Examiner" found as a part of TL 10-01 and used in the DATE # exam, the examiner is instructed not to give any nexus statement if the veteran does have a CMI like CFS. The examiner in the DATE# exam followed the training as an examiner and the followed the "Notice to the Examiner."

We ask the Board to look at the evidence from the CDC training dated 7/26/2016 that does show when exclusion illnesses are not. As the DATE examiner did follow, depression secondary to the illness is not a reason to rule out CFS. Just as other illness that are under control.

We ask that the Board look sympathetically or liberally by generously construing the evidence at the evidence that the Claimant was given a diagnosis of chronic fatigue syndrome (CFS) by a VA C&P medical examiner using the VA guidelines (change date 5/25/1010) on DATE#. The examiner had the veteran C-file for the exam, noted all of the testing done to exclude other illnesses and took a history from the Claimant. As noted in the CDC training depression secondary to their chronic illness is not an exclusionary factor for a diagnosis of CFS. The claimant's sleep disturbance does fall under one of the ten listed "other criteria's" he must have. The claimant's sleep disturbance was ruled as not being sleep apnea as per the sleep study.

We ask that the Board look sympathetically or liberally by generously construing the evidence at the evidence that the AOJ did not us the claimants statement of DATE# that was a NOD for the denial of the CFS. This statement does lists the symptoms of CFS. This statement was used to add a claim for headaches. There is also a statement for the claimant's wife with the same date. Veterans' statements that is in the record do show how CFS effected his life and has reduced his activities by far more than 50%. This is objective medical evidence, SEE: 38 C.F.R. 3.317, Gutierrez, v. Principi (2004).

SEE Page 3

James A. Bunker

Agent 5MW

VA From 646
Page 2

VA Form 646
Page 3

The Claimant sent his private medical records to the AOJ certified in April 2012 as per Virtual VA 21-0820 dated 07/24/2012. 38 C.F.R. Part 4 (2007). See tracking number in file.

We ask the board to remember that a rating decision is based upon all evident of the records. Francisco v. Brown, (1994), in this case the rater only based it on a C&P exam that we feel is inadequate.

As was noted in the NOD file by the claimant through his agent, it is contented that the exam was inadequate for CFS on 2/13/2012. The examiner did not address the symptoms in the claimants statements of DATE 1 or DATE 2. The examiner did not address the claimants wife's statement of DATE 3. While the record did show it RO took up to 3 weeks to date stamp evident, the May statements was dated stamped into the RO inside a week and was a part of the record. The court have held that favorable evidence to the claimant cannot rejected without discussing that evidence. Daves v. Nicholson, 21 Vet.App. 46, 51 (2007) (citing Meyer v. Brown, 9 Vet.App. 425, 233 (1996)).

We ask the board to consider that the examiner did not express why the claimant's reactive depression secondary to his chronic illness is not an excluding factor as per the CDC training course in CFS. That the examiner did not state why weight is an excluding factor, as the claimant statement shows the reason why his weight went up. The exam did not show a BMI of over 45 as per the CDC training. The examiner failed to note the veterans sleep problem is related to the service and is a part of CFS as one of the 6 he must have. That the service did try sleeping pills to help. That sleep apnea was excluded.

We ask the Board to remember what objective medical evidence is under 38 U.S.C § 1117 codified in 38 C.F.R. § 3.317 and as per court ruled in Gutierrez v. Principi 19 vet.App. 1 (2004) The AOJ did not apply the law regulation and case-laws in the SOC of 07/01/2013.

Under 38 U.S.C § 1118(a)(3) veteran that in the Gulf War and has an illness under 38 U.S.C § 1117 shall be presumed to have been exposed by reason of such service to the agent, hazard, or medicine or vaccine associated with the illness in the regulations. The court ruled in Gutierrez v. Principi 19 vet. App. 6 (2004) that a veteran does not have to prove any nexus.

James A. Bunker

Agent 5MW



After 90 Days....

After 90 days, the claimant must demonstrate good cause for the delay *such as*:

- Discovery of evidence after the 90 day period.
- Illness.
- Death of an individual representative.

Prepare a motion based on 38 CFR 1304(b), explain the change and the reason for the change.

Note: Anytime evidence is sent to the Board, make sure you prepare a letter stating you want to waive regional office jurisdiction. Otherwise, the case will have to go back to the regional office for consideration.



BVA Decisions

When a BVA Judge decides the case, he/she can do several things:

Grant the issue(s) Deny the issue(s) or

Remand the issue(s)

The decision may include all three.

The Board will send the claimant and the VSO a copy of the decision. If the issue is granted or denied, the Board's decision is final and will include appeal rights to the **Court of Appeals for Veterans Claims (CAVC)** on the denied issues. Any issue that is remanded is not a final decision.



REMAND

If the Board finds that it does not have enough information to make a decision on a specific issue, the Remand Decision will instruct the regional office or the Appeals Management Center (AMC) what it needs to make a decision.

Or, if there is something that has happened, such as a change in law, request for a hearing, etc. that the appeal requires re-adjudication, the appeal is remanded.

Court of Appeals for Veterans Claims: Stegall vs. West (6/98) held that all remand orders must be complied with before the case is returned to the BVA.



Remands

Once the information has been received (or an unsuccessful attempt has been made), the regional office or AMC will make another decision and grant the benefit sought or continue the denial and issue a SSOC.

The appellant should review the decision, and return the attachment which states whether or not he has or does not have additional evidence to submit. It is also his chance to tell the Board why he does not agree with the decision.



BVA FINAL DECISIONS

Denials:

- File a motion asking the Board to reconsider the claim or review the case because there was a clear and unmistakable error (CUE) in the Board's decision. The motion must discuss the reason for the request.
- File an appeal with the US Court of Appeals for Veterans Claims. There is a **time limit of 120 days from the date of the decision**, so pay attention to the date of BVA's decision.
- Go back to the local VA and reopen the claim.
- Do nothing.



BVA FINAL DECISIONS

Grants:

Sometimes the BVA decision will include the percentage and effective date; however, most of the time it doesn't.

When the RO does the rating implementing the BVA decision check for percentage and effective dates on grants/and increases. You can appeal that decision on percentage and/or effective date.



Reconsideration

Request for Reconsideration by Rating Board?

There is no such provision in regulation, however:

- Submission of new evidence
- Identification of evidence of record not considered

Does not extend appeal period unless evidence is in timely response to DTA letter



Clear & Unmistakable Error (CUE)

No Time Limit

38 CFR 3.104(b)

38 CFR 3.105(a)

38 CFR 20.1403

An unappealed RO decision

Russell v. Principi, 3 Vet.App. 310(1992)



Questions?

Take Away Points

1. Many UDX are a part of a CMI
2. Vets statements are very important.
3. A diagnosed illness may still be related to the service if there is a large scale study and a nexus with a good reasoning .
4. Unknown causes = 100% proof of what did or did not cause the symptom.