

LWPER 997 Exam Fall 2017

Overall Directions:

- 1. Students are permitted to bring the textbook, the collection of statutes and regulations provided in class on Nov. 15, class notes in hard copy form, and an outline in hard copy form.**
- 2. This is an open book exam that allows student access to materials on their laptop, but copy and paste functions between applications are disabled, and all Internet and Network access is blocked.**
- 3. This exam is worth 80 points and 80% of your overall grade. This exam consists of two prompts. Students must answer the questions listed after each prompt. The first prompt is worth 20 points. Plan to spend approximately 35 minutes on prompt 1. Prompt 2 is worth a total of 60 points. Plan to spend approximately 85 minutes on prompt 2 which has two parts.**

Exam Question I

Read the prompt and answer the questions set out after the prompt.

Our client, Mr. Jones, was a Navy Seabee who served overseas for two years in Vietnam from 1967 to 1969. In 1968, Mr. Jones was diagnosed with diabetes. Here is a description of his Seabee unit:

“Seabee Team accomplishments were many and varied. My U.S. Army Special Forces Unit was engaged in training and advising Vietnamese Strike Forces and the Civilian Irregular Defense Group in anti-guerilla fighting and defense tactics, and that required me to set up fortified camps in advance areas able to withstand recurring ground and mortar attacks.”

Mr. Jones was diagnosed with Hodgkin’s lymphoma in 2010 which went into remission after chemotherapy treatment ended in 2013. The veteran’s chemotherapy treatments from 2010 – 2013 caused peripheral neuropathy in his right hand and both feet beginning in 2010 and continuing to the present. Since 2012, overuse of his left hand to compensate for peripheral neuropathy in his right hand is causing him pain in that left hand. Since 2012, the veteran has been diagnosed with arthritis in both hands but not his feet by his private treating physician who gave the veteran treating physician service-connection opinions for all of his hand and feet claims made in January 2014. Mr. Jones has not taken diabetes medicine since 1970 and stopped being tested for it at that time. His father and mother had arthritis in both feet to the point of being crippled and wheel-chair bound at age 70.

In January 2014, a veteran service officer helped Mr. Jones to file a claim for diabetes, Hodgkin’s lymphoma, peripheral neuropathy in his right hand and both feet, and arthritis and loss of use and grip in both hands. All of his private medical records were filed with the claim

which included office notes of marriage counseling sessions he has attended with his wife and a psychiatrist who diagnosed him with a psychological adjustment disorder in late 2012 from forced retirement due to loss of use of his hands.

In December 2014, the Regional Office denied all of the claims. Mr. Jones asked for a hearing before a Decision Review Officer, and in January 2015, he testified at the hearing about all of his complaints, including the fact that he has been sad, and feeling hopeless since being unable to use his hands.

The Decision Review Officer made some written rulings in January, right after the hearing, and reversed some of the RO's Initial Decision. The DRO did not reverse the denial of the diabetes claim and did not provide any explanation as to why. The DRO also denied direct service connection for arthritis in the left hand with no explanation. However, the DRO did grant service connection for Hodgkin's lymphoma effective December 2014 but rated it a zero percent rating due to remission. The DRO, however, granted service connection for peripheral neuropathy of the right hand and feet as a residual of chemotherapy effective December 2014. The DRO concluded that the rating for peripheral neuropathy for each extremity was between a 30% and 40% rating. Both rating amounts applied to each extremity. The DRO awarded a 30% rating to each extremity, and the DRO's Statement of the Case addressed in some detail why 30% was the appropriate rating for each extremity, but Mr. Jones was not sent to a VA compensation and pension exam before the rating was awarded. The SOC did not mention any medical diagnoses or claims.

Mr. Jones came to us asking if he should appeal any part of this decision. We will not appeal the zero percent rating for lymphoma in remission. Please analyze and describe any bases for appeal that Mr. Jones may have, and the strengths and weaknesses of his claims. Be sure to cite to all directly applicable and analogous statutes, regulations and/or case law to support your analysis. (20 points)

Exam Question II

Read the prompt and answer the questions set out after the prompt.

Mr. Orlando filed a claim for benefits for a service-connected disability that he characterized as a "nervous condition" and "recurrent headaches" and he supported his request with a psychiatric evaluation made by a private physician quoting all applicable provisions of the Diagnostic and Statistical Manual of Mental Disorders who concluded that Mr. Orlando had anxiety and depression and those two conditions were at least as likely as not connected to his service in Vietnam based on an exam, a review of Mr. Orlando's private medical records, and lay statements from the veteran, his family and buddies from service, including his commanding officer. Mr. Orlando did not provide any service records to his psychiatrist as they were destroyed in the 1973 St. Louis fire at the federal National Personnel Records Center. The VA sent Mr. Orlando for a VA compensation and pension exam. The VA psychologist examiner sent the VA a one-sentence exam report which stated only the following: "I conclude that Mr. Orlando does not have a mental disorder, and that his nervous condition is not service connected because he has a personality disorder which is not a disability under the law."

The VA issued Mr. Orlando a one-sentence Initial Decision denying service-connection which adopted the words of the VA examiner and stated only the following: “We conclude that the VA examiner’s opinion is more probative and we agree with the VA examiner that Mr. Orlando does not have a mental disorder, and that his nervous condition is not service connected because he has a personality disorder which is not a disability under the law.” Mr. Orlando filed a Notice of Disagreement that stated:

“I just received a denial of compensation for my nervous condition. I hope that you can make an evaluation on appeal and correct this decision, since I do not see any reason why you would not accept my doctor’s opinion, and my testimony, and my family and buddies’ testimony that I have been depressed and anxious during and since service.”

The Regional Office provided him with a one-sentence Statement of the Case, which identified the appeal as having a single issue: “Mr. Orlando has provided insufficient evidence to establish service connection for a nervous condition.”

Mr. Orlando retained an attorney who just graduated from law school and she filed a VA Form 9 using the same language as his NOD. First, the Board affirmed the Regional Office’s Initial Decision reaching the exact same decision using the same sentence from the RO’s Initial Decision. As a second alternative basis for its decision, the BVA dismissed Mr. Orlando’s appeal because he did not appropriately set out allegations of error of fact or law in the NOD. The CAVC reversed and remanded. It stated:

“Under statute, a claimant’s appeal should ‘set out specific allegations of error of fact or law, such allegations related to the specific items in the statement of the case.’ We find that the construction of this statutory language must be reconciled with other veterans’ law statutory provisions, and in addition, must be reconciled with common law veterans law decisions and principles enunciated in those decisions. In addition, construction of this language must be reconciled with enactment of that provision of the statute. In 1962, Congress enacted the law that ‘required [the] VA for the first time to fully explain its decisions through a new procedure called the Statement of the Case.’ Furthermore, in 1933, Congress authorized the President to create what is now the Board of Veterans’ Appeals. The Board was created later that same year by executive order. Language similar to the language at issue in this case first appeared in that 1933 order: ‘Each application for review on appeal should contain specific assignments of the alleged mistake of fact or error of law in the adjudication of said claim, and any application for review on appeal insufficient in this respect may be dismissed.’

The agency argued that the statute at issue here is clear and unambiguous and that the agency’s regulations do not aid in the interpretation of the statute. We disagree. We conclude that the statute language at issue should be interpreted – first as indicated above – in light of the other statutes and principles of veterans’ law – and second, in light of the agency’s corresponding regulation(s) which appear to relax the standard. If the Regional Office addresses multiple claims in the same decision, it may be reasonable to expect the veteran to be more specific. On the other hand, less specificity is necessary when the

Regional Office's decision turns on only a single issue. In sum, Mr. Orlando adequately identified the issues on appeal. On remand, the Board should address all errors made by the Regional Office and the Board in an expeditious manner."

1. Analyze and discuss the errors made by the Board. Be sure to cite to all directly applicable and analogous statutes, regulations and/or case law to support your analysis. (30 points)

2. Analyze and discuss the CAVC's reasoning in its opinion. Be sure to identify and discuss (a) the language in the statute(s) and regulation(s) at issue in the opinion, covered in class this semester, which are used or alluded to by the Court in its opinion, (b) the applicable common law and/or statutory veterans law principles covered in class this semester, which are used or alluded to by the Court in its opinion, and (c) any applicable statutory or regulatory tools of interpretation covered in class this semester, which are used or alluded to by the Court in its opinion. (30 points)