

Exam Rubric

1. 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)

Issue spotting / Appeal bases

1. (3 pts) 38 U.S.C. § 1110 - *Combee v. Brown* w/o presumption; *Mattern v. West* (as likely as not)
38 U.S.C. § 1111 – soundness presumption
38 U.S.C. § 1116 – AO presumption / type 2 diabetes detail
Brokowski or Romanowski – 3 elements *Cosman v. Principi* (med opin for nexus); *Colvin v. Derwinski* (not own med op)
Skoczen v. Shinseki – § 5107(a) –vet burden to prove the claim
BONUS: 5103(a) – notify vet evidence needed to substantiate claim *Wilson v. Mansfield*; *Vasquez-Flores*
 - LYMPHOMA - Agent Orange statute; is not a current condition but leads to secondary neuropathy
 - FEET - peripheral neuropathy granted
 - DIABETES – Agent Orange statute; type 2 or not is unclear; is not a current condition but still needed to be discussed
2. (3 pts) 38 U.S.C. § 5104(b) – statement of the reasons and summary of the evidence considered; *Gallegos v. Principi* - info to request appellate review; 38 C.F.R. § 3.103(f); 38 C.F.R. § 3.303 *Gonzales v West* (review v. discuss entire record); *Wilson*; 38 U.S.C. § 1154 – consider lay evidence; *Buchanan*; *Jandreau*
 - SOC error – reasons and evidence considered; should discuss private exam and all diagnoses and claims
3. (3 pts) DUTY TO ASSIST ERROR – 38 U.S.C. §5103A(a) = evid necessary; (b) = duty to assist to get records - VA medical or service records relevant; if identifiable and relevant *Hyatt*
4. (3 pts) DUTY TO ASSIST ERROR – 38 U.S.C. §5103A(a) = evid necessary; (d) = duty to assist to obtain C&P exam - diagnoses v. ratings; 38 C.F.R. § 3.159; *Palczewski*; *Paralyzed Veterans of America v. Sec. of VA* OR 38 C.F.R. § 4.1-4.2 & 4.25- rating specialist not C&P examiner should decide – *Moore*
5. (2.5 pts) 38 C.F.R. § 3.1(p)
38 C.F.R. § 3.155(a) – informal claims
38 C.F.R. § 3.157(b)(1) -Medical treatment records cannot be considered a claim w/ narrow exception provided *MacPhee v. Nicholson* “communication in writing,”
 - INFORMAL PSYCHOLOGICAL CLAIM – made in testimony & medical records, is that enough; was duty to notify triggered; did vet meet burden (for informal claim especially) OR A SECONDARY ONE TO HANDS
6. (2.5 pts) 38 C.F.R. § 3.310(a) - *Roper v. Nicholson (secondary) & Allen v. Brown* - For *Allen* aggravation, the service-connected condition takes the place of the in-service injury or disease.
 - LEFT HAND - SECONDARY TO RIGHT HAND - SECONDARY TO LYMPHOMA
7. (.5 pt) *Hodge v. West* - Duty to sympathetically read claims *Rodriguez v. West & Robinson v. Shinseki* – applies even if an attorney is involved
8. (1.5 point) TDIU - 38 C.F.R. § 3.416(a) *Moore v. Nicholson*; *Vasquez-Flores* (will count appeal of rating)
9. (1 point) Weakness - *Walker v. Shinseki* - hearing case; have to look at whether other causes of condition exist
10. not graded/no one addresses: EFFECTIVE DATE ERROR – should be date of claim = Jan. 2014 & NOT date claim was denied by RO in Dec 2014; RATING ERROR – when two ratings apply, apply the higher one – use the rating regulation or the benefit of the doubt doctrine; if both ratings are applicable, decision should discuss why one rating is chosen and another is not; *Mauerhan v. Principi* - assign the higher rating if two apply; RIGHT HAND – peripheral neuropathy granted but loss of use, loss of grip not addressed; lay testimony law

2-1 Issue Spotting / Board errors

- 1. (7 points) 7105(a) required an NOD to be in writing, but left a gap to be filled; not specify other content. *Gallegos* § 20.201 desire for appellate review. *Gallegos v. Principi***
- 2. (10 points) 7104(d) - *Gilbert v. Derwinski* / inadequate reasons and bases / *Adams, Marks / Roper* (lay = 0)**
 - Precise basis for the decision
 - Permit claimant to understand the Board's response
 - Clear enough to permit judicial review; conclusory statements are not enough
 - Must evaluate positive evidence or weigh positive and negative evidence & credibility *Walch*
 - two permissible views = equipoise; Therefore, BD should explain why take one view over another
 - provide reasons for rejecting material evidence favorable to the claimant.
 - BUT need not discuss every fact – and where it would have no benefit to the veteran
- 3. (3 pts) Board relies inadequate exam /not state all records were reviewed 7104(d) *Colvin, Roper*, 38 U.S.C. 5103A / 38 CFR 3.159 / *Walker***
- 4. (2 pts) w/o attorney, read NOD broadly and favorably / *Hodge* ROBINSON**
- 5. (3 pts) 7104(a) & 5107(b) failure to apply the benefit of the doubt**
- 6. (2 pts) *Brammer & Walker* – 1973 fire – therefore, can use lay testimony; *Buchanan; Jandreau***
- 7. (2 pts) RO VIOLATED DUTY TO ASSIST = TO GIVE GENERIC NOTICE / RO VIOLATED DUTY TO ASSIST = SHOULD OBTAIN DOCUMENTS FOR HIM OR CONSTRUE CLAIM BROADLY B/C OF LACK OF DOCUMENTS 38 U.S.C. §§ 5103A, 5107(a), 5108 & 7111 & 38 C.F.R. § 3.159 *Hyatt v. Nicholson***
- 8. (1 point) 38 U.S.C. § 1110 - *BRAMMER*; + 3 elements**
- 9. HEADACHES = *Adams v. Shulkin* = undiagnosed condition; PSYCHIATRIC CONDITION – CANNOT SUPPORT WITH LAY EVIDENCE = LAY HYPOTHESIS = EVIDENCE OF ELEMENT 1 = IN SERVICE CONDITION**

2-2

Statutes (5 points) § 20.201 is a reasonable and permissible regulation that fills a gap in 38 U.S.C. § 7105, requiring that a veteran NOD include terms that can be reasonably construed as a desire for appellate review. *Gallegos v. Principi*

Common law principles (8 points)

Brown v Gardner – considered pro-claimant nature of the adjudication system

Allen v. Brown - uses *Brown v. Gardner* to resolve doubt in statutory interpretation in favor of the veteran
Hodge v. West - **Duty to sympathetically read claims**; *After Comer was decided, the Federal Circuit reexamined whether the sympathetic reading doctrine applied to attorney pleadings and concluded that it “is expressly imposed by the VA's own regulations. *Robinson v. Shinseki*, 557 F.3d 1355, 1359 (Fed. Cir. 2009).*
Walker v. Shinseki 1973 FIRE CASE; LAY STATEMENTS; pilot in service: hearing loss – other causes = more likely causes: age-related hearing loss plus recreational hunting 7-8 times per year; BOARD ERROR – AUDIOLOGIST EXAM WAS INADEQUATE

- **USE FAIRNESS & LOGIC & CONSISTENCY WITH PRIOR LAW**

Statutory law principles / Tools of interpretation – 17 points

1. (3 pts) PL: 7105(a) ‘set out specific allegations of error of fact or law, such allegations related to the specific items in the statement of the case.’

SOC didn’t say much = NOD need not say much

2. (3 pts) CONTEXT / STATUTORY SCHEME: We find that the construction of this statutory language must be reconciled with other veterans’ law statutory provisions

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.’

3. (3pts) LH: 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.’

4. (3 pts) CANONS OF CONSTRUCTION:

Brown v Gardner – considered pro-claimant nature of the adjudication system

Allen v. Brown - uses Brown v. Gardner to resolve doubt in statutory interpretation in favor of the veteran

5. (5 points) USE CHEVRON DEFERENCE

STATUTE IS AMBIGUOUS = HAS A GAP & A REGULATION IS INVOLVED

7105(A)

§ 20.201

COURT IN PROMPT APPEARS TO USE CHEVRON BUT ALSO USES BROWN TO INTERPRET REGULATION IN FAVOR OF THE VETERAN AND SAY THAT IT RELAXES THE STANDARD – NORMALLY CHEVRON & BROWN ARE AT ODDS BUT HERE THEY ARE NOT. UNLIKE THE HEINO & PALCZEWSKI CASES WE READ.

Step 1: has Congress directly spoken to the precise question; if the intent of Congress is clear, that is the end of the matter; if not, then Congress’s intent is silent or ambiguous & has Congress has left a gap – thus court will go to step 2 (courts uses PL & LH here & for practical effect reasons as agencies are experts & statutes are complex & agencies are better suited than courts to resolve conflicting policies)

Step 2: assuming agency was given power to promulgate rules & charged with responsibility to interpret and enforce statute, then ask whether the agency’s answer is based on a **permissible** construction of the statute? regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute (v. if competing policy decision was left to agency then courts and parties can’t contest that) **Gallegos**; *Step Two*: When is an agency’s regulation a permissible? There are many ways that this step is phrased. It is often stated as an inquiry into **whether an agency’s interpretation is reasonable**.