



NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM



Department of
Veterans Services

Gulf War Illness Claims

Agenda

- Background
- Requirements for Presumptive SC
 - “Persian Gulf War Veteran”
 - Qualifying diseases
 - Manifestation periods
- Common VA Errors



Gulf War Illness

- **During Operations Desert Shield and Desert Storm**, members of the Armed Forces were exposed to numerous potentially toxic substances, including fumes and smoke from military operations, oil well fires, diesel exhaust, paints, pesticides, depleted uranium, infectious agents, investigational drugs and vaccines, and indigenous diseases, and were also given multiple immunizations.
- These service members may have also been exposed to biological weapons and chemical weapons, including nerve gas.

Gulf War Illness

- After returning from the Persian Gulf Theater of Operations, many Vets exhibited symptoms of illness that could not be diagnosed or suffered from illnesses that could not be clearly defined.



Gulf War Illness

- In 1994, Congress created **38 U.S.C. § 1117**, which provides special rules for establishing SC for certain conditions that apply only to Persian Gulf War Vets
- These rules have been updated over the years and apply to all Vets who have served in the **Persian Gulf Theater of Operations** since the beginning of the first Persian Gulf War, including Vets of OIF

Gulf War Illness

- Requirements to qualify for presumptive SC under special rules:
 1. “Persian Gulf War Veteran”
 2. Qualifying chronic disability
 3. Manifestation w/in certain period

“Persian Gulf War Veteran”

1. Active duty in “Southwest Asia theater of operations”

- Iraq
- Saudi Arabia
- Kuwait
- Bahrain
- Qatar
- U.A.E.
- Oman
- Gulf of Aden
- Gulf of Oman
- Persian Gulf
- Arabian Sea
- Red Sea
- Airspace above these areas

QUESTION

Does service in Afghanistan qualify a person as a “Persian Gulf War” Vet?

- A. Yes – special rules apply
- B. No – special rules don’t apply
- C. Sort of – some special rules apply
- D. Not Sure



“Persian Gulf War Veteran”

Countries NOT in SW Asia theater of operations:

- **Afghanistan**

- Exception: 9 infectious diseases presumed SC for Vets who served there on/after 9/19/2001
- *Cox v. McDonald*, 28 Vet. App. 318 (2016)

- **Turkey**



QUESTION

What are the dates of the Persian Gulf War?

- A. 8/2/1990 to present
- B. 8/2/1990 to 2/28/1991
- C. 8/2/1990 to 2/28/1991 AND 9/19/2001 to 12/1/2011



“Persian Gulf War Veteran”

2. Served “during the Persian Gulf War”

- **Start date:** Aug. 2, 1990
- **End date:** Not yet set by Congress

- **OIF Vets included!**

Categories of Qualifying Chronic Disabilities

- 1) Undiagnosed illness
- 2) Medically unexplained chronic multi-symptom illness (MUCMI)
- 3) Any diagnosed illness VA determines should be presumptively SC and publishes in its regs
 - Certain infectious diseases

1st Category of Qualifying Disabilities

1. **Undiagnosed illness**

- A condition that “by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis”



Examples of signs/symptoms that may be manifestations undiagnosed illness

- **Fatigue**
- **Headache**
- **Muscle pain**
- **Skin abnormalities**
- **Joint pain**
- **Neurologic abnormalities**
- **Neuro-psychological symptoms**
- **Respiratory system symptoms**
- **Sleep disturbances**
- **Gastrointestinal symptoms**
- **Cardiovascular symptoms**
- **Abnormal weight loss**
- **Menstrual disorders**

Joyner v. McDonald,
766 F.3d 1393 (Fed. Cir. 2014)

- VA erred in denying Vet's claim for SC for neck pain as due to undiagnosed illness
- Pain alone can be evidence of a qualifying chronic disability
- Vet does not need to be subjected to all possible medical testing available and then 'diagnosed' with an 'undiagnosed illness' after all possible medical conditions have been ruled out

Undiagnosed Illness

Advocacy Advice:

- If some of Vet's symptoms are part of a diagnosed illness, but others are not, the extra symptoms may qualify as a undiagnosed illness
 - List all of Vet's symptoms
 - Find medical evidence attributing each symptom to a diagnosed disability
 - Argue any symptoms w/out associated dx should be attributed to undiagnosed illness

Undiagnosed Illness

Advocacy Advice:

- Vet diagnosed with a disease may be able to show undiagnosed illness by submitting a medical opinion that contradicts the diagnosis and states symptoms can't be linked to a particular disease
- Vet with diagnosed (non-MUCMI) condition may also be able to prove SC using usual theories of SC

2nd Category of Qualifying Disabilities

2. Medically unexplained chronic multi-symptom illness (MUCMI)

- a) Chronic fatigue syndrome
- b) Fibromyalgia
- c) Functional gastrointestinal disorders (IBS, etc.)
- d) Any other diagnosed disease with certain features

MUCMI

- Functional GI disorders include:
 - Irritable bowel syndrome
 - Functional dyspepsia
 - Functional vomiting
 - Functional constipation
 - Functional bloating
 - Functional abdominal pain syndrome
 - Functional dysphagia

MUCMI

- Functional GI disorders DO NOT include *structural* GI diseases, such as:
 - GERD
 - Crohn's disease
 - Other inflammatory bowel diseases

MUCMI

- Other diagnosed diseases can qualify as a MUCMI if they have the following features:
 - No conclusive pathophysiology OR etiology
 - Overlapping symptoms and signs
 - Features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of lab findings

MUCMI

- Etiology: all of the factors that contribute to the occurrence of a disease or abnormal condition; the causes or origin of a disease or disorder
- Pathophysiology: the functional changes that accompany a particular syndrome or disease

MUCMI

- Illnesses with both *partially* understood etiology AND *partially* understood pathophysiology are NOT considered medically unexplained
 - Diabetes
 - Multiple sclerosis

Stewart v. Wilkie

30 Vet. App. 383 (2018)

- BVA found that asthma was not a MUCMI because it has a partially understood etiology
- BVA did not address whether the pathophysiology of asthma was also partially understood

Stewart v. Wilkie

- CAVC held:
 - a multisymptom illness is a MUCMI if *either* the etiology *or* the pathophysiology is inconclusive – both are not required
 - a multisymptom illness is *not* a MUCMI if it has *both* partially understood etiology *and* partially understood pathophysiology

Stewart v. Wilkie

- Vet and VA also disagreed on whether the term medically unexplained requires VA to identify the cause of a specific Vet's illness or whether the question may be resolved by general knowledge in the medical community about the illness

Stewart v. Wilkie

- CAVC held:
 - The determination of whether an illness is “medical unexplained” is always an individual determination particular to the Vet in each case, rather than a broad determination regarding a condition in general that should be applied to all Vets with that condition

Advocacy Advice

- If a Persian Gulf War Vet has a diagnosed chronic disease that has multiple symptoms, consider arguing that it is a MUCMI
 - **Ensure VA addresses whether there is both:**
 - inconclusive etiology, and
 - inconclusive pathophysiology
 - **Often, there is a good argument that the cause (etiology) of the disease in the Vet is inconclusive, and it qualifies as a MUCMI**

3rd Category of Qualifying Disability

3. Any diagnosed illness that VA determines should be presumptively SC and publishes in its regs.

- The following infectious diseases prevalent in SW Asia:
 1. Brucellosis
 2. Campylobacter jejuni
 3. Coxiella burnetii (Q fever)
 4. Malaria
 5. Mycobacterium tuberculosis
 6. Nontyphoid Salmonella
 7. Shigella
 8. Visceral leishmaniasis
 9. West Nile virus

Infectious Diseases

Only this part of the reg (presumptive SC for the 9 infectious diseases) **covers Vets with service in Afghanistan on/after 9/19/2001.**



“Chronic” Disability

The disability must be “chronic”

- **Length of time:**
 - Lasts for at least 6 months, or
 - Shows intermittent periods of improvement and worsening over at least 6 months
- Period begins when the first symptom(s) appear



“Objective Indications”

- Vet must exhibit “objective indications” of the qualifying chronic disability:
 - Signs in the medical sense of objective evidence perceptible to an examining physician, **and**
 - Other, non-medical indicators capable of independent verification
 - 38 C.F.R. § 3.317(a)(3)

“Objective Indications”

- Lay statements about the Vet’s symptom(s) can support claim if an ordinary person can observe those symptoms
 - Headaches, sleep problems, fatigue, joint pain are some symptoms that may be observed by lay persons
 - Lay statements should describe symptoms in detail
 - Vet’s statement + corroborating lay statement satisfy “objective” evidence criteria
 - Get buddy statement about symptoms!

“Objective Indications”

- Other examples of objective evidence:
 - Medical records showing Vet sought treatment for symptoms
 - Employment records documenting time lost from work

When the Signs or Symptoms Must Appear

1. The signs or symptoms must first appear while Vet served in the Persian Gulf, OR
2. Become at least 10% disabling during applicable presumptive period

When the Signs or Symptoms Must Appear

- Presumptive periods:
 - **Undiagnosed illnesses, MUCMIs:** prior to 12/31/2021
 - **Most infectious diseases:** w/in one year from date of separation from period of service in SW Asia
 - **Visceral leishmaniasis and TB:** no time limit
 - **Malaria:**
 - w/in 1 year of separation from period of service in SW Asia, or
 - at a time when standard or accepted treatises indicate that the incubation period commenced during service in SW Asia

10% Disabling

- Use VA Rating Schedule to determine whether disability can be rated 10% or more
- Undiagnosed illness and some infectious diseases *not* listed in the rating schedule
- Must find the most appropriate DC by looking at the “functions affected, anatomical localization, or symptomatology”

Presumption of Service Connection

- If Vet satisfies 3 requirements, VA presumes qualifying chronic disease is SC
- No medical nexus opinion needed to link disease to Gulf War service!
 - *Gutierrez v. Principi*, 19 Vet. App. 1 (2004)

QUESTION

- Is the presumption of Service Connection rebuttable?
 - A. Yes
 - B. No
 - C. Not Sure



Presumption of Service Connection is Rebuttable

- VA may deny claim if there is affirmative evidence that the qualifying chronic disability was:
 - Not incurred during Persian Gulf War service,
 - Caused by something that happened after Vet left SW Asia, or
 - Caused by Vet's willful misconduct or drug or alcohol abuse

Common VA Errors In Gulf War Illness Claims

- VA frequently commits errors when adjudicating Gulf War Illness claims
- There are 5 common types of errors NVLSP sees VA adjudicators commit...

Common VA Errors In Gulf War Illness Claims

1. Failing to consider the favorable rules for presumptive SC for an undiagnosed illness when a Persian Gulf War Vet does not explicitly claim benefits for Gulf War Illness, but that theory of entitlement is reasonably raised by the evidence

Common VA Errors In Gulf War Illness Claims

2. Attributing a symptom that has not been medically linked to a diagnosed disability with a diagnosed disability unrelated to military service
 - VA examiner attributes some, but not all, of Vet's symptoms to a diagnosed disability, but the VA adjudicator over-broadly interprets the medical evidence as showing that *all* of the symptoms are attributable to the diagnosis

Common VA Errors In Gulf War Illness Claims

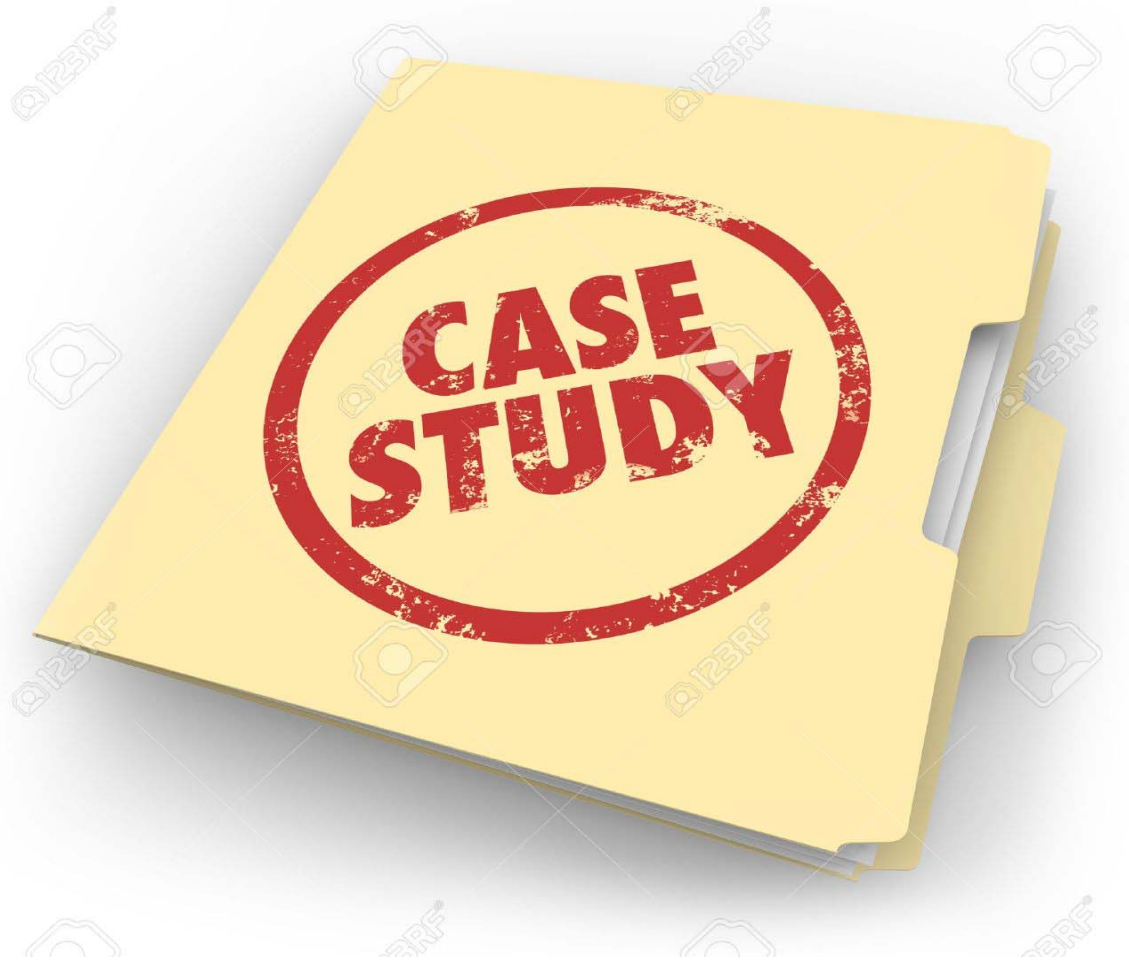
3. Denying the claim due to lack of medical nexus evidence
 - For example, VA denies claim because:
 - a. Symptoms not linked by a medical expert to an undiagnosed illness
 - b. Medical expert opines that symptoms were less likely than not related to Vet's Persian Gulf War service, without offering a diagnosis or alternative cause of the symptoms

Common VA Errors In Gulf War Illness Claims

4. Denying the claim due to the absence of “objective indications” of a chronic disability, without considering non-medical indicators capable of independent verification
 - Ex: VA denies SC for an undiagnosed illness because C&P examiner finds no objective evidence of symptoms. Adjudicator ignores corroborating lay statements about observable symptoms, such as joint swelling, twitching, and complaints of pain; and ignores records showing that Vet sought treatment for the symptoms.

Common VA Errors In Gulf War Illness Claims

5. Failing to adequately address whether a diagnosed chronic multi-symptom illness is a MUCMI
 - Ex: VA denies SC for lupus because condition is diagnosed, but does not address whether condition is a MUCMI based on inconclusive etiology or pathophysiology



Background

- Vet served from March 1993 to March 1996
- He served at Riyadh Air Base in Saudi Arabia from June 15, 1994, to September 15, 1994

QUESTION

- Is he a Persian Gulf War Veteran?
 - A. Yes – location and dates qualify
 - B. No – dates bad
 - C. No – location bad
 - D. Not Sure



Persian Gulf War Veteran



- **Dates: As long as he served between August 2, 1990 to present**
- **No length of time requirement**
- **Saudi Arabia qualifies**

July 2012 Claims for SC

PART II - NATURE AND HISTORY OF SERVICE-RELATED DISABILITY(IES) - If you need more space please use Item 45, "Remarks"		
11. PLEASE PROVIDE NATURE OF SICKNESS, DISEASE, OR INJURIES FOR WHICH THIS CLAIM IS MADE; DATE EACH BEGAN; AND PLACE OF TREATMENT		
A. LIST DISABILITY(IES)	B. DATE BEGAN	C. PLACE OF TREATMENT
bilateral knees		chronic joint pain due to Gulfwar
chronic headaches		
bilateral hearing loss		
tinnitus		
chronic fatigue due to Gulfwar		
heart condition due to Gulfwar		
gastrointestinal conditon.		due to gulf war
12A. ARE YOU NOW OR HAVE YOU RECEIVED TREATMENT	12B. DATES OF TREATMENT/CARE	12C. NAME AND ADDRESS OF VA MEDICAL FACILITY





June 2007 Private Treatment Note

General: *Present* - Weight Loss > 10lbs. *Not Present* - Appetite Loss, Fatigue, Obesity and Weight Gain > 10lbs.

Skin: *Not Present* - Bruising, Excessive Sweating and Rash.

HEENT: *Present* - Seasonal Allergies. *Not Present* - Blurred Vision, Double Vision, Eye Pain, Eye Redness, Hearing Loss, Ear Discharge, Ear Pain, Ringing in the Ears, Nose Bleed, Nasal Congestion, Hoarseness and Sore Throat.

Neck: *Not Present* - Neck Mass and Neck Pain.

Respiratory: *Not Present* - Chronic Cough, Difficulty Breathing and Wheezing.

Cardiovascular: *Present* - Elevated Blood Pressure. *Not Present* - Chest Pain, Difficulty Breathing On Exertion, Edema, Palpitations, Leg Pain and/or Swelling and Shortness of Breath.

Gastrointestinal: *Not Present* - Abdominal Pain, Bloody Stool, Change in Bowel Habits, Difficulty Swallowing, Gas, Heartburn, Nausea and Vomiting.

Male Genitourinary: *Not Present* - Blood in Urine, Frequency, Impotence, Painful Urination, Penile Lesions, Testicular Pain, Urgency and Urinating at Night.

Musculoskeletal: *Not Present* - Back Pain, Claudication, Joint Pain and Muscle Pain.

Neurological: *Not Present* - Headaches, Paresthesias, Syncope, Spinning Sensation, Tremor and Weakness In Extremities.

Psychiatric: *Not Present* - Change in Sleep Pattern, Depression, Inability to Concentrate, Insomnia and Suicidal Ideation.

Endocrine: *Not Present* - Appetite Changes, Cold Intolerance, Excessive Thirst, Heat Intolerance and Libido Change.

Hematology: *Not Present* - Abnormal Bleeding and Easy Bruising.

June 2007 Private Treatment Note

Assessment & Plan ([REDACTED] PAC; 6/19/2007 2:17 PM)

ELEVATED BLOOD PRESSURE READING WITHOUT DIAGNOSIS OF HYPERTENSION (796.2)

Plans:

CAREGIVER TO FOLLOW UP BY PHONE WITH UPDATE NEXT MONTH

GENERAL SYMPTOMS; CHRONIC FATIGUE SYNDROME (780.71)

Plans:

Adipex-P (37.5MG Tablet 1 (one) Tablet PO QD, #30 Tablet, Ref. x3 #30 Tablet, 06/19/2007) Ordered.

QUESTION

- Does he have signs or symptoms of a qualifying disability?
 - A. No – says fatigue is not present
 - B. Yes – says general symptom of CFS
 - C. Not Sure – conflicting medical evidence



June 2007 Private Treatment Note



- There are conflicting notations, but an advocate should argue that there is a diagnosis of chronic fatigue syndrome

March 2009 Private Treatment Note

- Vet has fatigue and low energy for 6 months.
- Onset of the fatigue has been gradual and occurring in a persistent pattern for 6 months
- The course has been constant
- The fatigue occurs all the time
- Assessment & Plan:
 - **general symptoms; chronic fatigue syndrome (orders testing)**

December 2014 VA Psychiatric Medical Record

Veteran already has a VA Primary Care Provider

-----MEDICAL REVIEW OF SYSTEMS-----

REVIEW OF SYSTEMS

Nutritional Assessment:

Denies changes in appetite, significant weight gain or weight loss
About 7lbs wt loss in past 1 month

General:

Within normal limits
excessive fatigue

HEENT:

Denies problems
headaches

Cardiovascular:

Denies problems
Pt believes he has an enlarged heart but CXR WNL

Respiratory:

Denies problems
SOB/COPD

Skin:

Denies problems
Tatoos on both arms

Musculoskeletal:

Denies problems

December 2014 VA Psychiatric Medical Record

DIAGNOSIS

MDD, Rec, Mod

Preliminary Plan of Care:

Wellbutrin SA 150 mgs qam x 4 days then 150mh Wellbutrin SA BID
Trazodone 50-100mg at bedtime for sleep

Psychiatry outpt f/u: Jan 21 @9am MH Platinum Team

Discussed R/B/MOA of all meds prescribed today. Pt verbalized understanding, knows what to look for, and knows what to do if these occur.

Educated pt on illness, course/prognosis w/ and w/o tx, as well as tx options. Pt agrees w/ the current tx plan.

Educated pt on medical and psychiatric risks of ETOH consumption, esp in context of active mental illness. Included risk of disinhibition leading to suicidal or aggressive behavior as well as risks of w/d (incl death). Pt is aware of addiction and detox services available through the VA system if needed. Pt declines need for VA substance abuse services at this time.

QUESTION

Is there anything important on this medical record?

- A. No – it is a psych medical record
- B. Yes – notation of excessive fatigue
- C. No – no relevant diagnosis



December 2014 VA Psychiatrist Medical Record



- Notation of excessive fatigue could be a sign or symptom of an undiagnosed illness.
- It could also be attributable to a MUCMI – CFS

QUESTION

Is there anything else that is a red flag?

- A. No
- B. Yes – headaches
- C. Yes – tattoos
- D. Not sure

December 2014 VA Psychiatrist Medical Record



- Headaches may be a manifestations of an undiagnosed illness

June 2016 VA Exam

Veteran is currently seeking SC for condition of CFS, originally evaluated for SC for this condition 6/29/2012. New Medical evidence dated 3/29/2009 indicates a diagnosis of Chronic Fatigue Syndrome WITH Rx for Adipex, a powerful stimulant used for weight loss. There is no evidence of a workup to exclude other causes for "Fatigue"...review of symptoms indicates that this veteran did not render a complaint of chronic fatigue at the time of his evaluation.

Veteran currently reports he is tired all the time. VETERAN REPORTS SYMPTOMS OF FATIGUE 2/2 DECREASED SLEEP/INSOMNIA, ANHEDONIA AND LACK OF APPETITE SINCE BEING DURING THE MILITARY. VETERAN REPORTS BEING EVALUATED AT PLAZA MEDICAL CENTER FOR HIS SYMPTOMS AND UNDERWENT WORKUP. VETERAN HAS NOT HAD A SLEEP STUDY OR BEEN EVALUATED FOR HIS INSOMNIA. AT THAT TIME HE WAS TOLD THAT HIS FATIGUE WAS PROBABLY DUE TO HIS LACK OF SLEEP. VETERAN CURRENTLY WITH DX OF HTN, HEADACHES, MORBID OBESITY, BACK PAIN AND MAJOR DEPRESSION (TX BUPROPION). VETERAN IS HOMELESS WITH WIFE WHO IS ILL AND 3 CHILDREN AND IS UNEMPLOYED.

June 2016 VA Exam

6/19/2007, 11/01/2009 there is insufficient Subjective/Objective Medical Evidence to support a diagnosis of Chronic Fatigue Syndrome. Although the diagnosis of Chronic Fatigue Syndrome is rendered, based on section 4.88a, Veteran does not meet criteria for CFS.

June 2016 VA Exam

MEDICAL OPINION:

VETERANS CLAIMED CONDITION OF CHRONIC FATIGUE SYNDROME IS AT LESS LIKELY THAN NOT PROXIMATELY DUE TO OR CAUSED BY ALLERGY SYMPTOMS INCURRED DURING MILITARY SERVICE.

RATIONALE:

ENLISTMENT EXAM, STRS, SEPERTAION EXAM ARE ALL SILENT FOR CONDITION OF CHRONIC FATIGUE SYNDROME

VHA MEDICAL RECORDS DO NOT INDICATE SIGNS/SYMPTOMS, DIAGNOSIS/TREATMENT OF CHRONIC FATIGUE SYNDROME

VETERAN WITH SIGNS / SYMPTOMS THAT ARE NOT CONSISTENT WITH DIAGNOSIS OF CFS (SEE 3/2009 PRIVATE HPI/REVIEW OF SYMPTOMS AND DIAGNOSIS OF CFS), AND ARE NOT CONSISTENT WITH CHRONIC FATIGUE SYNDROME as defined by 38 C.F.R. § 4.88a.

38 C.F.R. § 4.88A

Chronic Fatigue Syndrome

For VA purposes, diagnosis of CFS requires:

1. new onset of debilitating fatigue severe enough to reduce daily activity to less than 50 percent of the usual level for at least six months; and
2. the exclusion, by history, physical examination, and laboratory tests, of all other clinical conditions that may produce similar symptoms; and

38 C.F.R. § 4.88A

Chronic Fatigue Syndrome

3. Six or more of the following:
- acute onset of the condition
 - low grade fever
 - nonexudative pharyngitis
 - palpable or tender cervical or axillary lymph nodes
 - generalized muscle aches or weakness
 - fatigue lasting 24 hours or longer after exercise
 - headaches (of a type, severity, or pattern that is different from headaches in the pre-morbid state)
 - migratory joint pains
 - neuropsychologic symptoms
 - sleep disturbance

QUESTION

Since the VA examiner stated that Vet does not have a diagnosis consistent with § 4.88A, can SC be granted?

- A. No – dx must comply w/ § 4.88A
- B. Yes – dx under § 4.88A not required
- C. Yes – SC can be granted under different theory
- D. Not Sure



June 2016 VA Exam



August 2017 VA Gulf War Exam

"Gulf War and Health: Volume 10: Update of Health Effects of Serving in the Gulf War", which found the following associations between deployment to the Gulf War and specific general-medical health outcomes. Sufficient evidence of an association was found for

Multisymptoms Illnesses, including:

(1) chronic fatigue syndrome, (2) fibromyalgia, and (3) irritable bowel syndrome.

Sufficient Evidence of an Association

o Generalized anxiety disorder, depression, and substance abuse (particularly alcohol abuse)

o Gastrointestinal symptoms consistent with functional gastrointestinal disorders such as

irritable bowel syndrome and functional dyspepsia

This veteran does not have a diagnosis of these conditions.

August 2017 VA Gulf War Exam

Regarding the issue of "an undiagnosed illness," this veteran does not exhibit a disability pattern that is consistent with this concept. There is no historical or documentary evidence that supports this contention. His symptomatology can be explained based on standard medical definitions and practice.

Regarding the issue of "a diagnosable but medically unexplained chronic multisymptom illness of unknown etiology " this veteran does not have a current medical condition consistent with this concept. There is no historical or documentary evidence that supports this contention. His symptomatology can be explained based on standard medical definitions and practice.

QUESTION

- Is this exam adequate?
 - A. Yes – sufficient rationale
 - B. No – unclear what symptoms examiner is talking about
 - C. Not Sure



August 2017 VA Gulf War Exam

B

- The examiner's rationale is insufficient
 - Symptoms not specified
 - Diagnoses associated with symptoms not provided

LAY STATEMENTS



August 2012 NOD

I AM WRITING TO APPEAL THE DECISION
THAT WAS MADE REGARDING THE FOLLOWING:

- * CHRONIC HEADACHES
- * CHRONIC FATIGUE SYNDROME
- * HYPERTENSIVE HEART DISEASE
- * GASTROESOPHAGEAL REFLUX DISEASE

OFFICE OF DISAGREEMENT
CORDED 8/24/12
215B/6



August 2012 NOD

CHRONIC HEADACHES AND ACID REFLUX SINCE RETURNING AND ALSO FROM CHRONIC FATIGUE. IT HAS PROGRESSIVELY GOTTEN WORSE AS I HAVE NOT HAD TREATMENT AT THE VA UNTIL RECENTLY. I HAD MY PRIVATE DOCTOR SEND RECORDS THAT YOU HAVE RECEIVED, AND THERE ARE ALSO RECORDS FROM THE VA.

I WISH TO HAVE THESE OTHER MEDICAL CONDITIONS CONSIDERED AS THEY DO AFFECT ME EVERY DAY AND I AM ON MEDICATIONS THAT I TAKE DAILY THAT HAS BEEN PRESCRIBED TO ME FROM THE VA HOSPITAL DOCTORS. I DO NOT THINK THEY WOULD PRESCRIBE MEDICATION IF THE ISSUE WAS NOT REALLY THERE. AS FOR STATING THAT I DID NOT SERVE OVER SEAS OR IN SOUTHWEST ASIA, THE COPY OF MY DD FORM 214 CLEARLY STATES THAT I WAS INDEED THERE!

July 2015 Board Hearing

- Suffered from fatigue for at least 15-16 years, progressively gotten worse
- **First saw a private doctor for fatigue in 1997**
- Not prescribed anything back then, but in past couple years has been prescribed meds to help him sleep
- **Was told muscle pain is related to chronic fatigue**
- Needs meds to help him sleep sometime
- **Has short-term memory loss that he was told was related to fatigue, can't interact with children like he used to because he's tired or in pain**

July 2015 Board Hearing

- His headaches are also related to fatigue
- Can't work because sometimes he needs to close his eyes for 30-40 minutes (mostly because of headaches, but maybe also fatigue), and most employers won't allow that
- He started noticing problems 3-6 months after discharge
- His wife says he's in constant horrible pain

July 2015 Board Hearing

- VLJ: “But we’re talking about undiagnosed for purposes of chronic fatigue. You need a diagnosis of chronic fatigue. Specifically listed under § 3.317, you have a service in Southwest Asia and I have a diagnosis as basically that’s a grant.”



BVA DECISION



VA

U.S. Department
of Veterans Affairs

March 2018 Board Decision

Private medical records from March 2009 reflect treatment for fatigue. The Veteran complained that the onset of fatigue was gradual and had been occurring consistently for six months. The diagnosis was chronic fatigue syndrome.

The Veteran was afforded a Gulf War General Medical Examination in June 2012. The Veteran reported fatigue, decreased sleep and insomnia, anhedonia, and lack of appetite since he was in the military. He also reported that he was told that his fatigue was probably due to his lack of sleep. No diagnosis was rendered in the examination, and the examiner found that none of the Veteran's symptoms were attributable to chronic fatigue syndrome.

At the July 2015 Travel Board hearing, the Veteran testified that he had suffered from chronic fatigue for at least 15 to 16 years and that it had progressively gotten worse. He stated that he also had muscle pain that he was told was related to the chronic fatigue.

The Veteran underwent a VA examination in June 2016 and was diagnosed with chronic fatigue syndrome. The examiner noted March 2009 treatment diagnosing chronic fatigue syndrome and that there was no evidence of a workup to exclude other causes of fatigue. The examiner opined that, though a diagnosis of chronic fatigue syndrome was rendered, the Veteran's medical records provided insufficient medical evidence to support a diagnosis of chronic fatigue syndrome pursuant to 38 C.F.R. § 4.88a. The examiner also opined that the Veteran's claimed chronic fatigue syndrome was less likely than not proximately due to or caused by allergy symptoms incurred during military service.

March 2018 Board Decision

Based upon review of the evidence, the Board finds the Veteran's claim for service connection for a chronic fatigue syndrome must fail because the medical evidence of record does not indicate a current diagnosis of this condition that meets the criteria of 38 C.F.R. § 4.88a.

As cited, the claims file contains multiple opinions. The opinions of record, to include the June 2016 opinion, provide adequate rationale for the finding that the Veteran does not meet the diagnostic criteria for a diagnosis of CFS at any time during the appellate period. Carefully considering all the evidence of record, the Board finds that these opinions, with rationale for while the diagnostic criteria are not met, outweigh the Veteran's assertion that he has the disability.

March 2018 Board Decision

The Board recognizes that the record contains a March 2009 diagnosis of chronic fatigue disorder. However, the June 2012 and June 2016 VA examinations specifically found the Veteran did not have a diagnosis of CFS, and considered this prior notation of diagnosis. As discussed above, there is competent opinion evidence that this prior reference was not a diagnosis in line with 38 C.F.R. § 4.88a. Therefore, the Board finds the evidence weighs against a finding of a current separate diagnosable chronic fatigue syndrome. In short, there is no diagnosis of record during the applicable period that indicates that it meets the criteria outlined in 38 C.F.R. § 4.88a.

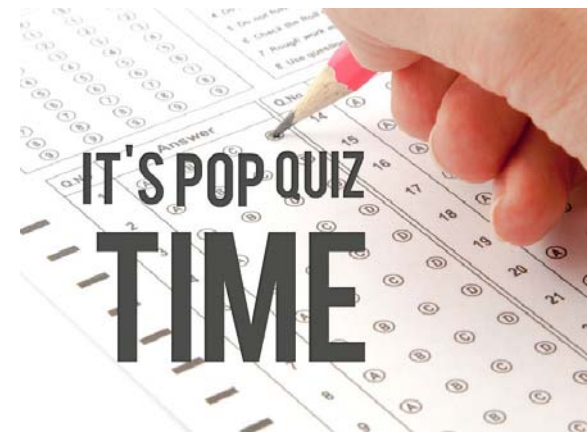
Where the medical evidence establishes that a Veteran does not currently have a disorder for which service connection is sought, service connection for that disorder is not authorized under the statutes governing Veterans' benefits. *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992); *Rabideau v. Derwinski*, 2 Vet. App. 141, 144 (1992).

For all the foregoing reasons, the claim for service connection for chronic fatigue syndrome must be denied. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine. However, as the preponderance of the evidence is against the claim, that doctrine is not applicable.

QUESTION

Is BVA correct in denying claim because CFS diagnosis does not satisfy § 4.88A criteria?

- A. Yes – dx must meet § 4.88A criteria
- B. No – Board failed to address undiagnosed illness
- C. Not Sure



March 2018 Board Decision



- The Board failed to discuss whether SC was warranted for an undiagnosed illness manifested by symptoms including fatigue

Joint Motion for Remand

- Vet had fatigue and muscle pain symptoms that were not attributable to a diagnosed condition
- There is evidence that suggests his symptoms may have manifested to a degree of 10%

Joint Motion for Remand

- The record contains multiple reports of symptoms such as fatigue, headaches, and sleep disturbances.
 - 6/2016 VA exam
 - 12/2014 VA medical record
 - 8/2012 NOD
 - 3/2009 private medical record
 - Lay statements

Joint Motion for Remand

- These symptoms are listed as those that may be considered to be manifestations of an undiagnosed illness.
- Thus, despite BVA finding no competent medical evidence to confirm a diagnosis of CFS, remand was warranted because the BVA failed to address whether the symptoms of fatigue, headaches, and sleep disturbances would support entitlement to SC for an undiagnosed illness.

Advocacy Advice

- If a Vet files a claim for CFS, but does not meet the diagnostic criteria under § 4.88A, argue that fatigue and other symptoms are manifestations of an undiagnosed illness (as long as sx are not attributed to a known diagnosis), rather than a MUCMI.
- If Vet files a claim for fibromyalgia, but is not formally diagnosed, argue that pain, fatigue, and other symptoms are manifestations of an undiagnosed illness.



