




NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM



The New Wave of Veterans:

Helping Post-9/11 Combat Veterans with TBI & PTSD

Why are we here today?



**VETERANS WITH TBI
HAVE MORE THAN 2X
HIGHER RISK OF
SUICIDE**

**ALMOST HALF OF US
VETERANS WITH BRAIN
INJURY ARE JOBLESS**

**Veteran suicides increase despite host of
prevention, mental health efforts**



**Veterans
Crisis Line**
1-800-273-8255 PRESS 1



<https://www.futurity.org/traumatic-brain-injury-veterans-suicide-2236532-2/>
<https://www.futurity.org/severe-traumatic-brain-injury-veterans-unemployed-790852/>
<https://www.militarytimes.com/news/pentagon-congress/2019/09/20/veteran-suicides-increase-despite-host-of-prevention-mental-health-efforts/>

Topics

Post-9/11 Veterans with TBI and PTSD

- Post-9/11 Combat Veterans
- Who is a Combat Veteran?
- “Signature Injury” of Post-9/11 Combat Veterans: TBI
- VA Disability Ratings Guiding Principles
- TBI and PTSD Overlap

Post-9/11 Combat Veterans

War in Afghanistan	Operation Iraqi Freedom (OIF)	Other attacks, operations, etc.
<p>Operation Enduring Freedom (OEF)</p> <ul style="list-style-type: none"> • Start date: 2001 • End date: 2014 <p>Operation Freedom's Sentinel</p> <ul style="list-style-type: none"> • Start date: 2015 • End date: Ongoing 	<ul style="list-style-type: none"> • Start date: 2003 • Invasion of Iraq • End date: 2011 	<p>Operation Martyr Soleimani (Iranian attack on U.S. Forces)</p> <p>Many others...</p>

Post-9/11 Vet Demographics

Age

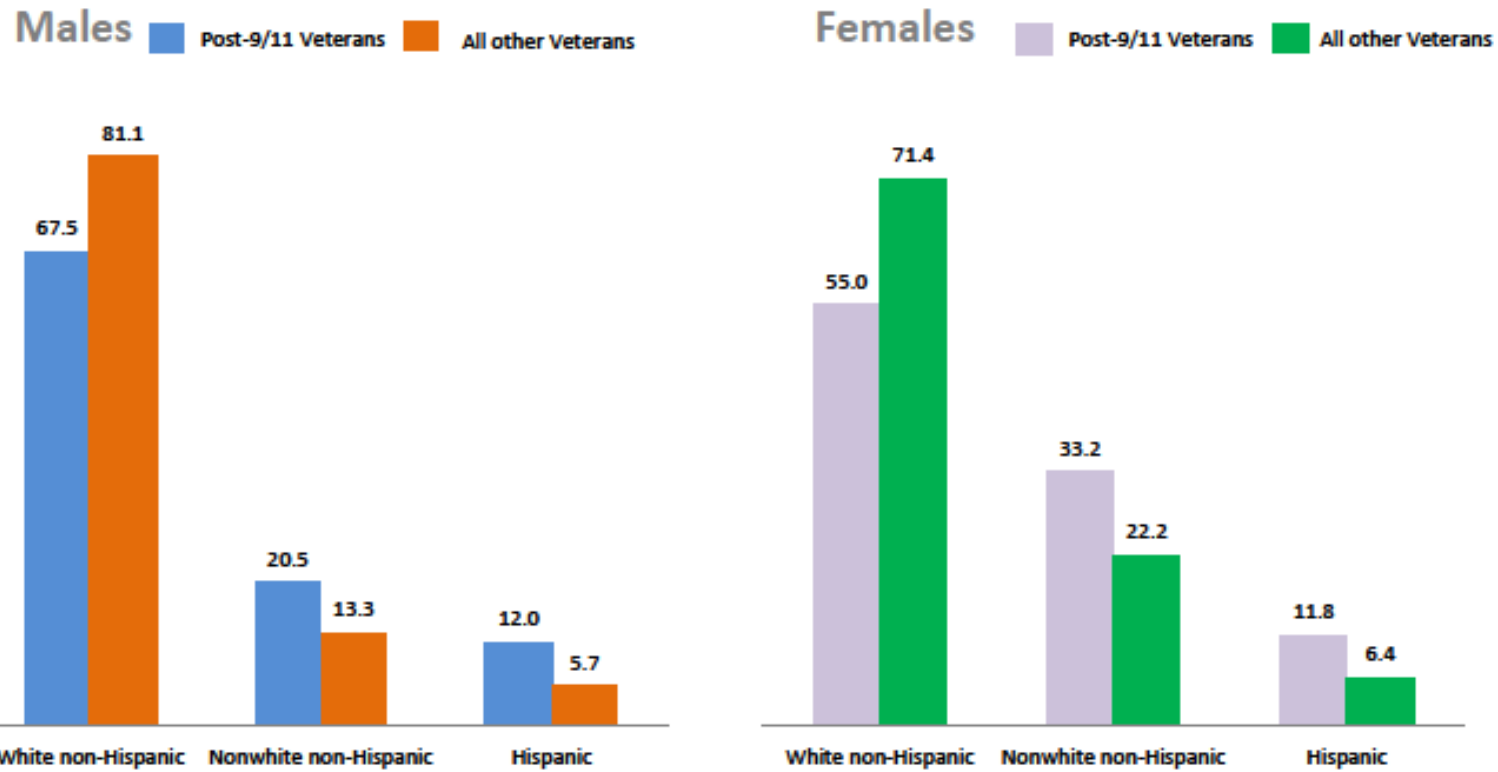
- Gen X
- Gen Y / Millennials
- Gen Z

Size

- 4.2 million
- Ongoing current wars
- VA Projection: about 5.1 million by 2021

Post-9/11 Veterans were more racially diverse than all other Veterans.

Race Distribution
(in percent)



Note: "Nonwhite" includes Black, American Indian/Alaska Native, Native Hawaiian and Other Pacific Islander, some other race, and two or more races.

Source: U.S. Census Bureau, American Community Survey PUMS, 2016
Prepared by the National Center for Veterans Analysis and Statistics

Period of Military Service of Female Veterans

(in percent)



Source: U.S. Census Bureau, American Community Survey, 2016. Puerto Rico Community Survey, 2016. For more information, see www.census.gov/programs-surveys/acs/

Modern Warfare

- Multiple deployments
- Guerilla warfare & terrorist attacks
- Advances in technology and medicine
 - Surviving in situations where in previous times may have died



Physical, mental,
and emotional
injuries

Modern Warfare

- Higher in-service injuries and disabilities compared to other generations
- Trauma from surviving near death experience
 - TBI and PTSD
 - Mental health, i.e. suicidal ideation
 - Connection to family law, criminal law, employment, creditor's rights
 - Connection to homeless veterans



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Modern Warfare

Your Role as a Combat Veteran's
Advocate



Combat Veteran

2 step-analysis for application of relaxed standard of evidence:

Step 1: Establish claimant is a “combat veteran”

Step 2: Establish the 3 elements of an SC claim

1. Current Disability
 2. In-service injury, disease, or event*
 3. Nexus
- Relaxed standard for proving 2nd element, if injury incurred during combat

Combat Veteran

For VA Claims purposes:

- Any veteran who engaged in combat with the enemy in active service during a period of war, campaign, or expedition
 - 38 U.S.C. § 1154(b)
- Service in a combat zone \neq combat

Combat Veteran

- Must have participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality
 - participated in attacking or defending an attack of the enemy
 - receiving enemy fire not required
 - includes presence either as a combatant, or service member performing duty in support of combatants, such as providing medical care to the wounded
 - *Moran v. Peake*, 525 F.3d 1157 (Fed. Cir. 2008); VA Gen. Coun. Prec. 12-99 (Oct. 18, 1999); Manual M21-1, IV.ii.1.D.3.d

Question 1

Is following statement enough to prove to VA that a person is a combat veteran?

“In Iraq I engaged in combat with the Islamic Revolutionary Guard Corp.”

- Yes
- No
- Maybe

Question 1: Answer

Answer: Maybe

- VA is not required to accept Vet's statement that he or she was in combat
- But, corroboration of Vet's statement also not required
- VA must weigh all evidence, including Vet's statement, when determining whether Vet engaged in combat

Vet's Lay Statement

- If not clear in record that Vet engaged in combat, Vet should provide as much detail as possible about the incident(s):
 - Date(s)
 - Location(s)
 - Unit(s) to which assigned
- Will likely trigger VA's duty to attempt to obtain military records of event
 - 38 U.S.C. § 5103A(c)

In practice, when not clear in the record, it is best to provide corroborating evidence of the Vet's participation in combat

- Role as an advocate includes persuading the VA
- Presence of corroborating evidence will make it more likely that VA finds Vet had combat service, and will do in the early stages of the claim
- Case-by-case determination by VA

Advocacy Tip!

Corroborating Evidence

Corroborating Evidence Examples

- Military Occupational Specialty (MOS) or
- Certain Military Decorations
 - Army Commendation Medal with “V” Device
 - Air Force Combat Action Medal
 - Fleet Marine Force Combat Operations Insignia
 - Navy Cross
 - Others
- Buddy statements

Combat Veteran

2 step-analysis for application of relaxed standard of evidence:

Step 1: Establish claimant is a “combat veteran”

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1. Current Disability
 2. In-service injury, disease, or event*
 3. Nexus
- **Relaxed standard for proving 2nd element, if injury incurred during combat**

In-Service Event and Lay Statements

- VA must generally accept combat Vet's statement that he/she suffered a disease, injury, or stressor event during combat **as fact**
- No service records or other corroborating evidence are required to support this statement!
 - 38 U.S.C. §1154(b)

Relaxed Standard of Evidence

- § 1154(b)'s relaxed standard for proving 2nd element if injury incurred during combat can be helpful in any SC claim, including a PTSD claim
- If Vet saw combat, and claims incident that happened during combat is the stressor, VA must generally accept the statement as proof the stressor occurred
- **More analysis of PTSD claims in the TBI and PTSD Overlap Section**

Lay Statement: Plausible?

Statement must be consistent with the conditions, circumstances, and hardships of service (the combat incident)

and

There must be no clear and convincing evidence the in-service disease, injury, or event did not occur during service

In-Service Event and Lay Statements

Rationale

- military record keeping may be deficient in combat situations
- records that might normally have been created might not have been created
- once-existing records might have been destroyed
- records made may not be complete

Dambach v. Gober

- “a combat veteran will receive the benefit of Section 1154(b) ... regardless of whether there is a record of the disease or injury or of a putatively related disease or injury.”
- even if some medical records were made during combat and those records do not document the disease or injury, **VA cannot use this absence of documentation against the Vet**

Lay Statement Examples

- These statements, even without corroborating STRs, should be sufficient prove an in-service injury:
 - “While firing a mortar on enemy positions in Iraq, I experienced a loss of hearing.”
 - “After the lead Hummer in our convoy was struck by an IED, I got out of our vehicle to help pull my buddies from the wreckage. While doing so, I dislocated by my right shoulder.”
 - “While running to a bunker while our base was receiving incoming rocket fire, I twisted by my left knee.”

TBI: Signature Injury of Post-9/11 Combat Veterans Topics



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- Definition
- Residuals
- Symptoms
- VA Claims
 - General guiding principles
 - VA's 4 Categories of TBI Residuals
 - 10 Facets Table & Impairment Scale
 - DC 8045 Notes 1-4
 - Comprehensive VA Medical Exams

Simple Definition of TBI

When an external force damages a person's brain

- **Open or penetrating injury**
 - e.g. a bullet or sharp object pierces the skull and enters the brain
- **Closed head injury**
 - e.g. a person's head suddenly and violently hits an object, e.g. motor vehicle accident

VA's Definition of TBI

- Traumatically induced **structural injury** and/or **physiological disruption of brain function as a result of an external force** that is indicated by new onset or worsening of at least one of the following clinical signs, immediately following the event:
 - any period of loss or a decreased level of consciousness
 - any **loss of memory** for events immediately before or after the injury
 - any **alteration in mental state** at the time of the injury (confusion, disorientation, slowed thinking, etc.)
 - **neurological deficits** (weakness, loss of balance, change in vision, praxis, paresis/plegia, sensory loss, aphasia, etc.) that may or may not be transient
 - **intracranial lesion**
 - VA Fast Letter 10-28 (Aug. 3, 2010) (rescinded)

Common Causes of TBI

- Explosive blasts, e.g. IED explosion
 - Research suggests the pressure waves passing through the brain disrupts brain function (Mayo Clinic)
 - <https://www.mayoclinic.org/diseases-conditions/traumatic-brain-injury/symptoms-causes/syc-20378557?page=0&citems=10>
- Motor vehicle accidents (MVAs)
- Head injuries from training for combat
- Sports injuries: boxing, wrestling, martial arts, swimming/diving
- Falls

Examples of Residuals of TBI

- Seizures
- Hydrocephalus (Fluid build up in the brain)
- Meningitis
- Blood vessel damage
- Headaches
- Vertigo
- Loss or altered state of smell or taste
- Ringing in the hear or hearing loss

<https://www.mayoclinic.org/diseases-conditions/traumatic-brain-injury/symptoms-causes/syc-20378557?page=0&citems=10>

Fact pattern: A soldier was sparring with a friend and got punched in the face. There is no medical record of this blow to his head.

Vet wants to file a VA claim.

Question: What can he do?

Submit lay statements, social media, letters home

Advocacy Tip!

Undiagnosed or
Undocumented TBI

TBI Severity

- Severity range of TBI: mild, moderate, severe
 - Severity of initial injury
 - DOES NOT impact the rating/evaluation assigned by VA
 - But, keep severity in mind when obtaining a private medical opinion

<https://www.publichealth.va.gov/exposures/traumatic-brain-injury.asp>

<https://www.mayoclinic.org/diseases-conditions/traumatic-brain-injury/symptoms-causes/syc-20378557?page=0&citems=10>



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TBI

Your Role as a Veteran's Advocate



Duty to Maximize

- VA has a duty to maximize Vet's VA benefits.
 - *Buie v. Shinseki*, 24 Vet.App. 242 (2011); *Tatum v. Shinseki*, 23 Vet.App. 152 (2009); *Bradley v. Peake*, 22 Vet.App. 280 (2008)
- E.g. “render[ing] a decision which grants **every benefit** that can be supported in law.”
 - 38 C.F.R. § 3.103(a) (2020)
- “[C]laimant will generally be presumed to be seeking the **maximum benefit** allowed by law and regulation.”
 - *AB v. Brown*, 6 Vet.App. 35 (1993)



Advocacy Tip!

Duty to Maximize

Be on the lookout for additional benefits or increased benefits

Your role as a veterans advocate includes serving as watchdog to make sure VA is doing what they are supposed to do

VA often makes mistakes when disabilities manifest in multiple symptoms

Duty to Maximize

VA Disability Ratings General Rule

- All disabilities, including those arising from a single disease or injury, are to be rated separately and then combined pursuant to 38 C.F.R. § 4.25

Exception to the General Rule: Anti-pyramiding

- 38 C.F.R. § 4.14: evaluation of the same symptoms under various diagnoses is to be avoided
- Rationale: Claimant would be overcompensated

Question 2

Susan is a combat vet and was involved in a motor vehicle accident while she engaged in combat. It caused disfiguring scars, painful scars, and facial muscle damage.

How many disability ratings should she receive from this MVA?

- 0
- 1
- 2
- 3

Question 2: Answer

Answer: 3 separate disability ratings

- Diagnostic codes at issue addressed 3 distinct disabling conditions, so separate disability awards could be established

Disabling Condition	VA Rating
Disfiguring Scars	Cosmetic Damage
Painful Scars	Pain
Facial Muscle Damage	Limitations of function

- *Esteban v. Brown*, 6 Vet. App. 259 (1994)

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.**”

- 38 C.F.R. § 4.3

Higher of Two Evaluations

“Where there is a question as to which of two evaluations shall be applied, the **higher evaluation will be assigned** if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned.”

- 38 C.F.R. § 4.7



Traumatic Brain Injury
Comprehensive
Medical
Examination

What is it?

VA must obtain a comprehensive medical exam to properly evaluate TBI for a service connection claim

By whom?

VA examiner must have special qualifications to conduct a TBI exam.

Exam is conducted by a VBA employee, not a VHA employee

Comprehensive Medical Exam

- VA TBI Exam must include testing sufficient to give the VA adjudicator adequate information about the several areas of TBI-related issues considered in the Rating Schedule
- Initial exam / dx must be done by one of the following:
 - Psychiatrist
 - Psychiatrist
 - Neurosurgeon
 - Neurologist

Comprehensive Medical Exam

If TBI initially diagnosed by one of the 4 specialists, then general clinician may conduct a VA TBI exam, but only if clinician completed a Disability Examination Management Office (DEMO) TBI training module

If exam report is unfavorable:

- Request qualifications of examiner (*curriculum vitae*) and info about completion of TBI training module
- If not a specialist and did not complete TBI training module, argue that exam was inadequate and request new exam
 - From 2007 to 2015, VA performed thousands of TBI exams with examiners who were not qualified
- Consider getting private exam

Advocacy Tip!

Comprehensive
Medical
Examinations

4 Categories of TBI Residuals

1. Physical/neurological dysfunction

2. Emotional/behavioral residuals

3. Subjective symptoms

4. Cognitive impairment residuals

- 38 C.F.R § 4.124a, DC 8045

TBI Residuals

- Residuals with a distinct diagnosis are separately rated under the appropriate diagnostic code
- Residuals not associated with a distinct diagnosis and cognitive residuals of TBI are rated under the “Evaluation of Cognitive Impairment and Other Residuals of TBI Not Otherwise Classified”
 - TABLE in 38 C.F.R. § 4.124a, DC 8045

Physical/neurological dysfunctions

Motor and sensory dysfunction, including pain, of extremities & face	Speech and other communication difficulties, including aphasia (inability to use/understand language)
Visual impairment	Dysarthria (can't articulate due to peripheral motor nerve problem, etc.)
Hearing loss and tinnitus	Neurogenic bladder (bladder doesn't empty fully due to nerve damage)
Loss of sense of smell/taste	Neurogenic bowel (loss of function due to nerve damage)
Seizures (DCs 8910-8914)	Cranial nerve dysfunction (disorders of smell, vision, eyes, taste, and positional vertigo)
Gait, coordination, and balance problems	Autonomic nerve dysfunctions (regulates unconscious body functions, including heart rate, blood pressure, body temperature, etc.)
Endocrine dysfunctions	

Emotional/behavioral

- Each emotional/behavioral residual of TBI that is a **diagnosed mental disorder** is rated under the appropriate DC in 38 C.F.R. § 4.130
- **If there is no diagnosed mental disorder,** rate emotional/behavioral symptoms under the TABLE in DC 8045

Subjective Symptoms

- If subjective symptom has a distinct diagnosis, e.g. migraine headaches, VA should evaluate it separately under the appropriate DC
- If subjective symptom has no distinct diagnosis, then evaluate under the Table in DC 8045
 - Table in DC 8045 isn't just for cognitive impairments

Subjective Symptoms

DC 8045 Non-exhaustive list of subjective symptoms includes

Anxiety (unless there is a diagnosed anxiety disorder, which is evaluated under appropriate mental health DC)

Headaches

Insomnia

Hypersensitivity to light or sound

Fatigability (unless it's chronic fatigue syndrome which is evaluated under DC 6354)

Blurred or double vision

Subjective Symptoms

- Advocacy Advice:
 - Lay statements, if found credible by VA, are sufficient to demonstrate subjective symptoms and their severity
 - Have Vet provide details about symptoms, frequency, severity, etc.
 - Corroboration not required, but will make it more likely VA finds statements credible
 - Submit “buddy” statements from family, friends, co-workers
 - Point to complaints in treatment records
 - Submit employment records showing missed work

Cognitive Impairment Residuals

- Cognitive impairment is decreased
 - Memory
 - Concentration
 - Attention
 - Executive Functions (goal setting, speed of info processing, planning, organizing, self-monitoring, prioritizing, problem solving, judgment, decision-making, spontaneity, flexibility in changing actions when current actions are not productive)
- Evaluate under the Table in DC 8045

10 Facets Table & Impairment Scale

- Applies to
 - Cognitive residuals and
 - Symptoms not accounted for by a separate diagnosed condition evaluated under a separate diagnostic code
- Each applicable symptom is categorized under 1 of the 10 facets
- After the symptom is categorized, the symptom's impairment level is assessed
- Impairment Scale: 0, 1, 2, 3, or 4

10 Facets Table

Memory, attention, concentration, executive functions	Visual spatial orientation
Judgment	Subjective Symptoms
Social interaction	Neurobehavioral effects (irritability, impulsivity, unpredictability, lack of motivation, verbal aggression, physical aggression, apathy, lack of empathy, moodiness, lack of cooperation, etc.)
Orientaiton	Communication
Motor activity (with intact motor & sensory system)	Consciousness

Impairment Scale

- VA rater evaluates each facet and assigns a level of impairment
- **Generally, 5 levels of impairment**

0	= 0% rating
1	= 10% rating
2	= 40% rating
3	= 70% rating
4 (Total)	= 100% rating

Impairment Scale

Description is included for each facet e.g. **Memory Facet:**

0	0%	No complaints of impairment
1	10%	Complaints of mild memory loss, attention, etc., w/o objective evidence on testing
2	40%	Objective evidence on testing of mild impairment of memory, attention, etc., results in mild impairment
3	70%	Objective evidence on testing of moderate impairment of memory, attention, etc., results in moderate impairment
4 (Total)	100%	Objective evidence on testing of severe impairment of memory, attention, etc., results in severe functional impairment

Motor Activity (MA) Facet

0	0%	MA normal
1	10%	MA normal MOST of time but mildly slowed at times due to apraxia (inability to perform previously learned motor activities despite normal motor function)
2	40%	MA MILDLY DECREASED or with moderate slowing due to apraxia
3	70%	MA MODERATELY DECREASED due to apraxia
4 (Total)	100%	MA SEVERELY DECREASED due to apraxia

Impairment Scale

- Some facets have less than 5 levels of impairment.
- E.g. **Subjective symptoms** have 3 levels of impairment (0, 1, or 2)

0	0%	Symptoms do not interfere w/ work; Instrumental Activities of Daily Living (IADLs); or work, family or other close relationships	E.g. mild or occasional headaches; mild anxiety
1	10%	3 or more subjective symptoms that mildly interfere w/ work; IADLs; or work, family, or other close relationships	intermittent dizziness; daily mild to moderate HAs; tinnitus; frequent insomnia; hypersensitivity to sound or light
2	40%	3 or more subjective symptoms that moderately interfere w/ work; IADLs; or work, family, or other close relationships	marked fatigability, blurred/double vision, headaches requiring rest periods most days

Social Interaction (SI) Facet

0	0%	Routinely appropriate SI
1	10%	<u>Occasionally</u> inappropriate SI
2	40%	<u>Frequently</u> inappropriate SI
3	70%	Inappropriate SI <u>most or all of time</u>

10 Facets Table & Impairment Scale

- After each symptom has been categorized and Vet is assigned a number for each facet, VA assigns a single evaluation under DC 8045 based on the highest rated facet
- Example:
 - A 70% evaluation is awarded under DC 8045 if “3” is the highest level for any facet (regardless of whether veteran has a “3” in only 1 facet, or all 10 facets)

DC 8045: Notes 1 & 2

Note 1: Overlapping sx, Duty to Maximize, Anti-pyramiding:

“.... If the manifestations of two or more conditions cannot be clearly separated, assign a single evaluation under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions....”

Note 2:

- Symptoms listed as examples in TABLE are only examples
- Listed examples **DO NOT HAVE TO BE PRESENT** to assign a particular evaluation

DC 8045: Note 3

Activities of Daily Living (ADLs)—
refers to basic self-care and
includes:

- bathing
- showering
- dressing
- eating
- getting in and out of bed
- using toilet

Instrumental ADLs (IADLs)—
refers to activities other than
self-care, needed for
independent living, such as:

- preparing meals
- housework
- shopping
- traveling
- laundry
- taking medications
- using phone

DC 8045: Note 4

- Terms “mild,” “moderate,” and “severe” TBI in medical records refer to classification of TBI at the time of the injury – NOT the current level of functioning
- Classification of “mild,” “moderate,” and “severe” DOES NOT AFFECT RATING ASSIGNED UNDER DC 8045

Recap

- Evaluate each residual separately
 - But same symptoms/manifestations cannot support more than 1 evaluation
- Evaluation arrived at under the TABLE in DC 8045 is considered the evaluation for a single condition and will be combined with other disability evaluations (for physical & emotional dysfunctions) under 38 C.F.R. § 4.25
- Combine residuals/conditions under § 4.25 (combined rating table)

Special Monthly Compensation

- Vets with residuals of TBI are often entitled to different types of SMC
- SMC should be considered if:
 - Loss of use of extremity
 - Certain sensory impairments (blindness in one or both eyes, deafness, aphonia, etc.)
 - Erectile dysfunction
 - Housebound
 - Aid and attendance (A&A) required

Special Monthly Compensation

- SMC(t) available, effective 10/1/2011, if Vet:
 1. Has SC TBI and/or TBI residuals; AND
 2. Needs regular A&A for residuals of TBI; AND
 - Other SC and NSC conditions cannot be considered
 - Doesn't need to show need for care by health care professional (care can be provided by spouse, family, neighbor, etc.)

Special Monthly Compensation

- SMC(t) available if Vet (cont.):
 3. Not eligible for SMC(r)(2); AND
 - SMC(t) paid at same rate as SMC(r)(2), which is highest monthly benefit available from VA
 4. Would require hospitalization, nursing home care, or other residential institutional care without regular in-home A&A

Conditions Presumed Secondary to TBI

- Effective 1/2014, VA considers some disabilities presumptively secondary to TBI
 - 38 C.F.R. § 3.310(d)
- Presumptions based on:
 1. Severity of initial TBI (mild, moderate, or severe)
 - Based on factors including time of lost consciousness, altered consciousness, and amnesia; and Glasgow Coma Scale score (based on eye, verbal, motor responsiveness after TBI)
 2. When disability first manifests

Conditions Presumed Secondary to TBI

- Presumptive diseases:
 - Parkinsonism, including Parkinson's Disease
 - Moderate or severe TBI, no time limit
 - Unprovoked seizures
 - Moderate or severe TBI, no time limit
 - Dementias (presenile of the Alzheimer type, frontotemporal, or with Lewy bodies)
 - Moderate or severe TBI, w/in 15 years of TBI

Conditions Presumed Secondary to TBI

- Presumptive diseases (cont.):
 - Depression
 - Moderate or severe TBI, w/in 3 years;
 - Mild TBI, w/in 1 year
 - Diseases of hormone deficiency that result from hypothalamo-pituitary changes
 - Moderate or severe TBI, w/in 1 year

Prestabilization Ratings

- If Vet recently discharged and experiences fluctuating symptoms due to TBI, Vet may be entitled to prestabilization rating for up to 1 year from date of discharge
 - 100%: Unstabilized condition with severe disability; substantially gainful employment not feasible or advisable
 - 50%: Unhealed/incompletely healed wounds or injuries; material impairment of employability likely
 - 38 C.F.R. § 4.28

Prestabilization Ratings

- Not used if 100% schedular or TDIU rating assignable
- 50% not used if schedular rating of 50% or more assignable
- May change to schedular rating at anytime, if schedular rating becomes higher
- Exam requested not earlier than 6 months or more than 12 months after discharge
- If exam indicates reduction warranted, higher rating continues to end of 12th month after discharge or end of period under 38 C.F.R. § 3.105(e), whichever later

TBI & PTSD Overlap

What is PTSD?

Posttraumatic Stress Disorder (PTSD):

An acquired mental condition manifested **after** exposure to one or more traumatic events, notwithstanding the absence of a person's emotional reaction at the time of the event. Manifestations of the disorder may vary in an individual case, but include **re-experiencing** the traumatic event(s), **avoidance** of stimuli associated with the trauma or **numbing** of general responsiveness, **increased arousal**, or some **combination** of these symptoms

Diagnostic and Statistical Manual of Mental Disorders (5th ed.)

3 Elements for SC PTSD

1. Current diagnosis
2. Credible supporting evidence that a claimed in-service stressor occurred
 - Relaxed standard: Vet's lay statements
 - Combat Vets: § 1154(b)
 - Noncombat Vets: § 3.304(f)(3)
3. Nexus, established by medical evidence, between current symptoms and in-service stressor

Element 2: Combat Stressor

- Combat Vets have lower evidentiary burden for proving stressor
 - If evidence establishes Vet engaged in combat and the claimed stressor is related to that combat, Vet's lay statement alone enough to prove stressor
 - Exception: clear and convincing evidence contradicts Vet's statements about stressor
 - **38 C.F.R. § 3.304(f)(2) and 38 U.S.C. § 1154(b)**

Element 2: Hostile Military or Terrorist Activity

- Vet's lay statement alone may establish stressor, if:
 - Stressor related to Vet's "fear of hostile military or terrorist activity"
 - Stressor consistent with Vet's service
 - No clear and convincing evidence to the contrary
 - **VA psychiatrist or psychologist** confirms:
 - Dx of PTSD
 - Stressor adequate to support dx, and
 - PTSD is related to stressor
 - 38 C.F.R. § 3.304(f)(3)

PTSD & TBI Overlap

- Post-9/11 Vets frequently suffer from mental disabilities due to their service, particularly PTSD
- In many cases, an incident that causes TBI is also a stressor that causes PTSD

PTSD & TBI Overlap

- When Vet has SC residuals of TBI and a separate diagnosed SC mental disorder, it is sometimes difficult or impossible to determine what symptoms are the result of TBI and which are the result of the mental disorder
- Sometimes TBI and the mental disorder manifest in some of the same symptoms (e.g., both cause irritability, sleep problems, and memory problems)

PTSD & TBI Overlap

- Example:
 - Vet has moderate memory problems that cause occupational and social impairment with reduced reliability and productivity that could be attributed to either TBI or PTSD

PTSD & TBI Overlap

- DC 8045, Note 1:
 - Don't assign more than one evaluation based on same manifestation
 - If manifestations clearly separable, assign a separate evaluation under separate DC
 - If manifestations can't be separated, assign one evaluation under DC allowing best assessment of overall impaired function due to both conditions

PTSD & TBI Overlap

- Possible tension between rules:
 - DC 8045, Note 1: if manifestations can't be separated, assign one evaluation under DC allowing best assessment of overall impaired function due to both conditions
 - Duty to maximize benefits: VA should attribute symptoms to DC that will give Vet higher evaluation
 - **Advice:** Argue that DC w/ higher evaluation provides best assessment of overall impaired function

Post-9/11 Vet Intake Hypo

- Call with Lucas, a Post-9/11 combat Vet about filing SC claims
- Lucas states he wants to file a VA claim for “the buzzing in my ears” and “sleep problems.”
- Lucas also says “I don’t qualify for unemployment and need help getting a job.”

Post-9/11 Vet Intake Hypo

- Other info Lucas tells you:
 - 33 years old and OEF and OIF veteran
 - From 2007-2011, he was deployed to Iraq
 - From 2012-2013, he was deployed to Afghanistan
 - Employment status: Laid-off
 - Highest level of education: High-school

Post-9/11 Vet Intake Hypo

- Lucas says:
 - **“I don’t like talking about what I saw and did. I just want to forget about it. All of it! I’m sorry I yelled.** I didn’t want to make this call because I want nothing to do the military. **I did things I can’t take back.** But I lost my job and my friend told me since the **buzzing in my ears and trouble sleeping** might be because of **the explosions and loud noise around me,** I could get money from the VA and your office could help me with my job situation.”
 - “Finding a job and getting some help is important because my wife moved out and said if I don’t get my act together, **she’s going to divorce me.**”

Post-9/11 Vet Intake Hypo

- Lucas brings some papers:
 - Doctor's note, **tinnitus**, insomnia, and Class 1 Obesity (BMI of 30.5)
 - DD 214, and other materials: honorable discharge and **Marine Corps Infantry Assaultman**
- Lucas provided consent for you to call his wife if more info is needed to help him with filing possible claims

Post-9/11 Vet Intake Hypo

- Lucas's wife tells you:
 - “Since Lucas returned from deployment, **he just isn't himself**. He drinks a lot more and maybe that's why he gained some weight, but he also stopped working out. He used to love going to the gym, but he **lost interest and kind of checked out on life**. It's even little things. Lucas was **never a snorer, but now he snore's loudly**. I know it's not intentional, so I deal with it, but **in the morning he's cranky and irritable**. He says it's because he **feels tired and wakes up with a headache** all the time.”

Post-9/11 Vet Intake Hypo

- Call with wife (con't):
 - “Lucas told me about **a surprise attack and he killed a man** and indicated that a **few of his guys got killed too**. He told me he **tripped over a dead body and hit his head real hard on the ground and was face to face with it, but he never reported it to a doctor and I’m the only one he’s talked to about it**. I love him, but last week was the last straw for me because when we went to get take out from a restaurant, when they gave us the wrong order, **Lucas just lost it and punched Jimmy**. Jimmy’s the owner and we’ve been going to his place since we were kids. Jimmy didn’t want to press charges, but someone in a car saw what was happening and the cops **charged him with assault and battery**.”

Question 3

What SC disability claims are raised by the information you have?

- A. Tinnitus
- B. Sleep apnea
- C. Mental disorder / PTSD, headaches
- D. Residuals of TBI
- E. All of the above
- F. A & B

Question 3 Answer

- Answer: E
 - Interview with Vet and his wife, and documents provided by Vet, indicate SC might be warranted for all listed disabilities
 - Catch-all description to use for mental disorder: “an acquired psychiatric disorder, to include PTSD.”
 - Should also raise TDIU in any claim
 - Ultimate decision on claims to file is Vet’s

- If possible, seek opinion from a specialist about whether Vet has residuals of TBI, and identify all DX and SX due to TBI
- Ensure VA accounts for all DX and SX when assigning rating
- Review rating criteria to ensure Vet obtains maximum entitlement (DCs for each DX and 8045 Table for other SX)
- **Usually best to get dx of a separate mental condition because it will often lead to a higher rating**

TBI & PTSD Overlap

More Advocacy Tips

TBI & PTSD Overlap

Advocacy Tips:

Lay Evidence

- Get as much lay evidence from family, friends, and co-workers as possible regarding subjective symptoms, frequency, severity, etc.
- Have Vet write a statement to give to VA examiners prior to the exams
- Try to have examiner mention all symptoms in report
 - It is unclear whether VA will require that the doctor mention/verify subjective symptoms
- Argue that nothing more than Vet's statement is needed regarding subjective symptoms

Questions?