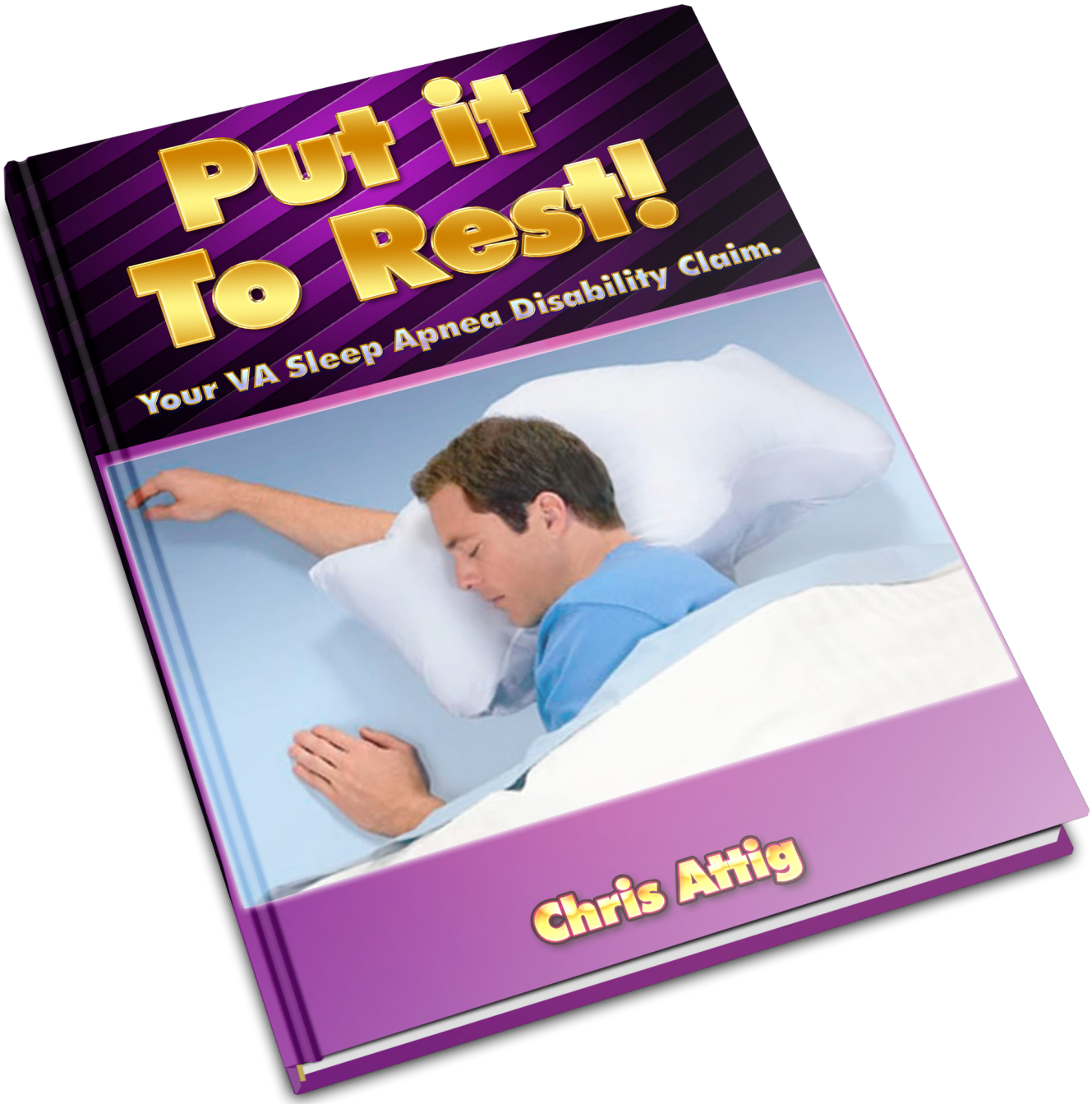
Put it To Rest!
Your VA Sleep Apnea Disability Claim.
Chris Attig

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Your VA Sleep Apnea Claim.

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"Changing the Way Veterans Experience the VA Claims Process

Chris Attig | Attig Law Firm, PLLC
www.attiglawfirm.com
Email: vetlaw@attiglawfirm.com
Licensed in Maryland and Texas
Accredited by the VA (September 2008)
Admitted to Practice, Court of Appeals for Veterans' Claims
Admitted to Practice, Federal Circuit Court of Appeals

My first job after school was military service. I reached the rank of Captain in the U.S. Army (Field Artillery) on Active Duty from 1993-1997, and served in the Reserves from 1997-2004.

I graduated Airborne School, attended Ranger school, and prior to leaving active duty, was invited to attend Special Forces Assessment and Selection (SFAS).

The Attig Law Firm handles cases at VA Regional Offices all around the US, before the BVA, and the Court of Appeals for Veterans Claims. My Vision is to Change the Way Veterans Experience the VA Claims Process. My Firm will do that by providing More Information, and More Power, in More Ways, to More Veterans.

I speak around the country on Veteran's topics:

Sept 2013	Using FOIA in your VA Cases (NOVA Conference, San Diego)
Apr 2013- present	The Journey to Service Connection (NOVA: San Diego Washington, D.C.)
February 2013	Veterans Law Day at SMU Law School (Dallas)
November 2012	Texas Veterans Legal Issues: Texas Ass'n of Counties (Galveston, TX)
Spring 2012	Overview of Veterans Benefits (Locke-Lord Law Firm, Dallas)
Spring 2012	Ethical Issues in a Veterans Law Practice (Dallas Bar Association)

"This eBook is not legal advice.

If you need specific guidance on the unique facts and law of your claim, STOP reading here and contact an attorney accredited by the VA for these types of cases."

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The reference to "Steps" is a reference to my belief that any Veteran can improve their VA Claim by following 8 Simple - but not easy - Steps.

Step 1: See the Problem
5 Reasons the VA Keeps Screwing Up Your Claim (FREE)

Step 2: Get your VA C-File
Take Back the Power: How to Get your VA C-File

Step 3: Know the Law
A Primer on VA Individual Unemployability Claims (TDIU)

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5 Paths to Service Connection

Step 5: 5-Star Evidence
The Secret to Proving Your VA Claim

Step 6: Choose your Battlefield
Climbing the VA Claims Process

Step 7: Get Help
8 Things You Need to Know Before hiring an Attorney in Your VA Claim.

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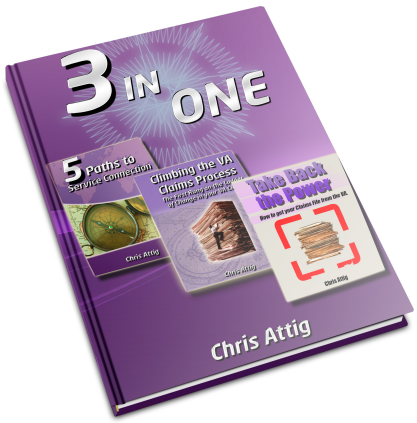
"There is no substitute for good legal advice.

This eBook is general information meant to educate and inform you - it is NOT legal advice."



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"Please tell me how to make this eBook better for MORE Veterans.

Tell me where I hit the nail on the head, or where I missed the mark."

PREFACE:
Changing the Way Veterans Experience the VA Claim Process.

I've been where you are.

While in the military, I tore my face to shreds, and injured my jaw, teeth and skull while jumping out of a C141 Starlifter.

I filed a claim for service-connection of those injuries with my local VA Regional Office - as an attorney, I was SHOCKED at how difficult it was to file and prove up a simple VA Claim.

So I've battled the VA in my own claim.

I've been frustrated by the VA's obtuse rules and regulations, annoyed by their excessive delays and baffled by the things they've written in their decisions.

I learned something along the way. I learned that Information is Power.

Ever year, thousands of Veterans come to the Attig Law Firm looking for help battling the VA.

The Veterans Law Blog is the Oldest, longest-running blog about Veterans Law by an accredited VA Attorney.

The Veterans Law Blog has been teaching Veterans how to simplify the law and process of their VA Claims and Appeals since 2007.

As of this writing in July 2014, the Veterans Law Blog has published over 500 posts containing valuable VA Claims Information. Posts are published every weekday, and tens of thousands of Veterans following the Veterans Law Blog on the website and through e-mail.

The posts cover a wide variety of topics designed to help Veterans understand the basic law and procedure of the VA Claims process.

Let me tell you about "Veterans University".

"Use the information in this eBook to help you better understand the VA Claims Process, and the language used by the Board and the Courts to rule on that process."

In addition to the Veterans Law Blog, we have "Veterans University". Veterans University is a growing section of the AttigLawFirm.com website where Veterans can have access to more detailed information about the complexities and the finer points of preparing and advancing their own VA Claim or Appeal.

The Veterans Law Guidebooks in Veterans University are organized using my approach to VA Claims, which I call the "8 Steps to Improve Your VA Claim". I have analyzed hundreds - if not thousands - of Veterans C-Files, and I have figured out some of the biggest reasons that Veterans get caught in the VA Hamster Wheel or why their claim or appeal gets caught in the Backlog.

I have come up with a path out of the mess of the VA bureaucracy called the "8 Steps to Improve your VA Claim". The steps are not easy - anything worth doing is worth putting work into - but in the end, I am sure that if you follow them, they will Change the Way You Experience the VA Claims Process.

This will be the 9th Veterans Law Guidebook to be released on the Veterans University page.

(As a purchaser of this Guidebook, I offer you a a discount on each of our other Guidebook - just use the links at the end of this Chapter.)

We have more Veterans Law Guidebooks, Videos and Podcasts on their way - if there is a particular issue you would like to see covered in a blog post, Guidebook, Video or podcast, please let me know.

Can I keep in touch with you by email?

I send out emails to tens of thousands of Veterans every week.

I would like to keep in touch with you by email.

Follow this link to the Veterans Law Blog where you can sign up for a variety of FREE emails that I send out each week and, sometimes, each day.

Please tell me what you thought of this eBook.

I really would like to know what you thought of this eBook - the only way I can make it BETTER for more Veterans is to get feedback from folks like you that tells me where I "hit the nail on the head" or where I "missed the mark".

In fact, this eBook was the suggestion of several Veterans who emailed me and told me they were struggling to understand the different kinds of evidence used in a VA Claim or Appeal.

If you have thoughts, ideas, suggestions, and even criticisms or complaints - PLEASE - tell me so that I can make the Veterans Law Blog the Best and Most Thorough source of information for Veterans battling the VA in their claim or appeal.

Leave Feedback for me on the Veterans Law Blog by clicking here.

Let me tell you who this Guidebook is NOT for.

If you want or expect legal advice, this is **not** the place for you.

If you are seeking or expecting legal advice, then fill out a consultation request form on the Attig Law Firm website.

No Veterans Law Guidebook should be considered legal advice. This Veterans Law Guidebook is not legal advice.

In fact, some or all of the ideas suggested may not be appropriate, and/or may not be effective, in your VA Claim or Appeal.

If you need, want, or expect specific guidance on the unique facts and law of your claim, STOP reading here and contact an accredited VA Benefits attorney.

There are good ones out there.

I have a Veterans Law Guidebook that will teach you the "8 Things you Need to Know When Choosing a Lawyer for your VA Disability Benefits Claim."

Be sure to read this Guidebook so that you can find and hire the lawyer that is best for your and your claim or appeal.

There is NO SUBSTITUTE for good legal advice. If you need legal advice, or specific guidance based on the unique facts and law of your case, contact an accredited VA Attorney immediately.

I will tell you this, too, just to be sure you understand: it is really easy to take a superficial reading of Veterans law sources, try to apply them in your case, and do serious damage.

The *study* of law is just that - a study.

While there are cases and rules and precedent that guide us, lawyers *study* law for years and still don't come anywhere near developing expertise.

What "works" in one case may not "work" in another case - even though the 2 rely on the same facts.

Heck, I've been at this for 7 years, and it takes 10 minutes with some of the Lions of Veterans Law (Robert Chisholm, Ken Carpenter and Barbara Cook) to know that I have a lot to learn.

In reading this Guidebook, please don't think that I'm advising you how to use the law mentioned in this eBook in your case. I'm also not telling you that you SHOULD follow the steps that I lay out. Use this information as a piece of your research - a small part of a broader study of the VA Claims Process.

Don't use this Guidebook to argue to the VA (or anyone for that matter) that you know the law or rules of evidence. First of all, the VA raters don't really care about the law - I rarely if ever cite case law to VA regional office employees. And I NEVER tell them about 5 Star Evidence….they won't have a clue what that means. That is a term that I coined, and that is used only on the Veterans Law Blog.

And don't take this Guidebook to your DRO hearing and say, *"Attig says it, see here, you have to do what he says."*

That's just not what this Guidebook is intended for.

Instead, use the information in this Guidebook to understand the VA process and educate yourself about the language and process that is used by the VA Regional Office, BVA, and Veterans Court in VA service connection claims and appeals.

I've been at this since 2007, and I'm still learning what these decisions mean and how to use them every day.

If you are concerned about how the law discussed in the attached cases will affect your case, or how to apply the law in the attached cases to the specific facts of your case - please stop right now and contact an accredited VA Benefits attorney.

The VA is a fickle bureaucracy. What works in one case may not in another case - even when they rely on the same facts.

There is no substitute for legal advice from an accredited Veterans Benefits attorney.

There is also no guarantee that this Guidebook will help you win your claim.

If I could make that guarantee, I'd call a bookie in Vegas and pick the next 20 Superbowl winners, and retire a very wealthy man.

Nobody can predict what the VA is going to do in any claim or appeal. Nobody can guarantee an outcome in your VA claim or appeal - and if someone is giving you that guarantee, then you should run far, far away.

The VA is unpredictable, and a fickle bureaucracy. What "works" in one case may not "work" in another case - even though the 2 rely on the same facts.

Before I share this Guidebook with you, I have one favor to ask: if you find something in this Book helpful, tell another Veteran how to get it.

Let's watch out for each other - nobody else has our back.

Let me know if this eBook helped you in your VA Claim

I love to hear good news.

Leave Feedback for me on the Veterans Law Blog by clicking here.

How this Guidebook is Organized, and what it seeks to do.

"This eBook is NOT legal or medical advice…it is meant to educate and inform about how, in my experience, the VA handles sleep apnea claims and appeals."

This Guidebook is NOT medical or legal advice.

I am not a doctor, so I cannot advise you on the diagnosis or treatment of any medical condition.

All I can tell you is that **Sleep Apnea KILLS - if you suspect you have Sleep Apnea, go see a doctor or, in case of a medical emergency, call 911 and get to the emergency room!**

My summaries of what sleep apnea is, and what it is not, comes from a few places: my experience and discussions with medical doctors while working sleep apnea claims; study of Veterans Court and BVA Decision; study of hundreds - even thousands - of Veterans C-Files to see how the VA handles sleep apnea claims and appeals.

This Guidebook is NOT legal advice. It is meant to educate and inform you about how - in my experience - the VA handles sleep apnea claims and appeals.

No Guidebook - no blog article, and no social media posting - can take the place of legal advice from an accredited VA attorney. Use this book to help you understand the jargon, process, procedure and evidence in a VA Sleep Apnea claim.

Do not use this Guidebook as a substitute for legal advice.

Now that the disclaimers are out of the way, I want to tell you how I have set this Guidebook up.

First, I want to give you an idea of what I understand sleep apnea to be, and why I think it is important to get it service-connected if you believe your sleep apnea is related to military service.

"I will consider this Guidebook a success if, at the end, you feel more comfortable in your understanding of your own VA Sleep Apnea Claim or Appeal."

Second, I want to walk you through the 4 Pillars of a VA service-connection claim - these are the 4 things that every Veteran must prove in most service-connection claims.

Third, we will talk about how I have seen lay and medical evidence used in VA Claims and Appeals - both the good and bad - and I will talk to you about my thoughts on how best to use Lay and Medical Evidence in your Sleep Apnea claim or appeal.

Fourth, I want to talk about some of the common errors that I see Veterans making in Sleep Apnea claims.

I will consider this Guidebook a success if, at the end of it, you feel more comfortable in your understanding of how the VA looks at, and talks about, Sleep Apnea claims.

But what is important to me is that you find this book helpful.

Tell me how to make it better. Fill out a review at this page on the Veterans Law Blog.

When I update this Guidebook, you will get a FREE update. That's the cool thing about our Veterans Law Guidebooks - you only have to purchase them once, and you will be kept up to date with any changes we make.

Here's a Special Offer for you, too: If you know of a way that I can make this Guidebook better - or if you give me feedback I can use to make this Guidebook a more valuable resource, I will **refund** your **ENTIRE** purchase price.

Chapter 1:
Sleep Apnea - What is It?

"Sleep Apnea is a Killer….If you don't stop breathing in your sleep and die, there is a good chance that untreated sleep apnea will lead to a cardiovascular event. Or cause other medical problems."

Sleep Apnea is a Killer. No "bones" about it - sleep apnea will kill you unless you get treatment and get it under control.

If you don't stop breathing in your sleep and die, there is a good chance that untreated sleep apnea will lead to a cardiovascular event.

Or cause other medical problems.

Sleep Apnea, in a nutshell, is a condition where you slow or stop breathing while you are sleeping.

If your breathing slows, and becomes shallow, the event is known as a hypopnea. If you stop breathing altogether while sleeping, the event is known as an apnea.

An apnea, can last anywhere from a couple seconds, to as long as a minute.

The impact, while you are sleeping, starts in the lungs. [1]The lungs aren't filling with air, so your blood is not oxygenating.

When your blood is not oxygenating, your brain becomes aware of the problem, and sends signals to move your body into a lighter level of sleep.

Think of it like the check engine light in your car.

Your car needs oxygen and fuel to properly ignite, and start running. If your car is not getting the right amount of oxygen

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[1] I am not a doctor. This explanation is over-simplified, and meant to illustrate to Veterans the seriousness of the condition, and how the symptoms and manifestations of the sleep apnea condition will ultimately relate to the impairment ratings for sleep apnea.

into the fuel mixture, there's a good chance your check engine light will come on.

Same thing in the human body.

If you aren't getting enough oxygen into your blood stream - and oxygen is vital to proper functioning of your heart, brain, nervous system, organs, and basically every other body function - your brain will, in a sense, wake you up so you can consciously control your breathing.

Ultimately, the immediate and recognizable limitation is that your body's sleep cycle is interrupted and you don't get the opportunity to go into a state of deep sleep that is needed to recharge your body's "batteries" and systems.

As a result, most people that have sleep apnea wake up in the morning feeling less than rested - even though they may have gotten a full night's "sleep".

In the long term, however, a sustained pattern of low oxygenation of the blood will increase the amount of carbon dioxide in your blood, and can lead to problems involving:

* the rhythm of your heart beat

* pressure build up on the right side of your heart

* fluid build up in the body

* heart failure

* stroke

Remember watching a movie where a character tries to kill themselves by locking themselves in a garage, and turning their car engine on?

What happens to them?

They die, right?

The body's process of shutting down and dying - very rapidly in that scenario - is precisely the same as what is happening to your body (albeit a little more slowly) when you have untreated sleep apnea.

With untreated sleep apnea, your heart will eventually shut down.

When your heart and lungs break down over the long term, it is much more painful.

Hypertension (high blood pressure), headaches, strokes, heart disease, other forms of brain and organ damage (from low blood-oxygen levels) make death from sleep apnea a very long and very painful - and not to mention a very costly - proposition.

Symptoms of Sleep Apnea

So you have seen some of the dangers of untreated sleep apnea.

What are the symptoms of this deadly condition?

For our purposes here, I'll group the symptoms into 4 categories, depending on who can observe them.

Why is this breakdown important for you, the Veteran, filing a VA disability claim for sleep apnea?

In a nutshell - and this is the "secret" that not many Veterans understand - different types of people can observe different types of symptomatology of your sleep apnea. [2]

The savvy Veteran will collect lay - and medical - evidence from all of these types of people, and provide it to the VA (using the 5 Star Evidence formula I teach in my eBook "The Secret to Proving Your VA Claim"), then your VA Claim for Sleep Apnea becomes much stronger, and much easier for the VA to grant the FIRST time around.

So here are the symptoms of sleep apnea[3], grouped by the types of people that can observe them:

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[2] Throughout this Guidebook, you will notice a theme: Lay evidence proving the development of the symptoms of sleep apnea over a period of time, coupled with medical evidence relying on those Lay Statements can invariably yield a very different outcome in a VA Sleep Apnea Claim or Appeal. The Veterans that used lay and medical evidence in the ways that I describe in this Guidebook seemed to me to have more successful - and quicker - outcomes at the VA Regional Offices and at the BVA.

[3] Again, I am not a doctor - these symptoms are not meant to help your DIAGNOSE your condition: only a trained medical professional can do that. In fact, these symptoms may also be warnings of other and more serious medical conditions. If you have these symptoms, or are worried about sleep apnea, go see your doctor. These lists of symptoms are merely meant to help you understand the types of evidence to include in your VA Sleep Apnea disability claim.

Symptoms the Sleep Apnea "victim" can observe:

* Morning headaches

* Memory problems - learning difficulties, or inability to concentrate

* Feelings of irritability throughout the day, depression

* Mood swings

* Confusion, poor memory

* Sexual dysfunction

* Waking up frequently in the night - often times you will think you are waking up to urinate

* A dry mouth or sore throat when you wake up

* Falling asleep throughout the day; fighting sleepiness throughout the day, or falling asleep whenever it is quieter (like behind the wheel of a car). Excessive daytime sleepiness is known as "hypersomnia" or "hypersomnolence" - you'll recognize this term when it comes to rating your service-connected sleep apnea

* Your sleep is "non-restorative" - you feel as tired in the morning as you did when you went to bed

* Acid reflux

* Cessation of breathing during the night.[4]

Symptoms that your spouse or loved ones can observe:

* Cessation of breathing during the night.

* Loud and Chronic Snoring - often described as snoring that wakes your partner up, or that can be heard in other rooms of the house.

* Pausing in the middle of snoring, or, choking or gasping after pauses in snoring

* Mood changes throughout the day

* Poor memory and attention

* Confusion

* Sexual dysfunction

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[4] At least one BVA decision concluded that a Veteran is "…not competent to observe symptoms of apnea (cessation of breathing) during his own sleep." BVA Docket No. 10-41721 (April 2013) If you have Sleep Apnea, you may realize that this is "horse-puckey".

If you wake up due to a cessation of breathing - during an apnea event - you may have a clear and distinct sensation of gasping for air, or choking. It doesn't take a rocket scientist to put two and two together and realize that you stopped breathing in your sleep. Be sure to communicate that sensation of choking while waking in your Lay Evidence statement - it is competent and credible evidence!

While it is true that you may not ALWAYS know when you have an apnea event in your own sleep, or how many apnea events you have in the typical hour of sleep, it is patently untrue that a Veteran is not competent to observe symptoms of apnea, such as cessation of breathing, during the Veteran's own sleep.

Symptoms that people around you throughout the day can observe:

* Mood changes throughout the day; sudden increases in irritability

* Falling asleep at work, or while driving, or feeling tired at unusual times of the day.

* Poor performance at work, or in school, due to decreased attention, ability to concentrate, or appearing confused

Symptoms that medical professionals can observe.

* enlarged Uvula (this is the thing hanging in the back of your throat)

* Blood-oxygenation levels

* Air movement through nose while sleeping

* Chest movements while sleeping

* Rate of Apneas/Hypopneas per hour of sleep, or per hour of sleep studied (known as the Apnea Hypopnea Index, or AHI).

Types of Sleep Apnea

A common myth about Sleep Apnea is that only the obese or overweight can have it.

This is a myth that is very dangerous.

Sleep apnea can affect even the most physically fit person, or folks that have an ideal Body Mass Index *(The Body Mass Index, or BMI, is the ratio of height and weight in a person, often indicative of whether or not they are over-weight).*

There are actually three (3) different types of Sleep Apnea[5]: obstructive, central, and complex.

Let's take a look at each.

Obstructive Sleep Apnea

Obstructive Sleep Apnea, or OSA, is a type of sleep apnea that occurs when your airway is blocked or obstructed.

To understand how this happens, let's look at the normal breathing process.

#1: Air is pulled in through the nasal passages.

#2: It crosses the uvula - that dangling thing in the back of your throat

#3: It passes through the throat muscles, between the vocal chords, and enters your lungs.

Though the path from your nose to your lungs is a short one, there are a lot of parts of your body that air has to pass through.

An obstruction - or a problem - anywhere along that path of air, can cause Obstructive Sleep Apnea. Here is just a sampling of the problems that can obstruct the airway (notice how FEW of them have to do with obesity):

* Deviated Septum (damage to the piece of cartilage that separates your nostrils)

[5] One doctor told me that there is a fourth, very rare, type of sleep apnea. He called it a Primary, or idiopathic, central sleep apnea. His explanation was very complex, and I am still researching this category of sleep apnea. The best I can explain, for now, is that it is a sleep apnea of unknown origin or etiology, which appears to not be tied to common or currently known causes.

* Swelling in your nose due to allergic or other conditions

* Damage to your throat or uvula

* Your tongue can fall back and obstruct the airway

* Reduction in the opening in the throat, or a narrowing of the side walls of your throat

* Damage to your vocal chords can restrict your airway

Any damage to your nose, face, mouth, throat, neck, chest, or diaphragm can cause the airway to be obstructed, or the airflow to be limited.

Likewise, damage to the lungs themselves can lead to OSA. Conditions like COPD (due to asbestos[6] or particulate exposure in burn pits, for example), blocks the air path at the point where the lungs move oxygen into the blood stream.

Here's one to think about, particularly for victims of a rape or sexual assault in the military.

Since rapes in the military are most often about power and control and domination, they are often quite violent.

In my experience, victims of military sexual assault or rape in the military, have a high coincidence of damage to their jaw, neck and back (muscle, bone and nerve), and a high coincidence of sleep apnea.

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[6] There is some scientific and medical evidence that demonstrates a possible connection between asbestos exposure and sleep apnea. However, there is also research that suggests that there is no causative connection between asbestos exposure and sleep apnea. Be very sure to get a competent medical expert to explain the connection carefully to the VA if you have a claim or appeal for service connection of sleep apnea secondary to asbestos exposure.

Common logic ties the sleep apnea to the mental health condition that invariably results from the trauma of being raped or physically assaulted.

However, I think there is another reason:

There is a muscle where the tongue attaches to the jawbone.

Damage to that muscle - facial reconstruction or a broken jaw (quite possibly in a sexual assault scenario) could cause it to relax improperly, and the tongue falls backward while sleeping, blocking the airway.

I have often wondered whether the victims of Military Sexual Assault suffer sleep apnea because of structural damage to the airway, resulting from damage to the back, neck, throat, or face.

Its certainly something worth exploring with your medical care provider.

OSA is, without a doubt, the most common form of Sleep Apnea. And OSA is the type of sleep apnea most commonly associated with obesity - hence the rumor that only "fat people" have sleep apnea.

Don't make the mistake of thinking that obesity is the only - or even the primary - cause of OSA, particularly for a Veteran seeking service connection of Sleep Apnea in a VA disability claim.

Central Sleep Apnea

Central Sleep Apnea, or CSA, is essentially a type of sleep apnea where the brain and the lungs are not communicating properly.

It is, at its core, an interruption of the communication network between the brain and the breathing muscles.

How does it play out? A couple of ways, in a nutshell.

Your brain does not send out the signal to your lung muscles to breathe, or it sends it to the "wrong" muscles due to nerve damage.

Your brain sends out the signal, but the lungs never "get" the signal, and so they never attempt to draw more air in.

Either way, your body does not take a breath in.

When the brain senses the lack of oxygen, it is going to first change the rate of breathing to have you get rid of some of the carbon dioxide that is building up in your lungs.

It then shifts to another rate of breathing to bring in more oxygen.

You may experience a type of breathing known as Cheyne-Stokes breathing: alternating deep and shallow breathing.[7]

This type of breathing can only be diagnosed by a medical professional, but it can be observed by anyone that watches you sleep and breathe.

> *TIP: If your spouse observes you going through cycles of heavy, followed by shallow, followed by heavy breathing, this is an observation you will want to document for your VA claim - it may be enough evidence to trigger the VA's duty to assist you and provide a diagnostic exam. It may also, if*

[7] Again, my apologies to the doctors and medical professionals out there - I am really over-simplifying this process in the hopes of giving Veterans a simple explanation so that they will know how to build lay and medical evidence to support their VA Sleep Apnea disability claim.

observed continually during or following service, be lay evidence that supports the actual element of nexus for service connection.

If this pattern of alternating breathing doesn't get the right balance of oxygen into your bloodstream - and even sometimes when it does - the brain may wake up the body to get conscious control over the breathing function.

Complex Sleep Apnea

Until about 2006, there were only 2 widely accepted types of sleep apnea: Central Sleep Apnea (CSA) or Obstructive Sleep Apnea (OSA).

In September 2006, researchers at the Mayo Clinic identified a new type of Sleep Apnea that they are calling "complex sleep apnea".

At its core, Complex, or mixed, Sleep Apnea is a type of sleep apnea with mixed causes. The causes of the condition can be a combination of CSA and OSA causes; it can also be that your CSA presents as OSA, and only becomes apparent as CSA after OSA treatment (this is called "Treatment Emergent CSA).

Mayo Clinic researchers found that patients who presented with the symptomatology and manifestations of OSA were not responding to the type of treatment that usually alleviates OSA symptoms - i.e., a CPAP machine (CPAP machines are Continuous Airway Pressure machines that essentially forces open the patient's obstructed airway).

In some OSA patients, the CPAP machine was not alleviating the problem: even despite theCPAP treatment, they still suffered the same symptoms and still had moderate to severe sleep apnea.
Dr. Timothy Morgenthaler, M.D., said:

"When [OSA Patients] put on a CPAP machine, they start to look like Central Sleep Apnea syndrome patients."

Treatments are still being researched for Complex Sleep Apnea. This condition is among the most difficult to service connect - because it is hard to show the VA how military service caused a condition for which the etiology - and treatment - is not yet well known.

Causes of Obstructive Sleep Apnea.

This is not, by any stretch, a complete list. The human body is complex, and so you should ALWAYS talk to your medical care provider to understand the cause of your OSA.

* Allergies or congestion of the upper airway

* Deviated septum

* Jaw damage - particular when damage to the jaw causes the inner jaw to be set further back than it normally would be (interfering with the tongue and tongue muscle control)

* Diabetes.[8]

* Hypothyroidism.

* Overweight/obesity.

* Muscle damage in the diaphragm.

* Swelling of the uvula.

* Relaxation of the muscles connecting the tongue to the jaw.

* Damage to the tonsils or vocal chords.

* Lung damage.

* Smoking or alcohol consumption (which in turn may be caused by an anxiety disorder like PTSD).

* Soft tissue, or tissue damage, in or near the airway.

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[8] The connections between diabetes and sleep apnea - as discussed elsewhere in this Guidebook - are astounding.

Sleep apnea can CAUSE diabetes by affecting the body's ability to process blood sugars, and can hamper treatment by messing with the body's ability to properly process and use insulin.

Diabetes, through more complex systems, can cause OSA and possibly CSA.

Then, there is the common situation where obesity, diabetes and OSA can all present together.

Just don't be too quick to assume that your obesity caused OSA and diabetes - the connection may be entirely more complex than just the obesity.

In fact, the OSA and diabetes could CAUSE the obesity, not vice versa.

* Some surgeries, like pharyngeal flap surgery, can cause OSA.

* Traumatic Brain Injuries that cause damage to the mechanics of the airway (as contrasted with TBIs that cause damage to the nerve-related communications between the brain and lungs).

Causes of Central Sleep Apnea.

Anything that interrupts the brain-lung communication "channel" can be a cause of Central Sleep Apnea.

This is important for Veterans, for many reasons.

First, a diagnosis of CSA should lead the Veteran to think about possible in-service injuries that could have led to this condition. Damage to the head, neck (cervical spine), nerve paths between the brain and the chest area, etc., may result from traumatic events in service: rape, assault, neck injury, upper back injuries, jarring explosions that rattle the brain or spine/neck, traumatic brain injuries

Second, a diagnosis of CSA should cause Veterans to think about service connecting more than one condition, and using more than one legal theory to service connect the CSA.

In fact, a common way to service connect a Central Sleep Apnea is using the "secondary service connection path" - proving service connection of the primary condition, and then showing that the CSA was caused by that primary condition.

When you think of possible causes of CSA, however, think of conditions that interrupt the communication between the brain and the lung: damages to the brain, muscles, or nervous systems.

For example, think of the following conditions:

* Parkinson's Disease

* Any motor neuron disorder, like Lou Gehrig's disease (ALS), Primary Lateral Sclerosis (PLS), Progressive Muscular Atrophy (PMA), Multiple Sclerosis, Myasthenia Gravis, etc.

* Brain infections.

* Alzheimers' or vascular dementia

* Stroke

* Damage to the Cervical Spine (neck), or the nerves in the cervicul spine (for example, cervical radiculopathy).

* Arthritis in the spine, spinal stenosis, degenerative disc disease in the cervical spine

* Surgery on the spine, or radiation treatment to the spine in the treatment of other medical conditions

* Excessive time at high altitudes[9] (like in the mountains of Afghanistan, perhaps)? I've seen that happen.

* How about medication (like what the VA docs have prescribed for your medical conditions)? You bet.

* Heart/cardiovascular disease can cause these interruptions in brain-lung communications.

* Traumatic Brain Injuries - closed skull injuries to the "Brain Housing Group" are a leading cause of these types of problems. You can bang up your head pretty good in a

[9] Pilots of any era or generation - pay particular attention here. Talk to your doctor to see if excessive time at high altitudes while flying on training or combat missions could have caused your CSA - or, for that matter, OSA or Complex Sleep Apnea.

vehicle accident, jumping out of an airplane, in an IED event, etc…and your head may look fine on the outside, but you may have nerve damage inside your brain.

* Thyroid diseases, and kidney failures are correlated to CSA, although I confess I do not yet understand the connections for Veterans claims purposes.

* Mental health conditions, typically anxiety disorders like PTSD

Any path of your nerves from the brain to the lungs can disrupt this communication.

I cannot stress this enough.

Knowing that you have been diagnosed with CSA helps you begin to cast a broad net to understand and identify not only the in-service event, but also the nexus elements of your claim for VA Sleep Apnea service-connection.

Chapter 2:
Why is it Important to Service Connect Sleep Apnea?

There's this attorney out there - in my personal opinion he is a pretty dim bulb on the legal Christmas tree - that believes that Veterans are making up claims for Sleep Apnea to defraud the government.

Based on his extensive background as a family law attorney in Florida, he observes:

> *"Virtually every single family law case which I have handled involving military members during the past three years has had the military retiree receiving a VA 'disability' based upon sleep apnea…"*

He then goes on to conclude, talking about Veterans with Sleep Apnea:

> *"By God, if somebody is disabled, compensate them. But [sleep apnea] is a sham and it rankles me to the core."*

What Mr. Webster doesn't know - what he didn't bother to look at - was actual medicine and science.

If he did, he would know what I know - and what you will know before you finish this chapter:

Over the next 30 years, Sleep Apnea will kill more Veterans than have all conflicts from Vietnam forward.

Why?

Because what we know about the human body, and how it works, tells us that the interruption of the body's ability to sleep is going to cause the rest of the body to break down.

You can live with no arms.

You can live without a kidney.

You can even live with half a lung.

But here are 3 things you CANNOT live without:

1) Food/Water
2) Blood/Oxygen
3) Sleep

Take any one of those 3 things away, and the rest of the body will start breaking down.

Taking sleep out of the equation, or impairing the body's sleep function, is like taking oil out of a car's engine: the system will seize up, one piece at a time.

Consider these statistics showing the high degree of correlation (which, to be clear, is not causation) between Sleep Apnea and Cardiovascular events:

* Of the 5.7 million people in the US that have heart failure (according to American Heart Association), approximately 76% of congestive heart failure patients have a sleep breathing disorder.[10]

* In one study, 49% of atrial fibrillation patents had Obstructive Sleep Apnea, and 30% of cardiovascular patients had Obstructive Sleep Apnea.[11]

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[10] Oldenburg et al. Eur J Heart Fail 2007.

[11] Gami et al. Circulation 2004

[12] AHI is the Apnea Hypopnea Index - the measurement of how many apnea and/or Hypopnea incidents you have per hour of sleep, or per hour of sleep study time.

* Another study shows that 52% of heart attack patients had an AHI[12] of greater than or equal to 10, and 70% of heart attack patients had an AHI greater than or equal to 5[13].

Here are some other frightening numbers surrounding sleep apnea:

* People with moderate to severe sleep apnea are 15 times more likely of being in a traffic accident.

* New research is suggesting connections between diabetes and Obstructive Sleep Apnea. One would think this is because of weight issues that might be common to both conditions, but it appears that sleep apnea may actually CAUSE Type 2 diabetes, because sleep impairment plays a significant role in the body's ability to process sugars. [14] There is also a demonstrated connection between Obstructive Sleep Apnea and insulin resistance in the treatment of diabetes.

* Chronic Brain Injury, and Traumatic Brain Injury, can cause a whole host of sleep disorders, including Sleep Apnea.[15] In fact, a leading study of Sleep Apnea and TBI showed that

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[13] Kuniyoshi et al. J Am Coll Cardiol 2008.

[14] Meslier N, Gagnadoux F, Giraud P, Person C, Ouksel H, Urban T, Racineux JL: Impaired glucose-insulin metabolism in males with obstructive sleep apnea syndrome. Eur Respir J 22(1): 156-160, 2003; West SD, Nicoll DJ, Stradling JR: Prevalence of obstructive sleep apnea in men with type 2 diabetes. Thorax 61(11): 945-950, 2006; Resnick HE, Redline S, Shahar E, Gilpin A, Newman A, Walter R, Ewy GA, Howard BV, Punjabi NM: Diabetes and sleep disturbances: findings from the Sleep Heart Health Study. Diabetes Care 26(3): 702-709, 2003; Reichmuth et al. Am J Respir Crit Care Med 2005; Punjabi et al. Am J Respir Crit Care Med 2002

[15] Verma A; Anand V; Verma NP. Sleep disorders in chronic traumatic brain injury. J Clin Sleep Med 2007;3(4):357-362.

impaired daytime functioning and somnolence is present in 98% of all patients with TBI, and sleep disordered breathing is a common finding as well.[16]

* Recent research is suggesting a strong connection between anxiety conditions (of which PTSD is a common form) and sleep disorders like Sleep Apnea.

* 65% of stroke patients have a sleep breathing disorder.[17]

* Severe Sleep Apnea raises the risk of death by 46%[18]

Can you see what happens here?

The 3 most talked about injuries resulting from Iraq and Afghanistan - Traumatic Brain Injury and PTS (or PTSD) and Military Sexual Trauma (MST) - are **known** to cause sleep breathing disorders like Sleep Apnea.

That means the tens of thousands of Veterans that fought in those wars are at high-risk for developing Sleep disorders like Sleep Apnea.

Vietnam Veterans aren't "off the hook" either.

As stated above, there is a high degree of correlation - and in some cases - a causative connection between Diabetes Type 2 and Sleep Apnea.

We now know that Agent Orange exposure in Vietnam is a known cause of Type 2 Diabetes, and increasingly large

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[16] Guilleminault C, Faull K, Miles L, Van den Hoed J. Post-traumatic excessive daytime sleepiness: a review of 20 patients. Neurology. 1982;33:1584–9.

[17] Dyken et al. Stroke 1996.

[18] Punjabi et al. PLoS Medicine 2009

numbers of Veterans exposed to Agent Orange are now being diagnosed with Diabetes.

This is why so many Veterans are claiming service-connection for Sleep Apnea.

Not because they are, like that attention-starved and self-righteous family lawyer in Florida thinks, scamming the system.

> *(Mr Webster told a Stars and Stripes reporter that his Daddy was REALLY disabled, not like modern Veterans who are just scamming the system).*

But instead, increasingly large numbers of Veterans are claiming service connection for sleep apnea because the 2 biggest injuries in the Iraq and Afghanistan conflicts are known causes of Sleep Apnea - and one of the biggest long-term travesties of the Vietnam War (getting doused with Monsanto's Agent Orange) causes a condition which in turn causes Sleep Apnea!

So, Mr. Webster, if you happen to read this eBook…I challenge you to a public debate - we can televise it or do it on a Google+ hangout.

You take the position that Veterans are scamming the benefits system by claiming compensation for Sleep Apnea.

I'll take the position that Sleep Apnea is the single biggest disability that combat (and peacetime) Veterans will face in the next 30 years.

We'll let the viewers vote who wins.

Care to take me up on the debate? Call me when you are ready to go. My phone number is (866) 627-7764.

But enough about Mr. Webster.

Let's talk about the Veteran who suffers from Sleep Apnea.

Should you service connect it? File a claim for service connection of your sleep apnea any time that you believe any of the following:

* Your military service was at least as likely as not the cause of your sleep apnea

* A service-connected condition caused your sleep apnea

* A service-connected condition aggravates or impedes the treatment of your sleep apnea

* Your non service-connected sleep apnea aggravates, or impedes the treatment of a service connected condition

* Negligent VA medical care caused your sleep apnea, or made it worse.

Why should you file a claim for service connection if you believe one or more of those things?

There are 3 Reasons, if you ask me.

1) Because sleep apnea that is not "asymptomatic" will interfere with your ability to work and hold a job. That's what VA Disability Compensation was meant to reimburse you for - a portion of the loss of earning power resulting from a military injury.

2) Because Sleep Apnea is the fulcrum on which a Veteran's long-term health is precariously balanced. 30 years after your war, you may find yourself with conditions that your Sleep Apnea caused - or the Sleep Apnea may interfere with your ability to treat another condition (remember how Sleep Apnea caused an insulin resistance in some Type 2 Diabetes patients?). You are entitled to be compensated for the

disabilities and limitations that result from your military service.

3) Because Sleep Apnea kills - directly by causing you to stop breathing while you sleep, or indirectly by causing conditions which shut down other systems in your body. Your surviving spouse and dependents will want to claim Survivors Benefits from the VA if your Sleep Apnea causes your death - so if you feel your military service in any way caused your sleep apnea, get it service connected as soon as possible.

Chapter 3:
Sleep Apnea and the 4 Pillars.

Before we can talk about Sleep Apnea and the 4 Pillars, we need to understand what the 4 Pillars of a VA Claim are.

I believe that there are four (4) key things that need to be proved in just about any VA Benefits Claim - I call them the 4 Pillars:

Pillar #1. Eligibility as a Veteran (Qualifying Service).
Here are 3 questions that a Veteran must answer to show eligibility for service-connected disability compensation:

Question #1: Did you serve in the active duty military?

You served in one the major branches (or a couple odd branches, like commissioned officers of the NOAA and the Public Health Service).

This is usually accomplished by a copy of your DD-214, but sometimes you will need more proof.

If you served in the National Guard, you are going to want to make sure that your callup to active duty was a "federal" callup and not a state governor calling you up to active duty.

The former will give you eligibility for service connected disability compensation through the VA. The latter will not.

Question #2: Did your injury occur while on active duty?

For service-connected disability eligibility purposes, it doesn't matter WHERE you were injured.

All the matters is the injury or incident which caused your medical condition have occurred between your date of entry to active service and your date of discharge.

Question #3: Do you have any situations that could remove your eligibility?

* *Drug, Alcohol and Tobacco Use:* The VA likes to deny any claim where drug use is even remotely at issue - on the grounds that they think the law removes a Veteran's eligibility if they drank, smoked, or used illegal drugs.

They are not always right to do that: there are plenty of situations where such situations can be service-connected.

Do yourself a favor: get a lawyer that understands the *Allen v. Principi* case.

Read more about service-connecting drug and alcohol abuse by following this link to the Veterans Law Blog.

* *Willful Misconduct:* If your injury is the result of a service-members "willful misconduct", then this may strip a Veteran of eligibility for service-connected disability benefits.
How do you know if the VA is going to claim this?

Simple: if the military service did a "Line of Duty" investigation and concluded that your injury is the result of "willful misconduct", then you may be ineligible. The opposite is true, too - if the military branch concluded that your injury was NOT the result of willful misconduct, the VA is largely stuck with that conclusion.

Read more about how Willful Misconduct can block your ability to recover service-connected disability benefits on the Veterans Law Blog.

* *Bad Conduct Discharge:* The only type of discharge that could disqualify you from service-connected disability benefits is the so-called "Bad-Conduct" or "Dishonorable" discharge.

There are, however, ways to upgrade your discharge after military service.

For example, are you a LGBT soldier discharged dishonorably under "Don't Ask, Don't Tell" policies of previous years?

You should be able to get a discharge upgrade in those situations, I would think.

***INSIDER TIP: Did you know that even if you got a "bad-conduct" or "dishonorable" discharge, if you are the victim of a Military Sexual Trauma, you are still entitled to free VA medical treatment for the injuries that resulted from that MST? Just go into your nearest VA Medical Center and get enrolled for VA Healthcare. If they give you any "flak" about eligibility, just have them take a look at "VHA Health Administration Directive 2010-33 (July 2010)".

* *AWOL:* Did your injury occur while you were Absent Without Leave for more than 180 days? You are, by law, not eligible....UNLESS...there are "compelling circumstances to warrant the prolonged unauthorized absence."

* *Jail*: If you are currently in jail, you are still eligible to seek a grant of service connection. You just won't receive all of your VA Disability Compensation while you are in prison. There are a lot of "ins and outs" on this one - call an attorney.

Pillar #2. Service-Connection.

Service Connection is actually comprised of 3 elements:

a) an in-service event, injury, disease, or illness

b) a current disability or limitation

c) Nexus between (a) and (b). There are 5 ways to show this nexus - I call them the 5 Paths to Service Connection, and talk about them in more detail in my Guidebook "5 Paths to Service Connection". Scroll to the beginning of this book for a link to purchase that Guidebook at a special discounted price.

You can read more about the 5 Paths to Service Connection, and especially the element of "nexus" to military service by clicking here and visiting this post on the Veterans Law Blog.

Pillar #3: Impairment Ratings.

How does the VA calculate the amount of money you will be paid when your military injury is service connected?

This is a question that not many Veterans understand the answer to.

In a nutshell, the VA examines the medical evidence in your C-File, compares it to the impairment rating table, and assigns a percentage. That percentage is what drives your VA disability compensation payment.

Here's how it works.

What are the VA Impairment Rating Tables?

The VA Impairment Rating Tables provide, in theory, a uniform way for the VA to fairly and consistently compensate Veterans who suffer from the same medical condition but who may not suffer from the same limitations in that condition.

A very common disability for Veterans is service-connected diabetes.

The VA Rates - or assigns a disability percentage - for diabetes based on whether there is medical evidence relevant

to the following criteria* (found at 38 C.F.R. § 4.119, Diagnostic Code 7913):

Diabetes managed by restricted diet: 10%

Diabetes requiring insulin AND restricted diet: 20%[19]

Diabetes requiring insulin AND restricted diet AND regulation of activities: 40%

Diabetes requiring insulin, restricted diet, regulation of activities, and 1-2 hospitalizations per year: 60%

After assigning a percentage, the VA rater than figures out the dollar amount of monthly compensation that correlates to that percentage, based on whether the Veteran is single, married, has children/dependents, etc.

Here are the 2014 VA Compensation Rate Tables.

Where do you find the VA Impairment Rating for your condition?

The VA publishes the Impairment Ratings at 38 CFR Table 4, which is known as the VA Schedule for Rating Disabilities.

You can find it on the internet by doing a search for 38 CFR Table 4.

You can buy the paper version of the Code of Federal Regulations, Title 38, Parts 18-end (Pensions, Bonuses & Veterans Relief) Department of Veterans Affairs: Revised 7/13 at Amazon.com.

[19] It's important to know that this is just an overview of Diagnostic Code 7913, for illustration purposes only. There are many more factors that can yield a higher or lower rating that I do not discuss here.

You can purchase a copy of the Code of Federal Regulations from the government (be prepared to shell out a few bucks and wait a several weeks).

You can also buy the 2013 Edition of Federal Veterans Laws, Rules and Regulations (2013) around the internet...be forewarned though, it carries a hefty $100+ price tag.

Here's an option I like if you have a Kindle: Get Title 38, Code of Federal Regulations (Pensions, Bonuses and Veterans' Relief), Volume 1 electronically and save some coin.

You can also get the "Bible" in Kindle format: Federal Veterans Laws, Rules and Regulations, (2013 Edition).

Once you get to 38 CFR Table 4, you will notice that it is hundreds of pages long.

The Table is broken down into 13 major body systems:

Musculoskeletal System

Organs of Special Sense

Impairment of Auditory Acuity

Respiratory System

Cardiovascular System

Digestive System

Genitourinary System

Gynecological conditions and Disorders of the Breast

Hemic and Lymphatic Systems

Endocrine System

Neurological Conditions and Convulsive Disorders

Mental Disorders

Dental and Oral Conditions

Each of those 13 major body systems is then broken into individual conditions, diseases, and disabilities within that body system.

For example, the Musculoskeletal System lists hundreds of conditions like arthritis, lumbar conditions, amputations of feet and hands, etc.

The Cardiovascular System lists dozens of conditions like Coronary Artery Disease, Valvular heart disease, Myocardial infarctions, and diseases of the arteries and veins.

How do you figure out your VA Impairment Rating?

This explanation is over-simplified so that I can simply illustrate how the VA Impairment Rating Tables work.

But lets say that you are a Veteran of OIF (Iraq) or OEF (Afghanistan), and have a service-connected diagnosis of diabetes.

Diabetes is a condition that (largely) affects the Endocrine system. So you go to 38 CFR Table 4, and find that conditions of the Endocrine System are found at 38 CFR § 4.119.

You turn to 38 CFR § 4.119 and find that the rating criteria (what percentage relates to what medical evidence) for Diabetes Mellitus is listed under Diagnostic Code 7913.

Then, you match up your medical evidence to the rating criteria under Diagnostic Code 7913 until you get the appropriate rating.

Where does the VA get the medical evidence to determine your Impairment Rating?

Mostly, from your C-File: they are bound by the evidence in your C-File in determining this rating.

Most times, the evidence used to assess the Impairment Rating is provided by the VA Doctor that performs the Compensation and Pension Exam (although the VA must look at all the medical evidence in your C-File)

So, if you have a rating that is incorrect, or too low, then you can bet that it is because the right evidence was **not** in your C-File.

This is one reason - among dozens - that I believe that the C-File is the most important document in your VA disability compensation claim. It is so important that I have published an Guidebook showing you how to get a copy of your C-File.

You can find the link to purchase the C-File Guidebook at the front of this book - I've included a Special Discount if you purchase it using that link.

Can a Veteran appeal the VA Impairment Rating decision?

Yes.

If you think that the rating is too low, you can and should file a Notice of Disagreement (NOD) with the decision assigning your Impairment Rating.

Most Veterans - believe it or not - do not know this.

Veterans are taught to challenge VA denials of service connection, but rarely are they taught to appeal incorrect assignments of an Impairment Rating.

In fact, my experience analyzing hundreds - if not thousands - of VA C-Files is that one of the most common VA errors that Veterans **don't** appeal is the assignment of a VA Impairment Rating that is too low.

Again, the above explanation is just a general overview of the VA Impairment Rating Tables - or as some folks call it, the VA's Schedule for Rating Disabilities.

Pillar #4: Effective Date.

The LAST thing that you want to make sure of in any VA Claim or Appeal is that the VA assigned the right Effective Date.

Getting the correct effective Date is the 4th Pillar of my 4 Pillars of a VA Claim for Service Connection.

When I say its the last thing that you want to address, that does not mean you should ignore it throughout your claim.

In fact, any time that you file a Notice of Disagreement (NOD) or a VA Form 9, you should always indicate that you reserve the right to challenge any effective date when the VA assigns one.

So, until you receive a decision GRANTING service-connection for a condition, there is really nothing you can do about the Effective Date.

The VA doesn't even assign one until they establish the initial Impairment Rating (Pillar 3) for your condition.

What is a VA Claim "Effective Date" and Why Should You Care?

When a VA grants a claim for service-connected disability compensation, it must decide on what date will be the start date for payment of benefits - because it takes the VA YEARS to decide claims, this "start date" governs how much money the VA owes you.

The date that governs when the VA should have started paying you Service Connected Disability Compensation is known as the Effective Date.

How do you figure out what the "right" VA Claim Effective Date is?

This is a tougher question than it appears.

There are a lot of twists, turns, and traps in Effective Date challenges and appeals - and if you are fighting for an earlier one, I cannot stress enough it is to seek out professional help.

Most VSOs don't know the difference between an Effective Date and a Blind Date, so I strongly encourage you to seek out the assistance of an accredited VA Attorney.

Find out how to choose the right attorney for your VA Claim or Appeal by downloading a FREE copy of my Guidebook: "8 Things Veterans Should Know Before Hiring an Attorney" - there is a link to this Guidebook earlier in this Guidebook.

General Rules Governing Assignment of VA Claim Effective Dates.

There are a lot of unique, unusual, hard to find and odd-ball Effective Date Rules. I can't possibly tell you about them all here.

What I CAN tell you about are some of the more common rules - here are 6 of the more common ones.

1. The "General" Effective Date Rule.

The General Rule is that the Effective Date is the LATER of these 2 dates:

#1: The date the VA received your original claim.

#2 The date your entitlement arose.

There are a whole bunch of $100 Lawyer Words in those short sentences. You will need to understand what a "claim" is, and you will need to understand what date your entitlement arose.

But remember, it is the LATER of the 2 dates - so if the VA received your claim on April 1, 2010, then it doesn't matter if your entitlement to benefits arose at an earlier date.

What DOES matter is what constitutes a claim.

And that is too much information for THIS post - we'll cover that question in my Guidebook "10 Veterans Court Cases that Every Veteran Should Know". You can download this Guidebook using the discount links that appear earlier in this Guidebook.

There is also considerable argument over how to determine the date the VA received the Claim - but these arguments really only matter when the possible dates are in a different month (or, when you need a PRECISE effective date within a specific month to show another federal, state or county agency the date when you became entitled to other local government benefits as a disabled veteran).

Generally, though, if the VA argues that they received your Claim on April 24, 2003, and you claim they received it 2 weeks earlier, on April 10th, the outcome of your case will be the same - as far as getting money from the VA, anyway.

2. Tying your Effective Date back to Separation from Military Service.

If you file a claim for disability compensation within one (1) year of your discharge from service, then when the VA service-connects your condition, you may be entitled to get past-due benefits all the way back to your Date of Separation.

But, miss that 1 year application timeline by as little as one (1) day, and the law is pretty clear - you don't get that advantage.

Bottom Line: File your claims while still on active duty, or as soon as possible after getting discharged.

3. Effective Dates in Claims for Increase.

Generally, in a claim for Increase in Rating, the effective date is the later of the date that your service-connected disability got worse, or the date the VA received your claim.

So, if you have service-connected PTSD, and you were receiving 50% until November 2012, when your condition started to get worse, you might file a Claim for Increased Rating.

If you filed that claim in January 2013, under the GENERAL rule, you might still be entitled to an effective date of January 2013 (although your payments will start the month AFTER the month of the Effective Date).

However, in a Rating Increase Claim, the law requires that the VA look back up to one year prior to the date of the claim filing to see if "it is ascertainable that an increase in disability had occurred."

If you can show that you had more than a marginal increase in the severity of your condition in the year prior to filing the

Claim for Increase, your Effective Date could be the date where there is first evidence of an increase in severity.

4. Effective Dates when submitting New and Material Evidence During the Appeal Period.

So the VA issues a Ratings Decision and you have one year to appeal by filing a Notice of Disagreement.

You knew that, right?

If you submit new and material evidence - from any source whatsoever - during the one year appeal period, the effective date should most likely be the date that you filed the original claim (prior to the ratings decision).

How does that work?

You file a claim on February 15, 1995.

The VA denies the claim on October 10, 2001, and you have one year to file the NOD/Appeal.

Let's say that within that 1 year period, you submit new and material evidence in your claim - doesn't matter what it is, as long as it is new and material to the reason for the denial in October 2001.

Your effective date - if the claim is granted - could be February 1995 - NOT October 2001.

Check out 38 CFR 3.156(b) to learn more about that rule.

5. Effective Date determinations in Agent-Orange claims under the Nehmer case.

Talk about confusing - the *Nehmer* effective date rules can be pretty challenging to navigate. *Nehmer* effective date rules

come into play when a Veteran has a condition that is presumed to result from exposure to Agent Orange.

I'm going to STRONGLY encourage you to reach out to an attorney to help you if you are trying to get an earlier effective date under *Nehmer*.

There are just way too many legal strategies and arguments surrounding effective dates - and especially *Nehmer* effective dates - to cover in a single chapter of a Veterans Law Guidebook.

Read more about calculating effective dates under Nehmer at this link to the Veterans Law Blog.

6. My FAVORITE Effective Date Rule.

So, let's say you receive a VA Ratings Decision in July 1975 for a claim that you filed in June 1974.

Let's say the basis for the denial was - in July 1975 - that there was no evidence that you had an event in-service that caused your disability in 1975.

You don't appeal.

20 years later, in March 1995, you find a copy of your service medical records - turns out they weren't "lost" but were maintained in paper files by the unit you served with.

You send those records to the VA in 1995, and they VA reopens your claim and grants you service connected disability compensation BASED ON THE INFORMATION IN THOSE RECORDS (material or not).

Which effective date do you think you get?

June 1974 - the date of your original claim?

July 1975 - the date of the original denial?

March 1995 - the date you reopened your claim?

If you guessed June 1974, I would argue that you guessed correctly.

38 CFR 3.156(c) requires that if newly discovered military service or military medical records form "all or part" of the basis of a new decision granting a benefit, the effective date goes back to the original claim which was denied for lack of that information.

Get Help When Challenging an Effective Date Decision by the VA.

There are so many more Effective Date rules that I really have to STRONGLY suggest that you get an attorney to help you in your Effective Date challenges.

I publish a FREE Guidebook for Veterans: "8 Things Veterans Should Know Before Hiring an Attorney in their VA Benefits Claim." Follow this link to get your FREE copy.

Now that you know the 4 Pillars of a VA claim, we can talk more specifically about each of them in the context of sleep apnea claim.

Chapter 4:
Sleep Apnea and the 4 Pillars: Eligibility

There is nothing unique about Sleep Apnea claims and basic VA Benefits eligibility.

In fact, this "Pillar" of VA claims rarely has to do with the medical condition being claimed, but more with the quality and nature of the Veteran's service.

As long as you served in the Active Duty Military, and the event that led to your sleep apnea occurred while you were in Active Federal military service, you should have no worries about this element.

Where you will get into trouble is in the "disqualifiers".

What does that mean?

There are certain things that can "disqualify" a Veteran from eligibility (see the previous chapter for a discussion of a few of the bigger events that serve to disqualify a Veteran from eligibility).

Many Veterans have mental health conditions which lead to heavy alcohol and/or drug use. If the medical evidence shows that your sleep apnea resulted from - or is at least as likely as not the result of alcohol or drug abuse - then your claim will become a lot more challenging

The VA doesn't like dealing with the fact that many Veterans turn to alcohol and drugs to cope with many mental health conditions.

And so any time they see Alcohol or Drugs mentioned as a factor in a medical condition, they deny.

But this is not proper.

If the VA is doing this to you, I want you to read up on the *Allen v. Principi* case. This is the case that said, essentially, that alcohol and drug abuse can be service-connected as part of a causal chain between 2 conditions.

So, for example, let's say you are diagnosed with combat-related PTSD. You "self-medicate" or "cope" by using or abusing drugs or alcohol. Your drug or alcohol use then causes your sleep apnea.

Can your sleep apnea still be service-connected?

Depending on the particular medical and factual evidence in your claim, there is a pretty good chance it can be.

Read about the Allen v. Principi case in this post on the Veterans Law Blog.

Get a much more detailed analysis of the *Allen v. Principi* case, and learn how you might apply the lessons from that case in your VA Claim or appeal, in my Guidebook "10 Veterans Court Cases that Every Veteran Should Know".

Use the link earlier in this Guidebook to purchase your copy at a discount.

Now, another way that I have seen a lot of Veterans try to service connect their sleep apnea is by using 38 CFR 3.317.

This regulation - oversimplified here - pertains to Gulf War Syndrome.

It generally allows a Veteran to service connect undiagnosed illnesses, or medically unexplained chronic multi-symptom illness, defined by a cluster of signs or symptoms.

These list of cluster signs/symptoms include fatigue, upper and lower respiratory problems, headaches, and sleep disturbances.

However, once you have a diagnosed condition like Sleep Apnea, you are no longer able to use 38 CFR 3.317 to service connect your undiagnosed symptomatology.

One Veteran recently found this out the hard way at the BVA.

In an April 25, 2014, BVA decision, the Board declined to service connect a Veteran's sleep apnea under 38 CFR 3.317 even though he had qualifying Persian Gulf War service.

This Veteran served in the Southwest Theater of Operations, and even had been awarded the Kuwait Liberation Medal. He had symptomatology, in and after service, of fatigue, as well as sleep and breathing problems.

The BVA didn't waste a lot of time denying service-connection on these legal theory. It said, simply:

A medical exam "…determined [the Veteran's] condition to be one with a known etiology and clinical diagnosis, and therefore not eligible for service connection under 38 C.F.R. § 3.317."

Takeaway point: You can only use 38 CFR 3.317 to attempt to service-connect sleep and breathing problems if you served during the Persian Gulf War (as defined in that regulation), and have an "undiagnosed illness".

That *doesn't* mean that you haven't seen a doctor to get a diagnosis.

It *does* mean that the disability that you are claiming service connection for must not - by history, physical exam and lab tests - be attributable to any known clinical diagnosis.

Chapter 5:
Sleep Apnea and the 4 Pillars: Current Diagnosis

Remember, there are 3 Types of Sleep Apnea: Obstructive (OSA), Central (CSA), and Complex, or Mixed, Sleep Apnea.

Each is diagnosed a little differently.

Before we can talk about how to prove the diagnosis of your current sleep apnea disability, I need to explain to you a couple of the different TYPES of diagnoses - at least for VA claim purposes.

First, there is the traditional diagnosis - where symptoms are observed and recorded and a conclusion is made.

Then there is the "differential diagnosis", which is (oversimplified), a type of diagnosis which concludes that a patient has a condition by *eliminating* other possible conditions.

This type of diagnosis might be used when a condition presents differently than the standard diagnostic criteria of a traditional diagnosis might suggest it should.

A less well-known type of diagnosis is the "rule-out" diagnosis.

This is (oversimplified) a type of differential diagnosis where all other conditions or diagnosis do not "fit" the presentation of symptomatology in the patient. A condition is diagnosed by excluding other possible conditions.

Traditional, Differential, and Rule-Out diagnoses all "should" carry the same legal weight in the VA claims process.

However, they often do not get the same legal weight - and in certain situations, I might argue that this is incorrect.

If the VA Regional Office, or the BVA, denies your claim because they gave less weight to a Rule-Out or Differential Diagnosis, then it is probably a good time to consider an attorney that knows how to attack this particular type of decision.

> Check out my Guidebook: "8 Things a Veteran Should Know Before Hiring an Attorney".
>
> Use the link at the front of this Guidebook to get your FREE Copy.
>
> It will help you find the attorney that is best for your VA claim - after all, not all attorneys are the same, and not all attorneys are a good fit for all Veteran's case.

Two types of diagnosis which the VA - or the BVA - might not give a lot of (or any) weight to are the "Probable" or "Suspected" diagnoses.

Technically, these are not "diagnoses" at all, but are instead just tools for physicians and their offices to use insurance billing and coding purposes - the physician that may not have a clear picture of a medical condition still needs to get paid or reimbursed for their testing, lab-work, etc.

However, when the VA or BVA see these medical "terms of art" (i.e., "doctor jargon"), they tend to interpret them using the lay, non-medical, meanings: the VA and BVA sometimes assume that a Probable or Suspected diagnosis means that the condition does not exist.

This can be an incorrect interpretation of these words: metaphorically speaking, it is the same as assuming that the

words "too" and "two" mean the same thing because they sound the same.

Or that the word "fair" can only mean one thing because it is one word; in fact, the use of the word relies on the context - "fair" can refer to a fun summer gathering like a county fair, or it could be used to describe the reasonableness of something, like a fair decision.

The meaning is derived from the context, and when the BVA or VA Regional Office concludes that a "probable" or "suspected" MEDICAL diagnosis means that LEGALLY a condition does not exist, they might just be reading the terms out of context.

Other reasonable minds would disagree with me.

So, if the BVA (or a VA Regional Office) denies your claim because you have a diagnosis of "probable" or "suspected" sleep apnea, then one possible recourse might be to consider appealing the denial, and arguing that the BVA or VA decided the claim based on incomplete evidence, and that the proper remedy is to send the Veteran for a diagnostic exam to confirm the probable or suspected condition.

Let's move on and talk about the specifics of what constitutes a traditional diagnosis of the 3 different types of Sleep Apnea: Obstructive (OSA), Central (CSA), and Complex, or Mixed, Sleep Apnea.

The Diagnosis of Obstructive Sleep Apnea (OSA)

Obstructive Sleep Apnea (OSA) is most commonly diagnosed through a sleep study.

A "sleep study" is the broad term for a polysomnogram.

A Polysomnogram is a multiple-component test that will use various electronic equipment to transmit and document specific physical events while you sleep. The recordings are then analyzed by your physician, or a qualified sleep specialist, to determine whether or not you have sleep apnea.

A polysomnogram may (but not always) include monitoring on other types of equipment, such as:

* An EEG (electroencephalogram) to measure and record brain wave activity.

* An EMG (electromyogram) to record muscle activity such as face twitches, teeth grinding, and leg movements, and to determine the presence of REM stage sleep.

* An EOG (electro-oculogram) to record eye movements.

* An ECG (electrocardiogram) to record heart rate and rhythm.

* Nasal airflow sensor to record airflow.

* Snore microphone to record snoring activity.

The use of these additional components will rely largely on your physician's particular requests during the sleep study, or based on the unique symptomatology of your sleep breathing problems, or based on other medical conditions you may have, or be suspected of having.

In 2009, the Adult Obstructive Sleep Apnea Task Force of the American Academy of Sleep Medicine issued recommendations to physicians and said this[20]:

"Clinically, OSA is defined by the occurrence of daytime sleepiness, loud snoring, witnessed breathing interruptions, or awakenings due to gasping or choking in the presence of at least 5 obstructive respiratory events (apneas, or hypopneas, or respiratory effort related arousals) per hour of sleep."

"The presence of 15 or more obstructive respiratory events per hour of sleep in the absence of sleep related symptoms is also sufficient for the diagnosis of OSA."[21]

"Diagnostic Criteria for OSA are based on clinical signs and symptoms determined during a comprehensive sleep evaluation, which includes a sleep oriented history and physical examination, and findings identified by sleep testing." [22]

A Sleep Study is not essential to a diagnosis of OSA.

In fact, the American Academy of Sleep Medicine was very careful to say that the diagnosis of OSA using a Sleep Study was a *recommendation*, and that the ultimate decision rested on the discretion of the clinician or practitioner.

So you don't always need a Sleep Study.

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[20] Clinical Guide for the Evaluation, Management, and Long-Term Care of OSA in Adults: Journal of Clinical Sleep Medicine, Vol. 5, No. 3, 2009. (available at http://www.aasmnet.org/Resources/clinicalguidelines/OSA_Adults.pdf, last visited on July 2, 2014)

[21] I saw NO BVA decisions that acknowledged this alternate diagnostic criteria - the BVA is "hung up" on the sole diagnostic criteria of an AHI of 5 or more.

[22] Id.

BUT - as shown in the next chapter - a diagnosis of Sleep Apnea without a Sleep Study (even if it occurred in military service) is going to give you problems with the next Pillar (establishing the in-service incurrence of sleep apnea).

In my observations and readings of BVA cases, trying to service-connect sleep apnea without a sleep study is like playing Russian Roulette with your VA Sleep Apnea Claim.

Takeaway Point: **Better safe than sorry. Get a Sleep Study performed and have a sleep specialist properly diagnose OSA (or CSA and Complex Sleep Apnea, for that matter)**.

But make sure that your diagnosis does not rest on a Sleep Study alone.

Ensure that it is accompanied by a physical exam and a sleep history assessment by your treater or the sleep specialist conducting the polysomnogram.

This will ensure that the VA, or the BVA, will not attempt to argue that your diagnosis is not competent or credible because it lacks that history and exam.

When you are working with your medical care provider - private or VA - it is important to understand what they are doing in regards to assessing your condition.

What do I mean?

I have heard stories of Veterans that have gone for treatment of breathing disorders, or sleep disorders, only to be told that they don't have sleep apnea, or that they have some other condition. Or that the doctor casually assumes that obesity or a high BMI is the cause of Sleep Apnea.

Make sure you understand what your physician is - and is not - doing, and why.

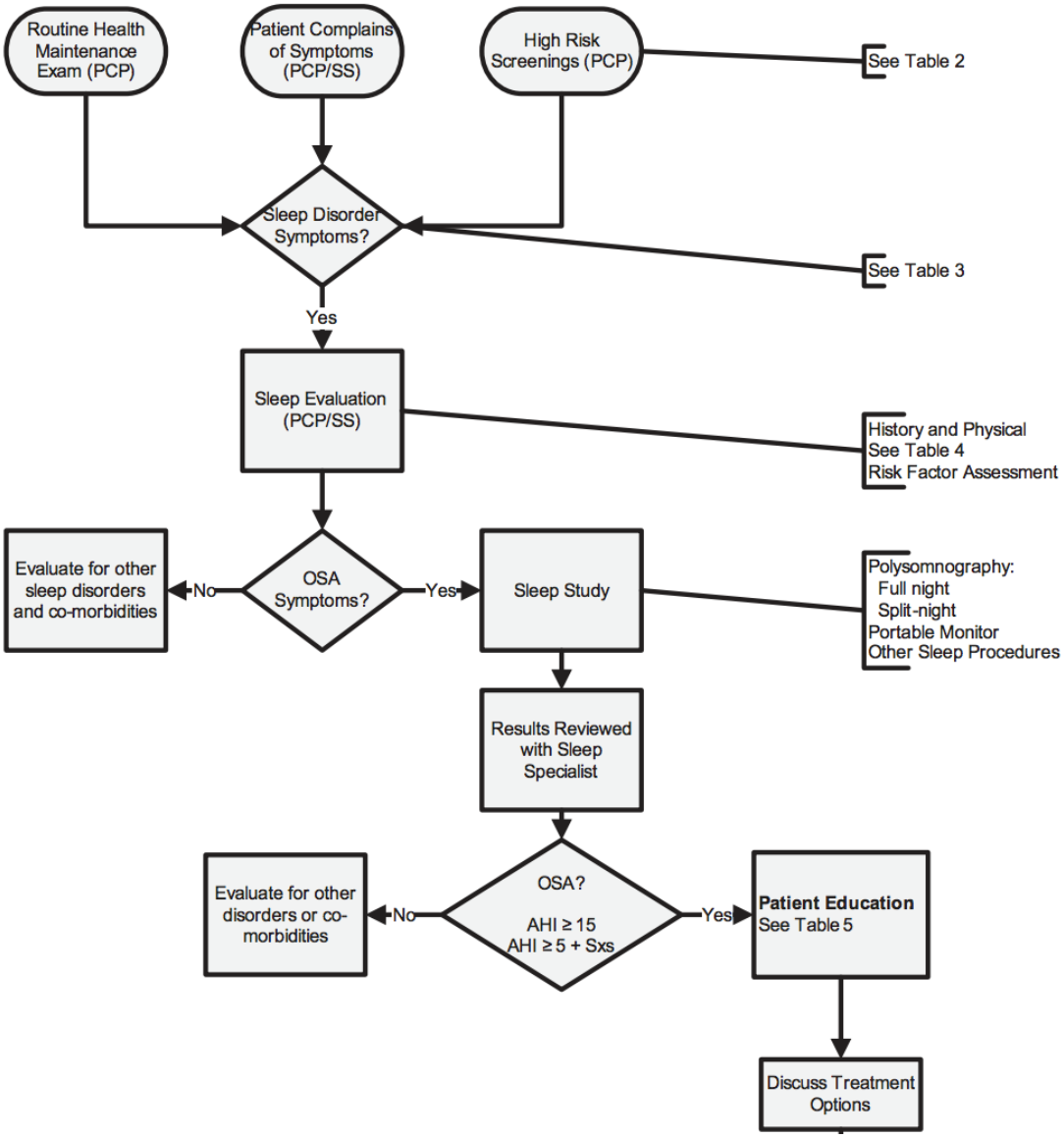
Ask for a Sleep Evaluation.

Ask for a Sleep Study.

While most doctors know what they are doing, and are quite good at what they do, be involved in your medical care.

Understand what you need to get in better health, and understand what you need from your doctor's records and notes to support your VA Sleep Apnea Disability Claim

On the next page, you will find a "flow chart" that the American Academy of Sleep Medicine recommends clinicians use when assessing whether certain sleep or breathing symptoms should be diagnosed as OSA…follow what your treater is doing, and ask questions based on this chart.



The Diagnosis of Central Sleep Apnea (CSA)

Remember how CSA differed from OSA?

CSA is the type of sleep apnea that results from a (over-simplified) miscommunication between the brain and the breathing muscles. CSA is often diagnosed in connection with another condition that causes that "miscommunication".

So, when it comes to diagnosing Central Sleep Apnea (CSA), the sleep study takes on an ever-so-slightly lowered importance. Breathing patterns, oxygenation of your blood (or measuring the proportion of Carbon Dioxide in your blood), and other tests may also help with the diagnosis.

For VA purposes, though, it never hurts to have a Sleep Study performed, even for a CSA diagnosis. In fact, I strongly encourage any Veteran claiming service connection of sleep apnea to get a Polysomnogram to properly diagnose sleep apnea.

What is crucial, however, for a CSA diagnosis, is that the diagnosing physician indicate what condition - or conditions - caused the CSA (in VA jargon, this would be the condition that sleep apnea is "secondary" to).

If you don't get this finding in your sleep apnea diagnosis, then your VA Comp and Pen Examiner is invariably going to go through the archaic methodology for concluding that your CSA is not related to military service.

They are going to whip out their 20 year old "cheat sheet" that shows that the "risk factors" for CSA are "….being male; being of older age; having an enlarged neck, and

having a history of a heart disorder, stroke, or brain tumor."[23]

They are then going to conclude that these risk factors that do or don't exist: whatever allows them to conclude that the CSA is not clearly related to military service, but appears attributable to other intervening risk factors.

This happened to one Veteran in a BVA decision from February 26, 2014.

Here's how it went down.

The Veteran served on active duty from 1987 to 1991, including time in Southwest Asia from December 1990 to April 1991.

In September 2008, the Veteran claimed service connection for sleep apnea, and in October 2009, he told the VA that he believed it was secondary to his Post-Traumatic Stress Disorder.

(Remember, earlier, how we talked about the correlation between anxiety disorders, like PTSD, and Sleep Apnea? Well, PTSD never appeared on the VA C&P Examiner's list of risk factors - even to this day as the evidence becomes increasingly convincing as to the correlation and/or causative connection between CSA and PTSD).

The Veteran's service medical records had no mention of a diagnosis of sleep apnea.

The Veteran provided no lay evidence showing his symptomatology of sleep apnea between discharge and diagnosis.

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[23] As you will see throughout this eBook, this is an archaic and medically incomplete - if not wholly inaccurate - way of assessing the etiology of sleep apnea - CSA, OSA, or Complex Sleep Apnea.

In March 2010, the Veteran was diagnosed with Central Sleep Apnea - by the VA - and given a CPAP machine.

The VA sent him for a C&P Exam in November 2013, and the C&P doctor explained the difference between CSA and OSA, and then said this:

"According to the examiner, identified risk factors for central sleep apnea include being male; being of older age; and having a history of a heart disorder, stroke, or brain tumor."

The Examiner added: ""[i]t would be speculative to assume that the Veteran's sleep apnea has been aggravated by his PTSD."[24]

Can you see how a diagnostic statement from the sleep specialist connecting the sleep apnea to the Veteran's PTSD might have been more helpful in the VA C&P Exam?

Contrast this with another case where the Veteran was diagnosed with Central Sleep Apnea (CSA) during a sleep study.

In that case, the physician that diagnosed the CSA opined - without any explanation - that the Veteran's CSA was "at least as likely as not" related to the Veteran's military service.

The BVA read this opinion, and compared it to the large amount of lay evidence that the Veteran had included showing the chain of sleep apnea symptoms from military service until the sleep apnea diagnosis.

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[24] I hope this Veteran appealed this decision to the CAVC - the BVA appears to have really over-stepped their bounds: the Examiner did not EVER conclude that the CSA was "less likely than not" related to military service - the BVA Judge "construed" that meaning. That is clear error - the BVA may not supplant its own understanding for medical reasoning.

The outcome for this Veteran was more favorable - the Veteran was granted service connection of his sleep apnea.

It is extremely rare - or at least several doctors have told me it is extremely rare - that CSA appears in a "spontaneous" or "primary" capacity (meaning, not connected to any other condition).

It is invariably some other medical condition that leads to Central Sleep Apnea.

If you have a CSA diagnosis, ask your diagnosing physician to state what the CSA is caused by, or secondary to.

The Diagnosis of Complex Sleep Apnea (CompSA).

Complex, or Mixed, Sleep Apnea is typically diagnosed in patients that first have a diagnosis of OSA.

In what I am told is its most common presentation, OSA resists treatment with a CPAP - or other traditional OSA treatment tools, and the symptoms persist, or the symptoms become those more clearly identified with CSA.

Your practitioner pay refer to this as Complex Sleep Apnea, Mixed Sleep Apnea, or "Treatment Emergent Central Sleep Apnea."

The diagnosis of this condition is going to typically include a diagnosis of OSA, plus medical and lay documentation supporting the resistance of the OSA to treatment, or the continuation of Sleep Apnea symptomatology even after the use of a CPAP machine, followed by a medical diagnosis of Complex Sleep Apnea.

There are very, very few BVA decisions that talk about Complex Sleep Apnea.

That is because it is a fairly emergent condition - remember, it was only in 2006 that the Mayo Clinic concluded that Complex Sleep Apnea was distinct from OSA and CSA.

For now, then, there is not much guidance from the BVA as to what sort of evidence they would like to see to prove up a diagnosis of Complex Sleep Apnea..

I will say that the few decisions that I saw talking about Complex Sleep Apnea did not really lay out the BVA had good medical knowledge of the condition.

One BVA decision talked about the original OSA diagnosis as being **"opposed to"** a more contemporaneous Complex Sleep Apnea diagnosis - it was as if the BVA saw some inconsistency in being initially diagnosed with OSA, and later diagnosed with Complex Sleep Apnea (or even CSA).

There is nothing "opposite" or "contrary" about this path of diagnosis: it is the most common presentation of Complex Sleep Apnea, as several medical practitioners and sleep specialists have shared with me.

The BVA seems to treat Complex Sleep Apnea as if it is a blend of Central and Obstructive Sleep Apnea, and I suppose that this could be accurate in some cases.

But the lack of medical evidence explaining this progression of Complex Sleep Apnea (as well as the use of nebulous language like "suggests" or "appears") tells me that the BVA is not seeing good medical documentation that helps the BVA Judge understand what the medical condition truly is.

So, if you have a Complex Sleep Apnea claim, you would do well to have a lot of medical evidence explaining the path and progression of your Sleep Apnea - from OSA to

Complex Sleep Apnea - or from OSA to CSA - as well as identification and explanation of what Complex Sleep Apnea is - in your unique medical situation.

Chapter 6:
Sleep Apnea and the 4 Pillars: In-service event

The technical verbiage of this element is that a Veteran must show "in-service incurrence or aggravation of a disease or injury".

That really breaks down to 4 ways to prove this "Pillar", as it relates to sleep apnea:

* In-service incurrence of Sleep Apnea (Diagnosis)

* In-Service incurrence of Sleep Apnea (Symptomatology)

* In-service injury that resulted in post-service Sleep Apnea

* In-service aggravation of Sleep Apnea

Let's look at those one at a time.

As we do, keep in mind that the evidence you use to prove the in-service incurrence of sleep apnea will largely depend on the unique type of Sleep Apnea you have (OSA, CSA, or Complex Sleep Apnea), or the medical conditions that your physicians believe might be causing your sleep apnea, or the unique nature of your service.

There is no "one-size-fits-all" path to showing in-service occurrence, or origination, of your Sleep Apnea condition.

Be as informed as you can be about all of the above factors, so that you can decide the best evidence to submit, or the best arguments to make, in asserting a particular in-service event, occurrence, diagnosis, or other situation which you believe gave rise to your Sleep Apnea.

How to Prove In-Service Incurrence of Sleep Apnea (In-Service Diagnosis).

There are, generally, 2 ways to show that your incurred "sleep apnea" in service. First, you can show an actual in-service diagnosis of sleep apnea. Second, you can show the presence of symptoms of sleep apnea - or the condition or event that caused your sleep apnea - occurring in service.

The first is rather straightforward. If a military doctor diagnosed you with sleep apnea while you were in the military service, 9 times out of 10, the VA can accept this diagnosis as proof of Pillar 2 (In Service Incurrence).

However, 1 time out of 10 (that is a "guess-timate"…I have no actual statistics how often this happens, but it is not typical) the VA might not accept an in-service diagnosis of sleep apnea as proof of "Pillar 1".

Why not?

In a nutshell, because there is something that they don't like about the diagnosis.

In a 2012 BVA Decision, I read of a Veteran who had a "clinical" diagnosis of sleep apnea. The VA Regional Office and the BVA rejected that diagnosis on the grounds that the clinical diagnosis was not corroborated or confirmed by a sleep study, or polysomnogram.

This led the VA to send the Veteran for an exam, and a sleep study was conducted. The VA's sleep study - there were actually multiple sleep studies performed in this case - concluded that the Veteran was "negative" for sleep apnea, and instead had insomnia.

Now, to be fair, the history of this Veteran's sleep apnea condition was cloudy, at best, and the clinical sleep apnea

diagnosis unsupported by a sleep study raised a red flag with the VA Regional Office.

To contrast this, consider this BVA Decision.

A Veteran testified that he had a sleep study and an in-service diagnosis of sleep apnea. He also testified as to the symptomatology of his sleep apnea as it presented in service.

The BVA stated:

> *"While the sleep study could not be located in the claims file, the diagnosis of sleep apnea in service was established. The Veteran described current symptoms compatible with a diagnosis of sleep apnea. Therefore, the Veteran's current sleep apnea was most likely caused by or a result of (or related to) the sleep apnea reported in service."*

The Board accepted the claim of the diagnosis in service - but not just because the Veteran's testimony of symptomatology supported a sleep apnea diagnosis. In this case, the BVA put great weight on the VA examiner's opinion that:

> *"… the Veteran's current sleep apnea was related to the sleep apnea [he] reported in service (in other words, the Veteran's competent and credible reports of symptomatology)."*

What's the point?

If you have an in-service diagnosis of sleep apnea, most of the time the VA is going to accept it as evidence of in-service occurrence of the condition….unless the rest of the record suggests that the diagnosis was not correct, or was incomplete, or has changed, or otherwise lacks corroboration by a medical expert connecting in-service

diagnosis or symptoms of sleep apnea to a present diagnosis of sleep apnea.

How to Prove In-Service Incurrence of Sleep Apnea (Symptomatology).

This situation is going to apply to a great many Veterans.

Here's how it arises.

Years after service, you are diagnosed with Sleep Apnea.

In the course of providing your "sleep history" to the physician that performs the Sleep Study, you recall that while you were in the service, you had many of the same symptoms that are now being diagnosed as Sleep Apnea.

Logically, most Veterans believe that showing that they had the symptoms in service means that their current Sleep Apnea is "service-connected".

This is not necessarily correct, and the misunderstanding stems from this fact:

In VA Claims, Symptoms are not the same as a Condition.

Remember when we talked about all the symptoms of Sleep Apnea?

Remember how I pointed out that these symptoms could also be symptoms of many other medical conditions, or even other types of sleep-breathing disorders?

Most Veterans don't realize that while they are competent to testify as to the symptomatology of the conditions from which they suffer - and sleep apnea symptoms are no different - they are not generally qualified, or competent, to show that the sleep apnea symptoms that they remember

experiencing in service are symptoms of the same sleep apnea condition that has been currently diagnosed.

In these situations, to prove up the element of "in-service" occurrence of sleep apnea - when all you have is lay evidence (yours and any one else that observed those symptoms) of in-service symptoms that "present" like sleep apnea and a current medical diagnosis of sleep apnea - you are going to need a medical opinion that connects your current condition to your in-service symptoms.

This can be provided by a private medical doctor, a VA medical doctor, or even a VA C&P examiner.

Let me give you an example of what I mean. Take a look at this 2014 BVA Decision.

A Veteran that served in Iraq was diagnosed with sleep apnea several years after service. His service appears to have ended in 2003, and the first diagnosis of sleep apnea was in 2007.

When he got to the BVA, the following "key" pieces of evidence were in his C-File:

> 1) Lay Statements from the Veteran, and the Veteran's wife describing the sleep apnea symptomatology since the Veteran returned from Iraq until the 2007 diagnosis.
>
> 2) A VA C&P exam from February 2012 concluded that sleep apnea was "less likely than not" related to military service, on multiple legal theories. (in other words, a negative or adverse C&P Exam).
>
> 3) A private physician opinion noting post-deployment symptomatology of sleep apnea, and in reliance on that symptomatology, an opinion that

> the Veteran's Sleep Apnea was, at least as likely as not, related to the Veteran's tours of duty in Iraq.

All 4 of these pieces of evidence - 2 lay statements and 2 medical opinions - were vital.

The Lay statements - while themselves not competent evidence of the in-service occurrence of the sleep apnea condition - were competent evidence of symptomatology.

The adverse VA C&P Exam - which failed to consider the lay evidence provided by the Veteran and his wife - opened the door for a BETTER opinion that relied on all of the evidence of record, including the lay statements of the Veteran and his wife.

The private medical opinion did exactly that: it relied on the lay evidence of symptomatology to connect the dots from the in-service symptomatology to the current sleep apnea condition AND THEN formed the opinion that the sleep apnea was "at least as likely as not" related to military service.

Here are the Takeaway Points from this case:

> 1) Take away any one of those 3 pieces of evidence, and the Veteran stood a really good chance of losing his sleep apnea service-connection appeal.
>
> 2) The lay evidence "proved-up" the in-service and post-service symptomatology, and the medical opinion connected that in-service symptomatology to the current diagnosis. [25]

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[25] This single sentence shows the method that I cannot stress enough: I'd be willing to bet that many Veterans can quickly fix their VA Sleep Apnea Appeal by proving up in and post-service symptomatology with Lay Evidence, and using that lay evidence to support a better Medical Nexus Opinion - from a private doctor or even from a VA C&P examiner.

In other words, a doctor corroborated that the symptoms that appeared in service were, as a matter of medical fact, symptoms of sleep apnea and not some other condition.

Now, don't get confused - showing that your in-service symptoms of sleep apnea are the same as the symptoms of your current sleep apnea symptoms or diagnosis does NOT mean that you have proved the vital evidence of "nexus" to military service.

Though it seems like you have, and in some cases you may have simultaneously proved both elements, in most cases, you are going to want a medical expert opinion that says the "magic words" that your current sleep apnea is "at least as likely as not" related to your military service.

The purpose of a medical opinion that connects your lay statements - and I hope you have more than 1 or 2 Lay Statements - of in-service symptomatology of sleep apnea is not to conclude that your sleep apnea is "related" to your military service.

The purpose is to show that the symptoms that you identified in service are actually symptoms of your current medical condition - and not some other medical condition.

Understanding that distinction is CRUCIAL - otherwise, you will likely be left with a VA Ratings Decision, or a BVA decision, that says that you have not proved an in-service occurrence of sleep apnea based on the appearance of in-service symptomatology.

Here it is again, in the most basic language possible:

Lay Evidence of Symptoms of Sleep Apnea in service

PLUS

Medical Evidence that those are symptoms of Sleep Apnea (and not another condition)

PLUS

A current diagnosis of sleep apnea

EQUALS

Likely Proof of Pillar 2: in-service occurrence of sleep apnea.

BUT DOES NOT NECESSARILY EQUAL

Proof of Nexus of Sleep Apnea

Contrast that with this:

Lay Evidence of Symptoms of Sleep Apnea in service

PLUS

A current diagnosis of sleep apnea

EQUALS

Proof of Nothing much at all.

How to Prove In-Service Injury for a Sleep Apnea claim.

If you have an event or injury that occurred in service, or you believe you had the symptoms of sleep apnea in service, you are going to need to have some Lay and Medical evidence to support your position.

This is not much different from any other claim for service-connection of another condition.

It may be a little more challenging, because the non-medically trained raters at the VA Regional Offices, not to mention C&P Examiners and BVA Judges, will have difficulty understanding how a physical injury might cause a sleep-breathing disorder like sleep apnea.

There are far too many people in this world - like that Florida Family Law Attorney I told you about earlier - that believe that Sleep Apnea is some made up thing, or not a real disability, or not related to physical injuries.

Here's the catch - and the one thing that is vital to proving this pillar of a VA Claim when the in-service occurrence that gave rise to sleep apnea is a physical injury or physical event: **your proof that something happened in service is going to depend on the unique etiology[26] of your Sleep Apnea**.

So, for example, if you have Obstructive Sleep Apnea (OSA), you are probably not going to want to waste a lot of time proving up an in-service event that caused a heart

[26] Etiology is a medical term referring to the origin of, or the set of circumstances that led to, a medical condition's diagnosis.

condition, since its unlikely that OSA was caused by a heart condition.[27]

On the other hand, if you were injured in an IED blast and suffered a Traumatic Brain Injury (TBI), you will want to spend some time showing the details of the IED blast - AND - explaining to the VA that (and why) you believe your Sleep Apnea results from this Traumatic Brain Injury.

Similarly, if you think that your Obstructive Sleep Apnea is the result of breathing in that crap they burned in the Burn Pits in Iraq, tell the VA that.

Don't be vague and unclear - they won't be able to connect they dots unless you lay it out, clean and simple.

Don't "hide the ball" either.

Don't just tell the VA that you believe your Sleep Apnea is caused by your Type 2 Diabetes.

Include the research showing what you believe to be the causative correlations of Type 2 Diabetes and Sleep Apnea.

Include lay statements showing the chronological overlap of the symptomatology.

Include lay statements showing the "trajectory" or "path" of your symptomatology.

When it comes to Sleep Apnea, be straightforward and patient.

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[27] This is not always true - OSA, CSA and Complex Sleep Apnea are complicated and confusing conditions, and may often be the result of a combination of many different factors. That is why there is no "Magic Formula" to proving service-connection of sleep apnea.

Remember, the VA still thinks that there are only a half-dozen risks factors for sleep apnea, and 2 of them are "being male" and "having a big neck".

The VA doesn't "get it" yet.

Don't hold that against them - many of these folks are trapped in a bureaucracy that perpetuates old myths about Veterans, medical conditions, attorneys, and much more.

Just be patient, and be sure to "dot your i's and cross your t's".

Take the time to explain your theory to them - and support your position with lay evidence, medical research, medical journal articles, and medical expert opinions.

Advance as many theories as are reasonable and supportable - don't just hang your hat on one.

Wherever possible, PROVE your theory to them.

PROOF of a theory in a VA service connection claim requires the use of 5 Star Evidence:

> 5-Star Lay Evidence is your Bullet - don't go into combat with just one cheap, generic and unreliable bullet. Use a whole magazine stacked with high quality precision rounds.
>
> 5-Star Medical Evidence is your Rifle. Don't use a rifle that someone else "sighted in" or "zero'd". Take your time to get your own Rifle for your own claim.

Use a different bullet and rifle for each element.

Just like you don't use a handgun to take out a target 250 yards downrange, you don't use always use the same lay and medical evidence for each Pillar of a VA Claim.

How to Prove In-Service Aggravation of Sleep Apnea.

I'm not going to spend a lot of time on this one.

Why not?

I have not seen this particular scenario cleanly arise in a case, or in a BVA Decision, such that I think that it is a commonly occurring situation.

That's not to say it doesn't happen. I'm sure it does.

Its just that its a very uncommon way of showing in-service incurrence of sleep apnea.

So let's just "hit the high notes".

To have in-service aggravation of sleep apnea, you would necessarily have had to have a pre-existing sleep apnea condition.

Your military enlistment physical would have to NOTE a condition of sleep apnea.

I capitalize that because the word "Note" in this context has a very distinct meaning.

You can read all about this distinct meaning in the Veterans Law Guidebook: "10 Cases that Every Veteran Should Know". A link to download that Guidebook, along with a discount, can be found earlier in this Guidebook.

In that book, I talk about a case called *Crowe v. Brown*, in which the Veterans Court told us exactly what it means for a condition to be "noted".

Here's the test that we developed at my law firm to determine if a Veteran's condition is "noted" upon entry to service:

> Go to your C-File and find your entrance physical. Then, take a look at what conditions the doctor has said existed prior to service.
>
> Make a list of them.
>
> Then, for each condition referenced, ask these questions:
>
> 1) Was the doctor's "note" of any of those conditions the result of a summary of your medical history?
>
> 2) Was the doctor's "note" of any of those conditions the result of the Doctor's examination of you?
>
> If your answer to Question Number 1 is yes, then the the condition is not "noted" and you are probably entitled to the presumption of soundness.
>
> If your answer to Question Number 2 is yes, then there is a good chance that the BVA or the Veterans Court will conclude that your condition was "noted" on your entrance physical.

So, if your sleep apnea was "noted" on your entrance physical, then you have a pretty unique set of proofs to make - they all tie in to the "Presumption of Aggravation"

The Presumption of Aggravation states that "[a] preexisting injury or disease will be considered to have been aggravated by active ... service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease." 38 U.S.C. § 1153.

So, if your sleep apnea is "noted" in your entrance physical, and your military service aggravated - or worsened - your sleep apnea, here is what you will need to prove to show an in-service occurrence/aggravation:

1) A change in the severity of the sleep apnea while in military service.

2) To be safe, a statement from a physician explaining that the worsening of your sleep apnea in service was NOT due to the natural progression of the disease.

Chapter 7:
Sleep Apnea and the 4 Pillars: Nexus

This element is the one that stumps most Veterans, most often.

Logically, it seems like if you show that you had an "in-service" occurrence of sleep apnea, that you would have also proved that your sleep apnea is related to your military service.

This is not true, and it is the single greatest reason that I see most Veteran sleep apnea claims denied:

Veterans failed to prove that an event that occurred in service (ranging from a sleep apnea diagnosis, sleep apnea symptoms, TBI, PTSD, Diabetes, or some other condition or event) is *"at least as likely as not"* related to their current sleep apnea diagnosis.

The proof of this element - commonly known as "nexus" - can be made in 5 ways.

I call them the 5 Paths to Service Connection.

There is an entire Veterans Law Guidebook dedicated to teaching you these 5 Paths to Service Connection, and you can use the links at the beginning of this Guidebook to purchase a copy at a discount.

But, for now, let's do a quick review of what those 5 paths are.

Most Veterans think of VA Service Connection as a single element - nexus.

In reality, its more like a bridge.

A bridge connects 2 pieces of terrain. Without a bridge, the land on either side of the bridge would be, well, unimportant.

It's not enough, though, to just tell the VA that your current medical condition is related to military service.

In fact, the "lion's share" of VA Claims and Appeals I have seen denied were denied due to a failure - or a lack - of adequate PROOF.

Direct - Type 1

This is the most traditional path to service connection of any medical condition.

It typically is used when you have a clear in-service event, and a clear current diagnosis of a disability.

A medical expert opinion ties those 2 pieces together with a medical opinion showing that the first (the in-service event) is "at least as likely as not" related to the second (the current diagnosis).

Direct - Type 2

This is a common path to service connection in a VA Sleep Apnea claim.

It might be used when the in-service event is not as "clear" as a diagnosis. I consider using this approach when there is evidence of sleep breathing symptoms/limitations in service, but no diagnosis until years after service.

A medical expert opinion reviews all the lay and medical evidence of record and, in one opinion, shows that the symptoms or limitations in military service were actually sleep apnea, or that they were early symptoms connected to the Veteran's currently diagnosed sleep apnea.

A second medical expert opinion concludes that the symptoms in-service, determined to be sleep apnea - or connected to the Veteran's current sleep apnea - in the first medical opinion, is "at least as likely as not" related to the current diagnosis of sleep apnea.

Secondary

This path to service connection would be used when another service connected condition occurs or arises out of military service and - at some point later - causes sleep apnea.

The VA doesn't have this list, but here are a list of MORE THAN 3 DOZEN medical conditions that are known - or strongly suspected - to cause sleep apnea (CSA, OSA, or Complex Sleep Apnea).

Whether they do or not in YOUR claim is going to require a medical determination.

I have NEVER seen a Veteran win a secondary service connection claim - sleep apnea or otherwise - without medical evidence that proves that the first condition caused the second condition.

With that said, here is the list[28]:

* Alcohol abuse.

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[28] This is, by far, not an exhaustive list. I have seen other conditions that are believed to cause a sleep apnea condition.

A condition made it on this list if either 1 of these 2 criteria were met:

1) At least 2 Medical Doctors told me that the condition is known, or commonly believed, to be a cause of sleep apnea, or,
2) A Veteran actually proved secondary service connection of Sleep Apnea for one of these conditions.

* ALS (Lou Gehrig's Disease).

* Anxiety (Generalized Anxiety Disorders)

* Atrial Fibrillation.

* Brain Infections or swelling of the brain.

* Cervical Nerve conditions.

* Cervical Spine Injuries, Stenosis, or degenerative conditions.

* Chronic Fatigue Syndrome.

* Congestive Heart Failure.

* Depression.

* Deviated Septum.

* Diabetes (Type 2).

* Drug Use (prescription or illegal narcotics).

* Encephalitis.

* Fatigue.

* Gasteroesophageal Reflux Disease (GERD).

* Heart Attack.

* Heart Rhythym Disorders.

* Hypertension, High Blood Pressure.

* Hypothyroidism.

* Insomnia.

* Insulin Resistance.

* Marfan Syndrome.

* Myasthenia Gravis.

* Non-alcoholic Fatty Liver Disease.

* Obesity.

* Parkinson's Disease.

* Polycythemia (High Red Blood Cell Count).

* Post-Traumatic Stress (PTS, or PTSD, is an anxiety disorder).

* Progressive Lateral Sclerosis (PLS).

* Progressive Muscular Atrophy.

* Restless Leg Syndrome.

* Rhinitis.

* Sinus Infections (Sinusitis).

* Seizure disorders (epilepsy, for example).

* Stroke.

* Tempromandibular Joint Syndrome (TMJ).

* Tonsillitis.

* Traumatic Brain Injury (TBI).

* Any medical condition that affects the Brainstem.

* Any medical condition that affects the spinal cord.

* Any medical condition that interferes with the operation of the breathing muscles, diaphragm, lung, or airways.

* Any medical condition that affects the alignment or strength of the jaw, tongue, or nose.

That makes the VA's list of "risk factors" (obesity, neck size, smoking and drinking, etc.) look a little out-dated, doesn't it?

If you have ANY one or more of those conditions already service-connected - and IN ADDITION have a diagnosis of Sleep Apnea - you should be asking your doctor to provide a medical opinion whether one or more of those conditions are causing your sleep apnea.

That's the **only** way you are going to prove "Secondary" Service Connection: you WILL need a medical opinion showing the causal relationship between one or more of the conditions on the list above, and your currently diagnosed sleep apnea.[29]

"Aggravation - Type 1"

There are 2 types of aggravation claims: I call them Type 1 and Type 2.

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[29] In preparing this eBook, I talked to hundreds of Veterans about their sleep apnea claims. Over HALF of them wanted to know how to connect sleep apnea to another medical condition - and most, if not all, of these conditions were on the list. Here's the answer: Get a Doctor to state that your OSA, CSA, or Complex Sleep Apnea is caused by, connected to, or the result of the other medical condition. That's the only way to do it when it comes to secondary service-connection: YOU WILL NEED MEDICAL EVIDENCE!

That Jargon - "Type 1 Aggravation" and "Type 2 Aggravation" - are MY words only.

The VA won't have a clue what you are talking about if you use my jargon.

It is a concept that I made up when I was learning this area of the law several years ago to help me understand the different types of service-connection by aggravation claims.

Type 1 Aggravation is where a service connected condition aggravates, or interferes with, a condition that is NOT service connected. For our purposes in this Guidebook, a Type 1 Sleep Apnea Aggravation claim would be where a service connected condition makes your sleep apnea (which is not service connected) worse - or interferes with the treatment of non-service-connected sleep apnea.

Type 2 Aggravation is where service connected sleep apnea aggravates another non-service connected condition, or interferes with the treatment of that other non-service connected condition. Type 2 Aggravation Claims for Sleep Apnea are, logically, Type 1 Aggravation Claims for the other non-service connected condition, so we will NOT discuss this type of situation in this Guidebook.

To show what I call a "Type 1 Aggravation" claim, you will have to show the following:

1) Service connection of another condition (Condition A)

2A) Medical and lay evidence of how Condition A is making your sleep apnea worse - regardless whether it caused your sleep apnea or is totally unrelated.

- OR

2B) Medical and lay evidence of how the TREATMENT of Condition A is making your sleep apnea worse - regardless of

whether or not the treatment of Condition A caused the Sleep Apnea

3) Medical and lay evidence showing what your Sleep Apnea "severity" was prior to the aggravation caused by Condition A (using the 4 rating criteria explained in the next chapter)

4) Medical and lay evidence showing what your Sleep Apnea "severity" was AFTER the aggravation caused by Condition A (using the 4 rating criteria explained in the next chapter)

It is important to note that you will only be compensated by the degree to which Condition A (the service-connected condition) is aggravating your Sleep Apnea.

So, let's say your sleep apnea symptoms are of persistent daytime hypersomnolence. (This would, if the sleep apnea were actually service connected, yield a 30 % rating).

Let's further say that Condition A, is making your sleep apnea worse, and as a result you need to be on a CPAP machine. (This would, if the sleep apnea were actually service connected, yield a 50% rating.)

You would, in this scenario, get compensated for a 50% disability for the sleep apnea. You would only be compensated for an additional 20% - the degree to which service-connected Condition A makes your sleep apnea worse.

Here's another scenario:

So, let's say your sleep apnea symptoms are of persistent daytime hypersomnolence. (This would, if the sleep apnea were actually service connected, yield a 30 % rating).

Let's further say that Condition A, is making your sleep apnea worse, and as a result your hypersomnolence is much more

severe, or pronounced. (This would, if the sleep apnea were actually service connected, still yield a 30% rating.)

In this scenario, assuming you could prove that the service-connected Condition A made your sleep apnea worse, and service connect the sleep apnea under an aggravation theory; however, you would likely not receive any additional compensation until Condition A made your sleep apnea symptoms rise to the level of a 50% rating.

This should not stop you from service-connecting that Sleep Apnea - even a non-compensable sleep apnea rating under an aggravation theory can be helpful later: if your sleep apnea gets worse, or god forbid, you learn years later that you had swelling of the right ventricle of your heart due to long term chronic sleep apnea (this would, in theory, yield up to a 100% rating).

VA Medical Care

There is a 5th path to service connection.

I'm going to describe it very generally because - quite frankly - I am not that familiar with these types of claims.

My Firm does not handle VA Medical Care service connection cases, FTCA claims, or Section 1151 cases, so my experience in these cases is entirely based on what I've read.

That is not enough of a foundation for me to try to educate you, so I am going to stay VERY GENERAL in my discussion of this type of service connection claim.

Veterans may be able to service-connect injuries (and their surviving spouses may be able to obtain DIC for a death) caused by treatment in the VA healthcare system.

The Attig Law Firm does not take these types of cases: they are extremely complex, extremely expensive, and resource-

intensive cases that often require the assistance of attorneys that have a LOT of experience handling medical malpractice claims.

Here's a very general overview, though.

38 U.S.C. 1151 states that if a veteran is injured because of VA hospitalization, treatment, rehab or therapy that is not the fault of the veteran, the injury is treated as service-connected.

You will have to show fault, whether that fault is through negligence, lack of proper skill, carelessness, error in judgment, etc.

To show fault, you will need a medical expert opinion. Medical experts can charge very high rates for their services.

In addition, to prove an "1151 claim", you will need to show:

Additional disability or death.
The VA will compare your condition immediately prior to treatment to your condition immediately after treatment by the VA to determine the existence of an additional disability.

VA Hospital Care, Medical treatment, surgery, or examination.
The term Hospital Care is narrow - prior to 1997, an 1151 claimant needed only show "hospitalization" which could have included anything that occurred general experience during the course of VA treatment. Now, the tighter showing of Hospital Care is necessary.

Proximate Cause.
This is a legal term that establishes the "bridge" between the VA treatment and the additional disability.

Proximate cause is a legal term, and the VA defines it as such: "the action or event that directly caused the disability or

death, as distinguished from a remote contributing cause." Additionally, you will need to show "actual cause".

The good news is that the burden of proof for this element is the "balance of the evidence" - which lies somewhere between substantial evidence and preponderance of the evidence.

Most veterans I have talked to that have been injured by for the above reasons want to talk to us about suing the VA for medical malpractice.

Can they?

The answer is generally, yes.

This type of lawsuit is permitted under the Federal Tort Claims Act (FTCA). The FTCA is a separate matter entirely, and far too broad a topic for this blog post.

A section 1151 claim is a straightforward, but fact and law intensive, means to service-connect a disability.

I strongly recommend that you seek out an attorney that has experience handling 1151 claims and FTCA claims against the VA - you will have to contact a LOT of lawyers to find one that does this work, but I would not "go it alone" in a case like this.

The Key to Proving the "Pillar" of Nexus in a VA Claim: Lay and Medical Evidence **MUST** work together.

Most Veterans make the mistake of relying too heavily on either lay evidence or medical evidence alone.

Especially when proving "nexus", the Veteran should use both - together.

What does this mean?

Medical Evidence and Lay Evidence work together.

They are like peanut butter and chocolate.

Summer and Margaritas.

Bonnie and Clyde.

Together, they are far more powerful than they are separately.

Consider this:

38 CFR 4.10 (2013) tells us that medical examiners are responsible for providing a *"full description of the effects of disability upon the person's ordinary activity"*.

Where do medical examiners get this information?

Veterans. In the form of lay evidence.

38 CFR 4.2 (2013) tells us that the examiner has to reconcile the various reports into a consistent picture " *..so that the current rating may accurately reflect the elements of disability present."*

If the examiner has only the Veteran's statements on a VA Form 21-4138, what is there for the doctor to reconcile?

Nothing - other than the examiners own background and experience.

This is why so many Veterans are frustrated by C&P examiners that don't seem to believe them, or who don't understand the full scope of the problems they face.

The C&P Examiner has never been given the FULL picture of the Veteran's disability and does not understand the limitations on the Veteran's Daily Life Activities.

Most Veterans don't paint the "whole picture". The result is that they are dissatisfied with the VA Disability Claims Process.

What if, on the other hand, there was a wealth of LAY evidence talking about the Veteran experiences in and after military service, such as:

* What the Veteran's spouse sees and observes?

* What the Veteran's co-workers see him/her doing or not doing at work?

* What friends observed about how he/she has changed since returning from military service?

* What extended family observe, if only a couple times a year?

* What if the medical examiner had access to all that information?

What if the Veteran's Treating Physician understood more about how the Veteran's condition affects daily living activities?

Here's what happens:

Treatment changes and improves.

Opinions from C&P Examiners improve.

It becomes harder and harder for examiners to paint a picture that is unfavorable to the Veteran.

The key is that a medical opinion is of higher quality - and more likely to be favorable to a Veteran - when the LAY evidence (described in more detail in the next chapters) paints a more clear picture of the Veteran's symptomatology and limitations due to Sleep Apnea.

And then, as a result, BVA Decisions increase in quality, because they have MORE evidence on which to "hang their hat".

Now, it is important to know that lay witness testimony can be sufficient to substantiate a claim for service connection of an injury. *Horowitz v. Brown*, 5 Vet. App 217 (1993). It is error for the BVA to require medical evidence to support lay evidence. See, *Horowitz*.

However, just because the BVA and the VA can't require lay evidence to corroborate medical evidence doesn't mean that you shouldn't provide it.

You can - at least in theory - win your sleep apnea claim with just lay, or just medical, evidence.

But if you have the opportunity to use both, you might just find that you have a different experience in the VA Claims Process.

So, when proving the element of nexus in a Sleep Apnea disability claim, take your time to develop as much Lay Evidence of your symptoms as possible

Then, provide all of that Lay Evidence to your Medical Examiner - whether it is a VA C&P Examiner or a private medical expert.

That VA Medical Examiner, or private medical expert, will have much more factual evidence on which to make a more accurate - and hopefully more favorable - nexus opinion.

Chapter 8:
Rating Sleep Apnea

Once your sleep apnea is service-connected, the next step is for the VA to Rate the percentage of disability you have form your sleep apnea.

How does the VA Rate to Sleep Apnea?

They use the Rating Tables for sleep apnea can be found at 38 C.F.R. § 4.97.

Go to that section of the CFR, and look for diagnostic code (DC) 6847.

You can tell if the VA rated you directly for Sleep Apnea, as your code sheet will list only the four digit DC for Sleep Apnea (6847).

You can tell if the VA rated your sleep apnea as secondary to another condition, as your Code Sheet will list an 8-digit DC for the sleep apnea condition. (e.g. XXXX-6847, where the XXXX is the four digit code for another disability, disease, or illness).

The VA Uses Diagnostic Code 6847 for any variant of the Sleep Apnea Syndrome - Obstructive, Central, Mixed are all rated the same way.

There are 4 levels of rating for Sleep Apnea: 0-30-50-100.

You cannot get any other percentage rating for Sleep Apnea but those 4 ratings.

Here is what you have to show to get rated at each level

100%	Chronic respiratory failure with carbon dioxide retention or cor pulmonale, or; requires tracheostomy

	* *Cor pulmonale is, oversimplified, failure or enlargement of the right ventricle of your heart.*
50%	Requires use of breathing assistance device such as continuous airway pressure (CPAP) machine
30%	Persistent day-time hypersomnolence
	* *Hypersomnolence is, oversimplified, the need for a great deal more sleep than average; like narcolepsy, it can make you fall asleep unintentionally, although it is quite different from narcolepsy.*
0%	Asymptomatic but with documented sleep disorder breathing
	* *Asymptomatic is a medical term used to describe a condition which has been diagnosed, but which is not currently showing any visible symptoms. For example, the VA often erroneously concludes that a condition was misdiagnosed or that a diagnosis cannot be confirmed when in fact the disease or condition is "asymptomatic".*

Those ratings tables look easy enough, right?

Here's the thing.

The VA Ratings Tables (and the raters that use them) and the Doctors that diagnose and treat Sleep Apnea are using 2 completely different languages and metrics.

Doctors that diagnose and treat sleep-related breathing disorders don't talk about sleep apnea like these ratings tables do.

Typically, when diagnosing sleep apnea for treatment purposes, most doctors are going to measuring one key criteria: the number of apneas, or hypopneas, per hour of sleep (or sleep-study time).

This is called the Apnea Hypopnea Index (AHI).

Doctors will consider you to have the following degrees of sleep apnea, based on where you fall on the AHI:

Apneas per hour	Level
0-4	Normal Range
5-14	Mild Sleep Apnea
15-30	Moderate Sleep Apnea
> 30	Severe Sleep Apnea

How do you relate those ratings to the VA Scale? You don't. You can't. [30]

Frankly, if you walk up to your rater, and show them that you have greater than 30 apneas per hour of sleep - that's some dangerously bad sleep apnea - they won't care.

All they care about are 4 things:

1) Are you asymptomatic? If yes, 0% is what you get.

2) How bad is your day-time Hypersomnolence? If the VA feels, or your medical doctor can illustrate, that it is "persistent", you'll get a 30% rating.

[30] But remember, the AHI is used by sleep specialists for diagnostic purposes - an AHI of 4 or fewer apneas or hypopneas is typically not going to support a sleep apnea diagnosis, so just be sure that your doctor doesn't diagnose sleep apnea based on an AHI of 4 or less without explaining the reason for the diagnosis.

3) Do you use a CPAP to breathe?
If you use a CPAP machine or other breathing assistive device, you'll get a 50% rating.

4) Do you have chronic respiratory failure, enlargement of the right ventricle of your heart, or a tracheostomy (a surgically created breathing hole in your throat). You need one of those 3 things for a 100% rating for sleep apnea.

Chapter 9:
Lay Evidence in the Sleep Apnea Claim

Before we can talk about Lay Evidence in a Sleep Apnea Claim, it would be helpful to review what Lay Evidence is in the first place.

I talk about evidence in much more detail in the Veterans Law Guidebook "The Secret to Proving Your VA Claim" - you can purchase your copy using the special discount link at the beginning of this Guidebook.

For now, let's talk - generally - about what Lay Evidence is.

What is Lay Evidence?

At its core, lay evidence is evidence that doesn't require "specialized" knowledge or expertise. Here are just a couple examples:

> Your "buddy statement" corroborating what happened to you in service is "lay evidence".
>
> Your testimony about the symptoms of your current disability is "lay evidence".
>
> Your wife's testimony about the diagnosis that was communicated to you at the XYZ Military Hospital 20 years ago is "lay evidence".

You should have lay evidence to support every Pillar of your claim - each of the 4 Pillars of your VA Claim should be supported by some form of 5-Star Lay Evidence.

For example, Lay Evidence can sometimes be used to prove a diagnosis of a medical condition.

A veteran does not always need a doctor or a medical professional to provide competent evidence of a diagnosis of a current condition or disease.

The Board of Veterans Appeals considers 3 scenarios in which lay evidence of a medical condition will be sufficient:

Lay evidence can be competent and sufficient to establish a diagnosis of a condition when:

> "(1) a lay person is competent to identify the medical condition (noting that sometimes the lay person will be competent to identify the condition where the condition is simple, for example a broken leg, and sometimes not, for example, a form of cancer):
>
> (2) the lay person is reporting a contemporaneous medical diagnosis, or,
>
> (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. *See Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007)*"

As always, though, the BVA is certain to weigh lay testimony and to make a credibility determination as to whether the evidence supports a finding of service connection and continuity of symptomatology. *See Barr v. Nicholson,* 21. Vet. App. 303 (2007).

Why is Lay Evidence important?

It used to be the Board's rule - endorsed by the Court of Appeals for Veterans Claims - that Lay Evidence was worthless, unless a doctor corroborated it.

This was the law for so long that it became part of the culture at the BVA.

BVA judges just do not - to me - seem to like, value, or even properly weigh Lay Evidence because their culture tells them that your statements are unreliable.

Why? Honestly, who the hell knows!

I bet that some cynical bastard somewhere in the BVA probably got the idea that you can be trusted with a rifle, or a $18 million weapon system, but that you are really in the VA Claims Process to mooch off the government.

Cynicism is highly contagious, as any Veteran can tell you.

The law made an abrupt turn with the *Jandreau* case. If you ask me, *Jandreau* is one of the 10 cases that every Veteran needs to know - not just because its the law, but because it teaches us how to use the law in our own VA claims.

The bottom line is this:

Lay Evidence can be used to establish any number of things in a VA Claim:

* to identify medical conditions (rare),

* reporting an earlier medical diagnosis (much more common),

* symptoms in support of a later diagnosis by a medical professional (very common),

* more.

The BVA commits remandable error unless, in its decision, it specifically addresses favorable Lay Evidence that appears in the record.

Do you see the Pure Raw Power of Lay Evidence?

If you include FAVORABLE Lay Evidence into the record - i.e., your C-File - it can push the VARO or BVA into a situation where they have to rely on it, or fully and specifically explain why they didn't rely on it or consider it.

As Shakespeare once said, "Here's the rub":

Lay Evidence has zero evidentiary value if the BVA Judge does not think it is credible.

How do you submit Lay Evidence?

A lot of Veterans use VA Form 21-4138.

This is, essentially, the VA Form for a Blank Piece of Paper.

There are 2 problems with using this form:

> Problem #1: the C-File is often so full of these forms, that the VA rater overlooks the information in them.
>
> Problem #2: The information on VA Form 21-4138 can be easily dismissed by the BVA because of these words on the form: "I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief."

There is no legal value in certification that information is "true and correct".

It establishes that the affidavit is competent, but it does not establish that it is credible.

All evidence must be competent, but credible evidence is given far more weight than merely competent evidence.

By analogy, if competent evidence is a shiny nickel, then credible evidence is a crisp new $100 bill.

Solving the Problem of Credible Lay Evidence.

If you are going to take the time to submit lay evidence, wouldn't you rather the BVA see it as a crisp new $100 bill, instead of a shiny new nickel? Of course you would.

How do you do this?

> **Option A**: If you have some time and money, you can pay a notary to administer an oath and affirm that you signed a document under penalty of perjury.
>
> **Option B**: Don't waste time and money on a Notary signature - use the Sworn Declaration Form my Firm uses.

In the Appendix of this Guidebook, you will find the Sworn Declaration form that my Law Firm uses to add lay evidence to the Veteran's C-File.

Benefits of using the Sworn Declaration:

It does not require a notary's signature (saving you $8 - $12 for a notary fee and all the travel time to and from the notary's office).

According to 28 USC § 1746 - carries the same weight as a notarized affidavit.

Just be aware: by using this form you are saying that you are making the statements "under pain of perjury".

That means that if the VA can show you lied in this document on a material fact, you could be charged with perjury (that's a crime, folks).

It may demonstrate the credibility of your testimony when used instead of a VA Form 21-4138.

Even the BVA has to acknowledge that Veterans are not likely to lie about a particular fact if they are aware that they could spend time in Federal prison for lying under oath.

So make darn sure that what you put in this Sworn Declaration is truthful and honest.

Don't use it to rant, complain, or ask for claim statuses: use it for statements of fact that are within your personal knowledge only.

Common Types of Lay Evidence in a VA Sleep Apnea Claim.

So, you have seen WHAT lay evidence is generally, and why it is vital to a VA Claim.

What kinds of Lay Evidence do you want to submit in your VA Sleep Apnea Claim?

Here is a list of the types of lay evidence you might want to include - the more you have from the lists below, the better your medical opinion evidence can be.

Statements from the Veteran of Symptomatology and Limitations of Sleep Apnea:

Statements as to which of the following symptoms you have, how long you have had them, when you had them, when you first noticed them, how long they last, etc.

Specific details are ALWAYS better.

* Morning headaches

* Memory problems - learning difficulties, or inability to concentrate

* Feelings of irritability throughout the day, depression

* Mood swings

* Confusion, poor memory

* Sexual dysfunction

* Waking up frequently in the night - often times you will think you are waking up to urinate

* A dry mouth or sore throat when you wake up

* Falling asleep throughout the day; fighting sleepiness throughout the day, or falling asleep whenever it is quieter (like behind the wheel of a car).

* Your sleep is "non-restorative" - you feel as tired in the morning as you did when you went to bed

* Acid reflux

* Cessation of breathing during the night.[31]

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[31] At least one BVA decision concluded that a Veteran is "…not competent to observe symptoms of apnea (cessation of breathing) during his own sleep." BVA Docket No. 10-41721 (April 2013). If you have Sleep Apnea, you may realize that this is "horse-puckey".

If you wake up due to a cessation of breathing - during an apnea event - you have a clear and distinct sensation of gasping for air, or choking.

While it is true that you may not ALWAYS know when you have an apnea event in your own sleep, or how many apnea events you have in the typical hour of sleep, it is patently untrue that a Veteran is not competent to observe symptoms of apnea, such as cessation of breathing, during the Veteran's own sleep.

Statements of Symptoms and Limitations that other people (your spouse, significant other, family members, friends, co-workers, bosses, former employers, neighbors, etc) can observe:

These statements should clearly state which symptoms the witness has observed, when they observed them, how frequently they observe them, how long they have seen these symptoms, when they first observed them, how long they last, and how they appear to affect you - at home, in your social life, and at work.

The more specific the details, and the more they are based on ACTUAL OBSERVATION by the witness, the stronger these statements will be:

* Cessation of breathing during the night.

* Loud and Chronic Snoring - often described as snoring that wakes your partner up, or that can be heard in other rooms of the house.

* Pausing in the middle of snoring, or, choking or gasping after pauses in snoring

* Mood changes throughout the day

* Poor memory and attention

* Confusion

* Sexual dysfunction

* Mood changes throughout the day; sudden increases in irritability

* Falling asleep at work, or while driving, or feeling tired at unusual times of the day.

* Poor performance at work, or in school, due to decreased attention, ability to concentrate, or appearing confused

Chapter 10:
Medical Evidence in the Sleep Apnea Claim

These are the 4 major categories of medical evidence in a sleep apnea claim.

Do your best to get as much of this medical evidence as possible. The more of it you are able to get, the better your claim will be.

What if you can't find this medical evidence? Wherever possible, use Lay Evidence.

So, for example, let's say you remember getting a diagnosis of sleep apnea in the military, but cannot find the sleep study results anywhere - and the VA can't find them either.

Provide a lay statement stating when you were diagnosed - providing as much detail as possible.

If you told ANYONE - your wife, husband, brother, sister, parent, friend, colleague, fellow service-member, etc - about that diagnosis, ask them to provide a statement that you told them about the diagnosis, and the timeframe you told them, as well as any other detail they can remember.

It's not the BEST evidence - the earlier diagnosis would be the best evidence - but something is better than nothing.

And lay testimony of a prior diagnosis supports the existence of that prior diagnosis, so long as you are not making it up, of course, and so long as the BVA or VA determines that your statement is Credible[32].

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[32] Legal Credibility RARELY has anything to do with truth or falseness, lying, etc. It is about, in 3 words: perception, bias, and integrity. I want you to Click on this Link and read about what Legal Credibility real is all about.

That said, here are the 4 Major Categories of Evidence in a VA Sleep Apnea Claim.

Category #1: Medical History and Treatment notes.

There are 3 periods of time that you want to collect your medical history and treatment notes for a sleep apnea claim.

Period #1: Your time in military service.

Don't wait for the VA to collect - or find - your military medical treatment records.

Keep a copy of your medical records when you leave service.

Get a copy of your VA Claims File to see what the VA already has in your record.

Contact the National Archives and ask for copies of your military medical records.

And If you can't find them there, sometimes those records are maintained at the facilities where you were actually treated - you'd be surprised how long government agencies hold on to SOME medical records.

Period #2: The time between military discharge and the Sleep Apnea diagnosis.

If you were treated at a VA Medical Facility, request those records directly from the facility using VHA Form 10-5345.

If you were treated at a private doctors office or a private facility, call the office or hospital and ask for the Medical Records Custodian. They will tell you how to request and receive copies of your medical records.

Private medical facilities often charge a fee for copying and mailing those records to you. If you are a Texas Veteran, by

law private medical record custodians may not charge you any fee for medical records you are using in your Title 38 VA Disability claims.

(Click here to learn how you can get Free Private Medical records as a Texas Veteran).

If you aren't in Texas, always ask for a discount on those medical records - remind them that you are a Veteran, and it would be helpful if they would waive the records fee due to your income or disability levels.

You'd be surprised how many people are supportive and want to help - but you have to ask first.

Period #3: The Time After Diagnosis.

Request these in the same way as the post-service treatment records.

Keep in mind, however, that the post-diagnosis records will most commonly be used only to establish the impairment rating.

Category #2: A Polysomnogram (commonly referred to as a Sleep Study).

You don't need a sleep study to prove a diagnosis of sleep apnea, but as far as I'm concerned, that's besides the point.

Trying to service-connect sleep apnea without a sleep study diagnosing sleep apnea can be done, but it is like playing Russian Roulette.

You don't want to be the Veteran that does this - it makes your future claim so much harder.

Now, **do not think** you need a Sleep Study done before you leave active duty.

If you can do that, great - its worth getting one even if it is a private medical sleep specialist, and not a DoD or military doc doing the sleep study.

It WILL make your claim a lot easier, especially if you file for Sleep Apnea Service Connection BEFORE leaving active duty and use the in-service sleep study to support your claim.

But you do NOT need a sleep study performed on active duty to service connect sleep apnea.

I discuss, throughout this Guidebook, other ways to service-connect sleep apnea without an in-service sleep study diagnosing sleep apnea.

Category #3: Expert Medical Opinions connecting past symptoms to current diagnosis (Symptomatology Opinion)

I explain the need for this type of opinion in several places throughout this Guidebook.

If you have symptoms of sleep apnea that begin in military service and/or after military service, but no prior diagnosis of sleep apnea, you are going to want this kind of opinion to show the VA that your past symptoms are actually symptoms of your current sleep apnea (as opposed to symptoms of some other condition).

This is important, so I discuss it in the "Common Scenarios" Chapter - Scenario #2. I also discuss it in the Common Errors Chapter, and in the Chapter that talks about Sleep Apnea and in-service occurrence.

Category #4: Expert Medical Opinions connecting current sleep apnea diagnosis to military service (Nexus Opinion)

The VA - and the BVA - are going to need to see prove that your current disability of sleep apnea is related to your military service.

This type of evidence is not accomplished by the opinion in Category #3. Even if you have the opinion described in Category #3, you are going to need this type of opinion too.

There are 2 ways to get a medical expert opinion in a VA Claim: pay your treating physician, or another qualified medical expert or sleep specialist, to review your medical records, your C-File and your sleep history, and provide you with the opinion.

Alternatively, you can request a VA Compensation and Pension Examination.

If you do use a private medical expert to provide an opinion, this next section tells you some things that you are going to want - clearly stated - in the opinion.

Exclude these "Magic Words", and you are asking the VA and BVA to ignore or discredit the private medical exam that you paid good, hard-earned money for.

"Magic Words" for a Sleep Apnea Nexus Opinion

So you went out and bit the bullet - you paid a private medical expert to offer an opinion whether your medical condition was related to service.

Or maybe you got your treating physician to write the opinion.

Either way, you thought your claim was locked up - after all, medical evidence of nexus in the form of an opinion letter can often be the dispositive piece of evidence in a VA Claim.

But - months later - you get a decision from the VA Regional Office denying your claim. Again.

This time, they say that your medical opinion letter was not competent evidence. Or they didn't give it any weight.

Or some other nonsense excuse.

If that happened to you, I want you to ask:

Did your Expert Medical Opinion have All the "Magic Words":

1) "I reviewed the Veteran's entire C-File".

I've seen the VA sink more independent medical exam opinions because they lacked this simple phrase.

(Of course, I've also seen the VA rely on C&P docs who make conclusions and state that they did NOT review the C-File - the point is, it's a "hoop" you have to jump through that the VA often does not).

Here's the VA's thinking: if your doctor did not review your entire Claims File before making an expert opinion, he or she made an opinion based on less than all the information.

Therefore, the VA says, the opinion is not credible.

So, add this to the list of reasons you need to get your C-File.

How do you get a copy of your C-File?

Use the discount link at the beginning of this Guidebook to get your copy of my Guidebook "Take Back the Power: How to Get a Copy of Your C-File".

2) "At least as likely as not".

These magic words are the ones that show the VA - and later the BVA - that you have met your "Burden of Proof". That you have put enough evidence into the record to support your claim.

These are hard words for medical experts to understand - seriously.

They are used to dealing with medical causation issues under State laws that require them to show something to a "reasonable degree of medical certainty".

And if they want to use that phrase, go for it.

State law standards are a more substantial conclusion of medical causation, and the VA docs will have to work overtime to discredit that opinion.

Keep in mind, though, that any phrase other than "at least as likely as not" is going to confuse the VA.

Better to just use the words that the VA and the BVA are used to seeing.

Bureaucrats need the stability of consistent words to function efficiently - do your best to make your claim fit the "standard" model, and you will move up the VA Claims Process Ladder a lot faster than other Veterans.

3) The doctor must explain his/her conclusion.

Remember back in grade school math class - we could get all the answers right on our homework or on a test, but our

teacher didn't care because she wanted us to "show our work".

Same thing for an independent medical expert opinion.

The doctor has to explain why he or she reached the conclusion he/she did.

It's not enough to say that your Sleep Apnea is at least as likely as not related to your military service.

The doctor has to explain WHY he or she reached that conclusion.

In these situations, it is helpful to have a wealth of Lay Evidence about your symptoms and limitations in the file, so that the doctor can better explain WHY he or she reached the conclusion he/she did.

I cannot stress this enough: Lay Evidence is the magic bullet, and medical evidence is the rifle - for an independent medical exam to be really truly helpful (not to mention harder for the VA or BVA to ignore), you are going to need a lot of Lay Evidence.

4) The doctor must explain any contrary opinions in the file.

I don't like going to a DRO hearing or the BVA with a situation called "Dueling Experts".

Here's how that situation arises:

On one hand, the VA has performed a C&P exam and reached a conclusion that a Vet's medical condition is not related to service.

On the other hand, the Veteran has received an independent medical opinion that concludes exactly the opposite - that the Vet's condition IS related to service.

The BVA will have to resolve who is right by weighing the evidence.

Call me cynical, but I really don't trust the BVA to properly weigh evidence. I've seen them "drop the ball" one too many times.

So when we have a medical expert offer an opinion, we ask him/her to review the VA C&P Exams and if there are any contrary conclusions, explain how those affect the doctor's opinion.

Here's how that looked in a recent expert opinion we submitted to the VA…the VA C&P examiner in a PTSD claim had diagnosed a condition that required evidence that simply did not exist. Here's how the private medical expert discredited that hokey diagnosis:

"The VA's report of exam by the [VA Doctor] is factually and medically inconsistent with the rest of the factual and medical documentation in the C-File.

[The VA's Doctor] asserts in his concluding comments:

"The Veteran's central pathology is his antisocial personality disorder."

According to the DSM-IV, a requirement for diagnosis of antisocial personality disorder is evidence of 12 months of more of repeated violation of rules and age-appropriate social norms prior to the age of 15 years.

[The VA Doctor] does not provide any evidence of this required criterion in his report."

Bang. Final nail in coffin. End of credibility of VA Comp and Pen examiner.

5) Add a CV or resume.

Your medical expert has to be competent to render the opinion.

Legal competence is a tricky concept, and no lawyer or court has ever explained it to my satisfaction.

The "Attig definition of competent evidence":

The proponent of the evidence knows what the heck they are talking about.

In layman's terms, however, your Medical Expert has to demonstrate that they have the required expertise.

For example, don't ask a gastroenterologist (stomach) for a medical opinion on the causation of your back pain.

Don't ask an anesthesiologist to diagnose a TBI (believe it or not, the VA just recently did this exact thing…insanity!).

How do you show the VA your expert is competent? Ask for a copy of the doc's CV (resume) to include with the opinion.

Improving the Value of Sleep Apnea Medical Evidence

This is a theme I cannot stress enough.

Medical Opinions are only as good as the facts on which they rely.

Where does a Medical Doctor get the facts they use in their medical opinions?

Two places: your medical treatment history and statements of your symptoms and limitations.

Statements of your symptoms and limitations are not limited to what YOU say.

Everyone that is around you throughout the day, night, week, month or year is capable of observing the symptoms you display or the limitations you face.

> You don't need to be a doctor to observe that someone stops breathing in their sleep.
>
> You don't need to be a doctor to observe that someone is falling asleep during the day.
>
> You don't need to be a doctor to observe that someone is snoring loudly.
>
> You don't need to be a doctor to testify that a Veteran had a diagnosis of sleep apnea in service
>
> You don't need to be a doctor to testify that the Veteran's sleep breathing problems started at the same time of his (or her) Traumatic Brain Injury in military service
>
> You don't need to be a doctor to testify that the Veteran was fired from his (or her) job because he (or she) kept falling asleep at work.

You DO need to be a doctor to tie all of those together to diagnose Central Sleep Apnea, Obstructive Sleep Apnea .

Let's try an exercise to show how this works in reality.

I am going to describe to you the opinions of 2 doctors, and the evidence on which they based their opinions.

Which of these 2 doctors do you think will have a more clear picture of the cause, origin, and severity of your sleep apnea:

Doctor Smith:

* Reviews your medical treatment notes for the last 10 years.

Reads a letter in which you describe how you wake up night, how your husband tells you that you snore a lot, and that it started while you were in the military.

* Reviews a Sleep Study showing the full extent and frequency of your apnea and hypopneas - and other objective medical measurements - per hour of sleep?

Doctor Jones:

* Reviews your medical treatment notes for the last 10 years.

* Reads a statement from you - in the Sworn Declaration format at the end of this eBook - as to the nature, type, frequency, duration and severity of the sleep apnea symptoms you experience.

* Reads a statement from your husband (or wife) - in the Sworn Declaration format at the end of this eBook - as to the nature, type, frequency, duration and severity of the sleep apnea symptoms they have witnessed you experiencing since military service.

* Reads statements from the soldiers you served with - in the Sworn Declaration format at the end of this eBook - as to the nature, type, frequency, duration and severity of the sleep apnea symptoms they witnessed in the military?

* Reads several statements from your co-workers - in the Sworn Declaration format at the end of this eBook - as to the nature, type, frequency, duration and

severity of the sleep apnea symptoms they witnessed you experiencing in your job after the military?

* Reads a statement from your boss(es) that you are always falling asleep at work.

* Reviews a Sleep Study showing the full extent and frequency of your apnea and hypopneas - and other objective medical measurements - per hour of sleep?

It's a "no-brainer", right?

Dr. Jones - the second doctor - is more likely to really understand the full etiology (medical word for origin/history), severity, extent and possible causation of a Sleep Apnea Condition, isn't he?

Dr. Jones is more likely to be able to give the Veteran a medical nexus opinion that shows that the Veteran's sleep apnea is related to his or her military service, right?

The VA Regional Office and the BVA are going to have a much more difficult time ignoring - or undercutting - the competence or credibility of Dr. Jones' opinion.

It never ceases to amaze me how many Veterans DO NOT provide the type of evidence that Dr. Jones had.

If you give the VA C&P Examiner the same sparse evidence that Dr. Smith had, above, you will likely NOT get your sleep apnea service connected.

If you want a "Dr. Jones" opinion, gather together the same type of evidence that Dr. Jones reviewed in the above example.

If you take nothing else away from this Guidebook, remember this:

In VA Claims, Medical Opinions are only as good as the Lay Evidence on which they rely.

It's like the old saying about computers: "Garbage In, Garbage Out".

If you put a bunch of garbage into a computer database, or give worthless instructions to a computer program, it's going to give you garbage back.

Don't give your Medical Examiner "Garbage."

Give him - or her - Lay Evidence from a VARIETY of witnesses (including yourself) in a legally competent and credible format (like the Sworn Declaration format at the end of this Guidebook) so that the Doctor can have confidence in concluding that your sleep apnea is related to your military service.

Chapter 11:
Putting it all Together - the 4 Most Common Sleep Apnea Scenarios.

The amount of information in this Guidebook can be overwhelming.

I know this from first hand experience - it can get confusing.

When I first started helping Veterans with VA Claims, it took me WEEKS to figure out all this stuff out.

Understanding how all the pieces I've described above - the types of Sleep Apnea Claims, the 4 Pillars of a VA Claim, the different Paths to Service Connection, Lay Evidence, Medical Evidence - it can get overwhelming.

So let's tie it all together.

Here are 4 Common Scenarios that I have seen in VA Sleep Apnea Claims and Appeals - and a general guideline that will help you understand how to tie everything together in this Guidebook.

Before I start though, 3 BIG warnings:

Warning #1:
No Guidebook, ebook, guide, form, blog post or checklist - nothing - can take the place of solid legal advice from an accredited VA attorney.

These examples are NOT legal advice - do not rely on them as legal advice.

They are GUIDES, only - meant to help you understand how to tie all of the information in this Guidebook together.

I am NOT telling you how to prove your VA claim - I don't know the first thing about your claim, and so I can't tell you what you really need - or don't need - in your VA Sleep Apnea claim.

This information is to help you understand how everything "fits" together in a VA Sleep Apnea claim - not to tell you how to fit everything together in YOUR VA Sleep Apnea Claim.

As my Italian uncle says, "Capisce?"[33]

Warning #2

These are not the ONLY 4 Scenarios that arise in VA Sleep Apnea Claims. They are just the most common ones that I have seen.

If your claim fits into one of these scenarios, do some research and talk to other Veterans. Talk to competent VSOs, or professional advocates. Talk to an accredited VA Attorney. Many Veterans are prevailing in the types of claims that are described in these 5 Scenarios.

If your claim does NOT fit into one of these scenarios, there is a good chance that you are having a hard time proving your claim to the VA, or the BVA - but don't lose hope.

I have seen other scenarios prevail at the VA Regional Office or the BVA, but they often require the assistance of a professional advocate to help the Veteran.

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[33] "Capisce?" is the Italian saying for (loosely translated) "Do You Understand?" or "Got it?". If you don't understand what I am saying in the paragraph you just read - or if you think that this Guidebook is legal advice or advising you on the law or facts of your claim - you would be wrong. I am merely showing you how all the information I've provided so far "fits" together. This is really important. Your claim is important, and you should not screw it up by using this Guidebook for something that it was not intended to be used for. Got it?

Consider contacting an accredited VA Attorney to discuss your claim - and use this Guidebook to help you understand how to talk more intelligently to an attorney about your claim.

Warning #3

THERE IS NO MAGIC FORMULA TO PROVING SERVICE-CONNECTION FOR SLEEP APNEA.

I get this question from Veterans at least twice per day: Show me how to prove service connection of my sleep apnea.

This is like calling your mechanic and, without telling him anything about your car or its problems, saying: "Show me how to fix my car".

Abandon the idea that there is a "quick fix" or "magic formula" to proving Service Connection of Sleep Apnea.

Every Veteran is different. Every Sleep Apnea Condition is different. Every Veteran's medical history is different.

There is NO "one-size" fits all "path" to proving Service-Connection of Sleep Apnea.

If you are looking for the "easy" way to get sleep apnea service-connected, you will not find it in this Guidebook - in my opinion, there is no such thing.

It's a complex medical condition, and presents differently in each and every person.

To prove service-connection of sleep apnea, you are going to have to put in some "leg-work".

You are going to have to think through your case - as objectively as you possibly can. You are going to have to get a

LOT of 5-Star Evidence, and provide it neatly and cleanly to the VA.

If you run to the VA and say "I have had problems breathing and sleeping since I was stationed near burn-pits in Iraq and now I have sleep apnea", chances are greater than not that they are going to deny you.

The VA DOES NOT understand the full scope of how sleep apnea occurs, medically or factually. As I showed you earlier, they still think its about being an "…obese male with a big neck."

You are going to have to connect the dots for them.

And that means you are going to have to think through your claim.

Having said all that, there are some key things that all sleep apnea claims need:

* A solid foundation of Lay and Medical Evidence showing when sleep apnea first began to present in the Veteran's life

* A good medical understanding of the unique CAUSE/ORIGIN (what doctors call etiology) of YOUR sleep apnea.

* A good Lay and Medical presentation and assessment of the sleep apnea symptoms you have had from service, or service-discharge, to the present day.

* A 5-Star medical opinion, resting on 5-Star Lay and Medical Evidence, that demonstrates HOW your Sleep Apnea is related to military service.

The scenarios below illustrate how you might tie all the information together that I have shared so far in this

Guidebook, and begin to understand the types of Lay and Medical Evidence the VA is expecting to see, as well as how lay and medical evidence work together to prove service-connection

Scenario 1: Diagnosis First Occurs a Long Time after Service, with no evidence of sleep-breathing problems in the Military Service, or Military Medical, records.

General Description of Scenario #1.

Here is the question that I am commonly asked in this scenario:

"How do I connect sleep apnea to military service when I served 5 - 25 years ago? Sleep apnea was not even known when I got out of the service, and so I never sought treatment - or knew to seek treatment - for my sleep breathing problems."

The factors that come into play in Scenario #1 are this:

* No diagnosis in service

* No evidence of treatment in service

* No evidence of symptoms in service

* Diagnosis many years after service

What is usually the "problem", from the VA's Perspective, in Scenario #1?

The major problem in scenarios like this - from the VA's perspective - is that all of the available evidence (or lack of evidence, in many cases) leaves a "question mark" as to the actual connection of sleep apnea to military service.

It may, in fact, be the case that your sleep apnea is related to military service. But how can anyone really KNOW this without solid Lay and Medical Evidence?

The VA, of course, cannot say it that way - they have 2 choices: Grant - or Deny - Service-Connection.

Without solid Lay and Medical Evidence to persuade them that your Sleep Apnea is related to military service, they are going to deny your claim.

Important Considerations/Questions to address in Scenario #1.

When approaching a Sleep Apnea claim that fits into this scenario, the first thing that I want to get is an understanding of the etiology - or the origins/cause of the Veteran's sleep apnea.

These are the steps I would follow, documenting the evidence I gather along the way.

1) I am going to have an extensive discussion with the Veteran to understand when he/she was first diagnosed with sleep apnea.

- I will request a copy of the medical records that show me the precise kind of sleep apnea that was diagnosed (OSA, CSA, Complex Sleep Apnea), so that I can start a more narrowed search for evidence of the "origins" of the Veteran's Sleep Apnea. *(Remember, CSA and OSA and Complex SA may have very different causes - knowing the TYPE of Sleep Apnea drives the investigation into the ORIGIN of the Sleep Apnea).*

2) I will have an extensive discussion with the Veteran about the symptoms of their particular sleep apnea condition, as well as other conditions that they have been diagnosed with, and when.

- Part of what I am trying to do is discern if there is any overlap in the sleep apnea symptoms and the diagnosis of conditions that are known or suspected to cause sleep apnea.

The Medical doctors I talk to in later parts of this claim may see a medical connection between conditions that I may not have seen or known about. After all, I'm a lawyer - not a doctor.

- I will document all of the above in Sworn Declarations from the Veteran.

3) I will have an extensive discussion with the Veteran about the history of their sleep breathing problems.

- What I am trying to do here is to get a "sleep breathing problem history" in a declaration format; when I ask a medical doctor if the sleep apnea that the Veteran currently has is related to his military service, I am going to want to be able to show that doctor the timeline of the appearance, frequency, and severity of Sleep Apnea symptoms.

- Lists of people, as far back as possible, who might have observed those symptoms.

4) I will begin talking to the people that the Veteran listed above, to understand the timeline, frequency, and severity of sleep apnea symptoms that the Veteran has experienced.

- I will document all of the above in Sworn Declarations from the Veteran.

- I will organize these statements chronologically, and if possible all the way back to military service, is important. I want to be able to show a medical professional - and later the VA - the "trajectory" that the Veteran's sleep apnea condition has taken over time.

5) I will take all of the Lay and Medical Evidence gathered from the above steps to a medical doctor - sometimes the primary care physician, sometimes a doctor with extensive sleep apnea experience or a sleep specialty, and ask a single question: are all of the historical symptoms that the Veteran and those around him/her observed related to the Veteran's current medical diagnosis of sleep apnea.

- If yes, explain your opinion/conclusion.

- If not, why not?

6) Once I have that opinion from the medical doctor that connects the historical symptoms and observations to the current diagnosis, I will approach another doctor - invariably one with extensive sleep apnea experience and/or a sleep specialty, and ask the ultimate question: given the medical and lay evidence, the Veteran's medical history, military service history, and all the information in the C-File - is the Veteran's current sleep apnea at least as likely as not related to military service?[34]

The Key Consideration - or Question - to be Resolved in Scenario #1.

This is the hardest type of Sleep Apnea claim to prove - because there is currently no recorded evidence of the Veteran's condition or its origins.

But just because it is not currently recorded does not mean it doesn't exist.

[34] Don't forget to ask the doctor to use all the "Magic Words" that the VA is going to want to see in a Private Medical Expert Opinion. We talked about them in the chapter on Medical Evidence in a Sleep Apnea claim.

Sleep apnea doesn't just spontaneously appear.[35]

It has to start - or originate - somewhere.

I NEVER expect the VA to take the time to figure this out.

With 21 million Veterans alive, each of whom was probably injured or disabled in some fashion in their military service, and with some 3 million Veterans actually filing a claim with the VA that an average of 3-5 medical conditions incurred in military service disabled them in some fashion or another, the VA simply does not have the medical know-how or the organizational structure needed to really truly figure out on an individualized basis whether a particular Veteran's sleep apnea is related to service.

In Scenario #1, the key is to identify - through 5-Star evidence (not a letter to the rater on VA Form 21-4138) - the true nature of the condition, and how it relates (if at all) to military service.

And once you have done this, clearly "connect the dots" for the VA rater - using 5 Star Evidence.

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[35] Actually, it can, as mentioned earlier in this book when I discussed "idiopathic sleep apnea" - that extremely rare type of sleep apnea that just spontaneously appears without any seeming logic or medical origin.

Scenario 2: The Veteran has a current diagnosis of sleep apnea. There is evidence of sleep breathing problems in-service, in the Veteran's service medical records, or lay evidence of these problems during the period of military service, but no diagnosis of Sleep Apnea "in-service".

General Description of this scenario.

Scenario #2 is different from Scenario #1 in one major way - in Scenario #2, there is typically evidence of sleep apnea symptomatology dating back to military service. (In Scenario #1, there was no recorded evidence of those symptoms in the military service or military service medical records).

Here is how Scenario #2 usually arises.

The Veteran has a diagnosis of sleep apnea.

The Veteran - or their spouse, a family member, friend or fellow service-member - began noticing sleep breathing problems while in the military. The Veteran may or may not know WHY these problems occurred, and they typically don't have a diagnosis.

A spouse, or colleague, or fellow service-member, may have observed the symptoms.

The Veteran may have sought treatment of these symptoms, and a record of this may appear in the military service medical records.

The Veteran never was diagnosed with sleep apnea while in service.

The Veteran may - or may not - have been diagnosed with another sleep breathing condition or disorder, but not Sleep Apnea.

The Veteran senses that because the symptoms started in service, and believes that those symptoms are the early indicators of his/her current sleep apnea diagnosis.

What is usually the "problem" from the VA's Perspective

In Scenario #2, the problem from the VA's perspective is that while it has to concede that the Veteran currently has sleep apnea, it has no way of knowing that the earlier in-service symptoms are symptoms of the SAME CONDITION that the Veteran currently has been diagnosed with.

Remember earlier in this Guidebook we talked about the symptoms of Sleep Apnea?

Remember how I told you that the symptoms of sleep apnea - or the limitations that result from sleep apnea - may be symptoms of many, many other medical conditions?

This is the quandary that the VA is in.

* What if the in-service symptoms were symptoms of a condition other than sleep apnea?

* What if they were limitations from a condition like depression, or insomnia, or chronic fatigue?

* What if they were the symptoms of a respiratory disorder, and not sleep apnea?

The VA needs evidence that connects symptoms to a condition to be able to determine that the symptoms you had last year, 5 years ago, 10 years ago, or more are related to the condition you have TODAY.

Important Considerations/Questions to address.

When approaching a Sleep Apnea claim that fits into Scenario #2, the first thing that I want to get is an understanding of

the connection - medically - of the symptoms that appeared in the past to the current diagnosis of Sleep Apnea.

1) I will talk to the Veteran about their current sleep apnea diagnosis, and request copies of the sleep study and sleep history through which the current sleep apnea was diagnosed.

2) I will have a discussion with the Veteran to understand the chronology and nature of the symptoms that he/she began experiencing during military service.

- Documenting the nature, severity, and frequency of these symptoms in a Sworn Declaration is vital to me - and to medical personnel - to be able to read through the list and timeline of symptoms.

3) I will ask the Veteran to list any people that might have also observed these symptoms in service, and speak to as many of those people as possible.

- Documenting the nature, severity and frequency of these symptoms in Sworn Declarations by the people that observed them is important to help the medical doctor corroborate the full sleep-breathing history of the Veteran.

4) I will have a discussion with the Veteran to understand the chronology and nature of the symptoms that he/she has experienced SINCE military service - from discharge until diagnosis of the current sleep apnea condition.

- Documenting the nature, severity, and frequency of these symptoms in a Sworn Declaration is vital to me - and to medical personnel - to be able to read through the list and timeline of symptoms, and see how they evolved, changed, or solidified over time.

5) I will ask the Veteran to list any people that might have also observed these symptoms SINCE military service - from

discharge until diagnosis of the current sleep apnea condition, and speak to as many of those people as possible.

- Documenting the nature, severity and frequency of these symptoms in Sworn Declarations by the people that observed them from discharge from the military until diagnosis of the current condition is important to help the medical doctor corroborate the full sleep-breathing history of the Veteran and trace the evolution of the symptoms over time.

- The pattern of symptomatology, over time, is what helps a doctor know if the symptoms in service are symptoms of the same condition that has currently been diagnosed.

6) I will put all of the above together in a tabbed binder, with table of contents, and approach a sleep specialist or medical doctor with extensive sleep apnea experience and ask them to help me understand whether the symptoms that were documented in service, and since service, are symptoms of the same condition that the Veteran has currently been diagnosed with.

7) Once I have that opinion from the medical doctor that connects the historical symptoms and observations to the current diagnosis, I will approach another doctor - invariably one with extensive sleep apnea experience and/or a sleep specialty - and ask the ultimate question: given the medical and lay evidence, the Veteran's medical history, military service history, and all the information in the C-File - is the Veteran's current sleep apnea at least as likely as not related to military service?[36]

[36] Never forget to ask for the Medical Expert to include the "Magic Words" that the VA needs to see in a private medical opinion - we discussed these "Magic Words" in the chapter on Medical Evidence in a Sleep Apnea claim.

The Key Consideration - or Question - to be Resolved in Scenario #2.

The Key Question the VA (or the BVA) is trying to understand in Scenario #2 is the "in-service incurrence" element.

This is the hardest scenario for most Veterans to understand - because you are not ONLY trying to determine whether the current sleep apnea diagnosis is related to military service, BUT ALSO trying to connect earlier undiagnosed symptoms to a more recent diagnosis of a medical condition.

You are FIRST and FOREMOST trying to determine whether the symptoms that a Veteran has experienced, in and after service, are symptoms of the SAME sleep apnea condition that they have been diagnosed with.

This is a crucial distinction - Scenario #2 invariably requires 2 medical opinions: one that connects the earlier in-service and post-service symptoms to the current diagnosis, and

another that determines that the current diagnosis is related to military service.[37]

Scenario 3: The Veteran is a diagnosis of Sleep Apnea in the Military Service Records, or during the period of service.

General Description of this scenario.

A Veteran was diagnosed with one form or another of sleep apnea in service.

The Veteran files a claim for sleep apnea, sends in the military diagnosis, and expects the VA to just grant it because the sleep apnea was diagnosed in service.

Months later, the Veteran is denied service connection, and the VA is arguing that the Veteran did not prove that the sleep apnea was related to his or her military service.

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[37] Veterans did not used to need to connect the dots with 2 medical opinions in Scenario #2. It used to be that if the Veteran provided a solid proof - through lay and medical evidence - that the symptoms experienced from discharge to diagnosis were the same as the symptoms of their currently diagnosed sleep apnea (plus a statement that their sleep apnea was a chronic condition), and that the Veterans sleep apnea was "chronic", they did not need the second opinion.

However, since the Fed Circuit's decision in *Walker v. Shinseki*, 708 F.3d 1331 (2013), continuity of symptomatology plus chronicity as a manner of proving service connection is no longer a valid method because sleep apnea is not listed as a chronic condition at 38 CFR 3.303 (b).

Since the *Walker* decision in 2013, Veterans that want to show that their current sleep apnea condition is related to the continuos symptoms from discharge to diagnosis may typically need to prove this with 2 medical opinions: One proving a connection between past symptoms and a current diagnosis, and another connecting the current diagnosis to military service.

In Scenario #3, what is usually the "problem" from the VA's Perspective?

Most Veterans think that once they have a Sleep Apnea diagnosis during the period of military service, they have a "no-lose" claim.

This is not always the case.

There is still a big question out there - is the sleep apnea condition that was diagnosed in service the same as the condition that was diagnosed after service?

Many times, it is.

But even when it is, the VA has no way of knowing this.

They have to be shown - with medical evidence - that the in-service diagnosis is the same as the current diagnosis.

This is much easier when the Veteran has a diagnosis in-service, close to discharge, and files their claim while in the process of separating from the military (or within a very short time after separation).

The longer the passage of time from the diagnosis to the VA claim for service connection of sleep apnea, the harder it will be to prove that the 2 conditions are the same diagnosis.

Why?

Because there are several different types of Sleep Apnea - and dozens of different causes of sleep apnea.

Here's a scenario for you.

A Veteran is diagnosed with Obstructive Sleep Apnea (OSA) while in the military. The sleep study performed on active

duty in the Army concludes that the Veteran's OSA resulted from an traumatic injury to the Veteran's cervical spine.

After treatment, the Veteran's sleep apnea "resolves", and for years is no longer a problem.

10 years after service, the Veteran is diagnosed, again, with Obstructive Sleep Apnea.

As it turns out, the Veteran's later OSA, diagnosed10 years after service, is caused by his obesity.

That diagnosis of sleep apnea in the military?

Largely irrelevant (or maybe not, it depends on a lot of factors too complex to discuss here).

But in any event, the in-service diagnosis has little or nothing to do with the current diagnosis.

The question in Scenario #3 would be this: Is the Veteran's obesity, which caused the Veteran's current OSA, related to his military service?

In other words, is the current OSA secondary to obesity, which is or should be service-connected?

The more time that passes between a diagnosis of sleep apnea in service, and a current claim for sleep apnea service connection based on a second diagnosis of Sleep Apnea, the more questions that will need to be answered or cleared up for the VA Regional Office or the BVA.

Important Considerations/Questions to address in Scenario #3.

As illustrated above, the key evidence in this scenario is going to be the connection between the in-service sleep apnea diagnosis and the post-service sleep apnea diagnosis.

1) The first thing that I would want to see is both diagnoses. I would want to compare a few things: the results of both sleep studies, the full sleep history from both diagnoses, and the causes or etiology that the doctors in both diagnoses identify.

- There are going to be 2 common results from this outcome (although these are not the only results).

One outcome is that there is a close parallel between the 2 diagnoses: the etiology and the sleep histories show the same general facts, timeline, symptomatology, limitations, and etiology.

Another outcome is that there are inconsistencies between the 2 diagnoses: the etiology and the sleep histories appear to be based on different facts, a different timeline, possibly similar or differing symptomatology and limitations, and a different etiology (origin or cause).

2) In the first outcome, where there is a close parallel between the 2 diagnoses, I am going to do the following:

- Have an extensive discussion with the Veteran about the symptoms and limitations he/she experienced from the first diagnosis to the second diagnosis, documenting as much as possible in a Sworn Declaration.

- Ask the Veteran to identify other people that observed those symptoms and limitations in the time period between the first and second diagnoses, and talk to as many of those people as I can. I will document the symptoms and limitations they observed, as well as the timeline, frequency, and severity of those symptoms and limitations in a Sworn Declaration.

- Ask the Veteran if he/she has received any treatment for the sleep apnea from any medical care provider - VA or private -

between those 2 diagnoses. If so, I am going to get copies of all of those medical records.

- I am going to assemble all of that information - the first diagnosis, the second diagnoses, the lay evidence between the 2 diagnoses, and the medical treatment evidence between the 2 diagnoses, and then I am going to approach a medical doctor with extensive sleep apnea experience (or a sleep specialist) and ask them to review that evidence and all the evidence in the Veteran's C-File, to determine if the 2 conditions are the same condition, or share the same etiology.[38]

3) In the second outcome, where there are inconsistencies between the 2 diagnoses, I am going to have to do a lot more work and investigation - I will invariably do all the steps listed in Scenario #1, and Scenario #4.

There is no way to educate you on how to put everything in this Guidebook together in a Scenario where you have 2 Sleep Apnea diagnoses - one in the military and after the military - that have different etiologies or different causative chains.

If you are faced with this scenario, the BEST thing you can do is get help from a Professional Advocate that can help you to develop a strategy for developing the evidence and proving up this kind of claim for service connection.

I recommend you talk to <u>at least</u> 3 different attorneys, if not more, to find the one that works best with you and your unique claim. The VA is going to have a tough time with this claim.

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[38] Never forget the "Magic Words" that the VA wants to see in a Private Medical Opinion - we discussed these "Magic Words" in the Chapter on Medical Evidence in a Sleep Apnea Claim.

The VA may view one diagnosis as "removing credibility" from the other diagnosis.

The VA may want to argue that the second is not related to the first.

There may be a degree of medical complexity in the etiology of both conditions that suggest that they are both tied to a common underlying condition.

It may be that the later form of sleep apnea is a Complex Sleep Apnea, or a treatment emergent Central Sleep Apnea.

Whatever the case, this is the most complicated form of Sleep Apnea claim that I can think of, and you are not going to want to try to argue or prove up this one on your own, in my opinion.

If this describes your situation - 2 different diagnoses of sleep apnea separated by any period of time - do yourself a favor.

Start talking to accredited VA attorneys about professional help for proving your claim.

Scenario 4: The Veteran has one or more conditions service-connected, and is claiming that those conditions CAUSED the sleep apnea.

General Description of this scenario.

In Scenario #4, the Veteran has service-connected, or is trying to service connect, one or more conditions that in turn caused the Veteran's Sleep Apnea.

In Scenario #4, what is usually the "problem" from the VA's Perspective?

Remember earlier in this book when I talked about the VA "cheat sheet" on risk factors for Sleep Apnea?

The VA - at least the Benefits side of the VA - is about 25 years behind the times when it comes to understanding Sleep Apnea.

They still cling to the idea that there are certain limited risk factors for sleep apnea: "….being male; being of older age; and having a history of a heart disorder, stroke, or brain tumor, neck size, obesity, smoking/alcohol/drug use", etc.

They are not aware of all the myriad potential causes for sleep apnea. In this Guidebook, I point out more than 3 DOZEN conditions which are known, or suspected, to cause Sleep Apnea.

While Sleep Apnea is not a "new" medical condition, it is one that we are only recently learning more and more about.

The VBA (the Veterans Benefits side of the house) rarely knows, no less tries to explore, the various causes for sleep apnea.

Important Considerations/Questions to address in Scenario #4.

When you have a medical condition that you believe is causing your Sleep Apnea, you are really going to need to lay it out "clean and easy" for the VA.

This means NOT giving the VA a haystack and yelling at them for not finding the needle.

The VA will need to see the following evidence:

1) Lay Evidence describing the symptoms that you - and others - witness. Key to this is the form (use the Sworn Declaration), and the contents of those statements. The statements should be specific about the time, duration, frequency, severity, and precise descriptions of symptoms and limitations that you and others observe.

2) Medical Evidence showing treatment for the sleep apnea

3) Medical Evidence showing treatment for the condition that is underlying - or causing - the sleep apnea.

4) Medical Expert evidence showing the connection between the 2 conditions - the sleep apnea and the underlying condition that is causing it.

5) Medical Expert evidence showing that the underlying condition is related to military service - unless you have already been granted service connection.

For example, let's say a Veteran is the victim of a Military Sexual Assault.

During the assault, the Veteran's jaw was broken (not an uncommon injury in violent military rapes that are often about displays of power, and not sexuality).

To fix the broken jaw, the Veteran had to get surgery.

In the course of doing so, the jaw was reattached in such a way that it weakened the tongue muscle, causing the tongue to obstruct the airway and causing OSA.

The Veteran is going to need to provide, at a MINIMUM, the following evidence:

1) Evidence of the in-service rape (including corroboration markers that are often required of Military Sexual Trauma victims - read about these markers on the Veterans Law Blog);

2) Evidence that the broken jaw was the result of the rape. (typically medical evidence);

3) Medical evidence showing that the broken jaw was surgically repaired;

4) Medical expert evidence showing how the tongue was weakened as a result of the surgery;

5) Lay and medical evidence that the tongue is what is obstructing the airway;

6) Medical evidence showing a diagnosis of obstructive sleep apnea, with the tongue obstruction being the cause; and,

7) A solid argument that ties it all together.

And that is just to get the claim for sleep apnea service-connected.

You will need additional lay and medical evidence as to the degree of impairment that results from the sleep apnea to be able to get the proper rating.

What about a thyroid condition - or Type 2 Diabetes - that the Veteran believes is causing sleep apnea?

Same thing, you will need evidence showing the following:

1) Lay and medical evidence showing the symptoms showing the diagnosis, symptoms and limitations of the thyroid condition or diabetes.

2) Medical expert evidence showing that the thyroid condition or diabetes is related to military service.

3) Lay and medical evidence showing the symptoms, limitations and diagnosis of the sleep apnea condition.

4) Medical expert evidence showing that the sleep apnea condition is caused by the thyroid condition.

The Key Consideration - or Question - to be Resolved in Scenario #4.

Here's where most veterans go wrong in a claim like the one described here in Scenario #4.

They submit their treatment records, explain their symptoms, and throw in a couple printed out medical journal articles that talk about the interplay of the 2 medical conditions.

That is like spreading a box of unassembled Legos out on the floor and saying "Lookey there, can you see the Lego Spaceship?".

You need someone to put it all together - and in a Secondary Service Connection Scenario, it will have to be a Medical Expert.

I have never seen a secondary service connection claim for sleep apnea - or any medical condition - won without a Medical Expert Opinion.

Chapter 12:
Common Errors in VA Sleep Apnea Claims

In the course of writing this Guidebook, I reviewed dozens, if not thousands, of BVA decisions in sleep apnea claims.

* I reviewed hundreds of C-Files that my firm has requested in Veteran's Sleep Apnea claims.

* I review Veterans Court decisions pertaining to Sleep Apnea claims.

* I reviewed of all my law firm's past claims involving sleep apnea conditions and claims.

In doing so, I came across 5 errors that appeared, in some form or fashion, in more than half of the claims that were denied by the VA Regional Office, BVA, or Veterans Court.

I am going to point out those 5 Errors, below, and how to try to avoid making them, but before I do so, I want to give you a couple warnings.

Warning #1: These are not the ONLY errors that Veterans make.

One or more of these errors appeared in more than half of the claims, cases, files, decisions and appeals I looked at.

However, there were reasons why every claim for sleep apnea was denied - and the errors that were made were commonly UNIQUE to the facts of the Veteran's particular claim.

One Veteran, for example, tried to argue that his own medical experience qualified him to diagnosis sleep apnea.

Not a common error, but one that truly affected the competence and credibility of his evidence.

Another Veteran tried to add Lay Evidence of sleep apnea symptomatology to the record - which was generally a smart thing to do.

But the Veteran didn't compare that Lay Evidence to the Veteran's own sleep history, and the 2 sets of evidence often created confusion as to the timeline of the Veteran's symptoms. The evidence was found to not be credible because it lacked "integrity" with the rest of the evidence in the C-File.

Every Veteran that has been denied sleep apnea has made some sort of mistake in proving up their claim to the VA Regional Office.

I did not see a single decision where I believed the Veteran was lying about their belief that their sleep apnea was related to military service.

Nor did I see a single decision where I believed the Veteran was trying to "cut corners" or defraud the government.

For most Veterans that are denied sleep apnea service connection, they have what I call a "failure of proof": Something is missing in the dots that the VA needs connected in order to grant the claim.

Warning #2:
No Guidebook, ebook, guide, checklist, blog post, form - in short, nothing - can take the place of solid legal advice from an accredited VA attorney.

These examples of common errors and how to avoid them are NOT legal advice - do not rely on them as legal advice.

They are GUIDES, only - meant to help you understand how to tie all of the information in this Guidebook together.

I am NOT telling you how to prove your VA claim - I don't know the first thing about your claim, and so I can't tell you what you really need - or don't need - in your VA Sleep Apnea claim.

This information is to help you understand how everything "fits" together in a VA Sleep Apnea claim - not to tell you how to fit everything together in YOUR VA Sleep Apnea Claim.

Tired of seeing this Warning? Heed it - its really important!

It is crucial that you do not rely on this Guidebook as legal advice.

It is meant to educate and inform you about sleep apnea, VA claims and appeals, and how the VA looks at Sleep Apnea claims.

It is NOT meant to advise you about your specific claim.

With that said, here are the 5 Most Common Errors that I saw in preparing his Guidebook:

Common Error #1: The Veteran - or the VA or the BVA - was confused about the type of Sleep Apnea.

Sometimes, the BVA or the VA used central or obstructive sleep apnea interchangeably. Sometimes, the Veteran did.

But most times, the decisions of the VA and the BVA just talked about "sleep apnea" without delineating the particular type of sleep apnea that the Veteran had.

If there is one thing that I hope this Guidebook made clear, it is that sleep apnea is a complicated medical condition that cannot be connected to military service without clear and detailed connections from the events that gave rise to the condition, to the nature of the symptoms, to the type of

diagnosis, all the way down to what types of evidence support the different types of claims.

When I see a Veterans decision that talks about "sleep apnea" without delineating whether it was CSA, OSA, or Complex Sleep Apnea, then I suspect that there is a failure of Lay or Medical Evidence, or the VA or BVA made an appealable error by oversimplifying - or misconstruing - the nature of the sleep apnea condition and/or its etiology.

Be sure to clearly spell out for the VA what TYPE of sleep apnea you have, and make sure that it is consistent throughout your presentation.

If, as in Scenario #3, in the preceding chapter, you have diagnosis of different kinds of sleep apnea, you are going to want to find a professional advocate to help you.

These kinds of claims are the most complicated of all the sleep apnea claims, and require an extensive review of the lay and medical history and evidence, and extensive medical expertise to connect the dots that need to be connected.

Solution: Don't talk about "Sleep Apnea".

Make sure your diagnosis says OSA, CSA, or Complex Sleep Apnea.

Make sure your proof explains why your Sleep Apnea is OSA, CSA, or Complex Sleep Apnea.

Talk about the specific type of sleep apnea that you have, and insist that your doctors, friends, family, VA raters, DROs, and BVA Judges talk about the specific type of Sleep Apnea you have.

Common Error #2: Lack of Lay Evidence.

The second most common error was the lack of lay evidence.

So many Veterans who were denied service-connection went all the way to the BVA with just this evidence:

1) A diagnosis of Sleep Apnea

2) A VA Form 21-4138, or several, explaining their own symptoms at the time of the claim (not in the military, or from military discharge to diagnosis)

3) A VA C&P exam denying service connection.

With evidence like that, you are just asking to lose your claim.

Lay Evidence is VITAL to a VA Claim. In fact, it is so important, that in most cases, the lack of lay evidence can weaken the medical evidence in your claim.

A doctor cannot diagnose a condition - and hope to get it right - without understanding a lot about how - and WHEN - the symptoms he/she is trying to diagnose presented in the patient.

Doctors that talk to just the patient are often not getting the full picture of the symptoms.

They are getting a very narrow idea of how the condition presents.

What makes medical evidence REALLY powerful in a VA claim is the strength of the Lay Evidence on which it relies.

I saw a lot of BVA decisions in which the Board reversed VA denials of service connection.

In almost all of these cases, the BVA's reversal happened because they were able to see ALL the dots connected in the claim, from service to diagnosis.

Those dots were connected by lay evidence, corroborated by other lay evidence, and summed up by medical evidence.

The BVA was more than willing to reverse the VA denial of sleep apnea service connection when the Veteran was able to connect all the dots:

* Self-observed symptomatology and limitations, as well as their frequency, severity and duration, from military service or discharge to diagnosis.

* Third-party observations of symptomatology and limitations, as well as their frequency, severity and duration, from military service or discharge to diagnosis.

* Medical records of treatment, whenever it occurred, that was consistent with - had structural integrity rooted in or based on - the previous 2 forms of Lay Evidence

* Medical opinions that looked at all of the above evidence, and provided an opinion that had the "Magic Words" we talked about earlier in the Chapter on Medical Evidence in a VA Sleep Apnea Claim.

Its not hard to build a claim that strong.

You have to do the legwork, though.

The VA is NOT going to do that.

Which leads me to the next most common error….

Common Error #3: Veterans left the VA to figure out the connection of military service and their sleep apnea.

I saw dozens of decisions and claims where the Veteran contended that they had PTSD and Sleep Apnea, and therefore both should be service connected.

I saw dozens of decision and claims where a Veteran contended that their TBI caused their Sleep Apnea, or their exposure to toxic fumes in the burn pits in Iraq caused their sleep apnea, or their heart condition or diabetes caused their sleep apnea….but did little or nothing to connect the dots for the VA or BVA in those claims.

Not surprisingly, the VA didn't develop the evidence to support that legal or medical theory.

Should the VA have developed the claim? Yes, I believe that they should.

Here's the thing, though: they rarely - if ever - will go to the lengths necessary to properly prove up the Veteran's Sleep Apnea claim.

If you leave someone else to connect the dots in your VA Claim, there is no telling where they will end up.

If you don't have the time or experience to handle a VA Claim, then get a professional advocate to help.

If you just file the claim, do nothing to develop the record, and don't retain or designate a representative to do it for you, then you really shouldn't be surprised when the VA and BVA deny your claim.

Now, if you just want to moan and complain about the VA's incompetence, and not ever be service connected for your sleep apnea?

By all means, file the claim, send a haystack of paper to the VA, and sit back and wait for them to deny you.

You can then complain to your hearts' content.

But if you want to service-connect your sleep apnea, start getting treated for the condition, and get out of the VA Hamster Wheel and get on with the rest of your reintegration to civilian life?

Do the legwork, and using the information and education that this Guidebook has provided, connect the dots for the VA using 5-Star Lay and Medical Evidence.

And when you get in over your head, don't hesitate to ask a professional advocate for help.

Common Error #4: Failure to tie in-service symptoms to current diagnosis.

We talked about this a little in the previous chapter in Scenario #2.

Remember, this is the scenario where a Veteran has a current diagnosis of sleep apnea, some evidence of symptoms - sometimes medical, sometimes lay, and sometimes both - in the military service or military medical records, but no diagnosis at or near the time of military service.

Many of the cases I saw where this scenario arose, the Veteran (and sometimes their advocates) made the same mistake - they thought that the chain of symptoms from service to diagnosis would be enough to show that the sleep apnea was related to military service.

It is not.

The only way to connect past symptoms to a current condition in a sleep apnea claim - at least as the law exists

now - is to show that the past symptoms are evidence of the same condition that has been currently diagnosed.

This is because the VA raters and the BVA judges that decide your claims are not medical doctors and have not medical training.

Even if they did, by law they are not allowed to rely on their own medical expertise, or lack of that expertise, to decide your claim.

So when a VA Rater sees in-service symptoms and a diagnosis many years later, medically speaking they have NO idea what those symptoms related to unless a medical doctor provides that relationship in the form of a medical expert opinion.

Listen, we could argue that the symptoms are exactly the same as the symptoms of your current condition, therefore they must be the same condition and they must be related to your military service.

But that is all we are doing - arguing.

If we want to stay in the VA Hamster Wheel, we argue. We speculate. We debate. We engage in conjecture.

But if we want out of the VA Hamster Wheel, we get evidence and we PROVE our claims.

So if you have a current diagnosis of Sleep Apnea, and years ago in the military (or at any point in between) you have symptoms of sleep apnea without a diagnosis, here is the FIRST type of PROOF that you are going to want to get:

A medical opinion stating that the earlier symptoms are symptoms of the same sleep apnea condition with which you have been diagnosed.

Your ability to get that medical opinion is going to largely be dependent on the Lay Evidence that you present to the medical expert.

Document your sleep-breathing history in lay statements - yours and your spouse, your family members, co-workers, fellow service members, friends, colleagues, bosses,….anyone that observed those symptoms from service to discharge.

Only by showing the doctor the full picture of your symptoms from the time of military service to the time of military discharge and then to the diagnosis of your sleep apnea will he or she really be able to make an accurate and informed decision as to the connection of past symptoms and current diagnosis.

And the best part?

This type of medical opinion - one that relies on a large volume of competent and credible lay evidence of observed symptomatology - is the strongest kind of medical opinion you can get.

Common Error #5: Missing diagnosis.

I was shocked at how many times this error showed up.

Many Veterans have asked me to review their sleep apnea denial in a VA Ratings Decision.

I look through the C-File and can not find a diagnosis of sleep apnea.

I ask the Veteran how they know they have sleep apnea, and they say, "My wife tells me I snore and stop breathing in my sleep".

Listen, I get it - the common core symptoms of sleep apnea are easily observable by a lay person.

I have an aunt with sleep apnea - I'm sure of it - I know the snoring, and I can tell when she stops breathing when she falls asleep watching TV. I am not dumb, and neither are you.

But here's the thing. I'm not a doctor.

Neither you nor I are medical professionals. We may know what Sleep Apnea looks like, and sounds like, but we sure as heck cannot diagnose it.

Only a medical professional can medically diagnose sleep apnea conditions.

And while you don't necessarily need a sleep study to diagnose sleep apnea, you are playing "Russian Roulette" with your VA Claim.

Do yourself a favor - get a sleep study and medical diagnosis of sleep apnea in your VA claim.

If you do nothing else - load the record with 5-Star Lay Evidence of your sleep apnea symptoms dating as close to military service as possible - and then ask that the VA fulfill the Duty to Assist and provide a sleep history exam, and a polysomnogram (and any other necessary medical tests), to diagnose sleep apnea.

When the record reasonably suggests that there is a possibility that your symptoms "could" be related to military service, the VA has a Duty to Assist you by providing a medical exam and diagnosis.[39]

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[39] I say this all the time - don't confuse the Duty to Assist with actual assistance. Sometimes, it is faster and better to go out and get a private sleep study, if you can afford it. If you can't, or your private health care insurance won't cover it, then you may have to ask the VA for a Diagnostic Exam under the Duty to Assist.

And by all means, document symptoms using your own lay statements, the lay statements of your spouse, children, family members, friends and co-workers.

Documenting with lay evidence is VITAL to a sleep apnea claim.

But you will not get ANYWHERE - with the VA or the BVA or the Veterans Court - unless a medical doctor diagnoses Sleep Apnea.

Chapter 14:
Conclusion.

Open your eyes to the possibility that you have more Power with the VA than you think.

Then use that Power.

I hope you found this Guidebook to be informative and educational - please let me know if I can improve it in any way by giving me feedback, here.

This Guidebook is not meant to be legal advice: no eBook on Veterans Law can serve as a substitute for legal advice from a VA accredited attorney.

Use this Guidebook to help you to think outside the box that the VA has attempted to put you in - but you are not being reasonable if you rely on it as legal advice, or legal guidance.

Do NOT rely on this Guidebook as legal advice - it is not intended for that purpose, and cannot be used for that purpose, because good legal advice requires an understanding of the specific facts and posture of your unique VA claims.

Instead, this Guidebook is meant to give you information and education about the VA Claims Process and the language the Courts and BVA and VA Regional Offices use when considering Sleep Apnea claims and appeals.

Your claim is nothing more - and nothing less - than the story of your military service. Even still, you have to tell it to the VA in a way that they will understand.

Hopefully this Guidebook gives you some ideas about how to use evidence to tell that story.

If you get in over your head, or just believe that it's time for a professional to take over, reach out to attorneys that are accredited by the VA and that have the experience and the "know-how" to offer you sound legal advice and/or assistance.

There's a saying in the legal profession:

"The lawyer that represents himself has a fool for a client."

Lawyers know that no matter how much of an expert any one of us is, we are often our own worst advocate.

I handled my own VA claim, in part because I wanted to experience the VA from the Veteran's perspective - not just the attorney's perspective.

The most valuable thing that I learned?

Knowing when I needed more information, or when I was in over my head.

If you liked what you read in this eBook send another Veteran to my website to get his or her copy.

Tell them about the Veterans Law Blog. Tell them about the Veterans University and the Veterans Law eBooks available there.

Let's watch out for each other - nobody else has our backs.

The Legalese: Disclaimers and Fine Print.

This Guidebook is not meant to be legal advice and does not serve as a substitute for legal advice. Information is power, and I am providing this information to give you, the Veteran, more power. This information is not widely or easily accessible to Veterans.

The information presented in this Guidebook is a general description of law and process; every Veteran's claim or appeal is unique and different. There may be approaches listed here that are not accurate or applicable to your case, claim or appeal.

You can do serious damage to your case by misapplying the information in this Guidebook to your claim or appeal.

The use of these cases is for information and education purposes only - so that you can understand the process and the jargon better.

THERE IS NO SUBSTITUTE FOR LEGAL ADVICE FROM AN ACCREDITED VA BENEFITS LAWYER.

There may be information is applicable to your case that is not provided in this Guidebook.

Downloading and reading this Guidebook does not make you a client of the Attig Law Firm and it does not make any of us your attorney.

If there is an attorney-client relationship, we will have a written and signed document explaining that relationship. If you do not have a written attorney client agreement signed by an attorney at the Attig Law Firm and by you, the Veteran, it is unreasonable to think that any attorney at the Attig Law Firm is your attorney or provided you legal advice.

It is very important to note that each and every Veteran's claim is different. Just because the Attig Law Firm was able to secure substantial past-due benefits for one Veteran or Veteran's spouse does not mean or imply that we will be able to do so for you. In

some cases, the Attig Law Firm may not be able to secure any financial compensation or past-due benefits due to the facts or law of your particular case.

It is best to consult with a lawyer familiar with and accredited to handle VA Disability claims and benefits if you have specific questions about the facts and law of your particular case.