



ISSUE PAPER: Patterns of VA Errors & Denials in Gulf War Illness Claims

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Department of Veterans Affairs (VA) regulation recognizes two classes of chronic qualifying disabilities entitled to presumptive service connection with service in the Southwest Asia (SWA) theater of operations: undiagnosed illnesses (UDX) and medically explained chronic multisymptom illnesses (MUCMI).¹

Based on a review of several hundred Veterans Benefits Administration (VBA or VA) disability compensation claims over several years, Vietnam Veterans of America (VVA) and Veterans for Common Sense (VCS) identified distinct patterns of VA errors and denials in these “Gulf War Illness claims”.

This issue paper contains three parts describing the patterns and providing examples:

- I. VA errors and denials for MUCMI claims
- II. VA errors and denials for UDX claims
- III. VA errors and denials based on location and dates of service in Gulf War claims

I. VA Errors and Denial Patterns for MUCMI Claims:

MEDICAL OPINION DENIAL PATTERNS – By definition, presumptive conditions do not require a medical nexus opinion.² VA’s *Adjudication Procedures Manual* (M21-1) explicitly states, “[w]here there is a current diagnosis of a MUCMI...an examination is **not** necessary unless workup is needed for the purpose of assigning a disability evaluation.”³ [*emphasis added*] The “Notice to Examiners” that must be provided by VA rating specialists in the examination request states that if a veteran is diagnosed with either a UDX or a MUCMI, then “no medical opinion or rationale is required as these conditions are presumed to be caused by service in the Southwest Asia theater of operations.”⁴

VA’s error arises either when the VA rating specialist incorrectly requests a nexus opinion when there is already a diagnosis of a UDX or MUCMI, or when VA’s compensation and pension examination (“C&P exam”) incorrectly provides a medical nexus opinion. When VA’s medical opinion is adverse, then the veteran’s claim is improperly denied by VA’s rating specialist. Subtypes include:

DENIAL PATTERN A: “Not-from-Service” Denial Pattern – VA’s C&P exam opines the presumptive condition did not manifest while the veteran was on active military service. In fact, the veteran’s MUCMI manifestation is not limited to while the veteran was in service. The condition can manifest during active military service **or** manifest to a “degree of 10 percent or more not later than December 31, 2021.”⁵ [*emphasis added*]

DENIAL PATTERN B: “No-Nexus” Denial Pattern– VA’s C&P exam opines the presumptive condition is “less likely than not” associated with the veteran’s service. As

¹ See generally 38 C.F.R. § 3.317.

² See *Gutierrez v. Principi*, 19 Vet.App. 1 (2004).

³ See M21-1, IV.ii.1.E.2.h.

⁴ See M21-1, IV.ii.1.E.2.m.

⁵ See 38 CFR 3.317(a)(1)(i).

explained above, “no medical opinion or rationale” is needed for a presumptive condition. When there is an adverse opinion by VA’s C&P examiner, then VA’s rating specialist incorrectly denies the veteran’s claim.

DIAGNOSIS DENIAL PATTERNS – Presumptive conditions do not require a medical nexus opinion. VA’s error arises when a VA medical nexus opinion is requested by a VA Regional Office and the VA C&P examiner or VA rating specialist incorrectly re-evaluates one or more diagnoses made by the veteran’s qualified treating physician(s).

It is generally acknowledged that VA may request a medical opinion when there is insufficient evidence to determine a claim,⁶ and it is the duty of a rating specialist to “reconcil[e] various reports into a consistent picture.”⁷ However, the VA nexus opinions upon which VA’s rating specialists rely must be based upon accurate facts and be supported by adequate reasoning.⁸ Subtypes of these denial patterns include:

DENIAL PATTERN C: “Diagnosis Overruled” Denial Pattern – VA’s C&P exam or VA’s rating specialist overrules, changes, or offers an alternative for the diagnosis made by the veteran’s qualified treating physician, resulting in a denial of the veteran’s claim for a MUCMI. In many cases the opinion of VA’s C&P exam is not based upon a full review of the veteran’s medical history and is not supported by adequate reasoning, such that the alternative diagnosis should be discounted in favor of the diagnosis provided by the veteran’s qualified treating physician.

DENIAL PATTERN D: “Lumping-Together” Denial Pattern – VA’s C&P exam or VA’s rating specialist inappropriately combines two or more conditions diagnosed by the veteran’s qualified treating physician(s) as separate and distinct, resulting in a denial of the claim for one of the lumped-together conditions. As stated in “C” above, in many cases the opinion stated in VA’s C&P exam is not based upon a full review of the veteran’s medical history and is not supported by adequate reasoning, such that the alternative diagnosis should be discounted in favor of the diagnoses provided by the veteran’s qualified treating physician.

This is a notable error because each MUCMI has a separate diagnostic code and a rating schedule within 38 CFR. In one example, a diagnosed functional gastrointestinal disorder (FGID) was lumped together with the diagnosis of and as merely symptoms of fibromyalgia (FM); while VA approved the veteran’s claim for FM, VA denied the veteran’s claim for the FGID. In another example, a diagnosis of chronic fatigue syndrome (CFS) was lumped together with the diagnosis of (and as merely symptoms of) FM; VA approved the veteran’s claim for FM (which carries a maximum schedular rating of 40 percent) but denied the veteran’s claim for CFS (which carries a maximum schedular rating of 100 percent). By combining the distinct diagnoses, the rating specialist is violating VA’s duty to maximize benefits.⁹ It is also a concern that veterans are thereby also not being properly considered for entitlement to total disability based on individual unemployability (TDIU).¹⁰

DENIAL PATTERN E: “Diagnosis Overlooked” Denial Pattern. VA’s C&P exam or VA’s rating specialist inappropriately ignores the diagnosis made by the veteran’s

⁶ 38 CFR 3.159(c).

⁷ 38 CFR 4.2.

⁸ See *Stefl v. Nicholson*, 21 Vet.App. 120 (2007).

⁹ See *Bradley v. Peake*, 22 Vet.App. 280 (2008).

¹⁰ See 38 CFR 4.16.

qualified treating physician. As a result, VA's rating decision is silent on the veteran's evidence, resulting in VA's denial of the veteran's claim. In such a situation, VA's C&P exam opinion was not based on accurate facts and should be discounted,¹¹ and VA's rating specialist has erred because reports of examination must be interpreted "in the light of the whole recorded history."¹²

DENIAL PATTERN F: "Disqualifying-the-Physician" Denial Pattern. VA's C&P exam or VA's rating specialist inappropriately disqualifies the medical certifications of the veteran's treating medical practitioner. As a result, the diagnosis made by the qualified treating physician prior to VA's C&P exam may be mentioned but is discounted, resulting in VA's denial of the veteran's claim.

There is no statutory or regulatory guidance that Gulf War illness claims be reviewed by any particular medical specialist.¹³ If a VA C&P exam discounts an opinion offered by another doctor solely on the basis of the physician's medical certification, that determination must be supported by adequate reasoning, or else it must be discounted.¹⁴

SCHEDULE OF RATINGS-BASED DENIAL PATTERN:

DENIAL PATTERN G: Fibromyalgia "Total Disability Rated as Non-Total" partial denial – VA's schedule of ratings currently only allows for a maximum rating of 40 percent for fibromyalgia. In the case of a veteran totally disabled by fibromyalgia based on an opinion from the veteran's qualified treating physician, VA's rating specialist only grants the veteran the maximum schedular rating for fibromyalgia of 40 percent. By contrast, a veteran totally disabled by fibromyalgia can be approved for Social Security disability (SSDI/SSI) benefits, which are granted solely on the basis of total disability.

This pattern is often but not always seen with the "lumping together" pattern described in Denial Pattern "D," above.

It is a concern that VA's rating schedule for fibromyalgia¹⁵ does not reflect the current state of medical science. As in "D" above, it is also a concern that veterans are thereby also not being properly considered for entitlement to total disability based on individual unemployability (TDIU).¹⁶

II. VA Errors and Denials for UDX CLAIMS:

DENIAL PATTERN H: "Undiagnosed Illness Overruled" Denial Pattern – A veteran's qualified treating physician concluded the veteran's symptoms constitute a UDX. However, VA's C&P exam and/or VA's rating specialist assigns one or more diagnoses to the veteran's symptoms. As a result, VA denies the veteran's claim because the undiagnosed illness symptoms have now been diagnosed and are not eligible for consideration as a UDX. For example, a veteran evaluated over a period of seven months for a chronic skin condition unable to be diagnosed by a treating

¹¹ See *Stefl*.

¹² 38 CFR 4.2.

¹³ See M21-1, III.iv.3.A.1.g ("Specialty examinations may be (and usually are) performed by non-specialist clinicians").

¹⁴ See *Stefl*.

¹⁵ See 38 C.F.R. § 4.71a, Diagnostic Code 5025 (Fibromyalgia).

¹⁶ See 38 CFR 4.16.

physician is diagnosed by VA's C&P exam or VA's rating specialist as dermatitis and VA denies the veteran's claim.

This involves the same issues as listed in Denial Pattern "C," above, when VA's C&P exam's opinion is not based upon a full review of the veteran's medical history and is not supported by adequate reasoning.

DENIAL PATTERN I: "UDX-to-CMI" Denial Pattern – This pattern is similar to "Undiagnosed Illness Overruled" denial. However, in this pattern, VA's C&P exam and/or VA's rating specialist diagnosed the UDX symptoms as a MUCMI and then VA denied the claim as shown in Denial Patterns "A" through "G," above.

DENIAL PATTERN J: Medical Opinion Denial Patterns – In these UDX denial patterns, the situation is similar to MUCMI patterns shown in "A" and "B", above.

III. Location and Dates of Service Denial Patterns in Gulf War Claims:

DENIAL PATTERN K: Location of Service Denial Pattern – In this pattern, VA incorrectly denies the claim based on the veteran's location of deployment. For example, VA incorrectly denied Gulf War-related service connection by disqualifying the veterans' qualifying service aboard a U.S. Navy ship stationed in the Persian Gulf, even though "the Persian Gulf" is listed in VA's definition of Southwest Asia (SWA).¹⁷

While incorrect denials on this basis (and as in "L", below) are now subject to quick correction under Higher Level Review,¹⁸ VA's improper denial still subjects the veteran to needless frustration and delay in the adjudication of a VA claim. To avoid these kinds of obvious errors, VA should, in the least, ensure initial decisions on Gulf War illness claims be reviewed by VA's more experienced rating specialists.

DENIAL PATTERN L: Dates of Service Denial Pattern – In this pattern, VA incorrectly denies the veteran's claim based on the veteran's dates of SWA service. For example, VA improperly denied Gulf War-related service connection of veterans whose deployment to SWA began after 1991, on the grounds the conflict ended in 1991, even though the war period in SWA remains open-ended.¹⁹ (See also "K," above).

DENIAL PATTERN M: Southwest Asia Definition Denial Pattern – VA improperly denies Gulf War veterans' claims based on VA's restrictive definition of SWA service,²⁰ which improperly excludes Gulf War service in five countries (Israel, Turkey, Jordan, Syria, and Egypt) included by the Department of Defense (DoD) for the award of the Southwest Asia Service Medal (SWASM)²¹. Either VA or Congress could expand VA's restrictive definition to mirror DoD's.²²

¹⁷ See 38 CFR 3.317(e)(1) and (2).

¹⁸ See generally M-21-1, Part I, Ch. 6.

¹⁹ See 38 USC 101(33); 38 CFR 3.2(i).

²⁰ See 38 CFR 3.317(e).

²¹ See 32 CFR 578.27.

²² It is the position of multiple Veterans Service Organizations, including VCS and Veterans of Foreign Wars (VFW) that VA's definition of qualifying SWA service should be corrected to mirror DoD's. VCS has a more comprehensive issue paper on this issue available on the VCS website.