Monday, October 02, 2017

RE: Denial of benefits (PTSD/Pre-existing Depression) Re-Consideration

NOD/DRO Review

I am writing in regard to VA's recent denial of benefits for PTSD and/or aggravation of a pre-existing condition of depression.

First, to address the C&P exam, dated 14Jul2017. The C&P examiner stated the following:

b. The condition claimed was less likely than not (less than 50% probability) incurred in or caused by the claimed in-service injury, event or illness.
c. Rationale: The primary rationale for this opinion is the presence of symptoms **similar to his current symptoms prior to joining the military** (see Mental Health history, Substance Abuse history). As stated in a December 1, 1989 Mental Health note "referral for eval of EPTE SA in 1987 of putting His head through a glass window while drunk. States he was in a state of depression at the time." and goes on "Significant hx of feeling dression with suicidal ideation both sober and intoxicated. Has stopped himself from killing himself with gun but can not verbalize why he stopped."
Similarly, veteran's history is inconsistent with his service being the **Major precipitant of his current distress. (This does not address aggravation)**

VA requested a follow up question to address the question of possible aggravation, dated 30August, 2017. In his follow up response the C&P doctor stated the following:

b. The claimed condition, which **clearly and unmistakably existed prior to service,** was not aggravated beyond its natural progression by an in-service event, injury or illness.
c. Rationale: It would be **speculation** to determine the presence of aggravation due to any trauma occurring during veteran's military service. This conclusion is based on the following: 1) Veteran has multiple established factors increasing the **likelihood** of depression including relationship difficulties, early family risk factors, and alcohol abuse. These established factors are **likely** associated with significant aspects of veteran's depression. **Separating out the portion of depression attributable to trauma in the presence of these other larger factors would be a**

questionable exercise at best. 2**) The literature to establish a connection between trauma and depression does not exist in a way that allows application in this situation**.

PTSD and Major Depression likely have some level of concordance (having one diagnosis increases the likelihood of having the other diagnosis); however, even this literature has not established firm levels of concordance depending on the severity of trauma, family history, and other risk factors not to mention the more than 25 years between the trauma and current functioning such as exists for the veteran. In addition, this literature is about diagnosed PTSD, not just a trauma having occurred. Similarly, there is literature on connection between general stresses and depression but again not in a manner that allows the assessment of a 25 year lapse between stress and current depression. 3) Veteran's depression is very mild. The mildness of the depression suggests that any portion of depression attributable to aggravation would be very small. Smaller than the accuracy of current psychological strategies to measure.

Just based on the C&P examiner's notes, his use of language (such as speculation, likely, likelihood, etc.) and his admission therein that determining aggravation would be limited to speculation, VA has failed to meet requirements, as prescribed by law and past court direction, as in Horn vs Shineski, noted in the following:

"…the burden is not on the claimant to show that his disability increased in severity; rather, it is on VA to establish by clear and unmistakable evidence that it did not or that any increase was due to the natural progress of the disease. Therefore, VA may not rest on the notion that the record contains insufficient evidence of aggravation. Instead, VA must rely on affirmative evidence to prove that there was no aggravation. If the Secretary fails to produce clear and unmistakable evidence of lack of aggravation, the claimant is entitled to a finding of in-service aggravation of the preexisting condition."

Also note that the C&P examiner refused diagnosis, initially diagnosed by VA's Dr. Rhonda Bray, of PTSD based on his assessment that I only met criterion A of a DSM 5 diagnosis; However, when reviewing his entire report, he contradicts that in every aspect of a DSM 5 diagnosis and actually lists symptomology that verifies my meeting every one of the criterion (A_H) as proven by the following statements in regard to each criterion listed, copied directly from his initial exam notes (A-H):

Criterion A: stressor

a. Stressor #1: multiple SCUD attacks including debris coming to his
Position in an ammo dump

Does this stressor meet Criterion A (i.e., is it adequate to support
the diagnosis of PTSD)?
[X] Yes [ ] No
Is the stressor related to the Veteran's fear of hostile military
Or terrorist activity?
[X] Yes [ ] No

Criterion B: intrusion symptoms

"Vet reports he cries whenever he comes to the VA" – Tearful and anxious every visit to VA (Military) as clearly indicated in multiple VA notes

"Vet reports that he believes he has nightmares,
Although he doesn't remember them" - Prescribed Prazosin for sleep impairment, shaking sweating and continuous awakening

Criterion C: avoidance

" Veteran does report some avoidance, "I don't
watch any of that [movies, documentaries]" – Avoidance of Gulf War related information due to the anxiety or distress it causes.

"Reports not enjoying social events and avoiding social situations,
including parties and other events where crowds are likely to gather"- Avoid crowds, especially Arabs due to anxiety from service in theater and stressors related to Saudi's pointing weapons

Also, not included in his notes were a conversation the examiner and I had in regard to panic attacks when I don a SCBA (similar to a gas mask during MOP4) and have panic.

Criterion D: negative alterations in cognitions and mood

“Veteran is very preoccupied with how his deployment damaged him and other veterans, "seems like we are all damaged to some degree."

“over-reactive, blaming irritability”

“veteran is very intensely involved in his sense of being wronged”

“ Veteran's responses indicate significant thought dysfunction. Significant persecutory ideation such as believing that others seek to harm him or her. Is suspicious of and alienated from others. Experiences interpersonal difficulties as a result of suspiciousness. Lacks insight. Blames others for his or her difficulties”

Criterion E: alterations in arousal and reactivity

“ persecutory ideation such as believing that others seek to harm him or her. Is suspicious of and alienated from others.”

“His memory/concentration difficulties make him feel out of control. He became very tearful in the interview as he described an incident leading to his referral to mental health”

He and his wife "haven't slept together for 7 8 years," due to his frequent awakenings and "shaking" in bed.

“Reports a significant history of antisocial behavior. Reports engaging In physically aggressive, violent behavior and losing control. Reports Being interpersonally aggressive and assertive. Is overly assertive and socially dominant. Engages in instrumentally aggressive behavior.

“erratic, angry behavior and sometimes emotional breakdowns or incidents of rage. Mike has broken household items and even his hand during such a case because of this, whiche caused him to be off work for months and have surgery and rehabilitation [2013]."

“Veteran reports negative, more than daily, distressing thoughts” Specifically, he describes a preoccupation with, "why I didn't die over there, I don't know how I made it, there's so many different incidents where I should of died and I didn't."

Does the Veteran have any other symptoms attributable to PTSD (and other mental disorders) that are not listed above?
[X] Yes [ ] No
If yes, describe: Veteran reports difficulty controlling his anger

For VA rating purposes, check all symptoms that actively apply to the
Veteran's diagnoses:
[X] Anxiety

Criterion F: Duration:

June 1, 2017 buddy statement by his mother, states, "After returning from the war in Desert Storm he seemed reserved, no longer having a close relationship with friends or family. He seemed more intense with any perceived conflict. It seems like he builds walls to keep some people at bay, keeping his feelings inside, and exhibiting a saddened mood for the most part, but explosive when he becomes agitated. He was not the same young man that left for Desert Srorm. He lost a tremendous amount of weight after returning home and seemed to rely on alcohol more when he would have especially dark moods.Mike seemed distraught and saddened."

C&P doctor states "25 years "relatively" symptom free attempting to prove no continuity in symptomology. Again, there is no clear & unmistakable evidence to support that opinion. All evidence available shows continuity of symptomology. The term "Relatively" makes this opinion useless in determining service connection and should warrant the C&P exam inadequate. Continuity and worsening of symptoms is supported in multiple ways:

1. **Buddy statements from family, employers, fellow Marine's**

2. **I sought help in 1994, but due to allergic reaction to Buspar, I did not seek help again. I have, documented by VA, a history of non-compliance with meds and a noted aversion to taking medication.**

3. **I have, as witnessed by buddy statements and local VA notes, not sought help from VA in the past due to fear of being labeled by the stigma attached to mental illness causing me to lose my gun license, because of misinformation from various sources that VA medical care is sub-par and not worth the effort.**

4. **I have not sought care over the years because any interaction with military (VA) causes me mental/ emotional breakdowns, as clearly evident and mentioned in my VA medical notes**.

Criterion G: Functional Significance

[X] Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks, although generally functioning satisfactorily, with normal routine behavior, self-care and conversation

Veteran's resp nses indicate significant thought dysfunction. Significant persecutory ideation such as believing that others seek to harm him or her. Is suspicious of and alienated from others. Experiences interpersonal difficulties as a result of suspiciousness. Lacks insight. Blames others for his or her difficulties.

Criterion H: Exclusion

There is no clear & unmistakable evidence to refute a PTSD diagnosis or comorbid PTSD and aggravated Depression. Per your examiner " PTSD and Major Depression likely have some level of concordance (having one diagnosis increases the likelihood of having the other diagnosis)". C&P doctor also lists anxiety as a present symptom, but it is not addressed or alluded to anywhere else in his notes.

Also, as a veteran serving in more than one designated combat zone, as designated by Presidential Executive Order #12744, per Title 38 USC 1710, I am recognized as a "Combat veteran":

COMBAT VETERAN ELIGIBILITY DETERMINATION TABLE
COMBAT ZONES, HOSTILITIES and MEDALS

a. **Combat zones** are designated by an Executive Order from the President as areas in which the United States (U.S.) Armed Forces are engaging or have engaged in combat. An area usually becomes a combat zone and ceases to be a combat zone on the dates the President designates by Executive Order.

designated by Presidential Executive Order #12744, per Title 38

Effective January 17, 1991, ***Executive Order 12744*** designated the following areas (including air space and adjacent waters) as CZs: Persian Gulf; Red Sea; Gulf of Oman; Gulf of Aden; that portion of the Arabian Sea that lies north of 10 degrees N. Lat., and west of 68 degrees E. Long.; and the total land areas of Iraq, Kuwait, **Saudi Arabia**, Oman, **Bahrain,** Qatar, and the United Arab Emirates.

b. **Hostilities or Imminent Danger Pay**. Hostile fire pay is defined as pay to anyone exposed to hostile fire or mine explosion, while imminent danger pay is paid to anyone on duty outside the United States area who is subject to physical harm or imminent danger due to wartime conditions,terrorism, civil insurrection, or civil war. Per FMR Volume 7A, CH 10

(Saudi Arabia LA/AS Aug 2, 1990 May 31, 2014)

c**. Medals**. Afghanistan Campaign Medal, Iraq Campaign Medal, Armed Forces Expeditionary Medal; Global War on Terrorism Expeditionary Medal (does not include Global War on Terrorism Medal); Kosovo Campaign Medal; Southwest Asia Campaign Medal; and other DOD authorized combat related medals.

(SW Asia Campaign Medal – per my DD215)

As a recognized combat veteran, the following directives and codes apply to determining service connection by VA:

a. Definition: Combat Disability

The term "combat disability" applies to any injury incurred in action against an enemy of the United States **or as a result of an act of such an enemy**. **The**se injuries include wounds by missiles (bullets or shrapnel)

psychological trauma or posttraumatic stress disorder (PTSD)

experienced in accidents**,** explosions, or airplane crashes during a period when the Veteran was in combat diseases directly attributable to exposure to the elements as a result of action against the enemy **or by the enemy**, such as exposure following an airplane crash or shipwreck

This being stated, the following MUST be applied by VA in determining service connection for either/or mental health condition PTSD and/or Depression:

(d)*Combat.* Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation.

(Authority: 38 U.S.C. 1154(b))

Accordingly, In VA's letter of denial, they cite that I was accepted into military service in "Sound condition"; However, the notations in my SMR's in reference to pre-existing depression (mental illness) note the existence of pre-existing depression and a guarded mood and affect. Acknowledging that there were signs of mental illness present, before and during that examination. The result of which was the Marine Corps requiring me to sign a "no harm contract", meaning that they conceded mental illness, but decided that it was mild enough to allow me to return to my company as long as I agreed to the terms of the "no harm contract".

This pre-existing condition was also conceded by VA and the C&P examiner as indicated by their statement in both the initial C&P exam and follow up letter, addressing aggravation dated 30 August2017, that it "Clearly & unmistakably existed prior to military service".

This being said, VA then, as referenced in the above laws, statutes and court directives, must prove clearly and unmistakably that aggravation of depression (mental illness) was not and could not have been aggravated by service. This must be done in a manner that gives special consideration, as per VA directive, to service connection per the following:

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability.

The lay person, upon looking at the evidence presented, would have to look at combat theater service, multiple near death experiences, death of a friend in country , being struck by shrapnel from exploding missiles and being 19 years old experiencing things and conclude that they could not possibly or reasonably aggravate a pre-existing mental illness.

In an effort to clarify my condition/conditions, and get an unbiased third party look at this C&P examiner's opinions, which based on language and lack of any clear & unmistakable evidence should be found invalid for rating purposes, I have contracted a third party PHD level Psychologist, at my own expense, who is not affiliated with VA nor affiliated with me to perform an independent psychological evaluation/IMO and un-biased analysis of the C&P doctor's exam opinions.

I have included the results of that evaluation with this letter.

I would ask that my claim for PTSD be re-considered, given Rhonda Bray's initial diagnosis, the fact that all criterion is indeed met per C&P doctor's notes, the results of the recent IMO and the fact that the initial VA C&P examination, as well as language in the C&P notes, are inadequate for rating purposes.

I would request that aggravation of pre-existing depression be awarded service connection based on the facts of my claim, VA and C&P doctor conceding the condition " clearly & unmistakably existing prior to service" ,the IMO findings and the fact that the previous C&P is invalid for rating purposes as it contains terminology and opinion that is speculation and ignores facts; also it does not represent clear and unmistakable evidence, contrary to my statements and evidence as a combat veteran, in which case, according to current laws/statutes, would require only lay evidence to begin with.

If, after re-consideration, and in light of this new evidence, VA refuses to apply the laws correctly and denies my claim again, denying service connection for either PTSD and/or Major Depressive Disorder, aggravated by service in combat theater of operations, then VA can consider this my official Notice of Disagreement.

If denied and sent to appeals, I would ask for a timely DRO review and will hire a Veteran's Law Attorney to represent me in an effort to assure that VA apply the laws and honor their duty to assist.

Sincerely,

"The following statements are true and factual to the best of my knowledge"