

The Battle of the Medical Experts

Nohr v. McDonald and Challenging a
Negative Medical Opinion

Overview

- How to obtain a private medical opinion
- Discussion of *Nohr v. McDonald*
- Using *Nohr* to attack the credentials of examiners who give negative medical opinions
- Ensuring that the examiner who gives a positive medical opinion wins the Battle of the Medical Experts
- *Sizemore* violations

What do you do when you receive a negative VA Medical Opinion?

- Obtain a positive opinion from a private doctor
 - and/or
- Attack the probative value of the VA examiner's opinion

Obtaining a Private Opinion

- The best way to challenge a negative VA medical opinion is by obtaining a positive private opinion
- In most cases where there is a negative VA medical opinion, success on the claim will be highly unlikely without obtaining a positive medical opinion from a private physician

How to Obtain a Private Medical Opinion

- One word: networking!!!
- Talk to friends and family who are doctors or who can put you in touch with doctors
- Talk to other VSOs to see if they know of any doctors who would be willing to assist with examining the veteran
- Ask around at community centers, posts, etc.

How to Obtain a Private Medical Opinion

- Make an appointment to speak with someone at the closest medical school/teaching hospital
- Become involved in local organizations or clubs to expand your network
- Use social media (Facebook, Twitter, etc.)
- Make use of the claimant's network as well

Considerations in Choosing a Private Physician

- The physician's specialty
 - In many cases, general practitioners will be sufficient, but when dealing with a medical condition that is more specialized, try to get a specialist
 - If the veteran is claiming service connection for a heart condition, obtaining an opinion from a cardiologist is preferable to an opinion from an ear, nose, and throat doctor

Considerations in Choosing a Private Physician

- The physician's familiarity with the veteran
 - While the VA does not have a rule *requiring* the assignment of greater probative value to the opinion of a veteran's treating physician, the physician's familiarity with the veteran can be a factor for assigning more probative value to one opinion over another
 - An opinion from a veteran's treating physician can be particularly helpful when dealing with certain issues, such as continuity of symptomatology
- The physician's credentials
 - Education
 - Experience
 - Publications

Before Obtaining a Private Exam

- Obtain a copy of the veteran's claims file
- Tab and label relevant documents in the claims file to make review of the file easier for the examiner
 - Make sure the examiner knows to note in his or her report that he or she reviewed the claims file
- Provide the examiner with a brief summary of the relevant facts and documents and explain your theory for why you think the veteran's condition is related to service or why he or she is entitled to an increased rating for a service-connected disability
- Provide the examiner with the relevant DBQ or DBQs

Before Obtaining a Private Exam

- Provide the examiner with a list of questions to answer (ex. is it at least as likely as not that the veteran's current condition is related to his or her service?)
 - Tell the examiner to provide a detailed rationale for his or her opinion
- Talk with the veteran about the upcoming exam and possibly prepare a written statement (especially if the claimed condition is a mental disorder) for him or her to give to the examiner. This statement should include:
 - The in-service incident or onset of the condition;
 - The continuity of symptoms from service to the present; and
 - The current symptoms noted by the veteran that are believed to be related to the current disability

Before Obtaining a Private Exam

- Explain to the examiner, in lay terms, the relevant law applicable to the case
 - Stress that the standard of proof is “at least as likely as not,” NOT to a reasonable degree of medical certainty
 - For increased rating cases, provide the examiner with the relevant rating criteria
- If possible, provide the examiner with medical articles or treatises that support your theory of the case

After Obtaining a Private Exam

- Before sending a private examination report to the VA, review the findings from the report and ensure that the information in the report is helpful to your client's claim
- Make sure that the examiner mentioned in the report that he or she reviewed the claims file
- After reviewing the examination report, if anything in the report is unclear, if information is missing, or if the examiner did not provide a well-reasoned rationale for his or her opinion, the report should be returned to the examiner for clarification
- If the examiner has an impressive resume, provide the VA with a copy of the examiner's curriculum vitae in addition to the examination report

Battle of the Super Cars

- Aston Martin

- vs.

- Bentley

Battle of the Medical Experts

- When a negative VA medical opinion is well-reasoned and well-supported, a claimant's best argument (after obtaining a positive, well-reasoned, and well-supported private medical opinion) may be citing to the benefit of the doubt rule (38 U.S.C. § 5107(b); 38 C.F.R. § 3.102)
- If possible, however, it is always preferable if you can find some way to diminish the probative value that the VA will place on the negative opinion
- In other words, make sure your private medical opinion is the Bentley in the Battle of the Medical Experts

The Presumption of Regularity/Presumption of Competence

- When providing a medical opinion, the VA is presumed to have chosen an individual with the proper qualifications to provide a medical opinion in that particular case
- If there appears to be an irregularity in the selection of the individual to perform the exam, the presumption of regularity does not apply and the burden shifts to the VA to prove the individual's qualifications
- For more on the presumption of regularity, see *Wise v. Shinseki*, 26 Vet.App. 517 (2014)

Nohr v. McDonald, 27 Vet.App. 124 (2014)

FACTS

- 1971: vet's enlistment exam did not identify any psychiatric disability so vet presumed sound upon entrance to service
- June 1972: service medical record revealed vet complained of being tired, rundown, nervous, with decreased appetite and sleep, and incidental personal problems; had problems facing separation from home and isolation in service; no diagnosis
- June 1974: discharge exam noted frequent trouble sleeping, depression, and excessive worry related to "shift work"

Nohr Facts (cont'd)

- May 2003: VA exam diagnosed vet with dysthymic disorder (vet filed service connection claim in February 2003), ongoing since childhood; alcohol dependency and cocaine and polysubstance abuse, in full sustained remission since 1988
 - Examiner also stated that vet's dysthymic disorder existed prior to enlistment and was not exacerbated by military service
- June 2003: Regional Office (RO) denied vet's claim
- May 2007: vet stated his lack of job satisfaction in the military probably led to his depression

Nohr Facts (cont'd)

- April 2007 and August 2009: Board of Veterans' Appeals (BVA or Board) remanded claim for medical exam to determine whether there was a nexus between his psychiatric disorder and his service
- August 2010: BVA denied claim after an October 2009 VA exam, finding that the condition preexisted service but clearly and unmistakably was not aggravated by his service
- On appeal, the U.S. Court of Appeals for Veterans Claims (CAVC or Court) granted the parties' Joint Motion for Remand (JMR) that stated the October 2009 VA opinion was insufficient to establish clear and unmistakable evidence that the vet's dysthymic disorder was not aggravated during service

Nohr Facts (cont'd)

- July 2011: Dr. Feng, a VA psychiatrist, stated after reviewing the vet's claims file, that the vet "had not endorsed any traumatic event other than his ordinary military duty" and that "there is obvious and manifest evidence that the vet's preexisting dysthymic disorder was not aggravated by service"
- October 2011: Board denied vet's claim again
- The Court then granted another JMR stating that Dr. Feng's opinion was not supported by an adequate rationale

Nohr Facts

- July 2012: Dr. Feng reaffirmed her opinion stating in an addendum that the vet's in-service complaints were typical of dysthymic disorder "running its own course"
- Dr. Feng concluded her addendum by stating: "Respectfully, while I recognize my personal limitation, the Board should seek for the next expert opinion if this examiner's report still is not satisfied by the Board review."
- The BVA provided the vet and his representative with a copy of the addendum opinion and informed them they had 60 days to respond with additional evidence or arguments

Nohr Facts (cont'd)

- The vet's representative timely responded and submitted 11 questions and requests for documents (the representative referred to these questions as interrogatories) from Dr. Feng (in the alternative, the representative requested that Dr. Feng appear at a personal hearing)

Nohr Facts (cont'd)

- Questions included:
 - Provide a copy of your most recent and up-to-date curriculum vitae
 - Provide a copy of the transcript from the July 30, 2012 interview between you and the vet
 - Provide a copy of all handwritten notes made by you during your interview with the vet
 - Explain the phrase “personal limitation” referred to in your July 30, 2012 opinion

Nohr Facts (cont'd)

- April 2013: BVA issued decision on appeal denying the claim and also denying the vet's request to have Dr. Feng respond to the interrogatories or appear at a hearing
 - The BVA said there is no VA regulatory authority for interrogatories and it refused to exercise its discretion to issue a subpoena
- The vet appealed to the CAVC and argued that the BVA failed to weigh or provide reasons or bases for rejecting favorable evidence (his affidavit in response to Dr. Feng's opinion)

Nohr CAVC Analysis

- The Court concluded that the vet's questions to Dr. Feng, reasonably raised the following issues:
 - Dr. Feng's competence and the adequacy of her opinion
 - VA's duty to assist

Nohr CAVC Analysis (cont'd)

- While there is a presumption that VA has chosen a person who is qualified to provide a medical opinion in a particular case, that presumption can be rebutted
- Dr. Feng's statement of some unspecified "personal limitation" can arguably read as suggesting there may have been some irregularity in the process of selecting Dr. Feng to provide the opinion
- The Court found this statement also raised an issue as to the adequacy of her opinion

Nohr CAVC Analysis (cont'd)

- The vet's request for Dr. Feng's curriculum vitae reasonably sought information necessary to overcome the presumption of competence generally afforded VA-selected physicians (the Court said this was not a "fishing expedition" on the part of the vet)
- At a minimum, the vet's request required a response from the BVA such as a statement of reasons or bases for why the vet was not entitled to answers to his questions

Nohr CAVC Analysis (cont'd)

- The vet's interrogatories included requests for documents held by Dr. Feng (a VA physician). See 38 U.S.C. § 5103A(a) ("The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit.")
- The Court was unclear why the vet's request for documents did not adequately identify "outstanding records that he wanted VA to obtain" and why VA was not obligated to make reasonable efforts to assist the vet in obtaining the records

Nohr CAVC Analysis (cont'd)

- The BVA's failure to address the substance of the vet's questions and whether the duty to assist obligated VA to attempt to obtain the requested records rendered the BVA's statement of reasons or bases, inadequate
- The Court found that the BVA's errors were prejudicial to the vet since the BVA concluded that Dr. Feng's opinion was adequate without addressing the vet's questions which reasonably implicated Dr. Feng's competence and the adequacy of her opinion (especially since the BVA had the high burden of showing by clear and unmistakable evidence that the vet's disorder was not aggravated by his service)

Nohr CAVC Analysis (cont'd)

- If the vet received the requested evidence, he may have been better able to attack the probative value of Dr. Feng's opinion
- The Court vacated the BVA's decision and remanded the case for further evidentiary development so that the BVA could address the adequacy of Dr. Feng's opinion and whether the duty to assist requires VA to assist the vet in obtaining the documents he has requested

Nohr Major Takeaways

- (1) If an examiner (either VA or private) gives a negative opinion, advocates should feel free to question the examiner's competency *if* the examiner calls into question his/her own competency (however, this should only be done when you have reason to believe the examiner may not be fully competent; do not go on "fishing expeditions," but feel free to look into the examiner's credentials); and
- (2) If an advocate thinks that an examiner has potentially favorable evidence that is not part of the claims file, advocates should request such evidence from the examiner.

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Advocates should ask the VA to provide an examiner's qualifications if there is an irregularity or some reason to call into question the examiner's qualifications
 - In other words, is there a red flag?

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Examples of irregularities
 - The examiner explicitly or implicitly questions their own qualifications or competence
 - The examiner in *Nohr* referencing her “personal limitation”
 - The examiner in *Wise* stated that she had a “relative lay person’s perspective of psychiatry”

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Examples of irregularities
 - The medical condition or conditions that the veteran claimed are outside of the examiner's specialty
 - A dermatologist providing an opinion on a heart condition
 - An eye doctor providing an opinion on PTSD

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Another instance where it will likely be beneficial to request the CV of a VA examiner is if you have obtained a positive medical opinion from a very qualified expert
 - In this case, the VA examiner's qualifications will hopefully pale in comparison to your expert and you can argue that the positive medical opinion should be given more weight

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Be cautious when requesting information about a VA examiner's credentials
 - When making these requests, advocates run the risk of adding information to the record that may bolster the examiner's credentials, and thus, increase the probative value that the VA assigns to the examiner's opinion
 - Ex: the examiner graduated first in her class at Harvard Medical School or the examiner has written several articles on the subject matter of your client's claim that have been published in prestigious medical journals

When to Use *Nohr* to Dispute the Competency of a VA Examiner

- Before requesting information from the VA about the examiner, such as his or her CV, see if this information is public (do a Google search)
- If this information is available on the internet or through some other public source, you can review it and then determine whether you want it added to the record
- This way, evidence that may hurt your client's claim will not be added to the record

How to Request the CV of a VA Examiner

- Hand deliver or mail to the Regional Office by certified mail, return receipt requested, a letter worded as follows:
 - “On behalf of [name of claimant and VA claims file number], I hereby request under the Freedom of Information Act (FOIA) that the VA send me at the address below a copy of the complete curriculum vitae of the following medical professional: [name of VA physician]. I request these documents for the following reasons: the claimant’s VA claims file contains a medical opinion prepared by Dr. [name of VA physician] that is dated [date of opinion].

How to Request the CV of a VA Examiner

- Letter continued:
 - I would like to persuade the VA that in deciding the claimant's pending claim, it should not credit this opinion because the physician was not qualified to reach the medical conclusions made in that opinion. The case law places the burden on the claimant to explain to the VA why the physician was not qualified to give the medical opinion in the claimant's case. To assist me in making this argument, the VA is required by its duty to assist, by due process, and the FOIA to promptly disclose the requested records to me, as the claimant's representative on the claimant's pending claim. My name and address are as follows:”

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When one positive medical opinion and one negative medical opinion are of record:
 - Build up the positive medical opinion
 - Emphasize the detailed rationale and the support provided for the opinion
 - Discuss the examiner's impressive credentials
 - Discuss the examiner's familiarity with the veteran (if the examiner is his or her treating physician)
 - If the examiner provides a higher degree of certainty than "as likely as not" in his/her opinion, highlight that to the VA

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When one positive medical opinion and one negative medical opinion are of record:
 - Break down the negative medical opinion
 - Point out any inconsistencies or factual errors in the examiner's report
 - Address any legal or factual assumptions that the examiner made which contributed to his or her negative opinion (*Sizemore* violations)
 - Attack the examiner's qualifications

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When one positive medical opinion and one negative medical opinion are of record:
 - Concluding argument
 - State that the positive opinion is of more probative value than the negative opinion so the VA should grant the claim
 - And at the very least, the evidence is even, and under the benefit of the doubt rule, the VA must grant the claims

Battle of the Medical Experts: Attacking a Negative Medical Opinion

- When there is only a negative medical opinion of record:
 - Attack the negative opinion in the same ways that you would if there was also a positive opinion of record
 - Argue that the VA examination was inadequate and therefore, the veteran is entitled to a new VA exam
 - See *Barr v. Nicholson*, 21 Vet.App. 303 (2007).

Sizemore Violations

- *Sizemore v. Principi*, 18 Vet.App. 264 (2004).
 - Vet's service connection claim for PTSD was denied by BVA
 - In a 1998 examination report, a VA examiner stated the following:
 - “[The veteran’s] stressors in Vietnam *apparently have not been substantiated and although it is likely that he was involved in combat activities, it seems a bit unusual that an artillery man would have personally killed eleven enemy soldiers unless they were being over[]run.*”

Sizemore Violations

- In a 1998 examination report, a VA examiner stated the following:
 - In an action of that nature, *I think [it] would probably have resulted in either some award being given to him or at least some documentation being discoverable with respect to that unit's heavy combat activity. . . .* When I asked him if he directly observed [his 11 friends killed], he states that he did directly observe it. *Again, that seems to be a bit of either an exaggeration or a horrible experience which should again be discoverable through the records."*
(emphasis added)

Sizemore Violations

- The Court found that the psychiatrist in this report overreached and the exam was tainted
- “To the extent that the examining psychiatrist is expressing an opinion on whether the appellant’s claimed in-service stressors have been substantiated, that is a matter for determination by the Board and not a medical matter.”

Recent *Sizemore* Violation by the BVA

- Board denied vet's service connection claim for sleep apnea
- Vet submitted statements from his spouse and military friends which indicated that his onset of sleep apnea symptoms occurred while he was on active duty
- A VA examiner provided a negative opinion
- The BVA decision contained the following quotes about the VA exam:

Recent *Sizemore* Violation by the BVA

- “The examiner opined that it would be unusual for there to be an abrupt onset of symptoms, during the short time of deployment to Qatar from May 20, 2005 to July 1, 2005, as described by the Veteran and his friends, with the added caution that the statements from friends were all written several years after 2005.”
- “Regarding the buddy statements regarding the Veteran’s reported fatigue during deployment in June 2005, the examiner noted again that these statements were written more than six years after the deployment; she opined that the statements include a lot of detail to be recalled from such a long time prior, which suggests prompting.”

Recent *Sizemore* Violation by the BVA

- “As the VA examiner noted, the recollections of symptoms in service were not reported until years after service (and given the time interval may not be accurate).”
- The examiner’s credibility determinations and the Board’s reliance on these determinations are in violation of *Sizemore*

Questions?