

# EMERGING TRENDS

## IN PTSD & FOREIGN NATIONAL DEFENSE BASE ACT CLAIMS

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# TOPIC 1: ADVANTAGES & CHALLENGES OF EXPERT REPORTS

- ▶ It is important to determine the who, what, when, where, why, and how of obtaining expert testimony
  - ▶ Who will need to obtain the experts?
  - ▶ What standards are the expert reports subject to?
  - ▶ When is the best time to obtain expert opinions?
  - ▶ Where (and by what outlet) should we obtain this report?
  - ▶ Why will the report be useful during litigation and/or settlement?
  - ▶ How will the above be useful in resolving and/or litigating claims?

# WHO WILL NEED TO OBTAIN THE EXPERTS...



...YOU!

1. Carrier Claim Representatives
2. TPA Claim Representatives
3. Self-Insured Employer Claim Representatives

# WHAT STANDARDS ARE THE EXPERTS SUBJECT TO?

- ▶ Presumption of Compensability
  - ▶ Featherweight Burden: Mere allegations and conditions that *could have cause symptoms* may suffice
  - ▶ Once a presumption is met, a prima facie claim is made, and a *presumption* of compensability and causation is imposed
  - ▶ Can it be rebutted? Yes. Need substantial evidence.
  - ▶ How do we get substantial evidence? Oftentimes experts.

# HOW DO WE REBUT THE PRESUMPTION OF COMPENSABILITY OF PTSD VIA AN EXPERT?

- ▶ 3 ways
- ▶ Expert must find that Claimant is not suffering from a psychiatric or psychological condition for one of three primary reasons:

# HOW DO WE REBUT THE PRESUMPTION OF COMPENSABILITY OF PTSD VIA AN EXPERT?

1. By the doctor opining that the Claimant's complaints do not meet the requirements for a PTSD or other psychological diagnosis;
2. By the doctor opining that the Claimant is malingering, i.e. faking or fabricating symptoms, for secondary gain to obtain compensation benefits, and thus is not entitled to PTSD or other psychological diagnosis;
3. By the doctor opining that Claimant is indeed suffering from PTSD or a psychiatric diagnosis, but the diagnosis is related to another cause, such as prior stateside event, or other non-work related condition such as martial problems, childhood issues, or other external

# EXPERTS – THE DOCTORS



- ▶ Peer Reviews
- ▶ IMEs
  - ▶ In Person?
  - ▶ Virtual?

# THE PEER REVIEW REPORT

Benefits	Detriments
Cost Effective	Does not include physical evaluation of Claimant
Time efficient	Given less weight than an IME
No requirement to disclose (for the most part)	
Can be used as negotiating point	
Can assist with War Hazards recovery	
Useful in preparing for deposition	
Develop impeachment evidence	
Focuses exclusively on medical records	Focuses exclusively on medical records
Educates if objective findings are not met	



# WHEN DO WE WANT A PEER REVIEW?

- ▶ Early on in the claim
- ▶ Before a Claimant's deposition
- ▶ Sometimes after a deposition
  - ▶ Supplement the expert's records review with testimony

# THE CARRIER'S CHOICE EVALUATION ("IME OR "CME")

Benefits	Detriments
Personally evaluates the Claimant	More costly
Can examine body language, tone, demeanor...	More time-consuming
Can establish rapport with Claimant	May still be weighed less than treating physician
Can develop be more fluid	Risk of unfavorable findings
Can assist in conducting discovery	Must disclose
More involved	
Given more weight by the ALJ than a peer	

# TYPES OF IMES



- ▶ Live IME: this option is the most favorable, especially with non-psychological injuries.



- ▶ Virtual: this option is a growing concept specifically due to ongoing restrictions and issues concerning the COVID-19 Pandemic

# BENEFITS/DETRIMENTS OF VIRTUAL PSYCH IMES

Benefits	Detriments
Quicker turnaround	Expert is not physically present to evaluate Claimant
Cost efficient	We are unaware of the surroundings
Claimant is more relaxed in home setting	

# OVERALL CONSIDERATIONS IN REGARD TO OBTAINING VIRTUAL PSYCH IMES

- ▶ We are finding that many of the Claimants are utilizing a virtual platform for their psychiatric/psychological treatment. As such, it allows for a more level playing field if the treating provider is also evaluating the Claimant virtually.

# WHAT TYPE OF PSYCH EXPERT TO UTILIZE

- ▶ Often it is best to look at what type of treating provider is used by Claimant.
  - ▶ Psychiatrist
  - ▶ Psychologist
- ▶ Psychiatrist-Useful as they can speak directly to the prescription therapy utilized by the treating provider
- ▶ Psychologist-Useful as they are best equipped and able to administer and analyze results of validity testing

# HOW TO USE A FAVORABLE REPORT

- ▶ Substantial evidence used to rebut the Section 20(a) presumption
  - ▶ Ideally, we want to make it have more weight than competing physicians
  - ▶ Impeach Claimant at Formal Hearing
    - ▶ Impeach deposition testimony
    - ▶ Impeach treating medical records
    - ▶ Results of validity testing
    - ▶ Credibility of the Claimant himself or herself
- Favorable reports can also be utilized during settlement negotiations

# TOPIC 2: ADMISSIBILITY OF FOREIGN EVIDENCE AT FORMAL HEARING





# DEVELOPMENTS AT THE OALJ

- ▶ At the OALJ, every witness is required to be sworn in and testify under oath
- ▶ However, the Hague Convention on Taking Evidence Abroad also governs obtaining evidence from (you guessed it) abroad
- ▶ The OALJ is asking parties who are looking to have foreign evidence admitted to provide legal memoranda on how they would be admissible
  - ▶ Foreign evidence such as...
  - ▶ The testimony of a Claimant located overseas

# DEPOSITION OF THE CLAIMANT - ADMISSIBILITY

- ▶ The Claimant is a party who will likely testify live at trial
- ▶ As the party is testifying at trial, the testimony at trial is the only admissible testimony
- ▶ That means the testimony of the Claimant is not admissible
- ▶ Except –
  - ▶ For impeach purposes
- ▶ May also be used for War Hazards purposes, discussed later

# DEPOSITION OF THE CLAIMANT - DISCOVERY

- ▶ We want to obtain:
  - ▶ Background, including educational and employment history
  - ▶ Medical history, both before and after employment
  - ▶ Details with respect to current injury / incident(s)
  - ▶ Exposures to War Risk Hazards
  - ▶ Possible Impeachment testimony

# WHO IS PRESENTING OALJ TESTIMONY?

- ▶ OALJ is concerned with the admissibility of testimony obtained from a witness abroad
  - ▶ Asking the party seeking to introduce evidence to provide legal opinions as to how and why it would be admissible

- ▶ So, who is the witness?
- ▶ Usually, the Claimant is the witness testifying at Formal Hearing
  - ▶ Employer/Carrier witnesses tend to be domestic (IME, vocational, etc...)
- ▶ Does the burden shift to Claimant to provide that legal opinion?
  - ▶ Not so fast...

# TOPIC 3: BACK TO WAR HAZARDS: LAST INJURIOUS EXPOSURE DATES FOR PTSD

- ▶ Last date of injurious exposure
  - ▶ For purposes of WH, that is our date of injury
  - ▶ Not always the same date as the date of injury on the LS-203
- ▶ Policy Period
  - ▶ War Hazards covers for payments made on policies covering the last date of injurious exposures
- ▶ Want War Hazards? Be sure they overlap!

# WAR HAZARDS BEST PRACTICES

- ▶ Want copies of policies early in order to determine carrier coverage dates for the Employer
- ▶ During the deposition, determine whether the two overlapped:
  - ▶ Last date of injurious exposure
  - ▶ Policy period
- ▶ Utilize IDF Logs or in/out travel logs to corroborate exposures
- ▶ Can modify dates of injury on an LS-203 to match up with last date of injurious exposure

# BENEFITS OF UTILIZING LAST DATE OF INJURIOUS EXPOSURE

- ▶ Increases chances of war hazards recovery
- ▶ Ensures complete closure of the claim after settlement, don't have piecemeal exposure dangling.



# EXAMPLES OF WAR HAZARDS ISSUES

- ▶ Claimant is employed in a War Zone From Feb. 2010 through Feb. 2011. Major attacks on Claimant's base occur on in July, 2010, Claimant testifies to that in deposition. Thereafter, Claimant has some general exposure to ongoing war hazard activity up through and including his last date of employment, but nothing like the July attacks. Claimant resigns without reason in Feb. 2011. WH Policy period covering Claimant's last day worked for Employer is October 1, 2010 to October 1, 2011.

BEST STRATEGIES...

The background is a light grey gradient. On the right side, there are several sets of parallel white lines that create a sense of motion and depth, extending from the bottom right towards the top right.



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