

The Presumption of Soundness

I. A LEGAL FICTION DRIVEN BY POLICY

A brief history: Why we presume a veteran is sound at service entrance unless a preexisting condition is noted.

- In 1924, Congress enacted a statute that provided for a conclusive presumption of soundness that could not be rebutted. *See Veterans' Act, 1924, ch. 320, § 200, 43 Stat. 607, 615 (the "1924 statute").*
- In 1934, to save the government money during the Depression, the President issued an Executive Order, "Regulation 1(a)," the effect of which was to sever service connection for World War I veterans. The Regulation allowed for the presumption of soundness to be overcome where there was evidence or medical judgment that an injury or disease existed prior to enrollment in service. This had the effect of making it very easy to rebut the presumption of soundness.
- In 1934, Congress acted to reverse the effect of Regulation 1(a), reestablishing service connection for those veterans affected by the Regulation. Congress also liberalized the presumption of soundness provisions by providing a means for rebutting the presumption (showing by clear and unmistakable evidence that (1) the veteran's condition preexisted service and (2) that condition was not aggravated by service) and by placing the burden of proof for rebuttal on the Government. *See Independent Offices Appropriation Act, 1935, ch. 102, § 27, 48 Stat. 509, 524 (1934) (the "1934 statute").* By providing for a means of rebuttal, Congress intended to address situations in which it seemed that veterans were unfairly being determined to have been disabled before entering service, and thus not entitled to disability compensation.
- During World War II, Congress broadened the scope of the standard articulated in the 1934 statute to include all veterans, not just World War I veterans. *See H.R. 2703 (amending Regulation 1(a) to make the presumption of soundness conclusive for conditions not noted upon entry into service); S. Rep. No. 78-403, at 6 (1943) (providing for rebuttal "where clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment"); 89 Cong. Rec. 7, 387 (approving the amendment providing for a means of rebuttal). See also, 38 U.S.C.A. § 1137 (extending the application of the provisions of 38 U.S.C.A. § 1111 to any veteran who*

served after December 31, 1946, notwithstanding the provisions of 38 U.S.C.A. §§ 1132 and 1133); 38 C.F.R. § 3.304(b).

- The Senate amendment to H.R. 2703 accomplished three things. First, it made clear Congress's intent that the government bore the burden of rebutting the presumption of soundness by clear and unmistakable evidence. Second, the amendment provided that the presumption could not be rebutted absent a showing by clear and unmistakable evidence that the veteran's condition preexisted service. Third, the amendment established that a presumption of soundness would apply, even when there was evidence of a preexisting condition, if the government failed to show by clear and unmistakable evidence that a veteran's preexisting condition was not aggravated.
- In July 2003, VA's Office of General Counsel issued a precedential opinion addressing the requirements for rebutting the presumption of sound condition under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304(b). In this opinion, VA's General Counsel announced a new interpretation of the presumption of soundness, and determined that to the extent that 38 C.F.R. § 3.304(b) indicated that the presumption of soundness could be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service, it was in conflict with 38 U.S.C.A. § 1111. Rather, VA's General Counsel held that in order to rebut the presumption of soundness, VA must show by clear and unmistakable evidence *both* that a condition not noted on entrance into service existed prior to service AND was not aggravated by service. Vet. Aff. Op. Gen. Couns. Prec. 3-2003 (July 16, 2003). (38 C.F.R. § 3.304(b) has since been modified such that it is now in agreement with 38 U.S.C.A. § 1111. See *Presumption of Sound Condition: Aggravation of a Disability by Active Service*, 70 Fed. Reg. 23027, 23029 (May 4, 2005)). **NOTE:** the amended version (requiring the satisfaction of both prongs) is applicable to claims that were pending on or filed after May 4, 2005. *Id.* at 23028.
- The fact that both prongs must be satisfied in order to rebut the presumption of soundness has been confirmed by the courts. See *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004); *Horn v. Shinseki*, 25 Vet. App. 231, 235 (2012). This line of cases has also clarified that the policy intent of the presumption of soundness is to convert an aggravation claim into one for service connection where the government is unable to clearly and unmistakably prove that a condition not noted on entrance into service existed prior to service AND was not aggravated by service.

II. THE PRESUMPTION OF SOUNDNESS: THE BASICS

What is the presumption of soundness?

- A legal assumption made for policy reasons that VA employs for the benefit of the veteran, whereby VA will consider a veteran to have been in sound condition, i.e., good health, when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders *noted* at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto *and* was not aggravated by such service. See 38 U.S.C.A. § 1111; 38 C.F.R. § 3.304(b).
- The presumption of soundness shields the veteran from a finding that the disease or injury preexisted (and therefore was not incurred in) service by requiring the Secretary to prove by clear and unmistakable evidence that a disease or injury manifesting in service both preexisted service and was not aggravated by service. See *Gilbert v. Shinseki*, 26 Vet. App. 48, 55 (2012).
 - **NOTE:** In order for the presumption to apply, the claimant must have status as a veteran. See *Smith v. Shinseki*, 24 Vet. App. 40, 44 (2010). Veteran status may be conferred by either peacetime or wartime service for the purpose of application of the presumption of soundness. See 38 U.S.C.A. §§ 101(2), 1137; 38 C.F.R. § 3.1(d).
 - This means that you must analyze whether veteran status may be conferred for a claim submitted by an individual who only had Active Duty Training (ACDUTRA) and/or Inactive Duty Training (INACDUTRA) service.
- **Effect of the Presumption:** To establish in-service incurrence of a disease or injury (second element of service connection under the *Shedden/Hickson* elements) unless such can be rebutted by VA. *Horn*, 25 Vet. App. at 236.
 - If VA is able to rebut the presumption of soundness, the second element of service connection is not established, and service connection is not warranted. *Gilbert*, 26 Vet. App. at 55.
 - If VA fails to rebut the presumption of soundness, the claim is one for service connection. **This means that no deduction for the degree of disability existing**

at the time of entrance will be made if a rating is warranted. *Wagner*, 370 F.3d at 1096.

When does the presumption of soundness attach?

- The presumption of soundness attaches only when the condition at issue is not noted at entrance into service **AND** the condition is determined to have manifested in service. *Gilbert*, 26 Vet. App. at 54.
 - **NOTE:** If a condition is noted on an entrance examination report, the presumption of soundness *never* attaches – the only benefits that can be awarded are for aggravation of such condition by application of 38 U.S.C.A. § 1153 and 38 C.F.R. § 3.306. *Wagner*, 370 F.3d at 1096.
 - **NOTE:** Whether a condition *manifested* in service is a factual determination to be made on a case-by-case basis. To date, we do not have statutory/regulatory/court guidance on what it means to have *manifested*. We do know, however, that if the evidence is not at least in equipoise on the question of whether the condition manifested in service, we need not address the presumption of soundness. *See Gilbert*, 26 Vet. App. at 52. We are required to address the presumption of soundness where a disease or injury not noted on entrance into service manifests in service AND a question arises as to whether it preexisted service. *Id.* at 55.
 - **Reminder:** If the presumption attaches, the next pertinent question is whether the presumption of soundness may be *rebutted*. *See* Section III below for additional guidance.

When is a disability considered to be *noted* at entrance?

- Only such conditions as are recorded in examination reports are to be considered as *noted*. 38 C.F.R. § 3.304(b).
 - **Note: A subjective report of the history of a condition is insufficient.** A history of the preservice existence of a condition recorded at the time of examination on entrance into service does not constitute a notation of such condition (but is for consideration in determining the date of inception of the condition). *See* 38 C.F.R. § 3.304(b)(1). Similarly, a signed statement from the veteran regarding the origin or incurrence of any disease or injury made in service (if against his or her own interest) is of no force and effect if other data do not establish the fact. 38 C.F.R. § 3.304(b)(3).

- **Tip:** Look for objective findings on the entrance examination (abnormal clinical findings, diagnoses, or a PULHES profile above 1) to substantiate the notation of a condition on entrance. *See Odiorne v. Principi*, 3 Vet. App. 456, 457 (1992) (observing that the “PULHES” profile reflects the overall physical and psychiatric condition of the Veteran on a scale of 1 (high level of fitness) to 4 (a medical condition or physical defect) which is below the level of medical fitness for retention in the military service).
- **Reminder:** The disorder need not be currently symptomatic, but only noted on entrance. *Verdon v. Brown*, 8 Vet. App. 529, 535 (1996).

What if the claimant was not examined on entrance into service?

- The presumption of soundness does not attach. *See Crowe v. Brown*, 7 Vet. App. 238, 245 (1994); *Smith*, 24 Vet. App. at 45.
- **NOTE:** An entrance examination is frequently not provided for shorter periods of service, such as periods of Inactive Duty Training (INACDUTRA) and Active Duty Training (ACDUTRA). This does not mean that an examination is never provided for INACDUTRA/ACDUTRA.

What if the claimant was examined, but the report of examination is missing/lost?

- Presume the Veteran to have been sound at entrance. **Absent evidence to the contrary, it is presumed that an entrance examination is provided prior to all periods of active duty service.** *See Quirin v. Shinseki*, 22 Vet. App. 390, n.5 (2009) (citing *Lee v. Brown*, 10 Vet. App. 336, 339 (1997) (holding that the presumption of soundness applies even when the record of a veteran’s entrance examination has been lost or destroyed while in VA custody)).

What if the condition is noted on entrance?

- If a preexisting disability is noted upon entry into service, the claim is one of entitlement to compensation based on aggravation of a preexisting disability, and not one involving the presumption of soundness. In an aggravation case, 38 U.S.C.A. § 1153 applies (not § 1111), and the initial burden falls on the veteran to establish an increase in the severity of the preexisting disability. ****This path is not covered by this outline.**
 - **Note:** This is a distinctly different statutory provision commonly referred to as the “presumption of aggravation.” *Horn*, 25 Vet. App. at 234.

III. REBUTTING THE PRESUMPTION OF SOUNDNESS

A Brief Overview of the Current State of the Law

In order to rebut the presumption of soundness, the following must be proven true by VA (the burden is not on the veteran to show that these are true):

Prong 1: In order to rebut the presumption of soundness, the following must be proven true by VA (the burden is not on the veteran to show that these are true) (**Pre-existence**)

Prong 2: There is clear and unmistakable evidence that the injury or disease was not aggravated by such service. (**Aggravation**)

Horn, 25 Vet. App. at 235.

In order to demonstrate that the condition *clearly and unmistakably* preexisted service entrance and was not aggravated by service, the evidence proving such must be undebatable. *Quirin*, 22 Vet. App. at 396 (quoting *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999)).

NOTE: The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. Vet. Aff. Op. Gen. Couns. Prec. 3-2003 (July 16, 2003).

NOTE: If both prongs are not met, then the presumption of soundness is not rebutted and the in-service element (2nd *Shedden/Hickson*) of a claim of entitlement to service connection is met. **This is so even where the first prong is satisfactorily proven by the government but the second is not.

- The finding in such cases is that the condition was incurred during service.
- **REMINDER:** Where an in-service injury or disease is deemed to have been incurred in service pursuant to the presumption of soundness, disability compensation (service connection) is not warranted unless the evidence is at least in equipoise that the current disability is related to the disease or injury deemed service incurred. *Gilbert*, 26 Vet. App. at 55. **An analysis regarding the remaining 2 elements of service connection (current disability and nexus) is essential, as the omission of this analysis, i.e., an assumption that these elements are satisfied wherever the presumption of soundness cannot be rebutted, would unfairly place such claimants in a better position than those ordinarily seeking service connection.

TIP: Even where a veteran concedes the existence of a condition prior to entrance into service, if **both** prongs are not met, the effect is to convert an aggravation claim into one for service

connection. *Wagner*, 370 F.3d at 1094. **Unlike a case where the degree of disability present at entrance into service is subtracted from the complete degree of disability, there is no subtraction because the veteran is considered to have been sound at entrance into service. This is an important distinction, as a rating awarded on the basis of 38 U.S.C.A. § 1153 will reflect only the degree of disability over and above the degree existing at the time of entrance into service. 38 C.F.R. § 4.22.

NOTE: Historically, i.e., prior to *Wagner*, 38 C.F.R. § 3.304(b) was not in agreement with 38 U.S.C.A. § 1111. The regulation imposed only a single burden on the government to rebut the presumption of soundness – either by showing preexistence OR that the condition was not aggravated by service.

NOTE: If both prongs are met, then the veteran is not entitled to service-connected benefits. *Wagner*, 370 F.3d at 1096. This is because the condition both preexisted service and was not aggravated by service. In such instance, the appeal should be denied because the second element of service connection is not met. **Remember that in this situation, neither 38 U.S.C.A. § 1153 nor 38 C.F.R. § 3.306 apply, as an analysis under these sections would amount to an attempt to make a finding less favorable to the claimant than is required by law (because a finding of aggravation rather than incurrence leads to a deduction in compensation under 38 C.F.R. § 3.22).

A Detailed Look at the Second Prong – Aggravation

- VA may show a lack of aggravation by establishing that there was no increase in disability during service or that any increase in disability was due to the natural progress of the pre-existing condition. *Wagner*, 370 F.3d at 1096.
- In order to conclude that there was no aggravation in service, 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. *Horn*, 25 Vet. App. at 235.
 - **Example:** In *Horn v. Shinseki*, the Court determined that VA could not rely on a Medical Examination Board report consisting of an unsupported “X” indicating that a condition both existed prior to service and was not aggravated as a result of service. The Court explicitly noted that VA must in such instances seek other evidence commensurate with the appropriate evidentiary standard of clear and unmistakable evidence. *Id.* at 242.
- **TIP:** There is no “presumption of aggravation” in rebutting the presumption of soundness. *Wagner*, 370 F.3d at 1094. Failure to rebut the presumption of soundness

does not result in finding that the condition was aggravated by service. Rather, as noted above, it results in a finding that the condition was incurred in service. Remember, 38 U.S.C.A. § 1153 and 38 C.F.R. § 3.306 are not applicable to this analysis, as those sections apply only when the condition is noted on an examination report at entrance into service.

IV. SPECIAL SITUATIONS

1. ACDUTRA/INACDUTRA

- Unless veteran status can be conferred on a claimant with ACDUTRA/INACDUTRA service only, the presumption of soundness does not apply. See 38 U.S.C.A. § 101(24)(A) and (B); *Paulson v. Brown*, 7 Vet. App. 466, 470 (1995); *Smith*, 24 Vet. App. at 44.
- A claimant who is a veteran based upon a prior period of active duty service may not be entitled to the presumption of soundness based on a subsequent period of ACDUTRA/INACDUTRA. See *Acciola v. Peake*, 22 Vet. App. 320, 324 (2008); *Biggins v. Derwinski*, 1 Vet. App. 474, 478 (1991).
- Even if veteran status may be conferred on a claimant with ACDUTRA/INACDUTRA service only, if an examination was not conducted at entrance into the period of ACDUTRA/INACDUTRA, the presumption of soundness does not apply. See *Crowe*, 7 Vet. App. at 245; *Smith*, 24 Vet. App. at 45.
- **Bottom Line:** The presumption of soundness attaches for a period of ACDUTRA/INACDUTRA if there is an entrance examination for the period of service in question, that entrance examination did not note a pre-existing disorder, AND the evidence is at least in equipoise regarding in-service manifestation of the condition at issue.

2. CONGENITAL DEFECTS/DISEASES

- **Defect:** The presumption of soundness does not apply to cases involving congenital defects, as a defect is defined as a condition that is not capable of deterioration. See 38 C.F.R. § 3.303(c); Vet. Aff. Op. Gen. Couns. Prec. 82-90 (July 18, 1990) (finding that hereditary defects are excluded from VA compensation benefits by 38 C.F.R. § 3.303(c)).

- **Disease:** Whether the presumption of soundness applies where a congenital/developmental/familial disease is not noted on entrance into service must be determined on a case-by-case basis. Making this determination may require development of the case, i.e., a professional medical opinion addressing whether the condition/disorder pre-existed service and/or whether the condition is a disease process or is simply a defect or abnormality.
 - **NOTE:** If it is clearly and unmistakably shown that a congenital/developmental/familial disease not noted on entrance into service preexisted entrance into service, you will need to determine whether prong 2 (aggravation) has been met and whether the presumption of soundness may be rebutted, as discussed above.
 - **NOTE:** Most diseases of hereditary origin can be considered to be incurred in service if their symptomatology did not manifest itself until after entry on duty. The mere genetic or other familial predisposition to develop the symptoms, even if the individual is almost certain to develop the condition at some time in his or her lifetime, does not constitute having the disease. Only when symptomatology and/or pathology exists can he or she be said to have developed the disease. *See Vet. Aff. Op. Gen. Couns. Prec. 67-90 (July 18, 1990).*

V. COMMON PITFALLS IN CASES INVOLVING THE PRESUMPTION OF SOUNDNESS

1. Assuming that if the presumption of soundness is not rebutted, then service connection must be granted.

- As noted in Section III above, an analysis regarding the remaining 2 elements of service connection (current disability and nexus) is essential, as the omission of this analysis, i.e., an assumption that these elements are satisfied wherever the presumption of soundness cannot be rebutted, would unfairly place such claimants in a better position than those ordinarily seeking service connection.

2. Shifting the burden of rebutting the presumption of soundness to the Veteran.

- As noted in Section I, VA bears the sole responsibility for rebutting the presumption of soundness. The claimant has no responsibility to show that a preexisting

condition underwent an increase in severity during or as a result of service. Examples of statements shifting the burden to the veteran include:

- “The evidence fails to show that the Veteran’s right knee bursitis, which preexisted service, worsened during his active service.”
- “There is no evidence that the Veteran’s right knee bursitis, which preexisted service, worsened during his active service.”

3. Failing to make a finding as to whether the condition at issue manifested in service.

- As noted in Section II, the presumption of soundness attaches only when the condition at issue is not noted at entrance into service **AND** the condition is determined to have manifested in service. *See Gilbert*, 26 Vet. App. at 54. The presumption of soundness need not be addressed if the evidence is not at least in equipoise on the question of whether the condition manifested in service.
 - Care should be exercised here. All of the relevant evidence of record must be considered in making this determination, not merely the in-service records.

4. Applying 38 U.S.C.A. § 1153; 38 C.F.R. § 3.306 to cases involving the presumption of soundness.

- As explained in Sections II & III, application of the presumption of aggravation impermissibly shifts the burden to the Veteran to show a worsening of the condition in service. 38 U.S.C.A. § 1153 and 38 C.F.R. § 3.306 apply only when the condition is *noted* on an examination report at entrance into service.

5. Determining that VA’s failure to rebut the presumption of soundness has the effect of creating a presumption of aggravation.

- As noted in Section III, there is no “presumption of aggravation” in rebutting the presumption of soundness. *Wagner*, 370 F.3d at 1094. Failure to rebut the presumption of soundness **does not** result in finding that the condition was aggravated by service. Rather, as noted above, it results in a finding that the condition was incurred in service.

APPENDIX: ROADMAP FOR CASES INVOLVING THE PRESUMPTION OF SOUNDNESS

1. **Is the evidence at least in equipoise as to whether the Veteran has or has had the claimed disability at any time contemporaneous to or since he filed his claim of entitlement to service connection?** (*Shedden/Hickson* Element 1 – current disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004); *Hickson v. West*, 12 Vet. App. 247, 253 (1999)).
 - IF NO, THEN deny the appeal. The present disability element is not met.
 - IF YES, THEN proceed to step 2.
2. **Was the condition noted on an examination report at the time that the veteran was examined, accepted, and enrolled for service?**
 - IF NO, THEN proceed to step 3.
 - IF YES, THEN analyze the case by application of 38 U.S.C.A. § 1153 and 38 C.F.R. § 3.306; not under 38 U.S.C.A. § 1111 and 38 C.F.R. § 3.304(b). (This is an aggravation case, not a case in which you will need to determine whether the presumption of soundness may be rebutted.)
3. **Is the evidence at least in equipoise as to whether the condition manifested during active service?**
 - IF NO, THEN do not include a presumption of soundness analysis.
 - IF YES, THEN proceed to step 4.
4. **Is there clear and unmistakable evidence that the condition preexisted entrance into service?**
 - IF NO, THEN the presumption of soundness has not been rebutted, the in-service element is met, the finding is that the condition was incurred during service. Proceed to step 6.
 - IF YES, THEN proceed to step 5.

5. Is there clear and unmistakable evidence that the condition was not aggravated by service?

- IF NO, THEN the presumption of soundness has not been rebutted, the in-service element is met, the condition was incurred in service. Proceed to step 6.
- IF YES, THEN the presumption of soundness has been rebutted. Deny the appeal; the in-service element has not been met.

6. Is the evidence at least is equipoise as to whether there is a nexus between the present disability and a condition that was incurred in service? (Remember, if you are at this step, then it is already fact that there was an injury or disease that has been deemed to have been incurred in service.) (*Shedden/Hickson* Element 3 – nexus. *Shedden*, 381 F.3d at 1167; *Hickson*, 12 Vet. App. at 253).

- IF NO, THEN deny the appeal, the nexus element is not met.
- IF YES, THEN grant the appeal.

PAST BOARD DECISIONS ADDRESSING THE PRESUMPTION OF SOUNDNESS¹

Presumption of Soundness Attaches

1. Presumption not rebutted – Prong 1 (preexistence) not met; no entrance exam of record (Grant)

ISSUE – Entitlement to service connection for bronchial asthma.

FINDINGS OF FACT

1. There is not clear and unmistakable evidence that bronchial asthma preexisted the Veteran's first period of active duty.
2. The Veteran's current bronchial asthma first manifested during her first period of active duty and has continued to the present day.

CONCLUSION OF LAW

¹ The past decisions included in this handout were obtained from Research Tools; neither the Board's Office of Learning and Knowledge Management nor the Office of Quality Review specifically endorse the findings or analysis contained in these decisions.

Service connection for bronchial asthma is warranted. 38 U.S.C.A. §§ 1110, 1111, 1131, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304 (2012).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duties to Notify and Assist

The Board finds that VA has substantially satisfied the duties to notify and assist, as required by the Veterans Claims Assistance Act of 2000 (VCAA). *See* 38 U.S.C.A. §§ 5103, 5103A (West 2002 & Supp. 2012); 38 C.F.R. § 3.159 (2012). To the extent that there may be any deficiency of notice or assistance, there is no prejudice to the Veteran in proceeding with adjudication of the claim for service connection for bronchial asthma given the favorable nature of the Board's decision.

II. Legal Criteria, Factual Background, and Analysis

The Veteran contends that service connection for bronchial asthma is warranted because she was first diagnosed with asthma during service and has experienced asthma symptomatology since service.

As will be explained below, evidence of record raises a question as to whether the Veteran had bronchial asthma that preexisted her entrance into her first period of active duty in October 1989. Governing law provides that every Veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities or disorders noted at the time of examination, acceptance, and enrollment into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that (1) an injury or disease existed before acceptance and enrollment into service (2) and was not aggravated by such service. 38 U.S.C.A. § 1111 (West 2002); 38 C.F.R. § 3.304(b) (2012); *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004); *Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991).

Before the presumption of soundness can be applied, there must be evidence that a disability or injury that was not noted on entrance into service manifested or was incurred in service. *See Gilbert v. Shinseki*, 26 Vet. App. 48, 52 (2012). Where there is evidence showing that a disorder manifested or was incurred in service, and this disorder is not noted on the Veteran's entrance examination report, the presumption of soundness operates to shield the Veteran from any finding that the unnoted disease or injury preexisted service. *Id.*

Only such conditions as are recorded in examination reports are to be considered as noted. 38 U.S.C.A. § 1111 (West 2002); 38 C.F.R. § 3.304(b) (2012). In *Smith v. Shinseki*, 24 Vet.

App. 40, 45 (2010), the United States Court of Appeals for Veterans Claims (Court) clarified that the presumption of soundness only applies where there has been an entrance examination prior to the period of service on which the claim is based. *See* 38 U.S.C.A. § 1111 (West 2002); *Crowe v. Brown*, 7 Vet. App. 238, 245 (1994) (holding that the presumption of sound condition "attaches only where there has been an induction examination in which the later-complained-of disability was not detected" (citing *Bagby*, 1 Vet. App. at 227)).

The record contains evidence that the Veteran experienced bronchial asthma during service. Specifically, service treatment records reflect that in April 1990 the Veteran was discharged from her first period of service after undergoing Entrance Physical Standards Board (EPSBD) Proceedings. The EPSBD report shows that during basic training the Veteran was unable to pass her Physical Training (PT) test until her fourth attempt because she experienced shortness of breath with exertion. After being transferred to Advanced Individual Training she was again unable to pass her PT test. She was put on a profile of no mandatory strenuous physical activity. Shortly thereafter, she was discharged from service because of bronchial asthma.

Since there is evidence that bronchial asthma manifested during the Veteran's first period of active duty, the Board turns to the issue of whether the Veteran was presumed sound at entry into that period of service. *Gilbert*, 26 Vet. App. at 52. The record does not contain an entrance examination for this period of service. However, it appears that there may be service records that are unavailable. In conjunction with her May 2007 claim, the Veteran submitted a February 1991 service record (from her second period of service) showing she was placed on profile because of bronchial asthma. This record was not included in the service records sent to VA by the National Personnel Records Center (NPRC). Since the records received from the NPRC include records from both periods of the Veteran's service, this omission raises a question as to whether VA has all of the Veteran's service treatment records. The Veteran testified at the July 2010 hearing that when she entered service she was given a thorough entrance examination and that asthma was not noted on that examination. Board Hearing Tr. at 4. The Veteran is competent to testify about the places, types, and circumstances of her service. 38 U.S.C.A. § 1154(a) (West 2002). Since there are other records missing from the Veteran's service treatment records and it is consistent with her active duty service that she would have undergone an entrance examination, the Board finds her testimony credible. Therefore, the Board concludes that the entrance examination for her first period of service is missing from the record. Where an entrance examination is lost or missing, the presumption of soundness attaches. *See Doran v. Brown*, 6 Vet. App. 283, 286 (1994).

In determining whether the presumption of soundness has been rebutted, the Board must next consider whether there is clear and unmistakable evidence that bronchial asthma preexisted the Veteran's service. The Board concludes that the record does not contain clear and unmistakable evidence that bronchial asthma preexisted her first period of service.

Evidence supporting that bronchial asthma preexisted service includes an April 1990 EPSBD report that indicates the Veteran had a lifelong history of episodic cough, wheezing, and shortness of breath with exertion. A notation was made that she had a history of asthma after the age of 12.

Further, on February 1991 entrance examination into her second period of service the Veteran reported having asthma and shortness of breath. It was again noted that she had asthma since the age of 12 and the examiner recommended that she be given a non-deployable discharge as soon as possible. The Veteran was subsequently discharged due to physical disqualification for duty in her military occupational specialty.

In contrast, in the Veteran's March 2008 Notice of Disagreement, she stated that the notation in her service treatment records that she had asthma since she was twelve was incorrect, since the condition did not start until she entered service.

At the July 2010 hearing, the Veteran testified that she never experienced difficulty breathing or shortness of breath prior to her service and that she was physically active. Board Hearing Tr. at 15. She reported that her symptoms began when she was in boot camp and progressed from there. Id. at 15-16.

Further, in July 2010 statements, the Veteran's mother and father stated that the Veteran never had symptoms of asthma as a child. Her mother recalled that the first time she became aware of the Veteran having asthma was when the Veteran called during service and asked if it was possible she had asthma. Her mother reported being surprised by the question, because the Veteran had never had any such symptoms before. Her father also reported that the Veteran was active in high school, performing in the high stepping marching band, running track, participating on the drill team, and taking dance classes. He said the Veteran did not have any known breathing problems prior to her service.

The Veteran and her parents are competent to testify regarding observable symptoms, such as whether the Veteran experienced shortness of breath and other observable symptoms of bronchial asthma prior to her service. 38 C.F.R. § 3.159(a)(2) (2012); see *Layno v. Brown*, 6 Vet. App. 465 (1994) (holding that a claimant is competent to report observable symptoms that require only personal knowledge, not medical expertise, as they come to the claimant

through his senses); *see also* *Washington v. Nicholson*, 19 Vet. App. 362 (2005) (holding that a claimant is competent to provide lay evidence regarding those matters which are within his personal knowledge and experience). The Board also finds these statements and testimony to be credible, as they are consistent with each other and have been the same throughout the appeal. In short, the Board finds current statements that the Veteran did not have bronchial asthma prior to service to be both competent and credible.

These statements directly contradict the April 1990 and February 1991 service treatment records that indicate the Veteran reported having bronchial asthma prior to her October 1989 service entrance. Since the service treatment record findings appear to have been based on the Veteran's reports, the record essentially contains conflicting lay evidence regarding whether the Veteran had asthma prior to her first period of service. Therefore, since it is debatable whether the Veteran's bronchial asthma preexisted entrance into her first period of service, the record does not contain clear and unmistakable evidence that bronchial asthma preexisted service. *Quirin v. Shinseki*, 22 Vet. App. 390, 396 (2009) (stating that clear and unmistakable evidence is evidence that "'cannot be misinterpreted and misunderstood, i.e., it is undebatable'" (quoting *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999))). Thus, the government cannot rebut the presumption of soundness and the claim is one of service connection, without consideration of a preexisting condition. *See Quirin*, 22 Vet. App. at 396.

Service connection may be established for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303 (2012). A disorder may be service connected if the evidence of record shows that the Veteran currently has a disorder that was chronic in service or, if not chronic, that was seen in service with continuity of symptomatology demonstrated thereafter. 38 C.F.R. § 3.303(b) (2012). Service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disability was incurred in service. 38 C.F.R. § 3.303(d) (2012).

In order to establish service connection for a claimed disorder, the following must be shown: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). The determination as to whether these requirements are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. *Baldwin v. West*, 13 Vet. App. 1 (1999); 38 C.F.R. § 3.303(a) (2012).

In the instant case, there is substantial medical evidence demonstrating that the Veteran has a current disability of bronchial asthma. On October 2007 and August 2011 VA

examinations, the diagnoses were bronchial asthma. Therefore, the first element of service connection is met.

As explained above, there is also evidence that the Veteran experienced bronchial asthma during service. Specifically, April 1990 service treatment records reflect the Veteran was treated for bronchial asthma and that, after undergoing EPSBD Proceedings, she was discharged from her first period of service because of bronchial asthma. Thus, the second element of service connection is also satisfied.

The key inquiry in this case is whether the Veteran's current bronchial asthma is etiologically related to the diagnosis of bronchial asthma in service.

When evaluating the evidence of record, the Board must analyze its credibility and probative value, account for evidence which it finds to be persuasive or unpersuasive, and provide reasons for rejecting any evidence favorable to the Veteran. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Although the Board may appropriately favor the opinion of one competent medical authority over another, *see Wensch v. Principi*, 15 Vet. App. 362, 367 (2001), it must consider and weigh all medical evidence, keeping in mind the command of *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990), that the benefit of the doubt in resolving such issues shall be given to the Veteran. *See* 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2012).

The Veteran testified at the July 2010 Board hearing that her asthma began in service and has continued since that time. Board Hearing Tr. at 10-11. She stated that her asthma is aggravated by various factors, such as physical activity and changes in the weather. *Id.* at 11. She uses an inhaler as needed. *Id.* She reported that her asthma has been getting worse and that she has difficulty walking certain distances, cannot run, and her doctor has instructed her not to do any type of hard labor. *Id.* at 12-13.

The Veteran currently receives treatment for bronchial asthma from private physician, Dr. L.A.K. In a July 2010 letter, Dr. L.A.K. indicated that in 1997 the Veteran mentioned having symptoms of sneezing secondary to allergies that were being treated with Claritin. In 2000, she was given Albuterol to keep on hand for intermittent mild wheezing. In 2006, she was noted to be using Singulair and Advair to treat asthma.

The record contains October 2007 and August 2011 VA examiners' opinions. However, these opinions are based on findings that the Veteran's asthma preexisted her first period of active duty. As the Board has concluded that the Veteran was presumed sound on

entrance into that period of active duty, it places no weight of probative value on these two medical opinions.

In October 2012, the Board requested an advisory medical opinion from a VHA specialist in internal medicine. In December 2012, a specialist opined that "it is at least as likely as not that the Veteran's current bronchial asthma is a continuation of the disease process of bronchial asthma diagnosed in April 1990, during the Veteran's first period of service." The physician explained that if the Veteran did not have bronchial asthma prior to service, then the logical conclusion is that the condition began during her first period of service. She opined that the continuation of the Veteran's symptoms and her stepwise progression of therapy intensification, by starting with as needed Albuterol and progressing to inhaled steroids with occasional use of systemic steroids, is consistent with the chronic disease course of asthma, which supports that her current symptoms are a continuation of symptoms that occurred during her first period of service. The record does not contain any probative contradictory medical opinion. Therefore, the third element of a nexus between the current disability and service has also been satisfied.

Because each of the three elements required for service connection has been met, service connection for bronchial asthma is warranted. The benefit sought on appeal is granted.

2. Presumption not rebutted – Prong 1 (preexistence) not met (Denial)

ISSUE – Entitlement to service connection for a low back disability.

FINDING OF FACT

The Veteran's current low back disability did not clearly and unmistakably exist prior to his entrance into service and is not related to an event or injury in service.

CONCLUSION OF LAW

Service connection for a low back disability is not warranted. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1131, 1137, 5107 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.310 (2012).

REASONS AND BASES FOR FINDING AND CONCLUSION

A Veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates

that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted. 38 U.S.C.A. § 1111; 38 C.F.R. § 3.304(b).

A March 1987 entrance examination is negative for notation of a low back disability. Therefore, the Veteran is presumed sound as to a low back disability. However, a September 1990 service treatment record reflects that the Veteran reported having experienced a lifting injury to his lower back prior to service in 1986, while lifting a trailer. The Board recognizes that lay statements may be capable of constituting clear and unmistakable evidence to rebut the presumption of soundness. *See Doran v. Brown*, 6 Vet. App. 283, 286 (1994); *see also Harris v. West*, 203 F.3d 1347, 1351 (Fed. Cir. 2000) ("All that [38 U.S.C. § 1111] requires is that the evidence, whatever it may be, must lead, clearly and unmistakably, to the conclusion that the injury or disease existed before the veteran entered the service."). Although the Veteran is competent to provide evidence regarding observable symptoms and injuries he experienced prior to service, his medical history report does not clearly indicate that a chronic low back disability began before service. It does not elucidate whether he incurred a disability or any residuals from the lifting injury, the course of treatment, or any other factors that may enable the Board to gauge any relevant information as to the preexistence of a low back disability. Thus, the evidence does not undebatably show that he had a preexisting chronic low back disability.

As such, the above evidence is not clear and unmistakable and is insufficient to rebut the presumption of soundness. *See Quirin v. Shinseki*, 22 Vet. App. 390, 396 (2009) (explaining that clear and unmistakable evidence "cannot be misinterpreted and misunderstood, i.e., it is undebatable" (quoting *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999))). Because the presumption of soundness has not been rebutted, the claim is one of service connection, without consideration of aggravation of a pre-existing condition. *See Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).

Service connection may be established for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. A disorder may be service connected if the evidence of record shows that the Veteran currently has a disorder that was chronic in service or, for certain chronic diseases detailed in 38 C.F.R. § 3.309(a), that was seen in service with continuity of symptomatology demonstrated thereafter. 38 C.F.R. § 3.303(b); *see Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013) (holding that the continuity of symptomatology provisions of 38 C.F.R. § 3.303(b) only apply to a chronic disease listed in § 3.309(a)). Service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disability was incurred in service. 38 C.F.R. § 3.303(d).

In order to establish service connection for a claimed disorder, the following must be shown: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). The determination as to whether these requirements are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. *Baldwin v. West*, 13 Vet. App. 1 (1999); 38 C.F.R. § 3.303(a).

Where a Veteran served 90 days or more during a period of war or during peacetime service after December 31, 1946, and arthritis, as a chronic disease, becomes manifest to a degree of 10 percent or more within one year from the date of termination of such service, such disease shall be presumed to have been incurred in or aggravated by service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113, 1131, 1137; 38 C.F.R. §§ 3.307, 3.309(a). If a condition listed as a chronic disease in § 3.309(a) is noted during service, but is either shown not to be chronic or the diagnosis could be legitimately questioned, then a showing of continuity of related symptomatology after discharge is required to support the claim. 38 C.F.R. § 3.303(b); *Walker*, 708 F.3d at 1336 .

In the instant case, there is medical evidence demonstrating that the Veteran has a current low back disability. Specifically, a June 2009 private medical record from Regional West Physicians Clinic reflects diagnoses of lumbar spondylosis with mechanical low back pain and facet degenerative joint disease in the lower segments of the lumbar spine. On June 2011 VA examination the examiner diagnosed lumbosacral degenerative disc disease. Therefore, the first element of service connection is met.

In May 2009, February 2010, and August 2011 statements, the Veteran alleged that his low back disability was due to climbing ladders on-board an air craft carrier, performing preventative maintenance of radars, and repairing electronic equipment in tight areas, all during his time in service. He also alleged that, while stationed on the USS Constellation, he was responsible for ensuring all Operation spaces had a working fire extinguisher. He reported having to continuously replace fire extinguishers, weighing 50 pounds each, for a year, due to their misuse.

The Veteran's DD Form 214 lists his military occupational specialties as Radar Technician and CATC DAIR Maintenance Technician. Medical history reports from 1991, 1992, and 1993, contained in the Veteran's service treatment records, are silent for low back-related complaints.

Although there is no evidence of low back complaints during service, the Board finds the Veteran's statements that his military occupational specialties required heavy lifting and working in tight spaces to be competent and credible as these duties are consistent with the circumstances of his service. Therefore, the evidence shows an event in service and the second element of service connection is met.

What remains to be established is that the Veteran's low back disability is related to the heavy lifting and work he performed in service. Multiple medical opinions and lay witness statements address this question. When evaluating the evidence of record, the Board must analyze its credibility and probative value, account for evidence which it finds to be persuasive or unpersuasive, and provide reasons for rejecting any evidence favorable to the Veteran. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). Although the Board may appropriately favor the opinion of one competent medical authority over another, *see Wensch v. Principi*, 15 Vet. App. 362, 367 (2001), it must consider and weigh all medical evidence, keeping in mind the command of *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990), that the benefit of the doubt in resolving such issues shall be given to the Veteran. *See* 38 U.S.C.A. § 5107 ; 38 C.F.R. § 3.102.

An August 2003 private treatment note from Dr. B.P. reports that in July 2003 the Veteran suffered an episode of severe muscle spasms in his low back while performing his normal post-service work duties as an electrician. The Veteran reported that this incident resulted in continued symptoms of sometimes incapacitating pain in his low back and right leg. Dr. B.P. noted that the Veteran had a ruptured disc on the left side at L5-S1. He provided an impression of low back pain and right lower extremity pain, due to degenerative disc disease of the lumbar spine. Dr. B.P. opined that the Veteran's symptoms were directly related to the July 2003 work-related injury. He further commented that he was sure the Veteran had pre-existing degenerative disc disease of the lumbar spine which was exacerbated by the work-related injury. Although this opinion indicates that the Veteran had degenerative disc disease prior to the July 2003 work-related injury, it does not indicate when degenerative disc disease had its onset. Therefore, the opinion does not weigh either in favor of or against the Veteran's claim and has no probative value on the question of whether his current low back disability is related to his service.

A September 2009 statement from the Veteran's spouse reports that the Veteran has had continuous and worsening back pain since his discharge from active duty. A December 2009 statement from the Veteran's father asserts that after service, the Veteran began taking over-the-counter pain pills for his back and had difficulty lifting heavy equipment.

On June 2011 VA examination, the Veteran reported that he began experiencing soreness in his back around 1991 and that it progressed through the years.

In a June 2012 opinion and October 2012 addendum opinion, Dr. U.S., a physician from the VHA, opined that she could not conclude that the Veteran's low back disability was a consequence of his military service. She stated that "it appears to be the sequela of a baseline predilection for degenerative disease and obesity as much as events that occurred after leaving the military." Dr. U.S. indicated that she reviewed the evidence of record, including the lay statements and the August 2003 opinion from Dr. B.P.; however, she did not provide a rationale for her conclusion that the Veteran's low back disability is more likely due to events after service and a predilection for degenerative disease and obesity. A medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the conclusions to the supporting data. See *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (providing that a medical opinion must support its conclusion with an analysis that the Board can consider and weigh against any contrary opinions). As these opinions do not contain such an explanation, the Board places little weight of probative value on them.

A January 2013 opinion from an IME in orthopedic spine surgery provides a thorough history and discussion of the Veteran's low back disability, including discussing the pertinent medical records, the Veteran's lay statements, and lay statements from the Veteran's spouse and father. Based on this discussion, the examiner opined that it was less likely than not that the Veteran's current low back disability is related to an event or injury in service and that it is more likely than not related to an incident that occurred in 2003. He indicated that the Veteran had no convincing documented evidence of low back problems during or after service. He noted the Veteran's history of his work in service, but indicated that there was not a documented injury that explained any sort of back problems beyond what would normally be expected in someone's back given the natural degenerative process/aging process.

The IME explained that, in his opinion, degenerative disc disease is a chronic condition that is more related to someone's genetic susceptibility than to someone's prior occupational history. He discussed seeing patients with severe degenerative disc disease who have no history of any heavy duty or heavy work activities, as contrasted to patients who have minimal to no degenerative disc disease, but have a history of heavy work activities. He indicated that genetics and lifestyle choices, such as smoking, can play a big role in the development of degenerative disc disease. He acknowledged that occupational exposure may increase or exacerbate degenerative disc disease, but there was no documented

evidence of such in the Veteran's file. The IME further noted that the radiculopathy and ruptured disc that was noted in 2003 would explain the Veteran's back and leg pain. He emphasized that having a ruptured disc and radiculopathy and increased back and leg pain were not related to preexisting degenerative disc disease.

He thus concluded that the record did not contain any compelling evidence of an injury or exacerbation of the Veteran's back during service and that he likely has ongoing degenerative disc disease that is more likely than not related to the natural history of that condition and the Veteran's own genetic makeup. He noted that the degenerative disc disease certainly may have worsened in the years since the Veteran's service, but that he does not believe it is causally related to his service. He also stated his opinion that the herniation and radiculopathy first noted in 2003 was unrelated to service and unrelated to his degenerative disc disease, which had been present prior to 2003. He explained that the physician's note in 2003 that degenerative disc disease had been present previously was simply acknowledging that degenerative disc disease is not a disability that occurs immediately.

He summarized his opinion by stating that there was no compelling evidence that the Veteran had a back injury or back problems during or immediately upon discharge from service. He further stated that the Veteran has degenerative disc disease that has likely been progressive for about the last ten years, but he did not have any inciting or aggravating event and that he suffered a herniated disc with increased radiculopathy in 2003 when he experienced an inciting event.

The Board places substantial weight on this probative opinion. The opinion addresses the pertinent question at hand, describes the disability in sufficient detail, and thoroughly explains the reasoning for the conclusions reached, thus, allowing the Board to make a fully informed evaluation of the underlying medical issues. *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (providing that a medical opinion must support its conclusion with an analysis that the Board can consider and weigh against any contrary opinions). Further, the opinion reflects that pertinent evidence, including post-service treatment records and lay statements of record, was considered in reaching the medical conclusions. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008) (holding that it is the reasoning for the conclusion, not the mere fact that the claims file was reviewed, that contributes probative value to a medical opinion).

Subsequent to the February 2013 IME opinion, the Veteran submitted September 1994 through October 2003 private medical records from Regional West Physicians Clinic reflecting continuing treatment for low back pain and strain and treatment regarding his 2003 work-related injury. Although the February 2013 IME did not have the opportunity to

consider these records, the Board does not find that it is necessary to provide them to the physician for further review and an addendum opinion, as they only provide supporting evidence for a factor that the physician already took into consideration. Specifically, they show evidence of a continuity of symptomatology of back pain since as early as September 1994. As explained above, the IME considered the lay statements regarding the Veteran's continuity of symptomatology of back pain when formulating his opinion. The additional medical records do not show that any inciting event occurred during service other than what the IME considered, that is, the effect of the Veteran's in-service work duties. Therefore, these records do not provide evidence that contradicts the February 2013 IME opinion or that raises questions about the conclusions reached therein.

The Board has also considered whether presumptive service connection for arthritis as a chronic disease is warranted in the instant case. Although the Veteran has indicated that he experienced symptoms of pain in his back during service and after his service discharge, the evidence of record fails to establish that he had arthritis to a compensable level within one year of his separation from service. Private treatment records show treatment for low back pain in September 1994, which is more than one year after the Veteran's service discharge; arthritis was not diagnosed at that time. Hence, the criteria for presumptive service connection for the low back disability as a chronic disease have not been satisfied.

38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

Furthermore, although the record contains lay and medical evidence reflecting continuity of symptomatology of low back pain since service, there was no condition noted in service that was indicative of a chronic back disability; thus, it is not necessary to further address the evidence regarding continuity of symptomatology. 38 C.F.R. § 3.303(b); *see Walker*, 708 F.3d at 1339. Notably, even if there was a condition noted in service that was indicative of a chronic back disability, medical expertise would be required to relate the Veteran's present arthritis etiologically to his post-service symptoms, since this determination is not one that is capable of observation by a lay person. *See Savage v. Gober*, 10 Vet. App. 488, 497-98 (1997); *Walker*, 708 F.3d at 1336, 1340 n.5. As explained above, the probative medical evidence of record clearly reaches the conclusion that the Veteran's current low back disability is unrelated to anything that occurred during service, even when considering the Veteran's continuity of symptomatology of back pain.

There is no other evidence in the record indicating a relationship between the Veteran's service and his current low back disability. Hence, a preponderance of the evidence is against these theories of entitlement.

3. Presumption not rebutted – Prong 2 (aggravation) not met (Grant)

ISSUE – Entitlement to service connection for a respiratory disorder.

FINDING OF FACT

The Veteran's respiratory disorder (chronic rhinitis and sinusitis) clearly and unmistakably preexisted his entrance into service. However, it is not shown by clear and unmistakable evidence that his respiratory disorder was aggravated during his active duty service.

CONCLUSION OF LAW

The criteria for service connection for a respiratory disorder have been met. 38 U.S.C.A. §§ 1110, 1111 (West 2002); 38 C.F.R. §§ 3.303, 3.304, 3.306 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Service connection may be granted for a disability resulting from disease or injury incurred coincident with or aggravated by service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303(a) (2013). Service connection generally requires evidence satisfying three criteria: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship ("nexus") between the present disability and the disease or injury incurred or aggravated during service. *See Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013); *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet .App. 247, 253 (1999).

However, in all cases, a veteran is presumed to have been sound upon entry into active service, except as to defects, infirmities, or disorders noted at the time of the acceptance, examination, or enrollment, or where clear and unmistakable evidence demonstrates that the condition existed before acceptance and enrollment and was not aggravated by such service. 38 U.S.C.A. § 1111 (West 2002); 38 C.F.R. § 3.304(b) (2013). In other words, when no pre-existing medical condition is noted upon entry into service, a Veteran is presumed to have been sound upon entry. *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004); *Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991).

The presumption of soundness applies only when a disease or injury not noted upon entry to service manifests in service, and a question arises as to whether it preexisted service. *Gilbert v. Shinseki*, 26 Vet. App. 48, 55 (2012). The presumption of sound condition does not apply where an entrance examination was not performed contemporaneous with entry to a period of service, because "[i]n the absence of such an [entrance] examination, there is no basis from which to determine whether the claimant was in sound condition upon entry into that period of service on which the claim is based." *Smith v. Shinseki*, 24 Vet. App. 40 (2010); *see also Gilbert*, 26 Vet. App. at 52.

If the presumption of soundness applies, the burden then shifts to the Government to rebut the presumption by clear and unmistakable evidence that the disability was both preexisting and not aggravated by service. *Wagner*, 370 F.3d at 1096; *Bagby*, 1 Vet. App. at 227. Accordingly:

Once the presumption of soundness applies, the burden of proof remains with the Secretary on both the preexistence and the aggravation prong; it never shifts back to the claimant. In particular, even when there is clear and unmistakable evidence of preexistence, the claimant need not produce any evidence of aggravation in order to prevail under the aggravation prong of the presumption of soundness . . . 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.

Horn v. Shinseki, 25 Vet. App. 231, 235 (2012). "The Federal Circuit has made clear that the Secretary may rebut the second prong of the presumption of soundness through demonstrating, by clear and unmistakable evidence, either that (1) there was no increase in disability during service, or (2) any increase in disability was due to the natural progression of the condition." *Quirin v. Shinseki*, 22 Vet. App. 390, 397 (2009) (citing *Wagner*, 370 F.3d at 1096). This burden must be met by "affirmative evidence" demonstrating that there was no aggravation. *See Horn*, 25 Vet. App. at 235. Conversely, the burden is not met by finding "that the record contains insufficient evidence of aggravation." *See id.*

If a veteran is presumed sound at service entrance and VA is unable to rebut the presumption, a disease or injury that manifested in service is deemed incurred in service. *Gilbert*, 26 Vet. App. 48, 53 (2012) (noting that such a finding establishes the second element of service connection). However, even if an injury or disease is deemed to have been incurred in service pursuant to application of the presumption of soundness (or by a finding that the injury or disease was actually incurred in service), a veteran must nonetheless establish that a current disability is related to the in-service injury or disease. *See id.* (citing *Holton v. Shinseki*, 557 F.3d 1362, 1367 (Fed. Cir. 2009) ("The presumption of soundness . . . does not relieve the veteran of the obligation to show the presence of a current disability and to demonstrate a nexus between that disability and the in-service injury or disease or aggravation thereof.")).

Regarding the existence of a present disability, the evidence confirms a diagnosis of chronic allergic rhinitis and sinusitis. Specifically, a May 2013 VA examiner diagnosed this condition. Accordingly, the existence of a present disability, manifested by chronic rhinitis and sinusitis is established.

Otherwise, a current respiratory condition other than chronic allergic rhinitis and sinusitis is not shown. A May 2013 VA examination establishes that the Veteran recently had pneumonia (resolved by the time of the examination), but that she does not have any other lower respiratory condition (such as asthma). A prior examination in February 2007 likewise establishes that the Veteran does not have a respiratory condition other than chronic rhinitis and sinusitis. Due to the absence of a diagnosed disability, service connection may not be established for a lower respiratory condition. *See McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007); *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

In addition to having a current disability, the Veteran competently and credibly asserts that symptoms of her rhinitis and sinusitis were present while in Afghanistan.

The foregoing facts are not materially in dispute. As such, they establish the existence of a present disability and in-service incurrence or aggravation of a disease. *See Walker*, 708 F.3d at 1333. In other words, these two predicate findings establish that the Veteran has a current respiratory condition that was manifested, at least to some degree, during service. *See Gilbert v. Shinseki*, 26 Vet. App. 48, 52 (2012).

However, the evidence of record next presents the question of whether chronic allergic rhinitis and sinusitis preexisted service.

On this question, service treatment records (STRs) show that the Veteran was examined in January 2006. This examination was conducted immediately prior to her entrance into active duty service in February 2006. Because it is contemporaneous with her entrance into service, the Board finds that it constitutes an entrance examination. *See Smith*, 24 Vet. App. at 46. This entrance examination does not note a respiratory disorder. To the contrary, clinical evaluation of the nose and sinuses was "normal." Of note, she endorsed a history of sinusitis and hay fever at that time, which the examiner noted as history of sinus infection, hay fever, seasonal sinusitis, and seasonal allergies. However, such documentation of her history does not constitute a "noted" disease for purposes of 38 U.S.C.A. § 1111. Accordingly, the Veteran is entitled to the presumption of soundness for this period of service.

The record on appeal is not sufficient to rebut the presumption of soundness. Regarding the preexisting prong of the presumption of soundness, the evidence includes medical records from June 2002 and September 2005 undebatably confirming the preexisting condition. Thus, the preexisting prong necessary to rebut the presumption of soundness is satisfied. *See Horn*, 25 Vet. App. at 235.

However, the record does not include clear and unmistakable evidence sufficient to rebut the aggravation prong of the presumption of soundness. *See Id.*

On this question, the Veteran underwent a VA examination in May 2013. The VA examiner concluded that the Veteran's chronic rhinitis and sinusitis condition had its onset prior to service in June 2002. The examiner then noted the Veteran's complaints of symptoms frequently during service, which, according to the examiner, "likely represented a worsening compared to baseline seasonal rhinitis and sinusitis complaints."

Notably, the May 2013 VA examiner opined that it is less likely than not that the disorder was permanently aggravated by service beyond the natural progress of the diagnosis. The examiner commented that it "appears" the Veteran's seasonal allergy and sinus problem returned to a similar intermittent pattern after return from deployment. The examiner explained that, in the years after deployment, there has been a pattern of intermittent sinus congestion, generally about once per year lasting for a period of several weeks. The VA examiner further reasoned that the Veteran was already taking considerable medication in 2002, "suggesting" that she had significant allergy problems then. The examiner finally observed that she is taking a similar amount of medication in recent post-deployment years.

The May 2013 VA examiner concluded, essentially, that the worsening during service represented no more than a temporary flare-up. However, the VA examiner's opinion is particularly equivocal on this latter point. The examiner only found evidence "suggesting" significant allergy problems prior to service which "appear[]" to have returned to her baseline after service. Although the VA examiner relied on an accurate factual premise in reaching this conclusion, such an equivocal opinion does not meet the degree of certainty necessary to rebut the aggravation prong of the presumption of soundness. In other words, the VA examiner's opinion does not provide clear and unmistakable evidence that the increase in disability was due to the natural progression of the condition.

Apart from the May 2013 VA examiner's opinion, the record on appeal does not contain any probative evidence addressing this complex medical question. And, although the totality of the medical evidence bears on this question, the Board, in its lay capacity, is unable to draw any inferences from the medical evidence. *See, e.g., Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011). The Board finds that no further development is necessary in this regard, because doing so would only be for the sole purpose is to obtain evidence against the claim. *See Mariano v. Principi*, 17 Vet. App. 305 (2003); *cf Douglas v. Shinseki*, 23 Vet. App. 19, 26 (2009) (the Board may seek further evidentiary development if the favorable evidence, along with the other evidence of record, is not sufficient to allow the Board to make a fully informed decision).

In light of the foregoing, the Board is unable to rebut the presumption of soundness. Because the remaining evidence establishes that the Veteran's chronic allergic rhinitis and sinusitis is related to the in-service disease, the claim is granted. 38 U.S.C.A. § 1111; *Gilbert*, 26 Vet. App. 53.

4. Presumption rebutted – (Denial)

ISSUE – Entitlement to service connection for bipolar disorder.

FINDINGS OF FACT

1. Bipolar disorder was not noted at the time of the appellant's entry into service.
2. The evidence clearly and unmistakably shows that the appellant's bipolar disorder existed prior to service and was not aggravated by service.

CONCLUSION OF LAW

Service connection for bipolar disorder is not established. §§ 1110, 5102, 5103, 5103A, 5107 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.303, 3.304, 3.306 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303. Service connection may also be granted for any disease initially diagnosed after service, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 U.S.C.A. § 1113(b); 38 C.F.R. § 3.303(d); *Cosman v. Principi*, 3 Vet. App. 503, 505 (1992).

Active military, naval, or air service includes any period of active duty for training (ACDUTRA) during which the individual concerned was disabled or died from a disease or injury incurred in or aggravated in line of duty, or any period of inactive duty training (INACDUTRA) during which the individual concerned was disabled or died from injury incurred in or aggravated in line of duty. 38 U.S.C.A. § 101(21), (24); 38 C.F.R. § 3.6(a), (d) (2009). ACDUTRA includes full-time duty performed for training purposes by members of the National Guard of any state. 38 U.S.C.A. §§ 101(22), 316, 502, 503, 504, 505 (West 2002); 38 C.F.R. § 3.6(c)(3) (2009). Presumptive periods do not apply to ACDUTRA or INACDUTRA. *Biggins v. Derwinski*, 1 Vet. App. 474, 477-78 (1991). Thus, service connection may be granted for disability resulting from disease or injury incurred or aggravated while performing ACDUTRA, or from an injury incurred or aggravated while performing INACDUTRA. 38 U.S.C.A. §§ 101(24), 106.

VA law provides that a veteran is presumed to be in sound condition, except for defects, infirmities or disorders noted when examined, accepted, and enrolled for service, or where clear and unmistakable evidence establishes that an injury or disease existed prior to service and was not aggravated by service. 38 U.S.C.A. §§ 1111, 1132.

The presumption of soundness attaches only where there has been an induction examination during which the disability about which the veteran later complains was not detected. *See Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991). The regulations provide expressly that the term "noted" denotes "[o]nly such conditions as are recorded in examination reports," 38 C.F.R. § 3.304(b), and that "[h]istory of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions." *Id.* at (b)(1).

The law further provides that the burden to show no aggravation of a pre-existing disease or disorder during service is an onerous one that lies with the government. *See Cotant v. Principi*, 17 Vet. App. 116, 131 (2003); *Kinnaman v. Principi*, 4 Vet. App. 20, 27 (1993). Importantly, the VA Office of the General Counsel determined that VA must show by clear and unmistakable evidence that there is a pre-existing disease or disorder and that it was not aggravated during service. *See* VAOPGCPREC 3-03 (July 16, 2003). The claimant is not required to show that the disease or injury increased in severity during service before VA's duty under the second prong of this rebuttal standard attaches. *Id.* The Board must follow the precedent opinions of the General Counsel. 38 U.S.C.A. § 7104(c).

Also pertinent is the decision of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), issued on June 1, 2004, summarizing the effect of 38 U.S.C.A. § 1111 on claims for service-connected disability. In that case, the Federal Circuit Court found that when no preexisting condition is noted upon entry into service, the veteran is presumed to have been sound upon entry and the burden then falls on the government to rebut the presumption of soundness. The Federal Circuit Court held, in *Wagner*, that the correct standard for rebutting the presumption of soundness under 38 U.S.C.A. § 1111 requires that VA shows by clear and unmistakable evidence that (1) the veteran's disability existed prior to service and (2) that the preexisting disability was not aggravated during service. In May 2005, 38 C.F.R. § 3.304 was amended to reflect the Federal Circuit's analysis in *Wagner*. If a disability was not noted at the time of entry into service and VA fails to establish by clear and unmistakable evidence either that the disability existed prior to service or that it was not aggravated by service, the presumption of sound condition will govern and the disability will be considered to have been incurred in service if all other requirements for service connection are established.

On the other hand, if a preexisting disorder is noted upon entry into service, the veteran cannot bring a claim for service connection for that disorder, but the veteran may bring a claim for service-connected aggravation of that disorder. In that case section 1153 applies and the burden falls on the veteran to establish aggravation. *See Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994). If the presumption of aggravation under section 1153 arises, the burden shifts to the government to show a lack of aggravation by establishing "that the increase in disability is due to the natural progress of the disease." 38 U.S.C. § 1153, 38 C.F.R. § 3.306.

After careful review of the evidence of record, the Board finds that the appellant's bipolar disorder preexisted service and was not aggravated in service.

Current medical records show that the appellant has been diagnosed as having bipolar disorder.

A psychiatric disorder, to include bipolar disorder, was not noted on the appellant's December 1993 service entrance examination report, and therefore he is presumed sound at entrance. In this case, however, in an August 1994 service Medical Evaluation Request, the appellant reported that he had been diagnosed as having bipolar disorder prior to his service with the Army National Guard and that he did not inform his recruiter of this condition prior to his enlistment. Pre-service medical treatment records associated with the service treatment records confirm that he was diagnosed as having bipolar disorder in March and April 1993. Therefore, although bipolar disorder was not noted on the appellant's entrance examination, the evidence, taken as a whole, constitutes clear and unmistakable evidence that the appellant's bipolar disorder preexisted service.

The Board also finds that there is clear and unmistakable evidence that there was no increase in the underlying severity of the disorder in service. In this case, there is competent medical evidence that the appellant's bipolar disorder did not undergo an increase in severity during his service. The February 2009 VA examiner stated that a combination of factors including genetic factors and environmental stressors are associated with bipolar disorder; however, there was no evidence of any significant abuse to the appellant during his period of service. In fact, the examiner opined that the appellant did comparatively better during his time in service than at any other point during the last 15 years. The examiner concluded that the appellant's bipolar disorder was not aggravated by his military service. There is no other medical opinion of record. Thus, the evidence clearly and unmistakably shows that the appellant's bipolar disorder was not aggravated during service.

In this case the evidence does not clearly and unmistakably establish that the Veteran's preexisting bipolar disorder increased in severity during or as a result of his service, the

presumption of soundness is rebutted. As such, the Veteran's bipolar disorder cannot be found to have been incurred in service, and service connection for bipolar disorder is not warranted.

Presumption of Soundness Does Not Attach

1. Pre-existing condition not noted on entrance; ACDUTRA – Grant based on aggravation under § 1153

ISSUE – Entitlement to service connection for asthma.

FINDINGS OF FACT

1. The Veteran has a history of childhood asthma. Neither asthma, nor a history of childhood asthma, however, was noted on entry into active service or at any time during his period of active service.
2. The Veteran was diagnosed with asthma prior to his August 1992 period of active duty for training. At the time of the diagnosis, the Veteran was not in active duty training status.
3. The Veteran's asthma permanently increased in severity during his August 1992 period of active duty for training. The worsening of his asthma disability was caused by the August 1992 period of active duty for training.

CONCLUSION OF LAW

The Veteran's pre-existing asthma was aggravated during and as a result of his August 1992 period of active duty for training. 38 U.S.C.A. §§ 101(24), 106, 1110, 1111, 1153 (West 2002); 38 C.F.R. §§ 3.303, 3.304, 3.306 (2011).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

In this decision, the Board grants service connection for asthma, which constitutes a complete grant of the benefit sought on appeal. As such, no discussion of VA's duties to notify or assist is necessary.

The Veteran, in essence, contends that his pre-existing asthma disability was worsened as a result of his 1992 active duty training with the Army Reserves. In July 2010 testimony before the Board, the Veteran explained that the physical training requirements during his active duty training, and running in particular, caused a severe asthma attack, for which he had been required to seek emergency medical attention. He stated that after the asthma attack,

his asthma seemed worse than it had been prior to the attack. Whereas before the attack he had not required regular treatment and monitoring of his asthma, after the attack, he required frequent medical intervention. For this reason, he asserts that he is entitled to service connection for asthma.

Notably, the Veteran does not contend that his asthma disability is related to his November 1973 to November 1976 period of active duty in the United States Army. Although the record reflects that the Veteran has a history of childhood asthma, neither this history, nor any findings or symptomatology related to asthma were noted during his period of active service. Evidence dated after the Veteran's separation from active service also does not support a finding that his current asthma is related to his period of active service. As the Veteran does not seek service connection for his asthma as a result of his period of active service from November 1973 to November 1976, and the evidence of record does not support a finding that it is related to his period of active service, the Board will limit its analysis to whether the Veteran is entitled to service connection for asthma in association with his service in the Reserves. In this regard, the Board notes that the Veteran has obtained "veteran" status as a result of his November 1973 to November 1976 period of active duty in the United States Army. *See Smith v. Shinseki*, 24 Vet. App. 40, 44 (2010). The Board now turns to an evaluation of the merits of his claim.

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110, 1131 (West 2002); 38 C.F.R. § 3.303 (2011). Service connection generally requires evidence of a current disability with a relationship or connection to an injury or disease or some other manifestation of the disability during service. *Boyer v. West*, 210 F.3d 1351 (Fed. Cir. 2000); *Degmetich v. Brown*, 104 F. 3d 1328 (1997); *Cuevas v. Principi*, 3 Vet. App. 542 (1992); *Rabideau v. Derwinski*, 2 Vet. App. 141 (1992).

Active military, naval, or air service includes any period of active duty training during which the individual concerned was disabled or died from a disease or injury incurred in or aggravated in line of duty, or any period of inactive duty training during which the individual concerned was disabled or died from injury incurred in or aggravated in line of duty. 38 U.S.C.A. § 101(21), (24) (West 2002); 38 C.F.R. § 3.6(a), (d) (2011). Active duty training is, inter alia, full-time duty in the Armed Forces performed by Reserves for training purposes. 38 C.F.R. § 3.6(c)(1) (2011). It follows that service connection may be granted for disability resulting from disease or injury incurred or aggravated while performing active duty training, or from injury incurred or aggravated while performing inactive duty training. 38 U.S.C.A. §§ 101(24), 106, 1131 (West 2002). As the Veteran in this case seeks service

connection for a disease, rather than injury, he is not eligible for service connection on the basis of his inactive duty training. 38 U.S.C.A. §§ 101(24), 106, 1131.

Every Veteran shall be taken to have been in sound condition when examined, accepted and enrolled for service, except as to defects noted at the time of the examination, acceptance and enrollment, or where clear and unmistakable evidence or medical judgment is such as to warrant a finding that the disease or injury existed before acceptance and enrollment, and was not aggravated by such service. 38 U.S.C.A. § 1111.

The statutory language regarding the presumption of soundness indicates that the presumption applies when a Veteran has been "examined, accepted, and enrolled for service," and where that examination revealed no "defects, infirmities, or disorders." 38 U.S.C.A. § 1111. Thus, the statute requires that there be an examination prior to entry into the period of service on which the claim is based. *See Smith v. Shinseki*, 24 Vet. App. 40, 45 (2010) (citing *Crowe v. Brown*, 7 Vet. App. 238, 245 (1994)) (holding that the presumption of sound condition "attaches only where there has been an induction examination in which the later-complained-of disability was not detected" (citing *Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991))). In the absence of such an examination, there is no basis from which to determine whether the claimant was in sound condition upon entry into that period of service on which the claim is based. *See Smith v. Shinseki*, 24 Vet. App. at 45; *see also Crowe*, 7 Vet. App. at 245. Indeed, on analogous facts, the Smith Court held that in light of the absence of evidence of an examination made contemporaneous with the Veteran's entry into service, the presumption of sound condition could not apply. *Smith*, 24 Vet. App. at 46.

The first inquiry in evaluating the Veteran's entitlement to service connection for asthma is whether the Veteran is entitled to the presumption of soundness for his 1992 active duty training. Service personnel records show that in June 1992 the Veteran received orders for active duty training to be held from August 1, 1992, to August 15, 1992. He was not examined at entry into active duty training on August 1, 1992. As there was no report of examination at entry into this period of active duty training, the Board concludes that the Veteran is not entitled to the presumption of soundness for his August 1992 period of active duty training. Having determined that the Veteran is not entitled to the presumption of soundness for his August 1992 period of active duty training, the next question before the Board is whether his asthma disability pre-existed this period of active duty training.

The record in this regard reflects that on quadrennial examination in August 1980, the Veteran was found to have scattered monophonic wheezes related to a history of childhood asthma. He was determined to be qualified for retention in the Reserves, but was advised to see a physician. The Veteran's duty status (inactive duty training versus active duty training)

at the time of this notation is not clear. However, the notation of wheezing and a history of childhood asthma are insufficient to establish a diagnosis of asthma in August 1980.

The record reflects no further findings related to asthma until March 1992, when quadrennial examination again was notable for diffuse bilateral wheezing. Although the examining physician determined that the Veteran was qualified for retention in the Reserves, he was referred for additional evaluation. A report of examination from the 4010th USA Hospital dated that same day shows that upon arrival, the Veteran was observed to be having difficulty breathing and to be wheezing. He was directed by medical personnel to seek treatment at a medical emergency facility, and was taken directly to Methodist Hospital. The records associated with the treatment the Veteran received at Methodist Hospital are not of record. However, a July 1992 Memorandum from the Department of the Army to the Commander of the Bayne-Jones Army Community Hospital shows that on March 14, 1992, the Veteran had an asthma attack while performing Regular Scheduled Training Assembly, while in inactive duty training status. A Public Voucher for Purchases and Services other than Personal shows that the Veteran was treated by Pendleton Memorial Methodist Hospital for a diagnosis of asthma. The March 1992 diagnosis of asthma is the first confirmed diagnosis of asthma of record. As this diagnosis pre-dated his entry into the August 1992 period of active duty training, the Board finds that the Veteran's asthma pre-existed his entry into that period of active duty training.

As the Veteran's asthma pre-existed his entry into active duty training in August 1992, in order for service connection to be warranted, his disability must have been aggravated during the active duty training, and the worsening must have been caused by the period of active duty training. See 38 U.S.C.A. §§ 101(24)(B), 1153, *Smith*, 24 Vet. App. at 48. A lack of aggravation may be shown by establishing that there was no increase in disability during service or that any increase in disability was due to the natural progress of the pre-existing condition. VAOPGCPREC 3-2003 (July 16, 2003); 69 Fed. Reg. 25178 (2004).

Service treatment records associated with his August 1992 period of active duty training show that on August 6, 1992, the Veteran reported to sick call with complaints of shortness of breath. He reported that he had been diagnosed with asthma in March 1992. Physical examination resulted in a diagnosis of upper respiratory infection. As the Veteran complained of chest tightness and was noted to have both inspiratory and expiratory wheezes, with positive use of accessory muscles, it was determined that he should be transported via ambulance to the local emergency room. The records associated with his emergency treatment are not in the claims file.

On follow up evaluation on August 10, 1992, the Veteran reported that he had been treated with an injection and a breathing treatment at the emergency room, and that he currently

was doing much better. He reported occasional wheezing, mostly in the morning, which responded well to an inhaler. Physical examination demonstrated lungs that were clear to auscultation, bilaterally, without retractions. The assessment was status post acute asthma attack. He was instructed to return to duty without restriction, and to continue to use his inhaler as needed. Follow up evaluation two days later revealed wheezing in the bilateral lower lungs. The Veteran indicated that his asthma had been bad that year.

Service personnel records dated in February 1994 show that the Veteran had nine unsatisfactory drill participations over the last year. He was noted to be suffering from health conditions that impaired his ability to perform his duties as a soldier.

Clinical records dated since February 1994 show that the Veteran is regularly followed for severe persistent asthma, and that exercise is a trigger of his asthma. These records also show that the Veteran reported a worsening of his asthma after a 1992 asthma attack. Treating clinicians have not opined as to whether his asthma was aggravated as a result of his August 1992 active duty for training.

On VA respiratory examination in March 2004, the Veteran reported a history of severe asthma since 1994. He indicated that he had asthma as a child, but that he eventually grew out of it, and it was not until 1994 that he began to have serious problems. He noted that in the past he had required frequent systemic steroids for control of his asthma, but that over the past few years, his disease had been fairly well controlled on inhaled steroids. After physically examining the Veteran, the examiner diagnosed the Veteran with very severe chronic obstructive lung disease with a reversible component attributable to asthma. The examiner noted that the Veteran's claims file was not available for review. Given the Veteran's history of childhood asthma, his history of allergic rhinitis with nasal polyps, and the fact that there was no evidence of record supportive of a history of exposure to airway irritants, the examiner determined that the Veteran's asthma was attributable to an allergic asthma, and that it may have no relation to his service in the military.

The same examiner again examined the Veteran in May 2007. At that time, the examiner noted the Veteran's history of 30-pack smoking years but did not offer an opinion regarding the etiology of the Veteran's asthma. In a May 2007 addendum to the report of examination, the examiner stated that the Veteran's asthma had its initial clinical onset during his childhood. In August 1992, he received emergency medical treatment for asthma. Upon review of the claims file in its entirety, the examiner opined that it was as likely as not that the Veteran's asthma underwent a chronic progression during his active duty training. The examiner did not address whether the progression was caused by the active duty training.

In effort to obtain additional information regarding the etiology of the Veteran's asthma, VA provided the Veteran with another examination in May 2009. After reviewing the claims file and examining the Veteran, the examiner determined that the initial clinical manifestation of the Veteran's asthma was in childhood. He currently suffered from chronic allergies, and had had nasal polyps, which were associated with chronic allergies. The examiner determined that the most likely cause of the Veteran's airway responsiveness was allergies. His asthma had been further exacerbated by smoking, which led to the development of chronic obstructive pulmonary disease. In the examiner's opinion, the Veteran's asthma demonstrated a natural progression of disease in a person with chronic allergies who presented with childhood asthma and who smoked cigarettes for greater than 20-pack years.

Following a July 2010 hearing with the Veteran, the Board determined that the record required additional clarification of the etiology of the Veteran's asthma, by way of an expert opinion. In a July 2011 opinion, a VA pulmonologist provided a detailed account of the Veteran's respiratory disease and determined, based on the number of variable references to allergic rhinitis, nasal polyps, childhood asthma, and severe recurrent asthma, that the Veteran's asthma progressed during his military service, culminating during his August 1992 active duty training. The examiner opined that the August 1992 asthma attack represented a progression of the disease, and that the origin, or cause, of the progression was service-related. Interpreting this statement in the light most favorable to the Veteran, the Board concludes that the physician, in indicating that the progression was service-related, was referring to the Veteran's August 1992 active duty training.

In this case, the Veteran has provided credible and competent testimony as to the increase in the severity of his asthma during his August 1992 period of active duty training, and this testimony is consistent with the clinical evidence of record. In addition, each of the VA examiners who reviewed the Veteran's record agreed that the Veteran's asthma underwent a progression during his August 1992 active duty training. The final question before the Board therefore is whether the progression was caused by the August 1992 active duty training.

The record contains evidence that weighs both in favor and against a finding that the progression was caused by the August 1992 active duty training. The May 2007 examiner did not offer an opinion as to the cause of the progression, weighing neither in favor nor against the Veteran's claim. The May 2009 examiner, however, determined that the progression was the result of the natural progress of the disease, as opposed to the result of the active duty training. In contrast, the July 2011 VHA physician found that the cause of the progression was the August 1992 active duty training.

Favorable evidence relating the progression of the Veteran's asthma to his August 1992 active duty training must be weighed against the negative opinion evidence of record. In considering what weight to assign the May 2009 VA examiner's opinion as compared to the July 2011 opinion, the Board concludes that neither opinion is entitled to more probative weight than the other. Both physicians reviewed the same medical evidence and came to different conclusions. Although both physicians discussed the medical evidence in detail, neither provided a detailed rationale for his conclusions regarding the cause of the progression. The absence of a rationale for either opinion prevents the Board from being able to determine which opinion is entitled to more probative weight. As neither opinion is entitled to more probative weight than the other, the Board concludes that the weight of the evidence for and against the claim is in relative equipoise.

After weighing the evidence regarding the cause of the progression of the Veteran's asthma disability, the Board finds that it is at least as likely as not that the Veteran's asthma disability was aggravated during and as a result of his August 1992 active duty training. Resolving all reasonable doubt in the Veteran's favor, the Board finds that the criteria for service connection for asthma have been met. 38 U.S.C.A. § 5107(b) ; *Gilbert v. Derwinski*, 1 Vet. App. 49, 50 (1990); 38 C.F.R. § 3.102.

2. Pre-existing condition noted on entrance (Denial)

ISSUE: Entitlement to service connection for bilateral pes planus.

FINDING OF FACT

Third degree bilateral pes planus was noted on November 1952 pre-induction examination; bilateral pes planus did not permanently increase in severity during service.

CONCLUSIONS OF LAW

Service connection for bilateral pes planus is not warranted. 38 U.S.C.A. §§ 1110, 1111, 1153, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.304, 3.306 (2010).

REASONS AND BASES FOR FINDING AND CONCLUSION

Service connection may be established for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303. A disorder

may be service connected if the evidence of record shows that the Veteran currently has a disorder that was chronic in service or, if not chronic, that was seen in service with continuity of symptomatology demonstrated thereafter. 38 C.F.R. § 3.303(b). Service connection may also be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disability was incurred in service. 38 C.F.R. § 3.303(d).

Service connection may also be granted on a presumptive basis for certain chronic disabilities, including arthritis, when manifested to a compensable degree within the initial post-service year. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309(a).

In order to establish service connection for a claimed disorder, the following must be shown: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). The determination as to whether these requirements are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. *Baldwin v. West*, 13 Vet. App. 1 (1999); 38 C.F.R. § 3.303(a).

A Veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted. 38 U.S.C.A. § 1111; 38 C.F.R. § 3.304(b).

A preexisting injury or disease will be considered to have been aggravated by active service where there is an increase in disability during service. Where the evidence shows that there was an increase in disability during service, there is a presumption that the disability was aggravated by service. To rebut the presumption of aggravation, there must be clear and unmistakable evidence (obvious or manifest) that the increase in severity was due to the natural progress of the disability. 38 U.S.C.A. § 1153; 38 C.F.R. § 3.306(a) and (b).

Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during, and subsequent to service. 38 C.F.R. § 3.306(b). Temporary or intermittent flare-ups of a pre-existing injury or disease are not sufficient to be considered "aggravation in service" unless the underlying condition as contrasted to symptoms is worsened. *Jensen v. Brown*, 4 Vet. App. 304, 306-07 (1993); *Hunt v. Derwinski*, 1 Vet. App. 292 (1991).

When there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102.

When all of the evidence is assembled, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the Veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

As an initial matter, it must be shown that the Veteran has a current diagnosis of bilateral pes planus, since service connection cannot be established without a current disability. *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992). In this regard, July 2008 X-rays reveal severe pes planus of both feet.

On November 1952 pre-induction examination, it was clinically noted that the Veteran had third degree pes planus, asymptomatic. As such evidence shows bilateral pes planus was noted on examination when the Veteran was accepted and enrolled into service, the presumption of soundness on induction as to bilateral pes planus does not apply. 38 U.S.C.A. § 1111; 38 C.F.R. § 3.304(b). Therefore, his claim of service connection for bilateral pes planus will be considered based on a theory of aggravation of a preexisting disability. 38 U.S.C.A. § 1153; 38 C.F.R. § 3.306. In order for the presumption of aggravation to arise, the evidence must show that there was a permanent increase in the severity of bilateral pes planus during service.

The Veteran argues that improper fitting boots and injuries to his feet and to his ankles during service aggravated his pes planus.

Service treatment records (STRs) show that in April 1953, the Veteran reported having pain in his ankles. An October 1953 STR shows the Veteran turned and sprained his left ankle after jumping out of a truck. X-rays were negative. He was put on light duty.

In November 1953 the Veteran was treated after a foot crush injury. X-rays were negative and treatment consisted of hot soaks and an ace bandage.

An August 1954 STR reflects that the Veteran sprained his left ankle while playing ball.

On December 1954 separation examination, it was clinically noted that he had third degree pes planus.

A November 2003 statement from the Veteran's spouse states that improper fitting shoes worn during service did not help his preexisting flat feet.

At the October 2004 DRO hearing, the Veteran testified that his feet did not bother him prior to service. Hearing Tr. at 4. He stated that the boots he was issued when he entered service were too big and caused him to have difficulty balancing when he walked. *Id.* He developed calluses on his toes and on the balls of his feet, so he had to weight bear on the outside of his feet. *Id.* at 5. His feet hurt throughout the day and he noticed that they were swollen at the end of the day when he removed his boots. *Id.* at 6-7. He requested a boot change several times, but he was never provided with different boots. *Id.* at 6-8. By the end of his service, he noticed that the arch of his foot was "down more" and that the character of his footprint had changed. *Id.* at 8-9. He also testified that he believed injuries to his ankles during service hastened the deterioration of his feet. *Id.* at 9.

To the extent that the Veteran asserts that his bilateral pes planus increased in severity based on pain, swelling, calluses, and difficulty balancing during his period of active duty service, the Veteran is competent to describe such symptoms. *See Layno v. Brown*, 6 Vet. App. 465, 469 (1994) (holding that a claimant is competent to report observable symptoms that require only personal knowledge, not medical expertise, as they come to the claimant through his senses); *see also Washington v. Nicholson*, 19 Vet. App. 362 (2005) (holding that a claimant is competent to provide lay evidence regarding those matters which are within his or her personal knowledge and experience). The Veteran's spouse is also competent to provide evidence regarding her observation of the Veteran's pes planus. Notably, the United States Court of Appeals for Veterans Claims (Court) has specifically held that "pes planus is the type of condition that lends itself to observation by a lay witness." *Falzone v. Brown*, 8 Vet. App. 398, 403 (1995). The Veteran is also competent to provide evidence regarding the facts and circumstances of his service. 38 U.S.C.A. § 1154(a); 38 C.F.R. § 3.159(a)(2). His history of injuring his feet and ankles during service is supported by STRs. Therefore, the evidence of record provides no reason to doubt his and his spouse's statements and the Board concludes that these statements are competent and credible as to the injuries experienced in service and the observable symptomatology of bilateral pes planus.

However, when weighed against the other evidence of record, the Board finds that these lay statements do not sufficiently show that there was a permanent increase in severity of bilateral pes planus during service.

Specifically, on December 1954 separation examination, it was clinically noted that the Veteran had third degree pes planus. This is the same level of pes planus that was noted on service entrance examination. This evidence weighs directly against a finding that there was a permanent increase in severity of bilateral pes planus during service as the clinical findings on entrance and separation were equivalent.

It is also notable that more than three years after service discharge, on April 1958 VA examination, the Veteran's pes planus was noted to be at the same third degree level of severity.

Additionally, although STRs show the Veteran injured his feet and ankles during service, VA examiner opinions interpreting these records found that he did not experience any chronic residuals from the injuries. After interviewing and examining the Veteran, reviewing his claims file, and reviewing medical literature, the December 2004 VA examiner concluded that STRs did not reveal "extensive injuries at the ankles." Moreover, she concluded that the Veteran's bilateral pes planus was not at least as likely as not related to injuries that occurred during service. In reaching these conclusions, the examiner considered the Veteran's reports that he has experienced bilateral foot pain since his discharge from service and that he experienced partial recovery after those injuries with generalized foot discomfort, increased foot fatigue, and decreased tolerance to long periods of standing or walking while on active duty. She explained that the Veteran had pes planus since childhood and that the current status of his pes planus was consistent with the natural progression of the condition.

The July 2008 VA examiner also interviewed and examined the Veteran and reviewed his VA claims file. He specifically discussed the Veteran's in-service ankle sprains and foot crush injury and noted that treatment in service involved icing and strapping. He explained that these injuries did not result in significant foot trauma and that the treatment provided in service was not consistent with severe injuries of the feet. The examiner noted the Veteran's report that he has experienced consistent and unremitting discomfort in his left foot since his in-service injuries. Based on his findings that the injuries in service were not of a severe nature, the examiner opined that it was less than likely that injuries sustained during service significantly affected the Veteran's current lower extremity disabilities and that it was more likely that they resulted from chronic progression of pes planus.

The Board places substantial probative weight on the December 2004 and July 2008 VA examiner's opinions. These opinions reflect a full review of the STRs and the competent and credible lay and medical evidence of record, reveal a complete familiarity with the Veteran's medical history, are supported by detailed findings and rationale, and are couched in certain terms. The December 2004 VA examiner additionally reviewed current medical literature on the matter. Both examiners discussed that the Veteran had preexisting pes planus and they explained that the status of his pes planus did not show any increase beyond the normal and natural progression of the condition. Therefore, they described the disability in sufficient detail and thoroughly explained the reasoning for their conclusions,

thus, allowing the Board to make a fully informed evaluation of the underlying medical issues. *See Stefl v. Nicholson*, 21 Vet. App. 120, 123 (2007).

The record also contains treatment records from A.J.C., DPM, MS. April 1997 and August 1999 records reveal medial arch collapse on the left foot secondary to old talocalcaneal pathology and resultant degenerative changes. These records do not explain the basis for this statement and do not clearly reference the Veteran's service or indicate that bilateral pes planus increased in severity during service. As such, these records hold less probative weight than the opinions of the December 2004 and July 2008 VA examiners on the matter of whether there was a permanent increase in severity in service. A letter from A.J.C., received in November 2004, states that the Veteran "will require long term treatment for his foot . . . problems, with his previous injuries and subsequent secondary problems" which have been exacerbated by his preexisting pes planus. She opined that it "seem[ed] appropriate to consider these problems as service related." The Board also places little probative weight on this letter. A.J.C. does not provide a rationale or analysis for her conclusion that the Veteran's foot problems are "service related." Without a rationale or analysis for this conclusion, the Board cannot appropriately weigh it against any contrary opinion. *See Stefl*, 21 Vet. App. at 123 ("[A] mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion."); *see also Miller v. West*, 11 Vet. App. 345, 348 (1998). Additionally, although the letter recognizes that the Veteran had preexisting pes planus, it does not explain whether the finding that the current foot problems are related to service indicates that there was an increase in the severity of bilateral pes planus during service. The Court has held that when missing information from a private medical report is "relevant, factual, and objective," VA may need to seek further clarification from the private treatment provider. *Savage v. Shinseki*, 24 Vet. App. 259, 270 (2011). However, the Board finds that seeking such clarification is not necessary with this medical opinion, as the question requiring clarification is a matter of opinion, not a factual and objective issue. *See id.* (stating that "we do not interpret VA statutes and regulations as establishing a broad requirement that VA inquire of private medical experts regarding the opinions expressed in their examination reports or the general bases therefor").

A March 2008 letter from R.W.P., DPM notes that the Veteran has significant bilateral pes planus defect, which had been present since childhood. R.W.P. noted that the Veteran has pain associated with his "longstanding pes planus, i.e. arch strain, post[erior] tibial tendonitis, and bunions." Although this letter notes that the Veteran currently has significant pain from pes planus, it does not provide an opinion about whether the disability showed a permanent increase in severity during service. Therefore, it has no probative value on that matter.

In weighing the competent evidence of record on the matter of whether there was a permanent increase in severity of bilateral pes planus during service, the Board places the most probative value on the service separation examination that found the Veteran's pes planus was at the same level of severity as when he entered service, similar findings on April 1958 VA examination, and the December 2004 and July 2008 VA examiner's opinions.

Although the Veteran's and his spouse's lay contentions regarding an increase in symptoms during service are competent and credible, they do not show a permanent worsening of the underlying condition of bilateral pes planus. *See Jensen*, 4 Vet. App. at 306-07. Therefore, their statements are outweighed by the other competent and probative evidence of record that shows bilateral pes planus did not undergo a permanent increase in severity during service. As such, the Board finds that the presumption of aggravation found in 38 U.S.C.A. § 1153 and 38 C.F.R. § 3.306 does not arise. *Browder v. Derwinski*, 1 Vet. App. 204, 206-07 (1991).

In conclusion, a preponderance of the evidence is against the claim; therefore, the benefit of the doubt rule is not applicable. 38 U.S.C.A. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49, 54-56 (1990). The claim of service connection for bilateral pes planus is denied.

June 2005

The Presumptions of Sound Condition (Soundness) and Aggravation Found in 38 U.S.C. § 1111 and 38 U.S.C. §1153.

I. The Presumption Of Sound Condition.

A. 38 U.S.C. § 1111 provides that every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

B. 38 C.F.R. § 3.304(b) (2003) (implementing 38 U.S.C. § 1111) provided: “Presumption of Soundness. The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted.”

C. However, in VAOPGCPREC 3-03 (July 16, 2003) the VA General Counsel held: “To rebut the presumption of sound condition under 38 U.S.C. § 1111, the Department of Veterans Affairs (VA) must show by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service. The claimant is not required to show that the disease or injury increased in severity during service before VA’s duty under the second prong of this rebuttal standard attaches. The provisions of 38 C.F.R. § 3.304(b) are inconsistent with 38 U.S.C. § 1111 insofar as section 3.304(b) states that the presumption of sound condition may be rebutted solely by clear and unmistakable evidence that a disease or injury existed prior to service. Section 3.304(b) is therefore invalid and should not be followed.”

D. As a result, VA has amended 38 C.F.R. § 3.304(b). 70 Fed. Reg. 23027 (May 4, 2005). The intended effect of this amendment is to require that, in order to rebut the presumption of sound condition under 38 U.S.C. § 1111, VA, not the claimant, must prove by clear and unmistakable evidence both that the disease or injury existed prior to service and that the disease or injury was not aggravated by service.

II. The Presumption Of Aggravation.

A. 38 U.S.C. § 1153 and 38 C.F.R. § 3.306(a) (2004) provide: “A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air 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.”

B. “Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service.” 38 C.F.R. § 3.306(b).

C. “The clear-and-unmistakable-evidence standard is an ‘onerous’ one . . . and requires that the no-aggravation result be ‘undebatable.’” *Cotant v. Principi*, 17 Vet. App. 116, 131 (2003);

III. The Federal Circuit’s View Of 38 U.S.C. § 1111 and 38 U.S.C. § 1153.

A. “When no preexisting condition is noted upon entry into service, the veteran is presumed to have been sound upon entry. The burden then falls on the government to rebut the presumption of soundness by clear and unmistakable evidence that the veteran’s disability was both preexisting and not aggravated by service. The government may show a lack of aggravation by establishing that there was no increase in disability during service or that any ‘increase in disability [was] due to the natural progress of the’ preexisting condition. 38 U.S.C. § 1153. If this burden is met, then the veteran is not entitled to service-connected benefits. However, if the government fails to rebut the presumption of soundness under section 1111, the veteran’s claim is one for service connection. This means that no deduction for the degree of disability existing at the time of entrance will be made if a rating is awarded. See 38 C.F.R. § 3.322.” *Wagner v. Principi*, 370 F. 3d 1089, 1096 (Fed. Cir. 2004).

B. “On the other hand, if a preexisting disorder is noted upon entry into service, the veteran cannot bring a claim for service connection for that disorder, but the veteran may bring a claim for service-connected aggravation of that disorder. In that case section 1153 applies and the burden falls on the veteran to establish aggravation. See *Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994). If the presumption of aggravation under section 1153 arises, the burden shifts to the government to show a lack of aggravation by establishing ‘that the increase in disability is due to the natural progress of the disease.’ 38 U.S.C. § 1153; see also 38 C.F.R. § 3.306; *Jensen*, 19 F.3d at 1417.” *Wagner, supra*.

C. Since the Federal Circuit’s decision in *Wagner*, the Veterans Court has also held, in a CUE context, that the “natural progress of the disease” provision of section 1153 may be appropriately used in analyzing the second prong of section 1111. *Joyce v. Nicholson*, 19 Vet.App. 36, 49-50 (2005).

IV. The Bottom Line

Utilize the legal analyses set forth above, and ensure that your factual conclusions with respect to each required element are “undebatable,” i.e., are supported by unequivocal medical histories, diagnoses or opinions, and an adequate statement of reasons or bases.

The presumption of soundness attaches only where there has been an induction examination during which the disability about which the veteran later complains was not detected. See *Bagby v. Derwinski*, 1 Vet. App. 225, 227 (1991). The regulations provide expressly that the term “noted” denotes “[o]nly such conditions as are recorded in examination reports,” 38 C.F.R. § 3.304(b), and that “[h]istory of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions.” *Id.* at (b)(1).

A pre-existing 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 a natural progress of the disease. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during, and subsequent to service. 38 U.S.C.A. 1153 (West 2002); 38 C.F.R. 3.306(b) (2004); *Falzone v. Brown*, 8 Vet. App. 398, 402 (1995).

Temporary or intermittent flare-ups of a pre-existing injury or disease are not sufficient to be considered “aggravation in service” unless the underlying condition itself, as contrasted with mere symptoms, has worsened. See *Jensen*

v. Brown, 4 Vet. App. 304, 306-307 (1993); *Green v. Derwinski*, 1 Vet. App. 320, 323 (1991); *Hunt v. Derwinski*, 1 Vet. App. 292, 297 (1991).