I. SERVICE-CONNECTED DISABILITY COMPENSATION

Barton F. Stichman, Esq
• 2 Major VA Disability Benefits

• Service-Connected compensation
• Needs-based, non-SC pension
Entitlement to Compensation: General Requirements

- Entitled to compensation for disabilities *incurred in or aggravated during active military, naval, or air service*

- Service Department findings binding on VA
Entitlement to Compensation: General Requirements

- 5 Elements of Disability Compensation Claim
  - Veteran Status
  - Existence of Current Disability
  - Connection between Service & Disability
  - Degree of Disability
  - Effective Date of Benefits
Threshold Requirement – Veteran Status

• “Veteran”: a person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable
Threshold Requirement – Veteran Status

• “Active Service”
  • Active Duty
  • Active Duty for Training (ACDUTRA), if individual concerned disabled or died from a disease or injury incurred or aggravated in line of duty during that period of ACDUTRA.
  • Inactive duty training, if individual disabled or died from an injury incurred or aggravated in the line of duty; or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training.
Threshold Requirement – Veteran Status

- Veteran must be discharged “under conditions other than dishonorable”

- Types of Military Discharge Characterizations:
  - Honorable
  - General (Under Honorable Conditions)
  - Under Other Than Honorable Conditions
  - Bad Conduct
  - Dishonorable
Status as a “Veteran”

• Discharge under other than Honorable (OTH) conditions bars status as “veteran” if VA determines it was the result of willful and persistent misconduct
Willful Misconduct

• Willful Misconduct:
  • Disabilities that result from a veteran’s willful misconduct are not compensable
    • “conscious wrongdoing or known prohibited action”

• Alcohol and Substance Abuse:
  • Compensation may not be paid for disabilities the result of a primary alcohol abuse or substance abuse
Establishing Service Connection: First of Three Requirements – Evidence of a Current Disability

- Record (usually) must contain diagnosis by medical professional

- Claimant must have the disability at time of filing or during pendency of claim
  - Requirement met even if condition resolved prior to adjudication

- VA duty to assist – may need to provide free exam
Establishing Service Connection: Second of Three Requirements – Evidence of Event, Injury or Disease during period of active service

- VA must consider lay evidence
- Despite lack of corroboration requirement, VA places great weight on Vet’s military personnel, medical records
- Relaxed evidentiary standard for combat vets
Establishing Service Connection: Third of Three Requirements – Nexus

• 5 alternative ways to establish Nexus

• VA must consider all nexus theories raised by record when adjudicating claim for service connection

• Must make *reasonable efforts to assist* in evidence development, unless no reasonable possibility assistance would aid in substantiating claim
Nexus – Five Theories

• Direct Service Connection
• Aggravation
• Statutory or Regulatory Presumption
• Secondary Service Connection
• Caused by VA Medical Treatment or Vocational Rehabilitation
First Theory: Direct Service Connection

- Service Treatment Records may show manifestation or diagnosis of condition in service

- Or, medical opinion may demonstrate that incident in service caused Vet to eventually suffer from disability
First Theory: Direct Service Connection

• Delayed Direct Service Connection
  
  • SC established if event (no manifestation) in service caused Vet to suffer disability/disease years later

  • Usually requires medical opinion linking incident in service to current disability
First Theory: Direct Service Connection

• Chronicity and Continuity

  • Only for chronic diseases listed in 38 C.F.R. § 3.309(a)

  • *Chronic Conditions* – if condition diagnosed in service, later manifestations of same disease at *any* later date SC unless clearly attributable to intervening causes

  • *Continuity of Symptoms* – needed when symptoms of a chronic condition *noted* during service, but first diagnosed as a chronic disease after service.
Second Theory: Aggravation

• If Vet shows worsening of condition that pre-existed service, “presumption of aggravation” applies

• Burden shifts to VA to show no aggravation (by showing “increase in disability due to natural progress of disease”)

• Clear and unmistakable evidence required to rebut pres. of aggravation
Second Theory: Aggravation

- *Presumption of Soundness* – Unless entry exam indicates otherwise, VA required to presume Vet in sound condition when entered service

- Rebutting Presumption of Soundness: VA must show clear & unmistakable evidence that condition pre-existed service & not aggravated during service
Third Theory: Statutory or Regulatory Presumption

• Presumption of service connection may be rebutted by affirmative evidence to the contrary, or

• Evidence establishing post-service intercurrent injury/disease that is a recognized cause of the disease
Third Theory: Statutory or Regulatory Presumption

- Chronic and Tropical Diseases:
  - Must manifest to a degree of 10% w/in 1 year (for most diseases)
  - Does not require medical diagnosis within 1 year of discharge
Third Theory: Statutory or Regulatory Presumption

- **POWs**: manifestation of diseases common among prisoners of war
  - Must manifest to degree of 10%
  - Examples: psychosis, anxiety, depression, post-traumatic osteoarthritis
  - Full list at 38 C.F.R. § 3.309(c)
Third Theory: Statutory or Regulatory Presumption

• Gulf War Illnesses
  • Must manifest in service in SW Asia or to degree of 10% before 12/31/2021
  • Medically unexplained chronic multi-symptom illness
  • Chronic undiagnosed illness
  • Certain infectious diseases
Third Theory: Statutory or Regulatory Presumption

• Radiation-Exposed Veterans:
  • SC may be granted for radiation-exposed Vets suffering from diseases linked to radiation exposure
  • Full list of diseases is at 38 C.F.R. § 3.309(d) and 38 U.S.C. § 1112(c)
Third Theory: Statutory or Regulatory Presumption

• Exposure to Herbicides (Agent Orange): Must have a listed disease & meet other requirements as to onset of disease & degree of disability

  • AO exposure presumed for some Vets (e.g. -vets who set foot in Vietnam or served on inland waterways)
Third Theory: Statutory or Regulatory Presumption

- **Amyotrophic Lateral Sclerosis**: Vets who served 90 days or more continuous active service may receive SC for ALS if disease develops after separation.

- **Diseases Associated with Contaminated Water at Camp Lejeune**: People who served 30 days at Camp Lejeune between 8/1/1953 and 12/31/1987 entitled to SC for kidney cancer, liver cancer, NHL, adult leukemia, multiple myeloma, Parkinson’s disease, aplastic anemia and other myelodysplastic syndromes, and bladder cancer.
Fourth Theory: Secondary Service Connection

- If SC condition causes or aggravates secondary condition, secondary condition may be service connected

- Vet compensated for % of disability over & above % that existed prior to aggravation

- Not relevant how long after service secondary disorder manifested itself

- Includes mental conditions caused by physical conditions and vice versa
Fifth Theory: Caused by VA Medication Treatment/VOC Rehabilitation

- Disability caused by VA medical care or vocational rehab may be treated “as if” service connected

- § 1151 requires
  - Fault by VA (negligence, lack of proper skill, carelessness, error in judgment) or
  - Accident by VA (lack of foreseeability) or
  - Lack of informed consent
II. MILITARY SEXUAL TRAUMA CLAIMS

Bernadette Valdellon, Esq
Military Sexual Trauma

- Military sexual trauma (MST) is the term used by VA to refer to experiences during military service of
  - sexual assault
  - repeated, threatening sexual harassment

http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf
Military Sexual Trauma

- MST includes any sexual activity where a service member is involved against his or her will
  - Pressured into sexual activities
  - Unable to consent to sexual activities
  - Physically forced into sexual activities
  - Subjected to sexual harassment
Possible Mental Health Diagnoses

• Potential DSM-5 diagnoses:
  • PTSD
  • Major Depressive Disorder
  • Generalized Anxiety Disorder
  • Panic Disorder
SC for PTSD due to MST

• Service connection requires:

1. Evidence of a current diagnosis of PTSD

2. Credible supporting evidence that a claimed in-service stressor occurred

3. A link/nexus, established by medical evidence, between current symptoms and an in-service stressor
Stressor: Credible Supporting Evidence

• The requirement for credible supporting evidence means that there must be some believable evidence that tends to support the Vet’s assertion
  • Vet’s statement alone not enough

• To determine if evidence is credible, VA considers
  • Plausibility
  • Consistency with other evidence in the case
  • Source
Stressor: Credible Supporting Evidence

- VA may not treat the absence of documentation of the MST in service records as negative evidence
  - Because MST often goes unreported, it is not reasonable to expect that the event would be reported and/or recorded
  - VA may not find Vet’s statements not credible simply because an injury was not recorded in service records
    - Exception: cases where it is reasonable to expect that the event would be recorded
- *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013)
Stressor: Credible Supporting Evidence

• Because Vets face unique problems documenting their claimed stressor in personal assault cases, VA has provided for special evidentiary-development procedures in those cases.

• Under 38 C.F.R. § 3.304(f)(5), evidence from sources other than Vet’s service records may be used to corroborate the existence of an in-service personal assault stressor.
Stressor: Markers

- 38 C.F.R. § 3.304(f)(5) lists the following markers (not exhaustive):
  - Police records
  - Medical records
  - STD or pregnancy tests
  - Statements from family, friends, roommates, clergy
    - “Is there anyone you confided in?”
Stressor: Markers

• 38 C.F.R. § 3.304(f)(5) markers (cont.):
  • Evidence of behavioral changes
    • Episodes of depression
    • Drug/alcohol use
    • Fights
    • Requests for transfer
    • Unexplained economic changes
    • Deterioration of work performance

- For PTSD claims based on personal assault/MST, after-the-fact medical opinions can corroborate the claimed stressor and must be considered by VA in determining whether the evidence establishes that the claimed stressor occurred.

- VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that MST occurred.
Stressor: Consider Non-MST Stressors

• Main goal is to obtain SC for Vet’s mental health conditions
  
  • Ask if Vet had any other military-related stressors
    
    • Sometimes, a stressor other than MST may be easier to prove
  
  • If Vet has another stressor that will make it easier to obtain SC, use that stressor to the Vet’s advantage
Nexus: Multiple Traumas

• If examiner finds that MST contributed in any way to the development of a mental health disorder, VA should grant service connection

• 38 U.S.C. § 5107(b) – benefit of doubt goes to Vet

  • When it is not possible to determine what portion of the current disability is related to service and what portion is related to pre-service, the entire disability must be attributed to service

Service Connection for Other Mental Disorders

• Diagnosis will determine what evidence is required
  • PTSD: 38 C.F.R. § 3.304(f)(5)
    • Must have credible supporting evidence of MST
  • Other mental disorders: 38 C.F.R. § 3.303
    • Do not necessarily need credible supporting evidence of MST
Service Connection for Other Mental Disorders

• SC for mental disorders other than PTSD has three requirements:
  
  • Evidence of a current diagnosis

  • In-service event, injury, or disease

  • A link, established by medical evidence, between the current diagnosis and in-service event
Nexus: Developing Evidence to Support Claim

- Have Vet draft a statement about continuous mental symptoms since separation from service
- Obtain additional lay evidence of continuity of symptoms from other individuals (family members, friends, fellow service members, etc.)
- Obtain medical evidence that documents symptoms following service (closer in time to service the better)
- Obtain a nexus opinion linking symptoms to service
Nexus: Opinions

• When obtaining a private opinion, advocates should ask the following questions:

• “Is it as likely as not that the veteran has a current mental disorder?”

• “If so:
  • Assuming that the MST event(s) in service occurred based on the markers the veteran has presented,
  • is it as likely as not that the mental disorder(s) is/are linked to any event in service (including the MST), or to service itself?”
III. ESTABLISHING THE APPROPRIATE DISABILITY RATING PERCENTAGE

Richard V. Spataro, Esq.
Assigning % of Disability Once Service Connection Granted

• Establishing appropriate percentage of disability involves comparing symptoms of the condition with the appropriate diagnostic code (DC) in the VA Rating Schedule in 38 C.F.R. Part 4
Assigning % of Disability Once Service Connection Granted

• VA rating schedule has hundreds of DCs covering almost all types of diseases and injuries

• Each DC lists several sets of symptoms – with each set matched to a particular disability rating percentage. Most do not go to 100%.

• %’s set in increments of 10, may be 0% (non-compensable)
Assigning % of Disability Once Service Connection Granted

• Example:

• DC 5260, Leg, Limitation of Flexion of

  Flexion limited to 15°...............................30%
  Flexion limited to 30°..............................20%
  Flexion limited to 45°..............................10%
  Flexion limited to 60°...............................0%
Assigning % of Disability Once Service Connection is Granted

- % of disability designed to reflect average impairment in earning capacity
- If multiple disabilities, % combined via Combined Ratings Table
Amount of Compensation

- Depending on the total combined rating %, level of payment fixed by statute and currently:
  - 10% = $136/month
  - 50% = $855/month (w/out dependent)
  - 100% = $2,974/month (w/out dependent)
- Disability comp not taxable & usually not subject to garnishment or attachment
Special Monthly Compensation

- Special Monthly Compensation (SMC) compensates Vets for loss of lifestyle
- SMC an add-on to regular comp
- Highest level of SMC pays over $8,500/month
Special Monthly Compensation

SMC paid for:

• Housebound

• Need for aid & attendance of another

• Loss or loss of use of extremities / parts of extremities

• Blindness

• Various combinations of other disabilities
TDIU

• Total disability ratings may be assigned where schedular rating less than total, but Vet unable to get or keep substantially gainful occupation b/c of SC disabilities

• Called Total Disability Based on Individual Unemployability (TDIU or IU)
TDIU

- “unemployability” = inability to secure & follow SGO
- Based on individual circumstances
- w/o regard to age
- Must only consider SC conditions
TDIU

• SGO is annual income over poverty threshold for 1 person, regardless of # of hours or days worked & regardless of past earnings

• U.S. Census Bureau 2017 poverty threshold for single person under age 65 = $12,752
TDIU

- Education & occupational history must be discussed

- “Marginal employment” not considered SGO
  - Earned annual income does not exceed poverty threshold, or
  - Vet is employed in protected environment
Extraschedular Ratings

• VA’s Director of Compensation may approve extraschedular evaluation if exceptional or unusual disability picture with related factors such as:
  • marked interference with employment or
  • frequent periods of hospitalization
Reevaluation of Severity of Disability

• VA may reevaluate SC condition
• Before assigning different % of disability, VA usually schedules exam
• Vet required to undergo review exam
Reduction In Evaluation

• General Concepts
  • To reduce % of disability, VA has burden of showing SC condition improved & lower % should be assigned
  • Remedy where reduction improper is reinstating previous higher evaluation retro to date of reduction
Reduction In Evaluation

- Reduction of Total Schedular Eval
  - Exam showing “material improvement” under “ordinary conditions of life” required to reduce 100% schedular evaluation
  - VA compares symptoms of next-to-last exam report, which formed basis for grant or continuation of 100% rating, with symptoms at most recent exam
Reduction In Evaluation

• Reduction of TDIU
  
  • Actual employability must be shown by clear and convincing evidence. Burden on VA.
  
  • TDIU may not be reduced solely because Vet begins to engage in SGO, unless Vet maintains SCO for 12 consecutive months
Reduction In Evaluation

• Where rating in effect 5 years or more:
  
  • VA may not reduce rating based on 1 exam unless all evidence shows sustained improvement
  
  • Exam on which reduction is based must be at least as full and complete as exam on which rating was awarded
Reduction In Evaluation

• For any SC evaluation effective < 5 years:
  • must be improvement in disability
  • must show improvement in ability to live & work
  • Entire history of disability must be reviewed & reduction based upon thorough current exam
  • Even if disability improved, if there is reasonable doubt do not reduce

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IV. DEPENDENCY AND INDEMNITY COMPENSATION AND NON-SERVICE-CONNECTED DISABILITY PENSION

Barton F. Stichman, Esq.
Monthly DIC Payments

• Who is Eligible to Apply:

• 1\textsuperscript{st} in line = surviving spouse
  • (>\$1,154/month);

• 2\textsuperscript{nd} in line = surviving children
  • (<18, or <23 if in school, or permanently incapable of self support <18)
Monthly DIC Payments

• Criteria: Either –

  • A service-connected disability was principal or contributory cause of veteran’s death; or

  • Vet was entitled to receive SC @ 100% rate for at least 10 years prior to death (i.e., death need not be related to service)
Non-Service-Connected Pension

• Entitlement Criteria:

  • 90 days of service at least one of which during “wartime”;

  • Vet is permanently and totally disabled (presumed for vets 65 years old or more); and

  • Limited income (<$12,907/year for vet without dependent) and net worth (<$80,000)
Non-Service-Connected Pension

• Wartime Service:
  • WWII: 12/7/41 through 12/31/46
  • Korea: 6/27/50 through 1/31/55
  • Vietnam Era: 8/5/64 through 5/7/75
  • Persian Gulf: any time after 8/2/1990
V. THE VA CLAIMS PROCESS

Richard V. Spataro, Esq.
Attorney Representation of Claimants before the VA

• Must be accredited by VA

• **STEP ONE**: Complete and send VA Form 21a to Office of the VA General Counsel (VAGC). Attorney is accredited for one-year period after VAGC notification of initial accreditation

• **STEP TWO**: Within one year of initial accreditation, complete 3 hours of approved CLE and an additional 3 hours CLE for every subsequent two-year period
Attorney Representation of Claimants before the VA

• To represent a particular claimant:
  • Complete and file VA Form 21-22a with VARO
    • May not designate a law firm as representative
    • POA stays in effect until revoked
  • Generally, only one representative is authorized
  • Newest POA is a revocation of old POA
Attorney Representation of Claimants before the VA

• To represent a particular claimant (cont.):
  
  • **Split Representation**
    
    • Scope of representation may be restricted to less than all claims
    
    • If POA not limited, VA will consider the advocate to be the representative on all VA claims
    
    • Explain scope of representation on Form 21-22a
    
    • Split representation may cause confusion at VARO
Claim Process at VA Regional Office

• Representation at VAROs—claimants overwhelmingly represented by veterans service officers (non-attorneys)

• Process begins with receipt of claim at RO
Claim Process at VA Regional Office

• Effective 3/24/2015, claimant must use a standard form to begin the process.

• Types of Claims:
  • Intent to File a Claim
  • Complete Claim
    • Non-FDC
    • FDC
Claim Process at VA Regional Office

- Fully Developed Claims (FDC)
  - Ready to rate, or would be after VA gets Fed records/exam
  - Vet must submit all other evidence at time of filing
  - Quicker decision than non-FDC claims
  - Not all claims qualify (NG/Reserve records needed, other non-FDC claims pending, appeals pending, etc.)
  - Filed on VA EZ form (21-526EZ, 21-527EZ, etc.)
Claim Process at VA Regional Office

• Claim not limited to diagnoses listed by Vet
• Vet’s intent in filing a claim is paramount
• VA must consider:
  1. Claimant’s description of claim
  2. Symptoms claimant describes
  3. Info claimant submits
  4. Info VA obtains
Claim Process at VA Regional Office

• Case usually referred to Veterans Service Rep then Rating Specialist

• VA does following:
  • Gives claimant notice of evidence needed to prove entitlement (unless FDC)
  • Develops claim (duty to assist – records, medical exams)
  • Makes decision
Claim Process at VA Regional Office

• Claimant Receives Notice Letter & Rating Decision

• Decision must include:
  • Reasons for decision
  • List of evidence considered by VA
  • Notice of procedural & appellate rights
Handling Veterans Appeals from Notice of Disagreement to Judicial Review

Jenny J. Tang
Appellate Litigation Attorney
Bergmann & Moore, LLC
Biography

• Litigator at Bergmann & Moore, LLC
• Years of prior experience at VA Board of Veterans’ Appeals (BVA)
• Published law reviews
• U.S. Court of Appeals for Veterans Claims (CAVC) Bar Association Board of Governors
Session Goals:

• Broad overview of the appeals process
  – VA level
  – Court of Appeals for Veterans Claims (CAVC) level

• Take away how to get started at either level
Appeals at a Glance

• Few clients with combat wounds

• Claims that are harder to prove
Representing Veterans

A. Before VA

– Nature of Process: “paternal” and “veteran-friendly”

– Payment: Contingency

B. Before the U.S. Court of Appeals for Veterans Claims (CAVC)

– Nature of Process: Adversarial

– Payment: Equal Access to Justice Act (EAJA fees)
A. Practice before VA

1. Current (Legacy) Appeals System

2. Appeals Reform – Feb. 2019
Current Appeals Simple Map

CLAIMS
- Claim
- VA Decision
- NOD
- SOC
- Form 9
- SSOC

APPEALS PROCESSING
- Optional BVA Hearing Request
- Certification to BVA
- AMC Appeals Management Center

VBA
- * 95% of appeals arise from VBA:
- < 5% of appeals arise from VHA, OGC, other

VETERAN
- Veteran has one year to file NOD
- Veteran has 60 days to file Form 9
- Only required if new evidence is obtained
- Hearings are scheduled after the appeal is certified to BVA

COURTS
- Federal Circuit Court
- U.S. Supreme Court

In the diagram, there is a flowchart outlining the appeals process from the claim stage to the Veteran's final decision. Each stage is color-coded and contains specific steps and necessary actions. The diagram illustrates the decision points and the pathways towards a final decision, including the involvement of the BVA, AMC, and potential remands to the Veteran.
Current Appeals Complex Map
Step 1: Notice of Disagreement
Step 3: Form 9
Step 4: Supplemental Statement of the Case
Step 5: Certified to the Board of Veterans’ Appeals
Step 6: Board of Veterans’ Appeals (BVA)
BVA at a Glance

- Veterans Law Judges: 23 cases per week
- Attorneys: 3 or 4 cases per week
BVA Hearings

• Scheduled in docket order

• Travel Board, videoconference, or “central office” (at BVA)
BVA Decision Outcomes Further Broken Down

- **Allowed**
- **Allowed (no remanded issue)**
- **Allowed (with at least one remanded issue)**
- **Remanded**
- **Denied**
- **Other**
Wait Times

- Veterans can track their appeals at www.vets.gov
- BVA website shows docket dates
Getting Around Finality

• Claims to reopen previously denied claims

• Motions for clear and unmistakable error in prior RO or prior BVA decision (CUE)
Practice Tips – Before VA

• Appellant “Briefs”

• Medical evidence

• Lay statements/ other lay evidence

• No duplicate evidence

• Accessing the claims file
2. Veterans Appeals Improvement and Modernization Act of 2017
B. Judicial Review: Practicing Before the U.S. Court of Appeals for Veterans Claims (CAVC).
Appeal the BVA Decision

• Appellate rights attached to back of BVA decision

• 120 days to appeal to Court of Appeals for Veterans Claims (CAVC)
The U.S. Court of Appeals for Veterans Claims (CAVC)

- Federal court with exclusive jurisdiction over veterans claims
- Adversarial system, Appellee is the VA Secretary
CAVC Outcomes (Per Issue)

- Vacated and Remanded
- Affirmed
- Reversed
- Dismissed
CAVC Appeal Process

• File Notice of Appeal – Entire BVA Decision is appealed

• In about 60 days, VA transmits the Record before the Agency (RBA)
  – Dispute or Accept
CAVC Appeal Process cont’d

• Rule 33 Conference scheduled
  – Appellant files Rule 33 Statement of Issues
  – Conference with VA Office of General Counsel attorney and CLS attorney
  • Joint Motion for Remand/ Joint Motion for Partial Remand
CAVC Appeal Process cont’d

• If no agreement: Appellant’s Brief filed w/in 30 days after the R33 conference
• Appellee’s (Secretary’s) Brief w/in 60 days
• Reply Brief Optional (60 days)
CAVC Appeal Process cont’d

• Rarely oral argument

• Decision issued:
  – Memorandum Decision (single judge) (majority of decisions)
  – 3 judge panel
  – *En banc*

• Motion for Reconsideration or panel review (optional) w/in 21 days.

• Judgment entered. Prevailing party files for EAJA fees.
Common Errors in BVA Decisions

• Duty to Assist

• Reasons or Bases
  – e.g., overlooking favorable evidence
  – e.g., assessing probative value of lay evidence
  – e.g., failing to discuss reasonably raised theory

• Clearly Erroneous Finding of Fact (difficult argument)
Practice Tips:

• Remand reasons matter!


• Rule 33 Memos – make it easy for VA OGC
Further Appeal

• 60 days to appeal CAVC decision to Federal Circuit.

• Appeal Fed. Cir. Decision to U.S. Supreme Court
The Veterans Law Community

National Veterans Law Moot Court Competition

Veterans Law Review and other journals

CAVC Historical Society
Questions?

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