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A Brief History of Presumptive Disability Decisions for Veterans

INTRODUCTION

Presumptions have played an important role in both the conceptual basis for service connection and the actual administration of the Department of Veterans Affairs (VA) compensation program. Presumptions are used to bridge gaps in scientific and medical knowledge, as well as to resolve complex policy questions and simplify determinations of service connection for VA (VA, 1993a). This chapter offers a brief history of the presumptive disability decisions established for veterans since 1921. It is not intended as a comprehensive or exhaustive account of all presumptive decisions; rather, it provides background on presumptions—it explains how they operate, why they are used, and their role in making disability compensation available to veterans. The chapter focuses on presumptions for health outcomes rather than administrative presumptions. For a comprehensive review of presumptive decisions, the reader is referred to *Analysis of Presumptions of Service Connection* (VA, 1993a), *Presumptions of Service Connection* (Zeglin, 2006), *VA Disability Compensation Program: Legislative History* (Economic Systems Inc., 2004a), and *VA Disability Compensation Program: Literature Review* (Economic Systems Inc., 2004b).

What Is a Presumption?

In the law, there is general agreement about what a presumption is, although there is considerable controversy about what a presumption does. A presumption is a procedural device that dictates that once basic fact A is established, the existence of fact B must be assumed unless the presumed fact is rebutted. A presumption therefore operates to relieve a party of the burden of establishing facts that it would otherwise be required to prove in order to prevail on its claim. A presumption that cannot be rebutted is a rule of substantive law; it does not satisfy the definition of a presumption because fact B must be assumed conclusively rather than conditionally. It does not allow for the possibility that fact B can be disproved.

A legislature has numerous choices when drafting a presumption; there is no uniform terminology that must be employed. To ensure passage, presumptions are often couched in somewhat ambiguous terms, particularly when they deal with sensitive and controversial policy issues. The result may be a deliberate fuzziness and ambiguity in the language that governs a particular presumption that will ultimately require recourse to the courts (Allen, 1980). Consequently, it is not always simple to determine precisely why a particular presumption was adopted or how it should be interpreted.

Why Are Presumptions Created?

Presumptions are created for a number of reasons. They promote fairness by simplifying proceedings and by making it less burdensome for claimants to gather evidence that is more accessible to the party against whom the claim is asserted. When the probability of the presumed fact's existence is high if the basic fact exists, presumptions eliminate the expense and time that would be required to establish the presumed fact by direct evidence. Sometimes presumptions are established for policy reasons because of a desire to make it easier for particular types of claimants to establish their claims. This may for instance be true for veterans' claims when information needed for an epidemiologic assessment, such as exposure data, is unavailable because it was not collected at the relevant time. Gratitude and sympathy for those who served their country obviously also play an important role (Reagan, 1988).

What Does a Presumption Do?

A true presumption affects the burden of proof. This can, however, mean different things as legislators, administrators, and judges do not always use consistent terminology to express their intentions. *Burden of proof* is a term used to label two different concepts: the burden of production and the burden of persuasion (*Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries et al.*, 1994. 512 U.S. Supreme Court 267, Case No. 93-744). See 512 U.S. Supreme Court 267, Case No. 93-744, for an extensive discussion of the evolution of the term *burden of proof*. A claimant or plaintiff ordinarily begins with both burdens. For instance, a veteran who relies on direct proof to show that he has a service-connected disability must generally both (1) produce evidence on that issue, and (2) persuade VA that the service connection exists.

Types and Categories of Presumptions

There are two major types of presumptions. Type 1 presumptions shift both the burden of production and the burden of persuasion. Type 2 presumptions have a lesser effect. For type 2 presumptions, establishment of the basic fact does not shift to the other party the burden of persuading the adjudicator that the presumed fact does not exist. The other party of the presumption only has to produce evidence that is contrary to, or meets the presumption. If the other party does so, the presumption vanishes, and the party with the original burden of persuasion—the party that had to establish the basic fact—continues to have the burden of proving the presumed fact.

The difference between type 1 and 2 presumptions can be illustrated by the presumption of death after an unexplained absence of 7 years. If the presumption is a type 2 presumption, as it would be under the Federal Rules of Evidence unless Congress provides otherwise (Federal Rules of Evidence: Rule 301: Presumptions in General Civil Actions and Proceedings. 1975. Public Law 93-595. 93rd Cong., 2nd Sess.), the plaintiff would prove an absence of 7 years, the basic facts needed for the presumption to apply. Under Rule 301 if the opponent of the presumption introduces a witness to testify that she saw the absentee 1 year after his disappearance, the presumption vanishes, and the plaintiff has the burden of proving death as though there had never been a presumption. If this is a type 1 presumption, as it is in presuming death for veterans after a 7-year absence (Seven-Year Absence Presumption of Death. 2006. 38 U.S.C. § 108), the basic facts establish death unless VA has sufficient evidence to show that the veteran is alive.

Presumptions for Veterans

There are several reasons justifying the widespread use of presumptions in the adjudication of VA benefit claims. Presumptions may simplify and streamline the adjudication process by eliminating the need to obtain evidence and decide complex issues. Presumptions also promote accuracy and consistency in adjudications by requiring similar treatment in similar cases. Presumptions may relieve claimants and VA of the necessity of producing direct evidence when it is impractical or unduly burdensome to do so.

“Finally, presumptions may implement policy judgments that the burdens arising in certain cases be borne by the government rather than the veteran claimants notwithstanding the uncertainty surrounding the issue of whether the claimants’ disabilities were, in fact, incurred or aggravated by service” (Zeglin, 2006, p. 3).

To establish direct service connection for a VA disability compensation claim, a veteran must demonstrate the following: (1) that a disability currently exists, (2) that an event of disease or injury occurred or was aggravated in the military, and (3) that a medical connection can be shown between the service event and the existing disability (as stated in Barrans, 2006). Presumptions lighten the burden of proof when patterns of circumstances impair veterans’ abilities to establish direct service connection. A presumption relieves the veteran of proving one or more of the requirements for direct service connection. The only difference between direct and presumptive service connection is the amount of proof required. All entitlements under presumptive service connection are identical to those under direct service connection (VA, 2006c).

There are both statutory and regulatory presumptions. Some presumptions relate to particular medical health outcomes, and others are administrative in nature (Pamperin, 2006). For example, there are several well-known presumptions of an administrative nature: presumption of death, presumption of sound condition, presumption of service connection due to aggravation, and presumption of total disability. The definitions of these presumptions are as follows:

Presumption of death: Presumption of death upon 7 years of unexplained absence (Seven-Year Absence Presumption of Death. 38 U.S.C. § 108[b])

Presumption of sound condition: “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.” (Presumption of Sound Condition. 38 U.S.C. § 1111)

Presumption of service connection—Aggravation: “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 [active] service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.” (Compensation for Service-Connected Disability or Death. Aggravation. 38 U.S.C. § 1153)

Presumption of total disability: “A person shall be considered to be permanently and totally disabled if such person is ... suffering from any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the person.” (Veterans’ Benefits. Determination with Respect to Disability. 38 U.S.C. § 1502)

Medical health outcome presumptions have generally been adopted after periods of war and have been driven by the concerns of and for returning Service members. Military service is demanding, and those serving often do not know where they will be stationed and to which agents they will be exposed. In addition, military personnel are governed by the “line of duty” clause. VA will cover disability for a veteran “resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contracted in line of duty, in the active military, naval, or air service,” unless such injury or disease was “a result of the

veteran's own willful misconduct or abuse of alcohol or drugs" (Compensation for Service-Connected Disability or Death. Basic Entitlement. 38 U.S.C. § 1110).

Presumptions established by Congress and VA have generally been defined by or linked to a location (e.g., service in Persian Gulf, Vietnam) or an activity (e.g., detonation of a nuclear device). Presumptions have also been defined by categories of disease. In general, VA categorizes medical health outcome presumptive decisions into the following categories: Chronic Diseases, Tropical Diseases, Former Prisoners of War (POWs), Radiation, Herbicide Agents, Mustard Gas/Lewisite, and Persian Gulf War (Zeglin, 2006).

Veterans are entitled to compensation for certain medical conditions that become manifest to a degree of 10 percent or more disability after they leave the military service, if there is a relationship between service and the condition being claimed (Presumptions Relating to Certain Diseases and Disabilities. 38 U.S.C. § 1112). The health outcomes for presumptions must be rated at least at a 10 percent level in order for a veteran to receive compensation for a specific presumption (Presumptions Relating to Certain Diseases and Disabilities. 38 U.S.C. § 1112). In addition, a veteran must establish the presumptive relationship within the prescribed presumptive period set by Congress or VA. The presumptive period is the allowable period after active duty period in which a veteran must develop a disease in order to be eligible for compensation. In the past, most presumptive periods were set at 1 year. Recently, the presumptive periods associated with certain diseases have been greatly lengthened to accommodate the long latency periods associated with some health outcomes (e.g., cancers), the considerable time required to resolve disability, the problems caused by government-mandated secrecy about some exposures (e.g., mustard gas during WWII)

(see [Appendix F](#), Table 1). Personal habits (e.g., tobacco use, alcohol and substance abuse) can be used to rebut presumptions, but in practice this is infrequently done (as stated in Barrans, 2006). Only subsequent to the diagnosis of mental health disorders will VA cover a veteran's alcohol and substance abuse treatment (as stated in Pamperin, 2006).

The last extensive study of the use of presumptions was performed by the Bradley Commission in the 1950s. The Bradley Commission recommended that the existing presumptions for service connection should be withdrawn. They felt that "there is otherwise in the law sufficient protection for the veteran to establish service connection of any and all diseases" (President's Commission on Veterans' Pensions, 1956, p. 178). The Bradley Commission noted that several diseases that were presumptively service connected were probably caused by old age, not necessarily service. It also believed that some diseases that were presumptively service connected had little to do with service in the military and in fact would be developed regardless of active duty. In addition to this, the specialists believed that more thorough medical exams should be given to Service members after military service to better classify health status after active duty. Overall, they believed that the list of chronic diseases at the time needed to be completely resurveyed to more accurately reflect the most updated medical knowledge. They noted advancements in treatment and diagnosing methods to support their theory. One criticism was that the system for presumptive conditions was outdated and overly simplistic. The findings not only called for a change in methods but also demanded much stricter guidelines for rating presumptive conditions. In addition, the Bradley Commission stated that medical principles should allow direct service connection rather than having to resort to presumptions in many instances. The analysis cited changes in medical knowledge and improving technology as reasons for updating the rating system and urged VA to completely change its policy of expansive presumptive periods to reflect the current situation of the medical world (President's Commission on Veterans' Pensions, 1956). Congressional hearings on the report were held, but no favorable action was taken on these recommendations.

THE PUBLIC POLICY DEBATE SURROUNDING PRESUMPTIONS

Members of Congress, representatives of VA, veterans service organizations (VSOs), and individual veterans have long debated the basis for and application of presumptions of service connection (VA, 2006b). The general categories of arguments favoring and opposing presumptions can be found in [Table 2-1](#). [Appendix E](#) provides quotations that support these categories of arguments favoring and opposing presumptions.

TABLE 2-1 Categories of Arguments Favoring and Opposing Presumptions

Categories of Arguments Favoring Presumptions

1. **Medical uncertainty.** Onset of illness vs. appearance of symptoms. Doctors disagree over relationship to service.
2. **Inadequacy of service records and examinations.**
3. **Excessive burden of proof on veteran.** Unfair to veteran to require medical proof when medical science is uncertain. Unreasonable to expect veterans afflicted with mental disability to prove SC.
4. **Incidence of disease** among veteran population.
5. **Difficult/delayed Diagnoses.** Only medical specialists are likely to diagnose disease (MS) in early stages. Average person is unlikely to consult for original symptoms.
6. **Social benefits.** Treatment of disease has broad social benefits. Treatment and compensation improve health of the nation generally.
7. **Enforce Congress's view.** Congress disagreed with findings of VA doctors.
8. **Association with risk factors.** A disease associated with a known military risk factor and not associated with other risk factors.
9. **Promote health.** Providing disability benefits relieves veterans of the need to perform work that could further compromise their health.
10. **Conditions of service.** Long-range harm can be caused by particularly harsh conditions of service, such as those experienced by POWs.

Categories of Arguments Opposing Presumptions

1. **Questions of fact.** Each case should be considered on its own merits. Service connection should be a question of fact rather than a question of law.
2. **Relationship to service.** Presumptive disabilities cannot be shown to be related to circumstances of military service.
3. **Administrative function.** Selecting diseases for inclusion as presumptive disabilities involves detailed medical and adjudicatory determinations best addressed administratively.
4. **Improved military procedures/records.** Modern facilities, procedures, and record keeping allow case-by-case determinations.
5. **Advances in medical science.** Advancements in medical science (since WWI) facilitate detection and diagnosis of diseases. Accepted medical principles can reasonably and accurately establish onset of disease.
6. **Philosophy of program.** Statutory presumptions for disabilities that cannot be shown to be related to service are inconsistent with the theory of compensation.
7. **Elevates cases without merit.** Puts cases without merit (from standpoint of service connection) on a par with those proven to be service connected.
8. **Provisions are adequate without presumptions.** Reasonable doubt to be resolved in favor of veteran eliminates need for presumption.
9. **Qualifying criteria excessively liberal.** In some cases, a bill's language is seen as overly inclusive.

SOURCE: VA (Veterans Administration). 2006b (unpublished). *Presumption of service connection: The public policy debate*. Washington, DC: VA.