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**THE INABILITY OF WORLD WAR II  
ATOMIC VETERANS TO OBTAIN  
DISABILITY BENEFITS: TIME IS RUNNING  
OUT ON OUR CHANCE TO FIX THE  
SYSTEM**

*Melinda F. Podgor*

*In this note, Ms. Podgor discusses the inability of more than eighty-eight percent of American servicemembers who were exposed to atomic radiation to recover benefits for diseases caused by that exposure. The author examines the three statutes that grant compensation to atomic veterans as well as the policies and procedures of the Veterans Benefits Administration (VBA). Ms. Podgor advocates for increased funding and training for personnel within the VBA. Additionally, the author argues for clarification of existing statutes so that atomic veterans' claims can be processed fairly.*

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This note is dedicated to the memory of the author's father, Marvin J. Podgor. The author wishes to thank her grandparents, Sam and Charlotte, and aunt, Gail, for inspiring her to write this note; her mother, Debbie, for her enthusiastic encouragement; her friends and family for their continued support; and Vinny, for always listening.

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## I. Introduction

Forty-five days after the United States dropped the atomic bomb on Nagasaki, Japan, Navy veteran Charles Clark was ordered into the city along with his shipmates.<sup>1</sup> Clark was eighteen years old.<sup>2</sup> During the five days they spent there, Clark and his shipmates were surrounded by the decaying bodies of Japanese victims of the bomb.<sup>3</sup> Without protection, they covered their faces with their shirt sleeves to avoid breathing in the odor.<sup>4</sup>

When Charles was thirty-seven, his teeth started to fall out and his jaw began to lose its structure.<sup>5</sup> Now, at the age of seventy-seven, he has had over 150 cancerous growths removed from his face, many lodged inside his ears and nasal passage.<sup>6</sup> In 1995, Clark filed a claim for disability compensation with the Department of Veterans Affairs (VA).<sup>7</sup> The agency denied his request, stating that reports from Nagasaki show that radiation<sup>8</sup> levels were safe when he was in Nagasaki.<sup>9</sup>

Roughly 195,000 servicemembers participated in the post-World War II occupation of Hiroshima and Nagasaki, Japan.<sup>10</sup> Additionally, 210,000 individuals, most of whom were servicemembers, were victims of U.S. atmospheric nuclear tests conducted between 1945 and 1962 in the United States and the Pacific and Atlantic oceans.<sup>11</sup> Less

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1. Tom Schoenberg, *Vets Search for Nuclear Secrets*, LEGAL INTELLIGENCER, Aug. 18, 2004, at 4.

2. *See id.*; The History Place, World War Two in Europe: Timeline with Photos and Text, <http://www.historyplace.com/worldwar2/timeline/ww2time.htm> (last visited Oct. 19, 2005). The atomic bomb was dropped on Nagasaki on August 9, 1945. If Clark was seventy-seven in 2004, he was eighteen when he entered Nagasaki.

3. Schoenberg, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. ENVTL. AGENTS SERV., DEP'T OF VETERANS AFFAIRS, IONIZING RADIATION BRIEF (2004), <http://www1.va.gov/irad/docs/IRADBRIEFS2005.doc> (referring to ionizing radiation as a type of subatomic particle, electromagnetic wave, or photon that is able to break chemical bonds and create electrically charged particles (ions) when they come into contact with atoms or molecules in the human body, thus affecting the body's health).

9. Schoenberg, *supra* note 1.

10. OFFICE OF PUBLIC AFFAIRS NEWS SERV., DEP'T OF VETERANS AFFAIRS, VA FACT SHEET: VA PROGRAMS FOR VETERANS EXPOSED TO RADIATION (1999), <http://www.va.gov/pressrel/99radpgm.htm>.

11. *Id.*

than 20,000 of these atomic veterans are still alive.<sup>12</sup> As of October 2004, roughly 18,275 atomic veterans applied for disability compensation,<sup>13</sup> but only 1,875 of these claims were granted.<sup>14</sup> Thus, 88.6% of atomic veterans have been denied disability compensation.<sup>15</sup>

This note will examine the controversy surrounding the inability of atomic veterans to obtain benefits for their radiation-induced diseases. Part II of this note will explain the three statutes that grant compensation to atomic veterans, the limited ability of atomic veterans to recover in tort from the government, and the process by which veterans bring claims for compensation in the VA. Part III will analyze problems with the policies and procedures of the Veterans Benefits Administration (VBA), problems with the VA's interpretations of the statutes providing for compensation, and problems with the courts' interpretations of the statutes providing for compensation. Finally, Part IV will recommend ways in which the VA, Congress, and the courts can help atomic veterans utilize the statutes that grant them disability compensation more effectively.

## II. Background

A veteran is defined as someone who "served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."<sup>16</sup> State statutes define an elder as someone who is over sixty<sup>17</sup> or sixty-five years of age.<sup>18</sup> In 2000, 28% of people aged sixty-five and over were veterans.<sup>19</sup> Fifty-

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12. *Marketplace: Profile: Health Problems Atomic Vets Are Facing* (Minn. Pub. Radio, Sept. 29, 2004).

13. Tim Dyhouse, *21 Cancers Linked to Radiation Exposure*, VETERANS OF FOREIGN WARS MAG., Nov. 1, 2004, at 10.

14. *Id.*

15. *Id.*

16. 38 U.S.C.A. § 101(2) (West 2002).

17. 53 AM. JUR. 3D *Proof of Abuse, Neglect or Exploitation of Older Persons* § 3 (2005); see, e.g., CONN. GEN. STAT. § 17b-450(1) (2004); 320 ILL. COMP. STAT. 20/2(e) (2005); LA. REV. STAT. ANN. § 14:93.3(C) (West 2004).

18. 53 AM. JUR. 3D, *supra* note 17; see, e.g., OR. REV. STAT. § 124.005(2) (2004); TEX. HUM. RES. CODE ANN. § 48.002(a)(1) (Vernon 2004).

19. There were 35 million people sixty-five years of age and older. LISA HETZEL & ANNETTA SMITH, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *THE 65 YEARS AND OVER POPULATION: 2000*, at 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf>. Of those 35 million, 9.7 million of them were veterans. CHRISTY RICHARDSON & JUDITH WALDROP, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *VETERANS: 2000*, at 3 (2003), available at <http://www.va.gov/vetdata/Census2000/c2kbr-22.pdf>.

nine percent of these veterans, or 5.7 million people, served in World War II.<sup>20</sup> In addition, the average age of veterans who served in World War II was 76.7.<sup>21</sup>

Congress has implemented three statutes that grant veterans who suffer from diseases as a result of exposure to radiation in World War II the ability to receive disability benefits, free medical care, and in some cases, lump-sum compensation packages.<sup>22</sup> Because the courts have virtually eliminated any ability for veterans to sue the government for torts,<sup>23</sup> these statutes are a veteran's only hope for receiving compensation and care for the harm he or she may have suffered. The majority of veterans' statutory claims are reviewed by the VA and then the courts through a detailed adjudication and appeals process.<sup>24</sup>

#### A. Statutes

In response to concerns about the possible health effects of exposure to radiation, Congress passed the Radiation Exposed Veterans Compensation Act (REVCA) and the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (VDRECSA).<sup>25</sup> These acts were intended to

ensure that Veterans' Administration disability compensation is provided to veterans who were exposed during service in the Armed Forces . . . to ionizing radiation in connection with atmospheric nuclear tests or in connection with the American occupation of Hiroshima or Nagasaki, Japan, for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service and that Veterans' Administration dependency and indemnity compensation is provided to

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20. RICHARDSON & WALDROP, *supra* note 19, at 3 fig.3.

21. *Id.* at 3 tbl.1.

22. Radiation Exposed Veterans Compensation Act, 38 U.S.C.A. § 1112 (West 2004); Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990), *amended by* Pub. L. No. 106-245, 114 Stat. 501 (2000); Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984).

23. *Feres v. United States*, 340 U.S. 135, 146 (1950); *Heilman v. United States*, 731 F.2d 1104, 1107 (3d Cir. 1984).

24. H.W. Cummins & Thomas J. Fisher, Jr., *Service Accepted, Compensation Denied: The Practice and Proceedings of the DVA Concerning Hanford Atomic Veterans*, 30 GONZ. L. REV. 629, 631-36 (1994-1995).

25. Veterans' Dioxin and Radiation Exposure Compensation Standards Act § (2)(1). This Act was also passed in response to the concerns of Vietnam Veterans who were exposed to herbicides containing dioxin. *Id.*

survivors of those veterans for all deaths resulting from such disabilities.<sup>26</sup>

These acts are two of three statutes that govern World War II veterans' rights to benefits or compensation for diseases stemming from radiation exposure. The third is the Radiation Exposure Compensation Act (RECA).<sup>27</sup>

REVCA mandates a presumption that service-connected radiation exposure causes twenty-one listed cancers.<sup>28</sup> If a servicemember can prove that he or she was present in certain listed locations during listed time periods,<sup>29</sup> and has one of the listed cancers,<sup>30</sup> he or she will automatically qualify for disability benefits<sup>31</sup> and free medical care for that disability.<sup>32</sup> This medical care includes freedom from co-payments for care or services, including outpatient pharmacy services,

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26. *Id.* § 3.

27. 38 U.S.C.A. § 2210 (West 2002).

28. *Id.* § 1112(c)(1).

29. This list includes: (1) on-site participation in the testing of an atmospheric nuclear device detonation; (2) the occupation of Hiroshima or Nagasaki, Japan between August 6, 1945, and July 1, 1946; (3) internment as a Prisoner of War in Japan during World War II which resulted in an opportunity for radiation exposure comparable to those who occupied Hiroshima or Nagasaki between August 6, 1945, and July 1, 1946; (4) service at gaseous diffusion plants in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, for at least 250 days before February 1, 1992; (5) exposure to ionizing radiation due to duties related to the Long Shot, Milrow, or Cannikin underground nuclear tests on Amchitka Island, Alaska, before January 1, 1974; and (6) active duty service immediately after internment as a Prisoner of War in Japan which resulted in an opportunity for exposure as mentioned above. 38 C.F.R. § 3.309(d)(3) (2004).

30. This list includes: leukemia (other than chronic lymphocytic leukemia); cancer of the thyroid, breast, pharynx, esophagus, stomach, small intestine, pancreas; multiple myeloma; lymphomas (except Hodgkin's Disease); cancer of the bile ducts, gall bladder; primary liver cancer (except if cirrhosis or hepatitis B is indicated); cancer of the salivary gland, urinary tract (which includes the kidneys, renal, pelvis, ureters, urinary bladder, and urethra); bronchiolo-alveolar carcinoma; and cancer of the bone, brain, colon, lung, and ovary. 38 U.S.C.A. § 1112(c)(2).

31. *Id.* § 1112(c)(1); *see also id.* §§ 1114–1115.

32. *Id.* § 1710(a)(1)(A); *see also* VETERANS HEALTH ADMIN., VA RADIATION PROGRAMS INFORMATION (2004), *available at* <http://www1.va.gov/irad/docs/IRADFACTSHEETS.pdf>. This only applies to veterans who “participated in atmospheric nuclear weapons tests; took part in the American occupation of Hiroshima and Nagasaki, Japan (from August 6, 1945 through July 1, 1946) and/or were POWs in Japan during WWII” because they are enrolled in the VA healthcare system at Priority Level 6. *Id.* at 2. However, veterans who served at gaseous diffusion plants in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, for at least 250 days before February 1, 1992, or whose exposure to ionizing radiation came from duties related to the Long Shot, Milrow, or Cannikin underground nuclear tests on Amchitka Island, Alaska, before January 1, 1974, do not have special eligibility for enrollment or health care. *Id.* at 3–4.