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Specific VA Claim Guidance

1. Specific Claim Guidance

1.1. Introduction

The VA rating schedule is the guide for VA employees in the evaluation of disabilities and conditions resulting from diseases and injuries encountered as a result of or incident to military service. The percentage ratings are supposed to represent the average impairment in earning capacity in civil occupations resulting from such diseases and injuries and their residual conditions. The degrees of disability specified are considered adequate to compensate for the loss of working time from exacerbations or illnesses proportionate to the severity of the disability.

For proper application of the rating schedule, accurate and descriptive medical examinations are required that describe the limitation of activity caused by the disabling condition. VA recognizes that, over a period of years, a veteran's disability may require re-ratings because of changes in law, medical knowledge, and his or her medical condition. In such cases, it is essential, that each disability be viewed in relation to its entire history.

The basis of disability evaluations is "functional impairment" or the ability of the body as a whole, or of a system or organ of the body, to function under the ordinary conditions of daily life including employment. Whatever the body part or system, rating evaluations are based upon lack of usefulness, of these parts or systems, especially in self-support. The medical examiner has the responsibility of furnishing, in addition to the etiological, anatomical, pathological, laboratory, and prognostic data required for ordinary medical classification, a full description of the effects of disability upon the claimant's ordinary activities. Under this standard, a person may be too disabled to engage in employment although he or she is up and about and fairly comfortable at home or upon limited activity. 38 C.F.R. § 4.10. Congenital or developmental defects, absent, displaced or supernumerary parts, refractive error of the eye, personality disorder, and mental deficiencies are not diseases or injuries for VA disability compensation purposes. *Id.* § 4.7.

Claimants should be aware that different medical examiners do not describe the same disability using the same language. Also, if the disability or condition has been longstanding, symptoms which have not changed may be overlooked or a change for the better or worse may not be noticed or described. While it is the responsibility of the VA rater to properly interpret examination reports in light of the claimant's whole history, it is still important for the claimant to review examination reports and make sure that they are accurate and include all

the relevant information that was discussed during the examination. Claimants should also consider preparing a summary of his or her medical history to be submitted each time medical evidence is sent to VA in support of a claim. This can go far in placing the various reports into a consistent picture so that a requested rating will accurately reflect the current medical condition. Also see the discussion about the difference between "lay" and "expert" evidence elsewhere in this KnowledgeBook.

It is also important to keep in mind that each disability or medical condition must be considered by VA from the point of view of the impact on working or seeking work. If a diagnosis or other medical conclusion is not supported by the discussion, test results, or analysis in report or if the report does not contain sufficient detail, the VA rater will either disregard the report as inadequate for evaluation purposes or have to return it for clarification. Either action will result in further delay, denial, or both.

VA raters are supposed to weigh all the evidence so that the decision to award or deny a claim is "equitable and just." All of the legal requirements and the probative weight (i.e., how much to believe) of each piece of evidence is to be "thoroughly and conscientiously studied" in the light of VA's established rules and policies. A decision is required to be "consistent" with the facts shown in every case. Of course, when "after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant." 38 C.F.R. § 4.6. This also includes awarding the higher evaluation where there is a question between two evaluations, as long as the disability picture more nearly approximates the criteria for that rating. *Id.* § 4.7.

When a change in diagnosis or medical evaluation is made, VA is required to assure itself that there has been an actual change in the claimant's medical condition and not merely a difference in thoroughness of the examination or the descriptive terms used in an examination report. If an actual change in condition has occurred, VA can correct erroneous ratings or otherwise assign a proper rating based on the evidence. 38 C.F.R. § 4.13.

For rating of disabilities aggravated by active service, the rating will reflect only the degree of disability above the degree existing at the time of entrance into active service. To do this, it is necessary for the rater to deduct from the present degree of disability the degree of disability existing at the time of entrance into service. The difference will be the rating assigned. If, however, the disability is rated as total (100%), no deduction should be made. Also, if the degree of disability at the time of entrance into the service is not ascertainable, no deduction should be made.

When calculating the "combined" rating when more than one individual rating has been awarded the ratings cannot simply be added together. VA has prepared a "combined ratings table" based on the concept of "remaining efficiency." 38 C.F.R. § 4.25, Table 1. The total combined rating is determined by combining ratings starting with the most disabling (highest rated) condition and the next highest rating, then by combining other less disabling conditions, if any, in order of severity.

The example provided in the rules, is of a person having a 60 percent disability rating, who is considered 40 percent "efficient." The effect of a further 30 percent disability is to leave only 70 percent of the efficiency remaining after consideration of the first disability, which is 28 percent efficiency remaining. In the combination table, a copy of which is included in the Appendix [link], figures appearing in the space where the column and row intersect will represent the combined value of the two ratings. The individual in this example individual is thus considered 72 percent disabled, as shown in the table opposite 60 percent and under 30 percent.

This combined value is then converted to the nearest number divisible by 10, with combined values ending in 5 or higher adjusted upward. For example, for a claimant with a 50 percent disability and a 30 percent disability, the combined value in the Table is 65 percent. The 65 percent is rounded up to 70 percent , which is the final combined rating. Similarly, with ratings of 40 percent and of 20 percent, the combined value is 52 percent, which is rounded down to a combined rating of 50 percent.

If there are more than two disabilities, the combined value for the first two, exactly as found in the combination table (i.e., not rounded), will be combined with the next rating in order of severity. This combination process continues for all remaining ratings. Only when all ratings have been combined is the combined rating value adjusted to the nearest rating divisible by 10. In other words, the rounding to the nearest rating divisible by 10 is done only once per rating decision following the combining of all disabilities and will be the last step in determining the combined total rating. 38 C.F.R. § 4.25.

VA also applies a "bilateral factor" when a partial disability results from disease or injury of both arms, or of both legs, or of paired skeletal muscles, the ratings for the disabilities of the right and left sides will be combined as usual. The bilateral factor is 10 percent of the combined rating for the right and left sides. This value is added (not combined) before further combinations or rounding to determine the final combined total rating.

The bilateral factor is applied to bilateral disabilities *before* other combinations are carried out. Further, the rating for such disabilities including the bilateral factor is treated as one disability for all further combinations. When applying the bilateral factor to disabilities affecting both upper extremities and both lower extremities, the correct method is to combine the ratings of the disabilities affecting the four extremities in the order of their individual severity and then apply the bilateral factor by adding (not combining) 10 percent of the combined value thus attained. The bilateral factor is not applicable unless there is partial disability of compensable degree in each of two paired extremities, or paired skeletal muscles. 38 C.F.R. § 4.26.

VA uses "diagnostic code numbers" when assigning and reporting the diagnostic code under which a condition has been rated. The diagnostic code numbers are arbitrary numbers that show the basis of the evaluation assigned that extend from 5000 to a possible 9999. When an unlisted disease, injury, or residual condition is encountered, requiring rating by analogy, the diagnostic code number will be "built up" by using first 2 digits from that part of the rating schedule that most closely identifies the part, or system, of the body involved, with a "99" as the last 2 digits.

In the selection of code numbers, injuries will generally be represented by the number assigned to the residual condition on the basis of which the rating is determined. With diseases, preference is to be given to the number assigned to the disease itself. If the rating is determined on the basis of residual conditions, the number appropriate to the residual condition will be added, preceded by a hyphen. In the citation of disabilities on rating sheets, the diagnostic terminology should be that of the medical examiner, with no attempt to translate the terms into schedule nomenclature. Residuals of diseases or therapeutic procedures should not cited without reference to the basic disease. 38 C.F.R. § 4.26.

The following medical conditions and diseases are commonly the bases for VA compensation claims. Successful applications will recognize the specific, and in some cases, obscure requirements for an award and provide VA with as much of the necessary information as possible to enable the most efficient processing of the application.

2. Specific Claim Types

2.1. Alcohol Dependency

VA has specific regulations addressing alcohol use and abuse. Bowing to reality, VA recognizes that service members do drink alcohol on occasion and the "simple drinking of alcoholic beverage is not of itself willful misconduct." 38 C.F.R. § 3.301(c)(2). However,

If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct.

Id. Further,

An injury or disease incurred during active military, naval or air service shall not be deemed to have been incurred in line of duty if such injury or disease was a result of alcohol or drugs by the person on whose service benefits are claimed.

38 C.F.R. § 3.301(d). In other words, if a veteran's medical condition was directly caused by excessive alcohol consumption (for example, an injury from a car wreck while intoxicated or a liver condition from excessive drinking), VA will not provide benefits for that condition.

A very important exception to this rule is when alcoholism is secondary to another condition, such as PTSD. In such situations – when a veteran is "self-medicating" – VA will not consider the situation as willful misconduct and will provide benefits for resulting health conditions.

Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

38 C.F.R. § 3.301(c)(2). Such secondary conditions may be eligible for an award of significant compensation depending on the nature and duration of the primary condition resulting in the alcohol abuse.

2.2. Amyotrophic Lateral Sclerosis (ALS; Lou Gehrig's Disease)

All veterans with amyotrophic lateral sclerosis ("ALS") or Lou Gehrig's disease, will receive full disability, lifetime health and death benefits regardless of when or where they served. There are three types of the disease

- *ALS (amyotrophic lateral sclerosis)* is the most common form and accounts for approximately 60% to 70% of all cases.
- *PBP (progressive bulbar palsy)* accounts for about 20% of all cases.
- *PMA (progressive muscular atrophy)* accounts for the remaining 10% of cases.

Although the reasons are unclear, the Institute of Medicine of the National Academies has acknowledged that there is an association between ALS and military service.

The VA regulation at 38 C.FR section 3.318, Presumptive service connection for amyotrophic lateral sclerosis," provides that

(a) Except as provided in paragraph (b) of this section, the development of amyotrophic lateral sclerosis manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease.

(b) Service connection will not be established under this section:

(1) If there is affirmative evidence that amyotrophic lateral sclerosis was not incurred during or aggravated by active military, naval, or air service;

(2) If there is affirmative evidence that amyotrophic lateral sclerosis is due to the veteran's own willful misconduct; or

(3) If the veteran did not have active, continuous service of 90 days or more.

This means that, unless there is clear evidence otherwise, the development of ALS at any time after discharge or release from active military, naval, or air service lasting more than 90 continuous days is presumed to be service connected. Further, veterans who have a diagnosis of ALS are considered service connected regardless of the number of years following discharge that they were diagnosed.

In addition to the broad presumption, VA has also made a recent change to the Diagnostic Codes that sets the minimum rating for ALS at 100 percent. In other words, VA will assign a total disability rating for any veteran who is diagnosed with ALS. Previously, the minimum rating for ALS was 30 percent, but the VA determined that providing a 100-percent evaluation in all cases would eliminate the need to reassess and reevaluate veterans with ALS repeatedly over short periods of time because the condition worsens and inevitably progresses to total disability.

As the proposed rule explained, ALS is a rapidly progressing disease, and establishment of a 100-percent evaluation for ALS will not adversely affect how ALS is evaluated for rating purposes. A veteran may receive compensation at the 100-percent rate based either on a 100-percent evaluation specifically for ALS or on a combined evaluation for ALS and other service-connected conditions. On either basis VA may consider the veteran for varying levels of SMC, which is an amount of compensation in addition to amounts payable for service-connected disability, including disabilities rated 100-percent disabling. Indeed, the VA Diagnostic Codes now include a note to: "Consider the need for special monthly compensation."

2.3. Appeals Management Center (AMC)

The Appeals Management Center ("AMC") was created by VA in July 2003. The VA's stated purpose for forming the AMC was to consolidate the responsibility for managing remands from the Board of Veterans' Appeals into a single office and process remands more timely and consistently. The AMC has authority to develop remands and reach decisions based on additional evidence gathered. If the AMC is unable to grant an appeal in full, the appeal is re-certified to BVA for continuation of the appellate process.

The AMC reportedly develops and decides 96 percent of Board remands. The remaining Board remands are handled directly by the responsible VA regional office. The AMC does not handle remands where the claimant: (1) has asked for a hearing with the adjudicator at the regional office or (2) is represented by a private attorney.

Although the purpose of the AMC is to improve the overall speed of processing remands, this has not been the reality. The AMC has become something of a "black hole" for remanded claims. VetsFirst recommends that claimants request that their remanded claims be sent directly to the regional office rather than the AMC. If a claim has been hung up in the AMC without action for a long period, a claimant should consider taking action to spur VA to process the remanded claim (see *Expeditious Treatment of Remanded Claims* section).

2.4. Arthritis

Diagnostic Code 5003, which evaluates degenerative arthritis, is found at 38 C.F.R. section 4.71a, and provides:

Degenerative arthritis established by X-ray findings will be rated on the basis of limitation of motion under the appropriate diagnostic codes for the specific joint or joints involved (DC 5200, etc.). When, however, the limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic codes, a rating of 10% is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, not added under diagnostic code 5003. Limitation of motion must be objectively confirmed by findings such as swelling, muscle spasm, or satisfactory evidence of painful motion. In the absence of limitation of motion, rate as below:

With X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups, with occasional incapacitating exacerbations.....20%

With X-ray evidence of involvement of 2 or more major joints or 2 or more minor joint groups.....10%

NOTE (1): The 20% and 10% ratings based on X-ray findings, above, will not be combined with ratings based on limitation of motion.

38 C.F.R. § 4.71a. Structurally, DC 5003 is composed of three parts, each of which addresses how to evaluate arthritic pain in a different situation:

(1) when it results in limitation of motion that is compensable under a DC that rates according to limitation of motion;

(2) when it results in limitation of motion that is noncompensable under a DC that is applicable to the joint involved; and

(3) when it does not result in limitation of motion.

See Hicks, 8 Vet. App. 417, 420 (1995).

A claimant whose degenerative arthritis limits the range of motion of a joint or joints will be evaluated under the specific DC applicable to the joint or joints when the limitation is compensable under those particular codes. "When, *however*, the limitation of motion of the specific joint or joints involved is noncompensable under the appropriate diagnostic code, a rating of 10[%] is for application for each such major joint or group of minor joints affected by limitation of motion, to be combined, *not added* under diagnostic code 5003." 38 C.F.R. § 4.71a, DC 5003 (emphasis added). In other words, a noncompensable disability under DCs such as 5260 and 5261 is a prerequisite for compensation under the second or third parts of DC 5003: only when arthritic pain does not cause limitation of motion, or causes a limitation of motion that does not rise to a compensable level, will a 10% rating under DC 5003 be appropriate. *Mitchell v. Shinseki*, 25 Vet. App. 32, 38-39 (2011).

Several other DCs are also relevant to arthritis. Section 4.58 discusses "Arthritis due to strain."

With service incurred lower extremity amputation or shortening, a disabling arthritis, developing in the same extremity, or in both lower extremities, with indications of earlier, or more severe, arthritis in the injured extremity, including also arthritis of the lumbosacral joints and lumbar spine, if associated with the leg amputation or shortening, will be considered as service incurred, provided, however, that arthritis affecting joints not directly subject to strain as a result of the service incurred amputation will not be granted service connection. This will generally require separate evaluation of the arthritis in the joints directly subject to strain. Amputation, or injury to an upper extremity, is not considered as a causative factor with subsequently developing arthritis, except in joints subject to direct strain or actually injured.

An important symptom affecting a rating of arthritis is the amount that joint motion is limited by the disease. The amount of pain experienced during motion impacts the determination of how much motion is limited. Section 4.59 is entitled "Painful motion," and states that:

With any form of arthritis, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. Muscle spasm will greatly assist the identification. Sciatic neuritis is not uncommonly caused by arthritis of the spine. The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

The Court has recognized that DC 5003 and 38 C.F.R. section 4.59 deem painful motion of a major joint or groups caused by degenerative arthritis that is established by X-ray evidence to be limited motion even though a range of motion may be possible beyond the point where pain sets in. For arthritis ratings, painful motion of a major joint is deemed to be limited motion. In relevant part, section 4.59 recognizes that painful motion is an important factor of disability which" entitles a claimant "to at least the minimum compensable rating for the joints." *Mitchell v. Shinseki*, 25 Vet. App. 32, 40 (2011).

Section 4.61 makes clear the importance of a thorough medical examination in support of arthritis claims.

With any form of arthritis (except traumatic arthritis) it is essential that the examination for rating purposes cover all major joints, with especial reference to Heberden's or Haygarth's nodes.

The Court will vacate a Board decision and remand the matter if the Board relies on an inadequate medical examination. *See Hicks v. Brown*, 8 Vet. App. 417, 421–22 (1995).

2.5. Asbestos

Conditions associated with asbestos exposure are rated under Interstitial Lung Disease, 38 C.F.R. section 4.97, DC 6833 "Asbestosis." No specific regulations govern adjudication of asbestos-related claims. The Veterans Benefits Administration, however, issued DVB Circular 21–88–8, Asbestos–Related Diseases on May 11, 1988, and included guidance in its adjudication procedure manual at the time. Later, VA promulgated the current regulations concerning the respiratory system, to include conditions related to asbestos exposure. Schedule for Rating Disabilities; Respiratory System, 61 Fed. Reg. 46,720 (1996).

The current M21-1MR contains a section entitled "Developing Claims for Service Connection for Asbestos-Related Diseases." This topic contains information on developing claims for service connection for asbestos-related diseases, including

- considering the latent period and type of asbestos exposure,
- the responsibilities of the rating activity, and
- the action to take when no disability is claimed.

M21-1MR, part 4, subpart II, chap. 1, sec. H, topic 29. VA also recognizes that many people with asbestos-related diseases often come to medical attention long after military service because the latent period varies from 10 to 45 or more years between the first exposure and development of a disease.

It is important to note that a claim is *not* substantially complete if a veteran alleges exposure to asbestos during service, but does not claim service connection for a specific disability. VA *does not* consider exposure to asbestos, in and of itself, is a disability. A claimant must identify the disability(ies) that resulted from his or her exposure to asbestos during service to assert a compensable claim. M21-1MR, IV, Subpart ii, 2.C.9.

A clinical diagnosis of asbestosis requires a history of exposure and radiographic evidence of parenchymal lung disease. Symptoms and signs include:

- dyspnea on exertion;
- end-respiratory rales over the lower lobes;
- compensatory emphysema;
- clubbing of the fingers at late stages; and
- pulmonary function impairment and cor pulmonale that can be demonstrated by instrumental methods.

Specific effects of exposure to asbestos include:

- lung cancer that

- originates in the lung parenchyma rather than the bronchi, and

- eventually develops in about 50 percent of persons with asbestosis;

- gastrointestinal cancer that develops in 10 percent of persons with asbestosis;
- urogenital cancer that develops in 10 percent of persons with asbestosis; and
- mesothelioma that develops in 17 percent of persons with asbestosis.

Disease-causing exposure to asbestos may be brief or indirect.

High exposure to asbestos and a high prevalence of disease have been noted in insulation and shipyard workers. During World War II, several million people employed in U.S. shipyards and U.S. Navy veterans were exposed to chrysotile products as well as amosite and crocidolite which were used extensively in military ship construction. Many post-WWII naval vessels continued to contain asbestos products.

When deciding a claim for service connection for a disability resulting from exposure to asbestos, VA raters will:

- determine whether or not service records demonstrate the veteran was exposed to asbestos during service;
- ensure that development is accomplished to determine whether or not the veteran was exposed to asbestos either before or after service; and
- determine whether or not a relationship exists between exposure to asbestos and the claimed disease, keeping in mind latency and exposure factors.

The Court has determined that the guidance in the Circular and the M21–1MR did *not* create a presumption of exposure to asbestos for personnel who served aboard Navy ships. The Circular and the M21–1MR provisions with respect to asbestos exposure are only "guidelines" for claim development:

These guidelines do not create a new presumption or a new basis of entitlement to benefits, but rather set forth a process for VA to follow where asbestos exposure creates a possible nexus between a current disability and service. Accordingly, the Court holds that the DVB circular did not liberalize the requirements for entitlement to disability benefits, or bestow any rights on VA claimants, and cannot, therefore, satisfy the requirement that new and material evidence be presented.

Ashford v. Brown, 10 Vet. App. 120, 124 (1997). Thus, there is no presumption for medical conditions arising from asbestos exposure. VA raters considering claims where such facts might be relevant "must determine whether or not military records demonstrate evidence of asbestos exposure in service." Raters are directed to continue development to the point that a determination can be made as to the existence of any "pre-service and/or post-service evidence of occupational or other asbestos exposure." *Dyment v. West*, 13 Vet. App. 141, 145 (1999) *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002).

Further a doctor's statement, "that one cannot totally rule out the possibility" of a connection between asbestos and an appellant's illness or death is *not* sufficient without evidence reflecting asbestos could be found in any x-rays or biopsies. *Dyment,* 13 Vet. App. at 144-45. A statement of a clear link between in-service asbestos exposure and the current medical condition(s) is required.

2.6. Asbestos Exposure

VA has recognized the potential for the service connection of asbestosis or other asbestos-related diseases for some time. VA issued DVB Circular 21- 88-8, Asbestos-Related Diseases in 1988. This document provided the first guidelines for considering compensation claims based on exposure to asbestos. The information and instructions from the DVB Circular were included in VA Adjudication Procedure Manual, M21-1, in 1992 and amended in 1997.

The current VA guidelines on asbestos are located in M21-1MR, Part IV, Subpart ii, Chapter 1, Section C, Topic 9 and Section H, Topic 29. The guidelines recognize that individuals with asbestos-related diseases may have only recently come to medical attention because the latent period for those diseases varies from 10 to 45 or more years between the first exposure and development of a disease. Further, the asbestos exposure may have been direct or indirect. VA also recognizes that the extent and duration of exposure is not a relevant factor.

VA guidelines provide, in part, that the clinical diagnosis of asbestosis requires a history of exposure and radiographic evidence of parenchymal disease. VA is supposed to develop any evidence of asbestos exposure before, during, and after service, and make a determination whether there is a relationship between the asbestos exposure and the claimed disease, keeping in mind the latency period and exposure information. *See, e.g., Ashford v. Brown*, 10 Vet. App. 120 (1997); *McGinty v. Brown*, 4 Vet. App. 428 (1993). The applicable

guidelines also note that some of the major occupations involving exposure to asbestos include mining, milling, work in shipyards, carpentry and construction, manufacture and servicing of friction products such as clutch facings and brake linings, manufacture and installation of roofing and flooring materials, and asbestos cement and pipe products.

Exposure to respirable asbestos and a high prevalence of disease have been noted in insulation and shipyard workers. This is significant considering that, during World War II, U.S. Navy veterans were exposed to three types of asbestos (chrysotile, amosite, and crocidolite) that were used extensively in military ship construction. Despite this connection, VA requires direct medical nexus evidence to support claims for diseases related to alleged asbestos exposure in service.

2.7. Back Problems

In August 2003, the VA revised the DCs dealing with disabilities of the spine. No one disputes that the spine is a central element of the entire body, carrying an elaborate nerve network which operates the arms, neck and legs. Back conditions are one of the most common kinds of all veterans' claims, and can be the most painfully disabling.

Despite the centrality of the spine in the body system, and the frequency with which back claims occur, the highest rating made available in the VA's 2003 amendments for either the cervical or lumbar spine is 40%, absent ankylosis, which is a rare condition. A higher rating is available, but only if the veteran is prescribed a certain amount of "bed rest" for his back condition. A 40% rating means that a veteran with a profoundly painful back condition cannot even qualify as being unemployable under 38 C.F.R. §4.165 unless he or she finds a doctor willing to prescribe bed rest for the condition. Bed rest is, however, rarely prescribed for serious back conditions. Claimants with serious back conditions may require extraschedular consideration and should explicitly request such consideration.

2.8. Cancer

VA does not have a separate rating for "cancer," rather cancers are rated under the DC for the affected organ or body part. In addition, many cancers have been declared presumptive for veterans experiencing specific conditions, such as herbicide exposure and radiation from atomic tests. *See, e.g.*, 38 C.F.R. §§ 3.307, 3.309, 3.311. Veterans submitting a claim for cancer should review each of these regulations to determine if any of the presumptive conditions apply to his or her service, which would eliminate the need for nexus evidence.

Claimants seeking compensation for cancer should also be aware that the rating for the cancerous condition is separate and distinct from the rating for the residuals (remaining conditions) once the cancer is successfully treated, removed, or is in remission. In particular, successful treatment of a life-threatening cancer can result in a significant rating reduction if the claimant is able to resume a largely normal life. At that point, VA can review the claim and assign a rating or ratings corresponding to the remaining medical conditions, if any. Understanding this point is particularly important when treatment options include "watchful waiting," such as with prostate cancer, where VA award a high rating during the waiting period, but may reduce the rating following surgery or other treatment, depending on the nature of the residual medical condition(s).

2.9. Changes to Military Records

Any person with military records, or his or her heirs or legal representative, may apply to the appropriate service's Board for the Correction of Military Records ("BCMR"). As with DRB's, the Army, Air Force, and Coast Guard have separate boards and the Navy operates a board for both Navy personnel and Marines. Federal law at 10 U.S.C. section 1552 authorizes a service Secretary to change any military record when "necessary to correct an error or injustice." The law provides for the service Secretaries to act through a board of appointed civilians in considering applications for the correction of military records.

If considering requesting a change to a military record, a person should first exhaust all other administrative remedies before appealing to the BCMR. A request should be submitted within 3 years after the issue was discovered or reasonably could have been discovered. The BCMR will, however, will review the merits of untimely applications and, if found meritorious, can waive the time limit. Applicants should file in a timely manner and should not assume that a waiver will be granted.

The application process is similar that for a discharge upgrade except that a DD Form 149 should be used. Copies of statements and records supporting the application should be attached to the signed form and mailed to the appropriate address on the back of the form. The BCMR will correct military records only if a veteran can prove that he or she was the victim of error or injustice. Also as with a discharge review, the best evidence is statements from persons who have direct knowledge or involvement. For example, statements from persons in your rating chain if you are contesting a performance report.

Unlike a discharge upgrade, character references from community leaders and others who know you may be helpful for a veteran requesting clemency based on post-service activities and accomplishments. A veteran may request a personal hearing before the BCMR deciding the case, but the Board will decide whether a hearing is necessary to decide the case. In general, the BCMR grants very few personal hearings, so the case should be fully presented in the materials submitted with the application.

After an application is received, one or more offices within the relevant branch of service, such as the JAG office, a treating hospital, or chain of command personnel, will prepare an advisory opinion on the case. Each advisory opinion is sent to the Board with the case file. If an advisory opinion recommends denial of the request, the document is sent to the applicant for comment within 30 days. No comment is required and failure to respond will not prevent consideration of the case.

The advisory opinions are only a recommendation and the BCMR will make the final recommendation on the case. The BCMR's recommendation is then forwarded to the relevant service Secretary, who has the final authority to accept or reject a recommendation. Historically, the Secretary accepts the BCMR's recommendation.

When complete, the decision is mailed to the applicant. If relief is granted, the appropriate records will be corrected and reviewed to see if the veteran is due any monetary benefits based on the corrected information. The BCMR is the highest level of administrative appeal and provides the final service decision. If the BCMR denies a case, the next step is to request reconsideration or file suit in court.

2.10. Changing Reenlistment Eligibility (RE) Codes

Veterans seeking a waiver or change of the Reenlistment Eligibility (RE) code for the purpose of entering another branch of service will need to contact the appropriate service recruiter. Each service has its own rules about when waiver of an individual's RE ineligibility based on post service performance. Each service Secretary may allow an individual to enlist in the service under his or her jurisdiction but has no authority to waive reenlistment/enlistment ineligibility for another service.

2.11. Chronic Fatigue Syndrome

For VA purposes, the diagnosis of chronic fatigue syndrome requires:

(1) onset of debilitating fatigue severe enough to reduce daily activity to less than 50 percent of the usual level for at least six months; and

(2) the exclusion, by history, physical examination, and laboratory tests, of all other clinical conditions that may produce similar symptoms; and

(3) *six* or more of the following:

(i) acute onset of the condition,

(ii) low grade fever,

(iii) nonexudative pharyngitis,

(iv) palpable or tender cervical or axillary lymph nodes,

(v) generalized muscle aches or weakness,

(vi) fatigue lasting 24 hours or longer after exercise,

(vii) headaches (of a type, severity, or pattern that is different from headaches in the pre-morbid state),

(viii) migratory joint pains,

(ix) neuropsychologic symptoms, and

(x) sleep disturbance.

38 C.F.R. § 4.88a. Similar symptoms are also discussed in section 4.88b "Schedule of ratings – Infectious diseases, immune disorders and nutritional deficiencies." Chronic fatigue syndrome is also a "qualifying chronic disability" for the purposes of an undiagnosed illness and "medically unexplained chronic multisymptom illnesses" for Persian Gulf veterans. 38 C.F.R. § 3.317.

2.12. Dependents and Survivors: Dependency and Indemnity Compensation (DIC)

When a veteran dies from a "service-connected disability," that veteran's surviving spouse, children, and under some conditions, parents are eligible for dependency and indemnity compensation (DIC). 38 U.S.C. § 1310(a); 38 C.F.R. § 3.5(a). DIC is a monthly payment made to a surviving spouse, child, or parent because of an service-connected death. A claim for DIC is treated as an original claim by the survivor, independent of claims for service connection brought by the veteran during his or her lifetime, and unprejudiced by any adjudications concerning such claims. *See* 38 C.F.R. § 20.1106; *see also Stoll v. Nicholson*, 401 F.3d 1375 (Fed. Cir. 2005); *Kane v. Principi*, 17 Vet. App. 97 (2003).

A veteran's death is considered service connected under section 1310 where a service-connected disability "was either the principal or a contributory cause of death." 38 C.F.R. § 3.312(a). To constitute a contributory cause of death, the disability must have "contributed substantially or materially" to death, "combined to cause death," or "aided or lent assistance to the production of death." 38 C.F.R. § 3.312(c). A DIC claim can be awarded even if the deceased veteran never filed a claim.

Generally, to determine entitlement to DIC, VA needs evidence showing (1) the cause of death, *and* (2) that the cause of death was

- related to, or hastened by, a service-connected condition, or
- related to a disease or injury that existed during active military service.

Evidence to support a claim for DIC may be obtained from:

- the claims folder;
- VA medical center treatment reports or VA outpatient clinic records;
- service treatment records; or
- private doctor or hospital treatment records.

Parents are eligible for DIC, but the combined income of the their household cannot exceed qualifying limits. *See* 38 U.S.C. § 1315(d)(3) (providing that no DIC benefits may be paid to a parent where the annual income of the parent exceeds a set amount, which is adjusted from time to time); 38 C.F.R. § 3.262(b)(1) (where a remarried parent and spouse are living together, the total combined income will be considered in determining DIC benefits); *see also* M21-1MR, Part I, Appd. B; Parent(s) Dependency Indemnity Compensation Rate Table, Chart 3; 38 C.F.R. § 3.262(o) (expenses paid for the veteran's last illness and burial that were not otherwise reimbursed are excluded from income); 38 C.F.R. § 3.262(e) (discussing exclusion of 10% of certain retirement payments).

The effective date of entitlement to DIC is the first day of the month in which the veteran's death occurred, if the claim is received within one year, or date of receipt of the claim, if the claim is received one year or more following death. 38 C.F.R. § 3.400(c)(2).

2.13. Dependents and Survivors: Accrued Benefits

Survivors of a deceased claimant may also be entitled to payment of "accrued benefits" based on the claims pending at the time of the claimant's death. Periodic monetary benefits (other than insurance and service members' indemnity) authorized under laws administered by VA, to which a payee was entitled at his or her death under existing ratings or decisions or those based on evidence in the file at date of death, and due and unpaid will, upon the death of such person, be paid as follows:

(1) Upon the death of a veteran to the living person first listed as follows:

(i) His or her spouse;

(ii) His or her children (in equal shares);

(iii) His or her dependent parents (in equal shares) or the surviving parent;

(2) Upon the death of a surviving spouse or remarried surviving spouse, to the veteran's children.

(3) Upon the death of a child, to the surviving children of the veteran entitled to death pension, compensation, or dependency and indemnity compensation;

(4) Upon the death of a child claiming benefits under 38 U.S.C. chapter 18, to the surviving parents; and

(5) In all other cases, only so much of the accrued benefit may be paid as maybe necessary to reimburse the person who bore the expense of last sickness or burial.

38 C.F.R. § 3.1000(a). Application for accrued benefits must be filed within 1 year after the date of death. A claim for death pension, compensation, or dependency and indemnity compensation by an apportionee, surviving spouse, child or parent is deemed to include a claim for any accrued benefits. *Id.* § 3.1000(c).

Issues on appeal to the Board of Veterans' Appeals or to the Court on the date of a claimant's death are in a pending status and survivors may be eligible to receive the accrued benefits from such claims. A *claim pending at the date of death* means a claim that had not been finally adjudicated on or before the date of death, including:

- a deceased beneficiary's claim;
- a claim to reopen a finally disallowed claim based upon new and material evidence *or*
- a claim to raise a clear and unmistakable error in a prior rating or decision *and*
- any substantive appeals or administrative appeals pending at the time of death.

For accrued purposes, a claim is considered pending at the date of death if the one-year period after the date of notice of an award or disallowance has not expired for filing a Notice of Disagreement. Any new and material evidence must have been in VA's possession at or before the date of the veteran's death.

Evidence in the file at date of death means evidence in VA's possession on or before the date of the beneficiary's death, even if the evidence was not physically located in the VA claims folder on or before the date of death. *Evidence in VA's possession* means evidence physically located at any VA facility, including, but not limited to:

- VA regional offices;
- VA insurance centers;
- VA medical centers;
- VA outpatient clinics;
- Vet Centers; and
- the Records Management Center.

Evidence needed to complete the application for accrued benefits means information necessary to establish that the claimant is within the category of eligible persons and circumstances exist which make the claimant the specific person entitled to the accrued benefit. M21-1MR, part VIII, chap. 1.

When a person having preferred entitlement dies, forfeits entitlement, or otherwise becomes disqualified before receiving and negotiating the check for his or her share of the accrued benefit, VA will pay the next person entitled based on relationship or reimbursement, if a claim is timely filed. Simultaneous claims from persons with different preference status are *not* considered as contested claims. If a person having preferred title has filed a claim, established entitlement, and died before payment and no other person within a permitted class or relationship survived, the accrued amount becomes payable as reimbursement to that individual's estate if he or she was the payer of the expenses of last illness and burial of the deceased beneficiary. M21-1MR, part VIII, chap. 1.

In 2008, Congress passed a statute that explicitly created the right of certain family members to "substitute" for a claimant who dies awaiting a decision on a VA benefits claim. The law limits the pool of possible survivors eligible for substitution to three categories of family members: the spouse, the children, and financially-dependent parents of a veteran who died on or after October 10, 2008. To the extent substitution is granted, it does away with the inequities of the "claim dies with the veteran" nature of VA benefits for those with a pending claim or appeal at the time of death.

VA's substitution rules define a "pending claim" as one that has been filed at a regional office but which has not yet been adjudicated (i.e., no rating decision issued). [VAMC claim???] A "pending appeal" is created by the filing of a NOD in response to a denied claim. In either situation, if the claimant dies, an eligible survivor has one year from the date of the death to request substitution. VA regulations do not require the agency to notify potentially eligible survivors – a *survivor must request* substitution. 76 Fed. Reg. 8666 (Feb. 15, 2011).

An eligible survivor must request substitution in writing from the same regional office where the original claim or appeal is pending. The written request must include the term "substitute" or "substitution," the deceased claimant's name, his or her claim number, along with the evidence supporting eligibility (e.g., marriage certificate, birth certificate, etc.). The survivor can also request substitution by completing and submitting a VA Form 21-0847.

If sufficient evidence is not provided or located in the existing file maintained by VA, the applicant may be requested to provide additional evidence. VA will mail its response to the substitution request. However, VA has no deadlines; thus, it is unclear how long a regional office will take to process and respond to a substitution request.

If a claimant dies while his or her claim is "pending" or "on appeal" at the regional office (i.e., an NOD has been filed), upon receipt of a substitution request, the death will put the claim or appeal on hold while VA processes the substitution request. If no substitution request is forthcoming within the year from the claimant's death, the regional office will close the deceased's case.

When an appeal is before the Board (i.e., the claims file has been forwarded from the regional office), VA's proposed rules require the Board to dismiss a pending appeal "without prejudice" upon notice that a claimant has died. The Board must then return the entire claim to the regional office to await a substitution request. Here again, if no substitution request is forthcoming within the year from the claimant's death, the case is closed. If a request is received and approved, the case is returned to the Board for resolution of the underlying claim(s).

2.14. Discharge Upgrades

Any person who has been discharged or dismissed from service, or his or her heirs or legal representative, may apply to the appropriate service's Discharge Review Board ("DRB") to "upgrade" a discharge. The Army, Air Force, and Coast Guard have separate boards. The Navy operates the board for both Navy personnel and Marines. Military discharge upgrades are performed under 10 U.S.C. section 1553, which authorizes the Secretary of the particular service to establish a board of review, consisting of five members, to review the discharge or dismissal of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member or, if the veteran is dead, his or her surviving spouse, next of kin, or legal representative. The DRB can consider almost all discharges for upgrade, but cannot change a punitive discharge imposed by a courts-martial.

An application for discharge upgrade must be made within 15 years of discharge. If a discharge is older than 15 years, a veteran must apply for a "change" to his or her military records, which is another – more difficult – process that should be avoided if at all possible (see below). An application for discharge upgrade is made by completing and submitting a DD Form 293, *Application for the Review of Discharge or Dismissal from the Armed Forces of the United States*, which is available at most DoD installations and VA regional offices. The application must be signed. Copies of relevant supporting statements and records should be sent with the application.

A discharge will only be upgraded if a veteran can show that the current discharge grade (for example, a bad conduct discharge) is inequitable or improper. The veteran seeking the upgrade has the burden of providing evidence, such as signed statements from witnesses or copies of records, that support an upgrade. It is not enough to provide the names of witnesses because the DRB will not contact witnesses to obtain statements. The veteran seeking the upgrade must get signed statements from all witnesses and submit them with the upgrade request.

The veteran's own personal statement is especially important. The statement must clearly explain what happened and why the current discharge grade is an inequity or improper. Supporting statements should be from persons who have direct knowledge or involvement in the incidents that resulted in the unfavorable discharge such as a supervisor or commander. Other statements that may be helpful are from persons with direct knowledge of your military service.

It is important to recognize that the DRB reviews conduct during service and evidence relating to periods of service. Behavior or conduct after military service, either good or bad, is not supposed to have any impact on the upgrade decision. In other words, submitting piles of statements about how a veteran has been a model citizen after leaving the service is unlikely to have any impact on the upgrade decision.

There is no requirement for a veteran to be represented when seeking a discharge upgrade and most applicants represent themselves. If a request involves more than basic legal issues, however, there are attorneys that represent persons seeking discharge upgrades. Many veterans service organizations will assist in preparing applications. These organizations may also provide advice even if a veteran decides to represent himself or herself.

A veteran may request a personal hearing. DRB hearings usually occur in Washington D.C., although there are times when the DRB will hold hearings in other locations. Wherever scheduled, all expenses incurred are the responsibility of the person requesting the hearing - the Government will not reimburse any expenses (travel, lodging, counsel, witness fees, etc.) associated with the matter. A failure to show up at the hearing without a timely request to reschedule, is considered a waiver of the right to a hearing. The DRB will then make its decision without hearing further from the veteran.

A DRB hearing is an administrative hearing, not a trial. The purpose is to determine whether the period of service under review was properly characterized. The person seeking the discharge upgrade has the burden to convince the DRB members that the discharge should be something other than what the military decided it should be at the time of discharge. The DRB cannot base a change on compassion or because you have changed for the better. Also the Board can only improve the discharge grade or make no change – it cannot make the discharge worse.

It generally takes about six to eight weeks to receive a decision, but there is no requirement and it could take longer. If a discharge is changed, the veteran will receive a new discharge certificate, a new DD Form 214, and a copy of the decision. If the discharge is not changed, the veteran will receive the decision document which will include the specific reasons the discharge was not changed and will also include a notice of the applicable appeal process.

2.15. Drug Use

VA considers conditions arising from the abuse of drugs similar to that of alcohol.

The isolated and infrequent use of drugs by itself will not be considered willful misconduct; however, the progressive and frequent use of drugs to the point of addiction will be considered willful misconduct. Where drugs are used to enjoy or experience their effects and the effects result proximately and immediately in disability or death, such disability or death will be considered the result of the person's willful misconduct.

38 C.F.R. § 3.301(c)(3). And further,

An injury or disease incurred during active military, naval or air service shall not be deemed to have been incurred in line of duty if such injury or disease was a result of alcohol or drugs by the person on whose service benefits are claimed.

38 C.F.R. § 3.301(d). In other words, as with alcohol, if a veteran's medical condition was directly caused by drug use (for example, a car wreck while driving under the influence of drugs or hepatitis C from injecting with contaminated needles), VA will not provide benefits for that condition.

But, as with alcohol:

Organic diseases and disabilities which are a secondary result of the chronic use of drugs and infections coinciding with the injections of drugs will not be considered of willful misconduct origin.

38 C.F.R. § 3.301(c)(3). Once again, veterans with medical conditions arising from drug use which are secondary to another service-connected condition ("self-medicating"), can receive benefits for those secondary conditions.

2.16. Expeditious Treatment of Remanded Claims

VA has a statutory obligation to expeditiously process remands from the Court. This means that not only must VA ensure that it completes the Court-ordered task, it must do so in an "expeditious manner." 38 U.S.C. §§ 5109B, 7112. According to the Court, an expeditious manner is characterized by promptness and is synonymous with swift, speedy, fast, and rapid.

The Court has also ruled that "excessive delays in the processing of remands ordered by the Court cannot help but sap public confidence and impugn the Court's dignity, as from the outside it invariably appears that VA is ignoring the valid mandates of an institution that has express authority over it in matters related to veterans benefits." Furthermore, "the Secretary's obligation to process Court remands expeditiously is integral to this Court's jurisdictional authority to remedy unreasonable delays in the processing of veterans' claims." The Court has further stated that the "failure of VA to comply with the obligation to process Court remands expeditiously, under certain circumstances is the same as noncompliance with the remand order itself," even if the Secretary later complies with the substance of the order." *See Harvey v. Shinseki*, 24 Vet. App. (2011).

As a result, "expeditious" handling means that claimants who received a remand from the Court to the Board or from the Board to a VARO, have a legal right to quicker (or priority) handling of their claims. Failure of VA to process a remanded claim within a "reasonable" time is a ground for a petition to the Court for an order to VA to process the claim. This is a very powerful right, if used appropriately.

The Court, however, has made clear that "where delay is the result of an overburdened system, rather than a disregard for the importance of compliance with a Court order" it will not force VA to act on a petition. As the Court stated, it will "not blindly issue writs or sanctions" and "will carefully consider whether action must be taken" should such petitions be misused. This means that the claimant must have waited a "reasonable" time and have made several efforts to contact VA requesting that a decision be made.

Sadly, as the claims backlog has grown, the "reasonable" time for VA to process a remand appears to have also grown, as have the Court's requirements for giving the VA chance to do the right thing without the Court's intervention. How long is too long for VA action and how many contacts with VA is enough depends on the individual case, but certainly means at least 6 months and two specific written requests to VA for action. Recent Court decisions, however, have identified "two and a half years" as "not unreasonable." Claimants who are experiencing very long delays with remanded claims may want to consider hiring an attorney experienced in this area, as it can be tricky.

2.17. Fiduciary Program

The VA fiduciary program was created with the best of intentions: to help claimants who because of physical or mental conditions cannot adequately handle their financial matters. Sadly, VA has twisted the program into a maze of requirements and restrictions where the interests and wishes of vulnerable veterans and their families are ignored and they are set up for abuse by unscrupulous individuals. Veterans and families who are notified of a "proposed" action to find a veteran "incompetent" or unable to manage his or her finances must act quickly to protect their rights or at least minimize the damage from VA action.

The current VA program that results in VA control over a veteran's finances is in reality a 3-step process, although the way in which VA treats each veteran is largely uncontrolled by any procedures.

1). Rating decision finding "incompetency;"

2). Determination of whether a "VA fiduciary" is needed; and, if needed,

3). Appointment of an individual as a "VA fiduciary."

Veterans will find very little that explains this process other than the VA correspondence that notifies a veteran that one of these steps has been, or will very shortly be, taken. It is not unusual for a veteran to receive no notice at all until his VA benefits, including any retroactive payments, have been given to a VA-appointed fiduciary (also known as a "federal fiduciary") who the veteran has never met or spoken with.

It is extremely important that veterans and their families understand the VA fiduciary process so that they can protect a vulnerable veteran's rights. VA will appoint a fiduciary of its own choosing despite:

(1) a veteran's written request for someone (for example, spouse or caregiver) to be his or her fiduciary;

(2) a Power of Attorney designating someone to handle the veteran's finances; or

(3) a state court guardian appointment or similar legal directive. Despite Congressional disapproval and Court decisions, VA continues to believe that it – and not a veteran or a veteran's family – knows how best to spend the veteran's money.

As a practical matter, therefore, veterans and families facing VA takeover of their finances need to understand how to challenge VA actions that are not in the veteran's interest.

2.18. Fiduciary Program: Incompetency Determination

Generally, the first notice that VA has targeted a veteran for its "fiduciary program" is a letter stating that "We have received information showing the because of your disabilities you may need help handling your VA benefits." The letter will then state that "We propose to rate you incompetent for VA purposes" or something similar. This letter, the associated rating decision, and the proper response, is *very* important because a veteran receiving this notification has very important rights. But, a veteran must act – and quickly – to preserve those rights.

First, a veteran has a right to a hearing and a right to present evidence and argument regarding why the incompetency finding is incorrect. VA will tell you (usually on the front page of the notice) that you have 60 days in which to respond. This is true. Somewhere later in the notice VA will tell you that if you submit a hearing request within 30 days, not only will you receive a personal hearing, but VA "will continue to send payments to you" until after the hearing and a decision is issued." This is a critical difference. If a veteran submits a hearing request along with his evidence and argument challenging the proposed finding more than 30 days after the date of the notice, VA will stop sending his VA benefit payments.

Unless there is absolutely no question regarding a veteran's ability to handle his finances, a personal hearing should be requested, if only to keep VA paying benefits until the issue is resolved.

Second, VA has the burden to establish a veteran's incompetency. VA must have *medical* evidence, not just a rater's opinion, to support its decision. VA must give a "presumption in favor of competency" absent evidence to the contrary. *See* 38 C.F.R. § 3.353(d). Further, the medical evidence that supports an incompetency decision must be "clear, convincing, and leaves no doubt as to" the purported incompetency. *Id.* § 3.353(c).

A veteran may challenge the sufficiency of the medical evidence VA relies upon to support an alleged inability to handle his or her funds. Experience has shown that VA has relied upon a veteran's statement that "his spouse handles the bills" to propose (and find) that a veteran was incompetent. Such statements, without more, should be challenged and VA made to produce, if it can, adequate medical evidence.

2.19. Fiduciary Program: Need for Fiduciary

Just because the veteran agrees, or VA makes a final decision, that the veteran cannot handle his finances and so is "incompetent for VA purposes," the next decision is supposed to be whether a fiduciary is required. VA, however, often skips this step or combines it with the fiduciary appointment step. A veteran or family should insist that VA make a written finding about why a VA-appointed fiduciary is required.

This is an important step because many veterans who are rightly determined to need help with their finances have a spouse, already have designated an attorney-in-fact (legal representative), or have a court-appointed guardian, who already takes good care of the veteran. VA believes that it can ignore these existing relationships and the associated legal rights. We believe that the law requires VA to recognize a relationship that has existed without documented abuse or misuse of funds is in the interest of the veteran and cannot be ignored. This is an issue that is being addressed in the courts, but for now, each veteran or his or her legal representative will have to assert the veteran's right to have someone of his or her choosing be their "fiduciary."

Further, the law explicitly allows VA to continue to pay benefits to a veteran, even if VA has found the veteran "incompetent." The payments can be some or all of the benefits. VA, therefore, should be required to clearly state why the veteran cannot receive at least some of the benefits he or she has earned by their service.

2.20. Fiduciary Program: Appointment of a Fiduciary

The final step in the process is the appointment of a "federal fiduciary." As discussed above, VA should only reach this step if:

(1) the veteran has been found incompetent;

(2) the veteran has been found unable to handle his or her benefits; and

(3) no existing relationship has been found to be in the interest of the benefit.

VA, however, is likely to jump directly from a finding of incompetency to the appointment of a fiduciary of its choosing. Veterans must be prepared to challenge such improper action.

The law allows VA to appoint a wide range of individuals as fiduciary, if a VA-appointed fiduciary is found to be required. These individuals include the veteran, a spouse, the veteran's caregiver, and state-court appointed

guardian or similar appointee, or a paid fiduciary. VA regulations also allow for a "temporary" fiduciary while a permanent fiduciary is under consideration.

Sadly for veterans, VA all too often ignores spouses and caregivers, and appoints a "paid federal fiduciary." A paid federal fiduciary is an individual who the veteran has never met or even spoken with who VA chooses and "qualifies" as the VA-appointed fiduciary. The "qualification" process is little more than checking a few boxes on a VA form and agreeing to do what VA tells them to do. In exchange for that, the individual is paid up to 4% of the v*eteran's monthly benefit*. In other words, the veteran – not VA – pays the bill for person who he does know or want to control his or her money.

As of April 2011, the appointment of a specific fiduciary can be challenged by filing an NOD. VA, however, will continue to pay the veteran's benefits to the challenged fiduciary until and unless the appointment is overturned – something which has not happened yet. In any event, the VA appeals process is so lengthy that the ability to challenge an incorrect appointment is of questionable value in most cases.

2.21. Fiduciary Program: Options

A veteran has few options if he or she is tagged as potentially needing VA's "help" with his or her finances. The key is to immediately challenge (1) the evidence of incompetency and (2) the appointment of anyone not desired by the veteran. The veteran and his family should also consider immediately informing VA of the existence of a state-appointed guardian, attorney-in-fact, or care-giver relationship and requesting a specific reason for VA to disrupt or ignore that relationship.

Further, before requesting or agreeing to an appointment of a spouse or other family member as the "VA fiduciary," the veteran and family member should understand that VA will require that person – even a spouse – to comply with VA's directions regarding spending the veteran's money. VA will also require that the veteran's money be kept in a separate bank account – no "household" accounts or "comingling" funds between spouses. Whether or not these (and other) requirements are too intrusive or otherwise unacceptable should be assessed before agreeing to the appointment.

As this is a very confusing and important area, veterans facing an incompetency proposal should very seriously consider obtaining legal assistance.

2.22. Hearing Aid Batteries

Veterans can order hearing aid batteries online using the Remote Order Entry System-Public (ROES-Public) application. VA's Remote Order Entry System (ROES) application allows veterans to place orders online for products and/or services available through the Denver Acquisition & Logistics Center (DALC). ROES provides a convenient, secure means of using the Internet to place orders for products available through the DALC. Veterans who currently receive VA care for designated medical/physical conditions can use ROES to request hearing aid batteries online. Previous methods of requesting replacement batteries (mail-in battery request card, e-mail request, phone request, etc.) will still remain in place.

In order to ensure that personal information is kept secure you will need to obtain access credentials prior to placing your first order. The instructions for obtaining the credentials can be found at *www.va.gov/eauth*. If you have access to VA's My HealtheVet application, you may already have established your credentials. Look for the ROES-Public application at *www.va.gov/eauth/roes* and follow the directions to login and place an order for batteries.

2.23. Hearing Loss and Tinnitus (Ringing of the Ears)

Hearing loss and tinnitus are very common claims. In addition, a clear diagnosis of the condition is usually available. The issue in many cases is a lack of clear evidence of the connection with service, especially when subsequent work history contains evidence of exposure to loud noises or other acoustic trauma.

VA regulations describe the requirements for adequate evaluation of hearing impairment.

- An examination for hearing impairment for VA purposes must be conducted by a state-licensed audiologist and must include a controlled speech discrimination test (Maryland CNC) and a puretone audiometry test. Examinations must be conducted without the use of hearing aids.
- VA uses Table VI, "Numeric Designation of Hearing Impairment Based on Puretone Threshold Average and Speech Discrimination," to determine a Roman numeral designation (I through XI) for hearing impairment based on a combination of the percent of speech discrimination (horizontal rows) and the puretone threshold average (vertical columns). The Roman numeral designation is located at the point where the percentage of speech discrimination and puretone threshold average intersect.
- Another table, Table VIa, "Numeric Designation of Hearing Impairment Based Only on Puretone Threshold Average," is used to determine a Roman numeral designation (I through XI) for hearing impairment based only on the puretone threshold average. Table VIa is be used when the examiner certifies that use of the speech discrimination test is not appropriate because of language difficulties, inconsistent speech discrimination scores, etc., or when indicated under the provisions of 38 section 4.86.
- The "Puretone threshold average," as used in Tables VI and VIa, is the sum of the puretone thresholds at 1000, 2000, 3000 and 4000 Hertz, divided by four. This average is used in all cases to determine the Roman numeral designation for hearing impairment from Table VI or VIa.
- A third table, Table VII, "Percentage Evaluations for Hearing Impairment," is used to determine the percentage evaluation by combining the Roman numeral designations for hearing impairment of each ear. The horizontal rows represent the ear having the better hearing and the vertical columns the ear having the poorer hearing. The percentage evaluation is located at the point where the row and column intersect.
- If impaired hearing is service-connected in only one ear, in order to determine the percentage evaluation from Table VII, the non-service-connected ear will be assigned a Roman Numeral designation for hearing impairment of I, subject to the provisions of 38 C.F.R. section 3.383.

38 C.F.R. § 4.85.

Claimants with "exceptional patterns" of hearing impairment may receive potentially higher ratings.

When the puretone threshold at each of the four specified frequencies (1000, 2000, 3000, and 4000 Hertz) is 55 decibels or more, the rating specialist will determine the Roman numeral designation for hearing impairment from either Table VI or Table VIa, whichever results in the higher numeral. Each ear will be evaluated separately.

When the puretone threshold is 30 decibels or less at 1000 Hertz, and 70 decibels or more at 2000 Hertz, the rating specialist will determine the Roman numeral designation for hearing impairment from either Table VI or Table VIa, whichever results in the higher numeral. That numeral will then be elevated to the next higher Roman numeral. Each ear is evaluated separately.

38 C.F.R. § 4.86. In addition, section 3.350 discusses when a claimant may be entitled to special monthly compensation due either to deafness or to deafness in combination with other specified disabilities.

Tinnitus in both ears does *not* constitute separate disabilities. While tinnitus is listed under the heading "diseases of the ear," DC 6260 does not address whether tinnitus, as perceived in one ear, two ears, or otherwise, is a single disability. The Federal Circuit has ruled that VA was entitled to apply its own construction to the ambiguous regulations and that it could assign only a single evaluation for recurrent tinnitus, whether the sound is perceived in one ear, both ears, or in the head. The Court found that tinnitus in both ears is a single disability eligible for a single 10% rating. *Smith v. Nicholson*, 451 F.3d 1344, 1350 (Fed. Cir. 2006).

2.24. Hepatitis

VA is the largest single provider of medical care to people with hepatitis C in the United States. The VA National Hepatitis C Program office has issued a document entitled "Hepatitis C: Military-Related Blood Exposures, Risk Factors, VA Care" which contains a list of risk factors for the disease. These factors help predict whether a person is at risk of hepatitis C; these factors do not cause the disease. It is just that they tend to occur more often in people with the disease than those without it. VA recommends hepatitis C testing for anyone who:

- Wishes to be tested;
- Has ever used a needle to inject drugs, even if once and long ago;
- Had a blood transfusion or organ transplant before 1992;
- Is a health care worker who had blood exposure to mucous membranes or to non-intact skin, or a needlestick injury;
- Was on long-term kidney dialysis;
- Was born of a mother who had hepatitis C at the time;
- Is a Vietnam-era veteran;
- Had contact with HCV-positive blood to non-intact skin or to mucous membranes;
- Has tattoos or body piercings;
- Has ever snorted drugs and shared equipment;
- Has liver disease or abnormal liver function test;
- Has a history of alcohol abuse;
- Has a history of hemophilia;
- Has had a sexual partner with Hepatitis C, now or in the past;
- Has had 10 or more lifetime sexual partners; or
- Has HIV infection.

In addition, the source of infection is unknown in about 10 percent of acute hepatitis C cases and in 30 percent of chronic hepatitis C cases.

A particular risk factor for Hepatitis C in certain groups of veterans is intravenous drug use. Pursuant to 38 C.F.R. section 3.301(c)(3), the use of drugs is not always considered willful misconduct prohibiting an award of VA benefits. Specifically, the regulation provides that "organic diseases and disabilities which are a secondary result of the chronic use of drugs and infections coinciding with the injection of drugs will not be considered of willful misconduct origin." 38 C.F.R. § 3.301(c)(3). Under this regulation, compensation may be available for hepatitis C even if it is the result of drug use during service. VA is required to make a finding as to whether any reported drug use constitutes willful misconduct under section 3.301. VA must also discuss any other risk factor or event that a claimant reports as potentially causing his or her hepatitis C.

There has been considerable interest expressed by veterans concerning the possible relationship between hepatitis C virus infection and immunization with jet injectors (air gun injection) or other military-related blood exposures. Although there have been no case reports of hepatitis C being transmitted by a jet gun injection, VA recognizes that it is biologically plausible. Any veteran enrolled in the VA health care system who has concerns about hepatitis C infection, because of jet gun injectors, other blood exposure during military service, any of several risk factors, or for any other reason, should request testing for hepatitis C.

The diagnostic term *infectious hepatitis* includes epidemic infectious, or viral, hepatitis, often called catarrhal jaundice, and homologous serum hepatitis. Infectious hepatitis is common throughout the world and was especially prevalent during World War II following administration of the yellow fever vaccine in 1942 and in the Mediterranean Theater.

Service connection for infectious hepatitis generally depends upon an explicit reference or other evidence of the disease in service. The following factors are relevant to determining service connection for viral hepatitis:

- the incubation period for viral hepatitis is from 15 to 50 days;
- the incubation period for homologous serum hepatitis is 50 to 180 days following administration of vaccines or transfusions;
- following recovery from the acute infection, a clinical syndrome of gastrointestinal symptoms may follow, characterized by intolerance for fats, fatigue, and mental depression; and
- recurring episodes that last from one to four months at varying intervals, and are precipitated by intercurrent infections and overexertion.

Liver function tests are of particular importance in the initial diagnosis, and when the disability is severe.

Chronic liver disease without cirrhosis (including hepatitis B, chronic active hepatitis, autoimmune hepatitis, hemochromatosis, drug-induced hepatitis, etc., but excluding bile duct disorders and hepatitis C), is rated under DC 7345. Hepatitis B infection must be confirmed by serologic testing in order to evaluate it under DC 7345. Hepatitis C (or non-A, non-B hepatitis) is rated under DC 7354.

2.25. Herbicides (Agent Orange): Korea

Currently VA can presume tactical herbicide exposure for veterans who served in specific US Army units that operated along the Korean demilitarized zone (DMZ) from April 1968 through July 1969. *See* 38 C.F.R. § 3.307(a)(6)(iv). The units recognized are listed in M21-1MR IV.ii.2.C.10.o. When the evidence shows that a veteran was assigned to one of these units during the time frame, the veteran qualifies for a presumption of exposure. When a veteran with Korean service alleges herbicide exposure but was not in one of the specified units or was in one of the specified units outside the time frame of tactical herbicide use, VA will send an information request to the JSRRC.

Veterans who were stationed in or near the DMZ after July 1969 may be able to obtain a presumption of exposure based on the principle that the herbicide would remain in the environment for some period of time after it was applied. Under this theory, VA may accept that a veteran was exposed to a herbicide and award the presumption even though service in the area was outside the designated period. Veterans with herbicide-related conditions should consider this argument if they do not have direct evidence of exposure while in Korea.

2.26. Herbicides (Agent Orange): Stateside

Veterans who did not deploy overseas may also have been exposed to herbicides including AO. VA has prepared a list of locations that are acknowledged to have contained or tested Agent Orange outside of Vietnam. The list can be found at http://www.publichealth.va.gov/exposures/agentorange/outside_vietnam_usa.asp and Appendix K. There is no presumption for such exposures, so a claimant will need medical evidence of a direct connection between exposure and the claimed medical condition to receive an award.

2.27. Herbicides (Agent Orange): Thailand

After many years and the uncovering of documents, VA has finally acknowledged that there was significant use of herbicides on the fenced in perimeters of military bases in Thailand. The use of AO in these locations was intended to eliminate vegetation and ground cover for base security purposes. Evidence of this use be found in a declassified Vietnam era Department of Defense (DoD) document titled *Project CHECO Southeast Asia Report: Base Defense in Thailand.*

It has also been confirmed that commercial herbicides, rather than tactical herbicides, were also used within the confines of Thailand bases to control weeds. These commercial herbicides do not fall under the VA regulations governing exposure to tactical herbicides such as AO. However, there is evidence that the herbicides used on the Thailand base perimeters may have been either tactical, procured from Vietnam, or a commercial variant of much greater strength and with characteristics of tactical herbicides.

The majority of troops in Thailand during the Vietnam era were stationed at the Royal Thai Air Force Bases of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, and Don Muang. If a US Air Force Veteran served on one of these air bases as a security policeman, security patrol dog handler, member of a security police squadron, or otherwise served near the air base perimeter, as shown by MOS (military occupational specialty), performance evaluations, or other credible evidence, then herbicide exposure should be acknowledged on a facts found or direct basis. This allows veterans to obtain presumptive service connection of the diseases associated with herbicide exposure, just the same as a "boots on the ground" Vietnam veteran. As a result, when VA receives a herbicide-related claim from a veteran with service in Thailand the key issue is whether the veteran's service involved duty on or near the perimeter of a military base during the Vietnam era, from February 28, 1961 to May 7, 1975.

Along with air bases, there were some small Army installations established in Thailand during this period, which may also have used perimeter herbicides in the same manner as the air bases. Therefore, if a US Army veteran claims a disability based on herbicide exposure and the veteran was a member of a military police (MP) unit or was assigned an MP MOS and states that his duty placed him at or near the base perimeter, then herbicide exposure on a facts found or direct basis should be acknowledged for this Veteran. The difference in approach for US Army veterans is based on the fact that some MPs had criminal investigation duties rather than base security duties. Therefore, the Veteran's lay statement is required to establish security duty on the base perimeter.

This process also applies to US Army personnel who served on air bases in Thailand because during the early years of the Vietnam war, before Air Force security units were fully established on air bases in Thailand, US Army personnel may have provided perimeter security. In such cases, if the veteran provides a lay statement that he was involved with perimeter security duty and there is additional credible evidence supporting this statement, then herbicide exposure on a facts found or direct basis can be acknowledged.

2.28. Herbicides (Agent Orange): Vietnam

Under 38 U.S.C. section 1116(f) and 38 C.F.R. section 3.307(6)(iii), a veteran who served in the Republic of Vietnam during the period from January 9, 1962, to May 7, 1975, "shall be presumed to have been exposed during such service to an herbicide agent." *Hall v. Nicholson*, 21 Vet. App. 67 (2006). For the purposes of establishing service connection under VA regulations, *service in the Republic of Vietnam* means

- service on the land of Vietnam or its inland waterways, or
- service in other locations if the conditions of service involved duty or visitation in the Vietnam.

There is no requirement for a specified length of service, duty, or visitation. Even a few hours in country during the Vietnam era may be sufficient to establish service connection for subsequently developed diseases based on a presumption of exposure to herbicides. The definition of "service in the Republic of Vietnam" has been controversial for many years. For all practical matters, however, the courts have resolved the issue to require "boots on the ground" or service on a "brown water" vessel. *See Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008).

A claim is not substantially complete if a veteran alleges exposure to herbicides during service, but does not claim service connection for a specific disability. A claimant *must* identify a specific disability he or she believes is related to their exposure to Agent Orange or other herbicide. Exposure to Agent Orange in and of itself is not a disability.

The Agent Orange Act of 1991 established a presumption of service connection for veterans with service in Vietnam during the Vietnam era who subsequently develop, to a degree of 10 percent or more:

- Hodgkin's disease;
- multiple myeloma;
- non-Hodgkin's lymphoma (NHL);
- acute and subacute peripheral neuropathy;
- porphyria cutanea tarda;
- prostate cancer;
- respiratory cancers, such as cancers of the
    - lung;
    - bronchus;
    - larynx; or
    - trachea;
- soft-tissue sarcoma;
- chloracne or other acneiform disease consistent with chloracne;
- type 2 diabetes mellitus;
- chronic lymphocytic leukemia;
- AL amyloidosis;
- ischemic heart disease;
- chronic B-cell leukemia; and
- Parkinson's disease.

38 C.F.R. §§ 3.307(a)(6); 3.309(e). When a veteran alleges exposure to herbicides during service aboard a Navy or Coast Guard ship that operated on the offshore waters of Vietnam, VA will look for:

- evidence that shows the ship:

    - docked to the shores or piers of Vietnam;
    - operated temporarily on Vietnam inland waterways; or
    - operated on close coastal waters for extended periods, with evidence that:
        - § crew members went ashore, or
        - § smaller vessels from the ship went ashore regularly with supplies or personnel
- evidence that places the veteran onboard the ship at the time the ship docked to the shore or pier or operated in inland waterways or on close coastal waters for extended periods, and
- whether the veteran went ashore when the ship docked or operated on close coastal waters for extended periods, if the evidence shows the ship docked to the shore or pier or that crew members were sent ashore when the ship operated on close coastal waters.

Service aboard a ship that *anchored* in an open deep-water harbor, such as Da Nang, Vung Tau, or Cam Ranh Bay, or along the Vietnamese coast does *not* constitute inland waterway service or qualify as docking, and is not sufficient to establish presumptive exposure to herbicides, unless the veteran served as a coxswain aboard ship and reports going ashore during anchorage. *See* M21-1MR Pt. 4, subpt. II, ch. 2, sec. C-10.k.

Veterans who served aboard large ocean-going ships that operated on the offshore waters of Vietnam are often referred to as "blue water" veterans because of the blue color of the deep offshore waters. They are distinguished from "brown water" veterans who served aboard smaller patrol vessels or their supply vessels that operated on the brown colored rivers, canals, estuaries, and delta areas making up the inland waterways of Vietnam. Brown water Navy and Coast Guard veterans receive the same presumption of herbicide exposure as veterans who served on the ground in Vietnam: blue water veterans do not. *See generally, Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008). For more information on ships that docked to the shore of Vietnam, traveled on inland waterways, or operated on close coastal waters for extended periods, see the following page on the Compensation Service Intranet website: *http://vbaw.vba.va.gov/bl/21/rating/VENavyShip.htm*.

Pursuant to the M21–1MR, when a veteran asserts exposure to herbicides in Thailand during the Vietnam era, the regional office must first place in the veteran's claims file a copy of the Compensation and Pension Service memorandum addressing this issue. *See* M21–1MR, pt. IV, subpt. ii, ch. 2, sec. C-10(p). The regional office must then "[a]sk the veteran for the approximate dates, location, and nature of the alleged exposure." *Id.*

If the veteran does not furnish the requested information within 30 days, then the regional office must refer the case to the Joint Service Records Research Center (JSRRC) "to make a formal finding that sufficient information required to verify herbicide exposure does not exist." *Id.* If there is no such finding, the regional office must determine whether the veteran provided sufficient information to permit the Joint Service Records Research Center to search for records concerning herbicide exposure. If there is sufficient information for such a search, then the regional office must request one from the JSRRC. *Id.* Veterans stationed along the demilitarized zone in Korea during certain periods may also be eligible for benefits for conditions resulting from herbicide exposure. *See* M21-1MR, Part IV, Subpart ii, 2.C.10.o. *See* *http://www.publichealth.va.gov/exposures/agentorange/outside_vietnam.asp*.

2.29. Homeless Veterans

Veteran homelessness is widely recognized as a problem of national importance. The statistics are depressing, with a count on a January night in 2011 finding 67,495 homeless veterans. Further, an estimated 144,842 veterans spent at least one night in an emergency shelter or transitional housing program in a recent year. Because of the public uproar over this situation, VA Secretary Shinseki announced the goal of ending veteran homelessness by 2015.

Whether or not this goal is achievable, VA has put in place a number of initiatives to assist homeless veterans and help veterans avoid homelessness. The National Call Center for Homeless Veterans hotline at 1-877-4AID-VET offers veterans who are homeless or at risk for homelessness 24/7 access to trained counselors. The hotline also offers information about VA Medical Centers; federal, state, and local partners; and community-based agencies, service providers, and others who work with veterans. Veterans calling the hotline:

- will be connected to a trained VA responder;
- be asked a few questions to assess needs;
- may be connected with the Homeless Program point of contact at the nearest VA facility; and
- will be asked for contact information will be so staff may follow up.

In addition to the hotline, VA provides a range of services to homeless veterans, including health care, housing, job training, and education. These services are in six general categories.

- ***Community Partnerships.*** A network of more than 2,418 shelters, soup kitchens, and other community partners around the United States are providing the services veterans need to stay in their homes or get back on their feet. Combined with other community organizations, there are over 4,000 community groups working to serve homeless veterans.
- ***Income/Employment/Benefits.*** VA has put more than 370 currently or formerly homeless veterans to work across the country as Vocational Rehabilitation Specialists who assist about 40,000 veterans annually.
- ***Housing/Supportive Services.*** Through a partnership with the U.S. Department of Housing and Urban Development (HUD), homeless veterans are provided with Section 8 "Housing Choice Vouchers" by HUD under the HUD-VASH Program. VA provides case management services through the HUD-VASH and Grant-Per-Diem programs.
- ***Outreach/Education.*** VA works on the ground in communities to raise the awareness of veterans and their support networks about services such as 1-877-4AID-VET, VA's 24/7 hotline to support veterans who are homeless or at risk of becoming homeless.
- ***Prevention.*** VA provides grants to community groups that assist veterans who are homeless or at risk of homelessness and their families as well in maintaining permanent housing.
- ***Treatment.*** VA supports veterans who need a range of medical, psychiatric, vocational, or educational services through its Domiciliary Care for Homeless Veterans.

Some of the specific programs available to homeless veterans include:

- ***Compensated Work Therapy (CWT)*** is comprised of three unique programs which assist homeless veterans in returning to competitive employment: Sheltered Workshop, Transitional Work, and Supported Employment. Veterans in CWT are paid at least the federal or state minimum wage, whichever is the higher.
- ***Homeless Veteran Supported Employment Program (HVSEP)*** provides vocational assistance, job development and placement, and ongoing supports to improve employment outcomes among

homeless veterans and veterans at-risk of homelessness. Formerly homeless veterans who have been trained as Vocational Rehabilitation Specialists (VRSs) provide these services.

- ***Homeless Providers Grant and Per Diem Program*** provides grants and per diem payments (as funding is available) to help public and nonprofit organizations establish and operate supportive housing and service centers for homeless veterans.
- ***HUD-VA Supportive Housing (VASH) Program*** is a joint effort between the Department of Housing and Urban Development and VA. HUD allocated nearly 38,000 "Housing Choice" Section 8 vouchers across the country. These vouchers allow veterans and their families to live in market rate rental units while VA provides case management services. A housing subsidy is paid to the landlord on behalf of the participating veteran. The veteran then pays the difference between the actual rent charged by the landlord and the amount subsidized by the program.
- ***Acquired Property Sales for Homeless Providers Program*** makes all VA foreclosed properties available for sale to homeless provider organization – at a 20 to 50 percent discount – to shelter homeless veterans.
- ***Supportive Services for Veteran Families (SSVF) Program*** provides grants and technical assistance to community-based, nonprofit organizations to help veterans and their families stay in their homes.
- ***VA's Health Care for Homeless Veterans (HCHV) Program*** offers outreach, exams, treatment, referrals, and case management to veterans who are homeless and dealing with mental health issues, including substance use. At more than 135 HCHV sites, trained VA specialists provide tools and support necessary for veterans to get their lives on a better track.
- ***Homeless Patient Aligned Care Teams (H-PACTs) Program*** provides a coordinated "medical home" specifically tailored to the needs of homeless veterans that integrates clinical care with delivery of social services with enhanced access and community coordination. Implementation of this model is expected to address many of the health disparity and equity issues facing this population and result in reduced emergency department use and hospitalizations, improved chronic disease management, improved "housing readiness" with fewer veterans returning to homelessness once housed.
- ***Homeless Veterans Dental Program*** provides dental treatment for eligible veterans in a number of programs: Domiciliary Residential Rehabilitation Treatment, VA Grant and Per Diem, Compensated Work Therapy/Transitional Residence, Healthcare for Homeless Veterans (contract bed), and Community Residential Care.
- ***Project CHALENG*** (Community Homelessness Assessment, Local Education and Networking Groups) brings together providers, advocates, and other concerned citizens to identify the needs of homeless veterans and work to meet those needs through planning and cooperative action. This process has helped build thousands of relationships between VA and community agencies so that together they can better serve homeless veterans.
- *Veteran Justice Outreach* provides eligible, justice-involved veterans with timely access to VA's mental health and substance use services when clinically indicated, and other VA services and benefits as appropriate.
- *Substance Use Disorder Treatment Enhancement Initiative* provides substance use services in the community to aid homeless veterans' recovery.
- *The Health Care for Re-Entry Veterans Program* helps incarcerated veterans successfully rejoin the community through supports including those addressing mental health and substance use problems.
- *The Readjustment Counseling Service's Vet Center Programs* feature community-based locations and outreach activities that help to identify homeless veterans and match homeless veterans with necessary services.

There are also numerous private non-profit organizations that offer a variety of services to homeless veterans and veterans threatened with homelessness. For example, the National Coalition for Homeless Veterans at *http://www.nchv.org/* has information about many services and programs across the country.

Finally, the VA has had a formal policy to give the pending benefits claims of homeless veterans "priority" in award development since 1991. *See* VA Circular 20-91-9. This policy is not required by law and how much special treatment VA actually provides a particular claim is unclear. But, any veteran with a pending claim should make sure that VA knows if he or she is homeless or facing homelessness while waiting for a decision.

2.30. Incarcerated Veterans

Veterans who are incarcerated do not lose their entitlement to VA benefits just because of a conviction or prison term. However, the amount paid each month will be *reduced* beginning with the 61st day of imprisonment for a *felony*.

Any person . . . who is incarcerated in a Federal, State or local penal institution in excess of 60 days for conviction of a felony will not be paid compensation or dependency and indemnity compensation (DIC) in excess of the amount specified in paragraph (d) of this section beginning on the 61st day of incarceration. VA will inform a person whose benefits are subject to this reduction of the rights of the person's dependents to an apportionment while the person is incarcerated, and the conditions under which payments to the person may be resumed upon release from incarceration. In addition, VA will also notify the person's dependents of their right to an apportionment if the VA is aware of their existence and can obtain their addresses. However, no apportionment will be made if the veteran or the dependent is a fugitive felon . . .

If this reduction occurs, for a rating before incarceration that was 20% or higher the new monthly payment will be at the 10% rate. If a rating was less than 20% (i.e., 10%), the new monthly payment will be half the 10% rate. Compensation benefits are *not* reduced if imprisoned for a misdemeanor.

In addition, if a veteran is imprisoned in a federal, state, or local penal institution as the result of conviction of a felony *or* misdemeanor, a *pension* payment will be *completely* stopped on the 61st day of imprisonment following conviction. Incarcerated veterans do not forfeit their eligibility for medical care. However, VA is restricted by law from providing hospital and outpatient care to an incarcerated veteran who is an inmate in an institution of another government agency when that agency has a duty to give the care or services.

Importantly, VA can take all or part of any withheld benefits (those above the 10% rate paid to the incarcerated veteran) and apportion it to a spouse, child or children, and dependent parents. Such apportionment is based on individual need. This is an important exception to the withholding requirement because it allows a veteran to direct his benefits to his or her family while incarcerated.

VA is required to resume full payment of the previous award of compensation or pension benefits as of the date of release from incarceration if VA receives notice of release within 1 year following release. VA considers being paroled or participating in a work release or half-way house program as having been released from incarceration. Veterans should notify VA if any of these events occurs to have full payments restored as quickly as possible.

Currently, VA keeps all of the money withheld from a veteran during an incarceration lasting longer than 60 days. This practice is being challenged in court. Veterans who are released from incarceration where VA has withheld a part of their compensation payments are encouraged to discuss the matter with an experienced attorney familiar with the applicable laws.

The Court has ruled that VA's duty to assist also extends to providing incarcerated veterans with examinations when one is required. The VA's duty to assist therefore includes substantial efforts to obtain both:

- an examination of an incarcerated veteran, and

- an incarcerated veteran's medical records, whether at the prison facility or elsewhere.

Further, VA must clearly document all such efforts even if VA cannot provide an exam or get a copy of the records. *See Wood v. Derwinski*, 1 Vet. App. 190 (1991) (noting incarcerated veterans must be afforded the same treatment as non-incarcerated veterans in pursuing disability compensation claims); *Bolton v. Brown*, 8 Vet. App. 185 (1995) (Court could not "lightly infer that the duty to assist a veteran in developing his [sic] claim applies any less to an incarcerated veteran than to a non-incarcerated veteran").

As a result, VA internal guidance mandates VA must provide necessary examinations to all veterans, including those currently incarcerated. The Veterans Benefits Administration (VBA) must assist incarcerated Veterans by working with prison officials in obtaining prison facility medical records or other relevant medical records, and scheduling examinations when warranted. VA is also supposed to respond to requests for examination for individual unemployability (IU) even though there may be no grant of IU while the veteran is incarcerated.

In some cases, prison officials will restrict or prohibit some VA actions, including examinations. If that occurs, VA must document all efforts to schedule examinations, including identifying and requesting the assistance of the appropriate prison officials. VA is supposed to document that they have made multiple attempts and exhausted all possible avenues for obtaining access to the incarcerated Veteran for the examination. If these efforts are not documented, an incarcerated veteran may have grounds to challenge a denial based on a lack of medical evidence.

2.31. Long Term Care

VA has several programs that provide long term care options for eligible veterans. Nursing home care, state veterans homes, and non-institutional extended care programs are described below. In addition, a recently enacted law required VA to create a program to provide assistance to the family caregivers of veterans seriously injured on or after September 11, 2001.

2.32. Long Term Care: Nursing Homes

VA is required to provide nursing home care to (1) a veteran in need of nursing home care for a service-connected disability and (2) a veteran who is in need of such care and who has a service-connected disability rated at 70 percent or more. 38 U.S.C. § 1710A. Nursing home care can be either "intermediate" or "skilled." Skilled care provides a higher intensity or frequency of care in facilities designed for such care.

VA offers three types of nursing home facilities, which may be provided without charge to the veteran or partially subsidized by VA:

- Community Living Centers are specialized nursing facilities located at some VA Medical Centers;
- Public or private nursing homes may be contracted by VA to provide care to veterans; and
- VA may also subsidize a veteran's stay at a state veterans home (see below).

VA generally maintains lists of available nursing homes approved for contract status. If a preferred facility is not already approved, a veteran can request that VA approve the facility.

2.33. Long Term Care: State Veterans Homes

Many states manage facilities especially for veterans. Some also extend care to spouses. VA assists in funding these facilities and requires state veterans homes to meet minimum standards. Each state, however, establishes its own eligibility requirements. State veterans homes usually make available several types of care including hospital care, domiciliary care, and in some cases, adult day care.

2.34. Long Term Care: Non-institutional Extended Care

VA is also required to provide long-term care options for veterans who do not need or desire full-time care in a nursing home or other facility. These extended care services include:

- Geriatric services;
- Adult day care;
- Respite care; and
- Other non-institutional alternatives as VA may decide to provide.

38 U.S.C. § 1710B. Particular programs offered to veterans included Home Bases Primary Care (HBPC); skilled home health care; and Homemaker and Home Health Aide Services (H/HHA). These and other programs are intended to allow eligible veterans to stay in their homes for as long as possible while still receiving necessary health care and other needed services.

2.35. Mail Order Prescriptions

Veterans can order and receive their prescription medicines by mail. "Meds by Mail" is a voluntary service, which provides a cost-free or low cost way for veterans to receive non-urgent maintenance medications delivered to their home. Veterans should continue to use a local pharmacy for urgent care medications. Eligible veterans can file claims for prescriptions filled at a local pharmacy and be reimbursed up to 75% of the allowable amount. Whether to use Meds by Mail or a local pharmacy for maintenance medications is up to the veteran.

The VA Health Administration website has general information about the Meds by Mail program. Meds by Mail forms can be downloaded at Meds by Mail - Prescription Order Form 10-0426. To obtain information about the status of an order or questions about drug availability, veterans should contact the Meds by Mail Servicing Center which is located in Cheyenne, Wyoming, Monday – Friday between 7 a.m. to 5:30 p.m. (Mountain Time) at 1-888-385-0235. Veterans with other health insurance that includes a pharmacy benefit are not eligible to participate in the Meds by Mail program.

Some important aspects of the Meds by Mail Program include:

- You can get maintenance medications which are taken for longer periods of time such as blood pressure, heart, arthritis and chronic pain medications.
- Meds by Mail can only provide you with CHAMPVA covered pharmacy items. "Over the Counter" items that do not need a prescription are not covered under the Meds by Mail program (exception for insulin and insulin supplies).

- Most prescriptions are filled with the generic equivalent. If your doctor wants you to have a brand name medication, call the Pharmacy Servicing Center (at 888-385-0235) first to see if the brand name is available.
- If only the generic equivalent is available, and you require brand name medication, have your prescription filled by a local pharmacy.
- Certain controlled maintenance medications in Schedule 3, 4, and 5. For example, generic equivalents of Tylenol No. 3, Valium, Klonopin, Vicodin, and many others are available through the Meds by Mail Program.

Veterans should note that eligibility questions are not addressed by the Meds by Mail Office. Eligibility is determined by the CHAMPVA Center, which can be contacted Monday-Friday, 8:05 a.m. to 7:30 p.m. (Eastern Time), at 1-800-733-8387.

2.36. Mental Disorders (Non-PTSD)

VA recognizes diagnoses of mental disorders conforming to the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, of the American Psychiatric Association (DSM-IV). If the diagnosis of a mental disorder does not conform to DSM-IV, or is not supported by the findings on the examination report, the rating agency is supposed to return the report to the examiner to substantiate the diagnosis. In the absence of any underlying psychiatric disability subject to service connection, a finding of "mental unsoundness" does *not*, in itself, constitute a disability subject to service connection.

If the diagnosis of a mental disorder is changed, the rating agency will determine whether the new diagnosis represents progression of the prior diagnosis, correction of an error in the prior diagnosis, or development of a new and separate condition. If it is not clear from the available records what the change of diagnosis represents, VA is supposed to return the report to the examiner for a determination. 38 C.F.R. § 4.125. Claimants should do their best to make sure that a private examination reports are clear and comply with the DSM-IV to avoid these types of delays.

VA only has a single "General Rating Formula for Mental Disorders" from which all mental disorders, except for eating disorders, are rated:

100% -- Total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name

70% -- Occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships

50% -- Occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short and long-term memory (e.g., retention of

only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing and maintaining effective work and social relationships

30% -- Occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal), due to such symptoms as: depressed mood, anxiety, suspiciousness, panic attacks (weekly or less often), chronic sleep impairment, mild memory loss (such as forgetting names, directions, recent events)

10% -- Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress, or; symptoms controlled by continuous medication

0% -- A mental condition has been formally diagnosed, but symptoms are not severe enough either to interfere with occupational and social functioning or to require continuous medication

38 C.F.R. § 4.130.

When evaluating a mental disorder, VA considers the frequency, severity, and duration of psychiatric symptoms, the length of remissions, and the claimant's capacity for adjustment during periods of remission. The evaluation is to be based on all the evidence of record that bears on occupational and social impairment rather than solely on the examiner's assessment of the level of disability at the moment of the examination. When evaluating the level of disability from a mental disorder, the rater must consider the extent of social impairment, but cannot assign a rating solely on the basis of social impairment. Delirium, dementia, and amnestic and other cognitive disorders are evaluated under the general rating formula for mental disorders; neurologic deficits or other impairments stemming from the same etiology (e.g., a head injury) will be evaluated separately and combined with the evaluation for delirium, dementia, or amnestic or other cognitive disorder. When a single disability has been diagnosed both as a physical condition and as a mental disorder, VA will evaluate it using a diagnostic code which represents the dominant (more disabling) aspect of the condition. 38 C.F.R. § 4.126.

For presumptive service connection under 38 C.F.R. section 3.309(a), a *psychosis* is any of the following disorders:

- Brief Psychotic Disorder;
- Delusional Disorder;
- Psychotic Disorder Due to General Medical Condition;
- Psychotic Disorder Not Otherwise Specified;
- Schizoaffective Disorder;
- Schizophrenia;
- Schizophreniform Disorder;
- Shared Psychotic Disorder; and
- Substance-Induced Psychotic Disorder.

For purposes of VA benefits, mental retardation and personality disorders are not diseases or injuries eligible for compensation, and disability resulting from them may not be service-connected. A disability resulting from a mental disorder that is superimposed upon mental retardation or a personality disorder, however, may be service-connected. 38 C.F.R. § 4.127. A veteran who has been discharged because of a "personality disorder" by the military, should be wary of that diagnosis and seek other opinions regarding whether other, service-connected, conditions exist.

If a mental disorder has been assigned a total evaluation due to a continuous period of hospitalization lasting six months or more, the rating agency shall continue the total evaluation indefinitely and schedule a mandatory examination six months after the veteran is discharged or released to non-bed care. A change in evaluation based on that or any subsequent examination shall be subject to the regulations for reducing a rating. 38 C.F.R. § 4.128.

A Global Assessment of Functioning (GAF) score is an assessment of an individual's overall level of psychological, social, and occupational functioning on a scale of 0 to 100. While claimants often point to GAF scores for support of mental condition claims, raters do *not* base the disability evaluation solely or primarily on that score. VA considers a GAF score in light of all the evidence in the case, including symptomatology and manifestations shown at mental status examinations and in treatment records.

2.37. Military Records

The government maintains records of military servie of every veteran. Historically, a veteran's service was documented in two files: a "service record" and a "service medial record." In the past decade or so, however, the military services have begun changing how and where a veteran's records are stored. Until recently, service records ultimately were sent to the National Personnel Record Center ("NPRC"), in St. Louis, MO. Millions of military personnel, health, and medical records of discharged and deceased veterans of all services serving during the 20th century are still stored there.

The NPRC also stores medical treatment records of retirees from all services, as well as records for dependent and other persons treated at naval medical facilities. Copies of most military and medical records on file at NPRC, including DD 214, *Report of Separation* (or equivalent), are available upon request by the following individuals:

Veterans and "Next of Kin:" Veterans and next-of-kin of deceased veterans have the same rights to full access to records. Next-of-kin are the unremarried widow or widower, son or daughter, father or mother, brother or sister of the deceased veteran.

Authorized Representatives: Authorized third party requesters, such as lawyers, doctors, and historians, may submit requests for information from individual records with the veteran's or, for deceased veterans a next-of-kin's, signed and dated authorization. A signed authorization should identify exactly what is authorized to be released to the third party. Authorizations are valid for one year from date of signature.

General Public: The general public can also request some parts of a veteran's military record without the authorization of the veteran or next-of-kin. The Freedom of Information Act (FOIA) and the Privacy Act, however, restrict the type of information that can be released without the veteran's or next-of-kin's authorization. In general, information available from military service records which can be released without violation of the Privacy Act are: name, service number (<u>not</u> Social Security Number), rank, dates of service, awards and decorations, and place of entrance and separation. If the veteran is deceased, the place of birth, date of death, geographical location of death, and place of burial can also be released.

Court Order: Access to military personnel records and medical records on file at the NPRC, may also be gained pursuant "to the order of a court of competent jurisdiction." Subpoenas qualify as orders of a court of competent jurisdiction only if they have been signed by a judge. To be valid, court orders must also be signed by a judge.

The records stored at the National Personnel Records Center cover military personnel who were discharged on or after the below-listed dates:

- Air Force Officers and Enlisted -- September 25, 1947
- Army Officers separated July 1, 1917
- Army Enlisted separated November 1, 1912
- Navy Officers separated January 1, 1903
- Navy Enlisted separated January 1, 1886
- Marine Corps Officers and Enlisted separated January 1, 1905
- Coast Guard Officers and Enlisted separated January 1, 1898

Military personnel records for individuals separated before these dates are on file at the National Archives and Records Administration, Old Military and Civil Records Branch (NWCTB), Washington, DC 20408, inquire@arch2.nara.gov.

Since about 1995, the individual services started digitizing their records. Now, all the military services except the Coast Guard, have stopped sending their veteran's records to the NPRC. The location of specific records now depends on the specific service and when it stopped sending its records to the NPRC. The National Archives maintains a Records Location Table that contains the location of each service's records at http://www.archives.gov/veterans/military-service-records /locations/index.html. The Archives.gov site also contains many pages of explanations for where essentially all of the government's military records are stored and how to request copies of those records.

Federal law requires that all requests for records and information be submitted in writing. The easiest way to request a record is by using Standard Form (SF) 180, *Request Pertaining to Military Records*. Requests must contain enough information to identify the record among the more than 70 million on file at the NPRC. The NPRC, therefore, needs certain basic information to locate military service records. This information includes the veteran's complete name used while in service, service number or social security number, branch of service, and dates of service. Date and place of birth may also be helpful, especially if the service number is not known. If the request pertains to a record that may have been involved in the 1973 fire, also include the place of discharge, last unit of assignment, and place of entry into the service, if known. Mail the completed SF 180, or the signed written request to:

National Personnel Records Center
(Military Personnel Records)
9700 Page Avenue
St. Louis, MO 63132-5100

Veterans and next-of-kin can now complete a records request on-line. One must still print out and sign a sign a signature verification, and mail or fax the verification, because federal law requires a signature on all records requests. Completing the application online can be easier and faster than completing the SF Form 180. Individuals who are not veterans or next-of-kin cannot use the on-line system.

Requesting Copies of Military Medical Records

As with the other service military records, the storage of service medical records has recently changed. In the 1990s, the military services stopped filing the health record with the service record portion. In 1992, the Army began sending most of its veterans' health records to VA. The other services have also now done the same - Air Force, Navy and Marine Corps in 1994 and Coast Guard in 1998 (see the Records Location Table for a listing of personnel and health records holdings and locations). Now, the VA Records Management Center, in St.

Louis, MO, is responsible for maintaining active duty health records and managing their whereabouts when on loan within the VA.

It is important to understand the difference between a veteran's "medical" or "health" records and "clinical" or "medical treatment" records. "Medical" or "health" records contain outpatient, dental and mental health treatment received in service. These records are contained in the "service medical records."

"Clinical" or "medical treatment" records are generated when veterans are hospitalized while in service. These records are not generally filed with the veteran's personal medical records. Instead, clinical records are filed by the name of the facility which last had responsibility for the records. Those facilities, in turn, retire those records to NPRC – so veterans should make sure that a request for clinical records are sent to the specific treating facility, as well as the NPRC.

To request information from a veteran's medical records, the requestor must provide the following information:

- Name of the last facility which had responsibility for the treatment record. Usually this is the last facility at which treatment was provided.
- The year and type of treatment (inpatient, outpatient, dental, mental health). If copies of specific records are needed, state the type of illness, injury, or treatment involved.
- The patient's full name as used during treatment.
- The patient's social security number and status (military, retiree, dependent of military, federal employee, dependent, or other) during treatment.
- Branch of service and sponsor's service number or social security number (if the patient was a dependent).

For medical records of separated/retired military personnel and Navy and Marine Corps dependents, send the request to:

National Personnel Records Center
Military Personnel Records
9700 Page Avenue
St. Louis, MO 63132-5100

For medical records of Air Force, Coast Guard, or Army dependents, send requests to:

National Personnel Records Center
Civilian Personnel Records
111 Winnebago Street
St. Louis, MO 63118-4126

Generally there is no charge for military personnel and health record information provided to veterans, next-of-kin, and authorized representatives. If the request involves a service fee, NPRC will notify the requestor as soon as that determination is made.

There is no mandatory time period for responding to a request. NPRC and the other facilities process 10,000's of requests each week. The response time is also dependent on the nature and complexity of the request. For example, requests that involve reconstruction efforts due to the 1973 fire may take longer than a request for a DD 214 from a recently archived file. NPRC, however, is generally more responsive than VA and some sort of answer should be received within a few months, if not sooner.

2.38. Military Sexual Trauma (MST)

Military sexual trauma (MST) is the term that VA uses to refer to sexual assault or repeated, threatening sexual harassment that occurred while the veteran was in the military. MST includes any sexual activity where someone is involved against his or her will – he or she may have been pressured into sexual activities (for example, with threats of negative consequences for refusing to be sexually cooperative or with implied faster promotions or better treatment in exchange for sex), may have been unable to consent to sexual activities (for example, when intoxicated), or may have been physically forced into sexual activities. Other experiences that fall into the category of MST include unwanted sexual touching or grabbing; threatening, offensive remarks about a person's body or sexual activities; and threatening or unwelcome sexual advances.

Sexual or personal trauma are events of human design that threaten or inflict harm. Trauma is defined as any lingering physical, emotional, or psychological symptoms. Examples of such trauma are:

- rape;
- physical assault;
- domestic battering; and
- stalking.

If such events occur during military service, any resulting physical or mental harm can be compensated as a service-connected condition.

MST is not limited to male on female activity. Both women and men can experience MST. Further, VA recognizes that experiences of sexual trauma can affect a person's physical and mental health even many years later. VA offers a number of free services to help veterans deal with their experiences. Veterans do not need to have a VA disability rating to receive these services and may be able to receive services even if not eligible for other VA care. A veteran does not need to have reported the incident(s) when they happened or have other documentation that they occurred to participate in VA MST services.

The most common condition experienced by MST victims is emotional or mental harm. As PTSD is a recurrent emotional reaction to a terrifying, uncontrollable, or life-threatening event, it is not an unusual condition in MST victims. Further, the symptoms may develop immediately after the event or may be delayed for years. Key symptoms include:

- sleep disturbances and nightmares;
- emotional instability;
- feelings of fear and anxiety;
- Impaired concentration;
- flash-backs; and
- problems in intimate and other interpersonal relations.

To assist victims, every VA healthcare facility now has an MST Coordinator who can answer questions about available services.

- Every VA healthcare facility has providers knowledgeable about treatment for problems related to MST. Because MST is associated with a range of mental health problems, VA's general services for PTSD, depression, anxiety, and substance abuse are important resources for MST survivors. In addition, many VA facilities have specialized outpatient mental health services focusing specifically on sexual trauma. Vet Centers also have specially trained sexual trauma counselors.

- VA has almost two dozen programs nationwide that offer specialized MST treatment in a residential or inpatient setting. These programs are for veterans who need more intense treatment and support.
- Because some veterans do not feel comfortable in mixed-gender treatment settings, some facilities have separate programs for men and women. All residential and inpatient MST programs have separate sleeping areas for men and women.

Veterans considering any of these options should speak with their existing VA healthcare provider, contact the MST Coordinator at their nearest VA Medical Center, or contact their local Vet Center.

In order to establish service connection for PTSD due to military sexual trauma, the veteran must show:

1) a diagnosis of PTSD;

2) that the PTSD is related to a military sexual trauma that occurred during active service; and

3) corroborating evidence of the trauma.

A revision to 38 C.F.R. section 3.304(f), effective July 13, 2010, renumbered the section addressing personal assaults which includes MST, to subsection 3.304(f)(5) which now states:

If a PTSD claim is based on in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident. Examples of such evidence include, but are not limited to:

- records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; and
- pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy.

Evidence of behavior changes following the claimed assault is one type of relevant evidence that may be found in these sources. Examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to:

- a request for a transfer to another military duty assignment; deterioration in work performance;
- substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or
- unexplained economic or social behavior changes.

VA will not deny a posttraumatic stress disorder claim that is based on in-service personal assault without first advising the claimant that evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor and allowing him or her the opportunity to furnish this type of evidence or advise VA of potential sources of such evidence. 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 a personal assault occurred.

While this regulation provides a great deal of flexibility in the types of corroborating evidence a claimant can use to support a MST claim, if VA evaluates a veteran's claimed stressor under subsection (f)(5), his or her lay testimony *must* be corroborated by other evidence to establish the occurrence of the stressor. *See, e.g., Menegassi v. Shinseki*, 638 F.3d, 1379, 1382 (Fed. Cir. 2011).

MST, and any other assault, victims should note that assaults by "friendly" forces are not covered by subsection 3.304(f)(3), which allows award of certain PTSD claims without documented stressors. That subsection applies only when the asserted in-service stressors are related to the "fear of hostile military activity." Subsection (f)(3) defines that phrase to mean "that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others." The Court has rejected the argument that sexual harassment and assault by members of the U.S. military satisfy this definition finding that the examples provided by Congress in authorizing this provisions all involve actions originating from individuals who commit hostile military or terrorist acts toward the U.S. military, *not* nefarious, or even criminal, acts of one service member directed at another service member. *Acevedo v. Shinseki*, 25 Vet. App. 286, 291 (2012) (citing *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2012)).

The Court, however, did not preclude VA from evaluating a claimed stressor, such as MST, under subsections (f)(3) *and* (f)(5). A MST victim may utilize the process under subsection (f)(3) when the circumstances are such that the veteran's claimed stressor is related to her "fear of hostile military or terrorist activity." However, the reduced evidentiary burden of subsection (f)(3) is not applicable to a claim based on a bare assertion that a claimant's stressors are related to his or her fear of hostile military activity. The Court suggested that the shootings at Fort Hood may be an example of a situation where subsection (f)(3) may be applicable.

2.39. National Guard and Reserve Issues

The eligibility of National Guard members and Reservists for VA compensation and other benefits is an issue that has generated a lot of rumors and bad information.

National Guard

Members of the National Guard are only eligible for VA compensation benefits when a medical condition results from or occurs during federal service. Guardsmen who are serving under state orders are not eligible for VA benefits. Federal service occurs when the service is ordered by the President under 10 U.S.C. section 12401.

Guard duty ordered by a state governor is not federal service and does not provide eligibility for VA benefits. This is because "members of the Army National Guard of the United States and the Air National Guard of the United States are not in active Federal service except when ordered thereto under law." The Court has made clear that "a member of the National Guard holds a status as a member of the federal military or the state militia, but never both at once." *Allen v. Nicholson*, 21 Vet. App. 54, 57 (2007). Training activities are included if "active duty" training. *See* 32 U.S.C. §§ 316, 502-505; 38 U.S.C. § 101(22) (definition of "active duty for training"). Other training activities are not considered "active duty" and do not provide eligibility for VA benefits. 38 U.S.C. § 101(23) (definition of "inactive duty for training").

Most states offer some level of benefits to Guard members inured while on state-ordered duty. Guardsmen with conditions arising from non-federal service should contact their state government for compensation eligibility requirements.

Reserves

One of the requirements for VA to consider an individual a "veteran" is "active" service. The term "active duty" is defined by statute as "full-time duty in the Armed Forces, other than active duty for training." 38 U.S.C. § 101(21)(A). The law also specifies specific additional service that confers eligibility for VA benefits in addition to the Army, Navy, Marine Corps, Air Force, and Coast Guard, including:

- National Oceanic and Atmospheric Administration (NOAA) or Environmental Science Service Administration (or predecessor agency) commissioned officer;
- Public Health Service commissioned officer;
- Military service academy cadet or midshipman;
- Military preparatory school attendee; and
- Authorized travel to and from any of the above.

Health conditions resulting from any of the above full-time service can be eligible for VA compensation, subject to the other requirements for an award.

2.40. Painful Motion

An important symptom affecting a rating of the bones and joints is the amount that limb motion is limited by disease. A related issue is how the amount of pain experienced during motion impacts the determination of how much motion is limited. Section 4.59 is entitled "Painful motion," and states that:

With any form of arthritis, painful motion is an important factor of disability, the facial expression, wincing, etc., on pressure or manipulation, should be carefully noted and definitely related to affected joints. Muscle spasm will greatly assist the identification. Sciatic neuritis is not uncommonly caused by arthritis of the spine. The intent of the schedule is to recognize painful motion with joint or periarticular pathology as productive of disability. It is the intention to recognize actually painful, unstable, or malaligned joints, due to healed injury, as entitled to at least the minimum compensable rating for the joint. Crepitation either in the soft tissues such as the tendons or ligaments, or crepitation within the joint structures should be noted carefully as points of contact which are diseased. Flexion elicits such manifestations. The joints involved should be tested for pain on both active and passive motion, in weight-bearing and nonweight-bearing and, if possible, with the range of the opposite undamaged joint.

In relevant part, section 4.59 recognizes that "painful motion is an important factor of disability" and states that "[i]t is the intention [of the rating schedule] to recognize painful ... joints, due to healed injury, as entitled to at least the minimum compensable rating for the joints." (emphasis added). *Mitchell v. Shinseki*, 25 Vet. App. 32, 40 (2011).

The Court has determined that the rule applies to *all* painful conditions not just arthritis because a proper interpretation of a regulation "examines and reconciles the text of the entire regulation, not simply isolated sentences." *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577–78 (Fed. Cir. 1995) (citing *Beecham v. United States*, 511 U.S. 368, 372 (1994)). In the eight-sentence regulation, the majority of the regulation provides guidance for noting, evaluating, and rating joint pain, and that guidance is devoid of any requirement that the pain be arthritis related. *Cf. DeLuca v. Brown*, 8 Vet. App. 202, 207 (1995) (rejecting interpretation that 38 C.F.R. section 4.45 is limited to muscle and nerve conditions because, inter alia, plain language does "not refer solely to muscle and nerve conditions"). Here, the title — "Painful motion" — reflects the subject matter of the regulation in general and implies no limitation to arthritis claims.

Overall, the first portion of the regulation regards painful motion involved with arthritis in particular. The remaining portion comments on joint pain in general, including pain caused by healed injury, mal-aligned joints, and crepitation; and the phrase introducing the first portion is neither insignificant nor limiting to the regulation. So when section 4.59 is raised by a claimant or reasonably raised by the record, even in non-arthritis contexts, the Board should address its applicability. *See Robinson v. Peake*, 21 Vet. App. 545, 552 (2008) (Board is required to consider all issues raised either by the claimant or reasonably by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991) (applicable provisions of law and regulation should be addressed when they are made "potentially applicable through the assertions and issues raised in the record"). *Burton v. Shinseki*, 25 Vet. App. 1, 3-5 (2011).

2.41. Persian Gulf Illness (Undiagnosed Illness)

Congress has decided as a matter of policy, stemming at least in part from difficulty of proof, that even though a Persian Gulf War veteran's symptoms may not at this time be attributed to a specific disease, the symptoms may nonetheless be related to conditions in the Southwest Asia theater of operations and, for that reason, are presumed to be service connected. Section 1117 of title 38 of the U.S. Code provides for entitlement to compensation on a presumptive basis to a Persian Gulf War veteran who complains of having an undiagnosed illness or illnesses that are 10% or more disabling during the presumption period established by the Secretary. 38 U.S.C. § 1117(a)(1)(A) and (B). *See* 38 U.S.C. § 1117; 38 C.F.R. § 3.317(a)(1)(i). A veteran is, therefore, not required to provide evidence linking his or her current conditions to events during service under these conditions.

Pursuant to section 1117(d)(2), the Secretary has promulgated 38 C.F.R. section 3.317, which provides, in pertinent part:

(a)(1) Except as provided in paragraph (c) of this section, VA will pay compensation in accordance with chapter 11 of title 38, United States Code, to a Persian Gulf veteran who exhibits objective indications of a qualifying chronic disability, provided that such disability:

(i) Became manifest either during active military, naval or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10% or more not later than December 31, 2016; and

(ii) By history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

...

(3) For purposes of this section, "objective indications of chronic disability" include both "signs," in the medical sense of objective evidence perceptible to an examining physician, and other, non-medical indicators that are capable of independent verification.

....

(b) For the purposes of paragraph (a)(1) of this section, signs or symptoms which may be manifestations of undiagnosed illness or medically unexplained chronic multisymptom illness include, but are not limited to:

1. Fatigue;
2. Signs or symptoms involving skin;
3. Headache;
4. Muscle pain;
5. Joint pain;
6. Neurologic signs or symptoms;
7. Neuropsychological signs or symptoms;
8. Signs or symptoms involving the respiratory system (upper or lower);
9. Sleep disturbances;
10. Gastrointestinal signs or symptoms;
11. Cardiovascular signs or symptoms;
12. Abnormal weight loss; and
13. Menstrual disorders.

38 C.F.R. § 3.317; *see also* 38 U.S.C. § 1117(g). VA also has established presumptive service connection for the following infectious diseases if it becomes manifest in a veteran with a qualifying period of service:

(i) Brucellosis;

(ii) Campylobacter jejuni;

(iii) Coxiella burnetii (Q fever);

(iv) Malaria;

(v) Mycobacterium tuberculosis;

(vi) Nontyphoid Salmonella;

(vii) Shigella;

(viii) Visceral leishmaniasis; and

(ix) West Nile virus.

38 C.F.R. § 3.317(c)(2).

When promulgating this regulation, VA provided the following explanatory statement:

The regulation does not require that physicians make such a diagnosis of an undefined disease. Physicians should simply record all noted signs and reported symptoms, document all clinical findings, and provide a diagnosis where possible. If the signs and symptoms are not characteristic of a known clinical diagnosis, the physician should so indicate. This conforms with the usual standards of medical practice.

Some veterans may present with purely subjective symptoms, which, nonetheless, establish a basis for a valid claim under the provisions of this rule. We believe, however, that it is not only fair but also in keeping with Congressional intent to require some objective indication of the presence of a chronic disability attributable to an undiagnosed illness before awarding compensation.

Ordinarily, an objective indication is established through medical findings, i.e., "signs" in the medical sense of evidence perceptible to an examining physician. However, we also will consider non-medical indications which can be independently observed or verified, such as time lost from work, evidence that a veteran has sought medical treatment for his or her symptoms, evidence affirming changes in a veteran's appearance, physical abilities, and mental or emotional attitude, etc. Lay statements from individuals who establish that they are able from personal experience to make their observations or statements will be considered as evidence when VA determines whether the veteran is suffering from an undiagnosed illness.

60 Fed. Reg. 6,660-63 (Feb. 3, 1995). Manifestations of undiagnosed illnesses are presumed service connected unless there is affirmative evidence that an undiagnosed illness was not incurred in service or was instead caused by a supervening condition. *See* 38 C.F.R. § 3.317(c)(1)(2).

Thus, in order to establish service connection under 38 U.S.C. section 1117 and 38 C.F.R. section 3.317, a claimant must present evidence that he or she is a Persian Gulf veteran who:

1. exhibits objective indications;
2. of a chronic disability such as those listed in paragraph (b) of 38 C.F.R. § 3.317;
3. which became manifest either during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10% or more not later than December 31, 2016; and
4. such symptomatology by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

38 U.S.C. § 1117; 38 C.F.R. § 3.317(a). Objective medical evidence is not required for an award of service connection under section 1117. Rather, only competent evidence is required with "signs in the medical sense of objective evidence perceptible to an examining physician, and other, non-medical indicators that are capable of independent verification." 38 C.F.R. § 3.317(a)(2); *see also* 60 Fed. Reg. 6,660-63 (Feb. 3, 1995); *Gutierrez v. Principi*, 19 Vet. App. 1, 6-9 (2004).

A qualifying chronic disability may result from an undiagnosed illness that cannot be attributed to any known clinical diagnosis by history, physical examination, or laboratory tests. *See* 38 U.S.C. § 1117(a)(2); 38 C.F.R. § 3.317(a)(2). For purposes of establishing a qualifying chronic disability, an undiagnosed illness may be manifested by muscle or joint pain. *See* 38 U.S.C. §§ 1117(g)(4)-(5); 38 C.F.R. §§ 3.317(b)(4)-(5). To determine whether the undiagnosed illness has manifested to a degree of 10% or more, the veteran's condition

must be rated analogously to a disease or injury in which the functions affected, anatomical localization, or symptomatology are similar. *See* 38 C.F.R. § 3.317(a)(5).

The very essence of an undiagnosed illness is that there is no diagnosis. The function affected, anatomical localization, or symptomatology of an undiagnosed illness cannot be analogous if the Board applies that rating criteria to require objective evidence of a diagnosed disability. *See Gutierrez v. Principi*, 19 Vet. App. 1, 9 (2004) ("Objective medical evidence is not required for an award of service connection under section 1117."). Requiring a diagnosis in order to grant a 10% disability rating where a diagnosis cannot be had - is arbitrary and capricious because the analogy is, at best, illusory. *Stankevich v. Nicholson*, 19 Vet. App. 470, 471-73 (2006).

2.42. Posttraumatic Stress Disorder (PTSD)

Establishing service connection for Posttraumatic Stress Disorder (PTSD) requires:

1. evidence of a current diagnosis of PTSD;
2. credible supporting evidence that the claimed in-service stressor actually occurred; and
3. medical evidence of a causal link between current symptomatology and the specific claimed in-service stressor.

Sizemore v. Principi, 18 Vet. App. 264, 269-70 (2004). Until the 2010 amendment to section 3.304(f)(3), lay testimony alone was *not* sufficient to confirm the existence of a claimed in-service stressor for a noncombat veteran. 38 C.F.R. § 3.304(f); *see Sizemore*, 18 Vet. App. at 269-70.

Now, the lay testimony of a veteran alone may, under certain circumstances, establish the occurrence of an in-service stressor. A veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor for purposes of establishing service connection for PTSD if:

- PTSD is diagnosed in service, and the stressor is related to that service; or
- the stressor is related to the veteran's
- engagement in combat with the enemy;
- experience as a POW; or
- fear of hostile military or terrorist activity, if a VA psychiatrist or psychologist, or contract equivalent, confirms
    - the claimed stressor is adequate to support a diagnosis of PTSD; and
    - the veteran's symptoms are related to the claimed stressor.

Further the veteran's testimony must be consistent with the:

- circumstances, conditions, or hardships of service for claims based on an in-service PTSD diagnosis or POW or combat service; or
- places, types, and circumstances of service for claims based on a fear of hostile military or terrorist activity; and
- there must be no clear and convincing evidence to the contrary.

38 C.F.R. § 3.304(f)(3). For claims decided prior to July 13, 2010, a veteran's testimony alone can *not* establish the occurrence of a stressor that was related to the veteran's fear of hostile military or terrorist activity. But individual awards and decorations are considered as indicating that a veteran served in the immediate area and at the particular time in which the stressful event is alleged to have occurred and to support the description of the event.

Engaging in combat with the enemy means personal participation in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality. It includes presence during such events either as a combatant, or service member performing duty in support of combatants, such as providing medical care to the wounded.

Fear of hostile military or terrorist activity means

- the veteran experienced, witnessed, or was confronted with an event or circumstance that involved:
- actual or threatened death or serious injury, or
- a threat to the physical integrity of the veteran or others, and
    - the veteran's response to the event or circumstances involved a psychological or psycho-physiological state of fear, helplessness, or horror.

Examples of exposure to hostile military or terrorist activity include presence at events involving:

- actual or potential improvised explosive devices (IEDs);
- vehicle-imbedded explosive devices;
- incoming artillery, rocket, or mortar fires; and
- small arms fire, including suspected sniper fires, or attacks upon friendly aircraft.

The new rule applies to an application for service connection for PTSD that

1. Is received by VA on or after July 13, 2010;
2. Was received by VA before July 13, 2010 but has not been decided by a VA regional office as of that date;
3. Is appealed to the Board of Veterans' Appeals on or after July 13, 2010;
4. Was appealed to the Board before July 13, 2010 but has not been decided by the Board as of that date; or
5. Is pending before VA on or after July 13, 2010 because the Court vacated a Board decision on the application and remanded it for readjudication.

75 Fed. Reg. 39,843; *Ervin v. Shinseki*, 24 Vet. App. 318, 320-21 (2011), *opinion corrected*, 25 Vet. App. 178 (2012).

When a veteran has received any of the combat decorations listed below, VA will presume that the veteran engaged in combat with the enemy, unless there is clear and convincing evidence to the contrary:

- Air Force Achievement Medal with "V" Device;
- Air Force Combat Action Medal;
- Air Force Commendation Medal with "V" Device;
- Air Force Cross;
- Air Medal with "V" Device;
- Army Commendation Medal with "V" Device;
- Bronze Star Medal with "V" Device;
- Combat Action Badge;
- Combat Action Ribbon (Prior to February 1969, the Navy Achievement Medal with "V" Device was awarded.);
- Combat Aircrew Insignia;
- Combat Infantry/Infantryman Badge;
- Combat Medical Badge;

- Distinguished Flying Cross;
- Distinguished Service Cross;
- Joint Service Commendation Medal with "V" Device;
- Medal of Honor;
- Navy Commendation Medal with "V" Device;
- Navy Cross;
- Purple Heart; and
- Silver Star.

Primary evidence is generally considered the most reliable source for corroborating in-service stressors and should be carefully reviewed when corroboration is required. It is typically obtained from the National Archives and Records Administration (NARA) or Department of Defense (DoD) entities, such as service departments, the U.S. Army and Joint Services Records Research Center (JSRRC), and the Marine Corps University Archives (MCUA). Primary evidence includes:

- a DD Form 214;
- service personnel records (SPRs) and pay records;
- military occupation evidence;
- hazard pay records;
- service treatment records;
- military performance reports;
- verification that the veteran received *Combat/Imminent Danger/Hostile Fire Pay;*
- unit and organizational histories;
- daily staff journals;
- operational reports-lessons learned (ORLLs);
- after action reports (AARs);
- radio logs, deck logs, and ship histories;
- muster rolls;
- command chronologies and war diaries; and
- monthly summaries and morning reports.

The following alternative sources of evidence may be used as sources of information for confirming participation in combat or to otherwise corroborate a claimed in-service stressor when primary sources of corroboration are not available:

- buddy statements;
- contemporaneous letters and diaries;
- newspaper archives; and
- information from Veterans Benefits Administration-sanctioned websites.

A buddy statement should be accepted as corroboration of a claimed in-service stressor, so long as the statement is consistent with the time, place, and circumstances of the service of both the veteran and the buddy. If the evidence available calls into question the qualifications of the buddy to make the statement, VA may request the "buddy" to submit his or her *DD Form 214* or other evidence of service with the claimant.

In the process of evaluating a mental disorder, VA is required to consider a number of pertinent factors, such as the frequency, severity, and duration of a veteran's psychiatric symptoms. After consideration of these factors, and based on all the evidence of record that bears on occupational and social impairment, VA must assign a disability rating that most closely reflects the level of social and occupational impairment a veteran is suffering. Where there is a question as to which of two evaluations to apply, VA should assign the higher rating if a

veteran's disability more closely resembles the criteria for the higher rating; otherwise the lower rating will be assigned. *See* 38 C.F.R. § 4.7.

For PTSD claims based on in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident. Examples of such evidence include, but are not limited to: records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians and statements from family members, roommates, fellow service members, or clergy. 38 C.F.R. § 3.304(f)(5). In cases involving alleged in-service personal assaults, "medical opinion evidence may be submitted for use in determining whether the occurrence of a stressor is corroborated." *Menegassi v. Shinseki*, 638 F.3d 1379, 1382 (Fed. Cir. 2011) (citing 38 C.F.R. § 3.304(f)(5)). However, such an opinion may "be weighed by the Board in context with the other record evidence." *Id.* at 1382 n.1; *see also* 67 Fed. Reg. 10,330, 10,330-31 (Mar. 7, 2002) ("VA is not required to accept a doctor's diagnosis of PTSD due to a personal assault as proof that the stressor occurred or that the PTSD is service connected."). Military records may also be reviewed to determine if a there was disciplinary action or performance declines after the alleged incident.

The Secretary, acting within his authority to "adopt and apply a schedule of ratings," chose to create *one general rating* formula for mental disorders. 38 U.S.C. § 1155; *see also* 38 U.S.C. § 501; 38 C.F.R. § 4.130. By establishing one general formula to be used in rating more than 30 mental disorders, there can be no doubt that the Secretary anticipated that *any* list of symptoms justifying a particular rating would in many situations be either under- or over-inclusive. The Secretary's use of the phrase "such symptoms as," followed by a list of examples, provides guidance as to the severity of symptoms contemplated for each rating, in addition to permitting consideration of other symptoms, particular to each veteran and disorder, and the effect of those symptoms on the claimant's social and work situation.

The Court has held that the DSM-IV criteria will be considered in making the initial determination of service connection for PTSD, but that once service connection is granted, the diagnostic code "will be for application to establish the appropriate disability rating." *Cohen v. Brown*, 10 Vet. App. 128, 152 (1997). As stated above, the evidence considered in determining the level of impairment under section 4.130 is not restricted to the symptoms provided in the diagnostic code. Instead, the rating specialist is to consider all symptoms of a claimant's condition that affect the level of occupational and social impairment, including, if applicable, those identified in the DSM-IV. *See* 38 C.F.R. § 4.126. If the evidence demonstrates that a claimant suffers symptoms or effects that cause occupational or social impairment equivalent to what would be caused by the symptoms listed in the diagnostic code, the appropriate equivalent rating will be assigned. *Mauerhan v. Principi*, 16 Vet. App. 436, 442-43 (2002).

The Court has found that mental health professionals making a PTSD diagnosis "are presumed to know the DSM requirements applicable to their practice and to have taken them into account in providing a PTSD diagnosis." *Cohen*, 10 Vet. App. at 140.

When a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted. 38 C.F.R. § 4.129.

2.43. Prostate Issues

Prostate gland injuries, infections, hypertrophy, postoperative residuals are rated under DC 7527. A malignant neoplasms (i.e., cancerous tumor) of the genitourinary system (including the prostate) is rated under DC 7528 at 100%. However,

Following the cessation of surgical, X-ray, antineoplastic chemotherapy or other therapeutic procedure, the rating of 100 percent shall continue with a mandatory VA examination at the expiration of six months. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter. If there has been no local reoccurrence or metastasis, rate on residuals as voiding dysfunction or renal dysfunction, whichever is predominant.

In other words, the 100% rating remains unchanged for 6 months after treatment, but then the claimant must undergo a mandatory VA examination. The rating will then revised to represent the actual medical condition following the treatment based on the impact on affected organs. However, if a claimant diagnosed with prostate cancer elects not to undergo active treatment (chooses "watchful waiting"), the 100% rating should remain in place.

2.44. Radiation Exposure

Service connection for a condition which is claimed to be attributable to ionizing radiation exposure during service may be established in one of three different ways.[1] *Ramey v. Brown,* 9 Vet. App. 40, 44 (1996), *aff'd sub nom. Ramey v. Gober,* 120 F.3d 1239 (Fed. Cir. 1997). First, there are 15 types of cancer which are presumptively service connected. 38 U.S.C. § 1112(c). Second, 38 C.F.R. § 3.311(b) provides a list of "radiogenic diseases" which will be service connected provided that certain conditions specified in that regulation are met. Third, direct service connection can be established by "show[ing] that the disease or malady was incurred during or aggravated by service," a task which "includes the difficult burden of tracing causation to a condition or event during service." *Combee v. Brown,* 34 F.3d 1039, 1043 (Fed. Cir. 1994).

Under VA regulations, a veteran who was exposed to radiation during service and who later develops certain kinds of cancer, including cancers of the pharynx, esophagus, and lung, is entitled to a presumption that his cancer is service connected. 38 C.F.R. § 3.309(d). Additionally, if a veteran who was exposed to ionizing radiation during service later develops a "radiogenic disease," including all types of cancer, VA must refer the veteran's claim to the Under Secretary for Benefits for review. 38 C.F.R. § 3.311(b). On review, the Under Secretary for Benefits may request an advisory opinion from the Under Secretary for Health and must consider factors including the veteran's probable radiation dose, the relative sensitivity of the tissue involved to ionizing radiation, the veteran's gender and age, the time-lapse between exposure and onset of the disease, and the extent to which factors outside of service may have contributed to the development of the disease. 38 C.F.R. §§ 3.311(c), (e). Based on these factors, the Under Secretary for Benefits must determine whether it is at least as likely as not that the veteran's radiogenic disease resulted from in-service radiation exposure. 38 C.F.R. § 3.311(c)(1).

Section 3.311(c)(1) requires the Under Secretary for Benefits to "consider the claim with reference to the factors specified in paragraph (e)." The Court has ruled that under the plain meaning of this section, the Under Secretary for Benefits is not required to discuss each of the factors listed, but rather to consult these factors as a point of reference in determining the recommendation to the VARO. Failure to *discuss* these factors still requires VA to *consider* these factors. *See Hilkert v. West,* 12 Vet. App. 145 (1999).

After he has reviewed the claim, the Under Secretary for Benefits must choose one of two possible recommendations. *See* 38 C.F.R. § 3.311(c)(1). The Under Secretary for Benefits may find that it is "as likely as not" that the veteran's disease resulted from exposure to radiation in service, thereby recommending service connection. *See* 38 C.F.R. § 3.311(c)(1)(i). On the other hand, the Under Secretary for Benefits may find that there is "no reasonable possibility" that the veteran's disease resulted from radiation exposure in service. *See* 38 C.F.R. § 3.311(c)(1)(ii). If the Under Secretary for Benefits finds that the claim has "no reasonable possibility," he must inform the VARO of the decision in writing "setting forth the rationale for this conclusion." 38 C.F.R. § 3.311(c)(1)(ii).

If after receiving the advisory opinion from the Under Secretary for Health, the Under Secretary for Benefits still cannot make the conclusion as ordered under 38 C.F.R. section 3.311(c)(1), the matter must be referred to an outside consultant. 38 C.F.R. § 3.311(c)(2). Rather than stating that the outside consultant shall consider the claim with reference to the list of factors set forth, the regulation specifically provides that the consultant's report must include a written evaluation of a list of six factors similar to the list of factors set forth in 38 C.F.R. section 3.311(e). This regulation does not require or imply a need for all factors to be explicitly referred to in writing in order for the regulation to function logically. In some cases, it would be unnecessary to analyze all of the factors when the expert found that some of the factors were dispositive. Therefore, the Court has held that a discussion by the Under Secretary for Benefits of all of the factors under paragraph (e) is not required if the Under Secretary for Benefits recommends that there is "no reasonable possibility that the veteran's disease resulted from radiation exposure in service" as authorized under 38 C.F.R. section 3.311(c)(1)(ii).

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[1] VA currently consolidates adjudication of radiation claims at the Jackson regional office.

2.45. Survivorship

Until recently, an unresolved claim "died with the veteran" no matter how long it had been pending or whether VA's errors had delayed a decision. Sadly, mixing an adjudicatory process with median processing times approaching a decade with elderly and often ill claimants left many families with no decision, no benefits, and no means to obtain either. Survivors, mostly elderly widows, were relegated to starting the entire claims process over again (no matter how far the deceased claimant had progressed), adding more years or decades to the process.

In 2008, Congress recognized the problem and enacted a statute allowing the substitution of specified survivors for a deceased claimant.

1. If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion.
2. Any person seeking to be substituted for the claimant shall present evidence of the right to claim such status within such time as prescribed by the Secretary in regulations.
3. Substitution under this subsection shall be in accordance with such regulations as the Secretary may prescribe.

38 U.S.C. § 5121A. This law limits the pool of possible survivors eligible for substitution to three categories of family members: (1) the spouse, (2) the children, and (3) financially-dependent parents of a veteran who died on or after October 10, 2008. To the extent substitution is granted, it does away with the inequities of the "claim dies with the veteran" nature of VA benefits for those with a pending claim or appeal at the time of death.

Enactment of the new law has not ended the matter, however. VA only published proposed rules on substitution under the duress of federal lawsuit. Even now, the way VA implements these rules largely leave intact the worst aspects of the "deny 'till they die" process Congress sought to cure. As a result, individuals seeking substitution must know how to navigate the existing process.

VA's substitution rules define a "pending claim" as one that has been filed at a regional office but which has not yet been adjudicated (i.e., no rating decision issued). A "pending appeal" is also created by the filing of a NOD in response to a denied claim. In either situation, if the claimant dies, an eligible survivor has one year from the date of the death to request substitution. Curiously, VA's regulations do not require the agency to notify potentially eligible survivors – the survivors have to know about and request substitution.

The VA process for granting substitution is described in VA Fast Letter 10-30 published in August 2010. An eligible survivor must request substitution in writing from the same regional office where the original claim or appeal is pending. The written request must include the term "substitute" or "substitution," the deceased claimant's name, his or her claim number, along with the evidence supporting eligibility (e.g., marriage certificate, birth certificate, etc.). The survivor can also request substitution by completing and submitting a VA Form 21-0847. If sufficient evidence is not provided or located in the existing VA file, a substitution applicant may be requested to provide additional evidence. VA will mail a response approving or denying substitution. A denial of substitution is appealable.

If a claimant dies while his or her claim is "pending" or "on appeal" at the regional office (i.e., an NOD has been filed), an eligible survivor can apply to substitute for the deceased claimant. Upon receipt of a substitution request, VA will put the claim or appeal on hold and process the substitution request. If no substitution request is received within a year from the claimant's death, the regional office will close the case.

Although a survivor can be awarded accrued benefits without seeking substitution, there is an important difference in the evidence that VA will consider in reaching a decision. An award of accrued benefits is determined based on existing ratings or decisions, or decisions based on evidence in the file at date of death. As defined by 38 C.F.R. § 3.1000(d)(4), "evidence in the file at date of death" means evidence in VA's possession on or before the date of the veteran's death, even if such evidence was not physically located in the VA claims folder on or before the date of death.

A substitute claimant, however, can submit additional evidence in support of the claim. VA is also responsible for obtaining any additional evidence required and addressing notice or due process defects in the same manner as if the original claimant were still alive. Unlike prior accrued benefits claims, the record is not closed on the date of death of the original claimant, but remains open for the submission and development of any pertinent additional evidence. VA is also supposed to automatically consider any eligible survivor submitting a claim for accrued benefits as requesting to substitute.

When an appeal is before the Board (i.e., the claims file has been forwarded from the regional office), VA's current process requires the Board to dismiss a pending appeal "without prejudice" upon notice that a claimant has died. The Board must then return the entire claim to the regional office to await a substitution request.

Here again, if no substitution request is received within the year from the claimant's death the case is closed. If a request is received and approved, the case is returned to the Board for resolution of the underlying claim(s).

Claimants should be aware that the current substitution process creates two "zones of no substitution." The first zone being the time between a denied claim and submittal of an NOD; and the second zone being the time between an adverse Board decision and the filing of a Notice of Appeal with the Veterans Court. During these periods VA contends that, "substitution is not available because a person may not substitute for the purpose of initiating a claim or an appeal." As VA currently applies the law, if a claimant has not filed an NOD or Notice of Appeal before he or she dies, VA will not grant substitution – in other words, the claim *still* "dies with the vet" in these circumstances.

The Court, however, has taken a different view of Congress's intent in creating a substitution right. Contrary to the VA process, the Court determined in *Breedlove v. Shinseki*, 24 Vet. App. 7, 8 (2010), that there should be *no* "zone of no substitution" where "a veteran had died *after* issuance of the Board decision but *before* the time for filing a reply brief" in that Court. Further, the Federal Circuit has ruled that the survivor need not have filed an application for accrued benefits with VA, to obtain substitution from the Court.

2.46. Tobacco

VA treats tobacco-related health conditions differently depending on when the claim was submitted. 38 C.F.R. section 3.300 addresses claims based on the effects of tobacco products.

(a) For claims received by VA after June 9, 1998, a disability or death will not be considered service-connected on the basis that it resulted from injury or disease attributable to the veteran's use of tobacco products during service. For the purpose of this section, the term "tobacco products" means cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

(b) The provisions of paragraph (a) of this section do not prohibit service connection if:

1. The disability or death resulted from a disease or injury that is otherwise shown to have been incurred or aggravated during service. For purposes of this section, "otherwise shown" means that the disability or death can be service-connected on some basis other than the veteran's use of tobacco products during service, or that the disability became manifest or death occurred during service; or
2. The disability or death resulted from a disease or injury that appeared to the required degree of disability within any applicable presumptive period; or
3. Secondary service connection is established for ischemic heart disease or other cardiovascular disease.

(c) For claims for secondary service connection received by VA after June 9, 1998, a disability that is proximately due to or the result of an injury or disease previously service-connected on the basis that it is attributable to the veteran's use of tobacco products during service will not be service-connected.

Thus, for claims submitted after June 9, 1998, a claimant must demonstrate that the condition claimed was attributable to something other than the veteran's tobacco use. *See Stoll v. Nicholson*, 401 F.3d 1375, 1380 (Fed. Cir. 2005) (holding that 38 U.S.C. section 1103(a) "applies to [dependency and indemnity compensation] claims of surviving spouses of veterans, even if the veterans have previously established service connection for their disabilities"); *Kane v. Principi*, 17 Vet. App. 97, 102 (2003) (acknowledging that a claim for dependency and indemnity compensation is "a new claim, regardless of the outcome of previous [regional office] decisions regarding service connection").

However, secondary service connection for death or disability attributable to tobacco use subsequent to military service can be established based on nicotine dependence that had arisen in service if the addiction was the proximate cause of the death or disability. G.C. Prec. 19-97, para. 3; *see also Davis v. West*, 13 Vet. App. 178, 183 (1999). A subsequent event or an intervening or supervening cause, however, may interrupt the causal connection between an event or circumstance and subsequent incurrence of disability or death, severing the causal connection between the original act and the injury. *Id.*, para. 4. VA has adopted the criteria from the DSM-IV for diagnosing whether a veteran is dependent on nicotine and for determining when "sustained full remission" has been achieved. VA has also determined that "[w]here a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition" should "be considered to have been severed." *Id.*, para. 7.

The Court has held that nicotine dependence is a medical question that must be answered by a medical opinion or diagnosis, *see Davis*, 13 Vet. App. at 183-84, and that the onset of nicotine dependence is also a medical issue. *See Parker v. Principi*, 15 Vet. App. 407, 411 (2002). According to G.C. Prec. 19-97, in diagnosing nicotine dependence under the DSM-IV, an examiner must determine whether three or more of the following criteria are occurring at any time in the same 12-month period:

1. tolerance, as manifested by the absence of nausea, dizziness, and other characteristic symptoms despite use of substantial amounts of nicotine or a diminished effect observed with continued use of the same amount of nicotine-containing products;
2. withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms;
3. use of tobacco in larger amounts or over a longer period than was intended;
4. persistent desire or unsuccessful efforts to cut down or control nicotine use;
5. devotion of a great deal of time in activities necessary to obtain nicotine (e.g., driving long distances) or use nicotine (e.g., chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (e.g., giving up an activity which occurs in smoking-restricted areas); and
6. continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine.

G.C. Prec. 19-97 at para. 5 (citing DSM-IV at 181, 243-45). According to the General Counsel Opinion and the DSM-IV, a "sustained full remission" of nicotine dependence is achieved if none of the criteria for dependence have been met at any time during a period of 12 months or longer. *Id.* at para. 7 (citing DSM-IV at 180).

Under the DSM-IV, the criteria for nicotine dependence are used both for diagnosing nicotine dependence and for diagnosing a remission of the nicotine dependence. If the criteria are met for a 12-month period, the DSM-IV provides that the diagnosis of nicotine dependence is appropriate. If none of the criteria is met for a period of 12 months or longer, the DSM-IV provides that a "sustained full remission" of the nicotine dependence is achieved. In both instances, the criteria for dependence in the DSM-IV, which consist of various symptoms, are analyzed and must be used in determining whether there is dependence or no dependence. The Court has concluded that, because the question whether an individual has a nicotine dependence is a medical question that must be answered by a medical opinion or diagnosis, the question whether an individual has achieved a "sustained full remission" of the nicotine dependence is also a medical question that must be answered by a medical opinion. *See Davis* and *Parker*. VA is required to use medical evidence in assessing remission, i.e., in finding a "sustained full remission."

When an accrued benefits claim is filed after June 9, 1998, the cutoff date for filing tobacco-related claims, 38 U.S.C. section 1103 does *not preclude* the claimant from receiving accrued benefits for asserted tobacco-related disabilities when VA received the underlying claims before section 1103's June 9, 1998, cutoff date. *See Sheets v. Nicholson,* 20 Vet. App. 463, 465-66 (2006) (holding that 38 U.S.C. section 1103 has no effect on an accrued-benefits claim if VA received the veteran's underlying claim by June 9, 1998); *see also* 38 C.F.R. § 3.300(a) ("For claims received by VA after June 9, 1998, a disability or death will not be considered service-connected on the basis that it resulted from injury or disease attributable to the veteran's use of tobacco products during service.").

2.47. Total Disability Based on Individual Unemployability (TDIU/IU)

Total Disability Based On Individual Unemployability (TDIU/IU)

The ability to overcome the handicap of disability varies widely among individuals. A rating, however, is based primarily upon the average impairment in earning capacity, that is, upon the economic or industrial handicap which must be overcome and not from individual success in overcoming it. However, full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability and to the effect of combinations of disability.

Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; provided that permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person. VA will consider the following to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. Other total disability ratings are scheduled in the various bodily systems of this schedule.

Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. If a claimant has only one such disability, the disability must be rated at 60 percent or more, and that, if the claimant has two or more disabilities, at least one disability must be rated at 40 percent or more, with sufficient additional disability ratings to bring the combined rating to 70 percent or more. For the

above purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability:

1. disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable;
2. disabilities resulting from common etiology or a single accident;
3. disabilities affecting a single body system, e.g., orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric;
4. multiple injuries incurred in action; or
5. multiple disabilities incurred as a prisoner of war.

Further, the existence or degree of nonservice-connected disabilities or previous unemployability status should be disregarded when the rating requirements above are met and the service-connected disabilities render a veteran unemployable. 38 C.F.R. § 4.16(a).

Marginal employment is not to be considered substantially gainful employment. Marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination. 38 C.F.R. § 4.16(a).

All veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities are supposed to be rated totally disabled. Therefore, unemployable claimants who do not otherwise meet the requirements for TDIU should be considered for extra-schedular consideration. In seeking extra-schedular consideration, the rating board should include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment, and all other factors having a bearing on the issue. 38 C.F.R. § 4.16.

When the percentage requirements are met, and the disabilities involved are of a permanent nature, a rating of permanent and total disability will be assigned if a claimant is found to be unable to secure and follow substantially gainful employment because of the disability. Prior employment or unemployment status is immaterial if the claimant's disabilities render him or her unemployable. In making such determinations, the following guidelines are to be used:

(a) Marginal employment, for example, as a self-employed farmer or other person, while employed in his or her own business, or at odd jobs or while employed at less than half the usual remuneration will not prevent a finding of unemployability, if the employment restriction is due to disability.

(b) Claims of all veterans who fail to meet the percentage standards but who meet the basic entitlement criteria and are unemployable, will be referred by the rating board to the Veterans Service Center Manager or the Pension Management Center Manager.

38 C.F.R. § 4.17. A permanent and total disability rating is not to be precluded by reason of the coexistence of a misconduct disability when: (a) A veteran, regardless of employment status, also has innocently acquired a 100 percent disability, or (b) where unemployable, the veteran has other disabilities innocently acquired which meet the percentage requirements and would render the average person unable to secure or follow a substantially gainful occupation. *Id.* § 4.17(a).

A veteran may be considered as unemployable upon termination of employment which was provided on account of disability, or in which special consideration was given on account of the same, when it is shown that he or she is unable to secure further employment. With amputations, sequelae of fractures, and other residuals of traumatism shown to be static, a showing of continuous unemployability from date of incurrence, or the date the condition reached the stabilized level, is a general requirement in order to establish that the present unemployability is the result of the disability. However, consideration is to be given to the circumstances of employment in individual claims, and, if the employment was only occasional, intermittent, tryout or unsuccessful, or eventually terminated on account of the disability, present unemployability may be attributed to the static disability. 38 C.F.R. § 4.18.

VA may not consider a claimant's age as a factor in evaluating service-connected disability and unemployability. Advancing age may not be used as a basis for a total disability rating. Age, as such, is a factor only in evaluations of disability not resulting from service, i.e., for the purposes of pension. 38 C.F.R. § 4.19.

2.48. Traumatic Brain Injury (TBI)

VA uses DC 8045, "Evaluation of Cognitive Impairment and Other Residuals of TBI Not Otherwise Classified," to rate the residuals of traumatic brain injury (TBI). Cognitive impairment is defined as decreased memory, concentration, attention, and executive functions of the brain. Executive functions are goal setting, speed of information processing, planning, organizing, prioritizing, self-monitoring, problem solving, judgment, decision making, spontaneity, and flexibility in changing actions when they are not productive. Not all of these brain functions may be affected in a given individual with cognitive impairment, and some functions may be affected more severely than others. In a given individual, symptoms may fluctuate in severity from day to day.

VA states that the evaluation table contains "10 important facets of TBI" related to cognitive impairment and subjective symptoms. Each facet is rated on five criteria ranging from 0 to 3 and "total," although not every criterion has every level of severity. If a facet is rated "total," a rating of 100% is assigned. If no facet is rated total, the overall percentage is based on the level of the highest facet with 0 = 0%, 1 = 10%, 2 = 40%, and 3 = 70% ratings. *See* 38 C.F.R. § 4.124a.

Subjective symptoms may be the only residual of TBI or may be associated with cognitive impairment or other areas of dysfunction. Subjective symptoms that are residuals of TBI, whether or not part of cognitive impairment, are evaluated under the subjective symptoms in the table titled "Evaluation of Cognitive Impairment and Other Residuals of TBI Not Otherwise Classified." Any residual with a distinct diagnosis that may be evaluated under another diagnostic code, such as migraine headache or Meniere's disease, should be separately evaluated, even if that diagnosis is based on subjective symptoms.

Emotional and behavioral dysfunction is evaluated under section 4.130 (Schedule of ratings – Mental disorders) when there is a diagnosis of a mental disorder. When there is no diagnosis of a mental disorder, emotional and behavioral symptoms are evaluated under the criteria in the table "Evaluation of Cognitive Impairment and Other Residuals of TBI Not Otherwise Classified." Physical (including neurological) dysfunction is evaluated based on the following list, under the appropriate diagnostic code:

- motor and sensory dysfunction, including pain, of the extremities and face;
- visual impairment;
- hearing loss and tinnitus;
- loss of sense of smell and taste;
- seizures; gait, coordination, and balance problems;

- speech and other communication difficulties, including aphasia and related disorders, and dysarthria;
- neurogenic bladder;
- neurogenic bowel; cranial nerve dysfunctions;
- autonomic nerve dysfunctions; and
- endocrine dysfunctions.

This list of physical dysfunctions does not encompass all possible residuals of TBI. Residuals not listed here that are reported on an examination, should be evaluated separately under the most appropriate diagnostic code. The evaluation assigned based on the "Evaluation of Cognitive Impairment and Other Residuals of TBI Not Otherwise Classified" table should be considered for the evaluation for a single condition for purposes of combining with other disability evaluations.

Special monthly compensation may be appropriate for such problems as loss of use of an extremity, certain sensory impairments, erectile dysfunction, the need for aid and attendance (including for protection from hazards or dangers incident to the daily environment due to cognitive impairment), being housebound, etc.

There may be an overlap of manifestations of conditions evaluated under the table with manifestations of a co-morbid mental, neurologic, or other physical disorder that can be separately evaluated under another DC. If the manifestations of two or more conditions cannot be clearly separated, a single evaluation under whichever set of diagnostic criteria allows the better assessment of overall impaired functioning due to both conditions should be assigned. However, if the manifestations are clearly separable, a separate evaluation for each condition should be assigned.

When considering the proper rating the "instrumental activities of daily living" refers to activities other than self-care that are needed for independent living, such as meal preparation, doing housework and other chores, shopping, traveling, doing laundry, being responsible for one's own medications, and using a telephone. These activities are distinguished from "Activities of daily living," which refers to basic self-care and includes bathing or showering, dressing, eating, getting in or out of bed or a chair, and using the toilet. Similarly, the terms "mild," "moderate," and "severe" TBI, which may appear in medical records, refer to a classification of TBI made at, or close to, the time of injury rather than to the current level of functioning.

A veteran whose residuals of TBI are rated under a version of section 4.124a, DC 8045, in effect before October 23, 2008 may request review under DC 8045, irrespective of whether his or her disability has worsened since the last review. VA should review the veteran's disability rating to determine whether the veteran may be entitled to a higher disability rating under the revised DC 8045. A request for review should be treated as a claim for an increased rating for purposes of determining the effective date of an increased rating awarded as a result of such review; however, in no case can the award be effective before October 23, 2008.

3. Researching Stressors and Other In-Service Incidents

3.1. Documenting a Stressor

To prevail in a PTSD-based claim, including MST and related injuries, a claimant must establish that he or she has undergone a traumatic event (a "stressor") during military service that would support a clinical diagnosis of PTSD. In most cases, at least some documentation of the stressor must be identified to adequately support a claimed stressor. The primary exception to this rule is when military service records document that the claimant was in combat with the enemy. A combat-related military occupational specialty (MOS) or combat-related awards or decorations (for example, a Combat Infantryman's Badge or a Purple Heart) are examples of documented combat experience.

If available service records do not demonstrate a combat-related MOS or decorations, a claimant can still assert that he or she experienced combat or enemy fire or attack. In such a case, VA is required to assist in obtaining documentation that supports the claim (including researching government records) and that could place the claimant in a documented area of attack or an isolated hostile incident. However the information is gathered, a claimant's assertion of a combat-related stressor must be supported by documentation of the specific stressor or evidence of participation in combat with the enemy.

VA also recognizes many non-combat-related stressors. Examples of potential non-combat-related stressors include, but are not limited to:

- plane crash;
- ship sinking;
- explosion;
- rape or assault;
- duty
    - on a burn ward;
    - in graves registration unit; or
    - involving liberation of internment camps; and
- witnessing the death, injury, or threat to the physical being of another person not caused by the enemy actual or threatened death or serious injury, or other threat to one's physical being, not caused by the enemy.

"Primary" evidence is generally considered the most reliable source for corroborating in-service stressors. VA typically obtains this information from the U.S. Army and Joint Services Records Research Center (JSRRC) (formerly the U.S. Armed Services Center for Unit Records Research (CURR)), the National Archives and Records Administration (NARA), or the Marine Corps University Archives (MCUA). Primary evidence includes:

- unit and organizational histories;
- daily staff journals;
- operational reports-lessons learned;
- after action reports;
- radio logs;
- deck logs and ship histories;
- muster rolls;

- command chronology;
- war diaries;
- monthly summary, and morning reports; and
- Navy cruise books.

VA will generally consider the following "alternative" sources of evidence for information confirming participation in combat or to otherwise corroborate a claimed in-service stressor:

- military occupational specialty (MOS) evidence;
- hazard pay records;
- personnel folder;
- performance reports;
- buddy statements;
- contemporaneous letters and diaries; and
- newspaper archives.

Note that a non-combat veteran's testimony alone or after-the-fact psychiatric analyses that infer the occurrence of a traumatic event does not qualify as credible supporting evidence of the occurrence of an in-service stressor as required by 38 C.F.R. section 3.304(f).

Claimants needing evidence supporting asserted stressors should not leave it to VA to obtain such evidence. A claimant can and should research his or her own stressors and attempt to obtain supporting evidence. Basic internet searches (for example, Google, Bing) can find unit websites, military history sites, media reports, and other sources of information which can directly support a claimed stressor or lead to other sources of supporting information.

A stressor is a stimulus that causes stress. Therefore, a traumatic stressor is a stimulus of such proportions that one might suffer significant alterations in one's mental or physical life. VA recognizes three types of stressors in PTSD claims:

- combat;
- non-combat; and
- personal assault (to include sexual trauma).

Whichever type of stressor is claimed, VA requires a specific type of development to establish that a stressful event did occur as described below.

3.2. Combat-related Stressor

If a veteran engaged in combat, he or she only need to present a statement of the occurrence of the event if the stressor is consistent with the circumstances of the veteran's service (for example, infantry duty in an active war-zone). Further, VA is supposed to resolve every reasonable doubt in favor of the veteran and rebut a veteran's statement of a combat-related stressor only on clear and convincing evidence to the contrary. This means that unless the claimed stressor is inconsistent with the circumstances of the combat-related service, if there some specific evidence (for example, a non-combat MOS), or if there is clear and convincing evidence otherwise (for example, orders showing duty in non-combat area), VA generally must accept the stressor.

Additional or "secondary" evidence that can corroborate a claimed combat-related stressor includes a DD-214, statements from fellow unit members, letters home to family or friends, combat-related decorations (for example, Purple Heart, Combat Infantryman's Badge, etc.). VA is supposed to request such information from the Joint Services Records Research Center (JSRRC), to help verify that the stressor event occurred, but claimants should not rely on such a request and should send any supporting documents in their possession directly to VA.

3.3. Joint Services Records Research Center (JSRRC)

VA will generally make a request to the JSRRC to verify a stressor. The JSRRC researches Army, Navy, Air Force, and Coast Guard records containing historical information on individual units within these branches of service, as well as some personnel records related to stressful events described by the veteran. Marine Corps records are requested from the Marine Corps Archives. The JSRRC provides VA with a summary of its findings but does not evaluate evidence, render opinions, make conclusions, or decide the merits of a claim.

There are limits to what the JSRRC or any other organization can do to identify information regarding a stressor. For example, most of the records JSRRC researches are not stored electronically and must be searched manually. This not only takes time, but also creates room for human error. Similarly, claimants should also keep in mind that some types of claimed stressors are extremely difficult, if not impossible, to verify through official records, such as:

- events that "almost happened;"
- events that involving civilians;
- sniper attacks; and
- events occurring while traveling in a convoy.

In such cases, other sources of support will be required.

3.4. Non-combat Related Stressor

VA regulations for proving a non-combat related stressor require more information to establish a non-combat stressor than a combat-related stressor. VA requires a veteran provide "credible supporting evidence that the claimed in-service stressor occurred." VA must assist a claimant in developing evidence that supports the existence of the stressor – unless there is no reasonable likelihood that the assistance would help to substantiate the claim.

This evidence need not be found in military service records, although that is the most convincing source. The Court has stated that as long as a claimant can provide "independent evidence of the occurrence of the stressful event, and the evidence implies personal exposure," a claimant satisfies this element. Sworn declarations or affidavits from other members of a unit are very good evidence – but not every event has witnesses. Other sources, such as other military records, official unit histories, and media reports, can also be helpful. It is clear, however, that a statement from a psychiatrist or treating physician that a claimant's version of events is credible is not sufficient on its own to support a non-combat-stressor.

3.5. Self-directed Research

Technology makes it possible for claimants to perform useful research to identify support for stressor claims. Claimants are encouraged to do so even if VA is required to do the same, if only as a check of the VA effort. The following sites are just a small sample of those with potentially useful information:

Air Force Class A Aerospace Mishaps

This site provides verification of accidents involving the Air Force. http://usaf.aib.law.af.mil/

Air Force Historical Research Agency

Documentation of Air Force base attacks. *http://www.afhra.af.mil/*

Army Center of Military History

This site contains links to extensive unit histories and other potential sources of supporting information. *http://www.history.army.mil/*

Defense Department

The Department of Defense operates a huge number of sites that potentially contain information supporting combat and non-combat stressors. *http://www.defense.gov/RegisteredSites/RegisteredSites.aspx*

Dictionary of American Fighting Ships

This website includes evidence of incidents involving US Navy Ships. *http://www.hazegray.org/danfs/*

Gulf Link

Several resources can be found here, including information on Iraqi scud attacks. *http://www.gulflink.osd.mil/*

3.6. Records of the Military Assistance Command (MACV)

The records of the MACV contains information given as news releases during the Vietnam War. Details on base camp attacks, unit attacks, convoy attacks, aircraft crashes, etc. The MACV reports also describe events that happened in the four military corps of Vietnam, with information broken down by dates and provinces. The database includes unit histories (Army and Navy), Combat After Action Reports, Army Operational Reports-Lessons Learned covering 1941 to 2004, US Navy monthly summaries from Vietnam, attacks on Air Force bases, etc.

The database includes over 2000 pdf files, with many of them containing multiple individual documents. The documents are organized by branch of service. Within each service branch folder, there is a subfolder of general information and subfolder for the different war or conflict periods. Within each war or conflict period subfolder, there are subfolders for specific military units or naval vessels, and within the subfolders of military units or naval vessels, are the actual descriptive documents that are arranged by date. The majority of the documents are from the Army during the Vietnam era and these are further broken down into infantry unity, artillery units, aviation units, etc.

The records are available at various places on the internet including *http://www.lexisnexis.com/academic/upa_cis/group.asp?g=673*.

3.7. National Archives

The National Archives has an extensive collections of military and veteran related documents. *http://www.archives.gov/veterans/*.

In addition to self-directed research, there are professional archive researchers are available for hire to perform specific records searches.

3.8. Navy Seabee Museum

The historian at this facility can provide copies of After Action Reports, Unit Histories, and other documents in the museum's possession. http://www.history.navy.mil/museums/seabee_museum.htm.

3.9. Unofficial Websites

While the internet provides many sources of information, not all sources are equal. In general, VA will endorse information from a website that is a military (.mil) or government (.gov) site. For example, the websites listed above are acceptable sources for"official" information.

Claimants, however, are cautioned that VA may question or reject corroboration information obtained from "unofficial" websites or sites that do not provide bases for their "facts" or other statements. For example, most military units and vessels that served in the Vietnam War have a site containing photos, unit history, and personal recollections. While much of the information is derived from official sources, some sites contain "opinion" or unsupported (and unsupportable) "theories" regarding events. These sites can provide useful information. It is, however, best to use information from sites without obvious sources of information or bases only as a last resort or as a means of identifying other, more direct sources of information.

Appendices

1. History of Radiation Exposure Law

Reacting to the difficulty in establishing causation based on alleged radiation exposure and the significantly small number of claims for service connection which had been allowed based on such exposure, Congress enacted in 1984 the Veteran's Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98–542, 98 Stat. 2725 (1984) ("the Act"). Congress decided that there was enough of a statistical association between exposure to radiation and the manifestation of certain diseases such that those diseases should be recognized as "radiogenic." Accordingly, a stated purpose of the Act is:

to ensure that VA disability compensation is provided to veterans who were exposed to ionizing radiation in connection with atmospheric nuclear tests or in connection with 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 VA dependence and indemnity compensation is provided to survivors of those veterans for all deaths resulting from such disabilities).

Id. sec. 3.

The Act delineates specific findings underlying the new legislation. First, it is noted that, while many veterans who participated in atmospheric nuclear testing or the American occupation of Hiroshima or Nagasaki, Japan, are deeply concerned about possible long-term health effects of exposure to ionizing radiation, *id.* § 2(1), there is a great deal of scientific and medical uncertainty regarding such long-term adverse health effects. *Id.* § 2(2). Pursuant to the Act, Congress responded to this medical uncertainty by (1) assuring that priority medical care would be provided at VA facilities for veterans who were exposed to radiation and developed one of the listed radiogenic diseases, unless the disability was found to have a cause other than radiation exposure (*Id.* § 2(3)); (2) requiring that thorough epidemiological studies would be conducted of the health effects experienced by radiation-exposed veterans (*Id.* § 2(4)); and (3) requiring the development of radioepidemiological tables to track the probabilities of causation between various disabilities and radiation exposure. *Id.* Congress found that there is sufficient evidence that certain specific disabilities are linked to exposure to ionizing radiation; these disabilities include most types of leukemia; malignancies of the thyroid, female breast, lung, bone, liver, and skin; and polycythemia vera. *Id.* § 2(5).

It also was noted that the "film badges" which had been provided to members of the military in connection with atmospheric nuclear testing, and which had been the primary sources of dose information for veterans filing claims for disability compensation based on alleged exposure, often provided incomplete and inaccurate information and were not provided to most of the participants in nuclear test. *Id.* § 2(8), (9). Additionally, it was noted that the standards governing the reporting of dose information varied among the separate branches of the Armed Forces, and the VA had not promulgated permanent regulations setting criteria, standards, and guidelines for the adjudication of claims for disability compensation based on exposure either to herbicides containing dioxin or to ionizing radiation. *Id.* §§ 2(10), (11). Congress also recognized that radiation-based claims often involve long latency periods and present unique adjudicatory issues unlike those presented in non-radiation-based claims. *Id.* § 2(12). Finally, Congress took notice of the fact that in considering all of the evidence and material of record in support of a given claim for service connection, it has always been the policy of both the United States and the VA that the benefit of the doubt shall be provided to the veteran on each issue material to the determination of a given claim. *Id.* § 2(13).

In 1984, pursuant to the Act, a new subsection (a)(2) was added to 38 U.S.C. section 1154 which compelled the Secretary to promulgate regulations pertaining to service connection of disabilities in accordance with "the provisions required by section 5 of the ... Act." 38 U.S.C. § 1154(a)(2). Section 5 of the Act, in turn, provided the Secretary with specific directions on the requirements for and content of the new regulations dealing with radiation exposure-based claims. To promote consistency in claims processing and decisions, the Secretary was directed to prescribe regulations to (1) establish guidelines and (where appropriate) standards and criteria for the resolution of claims based on a veteran's exposure during service to ionizing radiation, *id.* §§ 5(a)(1)) and (2), ensure the appropriate application of the reasonable doubt doctrine to a veteran's radiation-based claim. *Id.* § 5(a)(2)).

The Secretary also was directed to include guidelines governing the evaluation of scientific studies relating to the possible increased risk of adverse health effects of exposure to ionizing radiation. *Id.* § 5(b)(1)(A). Such evaluations were required to be made by the Secretary after advice from the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards (the "Advisory Committee") - a specially constituted advisory panel of experts - and the results of these evaluations were required to be published in the Federal Register. *Id.* § 5(b)(1)(B) and sec. 6. The Secretary also was directed to include provisions governing the use of such evaluations in the adjudication of individual claims. *Id.* § 5(b)(1)(C). Additionally, in prescribing the new regulations under this section, the Secretary was required to make determinations, based on sound scientific evidence with respect to each alleged radiation-based disease, as to whether service connection should be granted in the adjudication of individual cases. *Id.* § 5(b)(2)(A)(i).

Further, the Secretary was required to include in the regulations provisions specifying the factors to be considered in adjudicating issues relating to whether or not service connection should be granted in individual cases and specifying the circumstances governing the granting of service connection for such diseases. *Id.* It was specifically noted, however, that the diseases referred to in section 5 of the Act included only those specified in section 2(5) of the Act, i.e., most types of leukemia, malignancies of the thyroid, female breast, lung, bone, liver, and skin, and polycythemia vera, and any other disease with respect to which the Secretary subsequently determined (after receiving and considering the advice of the Advisory Committee) that there existed sound scientific or medical evidence indicating a connection between the disease and exposure to ionizing radiation. *Id.* § 5(b)(2)(B).

In 1985, pursuant to the requirements outlined in the Act, the Secretary promulgated, after public review and comment, a detailed regulation, enumerated at 38 C.F.R. section 3.311b, governing the establishment of service connection for disabilities allegedly resulting from exposure to ionizing radiation.

The regulation specifically provides: "If any of the foregoing 3 requirements [have] not been met, it shall not be determined that a disease has resulted from exposure to ionizing radiation under such circumstances." 38 C.F.R. § 3.311b(b)(1)(iii). The regulation also provides specific guidelines concerning dose and exposure assessments for the recognized radiogenic diseases (section 3.311b(a)(1)), guides the veteran to the specific sources of dose information for particular recognized radiogenic diseases depending on the alleged source of exposure (section 3.311b(a)(2)), and provides for the referral of dose assessments to independent experts to reconcile any disputes (section 3.311b(a)(3)).

Based on specific recommendations of the Advisory Committee and scientific and medical evidence, the VA adopted a list of recognized "radiogenic diseases," enumerated at 38 C.F.R. section 3.311b(b)(2). The regulation indicates that the list is exclusive; the specific language of the regulation provides that:

For purposes of paragraphs (a)(1) (regarding dose assessments) and (b)(1) (listing three requirements for a well-grounded claim) of this section, "radiogenic diseases" shall only include the following:

(i) All forms of leukemia except chronic lymphatic (lymphocytic) leukemia;

(ii) Thyroid cancer;

(iii) Breast cancer;

(iv) Lung cancer;

(v) Bone cancer;

(vi) Liver cancer;

(vii) Skin cancer;

(viii) Esophageal cancer;

(ix) Stomach cancer;

(x) Colon cancer;

(xi) Pancreatic cancer;

(xii) Kidney cancer;

(xiii) Urinary bladder cancer;

(xiv) Salivary gland cancer;

(xv) Multiple myeloma;

(xvi) Posterior subcapsular cataracts; and

(xvii) Non-malignant thyroid nodular disease.

Id. Neutropenia (or leukopenia) is not included in the list of radiogenic diseases.

The regulation specifically excludes certain disabilities from the list of radiogenic diseases. *See* 38 C.F.R. § 3.311b(b)(3) (excluding polycythemia vera from list of radiogenic diseases). The regulation also specifies time periods within which the recognized radiogenic diseases must become manifest in order for a veteran to establish service connection.

(i) Bone cancer must become manifest within 30 years after exposure;

(ii) Leukemia must become manifest at any time after exposure;

(iii) Posterior subcapsular cataracts must become manifest 6 months or more after exposure; and

(iv) Other diseases specified in paragraph (b)(2) of this section must become manifest 5 years or more after exposure.

38 C.F.R. § 3.311b(b)(4).

The Secretary will amend the list of recognized radiogenic diseases when it is found that there is a significant statistical association between specific diseases and exposure to ionizing radiation. 38 C.F.R. § 1.17(c). Accordingly, over the years, based on advice provided to the Secretary by the Advisory Committee resulting from expanded scientific and medical knowledge, and after public review and comment, the Secretary has proposed various amendments to the list of radiogenic diseases. *See, e.g.*, 57 Fed. Reg. 10,853 (1992) (proposing to add parathyroid adenoma); 54 Fed. Reg. 42,802 (1989) (proposing to add lymphomas, except Hodgkin's disease, and cancers of the pharynx, small intestine, bile ducts, and gall bladder so as to conform the radiogenic diseases listed in 38 C.F.R. section 3.311b with those listed in section 3.309, *see infra*). Neutropenia (or leukopenia), however, has not been added to the list of radiogenic diseases.

However, although the language of 38 C.F.R. section 3.311b(b)(2) indicates that, for the purposes of establishing service connection based on exposure to ionizing radiation, the list of radiogenic diseases specified in the regulation is exclusive, the provision also refers the veteran to another subsection of the regulation—38 C.F.R. section 3.311b(h). Subsection (h), under the heading, "service connection otherwise established," provides:

Nothing in this section will be construed to prevent the establishment of service connection for any injury or disease otherwise shown by sound scientific or medical evidence to have been incurred or aggravated during active service.

The list of radiogenic conditions that appears at section 3.311b(b)(2) is meant to be exclusive. The current wording of section 3.311b(h) however, might be misinterpreted to mean that a veteran may attempt to prove that a disease not included on that exclusive listing resulted from exposure to ionizing radiation and is service connected based on "sound scientific or medical evidence." This interpretation of section 3.311b(h) would not conform to section 5(b)(2) of Public Law 98–542 which contemplates that VA will employ regulations which list each disease for which VA finds sound scientific and medical evidence of a connection of ionizing radiation.

In 1988, pursuant to the Radiation–Exposed Veterans Compensation Act of 1988, *supra,* Congress added subsection (c) to 38 U.S.C. section 1112 (implemented by 38 C.F.R. section 3.309). Section 1112(c)(1) provides for a presumption of service connection for certain diseases which become manifest in a radiation-exposed veteran within specified latency periods. It states in part:

A disease specified in paragraph (2) of this subsection becoming manifest in a radiation-exposed veteran to a degree of 10 percent or more within the presumptive period (as specified in paragraph (3) of this subsection) shall be considered to have been incurred in or aggravated during active military, naval, or air service, notwithstanding that there is no record of evidence of such disease during a period of such service.

Section 1112(c)(2) outlines the specific diseases for which the presumption of service connection will apply; these diseases are:

(A) Leukemia (other than chronic lymphocytic leukemia).

(B) Cancer of the thyroid.

(C) Cancer of the breast.

(D) Cancer of the pharynx.

(E) Cancer of the esophagus.

(F) Cancer of the stomach.

(G) Cancer of the small intestine.

(H) Cancer of the pancreas.

(I) Multiple myeloma.

(J) Lymphomas (except Hodgkin's disease).

(K) Cancer of the bile ducts.

(L) Cancer of the gall bladder.

(M) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).

The statute and implementing regulation provide that the presumption period for the listed diseases is the 40–year period beginning on the last date on which the veteran participated in a defined radiation-risk activity. 38 U.S.C. § 1112(c)(3). The defined "radiation risk-activities" for purposes of the aforementioned presumptions specifically include the occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946. 38 U.S.C. § 1112(c)(4)(B)(2).

The *Veterans' Radiation Exposure Amendments of 1992* (the 1992 Amendments), 106 Stat. 4774, Pub. L. No. 102–578 (S. 775) (Oct. 30, 1992), amended section 1112(c)(2) by including new subparagraphs "(N) Cancer of the salivary gland" and "(O) Cancer of the urinary tract" in the list of radiogenic diseases. The 1992 Amendments also amended section 1112(c)(1) by striking out the requirement that the diseases in section 1112(c)(2) become manifest in a radiation-exposed veteran to a degree of 10% or more within the presumption period. The 1992 Amendments also removed former section 1112(c)(3), i.e., the requirement that any disease presumed to be service-connected for radiation-exposed veterans be manifested within 40 years after exposure. Further, the 1992 Amendments required the Advisory Committee to investigate the effects of radiation exposure from military activities not covered by current law, and directed the Advisory Committee to review pertinent scientific data to determine whether bronchio-alveolar carcinoma should be added to the list of

radiogenic diseases. *Combee v. Principi*, 4 Vet. App. 78, 84-88 (1993) *rev'd sub nom. Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

2. History of Herbicide Litigation

"Agent Orange, which contains trace elements of the toxic by-product dioxin, was purchased by the United States government from [several] chemical companies and sprayed on various areas in South Vietnam on orders of United States military commanders. The spraying generally was intended to defoliate areas." *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 149 (2d Cir. 1987). The spraying of Agent Orange during the Vietnam conflict has been the subject of numerous law suits by Vietnam veterans claiming that exposure to Agent Orange during their service in Vietnam has caused serious illnesses in them and their offspring. *See, e.g.*, *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (setting the parameters for a multi-million-dollar veteran-compensation program, the Agent Orange Veteran Payment Program, funded by manufacturers of Agent Orange); *In re Agent Orange Product Liability Litigation*, 818 F.2d 194, 199 (2d Cir. 1987) (denying recovery against the Federal government on the grounds that *Feres v. United States*, 340 U.S. 135 (1950), "prohibits the judiciary from imposing liability upon the United States for injuries to servicemen that 'arise out of or are in the course of activity incident to service'"); *Nehmer v. United States Veterans' Admin.*, 712 F. Supp. 1404 (N.D.Cal.1989) (invalidating portions of Secretary's regulations relating to Agent Orange-related claims that imposed too strict a test for establishing service connection and failed to give benefit of doubt); *LeFevre v. Secretary, Dept. of Veterans Affairs*, 66 F.3d 1191 (Fed. Cir. 1995) (upholding Secretary's rulemaking determination not to establish presumptions of Agent Orange-related service connection for prostate, liver, and nose cancers).

Agent Orange has also been the subject of several federal laws designed to provide compensation benefits for veterans who claim disabilities that may be related to Agent Orange exposure during the Vietnam conflict. Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98–542, 98 Stat. 2725 (1984), as substantively amended by the Agent Orange Act of 1991, Pub. L. No. 102–4 (codified in large part at 38 U.S.C. § 1116). Regulations implementing current law are codified at 38 C.F.R. §§ 3.307(a)(6) and (d) and 3.309(e). *Brock v. Brown*, 10 Vet. App. 155, 161 (1997) *aff'd sub nom. Brock v. West*, 232 F.3d 915 (Fed. Cir. 2000) *reh'g en banc granted, opinion vacated sub nom. Brock v. Gober*, 222 F.3d 988 (Fed. Cir. 2000).

In October 1984, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. 98–542, §§ 5–6, 98 Stat. 2725, 2727 (1984) (Dioxin Act), which required VA to prescribe regulations that "establish [ed] guidelines and (where appropriate) standards and criteria for resolution of claims ... based on a veteran's exposure during service ... in the Republic of Vietnam during the Vietnam era to a herbicide containing dioxin." In order to establish such guidelines, an advisory committee, to be composed of experts in dioxin, experts in epidemiology, and interested members of the public, was required to provide recommendations regarding diseases that should be deemed to have a connection to exposure to dioxin. The Secretary, taking those recommendations into consideration, was then required to prescribe regulations setting forth the circumstances under which service connection would be granted for diseases found, based on "sound scientific or medical evidence," to have a connection to exposure to herbicides containing dioxin. *Williams v. Principi*, 15 Vet. App. 189, 191 (2001) *aff'd*, 310 F.3d 1374 (Fed. Cir. 2002).

In February 1987, Vietnam veterans and survivors of veterans filed a class action suit in the District Court against the Veterans' Administration (now the Department of Veterans Affairs), alleging that 38 C.F.R. section 3.311a violated provisions of the Dioxin Act because the scientific standard used in determining whether claimed diseases were related to Agent Orange exposure was too restrictive. *See Nehmer v. United States Veterans' Administration*, 712 F. Supp. 1404, 1408–10 (N.D. Cal. 1989) (*Nehmer I*). As a preliminary matter, the District Court, in December 1987, issued an order granting the plaintiffs' motion for class certification. *Nehmer v. United States Veterans' Administration*, 118 F.R.D. 113 (N.D. Cal. 1987). In that order, the District

Court noted that, in opposition to the plaintiffs' motion, the defendant had argued that some of the named plaintiffs had never submitted a claim under the challenged regulation; rather, their claims had been denied prior to the promulgation of section 3.311a. *Id.* at 117.

In response to that argument, the District Court noted that the plaintiffs were claiming "that the 1985 regulation, and the procedures used to enact it, violate[d] the Dioxin Act" and that the "[p]laintiffs denied benefits prior to the regulation's enactment lack standing to pose that legal challenge to their denial." *Id.* Nevertheless, the District Court held that, because the "pre-1985 claimants share a threat of future harm with other class members," the plaintiffs had satisfied the requirement that class members share common questions of law and fact. *Id.*

On the merits of the plaintiffs' claim, the District Court, in May 1989, issued a decision agreeing with the plaintiffs that the portion of the regulation that specified that there was no cause-and-effect relation between dioxin exposure and diseases other than chloracne was contrary to the Dioxin Act. *Nehmer I,* 712 F. Supp. at 1409; *see also* 38 C.F.R. § 3.311a(d). Accordingly, the District Court held that 38 C.F.R. § 3.311a(d) was invalid and "void[ed] all benefit decisions made under [38 C.F.R. § 3.311a(d)]." *Nehmer I,* 712 F. Supp. at 1409.

In order to resolve remedial issues implicated by *Nehmer I,* the parties subsequently entered into a final stipulation and order [hereinafter the *Nehmer* Stipulation], which was incorporated into the District Court's final judgment. *See Nehmer v. United States Veterans' Administration* (*Nehmer II*), 32 F. Supp. 2d 1175, 1176 (N.D. Cal. 1999). The *Nehmer* Stipulation provided that, if VA issued new regulations regarding herbicide – exposure claims that provided service connection for diseases other than chloracne, VA was required to readjudicate previously denied claims if the denials had been voided by the District Court's 1989 decision. *Nehmer* Stipulation, para. 3; *see Nehmer II,* 32 F.Supp.2d at 1177. The *Nehmer* Stipulation further provided that the effective date for an award resulting from such readjudication would be the date of the claim upon which the voided decision was predicated [hereinafter Stipulation 1]. *Nehmer* Stipulation, para. 5; *see Nehmer II,* 32 F.Supp.2d at 1177. In addition, the parties stipulated that, for awards based on herbicide-exposure claims filed after May 3, 1989, the effective date for such awards would be "the date the claim was filed or the date the claimant became disabled or death occurred, whichever is later" [hereinafter Stipulation 2]. *Nehmer* Stipulation, para. 5. *Williams v. Principi*, 15 Vet. App. 189, 191-92 (2001) *aff'd*, 310 F.3d 1374 (Fed. Cir. 2002).

In February 1991, Congress enacted the Agent Orange Act of 1991, Pub. L. No. 102–4, § 2, 105 Stat. 11 (1991) (Agent Orange Act), which provided that Vietnam veterans were entitled to presumptive service connection for diseases specified therein, as well as for diseases subsequently identified by regulation as having a relation to exposure to herbicide agents. *See* 38 U.S.C. § 1116 (codifying most provisions of the Agent Orange Act). Under the authority of the Agent Orange Act, VA subsequently promulgated final regulations, effective June 9, 1994, that provided that veterans exposed to herbicide agents during active military service were entitled to presumptive service connection for enumerated conditions (including respiratory cancers) becoming manifest to a degree of 10% or more during a specified period. 59 Fed. Reg. 29, 724 (1994) (amending 38 C.F.R. §§ 3.307(a) and 3.309(e), under the authority of the Agent Orange Act, to provide presumptive service connection for multiple myeloma and respiratory cancers); *see* 38 C.F.R. §§ 3.307(a)(6), 3.309(e) (2000). VA then began readjudicating claims when it determined that a prior denial had been voided by *Nehmer I,* as well as those claims that had been held in abeyance pending the new regulations.

The District Court in February 1999 issued another opinion in the litigation concerning VA's Agent Orange regulations. *Nehmer II,* 32 F.Supp.2d at 1175. In that opinion, the District Court noted that *Nehmer I* had "void[ed] all benefit decisions made under 38 C.F.R. § [3.]311[a](d)" and that under the *Nehmer* Stipulation VA was required "to reopen and readjudicate previously denied claims that were voided by the Court's May 1989 order if and when the VA issue[d] new Agent Orange regulations service-connecting diseases other than

chloracne." *Nehmer II,* 32 F. Supp. 2d at 1176–77. In describing the impetus for the *Nehmer II* litigation, the District Court stated:

The instant dispute concerns the scope of the VA's readjudication obligations under [the *Nehmer* Stipulation].... [T]he VA ... has found that a number of diseases, besides chloracne, are service connected based on their link to Agent Orange. Thus, there are many class members who, *during the time period when the invalid regulation was in effect,* filed a claim for service-connected benefits based on a disease that the VA did not then recognize as linked to Agent Orange—but which the VA now recognizes is so linked pursuant to its revised Agent Orange regulations. *Those claims were, of course, all denied at the time they were filed.*

Nehmer II, 32 F. Supp. 2d at 1177–78 (emphasis added).

In rejecting VA's position, the District Court reasoned, with respect to the first readjudication criterion, that "if a veteran failed to raise the Agent Orange issue because he knew it was useless to do so under 38 C.F.R. § 3.311a(d), then the veteran was denied benefits as a result of the invalid regulation just as surely as if he had expressly raised the issue and it had been rejected." *Nehmer II,* 32 F. Supp. 2d at 1180. The District Court also reasoned that the first criterion was overly narrow because "the Agent Orange regulation itself imposed no special pleading requirement" and because, under the nonadversarial VA adjudication system, claimants are not required to specify a legal basis upon which benefits may be predicated. *Nehmer II,* 32 F. Supp. 2d at 1180–81.

With regard to the second criterion, the District Court reasoned that, prior to February 1990, VA was not required to provide any reasons in its denials of benefits and that "VA's failure to expressly cite to 38 C.F.R. § 3.311a(d) in a denial prior to February 1990 is thus hardly a reliable indication that the regulation was not in fact considered." *Nehmer II,* 32 F. Supp. 2d at 1182. In sum, the District Court concluded that VA's readjudication criteria were "overly formalistic and simplistic" and would preclude readjudication of some claims that had actually been denied under the invalidated regulation. *Nehmer II,* 32 F. Supp. 2d at 1180.

After rejecting VA's position as to what claims had been voided by *Nehmer I,* the District Court then held that, although *Nehmer I* "did not intend to void every decision," it had

intended ... the voiding of those decisions that involved a disease that is later service connected based on a revised, valid Agent Orange regulation. In short, by voiding all benefit decisions "made under 38 C.F.R. § 3.311a(d)," the Court did not void every pre-May 1989 benefit decision; rather it only voided those decisions in which the disease or cause of death is later found—under valid Agent Orange regulation(s)—to be service connected.

Nehmer II, 32 F. Supp. 2d at 1183; *Williams,* 15 Vet. App. at 194-95.