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## **3.8 DISABILITY COMPENSATION FOR DISEASES ASSOCIATED WITH AGENT ORANGE AND OTHER HERBICIDES USED IN VIETNAM**

3.8.1 The Three Requirements for Disability Compensation Based Upon Agent Orange Exposure

3.8.1.1 The Vietnam Service Requirement

3.8.1.2 The Second Requirement: Medical Evidence That the Veteran Has a Disease, or the Residuals of a Disease, Associated with Agent Orange Exposure

3.8.1.3 The Third Requirement for Some Diseases: Medical Evidence of the Onset of the Disease Within a Certain Time Period

3.8.1.4 Special Rules Regarding Non-Hodgkin's Lymphoma (NHL)

3.8.2 Veterans Should Reapply If Previously Denied Compensation for a Disease Listed in Table 3-1

3.8.3 Vietnam Veterans Who Have a Disease Not Recognized by VA as Connected to Agent Orange Exposure

3.8.4 Veterans Exposed to Agent Orange Outside Vietnam or Not During the Vietnam Era

3.8.5 The Lawsuits Against the Chemical Companies that Manufactured Agent Orange

Congress and the VA have afforded Vietnam veterans with an additional method to qualify for compensation benefits for certain diseases associated with Agent Orange.<sup>541</sup> Vietnam veterans who have one of the diseases now recognized by the VA as connected to Agent Orange exposure, or the residuals of one of these diseases, are able to have their disabilities presumptively service connected.

This change in law is relatively recent.<sup>542</sup> During the 1970s and 1980s, the VA denied tens of thousands of claims for disabilities and death which Vietnam veterans and their survivors attributed to Agent Orange exposure. Partially due to NVLSP's advocacy, the VA was forced to acknowledge beginning in 1990 that several types of cancer and other serious diseases are related to Agent Orange exposure. As a result, thousands of Vietnam veterans and their survivors have received hundreds of millions of dollars in disability and death benefits.

Additional favorable changes in law have recently occurred and may occur in the future. As a result of the Agent Orange Act of 1991,<sup>543</sup> the VA has contracted with an independent organization, the National Academy of Sciences, to review the scientific evidence on links between dioxin exposure and disease. Whenever the National Academy issues a periodic report about its review of the scientific evidence, the VA must decide whether additional diseases

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should be service connected. The Act requires the VA to service connect a disease based on exposure to Agent Orange if the National Academy report and other evidence show a positive association exists between Agent Orange and the disease. If the credible evidence for an association between Agent Orange exposure and a disease is equal to, or outweighs the credible evidence against, then the VA must service connect the disease.

Under the contract with the VA, the National Academy has already issued four reports on the health effects of Agent Orange, plus a special report on the link between diabetes and Agent Orange exposure.<sup>544</sup> As a result of the first two reports of the National Academy, the VA added many more diseases to the list of diseases presumed to be connected to Agent Orange exposure. The National Academy is continuing to analyze the scientific studies on the health effects of exposure to the herbicides used in Vietnam and will issue additional reports every two years until the year 2014.<sup>545</sup> Therefore, the VA may further revise their Agent Orange service connection rules in the future. Advocates who represent Vietnam veterans and their surviving family members can research the latest developments in this rapidly changing area of veterans' benefits law on NVLSP's web site (<http://www.nvlsp.org>).

### **Footnotes**

541. Agent Orange is the most commonly used of the many herbicides that were used during the Vietnam War, including Agents Blue, White, Purple, Brown, Green and Pink. Agent Orange was made from a combination of two compounds: 2,4-D and 2,4,5-T, which are chlorinated phenoxy acids. Exposure to Agent Orange has been associated with a variety of adverse health effects, largely because of the presence of a contaminant that is commonly known as dioxin. For purposes of this Manual, the term "Agent Orange" is used to refer to all of the herbicides used in Vietnam.

542. *See* 38 U.S.C.S. § 1116(a); 38 C.F.R. §§ 3.307(a)(6), 3.309(e) (2002).

543. 38 U.S.C.S. § 1116(a).

544. In 1999, then Secretary of Veterans Affairs, Togo West, requested that the National Academy expedite its report on Agent Orange exposure and diabetes. This report was issued on October 11, 2000, resulting in the addition of type 2 diabetes to the list of diseases presumed to be connected to Agent Orange.

545. *See* Pub. L. No. 107-103, Tit. II, § 201(d)(2), 115 Stat. 988 (Dec. 27, 2001).

### **3.8.1 The Three Requirements for Disability Compensation Based Upon Agent Orange Exposure**

To qualify for disability compensation based on Agent Orange exposure, a veteran only needs

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to satisfy two or three simple rules: (1) the veteran served in Vietnam during the Vietnam era; and (2) the veteran currently has one of the diseases, or the residuals of one of the diseases, recognized by the VA as linked to Agent Orange exposure to a disabling degree of 10% or more; and (3) for some (but not all) of the recognized non-cancer diseases (but not for any of the recognized cancers<sup>546</sup>), the disease manifested itself within a certain time period from the last day of service in Vietnam.

### **Footnotes**

<sup>546</sup>. Prior to 2002, the recognized respiratory cancers were subject to a time manifestation requirement. *See* Section 3.8.1.3.

#### **3.8.1.1 The Vietnam Service Requirement**

Vietnam veterans do not need to prove actual exposure to Agent Orange or any other herbicide during service in Vietnam to qualify for presumptive service connection. The rules require the VA to assume that if a veteran served in Vietnam, the veteran was exposed.<sup>547</sup> Therefore, the requirement of an in-service precipitating event reduces to showing that the veteran served in Vietnam during the Vietnam era.

Service in Vietnam is defined as "active military, naval, or air service . . . in the Republic of Vietnam at some point between January 9, 1962, and May 7, 1975."<sup>548</sup> This includes service "in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam."<sup>549</sup> Flying over Vietnam in an aircraft, without landing in Vietnam, does not qualify as service in Vietnam.<sup>550</sup> Further, serving on board a ship in the waters offshore, without any visitation in Vietnam, generally does not qualify as service in Vietnam.<sup>551</sup>

### **Footnotes**

<sup>547</sup>. *See* 38 U.S.C.S. § 1116(a).

<sup>548</sup>. 38 C.F.R. § 3.307(a)(6)(iii) (2002). *See also*, 38 U.S.C.S. § 1116(a)(3).

<sup>549</sup>. *Id.*

<sup>550</sup>. VA Gen. Coun. Prec. 7-93 (Aug. 12, 1993).

<sup>551</sup>. VA Gen. Coun. Prec. 21-97 (July 23, 1997).

#### **3.8.1.2 The Second Requirement: Medical Evidence That the Veteran Has a Disease, or**

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## **the Residuals of a Disease, Associated with Agent Orange Exposure**

To satisfy the second requirement, Vietnam veterans only need submit medical evidence showing that they currently have one of the recognized diseases (or its residuals) to a disabling degree of 10% or more.<sup>552</sup>

All of the diseases on the VA's recognized list of conditions linked to Agent Orange exposure as of the date of publication of the 2002 edition of this Manual appear in the left-hand column of Table 3-1.

**Table 3-1553**

<b>Diseases Recognized by VA as Connected to Agent Orange Exposure</b>	<b>Length of Time Requirements: (When symptoms of the disease have to appear and result in a disability at least 10% disabling in order to qualify for benefits)</b>
<b>Types of Cancer</b>	
<b>Cancer of the Bronchus</b>	<b>No time requirement (veteran qualifies no matter when this disease first appears).</b>
<b>Cancer of the Larynx</b>	<b>No time requirement (veteran qualifies no matter when this disease first appears).</b>
<b>Lung Cancer</b>	<b>No time requirement (veteran qualifies no matter when this disease first appears).</b>
<b>Prostate Cancer</b>	<b>No time requirement (veteran qualifies no matter when this disease first appears).</b>
<b>Cancer of the Trachea</b>	<b>No time requirement (veteran qualifies no matter when this disease first appears).</b>
<b>Hodgkin's Disease</b>	<b>No time requirement (veteran qualifies no matter when this disease first appears).</b>
<b>Multiple Myeloma</b>	<b>No time requirement (veteran qualifies no</b>

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**matter when this disease first appears).**

**Non-Hodgkin's Lymphoma**

**No time requirement (veteran qualifies no matter when this disease first appears).**

**Diabetes (Type II; also known as diabetes mellitus)**

**No time requirement (veteran qualifies no matter when this disease first appears).**

**Types of Soft Tissue Sarcoma**

**Time Requirement**

Adult Fibrosarcoma  
Alveolar Soft Part  
Sarcoma  
Angiosarcoma  
Clear Cell Sarcoma of Aponeuroses  
Clear Cell Sarcoma of Tendons and  
Aponeuroses  
Congenital  
Fibrosarcoma  
Dermatofibrosarcoma  
Protuberans  
Ectomesenchymoma  
Epithelioid Malignant  
Leiomyosarcoma  
Epithelioid and Glandular Malignant  
Schwannomas  
Epithelioid Sarcoma  
Extraskeletal Ewing's  
Sarcoma  
Hemangiosarcoma  
Infantile  
Fibrosarcoma  
Leiomyosarcoma  
Liposarcoma  
Lymphangiosarcoma  
Malignant Fibrous Histiocytoma

No time requirement (veteran qualifies no matter when this disease first appears).

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Malignant Giant Cell Tumor of the  
Tendon Sheath  
Malignant Glandular  
Schwannoma  
Malignant Glomus Tumor  
Malignant Hemangiopericytoma  
Malignant Mesenchymoma  
Malignant Ganglioneuroma  
Malignant Granular Cell Tumor  
Malignant Leiomyoblastoma  
Malignant Synovioma  
Malignant Schwannoma with  
Rhabdomyoblastic  
Differentiation  
Proliferating (systemic)  
Angiendotheriomatosis  
Rhabdomyosarcoma  
Synovial Sarcoma

**Diseases Other Than Cancer**

**Time Requirement**

Peripheral Neuropathy (acute or subacute)

Within months of exposure to Agent Orange in Vietnam and cured within two years after symptoms first appear (Note: this time requirement is written so narrowly it appears to be impossible for any Vietnam veteran to qualify).

Chloracne

Within one year of the last day the veteran served in Vietnam.

Porphyria Cutanea Tarda

Within one year of the last day the veteran served in Vietnam.

**Disabilities in Children of Vietnam Veterans**

**Time Requirement**

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Spina Bifida<sup>554</sup>

Child must have been conceived after  
veteran first arrived in Vietnam.

Certain Birth Defects in Children of  
Female Vietnam Veterans<sup>555</sup>

Child must have been conceived after  
veteran first arrived in Vietnam.

It is important to understand that medical terms sometimes change. For example, Non-Hodgkin's lymphoma (NHL) has been called by many different names, such as lymphosarcoma and reticulum cell sarcoma. Appendix 3-G to this Chapter contains a list of some common terms for NHL. To find out for sure whether the veteran's diagnosed disease is among those that are presumptively service connected due to exposure to Agent Orange, consult with a medical professional. To help understand the nature of the diseases listed above in Table 3-1, a short description of most of these diseases appears in Appendix 3-F to this Chapter.

Vietnam veterans who develop one of the cancers listed in Table 3-1 may still be denied disability compensation if the cancer on the list developed as a result of, or was caused by a different cancer. The U.S. Court of Appeals for Veterans Claims has ruled that if a Vietnam veteran first develops a cancer that is not listed in Table 3-1, like colon cancer, and that cancer later shifts or spreads (in medical language, "metastasizes") to another part or organ of the body so that the veteran then has a cancer that is listed in Table 3-1, like lung cancer, the VA is not required to grant the claim under the Agent Orange exposure regulations.<sup>556</sup>

On the other hand, if the veteran first develops a cancer that is listed in Table 3-1 and it shifts or spreads to another part or organ of the body that is not listed in Table 3-1, the VA must grant the claim and, in rating the degree of disability, it must consider the disabling effects of both the original cancer and the secondary cancer sites that may develop from the original cancer.<sup>557</sup>

*\*\*Advocacy Tip\*\* The key to winning a claim when the veteran suffers from at least one cancer on the VA list and at least one cancer that is not on the list is to obtain helpful medical evidence. Veterans and their advocates should try to get a statement from a physician, preferably an oncologist (a physician who is a specialist in cancer), stating that in the physician's expert opinion, it is as likely as not (or, even better, that it is very probable) that the cancer on the VA list was a "primary" cancer, and did not develop from a different cancer that the veteran already had.*

## Footnotes

552. See 38 C.F.R. § 3.307(a)(6)(ii) (2002).

553. This list of diseases associated with Agent Orange exposure as recognized by the VA

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appears in 38 C.F.R. § 3.309(e) (2002), except spina bifida in children of Vietnam Veterans which appears in 38 C.F.R. § 3.814 (2002).

554. See 38 C.F.R. § 3.814 (2002). See also Section 7.5 of this Manual for further information concerning benefits for children born with spina bifida.

555. Congress has required the Secretary of Veterans Affairs to publish regulations identifying the birth defects that will qualify. See U.S.C.S. §§ 1811-15. These regulations were not published as of the publication of the 2002 edition of this Manual. When published, these regulations must have an effective date of December 1, 2001. See generally Section 7.5.1.1. of this Manual.

556. *Darby v. Brown*, 10 Vet. App. 243 (1997).

557. See 38 C.F.R. § 3.310 (2002).

### **3.8.1.3 The Third Requirement for Some Diseases: Medical Evidence of the Onset of the Disease Within a Certain Time Period**

For some of the non-cancer diseases on the VA's list, there is a third requirement: that the condition became manifest (that is, symptoms of the condition began to appear) within a certain length of time after leaving Vietnam.<sup>558</sup> For diseases with a time requirement, the veteran must also show that the disease caused a disability that is at least 10% disabling within the same required time period.<sup>559</sup> If there is a requirement that the disease appear within a certain time period, the time period appears in the right-hand column to Table 3-1 above.

The proof that the disease manifested to the required degree within the required period must be in the form of medical evidence. Advocates should explore whether a physician is available and able to state, at minimum, that it is at least as likely as not that if the veteran experienced the symptoms as reported to the physician, the veteran was experiencing the symptoms of the disease. This medical evidence coupled with the veteran's or survivor's statement about the early symptomatology and any corroborating statements, should lead the VA to find that the claimant has satisfied the manifestation period requirement.

Prior to 2002, the recognized respiratory cancers – that is, cancer of the lung, larynx, bronchus, and trachea – were subject to a time manifestation requirement. Under the rule in effect from 1994 (when the VA first recognized these respiratory cancers as being related to Agent Orange exposure) through 2001, a respiratory cancer would not qualify under the VA's Agent Orange rules if the cancer first became manifest to a degree of 10% or more after 30 years had already expired from the last day of the veteran's service in Vietnam.<sup>560</sup>

Congress repealed the 30-year manifestation rule for respiratory cancers, effective on January 1, 2002.<sup>561</sup> Thus, the rule now is that a Vietnam veteran who develops a respiratory cancer to a

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disabling degree of 10% or more, or a qualifying surviving family member of a Vietnam veteran who dies of a respiratory cancer, is entitled to compensation based on that cancer no matter now when the respiratory cancer first appeared.

A Vietnam veteran or surviving family member who applied for, but was finally denied compensation because of the 30-year manifestation rule, can now qualify for compensation simply by filing a new application. To ensure that the VA grants the new claim – as it should -- the veteran or survivor should alert the VA to the fact that the 30-year manifestation rule has been repealed.

If this new claim is filed before January 1, 2003, the effective date of the award should be January 1, 2002, or the date the cancer became manifest to a disabling degree of 10% or more, whichever date is later. If the new claim is not filed until after January 1, 2003, the effective date of the award should be one year before the date the VA received the new claim, or the date the cancer became manifest to a disabling degree of 10% or more, whichever date is later. Because Congress did not make the repeal of the 30-year manifestation rule retroactive, the effective date of an award of benefits cannot be before January 1, 2002, in a case in which the respiratory cancer first became manifest more than 30 years after the veteran's last day of service in Vietnam.

#### **Footnotes**

558. *See* 38 C.F.R. § 3.307(a)(6)(ii) (2002).

559. *See* 38 C.F.R. § 3.307(a)(6)(ii) (2002).

560.. *See* 38 C.F.R. § 3.307(a)(6)(ii) (2002).

561.. *See* Pub. L. No. 107-103, Tit. II, § 201(a), 115 Stat. 987 (Dec. 27, 2001).

#### **3.8.1.4 Special Rules Regarding Non-Hodgkin's Lymphoma (NHL)**

The rules for service connection regarding Non-Hodgkin's lymphoma (NHL)<sup>562</sup> are slightly different than the rules for other disease linked to exposure to Agent Orange. One of the regulations that grant service connection for NHL bases the connection on service in Vietnam and not Agent Orange exposure.<sup>563</sup> In most ways that regulation operates the same as regulations granting service connection based on Agent Orange exposure. However, there are a couple of differences worth noting.

One difference involves the definition of service in Vietnam. The definition of service in Vietnam is slightly broader than it is for the other diseases listed in Table 3-1 above. For all diseases other than NHL, veterans are required to have either had duty or visitation in Vietnam.<sup>564</sup> Under one of the two regulations providing for service connection for NHL, service

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members who served in the waters off-shore do not have to show any duty or visitation in Vietnam.<sup>565</sup>

Second, the effective date rules for an award of benefits for NHL under 38 C.F.R. § 3.313 are more favorable than the effective date rules for an award for an NHL claim based the Agent Orange exposure under 38 C.F.R. §§ 3.307(a)(6) and 3.309(e). For these reasons, NHL claimants should always cite to 38 C.F.R. § 3.313 instead of 38 C.F.R. §§ 3.307(a)(6)(3) and 3.309(e) when filing a claim.<sup>566</sup>

In addition, effective October 23, 1995, the VA changed the rating schedule that is used to determine the level of disability caused by NHL.<sup>567</sup> Prior to that date, NHL was rated according to the same criteria as Hodgkin's disease, with incremental percentage ratings for varying degrees of disability.<sup>568</sup> Under the amended regulation, NHL must be rated as 100% disabling when the disease is "active" or during a "treatment phase."<sup>569</sup> Thus, a veteran can only be 0% disabled or 100% disabled by NHL. However, if the disease is not active, the VA must also rate the veteran on the residuals of NHL.<sup>570</sup>

### **Footnotes**

562. For the purpose of service connection for this disease, the definition of NHL "includes any diagnosis of a lymphoma (other than Hodgkin's lymphoma), mycosis fungoides, and old terms such as lymphosarcoma, reticulum cell sarcoma, and Sternberg's sarcoma." VBA Circular 21-90-11, change 1, ¶ 2(b) (Jan. 25, 1991).

563. *See* 38 C.F.R. § 3.313 (2002).

564. *See* 38 C.F.R. § 3.307(a)(6)(iii) (2002).

565. There are two regulation that provide presumptive service connection for NHL, 38 C.F.R. §§ 3.313 3.309(e) (2002). (Service in Vietnam for purposes of 38 C.F.R. § 3.309(e) (2001) is defined in 38 C.F.R. § 3.307(a)(6)(iii) (2002)). 38 C.F.R. § 3.313 (2002) provides the broader and more favorable definition of service in Vietnam for veterans.

566. *See* Section 8.6 of this Manual for more information concerning effective dates for awards of benefits due to Agent Orange.

567. 60 Fed. Reg. 49,225 (1995).

568. 38 C.F.R. § 4.117 (1996). The diagnostic code for NHL is 7715. The diagnostic code for Hodgkin's disease is 7709 (lymphogranulomatosis).

569. *See* 38 C.F.R. § 4.117 (2002).

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570. *Id. See also, Green v. West*, 11 Vet. App. 472, 475 (1998).

### **3.8.2 Veterans Should Reapply If Previously Denied Compensation for a Disease Listed in Table 3-1**

It took over two decades after the U.S. military halted its spraying of Agent Orange in Vietnam because of concerns about its dangers to the health of its troops for the VA to recognize that Agent Orange is associated with seriously disabling diseases. As Table 3-2 below shows, the VA did not begin to recognize this association until the 1990s. Column 2 of the table lists for each disease the VA now recognizes as related to Agent Orange exposure the date that the VA published amendments to its regulations recognizing the disease for the first time.

**Table 3-2**

<b>Disease</b>	<b>Publication Date</b>	<b>Effective Date</b>	<b>38 CFR §</b>
Chloracne	05-19-93	02-06-91	3.309(e)
Soft-tissue sarcoma (STS)	10-15-91 05-19-93	09-25-85 02-06-91	3.311a 3.307 & 3.309(e)
Non-Hodgkin's lymphoma	10-26-90 05-19-93	08-05-64 02-06-91	3. 313 3.307 & 3.309(e)
Porphyria Cutanea Tarda	04-03-94	04-03-94	3.307 & 3.309(e)
Hodgkin's disease	04-03-94	04-03-94	3.307 & 3.309(e)
Cancer of the lung	06-09-94	06-09-94	3.307 & 3.309(e)
Cancer of the larynx	06-09-94	06-09-94	3.307 & 3.309(e)
Cancer of the bronchus	06-09-94	06-09-94	3.307 & 3.309(e)
Cancer of the trachea	06-09-94	06-09-94	3.307 & 3.309(e)
Multiple Myeloma	06-09-94	06-09-94	3.307 & 3.309(e)
Prostate cancer	11-07-96	11-07-96	3.307 & 3.309(e)

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Acute and subacute Peripheral Neuropathy	11-07-96	11-07-96	3.307 & 3.309(e)
Spina Bifida in children of Vietnam veterans	09-30-97	10-01-97	3.814
Type II Diabetes	05-08-01	07-09-01	3.307 & 3.309(e)

Prior to these changes, the VA's denial that a relationship exists between Agent Orange and serious disabling diseases led the VA to deny tens of thousands of disability and death claims filed by Vietnam veterans and their survivors, many of which asserted that Agent Orange caused the disease or death. A Court Order issued in a class action lawsuit litigated by attorneys from the NVLSP required the VA to automatically identify many of these previously denied claimants, reevaluate their claims under the amended Agent Orange regulations, and, if they qualified under the new regulations, grant them prospective and retroactive disability compensation or DIC benefits.<sup>571</sup> Unfortunately, the VA violated this Court Order by failing to identify many claimants previously denied benefits for diseases the VA later recognized as related to Agent Orange.<sup>572</sup>

Any Vietnam veteran who was previously denied disability benefits by the VA for a disease listed in Tables 3-1 and 3-2 should file a new application for the same benefits under the new regulations.<sup>573</sup> The same advice applies to surviving family members of Vietnam veterans who died of a disease listed in Tables 3-1 and 3-2 and who were previously denied DIC benefits by the VA. Those who reapply and qualify for benefits under the rules discussed in this chapter will not only receive benefits in the future, but, as discussed in Section 8.6 of this Manual, many of them will also receive benefits retroactive to the date the VA received the claim it previously denied.<sup>574</sup>

### Footnotes

<sup>571.</sup> See Appendix 8-A at the end of Chapter 8 of this Manual. A description of this class action lawsuit appears in Section 8.6.1 of this Manual.

<sup>572.</sup> See *Nehmer v. U.S. Veterans Administration*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999).

<sup>573.</sup> Veterans who applied before and were denied but have no current disabling residuals from the disease, should still re-apply as they may still be eligible for retroactive benefits.

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574. Many veterans and surviving family members are entitled to retroactive benefits due to a class action lawsuit brought by NVLSP, *Nehmer v. U.S. Veterans' Administration*. In *Nehmer* the Court invalidated the VA's denials of all claims based on diseases related to Agent Orange exposure, if such denials were made on or after September 25, 1985. *See Nehmer v. U.S. Veterans' Administration*, 712 F. Supp 1404 (N.D. Cal. 1989). Pursuant to the Court's Order, all claims based on Agent Orange-related diseases which it denied on or after September 25, 1985 must be readjudicated. *Nehmer v. U.S. Dep't of Veterans Affairs*, No. CV-86-6160 at ¶¶ 3 and 5 (N.D. Cal. May 14, 1991) (Final Stipulation and Order). For further information concerning readjudication and retroactive effective dates under *Nehmer*, review Section 8.6 of this Manual, and write to NVLSP's Agent Orange Resource Center, 2001 S Street, N.W., Suite 610, Washington, D.C. 20009. Also available from NVLSP is a 45-page Self-Help Guide on Agent Orange, published both in English and Spanish.

### **3.8.3 Vietnam Veterans Who Have a Disease Not Recognized by VA as Connected to Agent Orange Exposure**

Unfortunately, Vietnam veterans who develop a condition not on the VA's list have a hard time convincing the VA that it resulted from exposure to Agent Orange. Although unlikely, it is possible that a claim for compensation could be granted if a veteran can submit (1) a doctor's statement that the veteran currently suffers from the disease or disability (or its residuals), and (2) an opinion from a medical expert stating that it is as likely as not that exposure to Agent Orange caused the disease or disability.<sup>575</sup>

As mentioned, the list of recognized diseases has changed on a number of occasions. Veterans and their advocates should check to see whether, after the 2002 edition of this Manual was published, the veteran's disease was added to the VA's list of diseases that are presumptively service connected to herbicide exposure in Vietnam.<sup>576</sup>

If the disease is not on the VA's current list, veterans may still qualify for service-connected disability compensation at this time under VA rules discussed earlier in this chapter that have nothing to do with Agent Orange. In addition, if the veteran does not qualify for compensation under any of the VA's rules, the veteran may still be able to get help at this time from the VA in the form of a non-service-connected disability pension.<sup>577</sup>

Even if the veteran does not qualify for benefits under any current rules, it may still be advisable to file a claim immediately. This is especially true if the disease at issue is one of the diseases currently being studied by the National Academy and is among those most likely to be added in the future to those diseases recognized by the VA as associated with Agent Orange exposure. The benefit of taking this action is that if the VA later adds the disease to those that are presumptively service connected and grants the claim, the veteran will have a better chance of receiving retroactive benefits.

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The following Table 3-3 lists the diseases most likely to be added to the list of diseases recognized by the VA.

**Table 3-3578**

**Diseases and Disabilities Having the Best Chance of Being Added in the Future to the Conditions Connected to Agent Orange Exposure**

Abnormal Sperm Parameters and Infertility  
Birth Defects (Other than Spina Bifida in Children of Vietnam Veterans)  
Bladder Cancer  
Bone Cancer  
Breast Cancer  
Childhood Cancer (in Children of Vietnam Veterans)  
Chronic Peripheral Nervous System Disorders  
Circulatory Disorders  
Cognitive and Neuropsychiatric Disorders  
Female Reproductive Cancers (cervical, uterine, ovarian)  
Hepatobiliary Cancers  
Immune System Disorders  
Leukemia  
Liver Cancer  
Low Birthweight (in Children of Vietnam Veterans)  
Metabolic and Digestive Disorders (changes in liver enzymes, lipid abnormalities, ulcers)  
Motor or Coordination Dysfunction  
Nasal or Nasopharyngeal Cancer  
Neonatal or Infant Death and Stillbirths  
Renal Cancer  
Respiratory Disorders  
Skin Cancer  
Spontaneous Abortion  
Testicular Cancer  
Urinary Bladder Cancer

**Footnotes**

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575. Prior to 2002, the VA would not presume exposure to Agent Orange unless the Vietnam veteran had one of the diseases the VA recognizes as associated with Agent Orange exposure. *See* *McCartt v. West*, 12 Vet. App. 164 (1999). Therefore, for claims concerning diseases not presumptively service connected, evidence of exposure to Agent Orange had to be submitted. In December 2001, Congress eliminated the need to submit exposure evidence, even for diseases not yet recognized by the VA as presumptively service connected. *See* Pub. L. No. 107-103, Tit. II, § 201(c)(1), 115 Stat. 988 (Dec. 27, 2001). For all diseases alleged to have resulted from Agent Orange exposure, the VA must now assume that if the veteran served in Vietnam, he or she was exposed.

576. Congress has required the National Academy to continue until the year 2014 to write new reports analyzing the scientific evidence that becomes available in the future. Whenever a new report is issued, the VA may decide it needs to add more diseases to the list in Table 3-1. The NVLSP web site (<http://www.nvlsp.org>) contains an up-to-date list of all the diseases recognized by the VA.

577. The veteran may also qualify for free medical care. For more information, *see* Section 10.3.1 of this Manual.

578. *See* "Veterans and Agent Orange" Institute of Medicine, National Academy of Sciences Press 1994; "Veterans and Agent Orange: Update 1996" Institute of Medicine, National Academy of Sciences Press 1996; "Veterans and Agent Orange: Update 1998" Institute of Medicine, National Academy of Sciences Press 1999; "Veterans and Agent Orange: Update 2000" Institute of Medicine, National Academy of Sciences Press 2001.

### **3.8.4 Veterans Exposed to Agent Orange Outside Vietnam or Not During the Vietnam Era**

The presumption for service connection only applies to veterans who served in Vietnam as defined above. However, Agent Orange was used not only in Vietnam, but also in Korea and other hostile areas.<sup>579</sup> Until recently, the VA would grant compensation to veterans exposed to Agent Orange outside of Vietnam only if the claimant proved exposure to Agent Orange and submitted persuasive medical evidence of a connection between the veteran's current disease and that exposure.<sup>580</sup>

In an apparent effort to equalize the treatment of all veterans exposed to Agent Orange, the VA announced in 2001 that if exposure outside of Vietnam were proven, and the veteran had one of the diseases presumed by law to be related to exposure to Agent Orange (see Table 3-1 above), the medical condition would be presumed to have resulted from Agent Orange exposure and the claim granted unless there were other disqualifying factors.<sup>581</sup> The most difficult issue in these cases is proving exposure. The authors of this Manual have been informed that the VA is in the

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process of determining whether Department of Defense information is sufficient to presume that some non-Vietnam units were exposed to Agent Orange. No VA determination of this type was made as of the publication of the 2002 edition of this Manual.

The following areas outside of Vietnam have been confirmed as places where Agent Orange was used: the Korean demilitarized zone in 1968 and 1969 (extensive spraying); and Fort Drum, New York in 1959 (testing).

Other areas where veterans allege Agent Orange was sprayed or stored include: Guam from 1955 through 1960s; the Johnston Atoll (1972-1978); and the Panama Canal Zone from 1960s to early 1970s.

Any veteran concerned about exposure to Agent Orange during its use, manufacture, testing or transport outside of Vietnam is entitled to an Agent Orange physical by the VA and to be added to the Agent Orange Registry.<sup>582</sup>

### **Footnotes**

579. See BVA 98-17647 (Mar. 12, 1999); Todd Robertson, *Bases May Have Been Sprayed With Agent Orange*, Dallas Morning News, Aug. 24, 1999.

580. See BVA 98-17647 (Mar. 12, 1999) granting compensation to a veteran who established exposure to Agent Orange in Korea and who was diagnosed with NHL.

581. See comments on the final rule adding diabetes to the list of "diseases" in 38 C.F.R. § 3.309(e), at 66 Fed. Reg. 23166 (May 8, 2001).

582. Veterans Health Administration Directive 2000-027.

### **3.8.5 The Lawsuits Against the Chemical Companies that Manufactured Agent Orange**

In 1978, a Vietnam veteran named Paul Reutershan filed a lawsuit against some of the chemical companies that had manufactured Agent Orange. Other veterans later joined the suit, which was broadened to include all seven manufacturers (Dow Chemical Company, Monsanto Company, Hercules, Inc., T.H. Agriculture & Nutrition Company, Diamond Shamrock Chemicals Company, Thompson Chemical Corporation, and Uniroyal, Inc.).<sup>583</sup>

The lawsuit sought money damages for injuries caused to Vietnam veterans and their families by Agent Orange. The suit was a class action, that is, it affected not only the original plaintiffs, but also all the members of a class as defined by the court that supervised the case. The class members included any person who had been in the United States, New Zealand, or Australian armed forces at any time from 1961 to 1972 who was injured while in or near Vietnam by

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exposure to Agent Orange or other phenoxy herbicides. The class also included certain spouses, parents, and children.

A settlement was announced on May 7, 1984, the day on which the trial had been scheduled to begin. In exchange for the veterans' dropping the lawsuit, the chemical companies agreed to contribute \$180 million to a settlement fund. Between 1984 and 1988, when all of the appeals to overturn the settlement were finally denied, the settlement fund grew to \$240 million with interest. In July 1988, the United States District Court for the Eastern District of New York finalized plans to distribute cash and develop funding for services to veterans and their families.

The settlement money was divided into two main funds: \$170 million to be paid directly to disabled veterans or survivors (including \$5 million for veterans from Australia and New Zealand) and \$42 million (later \$52 million) to be used to fund programs that would benefit Vietnam veterans and their families. About 5% of the fund went for attorneys' fees, paid out of the interest earned on the original principal settlement amount.

The court established a payment program to distribute the \$170 million set aside for Vietnam veterans and surviving family members. The court also created the Agent Orange Class Assistance Program (AOCAP) to administer the funds set aside to provide services to veterans and their families. To be eligible for compensation under the payment program, veterans had to have served in the U.S. armed forces in or near Vietnam any time from January 1, 1961, through December 31, 1971; have been exposed to herbicides (using court-approved criteria) while in or near Vietnam; and have a total disability that occurred prior to the veteran's 60th birthday. Not all types of disabilities were compensable. A survivor was eligible for compensation if he or she could show that the veteran had served in the U.S. armed forces in or near Vietnam any time from January 1, 1961, through December 31, 1971; that the veteran had been exposed to herbicides; and that the veteran had died before age 60 from a non-traumatic cause.

The final deadline for applications to the payment program was January 17, 1995. This program is now closed, and it is too late to apply. While the program was open, 105,762 Vietnam veterans or their survivors applied to the payment program; 52,023 of these disability and survivor compensation claims were granted.

AOCAP is also closed now. During its existence, AOCAP administered grants to 85 programs (including NVLSP) to provide services to Vietnam veterans and their families. The program disbursed more than \$71 million and helped more than 239,000 Vietnam veterans and their family members.<sup>584</sup>

Until 2000, it appeared that no matter when they developed a disease that may have been caused by Agent Orange, Vietnam veterans could only receive compensation from the chemical company manufacturers through the settlement of this class action. In *Stephenson v. Dow Chemical Co.*,<sup>585</sup> however, the Court of Appeals for the Second Circuit ruled that two Vietnam veterans who first became ill after 1994 (that is, after all the settlement funds had been paid out)

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