

*Strategies For a  
Winning Campaign*

# Veterans DISABILITY Claims



**MARC WHITEHEAD, Esq.**

# **VETERANS DISABILITY CLAIMS**

*Strategies for a Winning Campaign*

**Second Edition**

**By Marc Whitehead, Esq.**

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***Strategies for a Winning Campaign***

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By Marc Whitehead, Esq.

Whitehead & Associates, LLP

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## Preface

As a child, I lived with my uncle Earl, who was a disabled Veteran. Uncle Earl was a colorful character. Earl told the story of how he was raised in the Tennessee hills near Knoxville, a used car salesman by day and a bootlegger by night. He told of how he used to run moonshine in a fake gas tank under his car, think of the movie *Thunder Road* (1958) with Robert Mitchum. Around 1940 he finally got caught and the judge gave him an “either/or” – either spend a year in the U.S. Army or spend a year in jail. Not knowing what the Japanese were up to, Uncle Earl chose what he thought would be a year in the army. Before he was honorably discharged in 1954, Uncle Earl served with great distinction in World War II, in the Sicilian and Italian campaigns, and in the Korean War.

An interesting sub-chapter began in 1945 when he began receiving letters from a young woman in Mississippi he had never met named Frances. During WWII, young women were given lists of GI’s to correspond with to keep up the troop’s morale. They considered it their patriotic duty. A relationship soon developed and in 1946 Aunt Frances and Uncle Earl were married. They had no children and in second grade I went to live with them and they raised me as their own in the small town of Normangee, Texas.

As I grew up, I witnessed firsthand the physical toll that Uncle Earl’s service to his country took upon his body as he grew older. I also witnessed the long struggle for him to win his Veterans Disability claim. The reality is that service connected disabilities frequently do not become severe until years after the Veteran has left the military and proving a Veteran’s disability claim can be very difficult. Uncle Earl’s life has inspired my desire to help disabled Veterans and I dedicate this book to him.

## **Chapter 1**

### **Beginning the Claims Process**

#### **How to Get Started with the Veterans Claims Process**

The Veterans Claims Process can be complicated, and as a result, many veterans don't obtain the benefits they earned. If you served our country as a member of the US armed forces and were impaired as a result, either physically or psychologically, you deserve compensation for your sacrifice. If you feel overwhelmed or confused by the process, you should consider working with an experienced veteran's benefits attorney. He or she can ensure that you are following the veterans' claims process correctly in order to have a better chance of getting your veterans benefits approved.

#### **What Veterans Benefits Does the VA Handle?**

For most, the veterans' claims process starts with the Department of Veterans Affairs (VA).

The VA has two main roles:

1. Providing medical care for veterans, and
2. Paying benefits to veterans.

The veterans' benefits the VA handles include:

- Compensation for service-related disabilities,

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- Pensions to low income, wartime veterans or their widows, and
- Compensation to widows and families of veterans.

These responsibilities are divided between the Veterans Benefits Administration (VBA) and the Veterans Health Administration (VHA). Since you are looking to process a claim for veterans' benefits (disability compensation or pension) you would be dealing solely with the VBA.

To start, you want to ensure that you qualify as a "veteran" according to the VA's definition: "a person who served in the active military, naval or air services, and who was discharged or released under conditions other than dishonorable."

Be aware that even if you have an honorable discharge, the VA retains the right to determine whether or not your disability came from dishonorable service.

### *Definition of a Veteran:*

*"A person who served in the active military, naval or air services, and who was discharged or released under conditions other than dishonorable."*

*~ According to the VA*

## **How Long Do VA Claims Take to Go Through?**

Unfortunately, the Department of Veterans Affairs takes a very long time when processing VA claims. VBA now serves almost 4.5 million veterans in their compensation or pension benefit claims. In just the past four years, over one million veterans have made new claims for compensation.

In 2006, the average time to process a VA claim through regional offices was 127 days. In 2012, that number rose to 260 days. More than 8 months! How horrible would it be to wait eight months only to be denied veterans benefits?

VA reports improvement in the atrocious number of backlogged claims. In 2016, the average time it takes VA to complete a claim is 124 days – vastly reducing the processing time over the

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past four years. But if you take a closer look at a decade's data, 10 years later VA is basically back to the same slow claims processing time as 2006.

VA also reports that the processing time for appeals resolved in 2015 was just over 3 years.

*If you are denied veterans benefits, there's a good chance it was due to an error in the process – not you.*

Appeals that reach the Board of Veterans' Appeals take, on average, over 60 months. This means tens of thousands of veterans wait **5 years or longer** for final appeal decisions.

The unacceptable delay of veterans securing their rightful disability benefits is not a new problem.

In 2002, a VA employee testified to the U.S.

Government Accountability Office (GAO) about

veterans' claims, saying even then that it was a long-standing issue and that "this isn't a problem that snuck up on them." The VA is well aware that veterans of World War II have been dying at a high rate while they try to wait out delays in processing their VA claims.

Many veterans who have had to go through the process and been denied veterans benefits end up so frustrated that they start to believe long delays are just a part of dealing with veterans claims. And they're not the only ones. Veterans' advocates and even members of Congress have complained, but so far the problem just seems to get worse.

Sadly, experts' predictions that these problems would only become bigger have become reality, as veterans of the Iraq and Afghanistan wars – and U.S. forces engaged in various missions around the globe – file more claims to an already slow system.

### Why Is the VA Claims Process So Bad?

You might not like the answer. One would like to think that we would put our best and brightest in charge of VA claims in order to help the proud men and women dedicating their lives to protecting our country, but performance tests have not shown this to be the case.

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In one presentation to Congress, a VA official said that they gave a job skill certification test to 650 of their VA claims adjudicators (GS 10s and GS 11s), and the results were not promising. Only 25 percent of the GS 10s and 29 percent of the GS 11s were able to pass the test. In short, part of the reason claims take so long is because VA employees don't know how to do their jobs.

The only silver lining in this debacle is that if you are denied veterans benefits, there's a good chance it was due to an error in the process – not you. Because of this, a high number of denials are overturned by experienced VA claims attorneys, and many veterans are ultimately given the benefits they deserve. Still, that's no excuse for having the problem in the first place. For the sake of our armed servicemen and women, training has to get better, and the entire VA claims process needs to improve.

### **VA Revamps the Claims Process with Electronic Claims Filing**

VA is making efforts to reform the system. Since 2013, VA has changed over from a paper-based process to an electronic processing system. In March 2013, VA had about 611,000 backlogged disability claims waiting over 125 days. By September 2015 this number was reduced to 71,350 backlogged, unresolved claims.

VA also claims the paperless, digital system, combined with improvements to staff performance and business processes, is working to reduce the backlog of claims and to improve claim-level quality and decision accuracy.

### **Quality Review Teams (QRT) Program**

VBA has established Quality Review Teams (QRTs) in all Regional Offices. This ongoing initiative is intended to improve the quality and timeliness of claims processing in every VBA facility that handles compensation and pension claims.

## **VA Introduces the “Fully Developed Claims” (FDC) Program for Fast-Track Decisions**

Recently introduced to the disability claims process is the concept of the “Fully Developed Claims” (FDC). VA alleges the FDC program gives veterans a way to gain favorable decisions, faster. Claims submitted under the FDC program may be processed by the VA within 30-60 days of submission. Successful claims filed for the first time (original claims) will result in an extra year's worth of compensation,

FDC is a further attempt by VA to expedite disability compensation claims and reduce backlog. For more about Fully Developed Claims, see Chapter 3, “How Do You Prove Eligibility for Veterans Claims?”

## Chapter 2

### Eligibility Requirements to Receive Veterans Benefits

#### What Are the Eligibility Requirements for Successful VA Claims?

When starting the process of making VA claims, it's important to first determine whether you meet the eligibility requirements for receiving veterans' benefits. All VA benefit programs require that anyone applying meet three basic criteria used to determine whether he or she will be classified as a veteran.

These three requirements are:

1. Whether the applicant has served in any branch of the military
2. Whether the applicant's military service was considered "active"
3. Under what circumstances the applicant was discharged

It is crucial to establish that you meet these general requirements for veteran status before beginning the claims process. Veterans' dependents and survivors can also apply for benefits after establishing that their loved ones' status met these three criteria.

## **What Other Eligibility Factors Are Considered During the VA Claims Process?**

Meeting the three criteria used to define whether someone is a veteran is just the first step in the claims process. After you've successfully established that you are eligible under the basic definition of a veteran, factors such as the length of your active service or whether your active service was during wartime will impact the types and amount of benefits that you, your spouse, or your dependents are eligible to receive.

In some special cases, a veteran who does not meet the three basic eligibility requirements can still be entitled to some benefits. An accredited VA disability attorney can be invaluable in helping guide you and your family through the challenging rules established by the VA claims process.

## **How Does the VA Claims Process Define Military Service?**

When it comes to the VA claims process, you must be "a person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable" to establish basic eligibility. The first step that either your VA disability lawyer or the VA Board will take in establishing your benefit eligibility will be to examine whether your experience qualifies as military service.

Conventional service in one of the five branches of the US Armed Forces is the most common type of military service. If you served with the US Army, Navy, Marine Corps, Air Force, or Coast Guard, you'll meet the military service requirement.

You could also meet the requirement by serving in one of these branches as a member of the Reserve, as a cadet or midshipman at a military academy, as a student in a prep school for one of the academies, or as a member of the Air or Army National Guard.

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## **The VA Claims Process: What Other Types of Military Service Make You Eligible?**

If you did not serve in one of the five branches of the US Military mentioned above, you may still meet the first requirement of the VA's definition of a veteran. It's always best to consult a VA accredited lawyer on these finer points, but here are a few examples of service that may qualify you for classification as a veteran:

- Commissioned full-time officers in the Public Health Service
- Commissioned full-time officers of the National Oceanic and Atmospheric Administration
- Commissioned full-time officers of the Environmental Science Services Administration
- World War II service in the Philippines' organized military forces
- World War II service as an American Merchant Marine
- Pre-1943 service in the Women's Army Auxiliary Corps
- Other service by civilians during a few specific periods of armed conflict

## **What Are the Active Service Requirements for Successful Veterans Claims?**

The next step in the veterans' claims process is establishing whether your service can be considered "active." This step can be a little trickier than meeting the requirement for military service, so you may want to consider enlisting the help of a veterans' disability attorney before embarking on your veterans' claims application.

## **How Is "Active" Service Defined when Making Veterans Claims?**

By its simplest definition, "active" duty that qualifies a veteran to receive benefits describes full-time service:

- In one of the five branches of the military
- As a commissioned officer for the Public Health Service or other federal service administrative organizations

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- As a cadet or midshipman at a military academy
- In attendance at a military academy preparatory school, if the person had an active duty commitment
- During authorized travel to or from any of the above listed types of active service

Some veterans' active duty during training periods can also make them eligible for benefits. If the veteran in question was injured or killed during a training period, the veteran or surviving benefactors may be able to receive benefits. This "active duty for training" specification applies to members of the Reserve or National Guard, military prep school students, and some other veterans.

It is also possible for the VA to consider veterans eligible for benefits if they were disabled or died in the line of duty as a result of certain cardiac health problems, like a heart attack, during training. This type of injury is considered a result of "inactive duty for training," and can apply to National Guard members, Reservists, and a few other types of veterans.

The VA's rules for determining active service eligibility can be complicated – for example, you'll have to keep in mind that for members of the National Guard, only the periods during which they were called into federal service can make them eligible for veterans' benefits.

### **How Does the Character of a Discharge Affect a VA Claim?**

When you begin the VA claim process with the purpose of proving your eligibility for veterans' benefits, you'll first need to establish that your service meets the VA's requirements of being active duty in a branch of the military or other military capacity. Once you've successfully met these two requirements, you'll have to pass a final criterion: determining the character of your discharge.

The VA states that anyone establishing veteran status for the purpose of receiving benefits must have been discharged "under conditions other than dishonorable." This might seem simple at first – but unfortunately, the VA's discharge categories do not match up with the military's discharge categories.

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## **How Is the Character of a Discharge Determined for a VA Claim?**

The military's discharge classifications are as follows:

- Honorable discharge (HD)
- Discharge under honorable conditions (UHC) or general discharge (GD)
- Discharge under other than honorable conditions (OTH) or undesirable discharge (UD)
- Bad conduct discharge (BCD)
- Dishonorable discharge (DD) or dismissal

Since the VA's language specifies that to be considered a veteran eligible for benefits, the discharge must be "other than dishonorable," people with the first three types of discharges (HD, UHC, or GD) almost always qualify. People with dishonorable discharges almost never qualify.

Many veterans end up applying to upgrade their discharge statuses before opening a case to determine benefit eligibility, but this involves yet another lengthy and complicated VA claim process. See Chapter 19, "Upgrading a Veteran's Discharge Status" for more detail on this subject.

## **How Does the Insanity Exception Affect Eligibility for VA Benefits?**

There are a few rare exceptions to the usual rule that veterans can only claim VA benefits for disability if their discharges were "other than dishonorable." If the veteran was ruled insane during the period of misconduct that led to a dishonorable discharge, the VA may waive the discharge requirement and decide to grant benefits to the veteran.

Of course, the diagnosis of insanity is a serious affair. The VA has a fairly strict definition of insanity, relating to behavior that sharply deviates from a healthy individual's usual character due to a mental disease.



## **What Are the Steps to Make a Claim for VA Benefits Using the Insanity Exception?**

In order to successfully argue that the insanity exception applies to your VA benefits, you will need medical evidence that you were insane, as defined by the VA, during the time of the misconduct that led to your discharge. The VA does not require that the misconduct and the insanity be causally connected, so it will be enough simply to prove that mental disease-induced insanity was present at the time of your misconduct. Unlike in civilian law courts, the VA does not require any evidence that the veteran claiming the insanity exception knew right from wrong or understood the consequence of his or her actions.

## **How Does Having Multiple Periods of Service Affect VA Claims?**

The VA claims process for determining benefit eligibility, already quite complex, becomes even more complicated when a veteran has multiple periods of active service. Specifically this becomes an issue when an individual received different discharges for his or her multiple service periods.

Of course, if a veteran was discharged for anything along the lines of mutiny, treason, or sedition, he or she is not going to receive benefits. But very few veterans are contending with disqualifying discharges for these reasons.

## **VA Claims: What Are the Criteria for Overlooking a Disqualifying Discharge?**

Generally speaking, veterans who were eligible to receive benefits for a previous period of service will not lose their benefits if a subsequent period of service resulted in a disqualifying discharge. The VA also has a provision under which back-to-back periods of service can be combined to result in a commitment eligible for a qualifying discharge. This usually only applies when the first period ended early with an honorable discharge, and the second period ended in a dishonorable discharge but after enough satisfactory time that, when combined with the length of the first enlistment, the total satisfactory service is greater than or equal to the initial service commitment.

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## Chapter 3

### How Do You Prove Eligibility for Veterans Claims?

You already know that to successfully argue veterans claims, being considered eligible for veteran status requires that you

- served actively in one of the five branches of the military (or in several other military branches), and
- were discharged under circumstances that were other than dishonorable.

But how are you supposed to prove all this to the VA Board?

Though the standard of proof requires that the VA give you the benefit of the doubt if the evidence on both sides is equal, the burden is still on you to make a convincing case.

The VA's decision is based mostly on service records, but you're the one who has to compile and submit these documents. If you have any doubt about the requirements for making your case, consult a VA disability lawyer immediately.

#### **What Is the Process for Making Successful Veterans Claims?**

The first thing you'll have to do is submit military records that prove the location and length of your active duty service as well as the type of discharge you received. There are three ways to do this:

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- Submit the original document from your service department
- Submit a certified copy of the original document
- Authorize an accredited agent to submit a certified copy

With these three options, this step is simple enough. If by some chance your records don't make it to the VA, the Board is still bound to request the pertinent documents directly from your service department.

However, what if your service document doesn't paint an accurate picture of your service? In that case, you are allowed to submit what is known as "lay evidence," including documents like medical records and personal statements, to help make your case. Veterans' claims are often won or lost on the basis of lay evidence.

### **How Does a Veteran File a Disability Claim with the VA?**

The Veterans Disability claims process can be confusing and overwhelming at a time when you are already dealing with an injury or illness, but you deserve to be compensated for your physical or psychological impairment. If you have an injury or disease that happened while on active duty, or was made worse by active military service, then you are entitled to tax-free disability benefits.

Begin the claims process by applying in one of the following ways:

#### **File for Veterans Compensation**

- **Submit a Paper Application:**

For Veterans Application for Compensation use the paper VA Form 21-526EZ.

Download copies at the U.S. Department of Veterans Affairs website:

<http://www.benefits.va.gov/BENEFITS/Applying.asp> or visit your closest VA Regional Office.

- **Apply Online** at [www.eBenefits.va.gov](http://www.eBenefits.va.gov).

The eBenefits website is a service of the Department of Veterans Affairs and the Department of Defense.

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### **File for Veterans Pension**

- **Submit a Paper Application:**

For Veterans Application for Pension use **VA Form 21-527EZ**. Download copies at the U.S. Department of Veterans Affairs website:

<http://www.benefits.va.gov/BENEFITS/Applying.asp> or visit your closest VA Regional Office.

- **Apply Online** at <http://vabenefits.vba.va.gov/vonapp/default.asp>

Use the Veterans On-Line Application (VONAPP) Website for Pension claims. (You **do not** use VONAPP to submit a Compensation claim.)

### **File Using Accredited Representation**

- Appoint a VA-accredited attorney or agent to act on your behalf in the preparation, presentation, and prosecution of claims for VA benefits.

Veterans seeking representation may rely on information found on the VA's website here: <http://www.va.gov/ogc/apps/accreditation/index.asp> — Office of General Counsel (OGC) Search for Accredited Attorneys, Claims Agents, or Veterans Service Organizations (VSO) Representatives.

### **File Using the “Fully Developed Claim” (FDC) Program for Fast-Track Decisions**

Recently introduced to the disability claims process is the concept of the “Fully Developed Claims” (FDC). Fully Developed Claims are part of the VA's response to expediting disability compensation claims and dealing with the tremendous backlog. Claims submitted under the FDC program may be processed by the VA within 30-60 days of submission.

Successful original claims under the FDC program will result in an *extra year's* worth of compensation. Once you begin your FDC, you have one year to complete it online. If VA approves your claim, you will be paid back to the day you began your claim.

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As a disabled veteran filing a FDC, you must assume the burden of collecting the necessary documentation, and assembling and preparing your claim without any help from the VA. **You waive your rights to VA's normal "Duty to Assist" you in your claim.**

The theory is that because your claim is fully developed – it is comprehensive and perfected – you are providing *everything* the VA needs to make a just decision. Aside from ordering medical exams and possible Federal records, all the VA has to do is review your claim and make a determination on it.

While this method does not guarantee an award of benefits, VA hopes the fast track, and for original claims additional benefits, are sufficient incentives for veterans to navigate the military records system and undertake the Veterans claims process on their own.

In theory, because the veteran does all the heavy lifting without VA's assistance, the veteran reaches a fast and accurate decision. In reality, a disabled veteran may or may not have the ability or fortitude needed to understand, locate and assemble all necessary evidence on their own to truly develop a winning claim.

If the VA decides your claim is not fully developed (is lacking necessary evidence) the VA would take your claim out of the FDC program and the claim would then undergo the regular claims process.

### **Fully Developed Claims are optional, and may be filed for**

- veterans disability compensation
- survivor benefits
- veterans pension

To file an FDC, VA advises to file electronically at [eBenefits.gov](http://eBenefits.gov). If you file a paper FDC for VA disability compensation, you will need to complete VA Form 21-526EZ and visit your local RO.

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WARNING! Do not submit both a mail and online application, or it could cause confusion about the claim. You should always keep a copy of all completed forms and materials that you provide to the VA for your records. This can be beneficial in case you are denied disability benefits or if the documents are lost.

*Do not submit both a mail and online application, or it could cause confusion about your claim.*

### **Required Medical Examinations**

When you begin the VA claims process, you will be subject to an examination at a VA medical center. An approved examiner will conduct the physical review of symptoms and take note of all your complaints. These examinations are offered for free to all veterans who are concerned that their ailments are related to their military service. Once the examination is complete, the results will be considered along with the evidence you provide with your disability claim.

### **Get Personalized Advice about the Veterans Disability Claims Process**

From here, your paperwork goes through 8 levels of command and 16 different information systems. It may take months or years to hear back.

If you have any questions or concerns about your claim, you can always contact the VA:

- via the VA website, <http://www.benefits.va.gov/benefits/>
- by visiting the closest VA Regional Office or
- by telephone at **1-800-827-1000**.

## **Chapter 4**

### **What Type of Benefits Can I Apply for?**

#### **The Next Step in the Veterans Claims Process**

Once you have determined that you meet the basic definition of a “veteran,” you should understand the difference between VA Compensation and VA Pension to ensure that you are applying for the appropriate benefits.

#### **Veterans Benefits: The Difference between Compensation and Pension**

If you are filing a claim for veterans’ benefits, there are important distinctions between compensation and pension as determined by the VA. Once you know which category you fall into, you can visit the Veterans Affairs website to get a better estimate of how much you can expect if your claim is approved.

They have two main rate tables that are used to pay benefits to veterans,

1. One for compensation and
2. One for pension.

Under certain conditions, the widows and children of disabled veterans are also eligible for compensation and pensions.

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## Veterans Benefits: Compensation

The VA considers money paid to a veteran due to an injury, disease, or condition that is “service connected” to be compensation. For a condition to be considered “service connected,” it must be sustained or aggravated as a result of service to the military.

*Compensation is not needs based and is not restricted to any particular period of service.*

Compensation is not needs based and is not restricted to any particular period of service. Currently, retired military personnel are subjected to offsets to these payments, but this is slowly being eliminated.

For disability claims, veterans’ compensation can be between 10 percent and 100 percent, depending upon the percentage of disability. Even if you have less than a 100 percent disability, you may be given a 100 percent rating if you are unable to work due to the service-connected disability. Veterans who are considered extremely disabled may even qualify for more than 100 percent.

To get service connected disability compensation a veteran must show:

1. The veteran’s discharge was other than dishonorable;
2. The disease or injury was incurred or aggravated in the “line of duty;” and
3. The disability was not a result of willful misconduct or drug/alcohol abuse;

### Help Tips

- Severe disabilities may get Special Monthly Compensation (SMC).
- Veterans who receive a 30 percent or more rating are entitled to additional family comp.
- If a veteran’s death is service connected, the family may receive Dependency and Indemnity Compensation (DIC).
- A military finding of “incurred in line of duty” can bind VA.

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## Basic Definitions of “Service Connection” and “In the Line of Duty”

Service Connected Disability means a death or disability was **incurred or aggravated** during active service **in the line of duty**.


In the Line of Duty means:

- The injury or disease was incurred or aggravated during a period of active service, unless a result of willful misconduct or drug/alcohol abuse.
- Covers anything that happened while in service. There is no requirement that the veteran had to have been performing military duties. Injury could have occurred while the veteran was off duty and off base.
- Includes latent medical conditions that were not discovered until years later. For example, a Vet injured her knee while skiing on leave, but no problems occurred until years later. It could be service connected.

## Veterans Benefits: Pension

A pension is needs-based welfare. Pensions are paid when any total disability – whether it is service-connected or not – leads to the veteran requiring financial assistance. These disability claims payments are substantially less than VA Compensation payments and are only available to certain veterans, such as individuals who served during a period of war, and are totally disabled from any type of work.

Instead of a percentage amount, they are paid in a flat amount, and a veterans benefits pension is offset by other income dollar-for-dollar. However, under the pension program there are some favorable presumptions, such as any veteran over the age of 65 is presumed to be totally disabled for the



**A pension is  
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purpose of the pension program and as stated above, it is not necessary that the disability be service connected.

Read more about Pensions in Chapter 9, “Veterans Pension Benefits.”

## Chapter 5

### VA Benefits: Types of VA Compensation Claims

#### VA Compensation Claims: The Most Important of All Veterans Benefits

Of all the available veterans' benefits, compensation is widely considered the most important of them. This is true both economically and politically, as there is no VA benefit more fervently supported by the American public than the benefits from VA compensation claims for soldiers injured while on active duty.

Because of this, the VA is much more protective of its compensation program than it is of all other programs, refusing to make changes that would lower its support with the public.

#### Are Veterans Benefits for Compensation Only Available to Soldiers with Battlefield Injuries?

The rules that determine VA compensation claims state that, in order for a veteran to qualify for service connected disability benefits, the medical condition they are afflicted with must have been "suffered or contracted in the line of duty." This also includes any preexisting conditions that were made worse in the line of duty.

But what does "in the line of duty" actually mean? Throughout history, the VA has long taken this phrase to mean that veterans are eligible for compensation for any problem that occurred from their introduction into military service, all the way through their discharge. This even

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includes any injury that occurred while the soldier was off base or while on leave. This also means that there doesn't have to be a strict connection between a veteran's medical condition and the performance of their military duties. There just has to be documentation that the medical condition occurred or worsened during the veteran's time of service.

Veterans are also eligible for compensation even if their medical condition does not pop up until years later. This is, of course, as long as they can prove that the condition was acquired while in the line of duty. And just like with any other service connected compensation claim, these delayed veterans' benefits will even cover conditions that resulted from personal choices a soldier made, such as skiing while on leave or sun tanning on the base.

### **Requirements for Obtaining Service-Connected Disability Compensation**

In the VA claims process, there are three fundamental requirements that a veteran must satisfy in order to qualify for service-connected disability compensation. The requirements are often referred to as the three *Caluza* elements, and each must be proven with "competent evidence." But what are these three fundamental requirements?

1. The veteran must present competent evidence of a current disability.
2. There must be medical evidence of an in-service occurrence or aggravation of the disease or injury. In some cases, lay evidence may also be accepted.
3. The veteran must prove that there is a link (nexus) between the in-service injury and the current disability by providing competent evidence.

The following are a detailed explanation of the elements of a VA claim as outlined above:

1. **A disability that currently affects you.** Many people are denied veterans benefits because they incorrectly believe that they are entitled to receive compensation just for being injured while they were serving in the military. This is not the case. For VA compensation claims to go through, you have to be suffering from a medically diagnosed injury that is currently affecting you. This means that even if you were shot or injured in

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some other kind of extreme way, if doctors have determined that your injury is healed, you won't receive any benefits.

2. **A disability that was caused by your service.** In order to receive compensation, you need to be able to show that some kind of event during your service (typically a disease or an injury) caused the current disability. The VA will examine your veteran's service medical records for proof, and also investigate to make sure that any conditions diagnosed during your service did not exist prior to your time in the military. If this is the case and you cannot prove that your service aggravated the condition, it might be denied. In the event that the condition is not mentioned in the veteran's service medical records, it is possible that "proof" can come from private medical records or statements from witnesses.
3. **A "nexus" must exist.** VA compensation claims not only have to show that the original injury occurred during your service (or that a previous injury was aggravated), they also have to provide medical evidence showing that your current disability stems from that original incident. How do you do this? By proving something called "continuity of symptomatology." Basically, you need to show that the original incident caused a particular condition for which you received treatment and how that treatment has continued. If you stop receiving treatment for a time, or if more than a year passes between the time you are discharged from service and you file your claim, proving the existence of a "nexus" becomes harder. Many denied veterans benefits are often the result of an inability to prove that a "nexus" exists.

## **Five Elements to Establish a Service-Connection Claim**

Note that the courts sometimes state that there are “five elements” to establish a service-connection claim for a veteran’s disability benefits. These five elements are:

1. Veterans status
2. The existence of a disability
3. A connection between the veteran’s service and their disability
4. The degree of disability
5. The effective date of the disability

You should be aware that the VA is required to assist the veteran in obtaining the evidence they need in order to win their disability claim. Exceptions to the VA’s “duty to assist” rule are claims filed under the Fully Developed Claims (FDC) process.

However, in the VA claims process, it is ultimately up to the veteran to satisfy the evidentiary burden of proof in order to successfully qualify for their compensation payments.

## **Should the Disability in a Veterans Benefits Application Be Service-Connected?**

When a veteran applies for disability-related veterans benefits, there is a *Code of Federal Regulations* (CFR) that lays out some of the basic guidelines. These guidelines are used to determine whether or not the injuries or diseases that are shown on a veteran’s service records should be considered service-connected. Each disabling condition for which a veteran is seeking compensation must be considered based on a few different criteria.

These criteria are:

- The places, types, and circumstances of the veteran’s services
- The official history of each organization the veteran has served in

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- The veteran's full medical records
- Any and all lay evidence that is pertinent to the veteran's disability claims.

### **How a Veterans Benefits Application Is Examined**

When determining whether a veteran's disability should be service-connected, all of the evidence on record will be reviewed thoroughly. In addition, it must be noted that the VA's policy on service connection provides for a very liberal interpretation of the facts, thereby giving the veteran a more than fair chance of proving their condition to be service-connected.

A good veteran's attorney knows that, although these VA regulations have been established nationally, it has been shown in the past that not all regional VA offices follow them consistently. If a regional VA office has denied someone their rightful veterans benefits without following the policy that has been set forth by the national VA, the disability attorney can challenge the decision, citing these policies in the appeal.

### **Proving Different Types of Compensation Claims**

VA compensation claims are one of the most common types of VA claims. Unfortunately the VA and our government have made the process of attaining VA benefits long, difficult, and incredibly complex; leading to uncountable denied veterans' claims. Many veterans haven't even been told that there are eight different types of compensation claims, and that the way you prove that you deserve benefits in each case is not the same.

The different VA compensation claim types are:

1. Direct Service Connection
2. Secondary Service Connection
3. Claims for Increased Disability Ratings
4. Reopened Claims
5. 1151 Claims

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## Veterans Disability Claims: Strategies for a Winning Campaign

6. Dependency and Indemnity Compensation (DIC) and Accrued Benefits
7. Clear & Unmistakable Error (CUE) Claims
8. Non-Service-Connected Pension Benefits

Below is a description of each type of compensation claim in detail so that you can avoid becoming another statistic for denied veterans' claims.

### **Direct Service Connection**

This is probably the kind of compensation claim that most veterans are familiar with. Veterans can file this type of claim at any time, but it becomes harder to prove the longer he or she is out of the service before filing the claim. It isn't unheard of for a veteran to have multiple direct service connection claims going through the system at the same time.

This type of claim has three requirements to prove that you deserve VA benefits:

- current condition,
- precipitating event that occurred during service, and
- nexus.

### ***Fundamental Requirements of Obtaining Service Connection Compensation***

1. Veterans Status (not dishonorably discharged)
2. Medical Diagnosis of CURRENT Disability. If an Original Claim (not a reopened claim) VA must assist the veteran in obtaining a Medical Diagnosis
3. Medical (sometimes lay) evidence of in service occurrence/aggravation of disease or injury.
4. If a combat veteran, then VA must accept Vet's statement of occurrence in combat as true.

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5. Medical evidence of a link or “nexus” between in service occurrence and current disability.
6. If a nexus is established, then VA must establish a Rating Percent.
7. If a nexus is established and rating established, then VA must assign an EFFECTIVE DATE (the date retroactive benefits will begin).
8. The Standard of Proof is “as likely as not” as to each issue. Tie goes to the Vet.
9. There is no requirement that the VA take the veterans treating physician’s opinions as true, unlike the Social Security Disability system.

### *Disabilities that Are Not Service Connected*

- Congenital defects
- Refractive eye errors
- Some Personality disorders and mental deficiencies

### **Secondary Service Connection**

When a Vet has a condition directly related to their service and later suffers from a different medical condition that developed because of the original condition, it’s possible to get veterans benefits for that secondary disability.

For example, a Vet who injured his or her leg while in service might feasibly develop a back condition later in life through favoring one leg over the other. In order for this secondary condition to qualify for veterans benefits, a Vet must

- 1) already have a condition deemed to be service-connected,
- 2) currently be suffering from a second condition, and
- 3) obtain a doctor’s opinion stating that the secondary condition “as likely as not” developed as a result of the original, service-connected disability.

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It's very important to be aware of and actively pursue benefits for secondary conditions, because they can often be more costly and damaging than the original issue.

### **Claims for Increased Disability Ratings**

It is common for a veteran's level of disability to increase over time. If you believe the level to which you are disabled has increased since you were first given a "percentage of disability" that was calculated by medical definitions, you may return to the VA and ask for your compensation to be increased. This will require the VA to examine you and give you a diagnosis.

There is no real drawback to this, and can be to your advantage if it's determined that your condition has worsened. It's also another opportunity for the VA to notice secondary conditions.

See more about Disability Ratings in Chapter 7, "Establishing a Disability Rating Percentage."

### **Reopened Claims**

Denied veterans' claims can be appealed, but even after the appeal period, it's possible to re-open a claim at a later time. To reopen your claim, you need to show "new and material evidence" that was missing during the original claim that directly relates to the reason the first claim was denied.

### **1151 Claims**

If a Vet is injured as a result of the treatment received at a VA Vocational Rehabilitation program or in a VA medical facility, an 1151 claim may be filed. Actually, two kinds of claims can be filed – under the Federal Tort Claims Act, a malpractice claim may be entered; but as a civil suit, it's subject to the statute of limitations. Also, any money the Vet receives from the malpractice claim will be deducted from the 1151 claim. One benefit of the 1151 claim is that you may pursue it at any time – there is no statute of limitations.

## **Dependency and Indemnity Compensation (DIC) and Accrued Benefits**

This type of compensation may be awarded to a spouse, or dependent child or parent of any deceased veteran who qualified to receive service connected compensation. To qualify,

- the veteran's death must be due to their service connected disability - or -
- their condition has to have been 100 percent disabling for 10 years before the veteran's death.

Normal service connected claims often become DIC claims because veterans die while still battling the VA to receive the benefits to which they are entitled.

## **Clear & Unmistakable Error (CUE) Claims**

CUE stands for Clear and Unmistakable Error, and the Vets who file these claims believe they were denied disability benefits due to VA mistakes on their original claim. Winning this claim is a big deal, because Vets will start getting monthly benefits as well as receive back pay (sometimes several years!) from the date they filed the original claim. CUE claims can be made at any time, but they are quite difficult to prove. You have to show that either the adjudicator didn't have the correct facts to decide the case (not based on new evidence, but on what was known then), or that the VA's provisions were not followed, and that resulted in changing the outcome of the case. Only one CUE claim is allowed per condition, so it's not something you want to go into lightly.

## **Non-Service-Connected Pension Benefits**

Technically, claims of this sort are pension claims, not compensation claims. Veteran must show three elements to qualify.

- 1) their current disability totally prevents them from working;
- 2) the allowed maximum income for pensions is higher than what they receive, and
- 3) they served during wartime.

Many denied veterans' claims forget one of these three elements.

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## **Chapter 6**

### **Establishing Service Connection through a Medical “Nexus”**

#### **Why Is Evidence of a Nexus Important for Successful VA Compensation Claims?**

Making successful VA compensation claims is dependent on several factors including – and perhaps most importantly – establishing a service connection or “nexus” between a veteran’s current disability and a precipitating incident during the veteran’s period of military service. The main cause of denied VA claims is a lack of medical evidence used to provide proof of this nexus.

The VA does its part to make sure veterans are aware of the need for medical evidence supporting their disability claims. If a veteran’s records do not include medical documentation, the VA will work to provide a medical opinion for the veteran’s case.

However, it is important for veterans and their advocates to remember that no matter how obvious the link between a veteran’s service injury and current disability may be, a lack of medical evidence that clearly defines the connection will sink the case. It’s important that you retain an experienced VA disability attorney who will be aware of this requirement and will work to provide the proper medical documentation of the service connection.

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## **Why Is Medical Evidence Needed to Prove a Nexus?**

Although veterans may testify about their symptoms and the service-related incidents that led to these symptoms during hearings for VA compensation claims, the fact that these veterans are not medical experts makes this testimony invalid when it comes to proving the service connection. But a veteran's evidence, also known as lay evidence when the veteran is not a medical expert, can be heard in a case as long as it is deemed "competent evidence." This entails that the veteran be deemed capable of identifying the medical condition in question (this occurs when the condition does not require specialized expertise for diagnosis). However, this lay evidence can only be used to establish a diagnosis, not the connection between diagnosis and an inciting service-related incident.

The importance of providing sufficient medical evidence to prove the nexus between your current disability and a service-related medical incident cannot be overstated. Since most VA compensation claims are lost due to lack of sufficient medical documentation of the nexus, it is crucial to work with a knowledgeable veteran's attorney to help you gather the evidence necessary to win your case.

## **What Is the Standard of Proof that Must Be Satisfied for Successful VA Claims?**

You already know that, in order to receive veterans benefits by successfully arguing VA claims, you'll need to prove the service connection or "nexus of evidence" linking your current disability with an incident or illness that occurred during your period of military service. But what is the standard of proof that your evidence must achieve in order to win the case?

VA regulations state that, if the evidence regarding any part of your claim is equally balanced between favorable and unfavorable proof, the VA must give benefit of doubt to the claimant and rule in your favor. Thus, any "reasonable doubt" created because of an equal lack of proof on both sides of the argument means that the veteran wins the case.

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Of course, in an ideal situation there will be enough proof on your side of the argument that the reasonable doubt rule will not need to be invoked. Hiring an experienced VA lawyer can be a key factor in preparing a strong case.

### **The Standard of Proof and the Evidence of Nexus**

The same rule applies specifically to the nexus of proof requirement. To win your case and start receiving veterans' benefits, the medical opinion you provide to prove the nexus need only state that it's "as likely as not" that your current disability and the precipitating service incident are connected. This removes the burden of providing absolutely definitive proof from medical experts and makes it much easier for veterans to make successful VA claims – a 50% chance of connectivity is all that's required.

### **When Is Medical Evidence Not Required for Successful Veterans Claims?**

Although the vast majority of veterans' claims require medical proof of a link between a veteran's current disability and a precipitating service incident, there are a few circumstances in which a medical opinion states the link is not required.

Generally, if a veteran's current disability is an obvious result of an injury that occurred during service (such as missing leg amputated after a service incident), the veteran will not be required to provide a medical opinion proving the link and will be granted veterans benefits. In cases like this, "lay evidence" (evidence provided by someone without medical expertise) is sufficient for the VA to make a determination. As long as the disability in question is readily identifiable to someone without medical training, lay evidence will be all that is required for the VA's favorable ruling.

Another circumstance in which medical evidence is not necessarily required for successful veterans' claims occurs when the disability currently suffered by the veteran is chronic and was diagnosed during military service. In cases like this, the veteran needs to provide a diagnosis made after leaving the service of the same chronic disease identified during active duty. But

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unlike most other cases, a diagnosis without any additional medical opinion or analysis will be enough for the VA to make a favorable ruling.

The VA provides a list of disabilities considered chronic and therefore eligible for this consideration. Veterans are also allowed to prove that disabilities not on this list could be considered chronic, but it is strongly recommended that you consult with a qualified legal advocate before trying this strategy.

### **How Does the Presumptive Service Connection Affect the Requirements for Veterans Claims?**

One more circumstance during which a nexus of evidence may not be required to receive veterans' benefits occurs when the veteran's disability qualifies for the presumptive service connection. The VA provides a list of disabilities that automatically qualify for veterans benefits as long as the condition in question was diagnosed during the specified presumptive period.

As an example, veterans who served in the Persian Gulf War or Operations Iraqi Freedom or Enduring Freedom would not need to provide evidence of linkage for fibromyalgia diagnosed during their service in Southwest Asia since it is on the VA's approved list.

Keep in mind that, although the VA does waive the nexus of evidence requirement in these cases, it is always recommended that veterans be ready to provide detailed medical opinions in the case that the VA does not make the assumed allowance. Arguing successful veterans claims is almost always more complicated than the VA's rules might proclaim, so hiring a qualified veterans attorney is a great way to increase the odds of winning your case.

### **VA Compensation Claims: What Is the Direct Service Connection?**

Of the five strategies by which a veteran can establish the link between a service incident and disability required for VA compensation claims, the direct service connection is usually the first method to which veterans turn. The phrase "direct service connection" means exactly what it

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says: the veteran's current disability is a direct result of an incident that occurred or a disease that was diagnosed during the period of military service.

The direct service connection is also the first strategy that VA board members are trained to use when evaluating claims. A lawyer accredited by VA will do everything possible to establish that the link between your disability and a presumptive service incident qualifies as a direct service connection.

### **How to Prove the Direct Service Connection for Successful VA Compensation Claims**

There are three types of evidence generally used by veterans and their legal counsel to establish the direct service connection:

- Medical documentation of the current disability
- Lay or medical evidence of a precipitating incident during service, such as an injury, event, or diagnosis of a related disease
- A medical opinion provided by an expert analyzing the evidence and linking the disability to the precipitating incident, event, or disease

Successful VA compensation claims require the presence of all three of these types of evidence. However, there are several circumstances under which a direct service connection can be established without the presence of the second and third types of evidence. These situations occur when the veteran can prove "chronicity" or "continuity of symptomatology."

If you think you may be eligible for direct service connection under either of these two special provisions, it is strongly recommended that you consult a VA disability claims lawyer no matter how strong you think your case is. It's always best to go in with more evidence than you think you'll need when arguing VA compensation claims – after all, your veteran's benefits depend on the outcome.

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## **What Is Chronicity?**

Although most disability claims require that veterans provide medical evidence of the link between a current disability and a precipitating service incident, there are a few special circumstances for which evidence of nexus is not necessary. “Chronicity” refers to a situation in which a veteran can receive benefits because the disability in question is a chronic condition that was diagnosed during a period of service or a designated presumptive period.

If you feel that your disability could be considered chronic by the VA, you’ll need to provide medical evidence showing that you were diagnosed with the condition during service and that a recent medical examination found that you continue to suffer from the same condition. Though you will have to produce statements from medical professionals, you won’t need to present anything other than diagnoses – no need for the detailed medical opinions and analysis required for other VA disability claims. The direct service connection is presumed under the policy of chronicity.

## **Which Conditions Are Considered Chronic for the Purposes of Disability Claims?**

There are two ways for veterans to prove that their current disabilities fall under the VA’s policy of chronicity. The first – and easiest – is simply to demonstrate that your illness or impairment is on the list of conditions recognized by the VA as chronic. Veterans whose conditions are on the list can quickly make successful disability claims even if a long length of time has transpired since their period of service, as long as they can successfully demonstrate diagnoses of the same chronic condition during service and at the present time.

If you consider your condition chronic but it is not on the VA’s approved list, it may still be possible to successfully argue your case and receive veterans’ benefits. In this situation, it’s a good idea to seek help from an experienced veterans' advocate or lawyer to build up evidence based on medical reference material or doctor’s statements.

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Making a successful case based on veteran-provided evidence is slightly more challenging but still highly possible. Chronicity makes it much easier for veterans with long-term conditions to successfully argue their disability claims and receive the veterans' benefits they deserve.

### **What Is Continuity of Symptomatology?**

Another policy through which VA compensation claims can be successfully argued without providing medical evidence of nexus is “continuity of symptomatology.” This policy refers to situations in which a chronic condition most likely manifested during service but was not specifically diagnosed during that time.

The key in proving that continuity of symptomatology applies to your case lies in the description of your symptoms. Although your current disability need not have been diagnosed during your period of military service, you will be required to show evidence that symptoms similar to your current ones were present and "noted" during service.

The U.S. Court of Appeals has ruled that favorable claims using continuity of symptomatology and the direct service connection do not require additional proof of a nexus of evidence. Though this ruling sounds clear cut, it's actually a little misleading. Most cases actually *do* require a medical opinion linking the current disability with the symptoms present during service except in a few rare cases where lay evidence is enough to prove that the condition exists. Hiring an experienced VA disability attorney can be a huge help in putting together a case like this.

### **What Is Required to Prove Continuity of Symptomatology for VA Compensation Claims?**

To successfully prove that your case can be determined using continuity of symptomatology, you and your lawyer will need to provide the following three types of evidence:

- Proof that the symptoms of the current disability were “noted” during the period of service
- Proof that these same symptoms continued after the period of service ended

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- Medical documentation (or in some rare cases, lay evidence) that a link exists between the post-service symptoms and the current disability

Veterans and their advocates should make sure not to rely merely on the evidence of continuous symptoms as proof. The third element of evidence, the establishment of a link by a medical authority, is crucial to successfully arguing VA compensation claims using continuity of symptomatology.

### **Can the Direct Service Connection Be Established for Diseases First Diagnosed after Service?**

The direct service connection is one of the most commonly used strategies for successfully arguing VA claims. But what if veterans discover that their disabilities diagnosed after serving were caused by service incidents? In these cases, the VA has ruled that the direct service connection can be granted when the veteran proves that the condition in question first began during military service, no matter how long it's been since that service period ended.

In order to establish the direct service connection in this circumstance, you and your disability lawyer will need to prove that a nexus of evidence exists connecting the current disability, no matter when it was diagnosed, to an incident or illness that occurred during your time of service. The requirements for establishing a nexus of evidence involve obtaining a medical expert's opinion that states the reasoning behind the declaration of the link.

In some cases, a *presumptive* service connection may exist if the current disability manifested within a certain amount of time after your period of service, depending upon the type of medical condition. The service connection will be automatic and will not require nexus of evidence. An experienced disability lawyer will be able to tell you if your condition qualifies for the presumptive service connection.

## **Which Conditions Diagnosed Post-Service Are Eligible for VA Compensation Claims?**

Any disease or medical condition that is proven to be linked to a veteran's period of service can be eligible for a direct service connection, no matter when the disease manifests during the veteran's lifetime. Some of the most common conditions eligible for the direct service connection are:

- Cancers caused by exposure to harmful substances
- Mental disorders, such as Posttraumatic Stress Disorder or panic attacks
- Degenerative diseases or other conditions caused by serious injuries
- Hearing loss from prolonged exposure to loud noises

Winning these types of VA claims requires gathering a large amount of medical documentation. For the sake of your veterans' benefits it's best to be as prepared as possible.

## **How Does the Service Connection Affect Veterans Claims?**

When it comes to veterans claims, there are three requirements that all veterans need to meet before being eligible to receive disability benefits. The first two requirements involve demonstrating both a current disability and evidence of an incident that occurred during military service (such as an illness or injury) related to the present disability. The third and final criterion is known as the "service connection" or "nexus requirement," and requires establishing a connection between the current disability and the precipitating incident during service.

It is crucial to enlist the help of a veteran's disability attorney when called upon to prove the nexus requirement, since most veterans claims are denied because of the failure to adequately demonstrate the service connection.

## Five Ways to Establish the Service Connection

There are a total of five methods a veteran can use to prove the link between military service and a current disability.

- **Direct service connection:** a clear, causal link between a veteran's current impairment and an event that occurred during the period of service.
- **Aggravation:** a condition that was present before the veteran's period of service but was worsened during duty, resulting in the present disability.
- **Presumptive service connection:** although the condition cannot be directly linked to an incident during service, VA regulations state a presumed connection based on the type of disability and date of service.
- **Secondary service connection:** the veteran's current impairment is not directly connected to a service incident but is a direct result of a medical condition that is clearly linked to the veteran's period of service.
- **An 1151:** The current disability resulted from an injury sustained as a result of VA healthcare, a VA rehab or training facility, or a VA sponsored work therapy program. (This strategy does not require a service connection and is a unique circumstance made valid for compensation by an act of Congress.)

Consulting a VA disability attorney can be a huge help when choosing the strategy that's right for your case. Keep in mind that the only evidence deemed acceptable in adjudicating these veterans claims is medical documentation. Obtaining clear and thorough evidence from a doctor or other medical professional is of paramount importance in successful veterans claims, no matter which of the five categories of service connection is invoked.

## Chapter 7

### Establishing a Disability Rating Percentage

Once a veteran establishes a service connection, the next step in the VA claims process is to establish the amount of their monthly compensation payment. The payment amount of these disability claims is calculated based on what degree the veteran's disability would impair the average person earning a living wage in the United States.

Oddly, a veteran's individual earning ability is not taken into account at all. That means the disability claims for a surgeon are calculated the same way as they are for a secretary.

#### **The Schedule for Rating Disabilities**

To grant your claim and award a benefit, VA "rates" your disability.

The VA **Schedule for Rating Disabilities** is VA's guide for evaluating the severity of mental and physical disabilities resulting from all manner of injuries or diseases that occurred as a result of military service.

In the Schedule, impairments are categorized based on the part of the body, or body system, impacted. Examples are musculoskeletal, respiratory, digestive, infectious diseases, etc.

Each category lists groups of medical issues. Each group of medical issues lists the possible diagnoses. Each diagnosis has a diagnostic code that defines the symptoms that are required for different ratings of disability.

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View the current schedule at the **Electronic Code of Federal Regulations Title 38, Chapter 1 Part 4, Schedule for Rating Disabilities**: <http://www.ecfr.gov>

## **The 10 Grades of Disability**

As far as figuring out just how disabled a veteran is, the VA has establish 10 grades of disability. These grades are: 0%, 10%, 20%, 30%, 40%, 50%, 60%, 70%, 80%, 90%, and 100%. The higher the disability evaluation grade, the higher the veteran's monthly payment.

A grade of 100% means the veteran is totally disabled and unable to work, providing them with the highest possible monthly payment. And even veterans with a service connected disability that only leaves them with a 0% disability grade may be entitled to some pretty great benefits that will help support their lives. Some of these benefits can include: VA health care, job retention rights, and priority when applying for state or federal jobs.

Once a disability percentage grade is established, a veteran is not necessarily stuck with that grade for the rest of their life. The VA claims process allows veterans to apply for an increase in their grade if their service-connected condition gets worse.

## **Claims for Increased Disability Ratings**

After it has been decided that you have a service-connected condition, you will be given benefits based on the "percentage of disability" that they calculate using medical definitions. If you believe the level to which you are disabled has increased, you may return to the VA and ask for your compensation to be increased, and they will examine you and give you a diagnosis. There is no real downside to this, and quite a bit of upside if it's determined that your condition has worsened. It's also another opportunity for the VA to notice secondary conditions.

## **Seven Points to Remember about VA Ratings**

1. Establishment of compensation usually results in monthly payments
2. Payments are designed to offset the degree of disability for average worker

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3. No consideration is given to the individual Vet's earning capacity
4. All veterans are paid the same for the same rating regardless
5. VA adopts a "Schedule of Ratings in reduced earnings capacity for specific injuries"
6. Ratings are from 0 percent to 100 percent in 10 percent intervals
7. A 0 percent rating gives no monthly compensation, but can provide other benefits such as preference in federal/state employment, job retention rights, and VA health care



## **Chapter 8**

### **Effective Dates**

#### **What Is the General Rule for Establishing the Effective Dates for VA Claims?**

When determining the effective date of any VA claims for benefits, there are certain rules that have been put into place by the Department of Veterans Affairs. These rules cover all types of claims, including original claims, reopened claims, and claims to increase disability ratings.

#### **Effective Date for Original VA Claims**

The general rule that is used to determine the effective date for an original claim is very straightforward. The VA will look at the date it received the claim and the date that the entitlement to the benefit “arose,” and choose the later one as the effective date.

#### **Effective Date for Reopened VA Claims**

In the case of a reopened claim for benefits, the VA needs to look at both the date that they received the reopened claim and the date that the entitlement to the benefits “arose.” In all cases, the later of these two dates will be considered the effective date.

Because of this rule, the VA is not allowed to use the original claim date to establish the effective date when they are dealing with any claim that has previously been finally denied. An experienced VA disability attorney will note, however, that a veteran can fight to have their

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effective date changed back to the original date on which they filed their claim. They can do this by showing that the VA made a “clear and unmistakable error.”

### **Effective Date for Claims to Increase Disability Ratings**

In certain instances, a veteran may be eligible to increase the rating of their already service-connected disability. In these cases, the effective date that their VA claims benefits are based on is either the date they filed the claim for increase or the date the disability increased in severity, whichever is later.

### **How Does the VA Determine the Date a Claim Was Received?**

Once the VA decides to award benefits to a veteran, the next step in the claims process is for the VA to determine the date on which they received the claim. Although this seems simple, oftentimes the VA and the veteran’s disability lawyer end up disagreeing on exactly what the true date is. This happens because the rules that govern what qualifies as a claim for benefits are not entirely black and white.

One of the major reasons the VA has trouble assigning the correct effective date is that claimants often file communications that are unclear. This leads to situations where the VA awards a service connection for a disability using a later effective date than they should.

However, if a veteran argues that the effective date should be earlier, the VA claims process obligates the VA to go back and review the claimant’s file, interpreting all communications liberally. If the VA finds evidence that the claim was made earlier than they thought it was, they may have to pay the claimant retroactive benefits.

### **Does a Form Have to Be Filed to Count?**

There are regulations that state that “a specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid or furnished to any individual under the laws

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administered by the Secretary.” However, the VA doesn’t actually have to receive a paper or electronic “form” for every different type of claim.

Even in cases where the VA does have a form for the claimant to use, the date the VA receives this form is not necessarily the effective date of the claim. That date is still determined by the date of the first claim, formal or informal, that the veteran submitted to the VA. Filling out this “form” is just a part of the VA claims process that the veteran must complete at some point in time.

### **What Communications or Actions Will Qualify as a VA Claim?**

There are multiple definitions of what kinds of communications qualify as VA claims. Simply, a veteran has made a qualifying claim if they have presented the VA with any communication or action that demonstrates their intent to apply for an identified benefit or belief in entitlement. This includes both formal and informal methods of communication. Communication from the veteran’s disability lawyer (if the veteran has given them power of attorney), a Member of Congress, or a minor claimant’s “next friend” would also qualify.

### **Does Oral Communication of VA Claims Qualify?**

An important issue is whether or not an oral communication between a claimant and a VA employee should qualify as an informal claim. According to The Court of Appeals for the Federal Circuit, no oral communication, no matter how specific, will qualify as an official claim because the regulatory definition of a “claim” stipulates that it must be “in writing.”

What about in cases where the VA employee made note of the veteran’s oral communication on paper? This “Report of Contact” form falls in somewhat of a grey area. The VA states that in certain circumstances, this can qualify as an official informal claim. However, in the case of *King v. Shinseki*, the panel of judges did not agree that this type of document should qualify.

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One other thing that definitely doesn't qualify as an informal claim for a service-connected disability is seeking treatment at a VA medical center. Just seeking treatment, without following it up with any official VA claims, only indicates an intent to apply for treatment.

### **How Are Disputes Over Which VA Claims Qualify Handled?**

It is not uncommon for there to be disputes over whether a written communication or action qualifies as an informal claim. In these situations, the dispute is usually solved by answering two key questions:

- 1) Is there an "indication of an intent to apply for one or more benefits"?
- 2) Has the claimant "identified the benefit sought"?

As with most issues, the VA is supposed to err on the side of the veteran when trying to decide if the answers to the above questions have been appropriately provided. This is especially true concerning mental illnesses.

For example, if a veteran has filed a claim for service connection for Posttraumatic Stress Disorder (PTSD), but it is later diagnosed that he actually has a different mental disorder, the VA must still approve the claim as long as certain factors are met. These factors are:

- 1) The claimant's description of the claim encompasses the newly diagnosed mental disorder;
- 2) The claimant's symptoms apply to the newly diagnosed mental disorder;
- 3) The information that the claimant submitted supports their VA claims.

## **Chapter 9**

### **Veterans Pension Benefits**

As stated in Chapter 4, VA pension is needs-based welfare. Pensions are paid when any total disability – whether it is service-connected or not – leads to the veteran requiring financial assistance. These disability claims payments are substantially less than compensation payments and are only available to certain veterans, such as individuals who served during a period of war, and are totally disabled from any type of work.

Instead of a percentage amount, they are paid in a flat amount, and a veterans benefits pension is offset by other income dollar-for-dollar. However, under the pension program there are some favorable presumptions, such as any veteran over the age of 65 is presumed to be totally disabled for the purpose of the pension program and as stated above, it is not necessary that the disability be service connected.

#### **An Overview of Non-Service-Connected Disability Pension Veterans Benefits**

In certain situations, the VA will provide veterans benefits for a disabled veteran who was forced to give up career opportunities while they were in service during war time. These benefits are designed to compensate the veteran for the resources that they would have built up had they not been called on to serve their country in active duty. In many cases, their career advancement was significantly hindered by their service. Because of this, they may have a very difficult time fully supporting themselves now that they are fully disabled.

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## **Veterans Benefits: Non-Service-Connected Disability Pension vs. Compensation**

These non-service-connected disability pension benefits should not be confused with compensation benefits, though both programs are administered by the Department of Veterans Affairs. The two programs have some major differences that veterans should be aware of.

To start, pension benefits are based on three important factors:

1. The disabled veteran participated in wartime service that eventually led to a discharge under any conditions other than dishonorable.
2. The veteran currently has permanent and total disability.
3. The veteran has demonstrated need. This is determined by the VA using a calculation that takes into account both the claimant's income and net worth.

Note that all medical expenses, including those for nursing home care, can be deducted from the veteran's total income. This is very important because it may help some middle and upper class veterans demonstrate that they are in need of these non-service-connected pension veterans' benefits, thereby qualifying for them.

### **What Are the Five Basic Eligibility Criteria for Pension?**

In order to make the VA claims process as straightforward as possible; the Department of Veterans Affairs has established five basic requirements that will be used to determine whether or not a claimant is eligible to receive the veterans' benefits of a pension.

### **The Five Requirements for the Pension Claims Process:**

- 1) The veteran in question must have been discharged under any condition other than dishonorable.

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- 2) Separate rules apply to any veteran who first enlisted in the military on or after September 8, 1980. In these cases, the veteran in question must have completed either twenty-four months of continuous active duty or the “full period for which the veteran was called or ordered to active duty.”

In addition, the veteran must have had at least one of the following:

- A total of 90 days of service during one or more periods of war
  - 90 or more consecutive days of service with at least one day coming during a period of war
  - At least one day of service during wartime that resulted in a discharge for a service-connected disability
- 3) The veteran must pass the “need test,” which means that they must have a limited net worth and income that doesn’t provide them with adequate maintenance.
  - 4) At the time of application for pension, the veteran must be permanently and totally disabled.
  - 5) Willful misconduct must not have led to the veteran’s permanent disability, or they will not qualify for a pension through the current VA claims process.

### **What Are the Three Different Pension Programs?**

Veterans who are eligible to make VA claims for pensions may be enrolled in one of three different pension programs: the Improved Pension Program, the Section 306 Pension Program, and the Old-Law Pension Program. Which program a veteran is eligible for depends on when they applied, and the amount of their pension is decided based on disability and need. This is calculated using the veteran’s countable income and net worth.

It is important to note however, that each pension program determines “need” in a slightly different way.

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## **The Improved Pension Program**

On January 1, 1979, the Improved Pension Program came into effect. Since that point, it is the only pension program for which new applications can be filed. In this program, all of the income coming from the veteran, the spouse, and any dependents is counted when the VA is trying to determine the veteran's need. This obviously works against the veteran but is offset by the fact that the Improved Pension Program has a much higher maximum annual pension rate than the other programs.

## **The Section 306 Pension Program**

Any veteran who applied for a pension between July 1, 1960, and December 31, 1978, was eligible for the Section 306 Pension Program. Under this program, the earned income of the veteran's spouse is almost always added as countable income. The only ways the spouse's income is not counted is if either the income is not available to the veteran or if counting the spouse's income would lead to hardship for the veteran.

On January 1, 1979, anyone who was receiving the Section 306 pension was given a choice to either keep that pension or switch to the Improved Pension Program. For those who chose to stay under Section 306, their benefits will be protected but never increased. To this day, veterans may still elect to switch to the Improved Program, but once they switch, they are never allowed to switch back.

## **The Old-Law Pension Program**

Any veteran who applied for a pension before July 1, 1960 received benefits under the Old-Law Pension Program. The main difference in this program is that it does not include spouse's income when calculating the veteran's countable income. Also, net worth does not come into consideration when determining need.

Much like the Section 306 Program, anyone who was on the Old-Law Pension Program on January 1, 1979, was given a choice of whether or not they wanted to switch to the Improved

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Pension Program. Again, if they don't switch, their pension benefits are protected but will never increase. But if they do switch their VA claims to the Improved Pension Program, they can never switch back.

## **What Is Countable Income as It Relates to Pensions?**

Over the last thirty years, the definition of permanent and total disability as it relates to the veterans benefits pension rate has not changed at all. However, the way the VA counts a veteran's income for the purposes of calculating their pension amount has changed a great deal.

So what exactly has changed about this calculation?

One thing that has *not* changed is the way the VA calculates a veteran's income. Basically, any income the veteran receives from any place is considered to be countable. The big changes have come with how the VA counts the income of the veteran's dependent spouse. While the spouse's income used to be left out in certain instances, it is now counted fully in the Improved Pension Program. This change was spurred by the increased presence of women in the workforce.

Another change that came with the Improved Program is the way the VA actually counts income. While it used to be counted based on income received within a calendar year, it is now counted on a prospective, annualized basis. This means that the VA will project the veteran's income for the next 12 months and use that to determine their pension amount.

One benefit a veteran gets from having a dependent spouse is that it will increase the maximum annual pension payment that is available to them. According to 38 USCS § 1521, under today's VA claims pension rates (established December 1, 2014), a veteran with no dependents can qualify for a pension of up to \$12,868 per year. But a veteran with a dependent spouse can qualify for a pension as large as \$16,851 per year. These rates are increased from time to time under section 5312 of title 38 USCS § 5312. Veterans can receive more depending on how many dependents they have and/or if they are in need of aid and attendance.

## **The Simple Process for Calculating the Veterans Benefits Pension Rate**

To start, Congress establishes a maximum amount of pension benefits that the VA can pay a veteran. There are three separate amounts for the three different programs (Improved Pension Program, Section 306 Pension Program, and Old-Law Pension Program). The VA will then deduct the veteran's countable income, dollar-for-dollar, from this maximum limit. What they are left with is the monthly veterans' benefits pension rate.

## Chapter 10

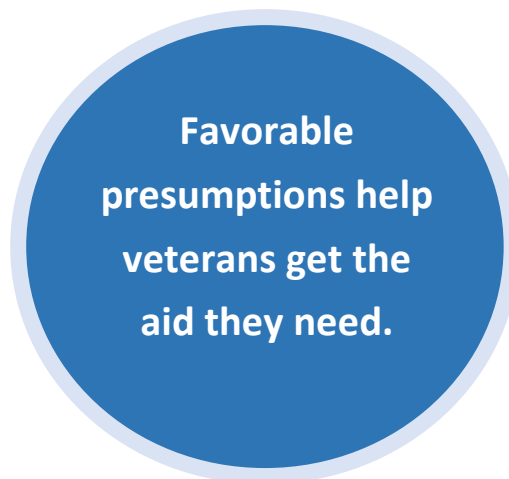
### Presumptions and Rules in the VA Claims Process

#### Favorable Presumptions in the VA Claims Process

The VA claims process can be tricky, especially if you are a vet trying to navigate it on your own.

Veterans claim denial is a common occurrence, and even if your claim is ultimately approved, it can sometimes take years of fights and appeals through the system.

It is important to know that there are a number of presumptions that go along with every claim for benefits from a veteran. Some of these presumptions work to your benefit; others can hurt you. This chapter will detail the favorable or “helpful” presumptions that generally serve to aid veterans, as well as unfavorable presumptions that allow the VA to stonewall and deny aid to veterans who need it.



#### Favorable Presumptions: Soundness

One of the most important presumptions that can help you to avoid veterans claim denial is that you entered into your service in good health. After all, you had to pass physical exams – how could you have done this if you weren't in sound health? Unfortunately, the VA often tries to

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ignore this presumption when arguing that a disabling condition existed prior to a vet entering the service, but at least the burden of proof is on them. They are required to show, through clear and unmistakable evidence that your condition was in fact preexisting.

### **Favorable Presumptions: Aggravation**

Another presumption in your favor is that any preexisting condition that you had treated while in the service received that treatment due to the condition being aggravated by the nature of your service. For the VA to disprove this and issue a veterans claim denial, clear evidence is again needed. This time, the VA must show that the original condition got worse due to “natural progress” – with most conditions, this isn’t the easiest thing in the world to do, since the nature of military service often causes quite a bit of physical wear and tear.

### **Favorable Presumptions: Agent Orange**

This favorable presumption is definitely a case of taking the positive from a bad situation. If you served in Vietnam during the war, it will be presumed that you were exposed to Agent Orange. Due to this presumed exposure, if you are currently suffering from one of any number of cancers, Type II Diabetes, or numerous other disabling conditions, it will be blamed on the Agent Orange and considered to be connected to your service.

### **VA Disability Benefits: Helpful Rules for Claimants**

When you’re slogging through the VA disability benefits claims process, it can seem like everything and everyone is stacked against you. The time it takes to process a claim is ridiculous – more than four months! – and there are so many rules and processes that it’s easy to miss one and receive a veterans claim denial for a trivial reason. And if you try to appeal, you might be waiting years before you get your benefits.

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Thankfully, there are some helpful rules and laws the VA uses that actually help claimants. These are “benefit of the doubt,” “duty to assist,” and “lenient standard of proof.”

### **Helpful Rule 1 – Benefit of the Doubt**

This rule revolves around a term called “equipoise.” Essentially, equipoise means there are two different opinions on something.

*Under Benefit of the Doubt,  
the VA always goes with  
the outcome that benefits  
the veteran more.*

In regards to veterans claim denial, this could mean that one doctor says your condition is not service connected, while another doctor believes it is.

Or it could refer to the fact that an initial medical report labels you as 40 percent disabled, but a follow-up report says you’re only 20 percent disabled.

Under Benefit of the Doubt, the VA always goes with the outcome that benefits the veteran more. This rarely happens, but obviously it can be quite helpful when it does.

### **Helpful Rule 2 – Duty to Assist**

Duty to Assist sounds like a very simple rule: if a veteran brings forth a claim, the VA has a duty to assist him or her in developing it. Unfortunately, the VA was doing such a horrible job in this duty that Congress passed the Veterans Claims Assistance Act in 2000 to redefine what the VA was required to do in more specific terms and essentially force them to better assist veterans.

The two main things this law requires of the VA are to:

1. Tell veterans what they need to do to prove their claim – the VA must provide documentation to the veteran before the claim is adjudicated on the five specific subject areas the VA uses to determine claims; if they fail to do so, the claim would be remanded.

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2. Obtain important records and conduct a thorough examination – it is the VA’s responsibility to get not only your service medical records, but also any related records you tell them about.

### **Helpful Rule 3 – Favorable Standard of Proof**

In comparison to the standard for civil court proceedings, where proof is determined by a “preponderance of the evidence,” the standard of proof for VA claims favors veterans. All veterans must show to win their claim is that “as likely as not” their current disability stems from an incident that occurred in the service. Now, this doesn’t mean it’s easy to avoid a veterans’ claim denial. Doctors’ statements cannot be speculative in nature, and must show that they have taken all medical records into account.

### **Unfavorable Presumptions in the Veterans Claims Process**

These “good” presumptions described above are prevailing thoughts that actually assist veterans in obtaining the help they need from the VA.

Unfortunately, there are unfavorable presumptions just like there are favorable ones, and these can lead to you being denied veterans benefits.

*If you smoke, drink, or use recreational drugs and it is at all possible to tie your current disability to these habits, the VA will generally strive to do this.*

### **Unfavorable Presumption: Substance Abuse**

If you smoke, drink, or use recreational drugs and it is at all possible to tie your current disability to these habits, the VA will generally strive to do this. For example, if you believe your lung cancer to be service-connected but you have been a smoker most of your life, the VA will use all of the evidence it can to show that your current condition is not due to your service, but rather your habits.

## Unfavorable Presumption: Misconduct

In the same way that substance abuse can lead to denied veterans benefits by allowing the VA to use it to explain your current disability, if your condition resulted from any sort of misconduct on your part, the VA will try to show this in an attempt to deny your claim.

Both of these are similar arguments in that the VA is trying to show that your condition is not service-connected. In the case of misconduct, the argument is that your condition did not result from something you were asked to do as a part of your service, even if the actual incident took place during your service.

## Unfavorable Presumption: The Presumption of Regularity

This one is incredibly frustrating, and unfortunately it happens more than it should. As part of the VA claims process, the VA is required to send documentation to vets of any important decisions. Sometimes, however, vets won't ever get this information, and because of this, they will miss their chance to appeal.

If they argue that the VA never sent the information, the VA will counter with the Presumption of Regularity, which basically says that government employees generally do the right thing.

*Presumption of Regularity  
basically says that government  
employees generally do  
the right thing.*

What does this mean? Even if there's zero proof of documentation being mailed, it is presumed that it was sent out, and the veteran loses his or her argument.

The only way to win in this instance is if the vet can show that there are records of the paperwork being mailed to the wrong address. Worse, there appears to be a movement growing from the VA General Counsel and Veterans Court judges to widen the Presumption of Regularity to cover

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## Veterans Disability Claims: Strategies for a Winning Campaign

more VA activities. One such suggestion argues that it should be “presumed” that VA medical examiners are competent, which would make it more difficult to overturn a veterans claim denial with outside medical evidence.



## Chapter 11

### Appealing a Denial of a VA Claim

#### How to Deal With Denial of Veterans Claims

Denial of veterans' claims is happening more and more with an overburdened and undertrained VA workforce. Because the claims adjudicators don't understand how the veterans' claims process works, many claims are incorrectly denied and end up being appealed and ultimately overturned. In some ways, this is good news for veterans, but if your VA claim is denied, it can lead to a lengthy and complicated appeals process where you need an experienced veterans' benefits attorney on your side.

#### Denial of Veterans Claims: First You Have to File

The veterans' claims process begins at your Regional Office (RO). If you want to think about it in terms of the law in general, the RO is similar to trial court. You must file your claim here, and a claim adjudicator will look it over and decide whether to approve or deny it.

This process is not fast. As of 2016, the average processing time for a claim is 124 days. If your claim is initially denied by the RO, don't give up.

*If your claim is initially denied by the RO, don't give up. There are a number of things you can still do.*

## Veterans Disability Claims: Strategies for a Winning Campaign

There are a number of things you can still do at the RO level, one of which is to request that a Decision Review Officer (DRO) review your claim. This must be preceded by filing a Notice of Disagreement (NOD).

If, however, a denial of your claim still occurs after you've exhausted your resources at the regional level, the next part of the veterans' claims process is to appeal the RO Decision before the Board of Veterans Appeals (BVA).

Appealing an RO decision means you will then have to deal with the Board of Veterans Appeals (BVA). The BVA is made up of attorney board members, one of whom will act as an administrative judge in your appeal. The BVA can consider new evidence and even seek out medical opinions on its own before deciding on your appeal, and the process averages two to two-and-a-half years.

Continued denial of veterans claims means that you will be utilizing the Court of Appeals for Veterans Claims (CAVC). This seven member court's only responsibility is to deal with appeals from the BVA, which should tell you something about just how many appeals are made.

If that does not work, the next stage of the veterans claims process is the Court of Appeals for the Federal Circuit (CAFC). This court has jurisdiction over VA regulations and reviews CAVC decisions. If your VA claim is denied here, it means that you will have to appeal to the US Supreme Court. This has only happened one time, and the outcome was very interesting. The Supreme Court decided in the veteran's favor, but Congress quickly put through legislation that countered their ruling on the denial of veterans' claims.

### **What's Determined in a VA Disability Decision?**

Part of the veterans disability claims process is filing a claim with your Regional Office. After a lengthy processing period, the VA will make a decision on your claim by examining three main issues:

- Whether or not your disability was connected to your service,
- Your percentage of disability, and
- The effective date of eligibility.

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**If your claim for benefits is denied based on any of these issues,  
*don't worry – you can appeal!***

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But first it's important to understand what the issues entail so that you go into your appeal armed and ready to fight for the compensation you deserve.

The three elements of the Veterans Disability Claims process are:

- 1. Connection of your disability to your service.** Simply put, if the VA determines that your disability did not result from an incident that occurred during your service, you will be denied veterans benefits. They won't even bother to even look into the other two elements if they find your disability isn't service-connected. To prove a connection, you have to point to a specific incident during your service that caused your current disability, show that you had no preexisting condition that could have caused it (or that your preexisting condition was aggravated during your service), and demonstrate a "nexus" – that your current problems are definitely related to that original incident suffered during your service.
- 2. Percentage to which you are disabled.** Title 38 of the Code of Federal Regulations (CFR) outlines a set of Diagnostic Codes with which to determine a person's level of disability. These codes describe various disabilities and assign percentages to them based on the severity of each condition. To calculate the percentage to which the Vet is disabled, a rating officer compares the medical description of the veteran's disability to the diagnostic code in the CFR that most closely matches it. A 0 percent finding still means that the VA admitted the disability is service connected, so the veteran can then appeal the percentage.

## Veterans Disability Claims: Strategies for a Winning Campaign

- 3. Your effective date.** This is the retroactive date from which the VA has to pay you benefits. Most often, this ends up being the original date that you filed the claim, but in some cases you might even receive retroactive benefits from the date of your injury. Vets who file claims within a year of being discharged typically receive retroactive benefits from their discharge date, and those who finally win their appeal after years of fighting and receive compensation will be paid back to the original claim. Obviously, a lot of money is involved in this decision, so it's one of the most important elements involved in the veterans disability claims process.

### The VA Claims Process Is a Long and Winding Path

The VA claims process is a long and winding path, with emphasis on the length. Initial processing takes an average of 124 days as of this 2016 writing. And that's not even counting appealing the denial of veterans' benefits, or other things that can drag the process out for years. Processing time for appeals in 2015 was 3.1 years; appeals that make it to the Board of Veterans' Appeals take, on average, over 5 years.

*The VA claims process is a long and winding path, with emphasis on the length.*

Why does it take so long? Some of this is due to the people in the system being overburdened and under-trained, but there are also a number of legally required steps that every claim must go through.

## What Are the Steps of the VA Claims Process?



1. **File a claim.** This should be obvious, but before the claims process can begin, a claim must be filed by the Vet stating that he or she believes they are entitled to benefits based on a disability they are suffering. When you file a claim, don't be too specific with medical terms. If, for example, you claim that you are suffering from spinal damage because you've been having a lot of pain, and it is later determined that the damage is instead to your muscles, it can lead to denial of veterans' benefits by the VA.
2. **Develop a claim.** After you file your claim, the VA is required to help you develop your claim. This means they will try to get your Veterans service medical records to follow up, as well as any other medical records that you mention. However, they won't look at your military records – if those are important to your claim, get them yourself. The VA will also give you a C&P Evaluation, or physical exam, for any current medical condition related to the claim, and provide a report with medical findings. And finally, the VA must send you a letter explaining the VA claims process – how to substantiate your claim, what the VA has done and will do, and what you need to do. Unfortunately, this “help” leaves a lot to be desired, which is why it's so important to find a good veteran's representative or veterans benefits lawyer.

Note: an exception to the VA's “duty to assist” veterans in their disability claims occurs with claims filed under the “Fully Developed Claims”

## Veterans Disability Claims: Strategies for a Winning Campaign

3. **The Rating Decision.** Once all the information is in, a Rating Decision will be made, rendering a decision on the claim. For a favorable decision, you must have proven a service connection, percentage of disability, and an effective date of eligibility. Denial of veterans benefits will happen if any one of these things is not met, and each individual element can be appealed.
4. **Notice and Award Letter.** Win or lose the claim, you'll still get a letter from the VA notifying you. In fact, you need to make sure the VA has your current address, or they simply won't adjudicate your claim. Win and you'll get an award letter that states your percentage of disability and tells you your effective date – the date from which you will start receiving benefits. The exact dollar amount of your compensation will be sent to you in a follow-up letter. You have the right to appeal all rating decisions. If you receive a denial of veterans' benefits, it's in your best interest to get a lawyer involved to assist with the VA claims process.

### **If You Are Denied Veterans Benefits, You Have the Right to Disagree**

In some cases, you may be denied veterans' benefits by receiving a 0 percent disability rating. This means that the VA acknowledges you have a disability, but does not believe you are disabled to a compensable degree. Alternatively, you may find yourself with a lower disability rating than you believe your situation deserves.

In either of these cases, you have the option to file a **Notice of Disagreement (NOD)** with the Regional Office up to one year after the rating decision. This is true even if the Regional Office sends you a misleading notification that you must respond within 60 days of the claim or the file will be shelved.

You can also **request a hearing** before a Decision Review Officer (DRO). In some cases, this is the only time you have the chance to speak with a live person about your VA claim. This hearing is recorded and transcribed, and new evidence can be considered for the final decision.

## Veterans Disability Claims: Strategies for a Winning Campaign

After the VA regional office receives your NOD, they are required to send you a **Statement of the Case (SOC)**, although there is no specific time in which it must be done. This lists evidence that was considered, adjudicative actions that have taken place, applicable VA law and regulations, and the reasons and bases for the VA's decision. The SOC will be sent to you and your Veteran Service Officer.

### **Taking the Next Step to Fight a Decision When Denied Veterans Benefits**

The most important thing about receiving the SOC is that you must file a formal appeal (**VA Form 9**) within 60 days of the date on the letter – or within one year of the original rating

*The most important thing about receiving the SOC is that you must file a formal appeal (VA Form 9) within 60 days of the date on the letter.*

decision for your VA claim. From here, your case will move out of the RO and on to the Board of Veterans Appeals.

#### **What Happens if I Am Denied Veterans Benefits by the Regional Office?**

Being denied veterans benefits by the Regional Office can feel like the end of the world, but it doesn't have to be. If you have served your country

and feel you have been wrongfully denied the benefits that you deserve, you have the option of filing a formal appeal. The process can be lengthy, and the Board of Veterans Appeals may take up to two and a half years to reach a final decision

### **How to File a Veterans Benefits Appeal with the Board of Veterans Appeals**

The first step in filing an appeal if you have been denied veterans benefits is to send a Formal Appeal to your Regional Office using the VA Form 9. This appeal will be certified and docketed by the Board of Veterans Appeals. You will receive a confirmation from the BVA, as well as a further explanation of the appeals process and any estimated delay in considering your case.

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Before the BVA makes any decision on your claim, you will be given the option to submit additional evidence. This is an excellent opportunity to submit more material that may support your veterans' benefits appeal at a personal hearing.

The actual hearing can take place via video conference or by a Traveling Board Member, at your Regional Office; or even in Washington, DC. You can appear alone, but you can also choose to be represented either by a veteran service officer or a VA disability lawyer. The BVA will eventually issue one of three decisions: to deny the claim, remand the claim for further development, or to grant the claim.

### **What if I Am Denied Veterans Benefits by the BVA?**

If the BVA denies your appeals claim, you may move up the chain and file an appeal to the Court of Appeals for Veterans Claims. It is crucial to file this second appeal within 120 days after receiving the BVA's decision. Don't be discouraged if your case moves up to this second level. Although the veterans' disability claim process can be long and difficult, there can be immense long-term benefit to filing an appeal if you have been denied veterans benefits.

### **You Have a Year After a Negative Decision to Hire a VA Disability Attorney?**

Well, that's what the law says. Denied veterans claims, however, have to be appealed by the veteran **within 120 days of the VA's final decision**. If you're thinking that those two things don't seem like they work together, you're right. Basically, the one year law is useless – you have 120 days after the VA denies your claim to get representation and appeal their decision, which is not a lot of time.

If you don't seek out representation until after that 120-day window, all you can do is ask that the VA reconsider your claim. As you might imagine, it is rare for the VA to agree to this request, and if they do comply and come to the same conclusion, there is no way for you to appeal their decision. This is why it's so important to act fast if you receive a final negative decision on your VA claim. **The best way for a VA disability attorney to help you is to start acting on your behalf within those first 120 days.**

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***Repeat:***

***It is critical to act fast if you receive a negative decision on your VA claim.  
Retain accredited legal counsel as soon as possible.***

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## **The Adjudication Process**

### **Four-Step Adjudication Process for Disability Claims at the VA Regional Office Level**

There is a four-step process that is traditionally used by regional VA offices to adjudicate disability claims for any service-connected compensation benefits. The process is as follows, with each step needing to be completed before moving on to the next step:

- ✓ **Step 1:** The VA decides whether or not the veteran in question is eligible to receive VA benefits. This includes making a determination that the veteran was separated or discharged under any condition other than dishonorable.
- ✓ **Step 2:** The VA uses all the rules it has set forth to determine whether or not the veteran qualifies for disability compensation.
- ✓ **Step 3:** The VA determines just how severe the veteran's disability is, using a percentage evaluation that will range from 0 to 100. This is based on the Schedule for Rating Disabilities.
- ✓ **Step 4:** The VA determines the effective date for the award of the appropriate service-connected disability compensation.

## **What Are the Duties of the VA in the Disability Claims Adjudication Process?**

When it comes to the adjudication process, the VA is supposed to do all they can to aid and assist veterans in making their disability claims. These duties were defined in the Veterans Claims Assistance Act of 2000 and include:

- The duty to notify a claimant of any and all information necessary for them to complete their claim application.
- The duty to notify a claimant of all information or evidence (both medical and lay) that will be needed from them to substantiate any VA claims they have.
- The duty to notify the claimant of which information will be provided by the secretary and which information needs to be provided by the claimant.
- The duty to “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claim.”
- The duty to “make reasonable efforts to obtain any relevant records” that the claimant authorizes the VA to obtain.
- The duty to obtain any of the claimant’s relevant medical records that are held by the Federal government, including: military medical records, other military records, records of VA medical treatment, and any other pertinent records.
- The duty to obtain a medical opinion or provide a medical examination when one is necessary to make a decision on any disability claims in question.

## **Can a Preexisting Condition Noted on Entry into Service Be Eligible for VA Claims?**

When the VA is making a determination about whether or not an injured veteran’s claims are valid, one of the first things they will do is look at the veteran’s medical records from the time

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they first entered the service. In some cases, the veteran already had a disease or injury before they even began their military career. This will have been noted on the veteran's records, and acknowledged by the veteran to whom it applies.

However, this does not necessarily preclude the veteran from receiving compensation for those same injuries or diseases they entered into military service with.

### **When Is a Preexisting Condition Noted on Entry into Service Eligible for Compensation?**

Any veteran with a preexisting condition may still be eligible for disability compensation if they are somehow able to get that condition service-connected. In order for them to do this, they must be able to prove that the condition they came into their military service with was in some way aggravated by the service itself.

If, with the help of their VA disability attorney, the veteran is able to prove that their time in the military exacerbated the preexisting condition, the veteran's compensation claims will be approved. In these cases, the amount of the veteran's claim will be set at a level that is based on the degree to which the disability worsened after the veteran was enrolled into military service.

## Chapter 12

### How Can Medical Evidence for VA Compensation Claims Be Obtained?

It's important to learn about the process for obtaining medical evidence to satisfy the nexus requirement before embarking on VA compensation claims. The format of this linkage evidence is fairly straightforward – all a veteran usually needs is a letter or statement from a physician (private or employed by the VA). Occasionally the linkage evidence will be provided by way of military medical records or a physician's in-person testimony.

However, the content of the doctor's statement is absolutely crucial to successful VA compensation claims. The medical opinion linking a veteran's disability to a precipitating service incident must be based on examination and analysis, not just the veteran's testimony, and must detail the reasoning used by the physician to arrive at the opinion.

It's also important that the wording of these opinions is very clear and specific – fuzzy or vague language has been a frequent cause of claim denials in past cases. The VA can and frequently does rule medical experts' opinions inadequate if analysis and reasoning are not explicitly present in the opinion.

***It is critical to understand what it takes to satisfy the nexus requirement.***

Choosing the right medical expert is also key to successfully arguing VA compensation claims. The expert does not have to be a doctor, but must have some sort of medical training in the field

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relevant to the veteran's impairment. Examples of possible experts include nurses, psychologists, and social workers. The better trained and better-respected your medical expert is, the more likely the VA is to rule favorably on his or her opinion, so choose carefully.

### **Other Strategies to Remember**

Evidence other than medical opinions can also be submitted to support VA compensation claims. Examples of this usually include studies and articles found in medical journals. Although these will not be sufficient to prove a nexus of evidence, they may support the case and sway the VA when the medical opinions provided are not quite definitive enough.

If a veteran doesn't present a medical opinion in his or her claims case, the VA will provide for an examination so that an opinion can be obtained. However, the VA will only do so if the veteran provides sufficient evidence of the disability and of an incident during service that could have led to the disability. The VA will throw out the case if there is "no reasonable way" that an exam would lead to a favorable ruling.

The VA can also rule that veterans providing medical opinions submit to an additional exam conducted by a VA physician – this usually happens when the VA is seeking to disprove a case. If this happens, keep calm and work with your lawyer to ensure that you have provided as much evidence as possible to strengthen your case.

Finally, it is possible to re-apply for veterans benefits if your case is denied. Veterans who are re-opening claims cases should be aware that new evidence will be required before the VA will revisit your case. The evidence necessary will depend on the reason you were denied veterans benefits in the earlier case. The road to winning VA compensation claims can be difficult, but with the help of a qualified disability lawyer, you'll be within reach of the veterans' benefits that you deserve.

## **How Can You Prove Service Connection by Aggravation for Veterans Claims?**

When arguing veterans claims, the best way to prove service connection by aggravation is – unsurprisingly – by showing clear evidence in the veteran’s service medical records of the current disability having worsened. But most veterans don’t have the luxury of providing such straightforward proof. If you feel that the documentation in your service records may not be substantial enough for the VA, there are other methods to successfully establish the service connection by aggravation.

The best alternative is usually to retain the services of a medical expert who can clearly demonstrate the change in severity of your condition before service and after service. The medical records and testimony provided by a private physician, combined with lay evidence from witnesses who can verify the change in your disability’s severity, may be enough to win your claim and start you on the road to receiving veterans’ benefits.

Be aware that the clearer and more definitive your physician’s statement is, the better your chance at a successful claim will be.

### **Case Law Regarding Aggravation**

Your VA disability lawyer may be able to cite past US Court of Appeals for Veterans Claims decisions that support your claim of service connection by aggravation. Several cases over the last few decades have dealt with whether or not old VA rulings showed “clear and unmistakable error” (CUE) in finding against the veteran. The results of these cases often have direct bearing on current veterans’ claims, so make sure that your attorney makes a thorough review of the language in these relevant court decisions.

## **Service Connection by Aggravation If Disability Was Not Noted During Entrance Exam**

Successfully arguing VA compensation claims usually requires proving that the current disability was caused by an incident that occurred during active service. But veterans' benefits may also be awarded if the current disability, though diagnosed before service, was aggravated during the claimant's active service period.

Veterans can usually only use the service connection by aggravation if their current disability was observed and noted during their service entrance examinations. But in some cases, even if your disability was not noted during your entrance examination, you may still be able to successfully argue for veterans' benefits by taking advantage of the fact that the burden of proof is placed squarely on the side of the VA.

Hiring a qualified veterans' advocate will be a crucial factor in proving a case without entrance exam documentation of your current condition.

### **When Is Service Connection by Aggravation Relevant?**

Veterans should only consider arguing VA compensation claims using the service connection by aggravation if the following conditions can be met:

- The disease in question must have worsened during active duty only (periods of active duty for training and inactive duty for training do not apply).
- The disease must have worsened because of the active duty, not because of a natural progression of the disease.
- The aggravation must have been permanent.

If veterans (along with prisoners of war) can prove a definite, permanent worsening of the condition due to time spent in active service, the VA will presume that the aggravation was a

## Veterans Disability Claims: Strategies for a Winning Campaign

result of the veteran's active duty. The task of providing a medical opinion linking the condition to service is therefore removed from the veteran's shoulders.

However, the VA will rule against veterans if it can find "clear and unmistakable evidence" that the aggravation was due either to natural progression of the disease or as an effect of medical treatment for the disease. If this happens during your case, you and your attorney should provide independent medical evidence to argue against the VA's assertion. You may be able to find a physician who will state that your condition increased in severity faster than its normal progression would have allowed due to active service. Though it can be tricky to successfully argue VA compensation claims in these cases, doing so is the only way to ensure receipt of the veterans' benefits you deserve.

### **Service Connection by Legal Presumption**

The scenarios by which VA claims can be successfully argued are both numerous and complicated. But if your current disability is eligible for service connection by legal presumption, you're in luck. This is one of the easiest methods through which veterans benefits can be won.

Service connection by legal presumption is often called a "liberalizing rule." The rule came about because certain veterans were unable to meet the standard of at least 50% proof (or the benefit of the doubt) that their current condition was connected to active service.

For example, prisoners of war were unable to provide adequate documentation that their current conditions began during periods of captivity. Thus, the service connection by legal presumption was created to remove the burden of proof in cases where basic medical principles trumped the need for a nexus of evidence.



## **Requirements for VA Claims Using Service Connection by Legal Presumption**

Veterans wishing to employ service connection by legal presumption in arguing their VA claims cases must demonstrate diagnosis of a current disability that falls into one of the following categories:

- Tropical diseases acquired during service
- Diseases specifically occurring in former prisoners of war
- Diseases specifically occurring in veterans exposed to radiation during service
- Diseases specifically occurring in veterans exposed to harmful toxins like herbicides (i.e. Agent Orange), mustard gas, or Lewisite during service
- Other diseases pertaining to Gulf War veterans

Veterans must also have served at least 90 consecutive days of active service (NOT including active or inactive training) on or after January 1, 1947 to be eligible for the service connection by legal presumption in their VA claims.

To successfully prove their cases, veterans only need to provide evidence that the current condition presented to at least a 10% degree of disability during the presumptive period specified for the disease in question. Veterans don't have to worry about whether their illnesses were officially diagnosed during service or during the presumptive period, as long as they can prove that symptoms were present during either of those times.

The VA then automatically presumes the service connection. The presumptive period differs for the various eligible diseases, so consult with a qualified veterans' attorney for a clearer idea about whether your case qualifies for this type of service connection.

The only ways for the VA to deny veterans benefits in cases that use the service connection by legal presumption is to provide "affirmative evidence" that the disease in question occurred during the presumptive period; not because of active service, but because of an incident that occurred after discharge or because of willful misconduct on the part of the veteran.

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If you feel that your current disability may fall under this rule but is not specifically mentioned by the VA on its list of eligible diseases, you may still be able to successfully argue for veterans' benefits. You and your VA attorney can develop a compelling case using medical evidence and private physicians' statements.

Even when your task seems daunting, remember this: many veterans have faced these same difficulties in arguing their VA claims, but have triumphed and gone on to receive the veterans benefits that they deserved – and so can you!

### **How Is the Service Connection by Legal Presumption for Chronic Diseases Used for VA Claims?**

Veterans suffering from chronic diseases connected to their active service may be able to win their VA claims by using the service connection by legal presumption. For certain chronic diseases, the VA automatically presumes the connection between the condition and the time in service and grants veterans' benefits. The list of chronic conditions accepted for this presumption is quite long and includes certain types of cancer, tuberculosis, Parkinson's disease, epilepsy, and many other ailments. Consider consulting a qualified disability lawyer who can help you determine whether the VA includes your condition chronic.

Once you've determined that your disability is on the VA's most current list, you'll need to meet the requirement of the presumptive period. Veterans need to provide medical evidence that the condition in question manifested to a degree of at least 10% no more than one year after their active service ended to be eligible for applying the service connection by legal presumption to their VA claims.

If you were diagnosed and treated with a chronic condition within the presumptive period, your case will be fairly clear-cut and it should be a straightforward process to obtain the service connection by legal presumption. However, if diagnosis occurred **after the presumptive period**, you will need to provide plenty of medical evidence to successfully receive your benefits.

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The most important piece of evidence to provide is a medical opinion stating that it's as likely as not that your disease first manifested during the presumptive period. With a physician's opinion clearly stating that assumption, you will be much more likely to have a successful claim.

### **How Is the Service Connection by Legal Presumption for Tropical Diseases Used for VA Claims?**

The requirements for establishing service connection by legal presumption for tropical diseases are quite similar to those applied to chronic diseases. The tropical disease in question must be on the VA's approved list, which includes dysentery, yellow fever, amebiasis, cholera, and several others specific to military service in tropical locations.

As with the legal presumption for chronic diseases, symptoms of the tropical disease in question must have been noted within one year after discharge for successful VA claims. However, this rule can be relaxed in the cases of certain diseases for which the incubation period is known to be longer than a year. As always, the best strategy is to provide as much medical documentation as possible to support your case.

Although the VA does make it easier for certain veterans to receive benefits by way of the service connection by legal presumption, successfully arguing VA claims can still be a tricky and complicated process.

### **Service Connection by Legal Presumption for Former Prisoners of War (POW)**

The veterans' claims for those who were kept as prisoners of war are given special consideration. Since it is virtually impossible for former prisoners of war to provide medical evidence from the time of their captivity, certain disabilities are assumed by the VA to be connected to this period of their service. The veteran is not required to provide any nexus of evidence, and there is no presumptive period – the current disability may have presented at any time after the former prisoner of war was discharged.

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Claimants are required to provide some medical evidence before becoming eligible to receive veterans' benefits. As with other types of veterans' claims, the veteran must provide medical evidence proving that the current condition is at least 10% disabling. But one additional hurdle in these cases requires proof that the veteran spent time as a prisoner of war. The claimant will need to provide documentation that the period of captivity was comparable to the POW circumstances during previous times of war. Hiring a qualified veterans' advocate to help with providing this documentation is always a good strategy.

### **Which Diseases Make Former Prisoners of War Eligible to Use the Service Connection by Legal Presumption for Veterans Claims?**

The VA's list of the conditions that are eligible for the service connection by legal presumption for former prisoners of war is always changing. For some diseases, eligibility is determined by the length of the veteran's time in captivity. The VA has ruled a former prisoner of war must have endured at least 30 days of captivity for a range of diseases including chronic dysentery, avitaminosis, malnutrition, irritable bowel syndrome, and many other disabilities.

Conditions including psychosis, any anxiety disorder, most heart diseases, stroke, hypertensive vascular diseases, posttraumatic osteoporosis and osteoarthritis, and in some cases frostbite do NOT require any minimum amount of time in captivity – merely that the veteran had been a prisoner of war for some period. The service connection by legal presumption can therefore be easily used to argue veterans claims for former prisoners of war with these disabilities.

The VA frequently changes the eligibility requirements for these diseases, so be sure to consult a qualified lawyer to get the latest information. Also, remember that former prisoners of war are eligible for many other types of veterans' benefits, such as priority medical treatment, full dental benefits, and a no co-payment policy for all prescriptions. For former prisoners of war, successfully arguing veterans claims can be a way to get a small amount of restitution for the terrible hardships endured during combat.

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## **How Does the Service Connection by Legal Presumption for Radiogenic Diseases Affect VA Claims?**

Veterans (and their surviving spouses) making VA claims on the basis of a disability caused by exposure to ionizing radiation are faced with a unique challenge.

It can be quite difficult to prove exposure to this type of radiation, at least to the degree that the VA usually requires for direct service connection eligibility. So the VA has established a service connection by legal presumption to make it easier for veterans with certain radiogenic diseases to receive benefits.

As long as the veteran can prove diagnosis of a qualifying illness and time spent around ionizing radiation, the connection between the two will be automatically presumed.

Since the VA's lists of qualifying radiogenic diseases and radiation-risk activities are constantly being updated, be sure to consult a knowledgeable attorney to find out whether your circumstance is eligible. Although only the listed diseases are granted this automatic service connection, veterans who can show compelling medical opinions that their non-listed conditions were caused by ionizing radiation may also be able to successfully argue VA claims and receive benefits.

There is also a special procedure by which veterans can establish a service connection for certain other radiogenic diseases (though not a presumptive one). For these conditions, the veteran's case will be reviewed by several organizations after the Department of Defense provides an estimate of the amount of radiation to which the claimant was exposed. The VA will take this and other opinions into account and then make a service connection ruling. As always, it is helpful to employ a disability lawyer who can help you develop the evidence to make your case as strong as possible.

Veterans' claims based on exposure to ionizing radiation may be service-connected by legal presumption.

## **Service Connection by Legal Presumption for Amyotrophic Lateral Sclerosis**

Veterans who suffer from Amyotrophic Lateral Sclerosis are also eligible for special consideration when making VA claims. Also known as ALS or Lou Gehrig's disease, this condition is more likely to present in veterans than civilians for reasons presently unknown to medical experts. Because of the demonstrated connection between active service and ALS, veterans who are diagnosed with the condition at any time after discharge are eligible for the presumptive service connection. The only requirement is that veterans served in active duty for at least 90 consecutive days.

If you currently suffer from ALS, or you are the loved one of a veteran suffering from ALS, consult with an experienced veteran's lawyer to make the most of this special service connection by legal presumption. The road to successful VA claims is never an easy one, but in some cases, the VA lifts the burden of proof off the shoulders of veterans who are in extra need of benefits.

## **Other Instances of the Service Connection by Legal Presumption**

This chapter has covered the many individual scenarios in which veterans making veterans claims can invoke the service connection by legal presumption. The VA also extends this option to veterans of three recent conflicts: the Persian Gulf War, Operation Enduring Freedom and Operation Iraqi Freedom.

Essentially, anyone who served in Southwest Asia after August 2nd, 1990, is entitled to use the service connection by legal presumption if their disability can be described as a "medically unexplained chronic multi-symptom illness." Examples of this include chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome.

Persian Gulf War, Operation Enduring Freedom, and Operation Iraqi Freedom veterans may also be entitled to use the presumptive service connection if their current condition is related to certain infectious diseases. Consult with a qualified veterans advocate if you feel that your service makes you eligible to receive veterans' benefits using the legal presumption for any of these illnesses.

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## **Are Victims of Agent Orange Exposure Entitled to Use the Service Connection by Legal Presumption in Veterans Claims?**

The VA also makes it possible for veterans whose disabilities are related to Agent Orange exposure to use the service connection by legal presumption when arguing their claims. The VA presumes that all veterans who were stationed anywhere in Vietnam during the war, including on inland waterways, may have been exposed to Agent Orange. Therefore, a veteran need only prove that he or she served in Vietnam during this presumptive period and has been diagnosed with a condition related with Agent Orange exposure. The VA will then grant veterans benefits via the service connection by legal presumption.

A qualified veterans' advocate should have a thorough knowledge of the conditions that the VA believes are connected to Agent Orange, so it is a good idea for veterans to seek legal consultation before embarking on veterans claims.

## **What Is the Secondary Service Connection?**

Veterans whose disabilities are the result of a service-connected condition may be able to receive benefits by using the secondary service connection to successfully argue VA compensation claims. Although in most cases a condition that didn't originate specifically because of a veteran's time in active service would be ineligible, the secondary service connection makes some circumstances of this possible.

The secondary service connection can be established either because a service-connected condition contributed to a veteran's new disability or because a service-connected condition has aggravated a non-service connected condition.

To clarify what is meant by non-service connected condition, here a few examples of successful claims made on the basis of the secondary service connection:

- A veteran's service-connected disability contributes to a diagnosis of depression, so the secondary service connection would apply to the depression.

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- A veteran is treated for tuberculosis with a medication that causes hearing loss, so the hearing loss is eligible for the secondary service connection.
- A veteran's knee is wounded in combat and the wound later leads to lower back pain and hip problems, so the later conditions are eligible for the secondary service connection.

### **How Can You Use the Secondary Service Connection to Argue VA Compensation Claims?**

The process for invoking the secondary service connection in VA compensation claims requires that the veteran develop sufficient medical evidence to prove the connection between the secondary condition and the service-connected disability (or the treatment the veteran received for the service-connected disability). It's a good idea to consult with a VA disability attorney who can help ensure that the medical evidence you bring to your case will convince the VA to find in your favor.

Above all, it's crucial to procure a medical opinion from a private physician stating that the secondary condition was definitely (or at least 50% likely) caused or aggravated by the service-connected disability. Though the VA almost always orders a VA-approved medical examination, it's a good idea to have a private physician's opinion to offer as a supplement. When it comes to VA compensation claims, you can never be too thorough in developing the evidence for your case.

### **Conditions Related to Tobacco Use**

Veterans may not claim a service connection for any conditions caused by tobacco use during periods of military service. The use of tobacco in any form cannot be used in the nexus of evidence for VA claims.



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However, this rule is not completely insurmountable. The possibility exists for claimants to receive veterans' benefits for tobacco-related conditions through other strategies. VA disability claims regarding tobacco use are fully discussed in Chapter 18, “Are Conditions Related to Tobacco Use Eligible for VA Claims?”

## Chapter 13

### Family Benefits

#### What Veterans Benefits Are Available to Family Members?

In some cases, veterans' benefits are made available to certain members of an injured veteran's family. These benefits may be available to dependents of a living veteran who is unable to support them, or to surviving family members of a veteran who has passed away. Benefits can include: death compensation, death pension, accrued benefits, and dependency and indemnity compensation (DIC).

*Dependents and survivors who are eligible for veterans' benefits have no actual entitlement rights to the disability claims.*

It is important to note that the dependents and survivors who are eligible for veterans' benefits have no actual entitlement rights to the disability claims. The benefits they receive are based solely on their qualifying family relationship to the injured or deceased veteran.

#### Which Family Members Might Qualify for These Veterans Benefits?

**Spouse:** This could be a current spouse in instances where a living veteran is unable to provide enough support for a spouse who is in need or a surviving spouse in the unfortunate situation

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where a veteran has passed away. In order to qualify, a spouse must be able to show proof of a legal marriage.

**Child:** This could be either a current child or the surviving child of a deceased veteran. In order to qualify for benefits, the child must be the veteran's biological child, adopted child, or stepchild. The child also must: be unmarried, either under 18 years old or between 18-23 and pursuing an education, or be permanently incapable of self-support.

**Parent:** This could be either a dependent parent or a surviving parent of a veteran who has passed away. In order for a parent to qualify for these disability claims, they must show that either their financial dependency (in cases of a living veteran) or income eligibility (in cases of a deceased veteran) is reliant on the injured veteran.

### **What Veterans Benefits Are Available to Qualifying Family Members of a Deceased Veteran?**

The survivors of a deceased veteran or VA claimant may be eligible for a variety of different veterans' benefits. Access to these benefits, however, will depend on the circumstances surrounding the veteran's service, and also the veteran's relationship to the surviving family members.

### **Veterans Benefits for Family Members**

Some of the smaller, more basic benefits that a qualifying family member may receive are:

- If the deceased veteran was receiving either a VA pension or VA disability compensation, the surviving spouse may be given the veterans benefits during the month that they died.
- If the deceased veteran was service-connected, their survivors will be eligible to receive a certain amount towards their burial and funeral expenses.

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- Other veterans' benefits such as VA health care, VA home loans, and VA educational benefits may be available to surviving family members.

There are also more significant benefits that may be available to certain surviving family members of a deceased veteran. Some of these are:

- If the veteran had filed VA claims when they were still alive, certain surviving family members could be entitled to some lump-sum or accrued benefits.
- In the case of certain service-connected deaths, spouses and children may be given a special survivor's benefit (REPS).
- In some cases, survivors will be given access to monthly VA benefits such as DIC or the death pension.

### **VA Compensation Claims: Death Benefits Based on a Service-Connected Condition**

A deceased veteran's surviving family members may be able to file VA compensation claims to receive death benefits in certain cases. But in order to be eligible for these benefits, it must be shown that the disease, disability, or injury that caused the death (or contributed to the death) was one for which the veteran had a service-connection. If this is the case, the survivor will qualify to receive DIC.

### **How Do You Show That a Condition Is Eligible for a VA Compensation Claim for Death Benefits?**

When a service-connected disability is listed on the death certificate as the primary cause of death, that will be enough evidence for the qualified surviving family members to receive death benefits. However, if the service-connected disability is not the primary cause of death, the family might want to hire a disability lawyer to look into proving that it was at least a contributory cause of death, which would still qualify them for DIC.

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Here are some rules to help denote whether or not a service-connected disability might be considered a contributory cause of death.

- The service-connected disability must have contributed “substantially or materially” to the veteran’s death, thereby contributing to the actual cause of death. It is not enough to show that the disability was casually involved in the death.
- Minor service-connected disabilities are normally not considered to have contributed to a death that occurred mostly due to a different disability. This includes most disabilities that were not progressive or did not affect a vital organ.
- Any service-connected disabilities that actively affected vital organs may be considered contributory, even if the primary cause of death was unrelated.

### **How Does Death in Service Affect a Family’s VA Compensation Claim for Death Benefits?**

In almost all cases, if a veteran dies in service, the death will be considered service-connected. This includes situations where the soldier has gone missing in action, because their death is presumed.

Only a few situations exist where a veteran’s death in service is not automatically considered to be service-related. These are: suicide, death by disease within the first six months of active service, and any death that is thought to have come as a result of the veteran’s misconduct. In these cases, a formal ratings decision will be issued to determine whether or not the death will be considered service-connected, thereby making it eligible for the surviving family members to file VA compensation claims for death benefits.

### **Special Survivors Veterans Benefits: The Restored Entitlement Program for Survivors (REPS)**

In 1983, the Restored Entitlement Program for Survivors (REPS) was put in place to restore Social Security benefit payments to surviving spouses and children who should have been

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entitled to these veterans' benefits. If eligible, REPS benefits are paid to surviving spouses and children of soldiers who were killed in active duty before August 13, 1981, or who died of a service-connected disability that began before that same date.

### **Which Surviving Spouses Are Entitled to REPS?**

A surviving spouse is eligible for REPS benefits if the spouse cares for a child of the deceased veteran while the child is between age 16 and age 18. When Social Security payments stop once the child hits 16, the REPS benefits kick in – VA compensation claims shouldn't even need to be filed.

If the child is deemed mentally incompetent, the Social Security payments will usually continue past age 16. In this case, the spouse will receive REPS payments in an amount that will cover the difference between the Social Security payments and what the full REPS payment amount would be. If the spouse remarries, the REPS benefits will terminate. These benefits will, however, be put back in place if that marriage ever ends.

### **Which Surviving Children Are Entitled to REPS?**

A veteran's surviving child is only eligible for REPS benefits in one specific instance. They must be between the ages of 18 and 22 and enrolled full time in an approved postsecondary school. They also cannot be married. Unlike in the case of a spouse, if a child loses eligibility to these REPS veterans benefits for any reason, they may not reestablish it with VA compensation claims.

*There are some very stringent rules that govern REPS benefit amounts.*

#### **How Does Income Effect REPS Payments?**

Because REPS is run by the Social Security Administration, there are some very stringent rules that govern benefit amounts. Basically, whatever REPS benefits an eligible surviving family member is entitled to,

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those benefits are reduced by \$1 for every \$2 they earn in wages over the designated annual limit.

Also, if the survivor is eligible for Social Security, payments will only be made in an amount that covers the difference between what their Social Security payments are and what their REPS veterans' benefits should be.

### **Non-Service-Connected Veterans Benefits: What Is a Death Pension?**

The spouse of a non-service-connected veteran who has passed away may still be entitled to monthly veterans benefits. This is called the death pension, and it is available to qualified spouses in cases where the veteran served at least 90 days of active duty, was discharged under any conditions other than dishonorable, and served at least one day of active duty during a period of war.

If the veteran served after September 7, 1980, in most cases they also must have been in continuous active duty for at least 24 months in order for their spouse to submit VA claims and qualify for the death pension. Exceptions to this 24 month rule are:

- The veteran served the full period in which they were ordered to active duty.
- The veteran did not serve their full period only because they were granted either early discharge or a hardship discharge.
- The veteran was discharged or released from active duty because they suffered a disability.
- At the time of death, the veteran was eligible to receive some form of compensation for a service-connected disability that occurred during wartime.

### **What is the Improved Pension Program?**

The improved pension program will be used for any new death pension VA claims filed for by a qualifying survivor. This program bases the awarded pension amount on the survivor's monetary

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need, taking into account their current income and measurable assets (not including home value). In some cases, this can lead to a qualifying survivor receiving no death pension at all.

There are also some rules that govern whether or not a surviving spouse is qualified to receive the death pension. If the surviving spouse was married to the veteran for at least one year before they died or has a child with the deceased veteran, they qualify. In cases where the surviving spouse married the veteran after discharge, they may still be eligible to file VA claims for the death pension if they were married previous to these dates:

- Mexican Border Period and WWI: They were married before December 14, 1944.
- WWII: They were married before January 1, 1957.
- Korea: They were married before February 1, 1965.
- Vietnam: They were married before May 8, 1985.
- Persian Gulf War: They were married before January 1, 2001.

### **Veterans Benefits: The Surviving Child**

In most cases, the surviving child of a veteran does not have independent entitlement to the improved death pension if they are in custody of an eligible surviving spouse. The spouse, however, will be able to qualify for more monthly veterans benefits in order to take care of the dependent child. If the child is not in custody of the surviving spouse, the death pension veterans' benefits may be paid to the child's legal guardian.

### **How Do Special Allowance Rates Affect Veterans Benefits for Family Members?**

When it comes to dispersing veterans benefits to family members, the VA has a few special rules to accommodate loved ones who need extra assistance. These special allowances fall into two categories: family members who require aid and attendance (A&A), and family members who do not need constant supervision but are still permanently housebound (HB).

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Both of these allowance categories are available only to family members who qualify as one of the following in relation to the veteran: a spouse, a surviving spouse, a parent, or a surviving parent.

### **How Do Family Members Qualify for Special Allowance Veterans Benefits?**

If your loved one needs daily care and assistance, he or she will be eligible to receive the A&A special allowance benefit only if one of the following criteria is met:

- Documentation that the family member is blind or nearly blind
- Proof that the family member is in a nursing home due to physical or mental limitations
- Medical evidence or a doctor's statement that the family member is unable to care for himself or herself and/or protect himself or herself from daily hazards

If your loved one's disability does not fall into any of the above categories, he or she may be able to qualify for the HB allowance if you can prove that the person is "substantially confined" to the home and will be for the rest of his or her lifetime.

### **What Other Rules Affect Special Allowance Veterans Benefits?**

Though the above qualifying criteria may seem fairly easy to meet, the VA claims process can still be tricky. If you're even slightly unsure of the process for proving the above requirements, consult a veterans' advocate or lawyer who can clarify everything you need to know. Hiring a lawyer can be especially helpful when it comes to obtaining doctor's statements that are detailed enough for the VA to decide in your favor. A qualified advocate will be able to evaluate all medical evidence to ensure it meets the level of detail required by the VA.

A disability attorney can also help you navigate other intricacies of the VA claims process. You'll need to know that a spouse is only eligible for special allowance benefits if the veteran has been rated at least 30 percent disabled. Also, a spouse can only receive special allowance veterans benefits directly if the veteran is deemed incompetent or is deceased. In all other cases, the veteran collects the funds on behalf of the spouse.

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## **Are Children Born With Spina Bifida Eligible for Additional Veterans Benefits?**

Under the Agent Orange Benefits Act of 1996, children with Spina Bifida born to Vietnam veterans were ruled eligible to receive increased veterans benefits. These children are entitled to benefits including health care coverage, vocational rehabilitation in the case the child is capable of holding down a job, and a monetary allowance that is adjusted yearly to compensate for increased cost-of-living.

## **What Requirements Must Be Met to Receive Increased Veterans Benefits?**

There are a few important distinctions that the VA makes when determining who is eligible to receive additional compensation due to cases of Spina Bifida. The child in question must be the biological offspring of a Vietnam War veteran who served between January 9, 1962, and May 7, 1975. The child must also have been conceived after the veteran spent some amount of time in Vietnam.

The children of female veterans who served in Vietnam during the dictated time period that exhibit birth defects other than Spina Bifida may also be eligible for additional benefits. A qualified disability attorney can help you determine which birth defects make a child entitled to this increased compensation.

## **What is the Process for Claiming Veterans Benefits for Children with Spina Bifida?**

Beginning the disability claims process for children with Spina Bifida is fairly easy – the first step is simply to file an informal claim stating that the child has the disability and is eligible under the requirements stated above. Then, you'll need to submit VA Form 21-0304. Unlike most disability claims applications, this process doesn't require the child to be formally examined by the VA (except in cases where the diagnosis is doubted).

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However, since the VA's decision is made purely on the basis of a doctor's statement, it is important to retain counsel who can advocate on your behalf and ensure that all medical documentation describes your child's symptoms honestly and in great detail. The VA will rate your child's Spina Bifida across four levels of disability and pay benefits out in accordance with the judgment of severity.

Because of this, and because this is a rare circumstance in which the child, not the veteran, files the disability claim, it is important to consult a veterans disability attorney to ensure that you and your son or daughter received the veterans benefits to which your family is entitled.

### **DIC Disability Benefits for Surviving Family of Veterans Exposed to Agent Orange**

Surviving family members of Veterans who were exposed to Agent Orange during military service may be eligible for monthly VA compensation payments through the VA's Dependency and Indemnity Compensation (DIC) program. This includes disability claims that were previously denied.

Claims for benefits for Veterans and surviving family of veterans exposed to Agent Orange are fully discussed in Chapter 16, "Agent Orange Exposure."

## Chapter 14

### Psychological & Cognitive Disabilities

#### Disability Compensation for Mental Disabilities Other Than PTSD

*Disability claims for mental disorders are oftentimes very challenging for both the veteran and their disability lawyer.*

There are many unique issues that a veteran and their disability lawyer must be aware of when going through the VA claims process for a case relating to a mental disorder. First, a veteran must be sure to have their mental disability professionally diagnosed. Once diagnosed, they will need to show that the disability is service-connected in one of five different ways.

#### What Are the 5 Ways to Service Connect a Mental Disorder During a VA Claims Process?

1. The mental disorder that the veteran is suffering from was first evidenced during service.
2. The veteran had a preexisting mental disorder that was aggravated by service.
3. The mental disorder in question developed soon after a service-connected physical disorder was incurred.

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4. The mental disorder was diagnosed within a year after service ended. This period of time is extended in any case involving a prisoner of war.
5. The mental disorder resulted from an injury that occurred while the veteran was being administered VA medical care.

Because of all the unique issues related to mental disorders, these disability claims are oftentimes very challenging for both the veteran and their disability lawyer. The first thing a veteran must do is figure out what mental disorder they are seeking benefits for. This can be a very difficult thing to have properly diagnosed.

But remember, a claim cannot be denied just because you have applied for the wrong mental disorder. As long as some of the symptoms overlap, the claim can be applied to the correct disorder once it has been diagnosed. You may, however, be required to provide new evidence in this case.

Another obstacle that many veterans will face is the fact that they may suffer from more than one mental disorder. In these cases, a veteran can receive a separate service connection for each of the different disorders they suffer from. However, only one disability rating will be assigned to cover any disorders with overlapping symptoms that a veteran has applied for during the VA claims process.

### **Definition of Important Terms Used in Mental Disorder VA Claims**

When dealing with VA claims regarding mental disorders, the U.S. Department of Veterans Affairs uses a certain specialized language. In order to more effectively argue mental disorder claims, a veteran and the VA disability attorney who represents them should make themselves familiar with some of these special terms.

## **Mental Disorder Definitions**

Here are some common terms that anyone involved with VA claims should learn:

**Amnestic:** Causing loss of memory.

**Axis:** One of the 5 different types of problems a person making VA claims for a mental disorder may have.

**Axis I:** Clinical disorders.

**Axis II:** Personality Disorders and Mental Retardation.

**Axis III:** General Medical Conditions.

**Axis IV:** Psychological and Environmental Problems.

**Axis V:** Global Assessment of Functioning.

**Bipolar Disorder:** A mood disorder where both excitable (manic) and depressed (depressive) episodes take place.

**Cognitive:** The process of thinking.

**Dementia:** A disorder that causes general loss of intellectual abilities and impairment of judgment, memory, and abstract thinking.

**Dissociative Disorders:** Mental disorders such as multiple personality disorder which cause sudden, temporary changes in memory, identity, or consciousness.

**DSM (III, III-R, or IV):** The *Diagnostic and Statistical Manual of Mental Disorders*. These are previous editions of a reference book developed by the American Psychiatric Association (APA) that classifies known mental illnesses and their symptoms. Although superseded by edition DSM-5 (listed below) the transition from DSM-IV to DSM-5 is still ongoing, and many documents still reference past versions of the manual.

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**DSM-5:** The Fifth Edition of *Diagnostic and Statistical Manual of Mental Disorders* developed by the American Psychiatric Association (APA), is the latest compendium of mental disorder criteria and diagnostic codes used by clinicians in the U.S. healthcare system. Released in May 2013, DSM-5 drops the Roman numeral nomenclature and marks the first major revision to the classification of and diagnostic criteria for mental disorders since DSM-IV was released in 1994.

**Dysthymic Disorder:** A mood disorder that results in depressed feelings and lack of interest in usual activities, but isn't severe enough to be Major Depression.

**Personality Disorder:** A pattern of behavior that departs from normal cultural expectations. This usually begins during adolescence or early adulthood.

**Psychotic Disorders:** Disorders such as Schizophrenia that result in the afflicted individual having regular delusions or hallucinations that put them out of touch with reality.

**Psychoneurotic Disorders:** A disorder that results in phobias, obsessions, and anxiety attacks. One example of this is Posttraumatic Stress Disorder.

**PTSD (Posttraumatic Stress Disorder):** A disorder in which the afflicted person re-experiences an extremely traumatic event. This usually results in nightmares, difficulty sleeping, anxiety attacks, and increased arousal.

**Schizoaffective Disorder:** A mental disorder characterized by the presence of both schizophrenia and mood disturbances such as depression.

**Schizophrenia:** A disorder where the afflicted are out of touch with reality most of the time. They suffer from grossly disorganized behavior, disorganized speech, delusions, hallucinations, and inappropriate affect.

**Somatoform Disorders:** A disorder where a person has certain physical symptoms of a medical condition, but tests do not reveal that they actually have that condition.

**Superimpose:** To lay or place something on or over something else.

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When dealing with cases involving VA claims, it is imperative that your attorney knows and comprehends the preceding list of terms so that he or she can effectively represent you when dealing with the VA

## **What Are the 8 Categories of Mental Disorders Eligible for VA Compensation Claims?**

Whether the afflicted party is eligible for VA compensation claims or not, mental disorders are a truly awful thing for anyone to have to live with. But establishing a mental disorder as service-connected can certainly make things somewhat easier by giving the veteran access to care. However, in order to qualify for these veterans' benefits, the mental disorder in question must first fall into certain specific categories.

The following are the eight categories of mental disorders that are eligible for VA compensation claims:

1. Schizophrenia and Other Psychotic Disorders
2. Delirium, Dementia, and Amnestic and Other Cognitive Disorders
3. Anxiety Disorders
4. Dissociative Disorders
5. Somatoform Disorders
6. Mood Disorders
7. Chronic Adjustment Disorder
8. Eating Disorder



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Any of the disorders included in the above eight categories may be eligible for VA compensation claims, depending on whether or not it is determined to be service-connected.

**Schizophrenia and Other Psychotic Disorders.** This category includes any mental disorder that causes loss of contact with reality and derangement of one's personality. Some of these are schizophrenia, shared psychotic disorder, delusional disorder, and brief psychotic disorder.

**Delirium, Dementia, and Amnesic and Other Cognitive Disorders.** These are brain-related disorders that include Alzheimer's, alcoholism, dementia due to infection, brain trauma, and drug or poison intoxication.

**Anxiety Disorders.** Some examples of anxiety disorders are Posttraumatic Stress Disorder, obsessive-compulsive disorder, panic disorder, phobic disorder, and agoraphobia.

**Dissociative Disorders.** These can include multiple personality disorder, dissociative fugue, dissociative amnesia, and depersonalization disorder.

**Somatoform Disorders.** Some of these are pain disorder, somatization disorder, conversion disorder, and hypochondriasis.

**Mood Disorders.** Some of the qualifying mood disorders may be bipolar disorder, major depression, dysthymic disorder, and cyclothymic disorder.

**Chronic Adjustment Disorder.** This involves the inability of the afflicted party to re-adjust to normal society over a long period of time. It can cause symptoms like anxiety, head and stomach aches, and depression.

**Eating Disorder.** This category includes both anorexia and bulimia.

## Linking a Mental Disorder to Military Service in the VA Claims Process

If a veteran is suffering from a mental disorder and wants to qualify for compensation, they must first prove through the VA claims process that the disorder is somehow related to their military service. This is not always a simple thing to do. In fact, in many cases veterans hire a disability lawyer to fight on their behalf.

**Diagnosis:** The first step is to get the disorder diagnosed. While symptoms of certain mental disorders can often be seen by a layman, in order to qualify for VA compensation, the afflicted party must be diagnosed by a true expert in the field. This can come in the form of a physician, psychiatrist, or psychologist.

**Linkage Evidence:** Once diagnosed, evidence must be presented that will prove that the disorder was either incurred during military service, or at the very least aggravated by it. This can be a very difficult thing to prove.

*The first step is to have  
the disorder diagnosed.*

One of the best ways to do this is by obtaining a statement from a doctor that says that, in their expert opinion, the patient's mental disorder was either caused by or exacerbated by their military service.

A common time to obtain this sort of expert opinion is during the DSM-5 axis diagnosis. If the examiner includes military service as a factor in their diagnosis, it means they have found it to be a clear contribution to the patient's mental disorder. This can then be used by your disability lawyer during the VA claims process as evidence to link the patient's disorder to their military service.

## **How Is the Degree of Disability of a Mental Disorder Evaluated for VA Compensation Claims?**

When evaluating VA compensation claims for veterans with mental disorders, diagnosing the illness and linking it to the patient's military service is just the first step in the VA claims. Next it must be determined just how impaired the person is. This is done using a sliding scale called the "General Rating Formula for Mental Disorders."

What this formula does is measure just how impaired the veteran's social and occupational functioning are. The unique thing about this scale is that it focuses specifically on how a veteran's symptoms affect their life. The outcome of this test is then used to determine the extent of their VA compensation claims.

## **What Are the Specific Criteria Used to Determine VA Compensation Claims?**

The "General Rating Formula for Mental Disorders" is measured in percentages of disability based on the veteran's level of impairment.

**100 Percent Total Social and Occupational Impairment.** Symptoms include persistent delusions or hallucinations, grossly impaired communication or thought processes, disorientation, memory loss for things that should be familiar, persistent danger of hurting self or others, and intermittent inability to perform normal daily activities.

**70 Percent Social and Occupational Impairment.** This results in deficiencies in thinking, mood, family relations, work, school, and judgment. Symptoms include intermittently illogical speech, suicidal ideation, near-continuous depression or panic that affects the ability to function, obsessed rituals which interfere with the daily routine, unprovoked irritability with occasional violence, neglect of appearance and hygiene, inability to maintain relationships, and spatial disorientation.

**50 Percent Social and Occupational Impairment.** This will result in reduced reliability and productivity. Symptoms include panic attacks more than once per week, circumstantial or

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stereotyped speech, difficulty comprehending complex commands, flattened affect, memory impairment, impaired abstract thinking, impaired judgment, difficulty with work and social relationships, and disturbances of motivation and mood.

**30 Percent Social and Occupational Impairment.** This is marked by an occasional decrease in work efficiency. Routine behavior, conversation, and self-care generally remain normal. Symptoms include anxiety, depression, panic attacks once per week or less, suspiciousness, mild memory loss, and chronic sleep impairment.

**10 Percent Social and Occupational Impairment.** Symptoms here are mild and result in a decreased ability to perform occupational tasks during periods of high stress. This can be controlled by medication.

**0 Percent Social and Occupational Impairment.** A mental condition has been diagnosed, but the symptoms are not severe enough to affect social or occupational functioning.

By using the preceding scale during the VA claims process, the appropriate amount of VA compensation claims can be accurately determined for any veteran who suffers from a service-induced mental disorder, but it still may be in your best interests to use a qualified VA disability lawyer to ensure that the scale truly reflects your condition.

### **How Can a Soldier With Traumatic Brain Injuries Avoid Denial of Veterans Claims?**

In recent years, the importance of soldiers having their brain injuries correctly evaluated in order to avoid denial of veterans' claims has become a hot button topic. One of the main reasons for this is the steep increase in traumatic brain injuries (TBI) suffered by soldiers during our most recent wars.

This increase can be linked directly back to an uptick in the use of roadside improvised explosive devices (IEDs), whose blasts often cause head trauma. This can result in Posttraumatic Stress

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Disorder and depression for those veterans who have been inflicted with these horrible brain injuries.

Because of the significantly higher levels of TBI, the VA has revised the criteria they use to determine the true effects of brain trauma on those who are applying for disability. However, a lot of people feel that the criteria are still too stringent and inaccurate, resulting in far too many underpaid and denied disability claims.

*12 to 20 percent of returning Iraq War veterans currently suffer from Posttraumatic Stress Disorder*

### **Evaluating Traumatic Brain Injuries Correctly to Avoid Denial of Veterans Claims**

Any veteran who thinks they may be feeling the effects of a traumatic brain injury suffered during service should immediately see a professional. They should also make sure to claim a service connection for any

mental condition that may be associated with their injury. This includes both Posttraumatic Stress Disorder and depression.

Another thing that an afflicted veteran must do is obtain a professional opinion on their ability to be regularly employed. This evaluation should include a “Global Assessment of Functioning (GAF)” score, which is a 0 through 100 rating by a mental health doctor that measures how well the person in question can adapt to handle various problems they might encounter in their social or work life.

If a soldier is proactive in following these steps, it will make them significantly less likely to be the victim of a denial of veterans’ claims.

### **Disability Claims for Posttraumatic Stress Disorder**

With an estimated 12 to 20 percent of returning Iraq War veterans currently suffering from Posttraumatic Stress Disorder, it's no wonder that PTSD-related disability claims are on the rise.

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For many years, the stigma associated with psychological disorders prevented a huge number of the Vietnam veterans suffering from PTSD from seeking treatment. But recent studies highlighting the need for improved mental health care for returning troops, as well as increased social acceptance of psychological disorders, has led to greater focus by the VA on acknowledging and treating PTSD.

### **Who Is Eligible for PTSD Disability Claims?**

The criteria for a diagnosis of PTSD are fairly varied, but in general, most returning veterans experience some of the following symptoms:

- Emotional numbness for a long period after the traumatic event
- Survivor's guilt
- Nightmares about and flashbacks to the traumatic event
- Difficulty sleeping and concentrating
- Strong reactions to sounds mimicking the traumatic event
- Difficulty reconnecting emotionally with friends and family
- Generalized anxiety, nervousness, or depression

If you are a veteran and are experiencing one or more of these symptoms, you may be eligible for veterans' benefits on the basis of a PTSD diagnosis. Consider contacting a good VA benefits lawyer to help make your case to the review board. The process can be tricky, and a qualified lawyer will be prepared to work hard and win you the benefits to which you are entitled.

The brave men and women who lay their lives on the line for this country deserve healing through competent and compassionate mental healthcare. The VA is able to provide this to all veterans who successfully argue their disability claims, so don't hesitate to put together a case if you feel you are entitled to veterans benefits based on a diagnosis of Posttraumatic Stress Disorder.

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## **What Are the Three Qualification Requirements for PTSD Disability Claims?**

The VA has a series of strict criteria in place to determine the validity of PTSD-related disability claims. These rules can be tough to navigate, but a qualified disability lawyer can see you through the process and help you obtain the benefits you deserve.

### **The First Requirement for PTSD Disability Claims**

The most important qualification is a medical diagnosis of Posttraumatic Stress Disorder. The diagnosing doctor must be in good standing with the VA and must strictly adhere to the criteria set out in the DSM-5 when making the determination. If the VA rejects your initial claim, your medical report will be returned for clarification, and in some cases the VA will conduct an independent medical inquiry.

However, because PTSD diagnoses are so subjective, all you need for a positive determination is 50 percent surety on the part of your doctor. Also referred to as an "as likely as not" decision, this makes it easier on the veteran to gain the necessary PTSD diagnosis.

### **The Second Requirement for PTSD Disability Claims**

After beginning the VA compensation claims process, veterans must provide evidence of a stressful event that occurred during their military service. The incident doesn't have to take place during combat, because in a war zone there are many disturbing incidents that can occur during an otherwise mundane day.

If your PTSD diagnosis was made during service, the only evidence this second step requires is a personal account of the traumatic event or events that led to this diagnosis. Unless there is clear evidence your personal statement is false, the VA will accept the story as sufficient evidence that the event occurred.

The requirements are slightly different if your PTSD diagnosis occurred after service. In this case, the circumstances of the trauma make all the difference:

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- If the stressor occurred during combat, your personal statement is the only evidence necessary to satisfy this step;
- If the stressor is related to a persistent and debilitating fear of hostile military or terrorist activity, again the only evidence necessary is your story, along with a psychiatrist's evaluation;
- If the stressor is related to an in-service personal assault, you may need to present evidence outside military records to substantiate the claim;
- If the stressor occurred under other circumstances, you may also need to present additional evidence.

### **The Final Requirement for PTSD Disability Claims**

If you have successfully provided a medical diagnosis of PTSD as well as a valid stress event, the final step before receiving your rightful disability claim will be to prove the service connection between the diagnosis and the stressor. In most cases, this will not be a problem as the medical records proving the diagnosis will contain details about the stressor claimed in step two of the process.

If you believe that you are eligible to receive veterans' benefits due to Posttraumatic Stress Disorder, don't hesitate – contact a reputable disability lawyer and get started on filing your disability claims as soon as possible.

### **What Are the Special VA Compensation Claims Rules on Service Connection for PTSD?**

While all VA compensation claims for Posttraumatic Stress Disorder (PTSD) must meet the three basic requirements for service connection in section 1154(b), there are some special variations that apply to these cases. In the case of *Pentecost v. Principi*, the Court of Appeals for Veterans Claims established that a service connection for PTSD requires:

1. A current PTSD diagnosis.

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2. Credible supporting evidence that shows that the claimed in-service stressor actually occurred.
3. Medical evidence that shows a causal connection between the current set of symptoms and the claimed in-service stressor.

As with any other illness or injury being claimed by a combat veteran, proving a claim of PTSD requires much less evidence than it would with a non-combat veteran. In most cases, the combat veteran's lay testimony will be all that is needed to establish that an in-service stressor actually occurred.

### **Rule Changes Made Service Connection Easier for PTSD Sufferers**

With the issue of Posttraumatic Stress Disorder coming to the forefront in recent years, it was decided that both combat and non-combat veterans should be given an easier path to establishing the occurrence of their in-service PTSD stressors. In 2008, there was an amendment made to reflect this. This amendment now allows veterans to prove an in-service occurrence of PTSD with lay evidence alone.

However, any disability lawyer should note that this rule only applies to those veterans who were actually diagnosed with PTSD while they were still in service. But if their PTSD didn't appear until after service, the normal service connection rules for VA compensation claims apply.

## Chapter 15

### Special Rules for Combat Veterans

#### **Are There Special Rules that Govern VA Compensation Claims for Combat Veterans?**

When combat veterans make VA compensation claims, they tend to have a much less difficult time getting their injury or illness service-connected than non-combat veterans. This is because VA law makes it significantly easier for combat veterans to prove that their disability occurred or was aggravated during service, thereby lowering the chances that they will be denied veterans benefits.

Unlike other veterans, a combat veteran doesn't actually need to show facts to prove that their disability stemmed from a service-related incident. They just have to make a claim that shows to be consistent with the circumstances and conditions in which they were deployed. In almost all cases, their statement that the disability occurred from a combat incident will be considered as fact. The only way anyone can even dispute them on this is if they provide "clear and convincing evidence to the contrary." (*38 C.F.R. §3.304 - Direct service connection; wartime and peacetime.*)

## **Why Do Combat Veterans Receive Special Treatment on VA Compensation Claims?**

Clearly, we all owe a major debt to any person who has suffered a permanent injury or illness while defending our country. But this is not the actual reason that combat veterans receive such special treatment when it comes to service-connecting their disabilities.

The main reason for this favorable treatment is that during combat military record-keeping can be very inefficient. Records can easily get destroyed and are often not completely kept. And in some cases, no records are created at all. Because of this, the VA has chosen to err on the side of the combat veteran with regards to compensation claims.

## **What Do Combat Veterans Need to Prove to Get VA Compensation Claims Approved?**

This special provision is only used to lower the burden on combat veterans to show that their injury or disease occurred or was aggravated during service. This doesn't, however, make them exempt from proving the other two service connection requirements in order to avoid being denied veterans benefits. The combat veteran will need to provide competent evidence that they currently have a disability as well as competent evidence that links their current disability to the in-service event that they claim caused the disability, if they want their VA compensation claims approved.

## **How Do You Know If an Incident Occurred While “Engaged In Combat”?**

It's already been established that combat veterans who attempt to get their in-service injuries service-connected are not required to provide as much evidence throughout the VA claims process as a non-combat veteran would. Because of this, it is absolutely critical that the VA accurately determines whether or not the event happened while the veteran was “engaged in combat with the enemy.” But how do they make this determination?

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Proving that an injury or illness occurred while in combat may be more difficult because the VA is not required to accept the veteran's statement that they were in combat as fact. They are, however, required to weigh and consider the veteran's statement when making this important determination.

According to the U.S. Court of Appeals for Veterans Claims, the veteran doesn't have to provide evidence corroborating their statement. However, any VA disability attorney should note that corroborating evidence would certainly be helpful in persuading the VA to accept the veteran's statement that they were engaged in combat.

### **Ways to Corroborate a Veteran's Statement about Their Combat Service**

- The veteran's combat service may be indicated on their service records. This can include documentation of any combat decoration, citation, or reward.
- Any evidence that shows that the area or base the veteran was in was attacked by the enemy. Whether or not the veteran in question was directly exposed to fire does not matter.
- Any documentation that the veteran received hazardous duty pay.
- "Buddy statements" from fellow soldiers regarding the veteran's inclusion in combat.

Again, a good VA disability attorney will note that even if a veteran cannot provide any of this corroborating evidence, it does not necessarily mean that the VA will determine that the veteran was not engaged in combat. When going through the VA claims process, each veteran's case and circumstances will be individually considered and assessed.

### **Step by Step Application of How a Veteran's Statement Is Analyzed**

Once someone has established their position as a combat veteran, the next step in the VA claims process is for the VA to analyze their statements and make sure they meet certain conditions. If these conditions are met, the combat veteran's lay statements regarding the injury or disease will be accepted. In order to analyze these statements, the VA will go through three steps.

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## **STEP 1: The Combat Veteran's Evidence Must Be Satisfactory during the VA Claims Process**

The VA will first focus on the evidence that has been provided by the combat veteran to determine whether it is “satisfactory.” There are three sub-steps involved in making this decision:

### **STEP 1A: What evidence does the “satisfactory” requirement apply to?**

- In this case, the “satisfactory” requirement applies only to evidence submitted by the veteran. This could include: their statements, any testimony they make, and any documents they present.

### **STEP 1B: What does “satisfactory” evidence mean?**

- According to the U.S. Court of Appeals for Veteran Claims, “satisfactory” means: credible, plausible, or capable of being believed.

### **STEP 1C: How do you determine whether evidence is “satisfactory?”**

- Where testimony is provided in person, the VA may consider: behavior and expressions, plausibility of the testimony, and whether the testimony is consistent with other evidence.
- Where the evidence is a written document, the VA may consider: consistency of that document, plausibility of that document, and consistency of that document when compared to other evidence.
- In any situation where the evidence is equal on both sides, the veteran will get the benefit of the doubt.

## **STEP 2: The Evidence Provided by the Combat Veteran during the VA Claims Process Must Be Consistent with Circumstances of Service**

The U.S. Court of Appeals for Veterans Claims has established certain principles they adhere to when determining whether a combat veteran's lay evidence is consistent with their circumstances of service. The principles are as follows:

- A combat veteran's medical records shouldn't be used to determine whether or not their statements are consistent with their circumstances of service. The only exception to this comes when the veteran's medical records show specific inconsistencies.
- In circumstances where there is equal evidence on both sides, the veteran will receive the benefit of the doubt.

## **STEP 3: There Cannot Be Clear and Convincing Evidence in the Record against Incurrence or Aggravation during Combat**

Once Step 1 and Step 2 are satisfied, the next step in the VA claims process is to look at any negative evidence that might prove the veteran's statements to be false. If there is no unfavorable evidence, the VA will accept the combat veteran's statement.

However, a veteran should note that even if there is negative evidence, it's still difficult for the VA to oppose a combat veteran's statement. That's because the VA claims process requires the high standard of "clear and convincing" negative evidence to be presented, as opposed to just a "fair preponderance of evidence."

## **Chapter 16**

### **Agent Orange Exposure**

#### **VA Benefits Available to Veterans Exposed to Agent Orange (AO)**

If you are a veteran with disabilities associated with herbicide exposure, including Agent Orange, you may qualify for health care, vocational rehabilitation and payment of monetary compensation benefits. These exposures have been associated with a variety of cancers and other diseases.

If you are a surviving spouse or surviving child of a veteran exposed to herbicides, you may also be eligible for benefits, including Dependency and Indemnity Compensation (DIC) benefits, CHAMP-VA health care and educational benefits.

In order to qualify for service-connection based upon herbicide exposure, veterans must establish that they have a current disability related to exposure to herbicides during military service. Once a current disability is established by medical evidence, it is necessary to determine where the veteran was located during military service and whether such location(s) involved exposure to herbicides.

The critical questions are:

- Where was the veteran?
- When was the veteran there?

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- Where were the herbicides?
- When were the herbicides there?

During the Vietnam Era, chemical herbicides such as Agent Orange were used to defoliate areas of Vietnam and in some cases, the perimeter of certain military bases as well as areas near the Demilitarized Zone (DMZ) in Korea. Herbicides were also tested at a variety of locations prior to being used in Vietnam. In addition, herbicides were stored at various locations such as Johnston Island, Guam and Gulfport, Mississippi during various time periods.

Because records of herbicide use were not maintained, finding documentation can be difficult; however, the VA continues to identify information and evidence concerning locations of exposure.

### **Veterans Outside of Vietnam Eligible for VA Benefits Based on Herbicide Exposure**

Did you know that you or a loved one may be eligible for VA benefits due to exposure to herbicides even if you served in areas other than Vietnam?

#### **Serving Outside of Vietnam**

Herbicides were used to provide perimeter base control on bases in Vietnam and Thailand, along the Ho Chi Min Trail and near the Demilitarized Zone in Korea beginning in September of 1967. Testing and storage of these herbicides also occurred at various locations in the United States and foreign locations.

If a veteran can establish that he or she was exposed to herbicides on a direct basis, VA will apply the presumption of nexus granted to diseases associated with herbicide exposure.

#### **Serving in Vietnam**

Of course, veterans who served during active military, naval, or air service in the Republic of Vietnam during the period beginning January 9, 1962 and ending May 7, 1975 may qualify for a

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presumption of exposure to herbicide agents. The Republic of Vietnam includes the land mass of Vietnam and its inland waterways.

### **Proving Exposure**

Regardless of location, establishing evidence that a veteran had exposure is the first hurdle to acquiring benefits.

Evidence of “boots on the ground” might include:

- Veteran’s military records,
- Service treatment records (STR),
- Deck logs and/or
- Ship newsletters, cruise books, buddy statements or photographs.

Veterans who served on “brown” water are eligible for a presumption of service connection for any disability recognized as associated with exposure to herbicides even if they did not have “boots on the ground.”

### **Proving You Are a Brown Water Naval Veteran**

Vietnam naval veterans, who operated in brown (shallow) waters, may qualify for service connection due to herbicide exposure.

In order to prove exposure as a naval veteran, you must:

1. Provide documentation of your location during relevant military service;
2. Identify your ship; and
3. Obtain evidence of the ship’s location in Vietnam waters

To qualify for benefits, veterans should provide documentation, which may include one or many of the following sources:

- A veteran’s copies of the ship logs or command history;
- Documentation on an official military site concerning the ship on which he or she served during the relevant time frame;

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- The veteran’s “201” military service file, which VA or the veteran should request from the National Personnel Records Center;
- A Personnel Information Exchange System (PIES) request to VA staff at the National Personnel Records Center;
- Documentation on the Compensation and Pension (C and P) Services website
- The Dictionary of American Fighting Ship Index on the Navy history site.  
<http://www.history.navy.mil/research/histories/ship-histories/danfs.html>
- National Archive “CONGA”;
- Deck logs from the Joint Services Records Research Center (JSRRC) and/or
- Documents such as cruise books and photographs found on the Internet at individual ship and organization sites

### **New Diseases Added to VA Agent Orange Presumptive Illnesses List**

The Department of Veterans Affairs has added Parkinson’s disease and ischemic heart disease to the list of “presumptive illnesses” related to Agent Orange exposure. In addition, VA expanded the presumption for chronic lymphocytic leukemia to include all chronic B-cell leukemias, such as hairy cell leukemia. These conditions are presumed to be service-connected to herbicide exposure in Vietnam.

Vietnam Veterans with these illnesses are able to claim VA disability benefits and health care services without having to prove that their conditions are connected to Agent Orange exposure. The new policy took effect in late 2010, and applies to veterans who served in Vietnam anytime during the period beginning January 9, 1962, and ending on May 7, 1975. It does not apply to veterans who only served on “Blue Water” Navy ships in the region.

*Vietnam Veterans with these illnesses are able to claim VA disability benefits and health care services without having to prove that their conditions are connected to Agent Orange exposure.*

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VA's decision to include these conditions brings the total number of categories of presumed illnesses linked to Agent Orange to 14.

### Agent Orange Conditions

**The VA already presumes that the following conditions are Agent Orange related:**

- Adult Fibrosarcoma
- AL Amyloidosis (also known as Primary Amyloidosis)
- Alveolar Soft Part Sarcoma
- Angiosarcoma
- B-cell Leukemias
- Birth Defects
- Cancer of the Brochus
- Cancer of the Larynx
- Cancer of the Lung
- Cancer of the Prostate
- Cancer of the Trachea
- Chloracne
- Chronic Lymphocytic Leukemia
- Clear Cell Sarcoma of Aponeuroses
- Clear Cell Sarcoma of Tendons
- Congenital Fibrosarcoma
- Dermatofibrosarcoma
- Ectomesenchymoma
- Epithelioid Malignant Leiomyosarcoma
- Epithelioid Malignant Schwannoma
- Epithelioid Sarcoma
- Extraskeletal Ewing's Sarcoma
- Hairy-cell Leukemia
- Hemangiosarcoma
- Hodgkin's Disease
- Infantile Fibrosarcoma
- Ischemic Heart Disease
- Leiomyosarcoma
- Liposarcoma
- Lymphangiosarcoma
- Lymphoma
- Malignant Fibrous Histiocytoma
- Malignant Giant Cell Tumor of the Tendon Sheath
- Malignant Glandular Schwannoma
- Malignant Glomus Tumor
- Malignant Hemangiopericytoma
- Malignant Mesenchymoma
- Malignant Schwannoma with Rhabdomyoblastic
- Multiple Myeloma
- Non- Hodgkin's Lymphoma
- Parkinson's Disease
- Peripheral Neuropathy
- Porphyria Cutanea Tarda
- Proliferating (systematic) Angiendotelimatosi
- Rhabdomyosarcoma
- Sarcoma
- Soft Tissue Sarcoma
- Spina Bifida
- Subacute Peripheral Neuropathy
- Synovial Sarcoma
- Type 2 Diabetes (also known as Diabetes Mellitus)

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## Recent Studies Regarding Possible Updates to Agent Orange-related Diseases

Recommendations have been made to the VA by the Institute of Medicine (IOM) regarding recent information about Agent Orange related diseases. The U.S. Department of Veterans Affairs is not bound by OIA committee's recommendations. At the time of this writing, VA is reviewing these findings, and has yet to take action towards implementing any of them.

- (1) The IOM states a link could exist between AO exposure and
  - Bladder cancer
  - Hypothyroidism

The above 2 diseases are now upgraded by IOM from "inadequate or insufficient" category to "limited or suggestive" evidence category.

- (2) A "reversal" was made by IOM for spina bifida in children of Vietnam vets. This disease is downgraded by IOM from "limited or suggestive" category to "inadequate or insufficient" category.
- (3) Institute of Medicine also clarified changes in how the VA evaluates claims for conditions with Parkinson's-like symptoms.

OIA states that Vets with Parkinson's-like symptoms – but without a formal diagnosis of Parkinson disease – should be considered eligible under the presumption that Parkinson's disease and the veterans' service are connected. To exclude a claim for a condition with Parkinson's-like symptoms, the onus would fall to the VA to “establish the role of a recognized factor other than the herbicides sprayed in Vietnam” on a case-by-case basis.

## Veterans Disability Claims: Strategies for a Winning Campaign

- (4) The VA has not found hypertension or stroke to be presumptively related to herbicide exposure in Vietnam, but the IOM committee reaffirmed their previous findings that put both conditions in the limited or suggestive evidence of association category.

### **DIC Disability Claims: Benefits for Surviving Family of Veterans Exposed to Agent Orange**

For a long time, veterans were not able to file disability claims for any conditions related to the spraying of the chemical Agent Orange during Vietnam. This was because the VA denied that exposure to the chemical could cause any serious diseases or deaths. As a result, thousands of qualified surviving family members of deceased veterans were denied veterans benefits that they deserved.

#### **How Disability Claims for Agent Orange Cases Changed in the 90s**

In the 1990s, the VA changed its position on Agent Orange by admitting that certain diseases could be caused by exposure to the chemical. Because of this change in policy, the VA now has to pay out these previously denied veterans benefits to the qualified families of those soldiers who died from related diseases.

But thousands more are entitled to these benefits and just need to apply. Many also may be eligible to receive back compensation to make up for the money that the veteran should have been paid when they were still alive.

*In the 1990s, the VA changed its position on Agent Orange by admitting that certain diseases could be caused by exposure to the chemical.*

An important thing to remember is that the surviving family member does not actually need to prove that the veteran was exposed to Agent Orange to make disability claims, because the law presumes that anyone who served in Vietnam was exposed to the chemical. The surviving family must just be able to show that the deceased veteran was diagnosed with a disease that is linked to

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Agent Orange exposure. This could be as simple as sending the VA copy of the death certificate that lists an Agent Orange-related disease as one of the causes of death.

But even if one of these diseases is not listed as the cause of death, a family member can still use a doctor's opinion to prove that it might have been. That would be enough evidence to receive the deceased veteran's Dependency and Indemnity Compensation (DIC) benefits.

### **The National Veterans Legal Services Program (NVLSP) and AO Exposure Disability Claims**

For years, the VA continued to do all they could to deny and underpay death and disability claims related to Agent Orange exposure. Time and time again, lawyers from the National Veterans Legal Services Program (NVLSP) repeatedly took the VA to court and forced them to pay huge sums of retroactive benefits in order to make things right.

***Nehmer v. U.S. Veterans Association***  
class action regulation

The NVLSP has set up a Nehmer Lawsuit Division to help make sure that the VA provides qualified veterans and their surviving families with the proper compensation. If you or your attorney contacts them, they will answer any questions you may have on matters related to AO exposure disability claims.

### **Effective Dates for Agent Orange Exposure in Vietnam**

Many Vietnam veterans and their survivors are eligible to have VA compensation claims for disability or death benefits granted as a result of their exposure to Agent Orange (AO). Some of these veterans qualify for a special set of effective date rules that are significantly more favorable to them than the normal effective date rules. This is a result of a class action lawsuit known as *Nehmer v. U.S. Department of Veterans Affairs*, brought by the NVLSP in 1986.

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In addition to establishing improved effective dates, the *Nehmer* class action regulation made three new diseases eligible for service connection due to AO exposure. These diseases are: Parkinson's disease, ischemic heart disease, and chronic B-cell leukemias (including hairy cell leukemia).

Because of the *Nehmer* order, the VA has been forced to go back and re-decide over 147,000 VA compensation claims that were filed between September 25, 1985, and August 31, 2010. If it is decided that disability and death benefits are to be awarded to any of these claimants, the VA will have to retroactively pay them these benefits based on the new, extremely favorable effective date rules. This could lead to over \$1 billion in retroactive payments to Vietnam veterans and their survivors.

### **What Are Qualifying Diseases and Their Special Effective Dates for Agent Orange VA Compensation Claims?**

There are many different Agent Orange-connected diseases that a Vietnam veteran may have been afflicted with. Each of these diseases has been assigned a corresponding effective date that is used to determine the amount of retroactive benefits that they or their surviving family members are entitled to when making VA compensation claims.

The NVLSP has published the *Nehmer Training Guide*, in which the official list of diseases presumptively service-connected due to Agent Orange Exposure is presented. The following is a list of these diseases and their effective dates as listed in the *Nehmer Training Guide*, Appendix 1 – List of Presumptive Conditions in 38 C.F.R. § 3.816:

- Chloracne – 2/6/91
- Soft-tissue sarcoma (STS) – 9/25/85
- Non-Hodgkin's lymphoma – 8/5/64
- Porphyria cutanea tarda – 2/3/94
- Hodgkin's disease – 2/3/94
- Cancer of the lung – 6/9/94
- Cancer of the larynx – 6/9/94

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- Cancer of the bronchus – 6/9/94
- Cancer of the trachea – 6/9/94
- Multiple myeloma – 6/9/94
- Prostate cancer – 11/7/96
- Acute and subacute peripheral neuropathy – 11/7/96
- Type 2 Diabetes – 5/8/01
- Chronic lymphocyte leukemia – 10/16/03
- Primary AL Amyloidosis – 5/7/09
- Ischemic heart disease – 8/31/10
- Chronic B-cell Leukemias (except chronic lymphocytic leukemia) 8/31/10
- Parkinson's disease – 8/31/10

A veteran can cite the “Nehmer Training Guide” when trying to get the VA regional office to assign the correct effective date for VA compensation claims for any of these Agent Orange-related diseases.

### **Why Were the Special Agent Orange Effective Date Rules for Death and Disability Claims Established?**

Throughout most of the 1970s and 1980s, the VA denied tens of thousands of Agent Orange-based death and disability claims by maintaining that the only illness AO exposure caused was the skin condition chloracne. However, in the early 1990s, the VA was forced to acknowledge that there were many other serious diseases that could be caused by AO exposure. This came about as a result of the class action lawsuit *Nehmer v. U.S. Department of Veterans Affairs*.

Now, any Vietnam veteran who is afflicted with any of these many AO-related diseases is eligible for a service-connection for that disease. This even applies to veterans and their surviving family members who have been denied benefits for that same disease in the past.

One of the most important things the *Nehmer* lawsuit established was the new effective date rules, which are very favorable to the veteran and their family. However, even after these new dates were approved, the VA did not make them public. In fact, they even went out of their way

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to hide and purposely misinterpret these rules in order to pay out less money to claimants and their families.

Because of this, it took almost a decade for the veterans, their surviving family members, and any VA disability attorney they may have hired to learn exactly what these new dates were and what they really meant.

### **What Communications Count as Disability Claims for Agent Orange-Related Diseases?**

Any disability claims for Agent Orange related diseases that were denied or filed after September 24, 1985, and before the List of Presumptive Conditions was published, could be considered Category 1 claims. In these cases, the rules that define what is considered to be an official disability compensation claim are very liberal.

Some examples of communications that should be sufficient to allow a veteran to qualify for the special Agent Orange effective date rules for disability compensation are:

- The veteran submitted an official VA document to the VA stating that they should grant him or her service-connected disability benefits for a specific disease that is listed in the List of Presumptive Conditions. These documents do not have to refer specifically to Vietnam or Agent Orange.
- The veteran made disability claims for a disease that was never specifically identified. However, while the claim was pending, medical records that diagnosed the veteran with a listed disease were filed with the VA.
- The veteran filed a compensation claim for a disability that was not listed in the List of Presumptive Conditions, but while the claim was pending, the veteran was officially diagnosed with a listed disease that was put into their VA claim file. This rule is often violated by the VA when setting effective dates. In order to improve their compliance with this rule, the VA added more details to its Nehmer Training Guide.

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## **Do Medical Records Count as Disability Claims?**

Your VA disability attorney will note that a veteran's medical records do not count as a claim by themselves. However, if medical records are present at the time the veteran files separate disability claims, the condition shown on the medical records will be considered part of those claims.

## **What Other Requirements Exist for Agent Orange VA Claims?**

In order for a Vietnam veteran to fit into Category 1 with regards to Agent Orange-related diseases, they must have either filed their VA claims or had them denied during a specific period of time. This period runs from September 24, 1985, to whatever date the ruling on the disease they suffer from was made official. This publication date can be found in the second column of the Nehmer Training Guide, Appendix 1 – List of Presumptive Conditions in 38 C.F.R. § 3.816.

## **Category 1 Rules for Agent Orange VA Claims**

The Category 1 rules are very clear and easy to comprehend when it comes to disability claims that were filed during the window period. These will always qualify a veteran for Category 1 status.

However, the rules can be a bit more confusing when trying to figure out if VA claims that were denied during the window period will still qualify the sufferer for Category 1. Some of these rules are:

- 1) If a veteran had their disability claim for an AO-related disease denied before September 24, 1985, but filed a timely appeal and ultimately received a final denial after said date, they would be included in Category 1.
- 2) If a veteran had their AO-related disability claim denied before September 25, 1985, and the final denial came after said date, they would not be included in Category 1. This is because the time period for a veteran to file a notice of disagreement or appeal expired after said date.

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- 3) If a veteran filed more VA claims for an already-denied disability after September 25, 1985, these new claims would qualify the veteran for Category 1.

If you are filing VA claims for Agent Orange exposure, hiring a disability lawyer can be a big help in navigating the many requirements and getting the best possible outcome for your situation.

### **What Is the Effective Date Rule for Veterans Who Filed Category 1 VA Claims?**

Vietnam veterans who file VA claims that qualify them for Category 1 will normally be given extremely favorable effective dates for their service-connected claims. In most cases, the effective dates for these claims will be the actual date on which the VA first received the claim.

There are two exceptions to this rule:

- 1) If there is no evidence to show that the disease in question was at least disabling to the degree of 10 percent on the date the VA received the claim, then the effective date will be the date the disease became disabling to a degree of at least 10 percent.
- 2) If the Category 1 disability claims were filed with the VA within one year of the veteran's discharge from service, the effective date will be the day after the date of discharge.

### **What If the Veteran Filed Multiple VA Claims that Fit within Category 1?**

There are many situations where a Vietnam veteran files more than one claim that fits within Category 1. If this is the case, the effective date is determined using the date of the first claim that was filed within the Category 1 window period.

For example, if a Vietnam veteran filed a disability claim for a disease in 1993 and was denied, then filed VA claims for the same disease again in 1996 after the disease was added to the List of

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Presumptive Conditions, the effective date would be set at the 1993 date on which they first filed the claim.

### **Vietnam VA Claims: What Are the Effective Date Rules for Category 2?**

The effective date rules for Category 2 VA claims determine whether or not a Vietnam veteran's surviving family members will qualify for death compensation or death pension. These rules apply to the families of those veterans who served overseas in Vietnam and died from a disease that was at least caused in part by one of the Agent Orange-related diseases on the List of Presumptive Conditions.

In order for a surviving family member to be included in Category 2, the claim in question must meet the following criteria:

- 4) There must have been a death benefits claim for either DIC or death pension. A VA disability attorney should note that a claim for pension is automatically considered as a claim for DIC even if the survivor indicated that the veteran's death was not due to service.
- 5) The VA claims in question must have been denied or filed in the effective date window, which is after September 24, 1985, and before the publication date in the List of Presumptive Conditions for the disease that led to the veteran's death.

Once it is decided that a DIC claim fits within Category 2, the next thing that needs to be determined is the effective date. This is normally set on the date the VA received the claim for DIC or death pension. It can also be set on the first day of the month in which the veteran's death occurred in cases where the claim was filed within one year of the veteran's death.

### **Do VA Claims for Service-Connected Burial Benefits Count as DIC Claims?**

In certain cases, claims for service-connected burial benefits will also count as DIC claims for the purpose of qualifying a surviving family member for Category 2 status.

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Here are some examples:

- A veteran's surviving spouse filed an application for burial benefits and indicated on the form that the cause of death was due to service. This caused the VA to forward a DIC claim application to the spouse, who filled it out and returned it to the VA within one year.
- A veteran's surviving spouse filed an application for burial benefits and indicated on the form that the cause of death was due to service. The VA did not forward a DIC claim application to the spouse. Due to the VA's failure to provide the correct VA claims application to the spouse, the one year filing period for the DIC application never began; therefore DIC must be retroactive to the date of the application for burial benefits.

## **Chapter 17**

### **Persian Gulf Veterans' Claims**

#### **Are Persian Gulf War Veterans Entitled to Disability Claims?**

The disability claims process for veterans of the Persian Gulf War can be a confusing one. However, the road to gaining your rightfully deserved compensation may be less treacherous than you think. Several cases decided by the US Court of Appeals for Veterans Claims have made it easier for veterans to receive their disability benefits by way of the presumptive service connection.

#### **How Does the Presumptive Service Connection Affect Disability Claims?**

In order to be eligible for benefits, a veteran must prove that he or she is suffering from a "qualifying chronic disability" that was incurred during active military service. In 1994, Congress made it easier for veterans who specifically served in the Persian Gulf War, including both Operations Desert Shield and Desert Storm, to prove a service connection by enacting 38 USC Section 1117 and 38 USC Section 1118.

These sections of the US Code establish a "presumptive" connection between the veteran's qualifying disability and his or her military service. Previously, the vague nature of many of the multi-symptom ailments affecting Gulf War vets had made both verifiable diagnoses and proven connection to military service almost impossible to attain, leading to many cases of veterans being denied their rightful benefits.

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Under Section 1117, a veteran merely has to prove that his or her qualifying disability manifested during service in the Persian Gulf or to a degree of 10 percent after being discharged from active duty. This altered rule makes it much easier for Gulf War vets to receive their hard-earned veterans benefits.

### **Does Section 1117 Affect Other Veterans' Disability Claims?**

The limits of Section 1117 extend the presumptive service connection to military veterans who served in the Persian Gulf area even after the conclusions of Operations Desert Shield and Desert Storm. Thus, all veterans of Operation Iraqi Freedom and Operation Enduring Freedom, as well as all active military serving in the Gulf area, can make use of the expedited VA claims process made possible by Section 1117.

However, although Congress enacted this US Code section to protect the heroic men and women who served and continue to serve our country, the VA still has ways of denying benefits to deserving veterans.

They may try to prove that your qualifying disability was caused not by the stresses of active service but by outside events before or after service or even by willful misuse of alcohol or drugs.

The best way to avoid such spurious claims on the part of the VA is to hire a qualified VA lawyer who can help you successfully make your disability claims case and receive the veterans benefits you have earned.

*The best way to avoid such spurious claims on the part of the VA is to hire a qualified disability attorney who can help you successfully make your disability claims case so you get the veterans benefits you have earned.*

## **What Is the Process for Persian Gulf Veterans to Make Disability Claims?**

Successfully presenting your disability claims to the VA Board can be a challenging task. You must prove that your case fulfills the three requirements for a presumptive service connection, as laid out by 38 USC Section 1117, and then undergo a VA-mandated physical examination. Hiring an experienced disability lawyer can be a huge help in ensuring that your case meets the requirements laid out by the VA.

## **What Are the Three Requirements for Establishing a Presumptive Connection When Making Disability Claims?**

**The first requirement** that must be fulfilled in order to receive the presumptive service connection is definitely the simplest – you must prove that you were on active duty somewhere in the Southwest Asian Theater sometime on or after August 2, 1990. Active duty includes time on land or in sea or air, and most countries surrounding the Persian Gulf as well as Afghanistan are included. The official language from the *Veterans Benefits Manual* covers "Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations."

**The second requirement** deals with proving that you have a "qualifying chronic disability." Simply put, to be eligible for veterans benefits under a disability claim you must be suffering from some sort of undiagnosed illness, a medically unexplained chronic multi-symptom illness, or any diagnosed illness previously ruled eligible. A qualified disability lawyer can help you parse which of your symptoms makes you eligible and which do not.

Finally, you will need to prove that your disability manifested during the eligible time period. Your symptoms must have manifested either during active service in the Persian Gulf or "to a degree of 10 percent or more during the presumptive period" that follows active duty. The length of the presumptive period varies depending on the nature of the illness or ailment.

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## **Are There Special Considerations for the Disability Claims of Certain Veterans?**

The VA has recognized that veterans who served in Iraq or Afghanistan during Operation Iraqi Freedom or Operation Enduring Freedom are entitled to some special considerations when it comes to their disability claims. A few injuries and ailments common among veterans of Iraq and Afghanistan have been made eligible to establish the presumptive service connection that is required to receive benefits.

Studies have shown that incidences of traumatic brain injury, or TBI, are much higher when it comes to veterans of these two conflicts – so prevalent that TBI is often considered to be the "signature disability" of vets returning from Iraq and Afghanistan. In addition, the VA has acknowledged that several environmental hazards present in Iraq, Afghanistan, and Djibouti have led to an increased risk for certain other ailments, and has implemented special considerations to deal with victims of these hazards.

## **What TBI Signs and Symptoms Are Relevant to Veteran Disability Claims?**

Veterans who served in Operation Iraqi Freedom or Operation Enduring Freedom were at a unique risk to injury from enemy combatant IED blasts. Some of the symptoms that indicate a brain injury include:

- Loss of or lessened consciousness
- Loss of memory
- Confusion, disorientation, or other evidence of altered mental state
- Neurological deficits such as loss of balance, praxis, aphasia, sensory loss, or paresis/plegia
- Intracranial lesion

At least one of these symptoms must have manifested immediately after the event for a successful diagnosis of TBI.

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## **Which Environmental Hazards Are Relevant to Veterans Disability Claims?**

Several environmental hazards present in Iraq, Afghanistan, and Djibouti are known to have contributed to an increase in veteran health issues. Burn pits that released toxic substances were utilized by the US military to dispose of waste starting in 2001. Dust storms, local industry emissions, and a few specific incidents such as the three-week burning of the Mishraq Sulfur Mine in 2003 are also noted as having increased veterans' exposure to dangerous environmental hazards. A wide range of respiratory, neurological, autoimmune, cardiopulmonary, and skin disorders have been linked to time served in the area of these environmental hazards.

If you are an Operation Iraqi Freedom or Operation Enduring Freedom veteran and you feel that you may have been affected by the factors listed under these special considerations, think about hiring a qualified disability attorney to help you fight for the veterans' benefits that you deserve. Making successful disability claims isn't easy, even for a veteran of Iraq or Afghanistan, and qualified legal counsel can make all the difference when it comes to bringing your case to the VA.

## Chapter 18

### Are Conditions Related to Tobacco Use Eligible for VA Claims?

Although the VA provides for the use of direct service connection in VA claims for a wide variety of disabilities, there is one glaring exception: veterans may not claim a service connection for any conditions caused by tobacco use during periods of military service. Under no circumstances can tobacco consumption by any method be used in the nexus of evidence for VA claims. This rule also applies to survivors seeking benefits after a veteran has passed away due to a tobacco-related illness.

However, this restriction is not quite as ironclad as it sounds. Although the VA cannot grant a service connection for disabilities that depend on tobacco use to prove linkage, it is possible for claimants to receive veterans' benefits for tobacco-related conditions through other strategies.

#### How Can Veterans Get Around the Tobacco Use Restriction?

If the disability for which you're seeking veterans benefits could conceivably be eligible for a service presumption that doesn't require providing a nexus of evidence, such as the service connection by legal presumption, you may still be able to make a successful case. This boils down to whether it's possible to make your case without a private physician's opinion.

For example, if you can use the service connection by legal presumption for a diagnosis of lung cancer due to Agent Orange exposure and won't need to provide a physician's opinion in your

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case, it is possible to game the system and receive benefits even if your doctor is convinced that your lung cancer was caused by smoking.

There is also a loophole regarding the use of secondary service connection for conditions caused by tobacco use. In the rare cases where a veteran took up smoking to calm the symptoms of a service-connected ailment (such as PTSD or another anxiety disorder) and then developed a condition because of this tobacco use, the veteran may be eligible for benefits. The case may be ruled in the veteran's favor as long as he or she can prove the following:

1. The condition that caused the tobacco use was service-connected.
2. The use of tobacco products was a major cause of the secondary disability.
3. The secondary disability wouldn't have manifested had it not been for the use of tobacco products.

## Chapter 19

### Upgrading a Veteran's Discharge Status

#### Can Upgrading a Discharge Make You Eligible for Veterans Benefits?

If you were the recipient of a less than honorable military discharge, then you already know that you are ineligible for veteran's benefits. But by upgrading your discharge, you can start receiving the compensation that you are entitled to as a former member of the US armed forces.

All branches of the service have two separate discharge upgrading forums: a Discharge Review Board (DRB), and a Board for Correction of Military Records (BCMR). Once the discharge has been changed to general or honorable in one of these two forums, the VA Board must then be utilized to grant veterans benefits.

In general, only veterans who received an honorable discharge or general discharge can be considered eligible for benefits.

In general, only veterans who received an honorable discharge or general discharge can be considered eligible for benefits. So if you feel that you were issued an incorrect discharge – other than honorable, bad conduct, or dishonorable – you can fight to overturn that judgment and receive the benefits that you deserve.

## Veterans Disability Claims: Strategies for a Winning Campaign

With the help of a qualified attorney and veterans' advocate, you might also be able to change your bad discharge to a disability separation or simply a retirement. Although you will not receive damages for an incorrectly characterized discharge, you may be eligible to receive back pay benefits if your discharge is deemed illegal or wrongful.

### **Are There Any Risks Associated With Upgrading a Discharge to Receive Veterans Benefits?**

Many veterans worry that fighting a discharge can lead to stigmatization or even potential harassment, but the discharge upgrading process is completely confidential to all individuals and organizations outside the military. However, it is true that members of the VA Board may not be incredibly sympathetic to veterans with less than honorable discharges.

That is why it is so incredibly helpful to have the assistance of a qualified veterans advocate as you navigate your way through the VA claims process. The VA's rules of eligibility for benefits are notoriously confusing, so an advocate will be invaluable in helping to parse those requirements. Enlisting the expertise of a good attorney can help ensure that you receive the veterans benefits to which you are entitled.

### **Is It Easier to Become Eligible for Veterans Benefits Through Discharge Upgrading or VA Adjudication?**

There are several different avenues available to those who wish to upgrade their discharges in order to become eligible for veterans benefits. The circumstances of your discharge will determine which path is right for you. If you're unsure as to which process will be most effective in gaining your benefits, consult a qualified attorney who can help you make the right choice.

All branches of the armed service offer two different forums in which veterans can upgrade their discharges, the Discharge Review Board (DRB) and the Board for Correction of Military Records (BCMR). In addition, VA adjudication provides another avenue through which servicemen and women can obtain veterans benefits, though the VA does not have the power to upgrade a discharge.

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## **How Do I Choose the Right Path to Make Me Eligible for Veterans Benefits?**

There are a series of factors that must be taken into consideration when choosing whether discharge upgrading or VA adjudication is the best fit for your situation. When it comes to discharge upgrading, the choice between filing with the DRB or BCMR can be affected by each forum's statute of limitations. Veterans have a hard and fast fifteen years from the date of discharge in which to file with the DRB – and this forum makes no exceptions or waivers. The BCMR only has a three-year statute of limitations from the date of discovery of the discharge error, but that forum can usually waive this limit on request.

You must also take into account each forum's eligibility rules concerning the classification of your discharge. Veterans with certain statutory bars can only file with the BCMR. Similarly, veterans with bad conduct discharges or dishonorable discharges issued by general court-martials can only file with the BCMR.

If you are not encumbered by a statutory restriction or a certain classification of discharge and you have a compelling personal story, applying to the DRB may be the best strategy. Because the DRB review process guarantees a personal hearing, you'll have the chance to make your case in person.

Most veterans apply for a discharge upgrade with the DRB or the BCMR, and then apply for veterans' benefits eligibility with the VA Board only after receiving the upgrade. But it is possible to skip straight to VA adjudication, although the VA Board is much more likely to grant eligibility to veterans who have upgraded their discharges than to veterans who still carry any discharge other than honorable.

There are a few rare cases in which it may be advantageous to apply simultaneously to a discharge review forum and to the VA Board, or even to the VA Board before the forum, but the problem of getting military records to multiple agencies at the same time is usually too much of an obstacle.

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However, your attorney can help you navigate this question as well as any other questions about discharge upgrading, the VA claims process, and the best way to make yourself eligible for veterans benefits.

### **How Do I Become Eligible for Veterans Benefits through Discharge Review?**

If you have a less than honorable discharge preventing you from receiving veterans' benefits, and feel that it was issued unfairly, you may be able to upgrade your discharge and become eligible for compensation.

The discharge review process is fairly straightforward, although it helps to have a qualified veterans advocate assist you in presenting your case. Any veteran may at any time apply to have his or her discharge reviewed. You'll have to go through either the Discharge Review Board (DRB) or the Board of Correction of Military Records (BCMR) for your branch of the armed services. There are several considerations to weigh when choosing between the DRB and the BCMR:

- If your discharge is less than fifteen years old and is a general discharge other than honorable discharge, uncharacterized discharge, or bad conduct discharge from a special court-martial, go with the DRB and use a DD Form 293.
- If your discharge is more than fifteen years old OR is a bad conduct or dishonorable discharge from a general court-martial, apply to the BCMR with a DD Form 149.

Once you've chosen the forum to which you'll apply, you'll need to request a copy of your military records using an SF 180 Form. It's usually best not to file your claim until you've received the copy of your records. After filing, the review process may take anywhere from six to twelve months, and occasionally longer. If your discharge upgrade is successful, you'll then need to begin the VA claims process to start receiving the veterans' benefits that you've earned.



## **What Factors Will Make a Discharge Review More Likely to Result in Veterans Benefits Eligibility?**

You and your lawyer will want to discuss the specific strategy you'll use to make the best possible discharge review case. Unfortunately, the burden is on the veteran to prove that the facts presented by military records don't tell the whole story. Introducing and developing evidence to counter or give more detail to the facts found in your records will be crucial to building a successful argument and winning your veterans benefits.

However, the review boards do tend to reconsider the discharge decision under current standards. If your discharge was based on factors that would today make such a discharge illegal, such as homosexuality, alcoholism, personality disorders without a psychiatric diagnosis, "unsuitability," or even bed-wetting, it may be fairly easy to get your discharge upgraded.

In cases where the discharge basis was not so blatantly illegal, you and your lawyer will need to develop a defense that proves your good character. Evidence of your education and work achievements, community service history, letters of recommendation, or any documents that support your good character will go a long way in proving to the review board that you deserve to have your discharge upgraded.

## Chapter 20

### Attorney Representation and Fee

Since the Civil War, the federal policy has been to discourage the veteran from using legal representation in claims made against the VA. This policy was accomplished by making it a federal crime for an attorney to charge a veteran more than \$10 to represent them before the VA. Obviously, this financial limitation prevented qualified lawyers from practicing in the field of veterans disability. Over time Congress began to lift some of these restrictions until finally Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006.

Under this act, an attorney may charge a reasonable fee for representation after a Notice of Disagreement has been filed, so long as the NOD was filed on or after June 20, 2007. The VA reviews fees for reasonableness and has stated that any fee of more than 1/3 of past due benefits will be considered unreasonable.

The net effect of this change in the law is that veterans in need of assistance can now hire a qualified attorney on a contingent fee basis. Under a contingent fee agreement, the veteran does not have to pay the lawyer money for their services upfront.

*Current law doesn't allow veterans to hire an attorney to represent them in their claim until after they are denied veterans claims and file a Notice of Disagreement.*

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The attorney will get paid a percentage of the veteran's back due benefit only if the claim is successful. If the claim is unsuccessful, then the veteran owes the attorney nothing for their services. However, the veteran may still be responsible for out of pocket expenses, such as the cost of getting medical records or medical opinions from their doctors. This change in how veterans are able to seek qualified attorneys has dramatically increased the success rate of disability claims.

### **What to Look for in a VA Disability Lawyer**

Not just any lawyer is allowed to represent veterans before the VA. An attorney must be "Accredited" by the Department of Veterans affairs before they are allowed to represent a Veteran on a VA disability claim. To get this accreditation, the attorney must complete specific legal education courses regarding the VA claims process and apply and be admitted to practice before the VA. An attorney that has met this criteria is allowed to hold themselves out as an "Accredited Veterans' Claims Attorney."

A good VA disability lawyer can be an incredibly useful ally when trying to obtain veterans' benefits. Even though the VA is required by law to provide you with free help on your claim, their definition of "help" can often be lacking. Most veterans say they don't really understand what is going on with their claims and where they are in the process at any given time.

An experienced VA disability lawyer can make sure that you understand the veterans' claims process and receive correct and complete information on your rights and responsibilities, and he or she can advocate on your behalf to push your claim forward.

### **What Do Good VA Disability Lawyers Need to Know?**

It may seem obvious, but the number one thing a veterans' representative should know is VA law. This means having Title 38 of the US Code close by, which contains VA law and regulations, as well as knowing the Claims Adjudication Manual (M21-1).

*A veterans' representative  
should know VA law.*

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Actually having this documentation is incredibly important. It is fairly common for the VA to assert something as “law” that is not, and the only way to know for sure is to compare what the VA has done to the Code as written. And for older cases, representatives should have access to VA regulations that applied at that time. No one wants to be denied veterans benefits because their lawyer was following the wrong code.<sup>7</sup>

Good VA representatives should also at least understand basic medical concepts and terminology. Vets should ask potential reps if they have medical sourcebooks and dictionaries like *The Merck Manual of Medical Information*, *Dorland’s Medical Dictionary*, *The Physician’s Desk Reference*, and *DSM-5* (for mental disorders).

### **Secure Your VA Disability Benefits through an Accredited Veterans Claim Attorney, Agent or Representative**

Most veterans don’t even think about talking to a VA disability attorney at first. After all the VA is there to help them, right? In fact, there are even laws and rules in place that say the VA is required to help you with your claim. Why would you pay someone when they do it for you free of charge?

But there’s a reason that veterans’ attorneys exist, and after struggling with the frustrations of an overwhelmed VA claims process, many veterans understand this all too well. The VA faces immense challenges. It is hard pressed to improve its services to veterans, specifically to speed up the process of decisions and appeals, end the backlog of claims, and perfect the accuracy and consistency of decisions.

After dealing with the VA for a while, veterans realize that despite the VA’s responsibility to assist veterans with their claims, there are many ways that the VA can get around or even blatantly ignore its responsibilities.

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The right representative can be especially helpful when it comes to obtaining doctor's statements that are detailed enough for the VA to decide in your favor. A qualified advocate will be able to evaluate all medical evidence to ensure it meets the level of detail required by the VA.

The rules and restrictions that affect VA claims are notoriously difficult to interpret and understand. If you're even slightly unsure of the process for proving the many requirements touched upon in this guide, a veterans' advocate or lawyer can clarify everything that you need to know, and take the burden off of your shoulders.

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## About the Author



Marc Stanley Whitehead is the founding partner of Marc Whitehead & Associates, Attorneys at Law, LLP which was established in 1992 in Houston, Texas. Born in Memphis, Tennessee, Marc was raised in Normangee, Texas. He graduated in 1985 from Normangee High School as class valedictorian.

Marc attended Texas A&M University where he graduated in 1989 with a Bachelor of Business Administration in Finance. Marc attended the University Of Houston Law Center and received his law degree (J.D.) in 1992, graduating in the top

quarter of his class. He was admitted to the State Bar of Texas in 1992. Marc is admitted to practice before all U.S. Federal District Courts in Texas, the U.S. Court of Appeals-Fifth Circuit and the U.S. Court of Appeals for Veterans Claims.

Marc's areas of practice include veterans' disability compensation, personal injury and wrongful death, Social Security disability, long-term disability insurance denials, employee benefit denials, ERISA litigation and insurance claims, and pharmaceutical and medical device litigation.

He is also a former adjunct professor of Law at the University Of Houston Law Center teaching Civil Trial Advocacy. He has also been an instructor for the National Institute of Trial Advocacy teaching Civil Trial Advocacy and an instructor for the National Business Institute teaching Social Security Disability Law.

Marc is an accredited Veterans Claim Attorney by the Department of Veterans Affairs. Marc is double board certified in both Personal Injury Trial Law by the Texas Board of Legal Specialization and in Social Security Disability Law by the National Board of Trial Advocates.

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## **Professional Activities & Associations**

American Association for Justice-Leader Forum Member

AAJ Risperdal Litigation Group Member

AAJ Xarelto Litigation Group Member

AAJ Transvaginal Mesh Litigation Group Member

AAJ Toxic, Environmental, and Pharmaceutical Torts Section

Houston Trial Lawyers Association

President (2009-10)

President Elect (2008-2009)

Secretary/Treasurer (2007-08)

Vice-President (1999-2007)

Texas Trial Lawyers Association

Board Member (1997-Present)

Board of Advocates (1999-2001)

HBA Social Security Section Chairman (2004-2005)

Memberships and Honors

Association of Civil Trial and Appellate Specialists

National Organization of Social Security Claims Representatives

College of the State Bar of Texas

Houston Bar Association

National Organization of Veterans Advocates

AV Rated by Martindale Hubble

10.0 AVVO Rating

Rated by Super Lawyers

Top 100 Trial Lawyers in Texas by National Trial Lawyers Association

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## Books and Publications

### *Published Books:*

- *The Complete Guide to Winning Disability Benefits*
- *The Disabled Doctor's Guide: Fight Your Disability Insurance Denial and Win the Benefits You Have Paid For!*
- *The Social Security Disability Puzzle: How to Fit the Pieces Together and Win Your Claim;*
- *Disability Insurance Policies: How to Unravel the Mystery and Prove Your Claim*
- *Veterans Disability Claims: Strategies for a Winning Campaign*
- *Car & Truck Crashes: 10 Secrets Victims Should Know to Protect Their Rights*
- *Transvaginal Mesh Lawsuits: What You Need to Know If You Have Suffered Harm from Vaginal Mesh Implants*
- *The Fall of Testosterone: How a Vaunted "Low T" Therapy Has Backfired and Put Millions of Men at Risk for Heart Problems and Stroke*
- *The Xarelto Disaster: How Johnson & Johnson Failed to Warn Consumers of Deadly Internal Bleeding Risks*
- *The Zofran Tragedy: Marketing Anti-Nausea Drug "Off-Label" to Pregnant Women Linked to Birth Defects*
- *Risperdal: The Shocking Truth – Marketing Fraud Adds Up to Billion\$... While Boys & Young Men are Irreparably Harmed*
- *Viagra: The Unvarnished Truth – The Link between the Deadly Skin Cancer Melanoma and Viagra*

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- *The Life Insurance Claims Kit: What To Do If Your Life Insurance Benefits Are Denied*

### ***Published Articles***

- *Tort Reform As It Relates to Strict Products Liability*
- *A Lawyer's Guide for Determining Eligibility of Social Security Disability Claimants*
- *Nuts & Bolts of Social Security Disability Law*
- *The Five Step Sequential Evaluation Process Used in Determining Disability For Social Security Claimants*

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