



NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

PRESUMPTIONS THAT HELP VETERANS OBTAIN VA BENEFITS

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TOPICS TO COVER




- What is a Presumption?
- Can a Presumption Be Overcome?
- Presumptions of Soundness and Aggravation
- Combat Presumption
- Presumptions of Service Connection
- Conditions Presumed to Be Secondary Service Connected




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WHAT IS A PRESUMPTION?


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WHAT IS A PRESUMPTION?

- A presumption is something accepted as true because it is believed to be likely, although not verified or proven
- A presumption is an inference of a particular fact from other facts which have been proven or admitted (don't need to "prove" it)
- A presumption is an assumption that is taken for granted
- A higher burden of proof is necessary to rebut an established presumption

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CAN A PRESUMPTION BE OVERCOME?

- Presumptions of SC can be rebutted where there is "affirmative" evidence (more than 50% probability):
 - To the contrary; or
 - That the disability was caused by an intercurrent injury or disease suffered between the date of separation from service and the onset of the disease; or
 - The disability is due to the Vet's own willful misconduct
 - See 38 U.S.C. § 1113
- Lower than "clear and convincing evidence" standard
- Rebuttal must be supported by competent evidence and adequate reasoning by VA adjudicator

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CAN A PRESUMPTION BE OVERCOME?



- Presumptions of soundness and aggravation are harder to overcome once triggered
- Can be overcome with certain “clear and unmistakable” evidence

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ADVOCACY “TAKE-AWAYS”



- Develop an awareness of presumptions and how to use them
- Presumption generally = GOOD for veterans, if applied correctly
- Establishes something favorable as being true


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PRESUMPTIONS OF SOUNDNESS AND AGGRAVATION


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PRESUMPTION OF SOUNDNESS


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PRESUMPTION OF SOUNDNESS

- Every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that injury or disease existed before acceptance and enrollment and was not aggravated by such service
- 38 U.S.C. § 1111
- Helps Vets prove that disabilities identified during service were incurred in service


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ENTRANCE EXAM

- Presumption of soundness only applies when Vet was actually examined at entrance
- “Plainly, the statute requires that there be an examination prior to entry into the period of service on which the claim is based In the absence of such an examination, there is no basis from which to determine whether the claimant was in sound condition upon entry into that period of service on which the claim was based.”
- *Smith v. Shinseki*, 24 Vet. App. 40 (2010)


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ENTRANCE EXAM

- The presumption of soundness **DOES APPLY** if there was an entrance exam, but it was lost or destroyed
 - “[T]he presumption applies even when the record of a veteran’s entrance examination has been lost or destroyed while in VA custody.”
 - *Quirin v. Shinseki*, 22 Vet. App. 390 (2009)
- Vet will need to present lay or other supporting evidence that claimed disability was not noted on entrance exam


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CONDITION “NOTED” ON ENTRANCE EXAM

- A condition must actually be shown on exam or observed (if the condition is asymptomatic) for the condition to be considered “noted”
 - Presumption of soundness did not apply to Vet’s claim for SC for bunions that were asymptomatic at the time of induction, but were “noted” in the induction medical exam report and an accompanying orthopedic exam report
 - *Verdon v. Brown*, 8 Vet. App. 529, 535 (1996)

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CONDITIONS NOT “NOTED” ON ENTRANCE EXAM

- Notation that Vet has a “history of” a condition does **NOT** qualify as being “noted”
 - But, Vet’s report may be considered in determining whether the presumption of soundness has been rebutted
 - 38 C.F.R. § 3.304(b)(1); see *Crowe v. Brown*, 7 Vet. App. 238 (1994); *Horn v. Shinseki*, 25 Vet. App. 231 (2012)
- Hearing loss found during entrance exam that does not meet VA’s definition of a hearing loss “disability” under the VA rating schedule is **NOT “noted”**
 - *McKinney v. McDonald*, 28 Vet. App. 15 (2016)

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IS PRE-SERVICE "INJURY" A CURRENT DISABILITY?



- Notation of a pre-service injury is not necessarily notation of the current disability/disease for which SC is being sought
- Vet fractured ankle prior to service. Ankle "fracture," but not "arthritis," was noted on entrance exam. Ankle arthritis was diagnosed in service.
- **Presumption of soundness applies to "arthritis," because it was not noted in entrance exam report**
- *Lichtenfels v. Derwinski*, 1 Vet. App. 484 (1991)

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REBUTTING THE PRESUMPTION OF SOUNDNESS



- VA can find that a condition pre-existed service, even if the presumption of soundness applies
- **BUT**, it is VA's burden and difficult to rebut
- VA must establish 2 things, both by clear and unmistakable evidence:
 - The condition actually pre-existed service; and
 - The condition was not permanently aggravated by service

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REBUTTING THE PRESUMPTION OF SOUNDNESS



- Clear and unmistakable evidence that a disability pre-existed service may include:
 - Medical or educational records
 - Credible lay statements of others if the condition was observable
 - Clear admissions of the veteran
 - Well-reasoned, well-supported, post-service medical opinion that it is "clear" or "undebatable" or "unmistakable" that a condition pre-existed service
 - Universally recognized medical principles establish disability pre-existed service
- 38 C.F.R. § 3.303(c)

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NOT CLEAR OR UNMISTAKABLE EVIDENCE



- Evidence that does NOT constitute clear and unmistakable evidence of pre-existence:
 - A check in a box on an MEB/PEB report indicating that a condition existed prior to service, w/out supporting discussion
 - *Horn v. Shinseki*, 25 Vet. App. 231 (2012)
 - An equivocal, unreasoned, or conclusory medical opinion stating that condition pre-existed service

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REBUTTING THE PRESUMPTION OF SOUNDNESS



- Clear and unmistakable evidence must also show that the disability was not aggravated by service because:
 - There was no increase in disability during service, or
 - Any increase in disability was due to the natural progression of the condition
- VA almost always needs a medical opinion indicating that the condition “clearly and unmistakably” was not aggravated by service
- Lack of evidence of an increase in severity in STRs is not “clear and unmistakable” evidence of no aggravation

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PRESUMPTION OF AGGRAVATION



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PRESUMPTION OF AGGRAVATION



- A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease

- 38 U.S.C. § 1153

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WHEN DOES PRESUMPTION OF AGGRAVATION APPLY?



- Applies when:

- Condition is “noted” on entrance **OR** there wasn’t an entrance exam and condition more likely than not pre-existed service

AND

- There is evidence of an in-service increase in disability

- Does NOT apply if presumption of soundness applies

- Even if clear and unmistakable evidence shows a condition not noted on entrance exam actually pre-existed service

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AGGRAVATION = PERMANENT WORSENING



- Evidence of temporary flare-ups of symptoms is not sufficient to trigger the presumption of aggravation

- Must be an actual/permanent increase in the severity of the underlying disability

- Whether there was an actual increase or just a flare-up is usually a medical determination

- *Hunt v. Derwinski*, 1 Vet.App. 292, 297 (1991)

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REBUTTING PRESUMPTION OF AGGRAVATION



- Once the presumption of aggravation attaches, the law steps in to presume that the disability was aggravated by service, **UNLESS VA shows by clear and unmistakable evidence** that the in-service increase was due to the **natural progression of the disease**
- 38 C.F.R. § 3.306(b)
- Burden shifts to VA to rebut the presumption with an explicit medical finding.
- *Sondel v. West*, 13 Vet. App. 213 (1999)

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RATING DIFFERENCE BASED ON APPLICABLE PRESUMPTION



- If presumption of soundness applies and claim granted: Vet rated based on the whole disability
- If presumption of aggravation applies and claim granted: Vet rated based on the degree of disability over the degree existing at time of entrance
- 38 C.F.R. § 4.22

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WHEN DISABILITY RATING NOT DISCOUNTED



- Exceptions to rule that Vet rated based on the degree of disability over the degree existing at time of entrance when presumption of aggravation applies:
 - If Vet totally disabled by aggravated condition, no deduction
 - If the degree of disability at entrance can't be determined, Vet entitled to rating based on the disability as a whole
- If evidence doesn't clearly show extent of disability at entrance, argue that condition should be considered 0% disabling at entrance, because Vet was accepted for service


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COMBAT
"PRESUMPTION"

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SPECIAL RULE FOR COMBAT VETERANS


- If a combat Vet states that he or she suffered a disease, injury, or stressor event “while engaged in combat with the enemy,” VA must generally accept that statement as fact
 - 38 U.S.C. § 1154(b); 38 C.F.R. § 3.304(d), (f)
- Must be consistent with circumstances, conditions, or hardships of such service
- Rebuttable by clear & convincing evidence to the contrary
- Rationale: Records or specifics may not be available because of the chaotic nature of combat

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SPECIAL RULE FOR COMBAT VETERANS


- Makes it easier for Vet to establish in-service incident element of SC claim
 - Vet must still establish current disability element, and usually nexus
- May be enough to establish nexus if “chronic” condition incurred in combat, and Vet seeking SC for same, currently diagnosed chronic condition
 - *Reeves v. Shinseki*, 682 F.3d 988 (Fed. Cir. 2012); 38 C.F.R. §§ 3.303(b), 3.309(a)

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WHAT QUALIFIES AS COMBAT?




- Vet personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality
 - Includes attacking or defending an attack of the enemy
- Presence in a combat zone generally NOT sufficient
- Proximity to nearby action by an enemy force, even where personal harm was a possibility also insufficient
- But, VA cannot conclude Vet did not engage in combat simply because Vet did not have a MOS, award, or decoration indicating combat

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PRESUMPTIONS OF SERVICE CONNECTION

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PRESUMPTIVE SERVICE CONNECTION



- Congress has directed that certain conditions are to be presumed SC, unless affirmative evidence proves particular Vet's condition unrelated to service
- Permits VA to assume that a disease was incurred while Vet was in service, even if no evidence directly links the condition to service
- Medical opinion (nexus) linking current disability to Vet's service not needed
 - Law presumes a medical linkage exists

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PRESUMPTIVE SERVICE CONNECTION



- To qualify for most presumptions of SC, Vet must have served at least 90 continuous days of active service
- 38 C.F.R. § 3.307(a)
- Exceptions:
 - Diseases specific to former POWs
 - Diseases associated with exposure to Agent Orange
 - Diseases associated with exposure to contaminated water at Camp Lejeune

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BURN PITS & OTHER TOXINS



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BACKGROUND



- The PACT Act created new presumptions associated with exposure to burn pits and other toxins:
 - **Presumption of toxic exposure**
 - 38 U.S.C. § 1119
 - **Presumption of service connection for “covered veterans”**
 - 38 U.S.C. § 1120
- VA treating all presumptions as going into effect on 8/10/2022, but DIC claims granted due to a new presumption may qualify for effective date based on date previously denied claim filed
- See VBA Letter 20-22-10

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38 U.S.C. § 1119

- VA must presume that a “covered veteran” had in-service exposure to substances, chemicals, and airborne hazards identified in list to be established and maintained by VA, in collaboration with SECDEF
- List may include end dates for presumptions of exposure, but cannot be earlier than last day of Persian Gulf War in 38 U.S.C. § 101(33)
- Rebuttable with affirmative evidence of no exposure

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“COVERED VETERANS”
38 U.S.C. § 1119(c)(1)(A), (B)

- Vets who, on or after 8/2/1990, performed active service while assigned to a duty station in, including airspace above:
 - Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Somalia, U.A.E.
- Vets who, on or after 9/11/2001, performed active service while assigned to a duty station in, including airspace above:
 - Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan

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EXPANDED VA DEFINITION
OF “COVERED VETERAN”

- To conform with its definition of “Southwest Asia theater of operation,” VA also considers an individual a “covered Veteran” if Vet, on or after 8/2/1990, performed active service in or above:
 - Neutral zone between Iraq and Saudi Arabia
 - Gulf of Aden
 - Gulf of Oman
 - Persian Gulf
 - Arabian Sea
 - Red Sea
- VBA Letter 20-22-10, § 4.3

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38 U.S.C. § 1120

- Presumption of SC for certain diseases associated with exposure to burn pits and other toxins
- Rebuttable presumption of SC for 23 diseases/types of disease for “covered veterans”

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PRESUMPTIVE DISEASES
38 U.S.C. § 1120(b)


- Asthma diagnosed after service
- Head cancer (any type)
- Neck cancer (any type)
- Respiratory cancer (any type)
- Gastrointestinal cancer (any type)
- Reproductive cancer (any type)
- Lymphoma cancer (any type)
- Kidney cancer
- Brain cancer
- Melanoma
- Pancreatic cancer
- Chronic bronchitis
- COPD
- Constrictive bronchiolitis or obliterative bronchiolitis
- Emphysema
- Granulomatous disease
- Interstitial lung disease
- Pleuritis
- Pulmonary fibrosis
- Sarcoidosis
- Chronic sinusitis
- Chronic rhinitis
- Glioblastoma

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PRESUMPTIVE DISEASES
38 U.S.C. § 1120(b)

- No requirement that disease manifest during a certain period after service or to a certain disabling degree
- List can be expanded to include any other disease the VA Secretary determines has a positive association with a substance, chemical, or airborne hazard in the list to be created by § 1119(b)(2)


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VA GUIDANCE ON ASTHMA

- VA will implement the PACT Act presumption for asthma *without* the language qualifying that it be diagnosed after covered service, but
 - If Vet diagnosed with asthma prior to or during service, VA must consider entitlement to SC under other theories of SC, such as direct or aggravation
 - Presumption will only apply if asthma is diagnosed after service
 - VBA Letter 20-22-10, § 4.4


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OTHER VA GUIDANCE

- Only chronic diseases qualify for presumption
 - Acute and transitory conditions do not qualify
- Skin cancers, other than melanoma, only qualify for presumptive SC if the location is the head or neck
- Only primary cancers may be considered as a presumptive disease
 - Metastatic or secondary cancers do not qualify
- VBA Letter 20-22-10, Attachment A, includes numerous diagnoses that fall w/in categories of types of cancers and other diseases listed in Act


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AGENT ORANGE

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AGENT ORANGE PRESUMPTIONS



- Vets who can establish in-service exposure to herbicides containing 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram, are generally entitled to presumptive SC for diseases listed in 38 C.F.R. § 3.309(e)
 - For ease of reference: "Agent Orange"
- Exposure can be established
 - By presumption, or
 - With evidence of actual exposure

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PRESUMPTIVE EXPOSURE



- VA presumes AO exposure for Vets who served:
 - In the Republic of Vietnam during the period beginning 1/9/1962 and ending 5/7/1975
 - In the 12nm area offshore of the Republic of Vietnam any time from 1/9/1962 through 5/7/1975 (38 U.S.C. § 1116A)
 - Along the Korean DMZ any time from 9/1/1967 through 8/31/1971 (38 U.S.C. § 1116B)
 - Regularly and repeatedly operated, maintained, or served onboard C-123 aircraft that, during the Vietnam era, sprayed AO (38 C.F.R. § 3.307(a)(6)(v))

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PRESUMPTIVE EXPOSURE



- Under the PACT Act, effective 8/10/2022, VA presumes exposure for Vets who served:
 - In Thailand at any U.S. or Royal Thai Base during the period beginning 1/9/1962 and ending 6/30/1976, without regard to where on the base the Vet was located or what military job specialty the Vet performed
 - Includes Vets on a ship that called on a Thai coastal base
 - Does not include service in territorial waters of Thailand

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PRESUMPTIVE
EXPOSURE

- **Laos** during the period beginning **12/1/1965** and ending **9/30/1969**
- **Cambodia at Mimot or Krek, Kampong Cham Province** (now in Tboung Khmum province) during the period beginning **4/16/1969** and ending **4/30/1969**

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PRESUMPTIVE
EXPOSURE

- **Guam or American Samoa, or in their territorial waters**, during the period beginning on **1/9/1962** and ending **7/31/1980**
- **Johnston Atoll or on a ship that called at Johnston Atoll** during the period beginning **1/1/1972** and ending **9/30/1977**
- Does not apply to service in offshore territorial waters of Johnston Island

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PRESUMPTIVE
EXPOSURE

- Vets only need to prove they were in a covered location momentarily during covered period to establish AO exposure
- Brief service in covered area difficult to prove
- Vet's testimony or written statement can be enough to establish boots on the ground
 - Statement competent evidence (usually)
 - No corroboration requirement!
 - Statement must be found credible by VA
- Even though Vet's statement alone can be enough to prove Vietnam service, Vet will have a better chance at success with corroborating evidence

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AO EXPOSURE: ALONG KOREAN DMZ



- DoD has identified several units that operated in or near the DMZ in South Korea, in an area where AO is known to have been sprayed.
- **MANUAL M21-1, VIII.i.1.A.3.c (change date Jan. 21, 2022)**
- **Vets who served in an identified unit between 9/1/1967, and 8/31/1971, presumed exposed to AO**
- 38 C.F.R. § 3.307(a)(6)(iv)

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AO EXPOSURE: ALONG KOREAN DMZ



- **Units presumed exposed to AO:**
- **Combat Brigade of the 2nd Infantry Division (ID) or 3rd Brigade of the 7th ID (may have been attached to either ID):**
 - **1st Battalion**—72nd Armor, 73rd Armor, 12th Artillery, 15th Artillery, 9th Infantry, 17th Infantry, 23rd Infantry, 31st Infantry, 32nd Infantry, 38th Infantry
 - **2nd Battalion**—72nd Armor, 9th Infantry, 17th Infantry, 23rd Infantry, 31st Infantry, 32nd Infantry, 38th Infantry
 - **2nd Squadron**—10th Cavalry
 - **3rd Battalion**—23rd Infantry, 32nd Infantry
 - **5th Battalion**—38th Artillery
 - **6th Battalion**—37th Artillery
 - **7th Battalion**—17th Artillery

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AO EXPOSURE: ALONG KOREAN DMZ



- **Units presumed exposed to AO:**
- **Combat Brigade of the 2nd Infantry Division (ID) or 3rd Brigade of the 7th ID (may have been attached to either ID) (cont.):**
 - 54th CBRE Detachment
 - 6th Aviation Platoon
 - deactivated 4/15/69 and incorporated into the 239th Aviation Co.
 - 239th Aviation Company
 - Service in the DMZ for members of the 6th Aviation Platoon or 239th Aviation Company limited to helicopter crewmen, which generally consisted of pilots, crew chief, and door gunners

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AO EXPOSURE: ALONG KOREAN DMZ



- Units presumed exposed to AO:
 - 2nd Engineer Battalion, 2nd ID
 - 2nd Military Police Company, 2nd ID
 - 25th Chemical Company, 2nd ID
 - 13th Engineer Combat Battalion
 - Division Reaction Force: 4th Squadron, 7th Cavalry
 - UN Command Security Battalion—Joint Security Area
 - Crew of the USS Pueblo

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AO EXPOSURE: C-123 AIRCRAFT



- Since 6/19/2015, VA presumes that a person who served in the Air Force or Air Force Reserve and **“regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era”** was exposed to AO

- 38 C.F.R. § 3.307(a)(6)(v)

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AO EXPOSURE: C-123 AIRCRAFT




- Person must have:
 1. Been assigned to an Air Force or Air Force Reserve squadron when the squadron was permanently assigned one of the affected aircraft, AND
 2. Had an Air Force Specialty Code (AFSC) indicating duties as a flight, ground maintenance, or medical crew member on one of these aircraft
- Rules apply to claims pending on or after 6/19/2015

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AO EXPOSURE: C-123 AIRCRAFT



- Qualifying Reserve Units
 - Pittsburgh International Airport, Pennsylvania, USAF Reserve Station (1972-1982)**
 - 758th Airlift Squadron
 - 911th Aeromedical Evacuation Squadron (was 33rd AES pre-1994)
 - 911th Aircraft Maintenance Squadron
 - Westover AFB (Westover Air Reserve Base) and Hanscom Field AFB, Massachusetts (1972-1982)**
 - 731st Tactical Airlift Squadron
 - 74th Aeromedical Evacuation Squadron
 - 901st Organizational Maintenance Squadron
 - Lockbourne/Rickenbacker AFB, Ohio (USAF Reserves, Rickenbacker Air National Guard Base) (1969-1986)**
 - 355th Tactical Airlift Squadron
 - 356th Tactical Airlift Squadron
 - 4413th Combat Crew Tactical Wing [Ferry Flights]

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AO EXPOSURE: C-123 AIRCRAFT



- Qualifying Active Duty Units (U.S.)
 - Hurlburt Auxiliary Field, Eglin AFB, Florida (1970-1973)**
 - 1st Special Operations Wing
 - 4410th Combat Crew Tactical Wing [Ferry Flights]
 - Langley AFB, Virginia (1970-1973)**
 - 4500th Air Base Wing [Aerial Spray Flights]
 - Luke AFB, Arizona (1970-1973)**
 - 56th Air Base Wing

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AO EXPOSURE: C-123 AIRCRAFT




- Qualifying Active Duty Units (Overseas)
 - Tainan Air Field, Taiwan (1969-1970)**
 - 309th Special Operations Squadron
 - 310th Special Operations Squadron
 - Howard AFB, Panama (1970-1973)**
 - 24th Special Operations Wing
 - Osan Air Base, South Korea (1970-1973)**
 - 51st Air Base Wing
 - Clark AFB, Philippines (1969-1970)**
 - 405th Fighter Wing

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AO EXPOSURE: C-123 AIRCRAFT



- Qualifying Air Force Specialty Codes
 - Officer AFSCs
 - Pilot/Copilot, Transport and Tactical Airlift: 1043-1055
 - Flight Nurse: 9761-9766
 - Enlisted AFSCs
 - Flight Engineer/Aircraft Loadmaster: 1130-1149
 - Aircrew Life Support Specialist: 1220-1229
 - Aircraft Maintenance Specialist/Flight Technicians: 4313-4359
- BUT, VA will accept any relevant evidence showing required regular and repeated contact, because many code numbers changed during the relevant time period

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DISEASES VA PRESUMES ARE CAUSED BY AGENT ORANGE



<ul style="list-style-type: none"> Bladder Cancer Hypothyroidism Chloracne Soft-tissue sarcomas Non-Hodgkin's lymphoma Porphyria cutanea tarda Hodgkin's disease Respiratory cancers (lung, larynx, bronchus, trachea) Multiple myeloma Prostate cancer Type 2 diabetes Chronic B-cell leukemias, including CLL and HCL 	<ul style="list-style-type: none"> AL amyloidosis Ischemic heart disease Parkinson's disease Parkinsonism Early-onset peripheral neuropathy Spina bifida in children of exposed Vets Certain birth defects in children of exposed female Vets HYPERTENSION MONOCLONAL GAMMOPATHY OF UNDETERMINED SIGNIFICANCE (MGUS)
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38 U.S.C. § 1116(a)(2); 38 C.F.R. § 3.309(e)
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MANIFESTATION REQUIREMENTS



- VA presumes that most diseases were caused by AO exposure if disease manifests to a degree of at least 10% disabling w/in the applicable presumptive period (if any)
- Diseases NOT subject to the 10% disabling requirement (presumption will apply, even if disease non-compensable):
 - Type 2 diabetes
 - Parkinsonism
 - Bladder cancer
 - Hypothyroidism
 - MGUS
 - Hypertension

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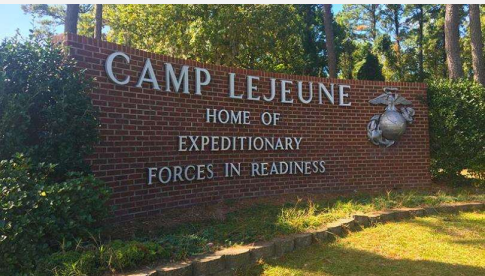
MANIFESTATION REQUIREMENTS

- Most presumptive conditions have no requirement that the disease appear w/in a certain time period
- But, the following diseases must manifest to a degree of 10% disabling w/in 1 year of the last day Vet was exposed to AO:
 - Early-onset Peripheral Neuropathy
 - Chloracne
 - Porphyria Cutanea Tarda
- For children of Vets to qualify for benefits for spina bifida and certain birth defects, the child must have been conceived after Vet was exposed to AO in RVN, along Korean DMZ, or Thailand (only spina bifida)

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CAMP LEJEUNE CONTAMINATED WATER



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BACKGROUND

- Contaminants were present in the base water supply at Camp Lejeune from 8/1/1953 to 12/31/1987 (as estimated by the Agency for Toxic Substances and Diseases Registry), including:
 - Trichloroethylene (TCE)
 - Perchloroethylene (PCE)
 - Benzene
 - Vinyl Chloride
- Caused by on-base industrial activities and an off-base dry cleaning facility

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CLCW PRESUMPTIONS



- VA established two presumptions associated with CLCW, effective 3/14/2017:
 - **Presumption of exposure to contaminated water**
 - 38 C.F.R. § 3.307(a)(7)
 - **Presumption of SC for certain diseases as due to exposure to CLCW**
 - 38 C.F.R. § 3.309(f)
- Diseases Associated With Exposure to Contaminants in the Water Supply at Camp Lejeune, 82 Fed. Reg. 4173 (Jan. 13, 2017)

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PRESUMPTION OF EXPOSURE



- To qualify for presumption of exposure to CLCW, individual must have served **no less than 30 days** (consecutive or non-consecutive) at Camp Lejeune during the period **8/1/1953 – 12/31/1987**
- “Service at Camp Lejeune” is any service w/in borders of:
 - **U.S. Marine Corps Base Camp Lejeune, or**
 - **U.S. Marine Corps Air Station New River**
- **Must be established by military orders or other official documents**

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<https://www.publichealth.va.gov/exposures/camp-lejeune/>

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SERVICE AT BOGUE FIELD



- Marine Corps Auxiliary Landing Field Bogue (Bogue Field) is an 875-acre sub-facility of MCAS Cherry Point, but less than 10 miles NE of Camp Lejeune
- Due to lack of potable water at Bogue Field, large water tanks known as “water buffaloes” or “water bulls” were driven in from Camp Lejeune
- Many Vets who were stationed at Cherry Point, but spent time at Bogue Field, drank contaminated water from Camp Lejeune

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SERVICE AT BOGUE FIELD



- Vets have had CLCW claims granted based on service at Bogue Field, despite never setting foot in Camp Lejeune
- Stetson University College of Law Veterans Law Institute has compiled and posted:
 - Buddy statements documenting that water from Camp Lejeune was brought to Bogue Field
 - Excerpts of briefs with arguments to support CLCW claims based on service at Bogue Field
- www.stetson.edu/law/veterans/bogue-field.php

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WHAT TYPE OF SERVICE QUALIFIES?



- Individuals who were on active duty
- Former Reservists and former National Guard members
 - Qualify as a “veteran”
- Exposure to contaminants considered an “injury” for individuals serving on ACDUTRA or INACTDUTRA
- If person develops one of the covered diseases, VA will presume disability began during that service for purposes of establishing that the Vet had “active” service

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DISEASES SUBJECT TO CAMP LEJEUNE PRESUMPTIVE SC



- If Vet presumed to have been exposed to CLCW, VA will presume that the **following conditions** are SC, if they manifest to a disabling degree of 10%:

1. Kidney Cancer
2. Liver Cancer
3. Non-Hodgkin's Lymphoma
4. Adult Leukemia (all types of leukemia with onset in adulthood)
5. Multiple Myeloma
6. Parkinson's Disease
7. Aplastic anemia and other myelodysplastic syndromes
8. Bladder Cancer

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RADIATION



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RADIOGENIC DISEASES IN RADIATION-EXPOSED VETERANS



- Certain types of cancer are presumptively service-connected for "radiation-exposed veterans"
 - 38 U.S.C. § 1112(c); 38 C.F.R. § 3.309(d)
- "Radiation-exposed veteran":
 - A vet who while serving on active duty, or an individual who while a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a "radiation-risk activity"
- The listed qualifying radiation-risk activities are limited

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RADIATION RISK ACTIVITIES

- Onsite participation in a test involving the atmospheric detonation of a nuclear device
 - Includes underwater detonations
 - Tests listed in 38 C.F.R. § 3.309(d)(3)(v)
- The occupation of Hiroshima or Nagasaki, Japan, by U.S. forces during the period 8/6/1945 – 7/1/1946
- Internment as a POW in Japan (or active-duty service in Japan immediately following internment) during WWII which resulted in an opportunity for exposure to ionizing radiation comparable to that of the U.S. occupation forces in Hiroshima or Nagasaki during the period 8/6/1945 – 7/1/1946


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RADIATION RISK ACTIVITIES

- At least 250 days of service before 2/1/1992 on the grounds of gaseous diffusion plant in Paducah, KY; Portsmouth, OH; or Area K25 at Oak Ridge, TN, if Vet:
 - Was monitored for radiation exposure for each of the 250 days with a dosimetry badge; or
 - Served for each of the 250 days in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges
- Service before 1/1/1974 on Amchitka Island, AK, if Vet was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests


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RADIATION RISK ACTIVITIES


- Service in a capacity which, if performed as an employee of the Dep't of Energy, would qualify the person for inclusion as a member of the Special Exposure Cohort under § 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000
- Cleanup of **Enewetak Atoll** during the period beginning 1/1/1977 and ending 12/31/1980

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RADIATION RISK ACTIVITIES


8. Onsite participation in the response effort following the collision of a U.S. Air Force B-52 bomber and refueling plane that caused the release of 4 thermonuclear weapons near **Palomares, Spain**, during the period **1/17/1966 – 3/31/1967**



9. Onsite participation in the response effort following the on-board fire and crash of a U.S. Air Force B-52 bomber that caused the release of 4 thermonuclear weapons near **Thule Air Force Base, Greenland**, during the period **1/21/1968 – 9/25/1968**



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DISEASES PRESUMED SC IN RADIATION-EXPOSED VETS

- Leukemia (other than chronic lymphocytic leukemia)
- **Thyroid cancer**
- Breast cancer
- **Pharynx cancer**
- Esophageal cancer
- Stomach cancer
- Small intestine cancer
- **Pancreatic cancer**
- Multiple myeloma
- Lymphomas (except Hodgkin's disease)
- Bile duct cancer

- **Gall bladder cancer**
- Primary liver cancer (except if cirrhosis or hepatitis B is indicated)
- **Salivary gland cancer**
- Urinary tract cancer (kidney, renal pelvis, ureter, urinary bladder, and urethra)
- **Bronchiolo-alveolar carcinoma**
- Bone cancer
- **Brain cancer**
- Colon cancer
- Lung cancer
- Ovarian cancer

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GULF WAR ILLNESS


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BACKGROUND

- During Operations Desert Shield and Desert Storm, members of the Armed Forces were exposed to numerous potentially toxic substances, including fumes and smoke from military operations, oil well fires, diesel exhaust, paints, pesticides, depleted uranium, infectious agents, investigational drugs and vaccines, and indigenous diseases, and were also given multiple immunizations
- They also may have been exposed to biological weapons and chemical weapons, including nerve gas

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BACKGROUND

- After returning from the Persian Gulf Theater of Operations, many Vets exhibited symptoms of illness that could not be diagnosed or suffered from illnesses that could not be clearly defined
- Although there is no presumption of “exposure,” Congress and VA have created presumptions of SC for **qualifying chronic disabilities**, often referred to as Gulf War Illness, for **“Persian Gulf veterans”**
- 38 U.S.C. § 1117; 38 C.F.R. § 3.317

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“PERSIAN GULF VETERAN”

- Active service in “Southwest Asia theater of operations” during the Persian Gulf War
 - Iraq
 - Saudi Arabia
 - Kuwait
 - Bahrain
 - Qatar
 - U.A.E.
 - Oman
 - Gulf of Aden
 - Gulf of Oman
 - Persian Gulf
 - Arabian Sea
 - Red Sea
 - Airspace above these areas
- 38 C.F.R. § 3.317(e)(2)

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"PERSIAN GULF VETERAN"



- Effective 8/10/2022, active duty service in the following countries during the Persian Gulf War also qualifies an individual as a "Persian Gulf veteran"

- Afghanistan
- Israel
- Egypt
- Turkey
- Syria
- Jordan

- 38 U.S.C. § 1117(f); Honoring our PACT Act of 2022, Pub. L. 117-168, § 405 (2022)

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"PERSIAN GULF VETERAN"




- Served "during the Persian Gulf War"

- Start date: 8/2/1990
- End date: Not yet set by Congress
- OIF, OEF Vets included!

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QUALIFYING CHRONIC DISABILITIES



1) Undiagnosed illnesses

- A condition that "by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis"
- 38 C.F.R. § 3.317(a)
- Vet does not need to be subjected to all possible medical testing available and then 'diagnosed' with an 'undiagnosed illness' after all possible medical conditions have been ruled out
- Joyner v. McDonald, 766 F.3d 1393 (Fed. Cir. 2014)

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QUALIFYING CHRONIC DISABILITIES



1) Undiagnosed illnesses (cont'd):

- Examples of signs/symptoms that may be manifestations of an undiagnosed illness:
 - Fatigue
 - Headache
 - Muscle pain
 - Skin abnormalities
 - Joint pain
 - Neurologic abnormalities
 - Neuro-psychological symptoms
 - Respiratory system symptoms
 - Sleep disturbances
 - Gastrointestinal symptoms
 - Cardiovascular symptoms
 - Abnormal weight loss
 - Menstrual disorders

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QUALIFYING CHRONIC DISABILITIES



2) Medically unexplained chronic multi-symptom illnesses (MUCMI)

a) Chronic fatigue syndrome

b) Fibromyalgia


c) Functional gastrointestinal disorders, such as:

- Irritable bowel syndrome
- Functional bloating
- Functional dyspepsia
- Functional abdominal pain syndrome
- Functional vomiting
- Functional dysphagia
- Functional constipation

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QUALIFYING CHRONIC DISABILITIES



2) MUCMIs (cont'd)


d) Any other diagnosed disease with:

- No conclusive pathophysiology OR no conclusive etiology
- Overlapping symptoms and signs
- Features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of lab findings

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QUALIFYING CHRONIC DISABILITIES



2) MUCMIs (cont'd)

- The determination of whether an illness is “medically unexplained” is always an individual determination particular to the Vet in each case, rather than a broad determination regarding a condition in general that should be applied to all Vets with that condition.
- Stewart v. Wilkie*, 30 Vet. App. 383 (2018)

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NOT QUALIFYING CHRONIC DISABILITIES




- NOT qualifying chronic disabilities:
 - Structural GI diseases, such as:
 - GERD
 - Crohn’s disease
 - Other inflammatory bowel diseases
 - Illnesses with both partially understood etiology and pathophysiology, such as:
 - Diabetes
 - Multiple sclerosis

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“CHRONIC”



- To qualify for the presumption of SC, the qualifying disability must be “chronic”
 - Lasts for at least 6 months, or
 - Shows intermittent periods of improvement and worsening over at least 6 months

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"OBJECTIVE INDICATIONS"



- Vet must exhibit "objective indications" of the qualifying chronic disability:
 - Signs in the medical sense of objective evidence perceptible to an examining physician, and
 - Other, non-medical indicators capable of independent verification
 - Lay statements about Vet's symptom(s) from vet and at least one other person can support claim if an ordinary person can observe those symptoms
- 38 C.F.R. § 3.317(a)(3)

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WHEN THE SIGNS OR SYMPTOMS MUST APPEAR



- Undiagnosed illness or MUCMI will qualify for presumptive SC if it manifests to any degree at any time!
- Prior to 8/10/2022, if undiagnosed illness or MUCMI first manifested after Vet left the SW Asia Theater of Operations, Vet had to show that it was at least 10% disabling to qualify for presumption of SC
- PACT Act eliminated 10% manifestation requirement and end date for presumptive period for undiagnosed illnesses and MUCMIs

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INFECTIOUS DISEASES



- Although not "qualifying chronic disabilities," VA presumes SC for the following infectious diseases for certain Vets:
 1. Brucellosis
 2. Campylobacter jejuni
 3. Coxiella burnetii (Q fever)
 4. Malaria
 5. Mycobacterium tuberculosis
 6. Nontyphoid Salmonella
 7. Shigella
 8. Visceral leishmaniasis
 9. West Nile virus
- 38 C.F.R. § 3.317(c)

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INFECTIOUS DISEASES – PRESUMPTIVE LOCATIONS



- Vet must have had active service in “Southwest Asia theater of operations” during the Persian Gulf War (8/2/1990 to present):

- Iraq
- Saudi Arabia
- Kuwait
- Bahrain
- Qatar
- U.A.E.
- Oman
- Gulf of Aden
- Gulf of Oman
- Persian Gulf
- Arabian Sea
- Red Sea
- Airspace above these areas

• 38 C.F.R. § 3.317(e)(2)

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INFECTIOUS DISEASES – PRESUMPTIVE LOCATIONS



- Vet will also qualify with active service in Afghanistan on or after 9/19/2001

• 38 C.F.R. § 3.317(c)(3)(ii)



- VA does NOT plan to extend presumption for infectious diseases to Israel, Egypt, Turkey, Syria, and Jordan

- Locations added to definition of “Persian Gulf Veteran” under PACT Act

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INFECTIOUS DISEASE MANIFESTATION PERIODS




- To qualify for presumption, infectious disease must become at least 10% disabling w/in the following periods:

- **Most infectious diseases:** one year from date of separation from period of service in SW Asia
- **Visceral leishmaniasis and TB:** no time limit
- **Malaria:**
 - 1 year of separation from period of service in SW Asia, or
 - at a time when standard or accepted treatises indicate that the incubation period commenced during service in SW Asia

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CHRONIC DISEASES


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PRESUMPTIVE SC FOR CHRONIC DISEASES

- VA will presume that a “chronic” disease is service connected if:
 1. Chronic disease is first diagnosed and manifested to a compensable degree w/in post-service presumptive period
 2. Disease first noted and manifested to compensable degree within post-service presumptive period, and symptoms continue until diagnosis of chronic condition
- 38 C.F.R. §§ 3.303(b), 3.307(a)(3), 3.309(a)

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WHAT IS A “CHRONIC” DISEASE?

If a condition is listed in 38 C.F.R. § 3.309(a),
it IS considered a chronic disease by VA

If a condition is NOT listed in 38 C.F.R. § 3.309(a),
it IS NOT considered a “chronic” disease by VA

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WHAT DISEASES ARE "CHRONIC"?



• More common chronic conditions:

- Anemia, primary
- Arteriosclerosis
- Arthritis
- Cardiovascular-renal disease, including hypertension
- Diabetes mellitus
- Epilepsies
- Hodgkin's disease
- Leukemia
- Multiple sclerosis
- Malignant tumors or tumors of the brain, spinal cord, or peripheral nerves
- Paralysis agitans (Parkinson's disease)
- Peptic ulcers
- Psychoses
- Other organic disease of the nervous system
- Sarcoidosis
- Tuberculosis, active

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WHAT DISEASES ARE "CHRONIC"?



• Less common chronic conditions:

- Atrophy, progressive muscular
- Brain hemorrhage
- Brain thrombosis
- Bronchiectasis
- Calculi of the kidney, bladder, or gallbladder
- Cirrhosis of the liver
- Coccidioidomycosis
- Encephalitis lethargica residuals
- Endocarditis (all forms of valvular heart disease)
- Endocrinopathies
- Hansen's disease
- Lupus erythematosus, systemic
- Myasthenia gravis
- Myelitis
- Myocarditis
- Nephritis
- Osteitis deformans (Paget's disease)
- Osteomalacia
- Palsy, bulbar
- Purpura idiopathic, hemorrhagic
- Raynaud's disease
- Scleroderma
- Sclerosis, amyotrophic lateral.
- Syringomyelia
- Thromboangiitis obliterans (Buerger's disease)

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WHAT DISEASES ARE "CHRONIC"?



■ "Organic Diseases of the Nervous System" include, but are not limited to:

- Carpal tunnel syndrome
- Migraine headaches
- Sensorineural hearing loss
- Tinnitus
- Glaucoma
- Progressive spinal muscular atrophy
- Diseases of the cranial nervous system
- Cranial nerve conditions
- Peripheral nerve conditions, such as peripheral neuropathy

• Manual M21-1, V.iii.12.A.1.d (change date Feb. 2, 2018)

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PRESUMPTIVE PERIODS FOR CHRONIC CONDITIONS



- To qualify for presumptive SC, chronic disease must manifest to a compensable degree within the following time after separation from service
 - Multiple sclerosis = 7 years
 - Hansen's disease (leprosy) and tuberculosis = 3 years
 - All other chronic conditions = 1 year
- 38 C.F.R. § 3.307(a)(3)

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ADVOCACY TIP



- **REMEMBER:** Because disease must satisfy the criteria for a compensable rating within the presumptive period, try to present evidence showing that Vet had symptoms / impairment listed in the relevant diagnostic code to qualify for at least a 10% rating
- To do so, advocates should:
 1. Go to a reputable medical website (ex. mayoclinic.org) and look up symptoms of the disability in question
 2. Look at VA Rating Schedule and determine what is needed to obtain a compensable rating

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TROPICAL DISEASES



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TROPICAL DISEASES

- VA will presume that certain diseases were caused by “tropical service”
 - 38 C.F.R. §§ 3.307(a)(4); 3.309(b)
- VA does not define “tropical service,” but 38 C.F.R. § 3.307(d)(1) states:
 - [T]he fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

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TROPICAL DISEASES

- The following are presumed to be caused by tropical service:

• Amebiasis	• Onchocerciasis
• Blackwater fever	• Oroya fever
• Cholera	• Pinta
• Dracontiasis	• Plague
• Dysentery	• Schistosomiasis
• Filariasis	• Yaws
• Leishmaniasis	• Yellow fever
• Loiasis	• Disorders/diseases caused by treatment for such diseases or treatment of such disease
• Malaria	
- 38 C.F.R. § 3.309(b)


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TROPICAL DISEASES


- To qualify for presumptive SC, the disease must manifest to a degree of 10% or more:
 - Within 1 year of separation from service, or
 - At a time when standard accepted treatises indicate that the incubation period of the disease commenced during service
- 38 C.F.R. § 3.307(a)(4)

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POW DISEASES


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FORMER POWS

- VA presumes that certain diseases that manifest in former prisoners of war (POWs) are SC, if they manifest to a degree 10% disabling at any time after service
- Former POW is a person who, during active service, was “forcibly detained or interned in line of duty” by
 - an enemy government or its agents, or a hostile force, during a period of war, or
 - by a foreign government or its agents, or a hostile force, under comparable circumstances
- 38 U.S.C. § 101(32)

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PRESUMPTIVE CONDITIONS FOR FORMER POWS

- Diseases presumed SC for any, regardless of time in captivity:
 - Psychosis
 - Any anxiety state, including PTSD
 - Dysthymic disorder or depressive neurosis
 - Organic residuals of frostbite (if consistent with location of detainment/internment)
 - Posttraumatic osteoarthritis
 - Atherosclerotic heart disease or hypertensive vascular disease and their complications (including myocardial infarction, congestive heart failure, arrhythmia)
 - Stroke and its complications
 - Osteoporosis, if Vet has PTSD

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PRESUMPTIVE CONDITIONS FOR FORMER POWS



• Diseases presumed SC if Vet held captive at least 30 days:

- Avitaminosis
- Beriberi (including beriberi heart disease)
- Chronic dysentery
- Helminthiasis
- Malnutrition (including optic atrophy associated with malnutrition)
- Pellagra
- Any other nutritional deficiency
- Cirrhosis of the liver
- Peripheral neuropathy except where directly related to infectious causes
- Irritable bowel syndrome
- Peptic ulcer disease

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AMYOTROPHIC LATERAL SCLEROSIS



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ALS




- ALS is also called Lou Gehrig's disease
- It is a fatal, progressive, neurodegenerative disease in which a person's brain loses connection with the muscles
- It causes muscle weakness, muscle atrophy, and spontaneous muscle activity
- Those with ALS lose their ability to walk, talk, eat, and eventually breathe

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ALS



- ALS is a rare disease, but studies have shown that Vets are at a greater risk of developing ALS than civilians. The reason for higher risk is unknown.
- VA established ALS as a presumptive disease based on a Nov. 2006 NAS report finding an association between active service and ALS
- 38 C.F.R. § 3.318

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ALS



- VA presumes ALS is SC if Vet is diagnosed **ANY TIME** after discharge or release from active service
 - 38 C.F.R. § 3.318
- Vet must have at least 90 days of continuous “active service” to qualify
 - National Guard / Reserve service generally does not meet the requirements of “active” service for the presumption
 - Active duty for training of 90 days does not qualify, unless the individual was disabled as a result of a disease or an injury incurred or aggravated in the line of duty during that ADT
 - Bowers v. Shinseki*, 748 F.3d. 1351 (Fed. Cir. 2014)


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NOTES ABOUT ALS CLAIMS




- VA prioritizes processing of claims for Vets w/ ALS
- Minimum rating for ALS = 100%
 - 38 C.F.R. § 4.124a, DC 8017
- SMC often warranted
- Entitled to VA automobile allowance and adaptive equipment
- Entitled to Specially Adapted Housing (SAH) grant

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PRESUMPTIONS OF SECONDARY SERVICE CONNECTION


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PRESUMPTIONS OF SECONDARY SC

- If a Vet is SC for certain conditions, VA will presume that certain other conditions are SC as secondary to the primary SC condition
- Primary SC injuries/disabilities that may trigger secondary presumptions are:
 - **Traumatic brain injury (TBI)**
 - **Lower extremity amputation**

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CONDITIONS SECONDARY TO SC TBI

- If Vet has service-connected TBI, VA will presume SC for the following conditions:
 - **Parkinsonism**, including Parkinson's disease
 - following moderate or severe TBI
 - **Unprovoked seizures**
 - following moderate or severe TBI
 - **Dementia**
 - if it manifests w/in 15 years of moderate or severe TBI

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CONDITIONS SECONDARY TO SCTBI



- **Depression**
 - if it manifests w/in
 - 3 years of moderate or severe TBI, or
 - 12 months of mild TBI
- **Diseases of hormone deficiency that result from hypothalamo-pituitary changes**
 - if they manifest w/in 12 months of moderate or severe TBI
- **Presumptions are rebuttable if there is "clear evidence to the contrary"**
 - See 38 C.F.R. § 3.310(d)(1)

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CONDITIONS SECONDARY TO SCTBI



- **Presumptions are rebuttable if there is "clear evidence to the contrary"**
 - See 38 C.F.R. § 3.310(d)(1)
- **Presumptions are based on severity of TBI at time of injury or shortly thereafter**
 - Considerations include whether structural imaging is normal or abnormal; amount of time of loss of consciousness, alteration of consciousness/mental state, and post-traumatic amnesia; and the Glasgow Coma Scale
 - 38 C.F.R. § 3.310(d)(3)

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CONDITIONS SECONDARY TO SC LOWER EXTREMITY AMPUTATION



- **If Vet is SC for:**
 - Amputation of one lower extremity at or above the knee, **OR**
 - Amputations of both lower extremities at or above the ankles
- **VA will presume that ischemic heart disease or other cardiovascular disease that develop in the Vet are secondary to the amputation(s)**
 - 38 C.F.R. § 3.310(c)

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NVLSP VA BENEFIT IDENTIFIER APP

- Questionnaire/App: Helps Vets and advocates figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- 3 WAYS to Access:
 - [NVLSP Website](#)

NVLSP TRAINING OPPORTUNITIES

- NVLSP offers private in-person and webinar training tailored to the needs of your organization
- If you are interested in finding out more information, please contact our Director of Training and Publications, Rick Spataro, at richard@nvlsp.org

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