AGENT ORANGE CLAIMS

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Requirements for Compensation Based on Agent Orange Exposure

Veterans qualify for presumptive service connection of diseases related to Agent Orange exposure if they meet two or three requirements:

- Service in Vietnam during the Vietnam era (or other proof of Agent Orange exposure)
- Agent Orange-related disease
- Some diseases must appear within a certain time after Vietnam service / exposure to Agent Orange
Vietnam Service

Active military, naval or air service in the Republic of Vietnam at some point between January 9, 1962 and May 7, 1975, including:

- Duty in or visitation to the country (feet on the ground).
- Service on the inland waterways of Vietnam, including:
  - all ships designated: LST, LCVP, PCF, and PBR
  - “Blue Water” ships that conducted operations the inland waterways of Vietnam.
- Service on a ship tied to a pier in Vietnam
- Service on a ship present in Da Nang Harbor (probably)
Not “Vietnam Service”

The VA will NOT presume that a veteran was exposed to Agent Orange based on the following types of service:

- Flying over Vietnam without landing (high altitude flights)
- Service in the waters offshore Vietnam (Blue Water Vietnam Service)
Exposure to Agent Orange Outside of Vietnam

Veterans without “Vietnam service” are entitled to presumptive service connection for Agent Orange-related disabilities if they can prove Agent Orange exposure.

- Service along the Korean DMZ, April 1968 to July 1969 (presumed exposure)
- If a veteran served along the fenced perimeters of airbases in Thailand during the Vietnam War, C&P Service will determine the likelihood of exposure.
- In other places the DoD has admitted to spraying, testing, or storing Agent Orange, the veteran must prove actual exposure.
Exposure to Agent Orange Outside of Vietnam

According to the VA C&P Service, no evidence supports claims based on:

• Loading Agent Orange on ships for delivery to Vietnam.

• Serving on a ship that transported, stored, used or tested Agent Orange.

• Working on shipboard aircraft or equipment that was used in Vietnam.
Diseases Linked to Agent Orange by VA

- **Cancers:** Cancer of the bronchus, larynx, lung, prostate, and trachea; Hodgkin’s disease; multiple myeloma; non-Hodgkin’s lymphoma; chronic lymphocytic leukemia, and numerous soft tissue sarcomas.

- **Other diseases:** Type 2 diabetes (diabetes mellitus), peripheral neuropathy, chloracne, porphyria cutanea tarda, and AL Amyloidosis.

- **Diseases in children of veterans:** Certain birth defects (children of female veterans) and spinal bifida.
Diseases Linked to Agent Orange by VA

- VA recently announced that ischemic heart disease, Parkinson’s disease, and B cell leukemias would be added to the list (more on this later)

- VA will grant service connection for cancers not linked to Agent Orange if the cancer is caused by a cancer associated with Agent Orange.

- VA will NOT grant service connection if the cancer was caused by another cancer not associated with Agent Orange.
Time Limits

- Some diseases must first appear within a certain time after the veteran left Vietnam and be 10% disabling within that period:
  - Chloracne and porphyria cutanea tarda: 1 year
  - Peripheral neuropathy: Appearance within months and cure within 2 years after the symptoms first appear
  - Children with spinal bifida and birth defects must have been conceived after the veteran first set foot in Vietnam.
- Until 2002, the VA required that respiratory cancers appear within 30 years after the veteran left Vietnam.
Special Rules for Non-Hodgkin’s Lymphoma

In addition to the under which VA presumes service connection for NHL based on Agent Orange Exposure, another regulation (38 C.F.R. § 3.313) allows VA to presume service connection for NHL (or its residuals) based merely on service in Vietnam. Veterans qualify for the presumption if they served in the waters offshore of Vietnam (Blue Water Vietnam Veterans), even if they did not set foot in the country.
Compensation for Conditions Caused by Diseases Related to Agent Orange

- A condition caused by a disease linked to a veteran’s Agent Orange exposure may be service connected under the theory of secondary service connection.

- Advocates should review all of a veteran’s conditions to determine if any could be secondary to a disease already linked to Agent Orange exposure.

- Type II diabetes often causes other medical problems, including arteriosclerosis, cataracts, eye problems, kidney diseases, nerve damage, blood sugar conditions, heart and circulation problems, skin conditions, and depression.
Veterans With Diseases Not Recognized as Being Related to Agent Orange

- VA may grant service connection for a disease not on its list of Agent Orange-related conditions with:
  - A current medical diagnosis of the disease, and
  - A medical expert’s opinion that the disease was caused by the veteran’s exposure to Agent Orange.

- VA may also grant the claim based on disability compensation rules unrelated to Agent Orange.
Veterans With Diseases Not Recognized as Being Related to Agent Orange

- The Institute of Medicine of the National Academies ("IOM") is trying to determine if other diseases can be linked to Agent Orange exposure. The IOM issues an update / report every two years.

- VA determines which diseases to add to its list of diseases associated with Agent Orange exposure based on the IOM’s reports.

- Veterans diagnosed with a disease that might be linked to Agent Orange in the future should file a claim with VA now. If the disease is later linked to Agent Orange, the veteran may qualify for retroactive benefits based on the original application.
Special Effective Date Rules for Agent Orange Claims - History


- In response, the VA issued a regulation, 38 C.F.R. § 3.311a(d), effective September 25, 1985, which provided for presumptive service connection for Vietnam veterans with chloracne. The regulation maintained that there was no medical evidence of a relationship between Agent Orange exposure and any other disease.
Special Effective Date Rules for Agent Orange Claims - History

- In 1987, Vietnam veterans and their survivors filed a class action lawsuit against the VA called *Nehmer v. U.S. Veterans Administration*, challenging 38 C.F.R. § 3.311a(d) because the rigid standard used in determining whether diseases were related to Agent Orange violated the 1984 Act.

- The Court invalidated 38 C.F.R. § 3.311a(d), and voided decisions made under the regulation.

- Thereafter, Congress enacted the Agent Orange Act of 1991, under which presumptive service connection was to be afforded to Vietnam veterans with diseases specified in the Act and diseases later linked to Agent Orange. Congress directed the VA to use the recommendations of the NAS to determine which diseases to link to Agent Orange.
Special Effective Date Rules for Agent Orange Claims - History

After the Agent Orange Act of 1991 was passed, the parties to the *Nehmer* suit signed a Final Stipulation and Order, which mandated:

1. If VA issued new regulations providing presumptive service connection for diseases other than chloracne, VA must readjudicate previously denied claims related to those diseases if the denial was voided by the Court.

2. The effective date for readjudicated claims would be the date of claim of the voided decision.

3. For awards based on Agent Orange claims filed after May 3, 1989, the effective date would be the latter of the date the claim was filed or the date death or disability occurred.
Special Effective Date Rules for Agent Orange Claims - History

- NVLSP filed a motion with the court in 1998 complaining that VA was refusing to readjudicate claims unless 1) the denied claim specifically alleged that Agent Orange or herbicides contributed to death or disability, or 2) that 38 C.F.R. § 3.311a had been cited by the agency as the basis for denial.

- The court rejected VA’s readjudication practices, explaining that all decisions involving a disease later linked to Agent Orange exposure in revised Agent Orange regulations were voided, regardless of whether or not the veteran specifically alleged that Agent Orange or herbicides caused the disease.

- In December 2001, Congress enacted the Veterans Education and Benefits Expansion Act, which extended to 2015 the expiration date for the period in which VA may issue regulations providing presumptive service connection for diseases suffered by veterans exposed to Agent Orange.
The special effective date rules stemming from the *Nehmer* litigation were codified in 2003 at 38 C.F.R. § 3.816.

On October 16, 2003, VA published a regulation adding Chronic Lymphocytic Leukemia (“CLL”) to the list of presumptive diseases. VA determined that the effective date to be assigned for CLL claims could be no earlier than October 16, 2003.

In 2004, NVLSP challenged the VA’s refusal to abide by the requirement in the Final Stipulation and Order to pay retroactive benefits based on diseases added to the list after the original end date of the Agent Orange Act of 1991 Act (September 30, 2002), but before the expiration date of the extension of the Agent Orange Act (September 30, 2015).
Special Effective Date Rules for Agent Orange Claims - History

- The Court held that the terms of the Final Stipulation and Order continue in effect until the 2015 expiration of the Act. As such, the VA could not refuse to pay retroactive benefits on CLL claims if the veteran or survivor was otherwise eligible under the favorable *Nehmer* effective date rules.

- The Court noted that the Final Stipulation and Order mandated retroactive payment for all diseases that may be service-connected “in the future.”
Special Effective Date Rules for Agent Orange Claims - Overview

• The special effective date rules discussed here apply to claims by eligible Vietnam veterans that involve a disease on the list of Agent Orange presumptive conditions, or that will be added in the future (including ischemic heart disease, Parkinson’s disease, and B cell leukemias).
Claims Finally Denied On or After September 25, 1985

- The effective date for veteran’s disability compensation claims will generally be the date the VA received the claim that was later denied.

  - The denied claim must have included a request for compensation for a disease now on the presumptive list as related to Agent Orange OR

  - A rating decision denying compensation must have referenced one of those diseases.

  - If the VA received a disability claim that was later denied within one year of discharge, then the effective date will be the day following the date of discharge.
Claims Finally Denied On or After September 25, 1985

- The effective date for DIC will be the date VA received the claim that led to the denial or, if the claim was filed within one year of the veteran’s death, the first day of the month the death occurred.

- The rules apply to survivors of Vietnam veterans who died of an Agent Orange-related disease, and were denied DIC or received any decision on a claim for death pension (denial or grant) on or after September 25, 1985.

- If a claimant dies after the date of the VA regulation adding the disease to the presumptive list, but before receiving retroactive benefits required by these rules, unpaid retroactive benefits are paid to the claimant’s survivors or estate in the following order:

  1. Surviving spouse
  2. Surviving children
  3. Surviving parents
  4. Estate of the Claimant
Hypo 1

A Vietnam veteran dies of lung cancer on April 1, 1982. The veteran’s widow files a claim for DIC on June 1, 1983. The widow’s claim is denied by the RO in 1984. The widow files a timely appeal to the BVA. The BVA denies the widow’s claim in October 1985. The widow files a second DIC claim in 1994, which the VA grants in 1995. The correct effective date for the award of DIC is:

June 1, 1983
A Vietnam veteran is diagnosed with Hodgkin’s disease on November 1, 1985. The veteran files a disability claim for the cancer on January 1, 1986. The claim is denied by the RO in 1986. The veteran files a second disability claim for Hodgkin’s disease in 1994, which the VA grants. The correct effective date for the award of disability compensation is:

January 1, 1986
Claims Received Before Disease Added to VA Regulation, but Ultimately Granted

- If VA received the disability compensation claim within one year of discharge - effective date will be the day after discharge.

- If VA received the disability compensation claim more than one year from discharge - effective date will be the date of claim.

- If VA received the DIC claim within one year of the veteran’s death - effective date will be the first day of the month the veteran died.

- If VA received the DIC claim more than one year from the veteran’s death - effective date will be the date of claim.

- If the claimant dies after the publication date of the regulation adding the subject disease to the presumptive list, unpaid retroactive benefits may be made to the claimant’s surviving family members or estate, in the order listed in the previous section.
Claims Received Before Disease Added to VA Regulation, but Ultimately Granted

Hypo 3

A Vietnam veteran dies of lung cancer on March 12, 1993. The veteran’s widow files a claim for DIC on June 6, 1993. The widow’s claim is denied by the RO in 1994. The widow files a timely appeal to the BVA. The VA added lung cancer to the Agent Orange presumptive list on June 9, 1994. The BVA grants the widow’s claim in October 1995. The correct effective date for the widow’s DIC claim is:

March 1, 1993

Although the date of claim is June 6, 1993, this was within one year of the veteran’s death.
On July 1, 1993, a Vietnam veteran is diagnosed with cancer of the larynx that is disabling to a degree of 10% or more. The veteran files a disability claim for his cancer of the larynx on December 1, 1993. The VA added larynx cancer to the Agent Orange presumptive list on June 9, 1994. The claim is granted by the RO in October 1994. The correct effective date for the veteran’s claim is:

December 1, 1993
Initial Claims Received After Disease Added to VA Regulation

• If a claim was received by VA after the date of the amendment adding the disease to the presumptive list, and the disability (or death) was present on the date of the amendment, the effective date of the claim is the later of:
  • the date of the amendment of the regulation adding the disease to the presumptive list; or
  • one year before the date of the filing of the claim that resulted in a grant of benefits.
A Vietnam veteran dies of lung cancer on May 1, 1993. The VA added lung cancer to its Agent Orange presumptive list on June 9, 1994. The veteran’s widow files for DIC for the first time on January 1, 1995. The widow’s claim is granted by the RO in October 1995. The correct effective date for the widow’s DIC claim is:

June 9, 1994
A Vietnam veteran dies of lung cancer on May 1, 1993. The VA added lung cancer to its Agent Orange presumptive list on June 9, 1994. The veteran’s widow files for DIC for the first time on August 1, 1996. The widow’s claim is granted by the RO in October 1996. The correct effective date for the widow’s DIC claim is:

August 1, 1995
A Vietnam veteran was diagnosed with CLL on January 1, 2003. The VA published final regulations adding CLL to the list of Agent Orange-related diseases on October 16, 2003. The veteran filed a disability claim for his CLL on December 1, 2003. The claim was granted by the RO in 2004. The correct effective date for service connection is:

October 16, 2003
Initial Claims Received After Disease Added to VA Regulation

Hypo 8

A Vietnam veteran was diagnosed with CLL on January 1, 2003. The VA added CLL to the list of Agent Orange-related diseases on October 16, 2003. The veteran filed a disability claim for his CLL on December 1, 2005. The claim is granted by the RO in 2006. The correct effective date for service connection is:

December 1, 2004
A Vietnam veteran was diagnosed with CLL on January 1, 2004. The VA added CLL to the list of Agent Orange-related diseases on October 16, 2003. The veteran filed a disability claim for his CLL on September 1, 2004. The claim is granted by the RO in 2005. The correct effective date for service connection is:

September 1, 2004

(The veteran was not diagnosed with CLL when it was added to the list of Agent Orange-related diseases.)
On July 24, 2009, the Institute of Medicine of the National Academies ("IOM") released a report finding evidence that exposure to Agent Orange is associated with an increased chance of developing ischemic heart disease and Parkinson's disease. The IOM affirmed that hairy cell leukemia and other B cell leukemias are in the same category as chronic lymphocytic leukemia and lymphomas, which were previously linked to Agent Orange.
Diseases Recently Linked to Herbicide Exposure

• On October 13, 2009, the Secretary of Veterans Affairs announced his decision to add the following to the list of diseases presumptively linked to Agent Orange exposure:
  • Ischemic heart disease;
  • Parkinson’s disease; and
  • B cell leukemias, such as hairy cell leukemia.
Diseases Recently Linked to Herbicide Exposure

• VA has not yet issued regulations implementing the decision to add these conditions to its list of Agent Orange-related diseases. VA is required to issue final regulations implementing presumptive service connection for these diseases within 210 days of receiving a report from the IOM. Therefore, the VA was required to issue final regulations by February 19, 2010.
Diseases Recently Linked to Herbicide Exposure

• A VA Fast Letter provides instructions to ROs for handling claims related to these diseases:

  • Until VA issues final regulations adding the diseases to the presumptive list, ROs must hold such claims.

  • If the claim can be granted on a direct basis, the claim will not be stayed and a rating decision will be released.

  • VA will send the claimant a letter explaining that the claim will be stayed, but begin development for records that may be necessary to establish the claim as ready-to-rate. VA will not request medical exams unless Agent Orange exposure has been verified.

  • When final regulations are issued, VA will produce a rating decision and notification letter.
Diseases Recently Linked to Herbicide Exposure

- Veterans or survivors should not delay in filing claims related to the diseases recently linked to Agent Orange.
  
  - Claimants who have not previously filed a claim for disability compensation or DIC related to one of the diseases should do so immediately to preserve the effective date for benefits.
  
  - Claimants who previously filed a claim for service-connected disability or death benefits related to one of the disease should immediately file another claim. This will protect the claimant from the possibility that VA will interpret the previous claim as a pension claim, or as being for a disease other than one of the three new diseases. The claimant should request an effective date based on the original claim.
  
  - NVLSP wants to ensure that the VA properly adjudicates these claims. Therefore, NVLSP requests that veterans who file (or filed) such claims prior to the date of the VA’s final regulations contact us at agentorange@nvlsp.org.
Diseases Recently Linked to Herbicide Exposure

What is ischemic heart disease ("IHD")?

- IHD encompasses many heart conditions.
- It is the foremost cause of death among people in industrialized countries.
- There will likely be tens of thousands of Agent Orange-related claims associated with IHD.
- Therefore, you should know about IHD.
Diseases Recently Linked to Herbicide Exposure

- Medical Definitions of IHD
  - Ischemia refers to a failure of the cardiovascular system to deliver adequate oxygenated blood to body tissue. “Myocardial ischemia” or “cardiac ischemia” is ischemia of the heart muscle, or a failure to deliver an adequate supply of blood or oxygen to the heart. Ischemic heart disease is the health condition characterized by the existence of myocardial or cardiac ischemia.

  - Coronary Artery Disease (“CAD”), also known as coronary heart disease, is a term related to atherosclerosis, which is the thickening and hardening of the walls of arteries near the heart or the clogging of such arteries. CAD is the most common form of IHD.

  - Artery spasms are another form of IHD.
Diseases Recently Linked to Herbicide Exposure

- The Social Security Administration’s Definition of IHD:
  - The result of one or more coronary arteries being narrowed or obstructed or, in rare situations, constricted due to vasospasm, interfering with the normal flow of blood to the heart muscle.
  - It includes CAD by any cause, including atherosclerosis, coronary spasm, coronary artery embolism, dissection, aneurysm, and vaculitis.
  - Symptoms are often caused by CAD, but IHD may also result from noncoronary artery impairment, such as aortic stenosis, hypertrophic cardiomyopathy, pulmonary hypertension, or anemia.
  - Symptoms include: angina pectoris (chest pain), atypical angina (bloating, gas, and abdominal distress), variant angina (chest pain periodically throughout the day, and during periods of rest), and silent ischemia (coronary arteries are blocked or constricted but no symptoms have become manifest).
Diseases Recently Linked to Herbicide Exposure

• The VA Clinician’s Guide states, “ischemic heart disease may be either absolute (e.g., coronary artery disease) or relative (e.g., cardiomyopathy with a greatly enlarged heart).”
Diseases Recently Linked to Herbicide Exposure

Final advice on IHD claims:

If a veteran has any type of heart condition, and you are unsure if it is considered IHD, file the claim to be safe.