

# AGENT ORANGE CLAIMS

# Requirements for Compensation Based on Agent Orange Exposure

(38 U.S.C. § 1116(a), 38 C.F.R §§ 3.307(a), 3.309(e))

Veterans qualify for presumptive service connection of diseases related to Agent Orange exposure if they meet 2 or 3 requirements:

- Service in Vietnam during the Vietnam era (or other proof of Agent Orange exposure)
- They have a disease (or its residuals) that VA recognizes is linked to Agent Orange, and it is at least 10% disabling
- Some non-cancer diseases must appear within a certain time after the veteran left Vietnam or was exposed to Agent Orange.

# Vietnam Service

(38 C.F.R § 3.307(a)(6)(iii))

VA will presume a veteran was exposed to Agent Orange if he or she had active military, naval or air service in the Republic of Vietnam at any point between January 9, 1962 and May 7, 1975.

This includes:

- Setting foot on the landmass of the Republic of Vietnam, even momentarily.

# Vietnam Service

## (38 C.F.R § 3.307(a)(6)(iii))

- Service on the inland waterways of Vietnam (Brown Water Vietnam Service), including:
  - Ships that operated primarily or exclusively on the inland waterways, including all LSTs, LCVPs, PCFs, and PBRs.
  - Ships that operated temporarily on the inland waterways, if the veteran was onboard on the date of such operations.
  - Service on a ship docked to the shore in Vietnam, but only if the veteran provides a statement that he went ashore.
  - VA has a list of ships with brown water Vietnam service that continues to grow. The current list can be found on NVLSP's website at:  
<http://www.nvlsp.org/Information/ArticleLibrary/AgentOrange/shiplist.pdf>.

# Vietnam Service

(38 C.F.R § 3.307(a)(6)(iii))

The VA will NOT presume 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)
- Service aboard a ship that anchored in an open deep-water harbor along the Vietnam coast, such as Da Nang, Vung Tau, or Cam Rahn Bay. (However, in the past, some VA adjudicators conceded AO exposure based on such service).

# Exposure to Agent Orange Outside of Vietnam

Veterans who did not serve in Vietnam are entitled to presumptive service connection for diseases on the VA's list of Agent Orange-related disabilities if they can prove exposure to Agent Orange.

However, the favorable *Nehmer* effective date rules discussed later **ONLY** apply to veterans with "Vietnam service." They do not apply to claims based on exposure to Agent Orange outside of Vietnam.

# Exposure to Agent Orange Outside of Vietnam

Relevant VA policies for exposure in places DoD has conceded using Agent Orange outside of Vietnam:

- VA presumes Agent Orange exposure for veterans who served along the Korean DMZ between 4/1/68 and **8/31/1971**. (Until 1/11, VA only presumed exposure between 4/68 and 7/69).
- VA will concede Agent Orange exposure to veterans who served along the fenced perimeters of military bases in Thailand during the Vietnam War.
- The veteran must demonstrate actual exposure in other places the DoD has admitted to spraying, testing, or storing Agent Orange.

# Exposure to Agent Orange Outside of Vietnam

According to the May 2009 VA C&P Service Bulletin, no DoD or other 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 Associated with Exposure to Agent Orange

(38 C.F.R §§ 3.307(a)(6)(ii))

Medical evidence must show that the veteran has a disease VA has linked to Agent Orange (38 C.F.R. §§ 3.309(e), 3.814).

- Cancers: Cancer of the bronchus, larynx, lung, prostate, and trachea, Hodgkin's disease, multiple myeloma, non-Hodgkin's lymphoma, **chronic B-cell leukemias, including hairy cell leukemia** and chronic lymphocytic leukemia, and numerous soft tissue sarcomas.
- Other diseases: **ischemic heart disease, Parkinson's disease**, type 2 diabetes, acute peripheral neuropathy, chloracne, porphyria cutanea tarda, and AL Amyloidosis.
- Diseases in children of veterans: Certain birth defects (children of female veterans) and spina bifida.

# Diseases Associated with Exposure to Agent Orange

The disease must be 10% disabling for the presumption to apply.

Secondary cancers:

- VA will grant service connection for cancers not associated with Agent Orange if they are caused by a cancer associated with Agent Orange. In other words, if the Agent Orange-related cancer metastasizes. 38 C.F.R. § 3.310.
- VA will NOT grant service connection if the cancer was caused by another cancer not associated with Agent Orange.

# Diseases Associated with Exposure to Agent Orange

On 8/31/10, VA added to its list of diseases associated with Agent Orange exposure ischemic heart disease (IHD), Parkinson's disease, and chronic B-cell leukemias.

## IHD:

Includes, but is not limited to, acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease, including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and Prinzmetal's angina.

(Does NOT include: hypertension, peripheral vascular disease, or stroke.)

# Diseases Associated with Exposure to Agent Orange

Parkinson's disease:

Belongs to a group of conditions called motor system disorders, which are the result of the loss of dopamine-producing brain cells.

The 4 primary symptoms are

1. tremor or trembling in hands, arms, legs, jaw and face;
2. rigidity or stiffness of the limbs and trunk;
3. bradykinesia, or slowness of movement; and
4. postural instability, or impaired balance and coordination.

Diagnosis is based on medical history and a neurological examination.

# Diseases Associated with Exposure to Agent Orange

## Chronic B-cell Leukemias:

(1) Hairy cell leukemia; (2) B-cell chronic lymphocytic leukemia/small lymphocytic lymphoma; (3) Acute lymphoblastic leukemia, mature B-cell type; (4) B-cell prolymphocytic leukemia; (5) Precursor B lymphoblastic leukemia; (6) diffuse large B-cell lymphoma; (7) follicular lymphoma; (8) mucosa-associated lymphatic tissue lymphoma (MALT); (9) small cell lymphocytic lymphoma; (10) mantle cell lymphoma (MCL); (11) Burkitt lymphoma; (12) mediastinal large B-cell lymphoma; (13) Waldenström macroglobulinemia; (14) nodal marginal zone B-cell lymphoma (NMZL); (15) splenic marginal zone lymphoma (SMZL); (16) extranodal marginal zone B-cell lymphoma; (17) intravascular large B-cell lymphoma; (18) primary effusion lymphoma; and (19) lymphomatoid granulomatosis.

# Time Limits

(38 C.F.R §§ 3.307(a)(6)(ii))

VA will only presume service connection for some of the non-cancer diseases if they first appeared within a certain time after the veteran left Vietnam.

- Chloracne and porphyria cutanea tarda: 1 year
- Acute Peripheral neuropathy: Appearance within months and cure within 2 years after the symptoms first appear
- Children with spina bifida and birth defects must have been conceived after the veteran first set foot in Vietnam.

# Time Limits

The disease must be at least 10% disabling within the designated period.

Medical evidence must show when the symptoms first appeared and the level of disability.

# Time Limits

Until 2002, VA did not presume service connection for cancer of the lung, larynx, bronchus or trachea unless they appeared and were at least 10% disabling within 30 years after the veteran left Vietnam.

Veterans denied compensation because of this time limit should re-apply for benefits.

The effective date will not be retroactive to the date of the original claim.

# Special Rules for Non-Hodgkin's Lymphoma (NHL)

In addition to the above rule, under which VA presumes service connection 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 Vietnamese coastal waters, even if they did not set foot in the country.

# The History of the *Nehmer* Litigation

1984: Congress enacts the Veterans' Dioxin and Radiation Exposure Compensation Standards Act.

1985: VA issues a regulation, 38 C.F.R. § 3.311a(d), effective 9/25/85, which provides for presumptive service connection for Vietnam veterans who contracted chloracne (a skin condition). VA says there is no medical evidence that Agent Orange causes any other disease.

# The History of the *Nehmer* Litigation

- 1986: Vietnam veterans and their survivors file a class action lawsuit against VA called *Nehmer v. U.S. Veterans Administration*. They argue the standard VA used to determine whether diseases are related to Agent Orange exposure was too limited, in violation of the 1984 Act.
- 1989: The Court agrees with the veterans, invalidates 38 C.F.R. § 3.311a(d), and voids decisions made under the regulation. *Nehmer v. U.S. Veterans Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989) (*Nehmer I*).

# The History of the *Nehmer* Litigation

1991: Congress enacts the Agent Orange Act of 1991. Vietnam veterans are afforded presumptive service connection for diseases specified in the Act or subsequently linked to Agent Orange exposure. Congress directs VA to link diseases to Agent Orange exposure based on recommendations of the National Academy of Sciences (NAS).

# The History of the *Nehmer* Litigation

1991: The parties to the *Nehmer* lawsuit agree to settle:

- If VA issues new regulations providing presumptive service connection for diseases in addition to chloracne, VA must readjudicate previously denied claims related to those diseases if the denial was voided by *Nehmer I*.
- The effective date for the readjudicated claims will be the date of claim of the voided decision.
- For awards based on Agent Orange exposure filed after May 3, 1989, the effective date will be the date the claim is filed or the date of death or disability occurred, whichever is later.

# The History of the *Nehmer* Litigation

1998: NVLSP, on behalf of the Vietnam veterans and survivors, challenges VA's refusal to abide by the terms of readjudication agreed upon in 1991. NVLSP complains to the Court that VA is 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 History of the *Nehmer* Litigation

1999: The Court rejects VA's readjudication practices, explaining that *Nehmer I* voided all decisions that involved a disease later linked to Agent Orange exposure by VA, regardless of whether the veteran specifically alleged that Agent Orange caused the disease. *Nehmer*, 32 F. Supp. 2d 1175, 1183 (N.D. Cal. 1999) (*Nehmer II*).

2001: Congress extends to 2015 the expiration date for the period VA may issue regulations providing presumptive service connection for Agent Orange-related diseases.

# The History of the *Nehmer* Litigation

- 2003: VA puts the *Nehmer* effective date rules into a regulation (38 C.F.R. § 3.816.)
- 2003: On 10/16/03, VA adds CLL to the list of presumptive Agent Orange diseases. VA determines that the earliest effective date for presumptive service connection for CLL is 10/16/03, even for claims filed prior to that date.
- 2004: NVLSP asks the Court to hold VA in contempt for failing to abide by the terms of the 1991 agreement for diseases added to the presumptive list after the original end date of the Agent Orange Act of 1991 Act (9/30/02), but before the expiration date of the extension of the Agent Orange Act (9/30/15).

# The History of the *Nehmer* Litigation

2005: The Court rules in favor of the Vietnam veterans, holding that the terms of the 1991 agreement continue in effect until the new expiration of the Act – 9/30/15. 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 notes that the Final Stipulation and Order mandated retroactive payment for all diseases that may be service-connected “in the future.”

## *Nehmer* Special Effective Date Rules: Applicability

- The special effective date rules apply to claims by eligible Vietnam veterans (those who served in Vietnam at any time between 1/9/62 and 5/7/75) or their survivors.
- The rules **DO NOT** apply to veterans who were exposed to Agent Orange outside of Vietnam.
- The claim must involve a disease on the list of Agent Orange presumptive conditions.

## *Nehmer* Special Effective Date Rules: Applicability

- The claim must have been pending any time between 9/25/85 and the date VA published the regulation adding the disease to its Agent Orange Presumptive List.
  - The claim counts if it was filed before 9/25/85, as long as it was still pending on that date

## *Nehmer* Special Effective Date Rules: Veteran's Disability Compensation Claims

The effective date will be the date VA received the first claim for the disease that was pending at any point between 9/25/85 and the date VA amended its Agent Orange Presumptive List.

- If the disease was not at least 10% disabling on the date of claim, the effective date will be the date the evidence shows it met the criteria for at least a 10% evaluation.
- If the claim was received by VA within one year of military discharge, then the effective date will be the day following the date of discharge.

# *Nehmer* Special Effective Date Rules: Veteran's Disability Compensation Claims

## Hypo 1

A Vietnam veteran was diagnosed with IHD on 4/1/02. The symptoms satisfied the criteria for a 30% disability rating. He filed a disability claim for IHD on 6/1/02. The RO denied the claim in December 2002 and the veteran did not appeal. IHD was added to the Agent Orange Presumptive List on 8/31/10. VA must readjudicate the case and assign the following effective date for benefits:

June 1, 2002

# *Nehmer* Special Effective Date Rules: Veteran's Disability Compensation Claims

## Hypo 2

A Vietnam veteran was diagnosed with Parkinson's disease on 11/1/84. The symptoms satisfied the criteria for a 10% disability rating. He filed a disability claim for Parkinson's disease on 2/1/85. The RO denied the claim on 10/1/85. Parkinson's disease was added to the Agent Orange Presumptive List on 8/31/10. VA must readjudicate the case and assign as the effective date for benefits:

February 1, 1985

# *Nehmer* Special Effective Date Rules: Veteran's Disability Compensation Claims

## Hypo 3

A Vietnam veteran was diagnosed with hairy cell leukemia (HCL) on 11/1/84. The symptoms satisfied the criteria for a 100% disability rating. He filed a disability claim for HCL on 2/1/85. The RO denied the claim on 9/1/85 and the veteran did not appeal. The veteran filed to reopen his HCL claim 3/1/96. The RO again denied the claim. HCL was added to the Agent Orange Presumptive List on 8/31/10. VA must readjudicate the claim and assign as the effective date for benefits:

March 1, 1996

## *Nehmer* Special Effective Date Rules: DIC Claims

The effective date will be the date VA received the first DIC or death pension claim that was pending at any point between 9/25/85 and the date VA amended its Agent Orange Presumptive List.

If that DIC or death pension claim was filed within one year of the veteran's death, the effective date will be first day of the month of the veteran's death.

# *Nehmer* Special Effective Date Rules: DIC Claims

## Hypo 4

A Vietnam veteran died from IHD on 4/15/83. The veteran's widow filed a claim for DIC on 6/1/83. The widow's claim was denied by the RO in 1984. She filed a timely appeal to the BVA. The BVA denied the appeal on 11/1/85. IHD was added to the Agent Orange Presumptive List on 8/31/10. VA must readjudicate the DIC claim and assign as effective date for DIC benefits:

April 1, 1983

# *Nehmer* Special Effective Date Rules: DIC Claims

## Hypo 5

A Vietnam veteran died from IHD on 5/15/02. The veteran's widow filed a claim for DIC on 7/1/03. The widow's claim was denied by the RO. IHD was added to the Agent Orange Presumptive List on 8/31/10. VA must readjudicate the DIC claim and assign as effective date for DIC benefits:

July 1, 2003

# What Constitutes a *Nehmer* Claim?

Anything that would constitute a claim for disability compensation or DIC under normal VA rules:

- Any communication or action that demonstrates an intent to apply for disability compensation or DIC or a belief in entitlement qualifies as a claim. For example, a written request for service connection for Parkinson's disease.
- “Inferred” claims (claims reasonably raised by the evidence).
- Death pension claims = DIC claims.

# What Constitutes a *Nehmer* Claim?

## Claims under footnote 1 of the 1991 *Nehmer* Final Stipulation and Order – “Footnote 1 Claims”

- If a disability was coded or *should have been* coded in a rating decision pursuant to a provision in the VA Adjudication Procedures Manual in effect at the time of the 1991 Final Stipulation and Order, there is a *Nehmer* claim.
- A disability should have been coded in a rating decision if it was “noted.” If during the development of a claim for service connection for Disability A, VA obtained a diagnosis of Disability B, then Disability B should have been coded in the rating decision for Disability A.

# What Constitutes a *Nehmer* Claim?

- The effective date of a Footnote 1 claim is the later of:
  - a) the date of the claim that gave rise to the rating decision that coded or should have coded the disability now on the Agent Orange Presumptive List, or
  - b) the date of diagnosis.

# What Constitutes a *Nehmer* Claim?

## Hypo 6

On 2/1/88, the Veteran filed a claim for entitlement to service connection for hearing loss. The veteran said he was treated by Dr. Smith, a private practitioner. VA asked Dr. Smith for all medical records related to the veteran's hearing loss. On 5/1/88, VA received from Dr. Smith every medical record he had on the veteran, including one showing that the veteran was diagnosed with HCL on 1/1/88. VA issued a rating decision on 11/1/88 granting service connection for hearing loss. The decision did not address HCL and it was not even listed as "NSC" on the rating decision code sheet. Pursuant to "Footnote 1", the veteran is entitled to service connection for HCL with an effective date of:

February 1, 1988

## What Constitutes a *Nehmer* Claim?

VA has instructed its adjudicators that the following also constitute *Nehmer* claims:

- Claims for non-service disability pension based on a disease now on the Agent Orange Presumptive List.
- Notice of death of a veteran = DIC claim.
- A burial benefits claim, unless the claimant was sent a DIC application and it was not returned to VA.

# Special Rules about Beneficiaries

If a Vietnam veteran claimant or DIC claimant dies after the publication date of the VA regulation adding the subject disease to the presumptive list, but before receiving retroactive benefits required by *Nehmer*, unpaid retroactive benefits are to be paid to the claimant's survivors or estate in the following order:

- Surviving spouse
- Surviving children
- Surviving parents
- Estate of the Claimant

# Special Rules about Beneficiaries

## Hypo 7

A Vietnam veteran married in 1973. He and his wife had a daughter in 1976. In 1998, the veteran filed a claim for entitlement to service connection for IHD. The symptoms satisfied the criteria for a 30% disability rating. The RO denied the claim. The veteran died from IHD in 2001 and his surviving spouse filed for DIC. The RO denied the claim. The widow remarried in 2007, after the age of 57. In 2009, she died. Pursuant to *Nehmer*, who is entitled to benefits?

- a) The Veteran's adult daughter is entitled to his retroactive disability compensation for the period 1998 to 2001.
- b) The Veteran's *widow's* surviving spouse is entitled to her retroactive DIC from 2001 to 2009.

## Current *Nehmer* Adjudications

VA has identified 140,000 Vietnam veterans or survivors of Vietnam veterans who, prior to 8/31/10, filed claims for service connection for IHD, Parkinson's disease, or a chronic B-cell leukemia, or DIC claims based on deaths from these diseases.

VA has issued decisions in approximately 40,000 cases in the three months beginning on 10/31/10.

# Current *Nehmer* Adjudications

VA has approximately 1,000 employees in 13 resource centers devoted to readjudicating IHD, Parkinson's disease, and chronic B-cell leukemia claims by Vietnam veterans or their survivors that were denied prior to 10/13/09.

VA estimates that *Nehmer* readjudications will be nearly complete by 9/30/11.

## Current *Nehmer* Adjudications

NVLSP has identified several common errors in VA's *Nehmer* readjudications.

If you find a case in which one of these errors has been made, please inform NVLSP about the error at [agentorange@nvlsp.org](mailto:agentorange@nvlsp.org).

# Current *Nehmer* Adjudications

1. VA has not identified all claims that must be readjudicated. In particular, it appears VA has missed many of the following types of cases:
  - DIC claims in which the veteran never filed a claim and was not coded for one of the 3 new Agent Orange Presumptive conditions.
  - Cases in which the veteran was previously granted service connection for one of the diseases on a non-presumptive basis (direct or secondary service connection).
  - Cases in which the veteran was “coded” for more than six non-service connected conditions.

## Current *Nehmer* Adjudications

2. Failure to correctly apply “Footnote 1”
  - VA wrongly assigns the date it received medical evidence showing the veteran had one of the 3 new presumptive Agent Orange conditions as the effective date of the claim, instead of the date of the claim that was pending when it received the evidence.
  - VA fails to apply Footnote 1 at all.

## Current *Nehmer* Adjudications

3. Failure to award SMC(s) (100% single + 60% combined) or other SMC awards to which the veteran may be entitled.
4. Failure to develop evidence relevant to the proper evaluation of the condition prior to the date of the most recent C&P or Disability Benefits Questionnaire (DBQ) examination. For example, VA fails to request old medical records or obtain a medical opinion on the previous severity of the condition.

## Current *Nehmer* Adjudications

5. Failure to address Concurrent Retirement and Disability Pay (CRDP) or Combat-Related Special Compensation (CRSC).
  - Veterans must apply directly to the military to obtain CRSC.
  - Agent Orange-related disabilities are considered combat-related.
  - If you see that a military retiree is granted service connection for an Agent Orange-related disability, urge them to apply for CRSC.

## Current *Nehmer* Adjudications

6. If service connection was previously granted for the condition on the theory that it was aggravated by another service-connected condition, and the veteran was only compensated for the degree of disability over and above the degree of disability that existed prior to the aggravation, the VA should now compensate the Veteran for the full severity of the disability.

# Current *Nehmer* Adjudications

## Hypo 8

A Vietnam veteran was diagnosed with IHD on 1/15/02. He was diagnosed with type 2 diabetes on 2/15/03. On 7/1/04, he filed VA claims for service connection for type 2 diabetes and IHD. VA granted presumptive service connection for type 2 diabetes as due to Agent Orange exposure and service connection for IHD because it was aggravated by the diabetes, both effective 7/1/04. Although the IHD would have warranted a 60% on its own, VA awarded a 30% rating for IHD because it found that the condition warranted a 30% rating before he was diagnosed with diabetes. Thus, VA only compensated him for the degree of IHD disability attributable to the diabetes. VA should readjudicate the veteran's claim and grant presumptive service connection for IHD as due to Agent Orange exposure. The VA should:

Increase the evaluation to 60% effective 7/1/04.

## Claims Initially Filed After the Date the VA Amended its Regulations

The *Nehmer* effective date rules do not apply to claimants whose initial disability or DIC claims were received after the amendment to VA regulations adding the subject disease to the presumptive list. However, normal VA effective date rules regarding liberalizing changes in law do apply.

## Claims Initially Filed After the Date the VA Amended its Regulations

If the first claim was received by VA after the date of the amendment adding the subject disease to the presumptive list, and the evidence establishes the presence of the disability (or death) on the effective date of the regulation adding the disease, the effective date is the more recent of:

- the effective date of the amendment of the regulation adding the subject disease to the presumptive list; or
- one year before the date of the filing of the claim that resulted in a grant of benefits.

# Claims Initially Filed After the Date the VA Amended its Regulations

If the first claim was received by VA after the date of the amendment adding the subject disease to the presumptive list, but the veteran did not have the disability on (or death had not occurred as of) the effective date of the regulation adding the subject disease, the effective date is the more recent of:

- the date VA received the claim; or
- the date of diagnosis.

# Claims Initially Filed After the Date the VA Amended its Regulations

## Hypo 9

A Vietnam veteran dies from coronary artery disease on 5/15/10. The veteran's widow files for DIC for the first time on 1/1/11. The correct effective date for the widow's DIC claim is:

8/31/10 (the effective date of the regulation adding IHD).

# Claims Initially Filed After the Date the VA Amended its Regulations

## Hypo 10

A Vietnam veteran died of IHD on 5/15/10. The veteran's widow filed for DIC on 7/1/10. The correct effective date for the widow's DIC claim is:

May 1, 2010

# Claims Initially Filed After the Date the VA Amended its Regulations

## Hypo 11

A Vietnam veteran was diagnosed with IHD on 11/15/10. He filed a disability claim for his IHD on 1/1/11. The correct effective date for service connection is:

January 1, 2011, because the veteran was not diagnosed with IHD on or before the date of the final regulation adding IHD to the list of Agent Orange-related diseases.

# Claims Initially Filed After the Date the VA Amended its Regulations

## Hypo 12

A Vietnam veteran was diagnosed with Parkinson's disease on 7/15/10. He filed a VA disability claim for Parkinson's on 1/1/11. The correct effective date for service connection is:

August 31, 2010

# Claims Initially Filed After the Date the VA Amended its Regulations

## Hypo 13

A Vietnam veteran was diagnosed with HCL on 4/15/09. The veteran files a disability claim for HCL on 12/1/11. The correct effective date for service connection is:

December 1, 2010

# Questions?