

VETERANS LAW

Award Effective Dates



“To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors”



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Topics

- General rules for initial claims
- Secondary service connection issues
- Claims under 38 C.F.R. § 3.156(c)
- Increased rating claims
- *Nehmer* claims
- Blue Water Navy Claims
- PACT Act claims



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What is an Effective Date?

- **The effective date is the date from which VA benefits are paid**



General Rule for Service Connection Claims

- Unless specifically provided otherwise, the effective date of an award based on a claim for service connection shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore

- 38 U.S.C. § 5110



General Rule for Service Connection Claims

- This means that the effective date of an award of SC disability compensation based on an initial claim is the LATER of:
 - The date of receipt of the original claim, or
 - The date the entitlement arose
 - **38 C.F.R. § 3.400**



General Rule for Service Connection Claims

- Date of Claim: The date VA receives the claim, physically or electronically, not the date the Vet signed or sent the claim
- Check the date stamp / electronic proof of receipt!





General Rule for Service Connection Claims

- Exception: Intent to File (ITF). Allows claimant to protect the effective date by filing a complete initial or supplemental claim within one year of the ITF
 - Applies to first claim for type of benefit identified on ITF that is filed after the ITF
 - But ITF can apply to multiple complete claims filed on the same day
 - Manual M21-1, II.iii.2.A.1.h (change date June 14, 2023)
- 38 C.F.R. § 3.155



General Rule for Service Connection Claims

- Exception: Claims received within one year of separation from service are treated as if received the day following separation
 - 38 U.S.C. § 5110(b)(1); 38 C.F.R. § 3.400(b)(2)
 - The Supreme Court addressed whether § 5110(b)(1) is subject to equitable tolling, such that VA could treat an application filed more than one year after separation as being filed within one year of separation, thus permitting a Vet to potentially recover decades' worth of retroactive benefits.



Arellano v. McDonough, 143 S.Ct. 543 (2023)

- Supreme Court found that -
 - Congress could have designed a scheme that allowed adjudicators to maximize fairness in every case, but it did not make that choice
 - Creating an equitable extension of § 5110(b)(1)'s one-year grace period would disrupt that choice
- In sum, 38 U.S.C. § 5110(b)(1) was not subject to equitable tolling



General Rules for Service Connection Claims

- **Date Entitlement Arose:** The initial date the Vet satisfied the substantive criteria for SC. Two considerations:
 1. The date the disability first manifested
 - First symptoms that can later be linked to the current disability



General Rules for Service Connection Claims

2. The date entitlement to benefits was authorized by law and regulation:

- **Ex: Date of a change in law**
 - If the effective date of a favorable VA regulation is January 1, 2026, then the effective date of any benefits granted due to that regulation can't be earlier than January 1, 2026, even if VA received the claim before January 1, 2026
- **But there are some exceptions!**



General Rules for Service Connection Claims

- **Date of a change in law**
 - If Vet satisfied criteria for SC on the effective date of the change in law, but files claim for SC after the effective date of the change, effective date can be up to one year earlier than the date of claim, but in no event earlier than the effective date of the change
 - **38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a)**



General Rules for Service Connection Claims

- Date of a change in law (example # 1)
 - 12/2016: Vet with qualifying service at Camp Lejeune in 1980 diagnosed with kidney cancer
 - 3/14/2017: Effective date of Camp Lejeune presumptive SC regulation, which includes kidney cancer
 - If Vet filed claim for SC for kidney cancer on:
 - 10/15/2017, effective date for SC = 3/14/2017
 - 6/15/2018, effective date for SC = 6/15/2017



General Rules for Service Connection Claims

- Date of a change in law (example # 2)
 - 3/14/2017: Effective date of Camp Lejeune presumptive SC regulation, which includes kidney cancer
 - 5/1/2017: Vet with qualifying service at Camp Lejeune in 1980 diagnosed with kidney cancer
 - 10/15/2017: Vet files claim for SC for kidney cancer
 - Effective date for SC = 10/15/2017



General Rules for Service Connection Claims

- Date of a change in law (example # 3)
 - 10/15/2018: Female Vet who served in Iraq diagnosed with breast cancer
 - 8/10/2022: Effective date for PACT Act presumptions which includes reproductive cancer of any type cancer
 - 8/7/2023: Vet files ITF
 - 8/1/2024: Vet files VAF 21-526EZ for SC for breast cancer
 - Effective date for SC = 8/10/2022



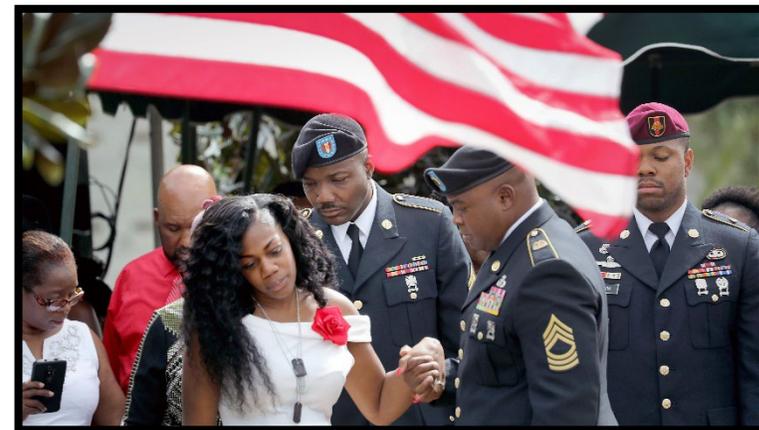
General Rules for Service Connection Claims

- Date of a change in law (example # 4)
 - 8/10/2022: Effective date for PACT Act presumptions which includes emphysema
 - 8/7/2023: Vet who served in Afghanistan files ITF
 - 9/10/2023: Vet receives dx of emphysema
 - 10/27/2023: Vet files complete claim for SC for emphysema
 - Effective date for SC = 9/10/2023 – date of dx



DIC Effective Dates

- DIC claim filed w/in one year of Vet's death
 - Effective Date = First day of month of Vet's death
- DIC claim filed more than one year after Vet's death
 - Effective Date = Date of claim





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SSA Claim = DIC Claim

- Application for Social Security survivor benefits is also considered an application for VA DIC benefits
 - SSA should transmit application/documents to VA (but not always done)
 - May support EED for DIC if claimant filed earlier SSA survivor benefits claim
 - **Notify VA about SSA claim and approx. date filed**
 - **VA must attempt to obtain docs from SSA, but submit copies in claimant's possession**
 - 38 U.S.C. § 5105; 38 C.F.R. § 3.153
- **More on interplay between SSA and VA claims – in “Miscellaneous Issues”**



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DIC Effective Dates

- Claim for DIC is automatically construed as a claim for Survivors Pension and accrued benefits/ substitution; and vice versa
- If survivor filed claim for DIC, and Survivors Pension claim was not adjudicated, the effective date for Survivors Pension claim will be preserved from the date of original filing
 - 38 U.S.C. § 5101(b); 38 C.F.R. § 3.152(b)(1)



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Scope of a Claim

- Once VA receives a complete claim:
 - VA will consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition as well as entitlement to any additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in the VA Schedule for Rating Disabilities
 - VA will adjudicate as part of the claim entitlement to any ancillary benefits that arise as a result of the adjudication decision (SMC, DEA, etc.)
 - 38 C.F.R. § 3.155(d)(2)



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Scope of a Claim

- If SC is granted for the primary claim or issue for which an ITF has been submitted and SC is granted secondary to the primary claim or issue associated with an ITF, the effective date would be the same as for the primary claim, because it was an entitlement established by the evidence of record and within the scope of the issue or condition listed in the complete claim giving rise to the primary claim
- Ex: If VA awards comp benefits for the primary condition of diabetes and evidence of record shows other conditions are caused by or related to the diabetes, VA would assign an effective date for the secondary conditions as of the date VA awarded the primary condition
 - **Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660, 57,670 (Sept. 25, 2014)**



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Scope of a Claim

- In other words:
 - If Vet files a claim for SC for a “back disability,” and evidence VA obtains during adjudication of the claim shows that Vet has left and right lower extremity radiculopathy caused by the back condition, VA must consider the “back disability” claim to include claims for SC for RLE and LLE radiculopathy, even if Vet didn’t list “radiculopathy” on claim form
 - If VA awards SC for the back disability, it must award SC for RLE and LLE radiculopathy and assign effective dates for radiculopathy based on the date of claim for the back disability



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Newly Obtained Service Department Records

- If VA receives or associates with the claims file relevant official service department records at any time after VA issues a decision on a claim, VA must reconsider the claim
- If the new decision results in a grant of benefits because of the new service department records, the effective date will be the date VA received the claim that it previously denied
- VA treats the original claim as if it had been granted, rather than denied
 - 38 C.F.R. § 3.156(c)
 - Records must be “relevant” = must speak to a matter in issue / matter in dispute. *See Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021)



Newly Obtained Service Department Records

- The record does not need to be one of the Vet's service personnel or medical records. The record does not even need to contain the name of the Vet. Examples include:
 - Military records that do not name the Vet, but corroborate an event the Vet claims to have occurred
 - Unit records that pertain to military experiences claimed by the Vet



Newly Obtained Service Department Records

- This rule does not apply to service dept. records that VA could not have obtained when it initially decided the claim, because:
 - the records did not exist when VA decided the claim, or
 - the claimant failed to provide sufficient info for VA to identify and obtain the records from the service dep't, MRRC, or another official source
- **38 C.F.R. § 3.156(c)(2)**



Newly Obtained Service Department Records

- Although § 3.156(c)(1) states that a service dep't record only counts if it existed when VA first decided the claim, this should not be taken literally
 - A newly created service dep't record is considered to have existed when VA first decided the claim, if the new writing is based on analysis of service dep't records that existed when VA first decided the claim



Newly Obtained Service Department Records

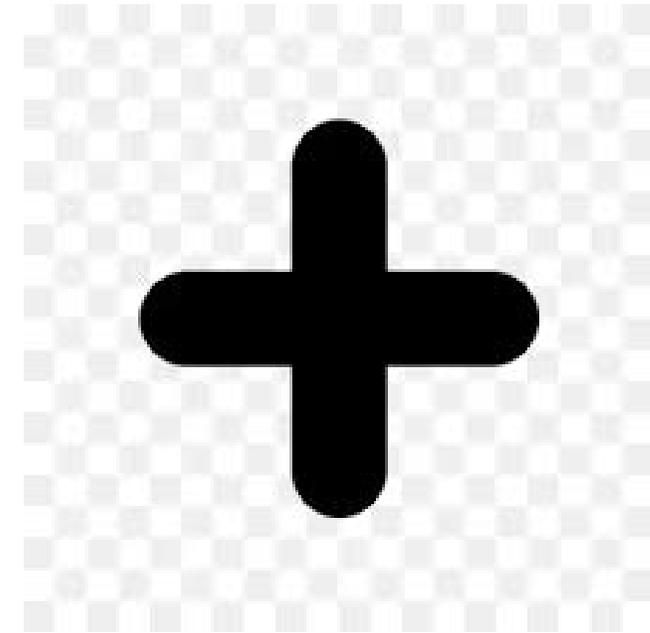
- In *Emerson v. McDonald*, the CAVC addressed whether 38 CFR § 3.156(c) applies if the new service dep't records are received after a reopened or supplemental claim has been granted.
- CAVC answered “yes” - after a denial, it does not matter when official service dept. records are received. If the requirements of § 3.156(c)(1) are met, VA must reconsider the original claim, even if SC has since been granted
 - *Emerson v. McDonald*, 28 Vet. App. 200 (2016)



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Increased Rating Claims

- General Rule on a claim for an increased rating
 - In general, the effective date for an increased rating will be the later of:
 - The date of receipt of the claim for the increased rating; or
 - The date entitlement to the higher rating arose
 - *See 38 C.F.R. § 3.400(o)(1)*



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Increased Rating Claims

- Important exception to the general rule:
 - If an increase in the severity of the disability occurred in the year prior to the date of the increased rating claim, the effective date for the increased rating can be the date of the increase in disability
 - In other words, up to one year prior to the date of claim!
 - Specifically, “[t]he earliest date as of which it is factually ascertainable based on all evidence of record that an increase in disability had occurred if a complete claim or intent to file a claim is received within 1 year from such date”
 - **38 C.F.R. § 3.400(o)(2)**



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- *Agent Orange - Nehmer claims*
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Nehmer Effective Date Rules

- Special effective date rules may apply to Vets who are granted presumptive SC for a disease based on exposure to herbicides in Vietnam, including its territorial seas, under the Court Orders in *Nehmer v. U.S. Dep't of Veterans Affairs*
 - 38 C.F.R. § 3.816
 - Special rules do not apply to claims granted due to AO exposure in other locations



Nehmer Effective Date Rules

- Special effective date rules:
 - For all diseases added to the AO presumptive list prior to 8/2022 (but NOT those added on or after 8/2022), VA must:
 1. Identify all Vietnam Vets and their survivors who applied for SC for the disease or who had applications pending for SC based on the disease between 9/25/1985 and the publication date of the regulation adding the disease



Nehmer Effective Date Rules

2. Re-decide whether benefits are warranted for the disease under the new regulation, after allowing claimant to add new evidence
3. If SC granted, assign an effective date for benefits based on the date of the original claim that was pending or denied on or after 9/25/1985



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Nehmer Effective Date Rules

- Special effective date rules:
 - Under Footnote 1 of the 1991 *Nehmer* Final Stipulation and Order, if Vet filed an SC or pension claim for disability X and, before the claim was finally denied or granted, evidence in the c-file showed that Vet had a disease that was later added to VA's AO presumptive list, then the claim for disability X also counts as a claim for the AO disease



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Nehmer Effective Date Rules

- If the claimant first filed a claim for SC of a disease after the disease was added to the AO presumptive list, the special *Nehmer* rules do not apply to the claim
 - But don't forget to look for FN1 claim!



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Nehmer Effective Date Rules

- In 8/2022, PACT Act added 2 NEW herbicide-related presumptive conditions:
 1. Monoclonal gammopathy of undetermined significance (MGUS), and
 2. Hypertension



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Nehmer Effective Date Rules

- *Nehmer* effective date rules DO NOT apply to these presumptions or future Agent Orange presumptions
- But, VA shall award retro DIC benefits for previously denied DIC claims based on MGUS and hypertension
- *See VBA Letter 20-22-10, § 4.4*



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Blue Water Navy Vietnam Veterans Act of 2019

- 6/25/2019: **Blue Water Navy Vietnam Veterans Act of 2019** signed into law, **effective 1/1/2020**:
 - Vets who served in the 12 nm territorial sea of the Republic of Vietnam are entitled to the presumption of Agent Orange exposure (codified holding of *Procopio v. Wilkie*)
 - Allows for retro benefits for claims filed 9/25/1985-1/1/2020
- Codified at 38 U.S.C. § 1116A



Blue Water Navy Vietnam Veterans Act of 2019

- Effective date can be earlier than 1/1/2020, if:
 - Vet or survivor filed claim for SC for covered AO disease on or after 9/25/1985, but before 1/1/2020, and
 - Claim was denied because it was not incurred in or aggravated by service, and
 - Vet or DIC claimant **files supplemental claim for SC of the same disease on or after 1/1/2020**
- Effective date will be date of earliest claim for disease filed on or after 9/25/1985



Blue Water Navy Vietnam Veterans Act of 2019

- If *initial* claim for benefit granted under BWNVVA (i.e., there was no earlier “denied” claim), the effective date for benefits should be the date of claim, even if filed before 1/1/2020
- Effective dates under BWNVVA can be earlier than date of claim based on other claim rules
 - DIC claim filed w/in year of Vet’s death
 - SC claim filed w/in one year of separation



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PACT Act

- 8/10/2022: President Biden signed into law
 - “Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022” or the “Honoring our PACT Act of 2022”
- 12/22/2022: VA issued VBA Letter 20-22-10
 - Processing Claims Involving Public Law 117-168, Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 or the Honoring our PACT Act of 2022 (hereinafter referred to as the “PACT Act”)



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PACT Act Presumptions

- PACT Act established many new presumptions, including:
 - New radiation-risk activities that qualify Vet as “radiation exposed” and entitled to presumptive SC for several cancers
 - New locations where herbicide exposure is presumed
 - New diseases presumed caused by herbicide exposure
 - New locations that qualify Vets for presumptive SC for Gulf War Illness (undiagnosed illnesses and MUCMIs)
 - Presumptive SC for diseases associated with exposure to burn pits and other toxins



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PACT Act Effective Dates

- Although PACT Act provides that, for most Vets, the new presumptions regarding locations of exposures and service connection of disabilities would go into effect on various dates over the coming years, VA is treating all new presumptions as applicable on 8/10/2022
 - VBA Letter 20-22-10, § 5



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PACT Act Effective Dates

- For living Vet claims for compensation, if SC granted based on new presumption, effective date rules based on change in law apply
 - Effective date can be up to one year prior to date of claim, but not earlier than 8/10/2022, if Vet had disease on 8/10/2022
 - 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a)



Special Effective Dates for DIC Claims

- When a law, reg, or court decision/settlement establishes or modifies a presumption of SC on or after 8/10/2022, VA must identify all DIC claims that were previously denied that might have been decided differently based on change
- Allow claimant to have claim reevaluated
- If DIC now granted, VA must assign effective date as if the new presumption was in effect at the time of the prior claim
- There is no time limit for requesting reevaluation of previously denied DIC claim
 - **38 U.S.C. § 1305**



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DIC Effective Date Example

- 5/15/2015: Vet w/ service in Iraq died from lung cancer
- 12/1/2015: Surviving spouse filed DIC claim, which was denied because cause of death not SC
- 10/23/2023: Surviving spouse, who hasn't remarried, files new VAF 21P-534EZ, requesting reevaluation of previously denied claim based on new eligibility under PACT Act
- Effective date for DIC: **5/1/2015**
 - **38 U.S.C. § 1305**



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