

VETERANS LAW

Entitlement to Veterans Benefits



“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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Basic Eligibility

- **2 Step Process:**
 - Must be eligible for veterans benefits; and
 - Must be entitled to veterans benefits
- **Eligibility:**
 - Veteran – “A person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 USC § 101(2) (emphasis added)



Basic Eligibility

- Length of Active Service:
 - After 8 Sep 80 – “full period” of active duty or 24 months of continuous active duty if not full period
 - **Exceptions: Disability compensation benefits!!**
- Military service characterized as “other than dishonorable”
 - Reminder – Does not equal dishonorable discharge



Compensation Versus Pension

- VA service-connected disability compensation
 - Based on disability incurred in or aggravated by active military, naval, air, or space service
- VA non-service-connected disability pension
 - Needs-based program for wartime veterans (discussed later in this training)
- A veteran may be eligible for both compensation and pension, but VA is prohibited from paying both benefits concurrently. *See* 38 USC § 5304(a)



Compensation Versus Pension

- A veteran entitled to both service-connected disability compensation and nonservice-connected pension may select which benefit to receive
 - If the veteran does not make a selection, the VA will automatically pay the veteran the higher benefit



Dual Receipt of VA Compensation and Full Military Retirement Pay

- Veterans are generally prohibited from receiving both their full military retirement pay and full VA disability compensation
 - There is often a tax advantage to receiving VA disability compensation (which is tax-free), rather than military retirement pay
- There are two exceptions -
 - Concurrent Retirement and Disability Pay (CRDP)
 - Combat-Related Special Compensation (CRSC)



Concurrent Retirement and Disability Pay (CRDP)

- Effective 1/1/2004, eligible military retirees are entitled to concurrent receipt of both military retired pay and VA disability compensation
- To qualify for CRDP, an individual must have –
 - Retired from the military due to longevity or disability
 - Served in the military for at least 20 years, and
 - A combined VA disability rating of 50 percent or higher
- CRDP is not taxed, but retired pay continues to be considered taxable income by the federal government (military retired pay is exempt from Michigan state income tax)
- No application is required, and a qualifying retiree will be enrolled automatically if eligible



Combat-Related Special Compensation (CRSC)

- Congress created a form of “special compensation,” providing “Combat-Related Special Compensation” (CRSC) to certain veterans who retired from the military due to longevity and who also have **combat-related disabilities**
- CRSC is a separate payment, in addition to military retired pay and VA disability payments
- In January 2008, Congress expanded the scope of CRSC eligibility to include those retired for disability (either temporarily or permanently) regardless of the number of years the individual served
- **A veteran cannot receive both CRSC and CRDP**, even though they may qualify for both payments
 - **Veteran will have to make election through DFAS**



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CRSC Eligibility

- The key determination in deciding whether an application for CRSC should be granted is whether the veteran has any qualifying disabilities (i.e., disabilities service-connected by the VA with a rating of 10 percent or more) that are “combat-related”
- Seven categories of disabilities that qualify as “combat-related” for purposes of CRSC are:
 1. Injuries incurred as a direct result of armed conflict
 2. Injuries incurred through an instrumentality of war
 3. Injuries incurred in the performance of duty under conditions simulating war
 4. Injuries incurred while engaged in hazardous service
 5. Injuries for which the member was awarded the Purple Heart
 6. Certain disabilities that are presumed to be connected to service
 7. Disabilities secondary to the disabilities in the first six categories



CRSC Effective Dates and Application Process

- The effective date of a CRSC award is the effective date of the VA disability compensation award for a combat-related disability, the date of retirement, or the effective date of the law that created entitlement to a CRSC award for that retiree – whichever is later
- The CRSC Board makes the decision on the application – the veteran uses DD Form 2860 and submits it to the Board for the respective military branch
 - The CRSC Board will make two (2) determinations –an initial determination of eligibility and a determination of the combat-relatedness of the veteran’s disabilities that have been service-connected by VA



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Basic Entitlement to Service Connection

38 USC § 1110:

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, air, or space service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs. [Emphasis added]

38 USC § 1131: Covering periods "other than wartime"



Elements of a VA Disability Compensation Claim

1. Veteran eligibility;
2. Existence of current disability;
3. In-service event, disease, or injury;
4. Connection between disability & service;
5. Degree of disability;
6. Effective date of benefits



Entitlement: Caluza Elements

- 1. Current Disabling Condition**
 2. In-Service Disease or Injury; AND
 3. Nexus Between the Two
- Using medical records to answer these questions
 - Role of Advocacy



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Current Disabling Condition

- Disability = functional impairment of earning capacity
 - Diagnosis not always required (*Saunders* decision – e.g., knee pain)
- Claimant must have disability at time of filing or during pendency of claim
 - Can resolve prior to adjudication
- VA has duty to assist in developing evidence
 - May need to provide free exam



Current Disabling Condition

- Veteran can submit less than required evidence of a medical diagnosis
 - Must show “persistent or recurrent symptoms of disability”
 - Triggers VA’s Duty to Assist
- Exception to current diagnosis requirement – Gulf War Illnesses
 - Undiagnosed by their very nature



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Current Disabling Condition

- Certain medical conditions cannot be service-connected
 - Laboratory findings without functional impairment – e.g., high cholesterol
 - Obesity has historically not been considered a disability for VA purposes (**but see 2025 Adams decision from the CAVC**) – although it can be considered part of the impairment caused or worsened by a disability, or as an “intermediate step” to another disability that can be secondarily-service-connected (e.g., obstructive sleep apnea)
 - Personality disorders
 - Congenital and development defects (but SC can be granted for superimposed injury)



Duty to Provide Medical Examination/Opinion

- Medical Examination – “C & P Exam”
 - Required when – per 38 USC § 5103A(d):
 1. Record contains competent evidence that the veteran has a current disability and/or persistent or recurrent symptoms of disability; AND
 2. Record indicates an in-service event that may be associated with the disability/symptoms; AND
 3. Insufficient medical evidence upon which to make a decision exists in the record
 - Medical opinion for Cause of Death claim - under 38 USC § 5103A(a), medical opinion may be warranted “if no reasonable possibility exists that such assistance would aid in substantiating the claim.”



Entitlement: Caluza Elements

1. **Current Disabling Condition**
 2. **In-Service Disease or Injury;** AND
 3. **Nexus Between the Two**
- Using medical records to answer these questions
 - Role of Advocacy



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In-Service Disease, Injury or Illness

- Must submit evidence that the disease, illness, or injury that caused or aggravated the current disability occurred while in service
- Look to both personnel and medical records



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In-Service Disease, Injury or Illness

- In-service event must be established before VA's duty to provide a medical examination is triggered
- VA gives great weight to SMRs/STRs and SPRs
- But, VA must consider lay evidence
 - No requirement that in-service incident be confirmed by military records
 - Non-combat events – weighed against the absence of evidence



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In-Service Disease, Injury or Illness

- “In the line of duty”
 - This phrase means that an injury or disease was incurred or aggravated during a period of active service, unless the injury or disease is the result of a veteran’s own willful misconduct or abuse of alcohol or drugs
 - “Willful misconduct” means “an act involving conscious wrongdoing or known prohibited action.” 38 C.F.R. § 3.1(n)



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In-Service Disease, Injury or Illness

- “In the line of duty” (continued)
 - A disease or injury will be considered to have been “incurred in the line of duty,” if it occurred “at almost any time during a veteran’s active service – even during authorized leave.” *Holton v. Shinseki*, 557 F.3d 1362, 1369-70 (Fed. Cir. 2009)
 - This is because “for purposes of disability compensation, a service member’s workday never ends.” *Holton*, 557 F.3d at 1366



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In-Service Disease, Injury or Illness

- “In the line of duty” (continued)
 - The military does not determine whether or not a disease or injury is “incurred in the line of duty” every time a service member is injured or becomes ill
 - However, when the service determines that a disease or injury was “incurred in the line of duty” (e.g., “LOD Yes”), VA is bound by that determination unless “it is patently inconsistent with the requirements of the laws administered by the Department of Veterans Affairs.” See 38 C.F.R. § 3.1(m)



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In-Service Disease, Injury or Illness

- Relaxed evidentiary standard for combat veterans -
38 USC § 1154(b)
 - VA must accept lay statements when (1) event occurred when the veteran was engaged in combat with the enemy; (2) is consistent with the circumstances of service; and (3) there is not clear and convincing evidence to the contrary
 - Use service records/awards to prove combat



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Entitlement: Caluza Elements

1. **Current Disabling Condition**
2. **In-Service Disease or Injury; AND**
3. **Nexus Between the Two**

- Using primarily medical records to answer these questions



Nexus (link) Between Disability and Service

- A nexus (link) between the current disability and military service is needed
- 5 ways to establish nexus
- VA must consider all theories reasonably raised by the record



Nexus Between Disability and Service

- Usually based on medical evidence
 - “Nexus letter”
 - Lay statements, photos, testimony add strength
 - No Rules of Evidence
- Medical opinion does not need to opine causal link by a medical certainty
- “At least as likely as not” standard



Five Theories of Service Connection

- 1. Direct Service Connection**
2. Aggravation
3. Statutory Presumption
4. Secondary to Existing Service-Connected Disability
5. Caused by VA Medical Treatment



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Direct Service Connection

- Claim based on a medical opinion connecting a post-service condition to an in-service injury or disease.
 - STRs show manifestation or diagnosis while veteran was on active duty; OR
 - Medical opinion demonstrates that incident in service caused veteran to eventually suffer from disability
 - Delayed Direct Service Connection
- Chronicity or continuity of symptoms



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Direct Service Connection

- Chronic Conditions

- If chronic condition, any subsequent manifestations of the same condition at any later date, however remote, are service connected unless clearly attributable to an intervening cause.
38 USC § 1101(3) and 38 C.F.R. § 3.309(a)

- List of chronic conditions is located at 38 C.F.R. § 3.307 and 3.309 (long list)

- Leprosy and TB (3 yrs) / MS (7 yrs)
- Arthritis / Hypertension/Diabetes Mellitus (1 yr)

- <https://www.law.cornell.edu/C.F.R./text/38/3.309>



Direct Service Connection Chronic Conditions

- Important VA regulations
- 38 C.F.R. § 3.303(b): basic principles of how Vets can establish SC through a showing of chronicity or continuity
- 38 C.F.R. § 3.307(a)(3): presumptive time periods for chronic conditions
- 38 C.F.R. § 3.309(a): disabilities VA considers chronic and rules for presumptive SC of chronic conditions first diagnosed after service



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Direct Service Connection Chronic Conditions

important

- What is a chronic condition?
 - If a condition is **listed in 38 C.F.R. § 3.309(a)**, it **IS** considered a chronic condition by VA
 - If the condition is **NOT listed in 38 C.F.R. § 3.309(a)**, it **IS NOT** considered a chronic condition by VA



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What Conditions Does VA Consider Chronic?

Full list at 38 C.F.R. § 3.309(a)

- 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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Organic Diseases of the Nervous System

- “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
 - **Source: Manual M21-1, V.iii.12.A.1.d (change date Feb. 26, 2025)**



Direct Service Connection Chronic Conditions

- Important distinction in chronicity cases:
 - If a chronic condition is diagnosed ***during service***
 - In-service severity of the condition doesn't matter (could be equal to a 0% rating)
 - If a chronic condition is first diagnosed ***within the presumptive period***
 - Condition must have manifested to at least a degree of 10% during the presumptive period



Direct Service Connection Chronic Conditions

- Benefits of Establishing Service Connection through Chronicity:
 - As long as Veteran puts forth medical evidence showing she currently has the chronic condition, a VA exam will not be necessary (except for evaluation purposes)
 - **No need for VA to obtain a medical nexus opinion**
- Vet does not need evidence of continuity of symptoms since service to establish SC



Direct Service Connection Continuity of Symptomatology

- Continuity of Symptomatology
 - If symptoms of a chronic condition “noted” during service, but first diagnosed as chronic disease after service, SC is warranted if continuity of symptoms from service to diagnosis
 - If lay person is competent to observe condition, medical evidence “noting” condition not required
 - Only for chronic diseases listed in 38 C.F.R. § 3.309(a)
 - 38 C.F.R. § 3.303(b)



Direct Service Connection Continuity of Symptomatology

- What does “noted” mean?
 - No comprehensive definition in VA Regulations
 - Could include:
 - Symptom or complaint listed in STRs
 - Condition not diagnosed beyond legitimate question as a chronic condition listed in § 3.309
 - Retrospective post-service statement about symptom experienced in service
 - **Must be found credible by VA**



Direct Service Connection Continuity of Symptomatology

- When should you raise this theory?
 - When a condition or symptom is noted in service (or w/in the presumptive period), but it is not shown to be chronic or the diagnosis may be questioned
 - If the condition or symptom first manifested w/in the presumptive period, it must have manifested to a compensable level (minimum of 10% under the applicable rating criteria)



Direct Service Connection Continuity of Symptomatology

- Continuity of Symptomatology and Medical Evidence
- While medical evidence is not *required* in continuity of symptomatology cases, VA will be more likely to grant a claim with this evidence, without the need to appeal to BVA or CAVC
- So, advocates should try to obtain a medical opinion from a private doctor that addresses whether it is at least as likely as not that:
 1. The current disability is related to Vet's continuing symptoms; and
 2. The current disability is related to an in-service event or injury ("delayed" direct SC)



Direct Service Connection Continuity of Symptomatology

- Continuity of Symptomatology and Medical Evidence
- The main difference between medical opinions in continuity of symptomatology claims and “delayed” direct SC claims:
 - **In a delayed direct SC claim**, the nexus opinion addresses the link between Veteran’s current disability and an in-service event, injury, or disease
 - **In continuity of symptomatology claims**, the nexus opinion addresses the link between Veteran’s current disability and Veteran’s continuing symptoms



Direct Service Connection Continuity of Symptomatology

- Continuity of Treatment vs. Symptoms
- To establish SC through continuity of *symptomatology*, continuity of *treatment* is not required
- Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology
 - *Savage v. Gober*, 10 Vet. App. 488, 496 (1997)
- The Regulation requires continuity of symptomatology, not continuity of treatment
 - *Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991)



Direct Service Connection Continuity of Symptomatology

- How to Handle the Absence of Evidence
- Sometimes a claims file will not contain medical evidence of any symptoms in service or w/in the presumptive period
 - Many reasons why: warrior ethos, promotions, security clearance
- If Veteran contends that, despite the lack of documentation, he or she has experienced symptoms since service, a detailed **lay statement** describing the continuity of symptoms will be important



Direct Service Connection Continuity of Symptomatology

- How to Handle the Absence of Evidence (continued)
- Explain why there is no documentation of symptoms
 - Did Vet not think condition was severe enough to warrant seeing a doctor?
 - Does Vet avoid going to the doctor? Why?
 - Did Vet receive treatment from a facility that is now closed and treatment records are unavailable?



Direct Service Connection Continuity of Symptomatology

- Conditions Capable of Lay Observation
- For chronic conditions that lay people are competent to observe and diagnose, medical evidence is not required to establish SC based on chronicity or continuity of symptomatology
- A notable chronic condition which can be diagnosed by a lay person is tinnitus, which CAVC found to be a chronic condition (when caused by acoustic trauma)
 - *Fountain v. McDonald*, 27 Vet. App. 258 (2015)



Direct Service Connection Continuity of Symptomatology

- Continuity of Symptomatology for Non-Chronic Conditions
- Putting forth evidence of continuity of symptomatology can still be helpful to a claim, even if the condition is not chronic under § 3.303(b) – e.g., sleep apnea
- Evidence of continuity of symptomatology may be sufficient to require VA to perform an exam under its duty to assist
- Such evidence can also make it easier for an examiner to provide a favorable nexus opinion



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Five Theories of Service Connection

1. Direct Service Connection
- 2. Aggravation**
3. Statutory Presumption
4. Secondary to Existing Service-Connected Disability
5. Caused by VA Medical Treatment



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Service Connection by Aggravation

- Worsening of a condition that pre-existed active military service
- Presumption of Soundness
 - Unless entrance exam shows otherwise, veteran was in “sound medical condition” when he or she entered military service. 38 USC § 1101(3) and 38 C.F.R. § 3.304(b)
 - MEPS exam is the baseline – start here!
- Compensation is for the difference between MEPS exam and separation exam/current medical condition



Presumption of Soundness

38 USC § 1111

- If veteran has entrance exam, VA presumes he or she is sound, except for conditions found on examination
- To rebut presumption of soundness, VA must show:
 - Clear and unmistakable evidence that condition pre-existed service; and
 - Clear and unmistakable evidence that condition was not aggravated during service
- If presumption applies, SC can't be based on aggravation, even if condition clearly & unmistakably pre-existed service



Presumption of Aggravation

38 USC § 1153

- If veteran shows that disability found on entrance exam permanently worsened during service, then “presumption of aggravation” applies
- Burden then shifts to VA to show by clear and unmistakable evidence that the condition was **NOT** aggravated by service
 - VA can only meet this burden by showing that the increase in disability was due to the natural progression of the disease



Five Theories of Service Connection

1. Direct Service Connection
2. Aggravation
3. **Statutory Presumption**
4. Secondary to Existing Service-Connected Disability
5. Caused by VA Medical Treatment



Nexus: Presumptive Cases

**What is presumed in a
“presumptive” case?**



Nexus: Presumptive Cases

Nexus!

The nexus is presumed by law based on existing medical and scientific evidence



Presumptive Service Connection

- Chronic Diseases
- ALS
- Tropical Diseases
- Former POWs
- Radiation Exposure
- Herbicide Exposure
- Camp Lejeune Water
- Gulf War/OIF/OEF
- Burn Pits





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Presumptive SC for Chronic Diseases





Presumptive SC for Chronic Diseases

- VA will presume that a “chronic” disease is service connected if the disease was noted in service and manifested to compensable degree within post-service presumptive period, and symptoms continue until diagnosis of chronic condition
 - Note: Generally, the disease must manifest to a compensable degree within the presumptive period (or other time period as established by law)
 - *Manifestation does not necessarily mean a formally diagnosis must be evidenced within the time period*
- Chronic conditions subject to presumptive SC are listed in 38 C.F.R. § 3.309(a)

Chronic Diseases

- **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
- **Parkinson's Disease**
- Peptic ulcers
- Psychoses
- Other organic disease of the nervous system
- Sarcoidosis
- Tuberculosis, active

Chronic Diseases

- 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)



Presumptive Period for Chronic Diseases

- Multiple Sclerosis – 7 years
- Hansen's Disease (Leprosy) – 3 years
- Tuberculosis - 3 years
- All other chronic conditions - 1 year to manifest *symptoms*



Presumptive Period for Chronic Diseases

Hypo #1:

Petty Officer Steve Shark was in the Navy from 1999-2008, where he served as a refueling hose operator on a C-130 aircraft. During his military service, he began to develop stiffness in his muscles, lost his sense of smell, and noticed his handwriting began to get generally smaller. On just one occasion, he mentioned his loss of smell and muscle stiffness to his doctor during an annual physical exam.





Presumptive Period for Chronic Diseases

In 2009, 11 months after he separated from the Navy, he began to develop tremors in his hands and was **diagnosed** with Parkinsons Disease.

Presumption?



Presumptive Period for Chronic Diseases

Hypo #2:

Petty Officer Steve Shark was in the Navy from 1999-2008, where he served as a refueling hose operator on a C-130 aircraft. During his military service, he began to develop stiffness in his muscles, lost his sense of smell, and noticed his handwriting began to get generally smaller. On several occasions, he mentioned his loss of smell and muscle stiffness to his wife.



Presumptive Period for Chronic Diseases

In 2009, following his separation, he began to develop tremors in his hands and was diagnosed with Parkinson's Disease 1.5 years (in 2010) after he separated from the Navy.

Presumption?

How would you prove this?



Presumptive Period for Chronic Diseases

Hypo #3:

Petty Officer Steve Shark was in the Navy from 1999-2008, where he served as a refueling hose operator on a C-130 aircraft. During his military service, he had no medical history and suffered from no known medical conditions.

In 2019, more than 10 years after he separated from the Navy, he began to develop tremors in his hands and was subsequently diagnosed with Parkinsons Disease.

Presumption? How would you need to prove this?



Amyotrophic Lateral Sclerosis (ALS; Lou Gehrig's)

- Diagnosed anytime after active duty
- Must have served 90 days or more of continuous active service
 - National Guard / Reserve service generally does not meet the requirements of “active” service for the presumption
 - 90 days of ADT does not qualify
- 100% Rating / Advance on docket
- See 38 C.F.R. 3.318



Tropical Diseases





Tropical Diseases

The following are presumed caused by “tropical service”:

- Amebiasis
- Blackwater Fever
- Cholera
- Dracontiasis
- Dysentery
- Filariasis
- Leishmaniasis
- Loiasis
- Malaria
- Onchocerciasis
- Oroya fever
- Pinta
- Plague
- Schistosomiasis
- Yaws
- Yellow Fever
- Disorders/diseases caused by treatment for such diseases
- Disorders/diseases caused by medications to prevent such diseases

Diseases of Former POWs





Diseases of Former POWs

- Presumed service connected when they manifest to a degree of 10% or more anytime after release
 - Psychosis
 - Any anxiety state, including PTSD
 - Dysthymic disorder or depressive neurosis
 - Organic residuals of frostbite (if consistent with location of detainment/internment)
 - Post-traumatic osteoarthritis
 - Atherosclerotic heart disease or hypertensive vascular disease and their complications (including myocardial infarction, congestive heart failure, arrhythmia)
 - Stroke and its complications
 - Osteoporosis, if Veteran has PTSD

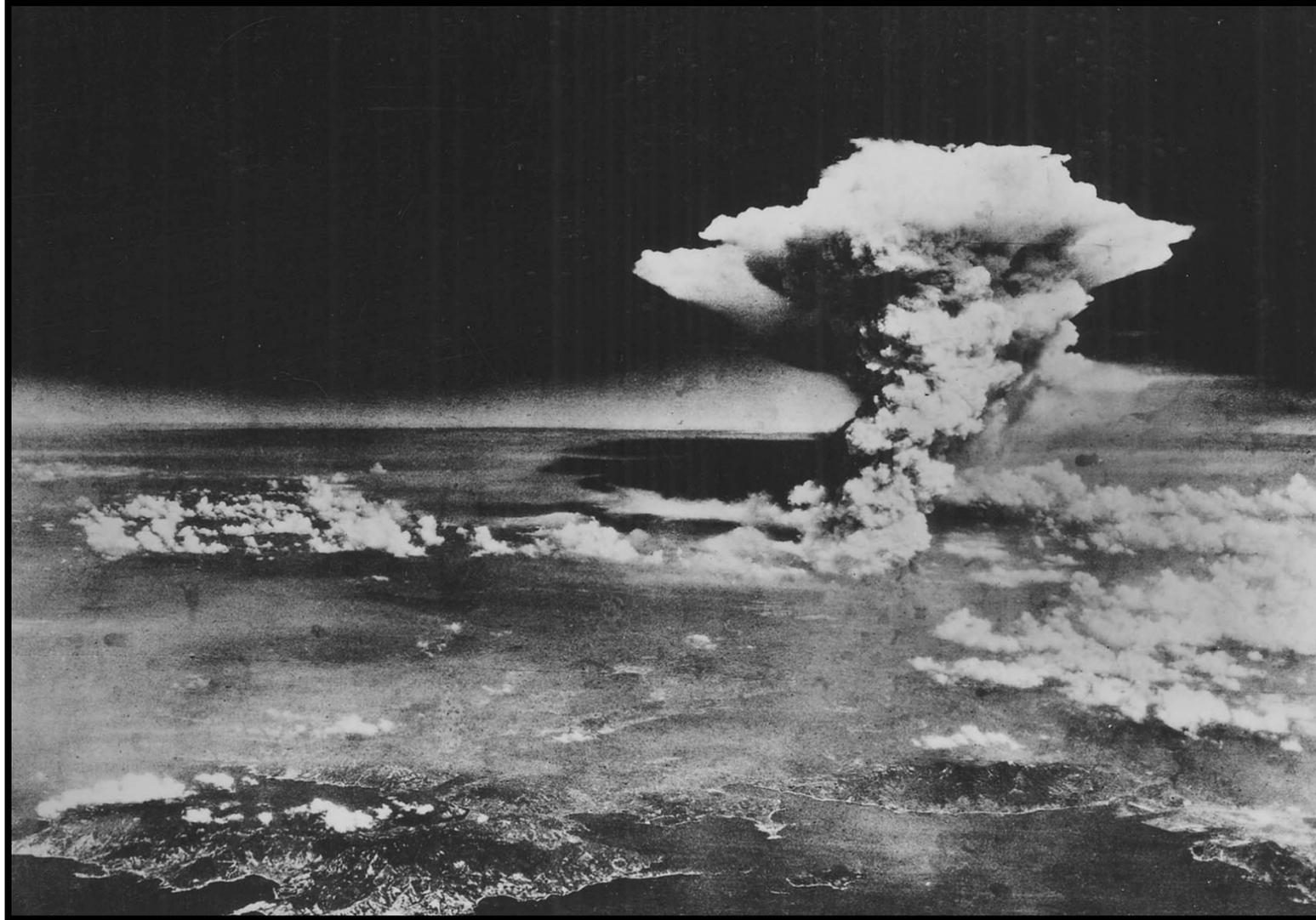


Diseases of Former POWs

- Presumed service connected when they manifest to a degree of **10% or more after captivity of 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



Ionizing Radiation Exposure





Ionizing Radiation Exposure

- **Presumptive All the Way:**

- Veteran must have manifested one of the included cancers and have participated in a qualifying radiation-risk activity

- **Cancers** listed in 38 CFR 3.309(d)(2)

- **Circumstances of Exposure** listed in 38 CFR 3.309(d)(iii)(2):

- Includes several specific (named) atmospheric, underground, or underwater test detonations of nuclear devices
- Service in Japan during the detonations at Hiroshima and Nagasaki (August 6, 1945 – July 1, 1946)
- Cleanup at Eniwetak Atoll, 1977-80; aviation incident in Palomeras, Spain, 1966-67; aviation incident in Thule, Greenland, 1968
- Service at other locations, like Paducah, KY, Portsmouth, OH, or Oak Ridge TN (specific time periods/events and specific duration of AD time)
- Service akin of Dept of Energy; special exposure cohort



Herbicide Exposure





Herbicide Exposure



- January 1962- May 1975:
 - 3.4 million veterans deployed to Southeast Asia / 2.7 million served on the ground in Vietnam
 - Operation Ranch Hand – 19 million gallons of herbicides were disbursed over 4.5 million acres of Vietnam
 - Defoliant to allow air interdiction of the Vietnamese resupply routes into South Vietnam





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IT WASN'T JUST AGENT ORANGE:

The Rainbow Herbicides of the Vietnam War Era



AGENT GREEN
2,4,5-T

USED: 1962

PURPOSE: Defoliation of
Jungle Vegetation

IN VIETNAM: 365 drums
(20,056 gallons)



AGENT PINK
2,4,5-T

USED: 1961-1963

PURPOSE: Defoliation of
Jungle Vegetation

IN VIETNAM: 1,315
drums (72,256 gallons)



AGENT PURPLE
2,4-D; 2,4,5-T

USED: 1962-1965

PURPOSE: Defoliation of
Jungle Vegetation

IN VIETNAM: 12,475
drums (685,474 gallons)



AGENT BLUE
Cacodylic Acid

USED: 1966-1972

PURPOSE: Crop
Destruction

IN VIETNAM: 29,330
drums (1,611,619 gallons)



AGENT WHITE
2,4-D; Picloram

USED: 1966-1972

PURPOSE: Defoliation of
Jungle Vegetation

IN VIETNAM: 104,800
drums (5,758,528 gallons)



AGENT ORANGE
2,4-D; 2,4,5-T

USED: 1965-1970

PURPOSE: Defoliation of
Jungle Vegetation

IN VIETNAM: 208,330
drums (11,447,272 gallons)



Together Always

WWW.VVA.ORG |||| 1-800-VVA-1316



In Service to America

Agent Orange





Agent Orange Timeline

- 1954-1975: US involvement in the Vietnam conflict
- 1979: Class action lawsuit filed by 2.4M Vietnam veterans and family members against US herbicide manufactures (Monsanto, Dow, Diamond Shamrock, Uniroyal, Thompson, Hercules, Hoffman)
- 1984: Class action settles for \$180M
 - Veteran must develop illness by 1994
- 1988: AO settlement fund created – payments conclude in 1994
 - Totally disabled veteran would receive \$12K over 10 years and forego other forms of government assistance (pensions, food stamps, etc.)
 - Widow would receive a lump sum payment of \$3700
 - Veterans outraged over settlement – wanted their day in court
 - Led to “Fairness Hearings” in 5 major US cities



Agent Orange Timeline

- 1984 – VA promulgates regulations to compensate Vietnam veterans for AO exposure
 - Only listed disease was Chloracne
- 1986: *Nehmer v. USDVA (ND Cal)*
 - **NVLSP** files suit challenging VA regulations and sought class certification to include all Vietnam veterans and their survivors
- 1989: Court invalidated VA's regulation and certified the class
- 1991: Agent Orange Act
 - Orders VA to review medical evidence that herbicide exposure caused various medical conditions and then service connect veterans automatically (and retroactively as applicable) if the claimant served in specific areas (Vietnam) and during specific times
 - National Academy of Sciences would review and validate medical research



Agent Orange Timeline

- 1991: Consent decree reached requiring VA to automatically re-adjudicate any previously denied claims whenever a new disease is added to the list of presumptive AO conditions
 - “Nehmerretroactive effective date”
- 1994: *Dow Chemical v. Stephenson* (SCOTUS 1994)
 - Vietnam veterans who developed illnesses after the settlement period had their Constitutional rights violated and were not bound by the settlement’s restrictions
 - Veterans were not barred from seeking further compensation
 - Sidenote – Dow and Monsanto ordered to pay \$65M in 2006 by South Korean court
 - Sidenote – Vietnamese victims never compensated – US paid \$3M to clean up Da Nang AB in 2007 (estimated clean up cost for all US military installations in Vietnam is \$60M)
- 1994: Multiple new presumptive conditions were added, triggering VA to reevaluate past denied claims under the consent decree



Agent Orange Timeline

- 1999: NVLSP files suit against VA for failing to follow the consent decree
- 2003: VA issues a new “Nehmer regulation” – 38 CFR 3.816
- 2007: NVLSP files suit against VA for failing to comply with the consent decree (9th Cir.)
 - VA refused to pay retroactive benefits for Lymphocytic Leukemia
 - "The performance of the United States Department of Veterans Affairs has contributed substantially to our sense of national shame."
 - “We would hope that this litigation will now end, that our government will now respect the legal obligations it undertook in the Consent Decree some 16 years ago, that obstructionist bureaucratic opposition will now cease, and that our veterans will finally receive the benefits to which they are morally and legally entitled. AFFIRMED”
- 2010: Additional conditions added to the presumptive list

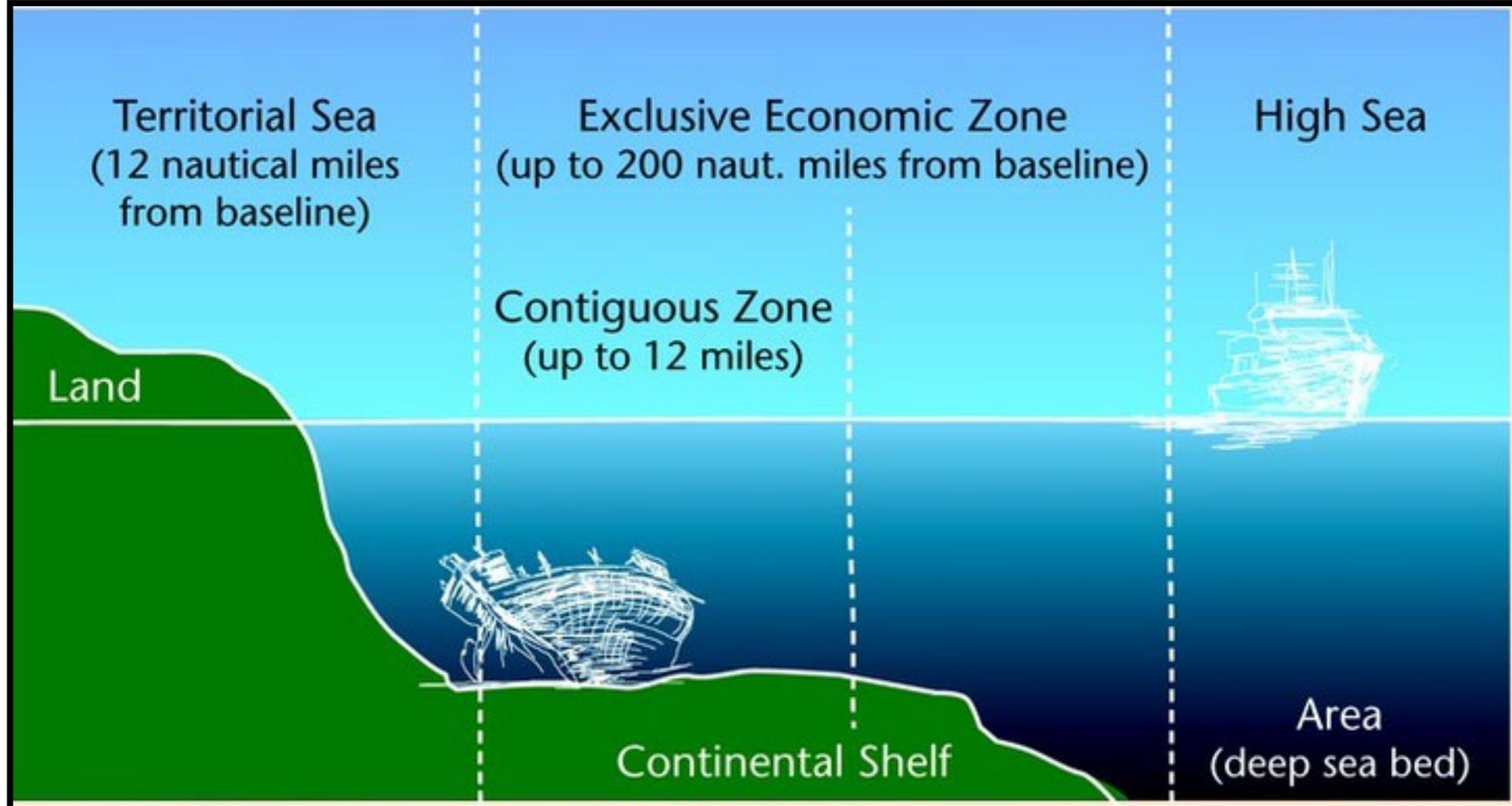


Blue Water Claims

- 2019: *Procopio v. Wilkie* (Fed Cir 2019)
 - Federal Circuit overturned its ruling in *Haas*
 - Ruled Congress' definition of "in the Republic of Vietnam" was defined under international law (UN Law of the Sea Convention) which includes the landmass of Vietnam and 12 nautical miles offshore
- Blue Water Navy Act of 2019



Blue Water Claims





Agent Orange Exposure Southeast Asia



- VA **presumes exposure** for veterans who served:
 - In the **Republic of Vietnam** during the period beginning 1/9/1962 and ending 5/7/1975 (38 CFR § 3.309 (e))
 - 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)



Agent Orange Exposure Southeast Asia

- 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 Veteran performed (i.e., patrolling the perimeter)
 - Includes Veterans on ships that visited Thai coastal bases
 - But...**does not include service in territorial waters of Thailand**





Agent Orange Exposure Southeast Asia

- **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





Agent Orange Exposure Guam

- **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



Agent Orange Exposure

Figure 4: May 1975 Photo of Drums of Agent Orange Stored on Johnston Island



Source: Alvin L. Young, *Agent Orange: A History of Its Use, Disposition, and Environmental Fate* (June 30, 2008). | GAO-19-24

Note: Many of the drums were no longer marked with an orange band around their center as a result of redrumming that took place from 1972 through mid-1977. According to archival sources, efforts were made to continue labeling new drums as “Herbicide Butyl Esters.”



Agent Orange Exposure Korea

- Along the **Korean DMZ** any time from 9/1/1967 through 8/31/1971 (38 U.S.C. § 1116B)
- DoD identified several units that operated in or near the Korean **DMZ where Agent Orange was sprayed**. See - MANUAL M21-1, VIII.i.1.A.3.c
- Veterans who served **in an identified unit** between 9/1/1967 and 8/31/1971, are presumed exposed to AO.
- However, 38 USC 1116b would suggest that presumptive exposure of herbicides could be maintained outside of the designated units if there was still service “in or near” the DMZ.





Agent Orange Exposure Korea

- **Exposed Units:**

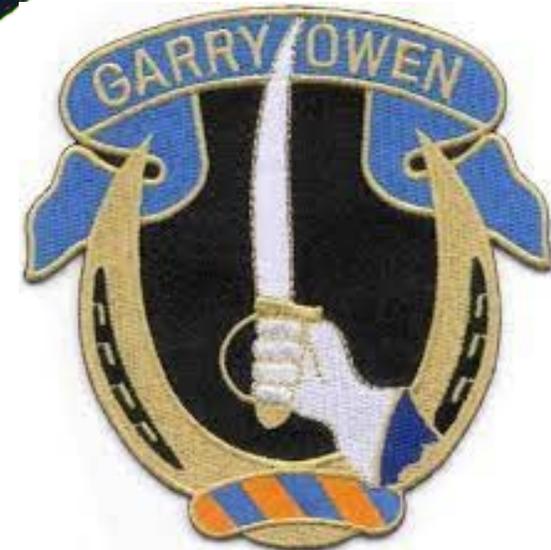
- Combat Brigade, 2 Inf Div or 3rd Brigade, 7 Ind Div
 - 1st Battalion—72nd Armor, 73rd Armor, 12th Artillery, 15th Artillery, 9th Infantry, 17th Infantry, 23rd Infantry, 31st Infantry, 32nd Infantry, 38th Infantry
 - 2nd Battalion—72nd Armor, 9th Infantry, 17th Infantry, 23rd Infantry, 31st Infantry, 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
 - 54th CBRE Detachment
 - 239th Aviation Company / 6th Aviation Platoon – limited to aircrew



Agent Orange Exposure Korea

- **Exposed Units:**

- 2nd Engineer Battalion, 2nd ID
- 2nd MP 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





Agent Orange Exposure C-123 Crews

- Since 19 June 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))
- Air Force Specialty Code (AFSC) indicating **duties as a flight, ground maintenance, or medical crew member on one of these aircraft**



Agent Orange Exposure C-123 Crews

• Units from:

- Pittsburgh International Airport, Pennsylvania, USAF Reserve Station (1972-82)
- Westover AFB (Westover Air Reserve Base) (1972-82)
- Hanscom Field AFB, Massachusetts (1972-82)
- **Lockbourne/Rickenbacker AFB, OH (USAF Reserves, Rickenbacker ANG Base) (1969-86)**
- Hurlburt Auxiliary Field, Eglin AFB, Florida (1970-73)
- Langley AFB, Virginia (1970-73)
- Luke AFB, Arizona (1970-73)
- Tainan Airfield, Taiwan (1969-70)
- Howard AFB, Panama (1970-73)
- Osan Air Base, South Korea (1970-1973)
- Clark AFB, Philippines (1969-1970)





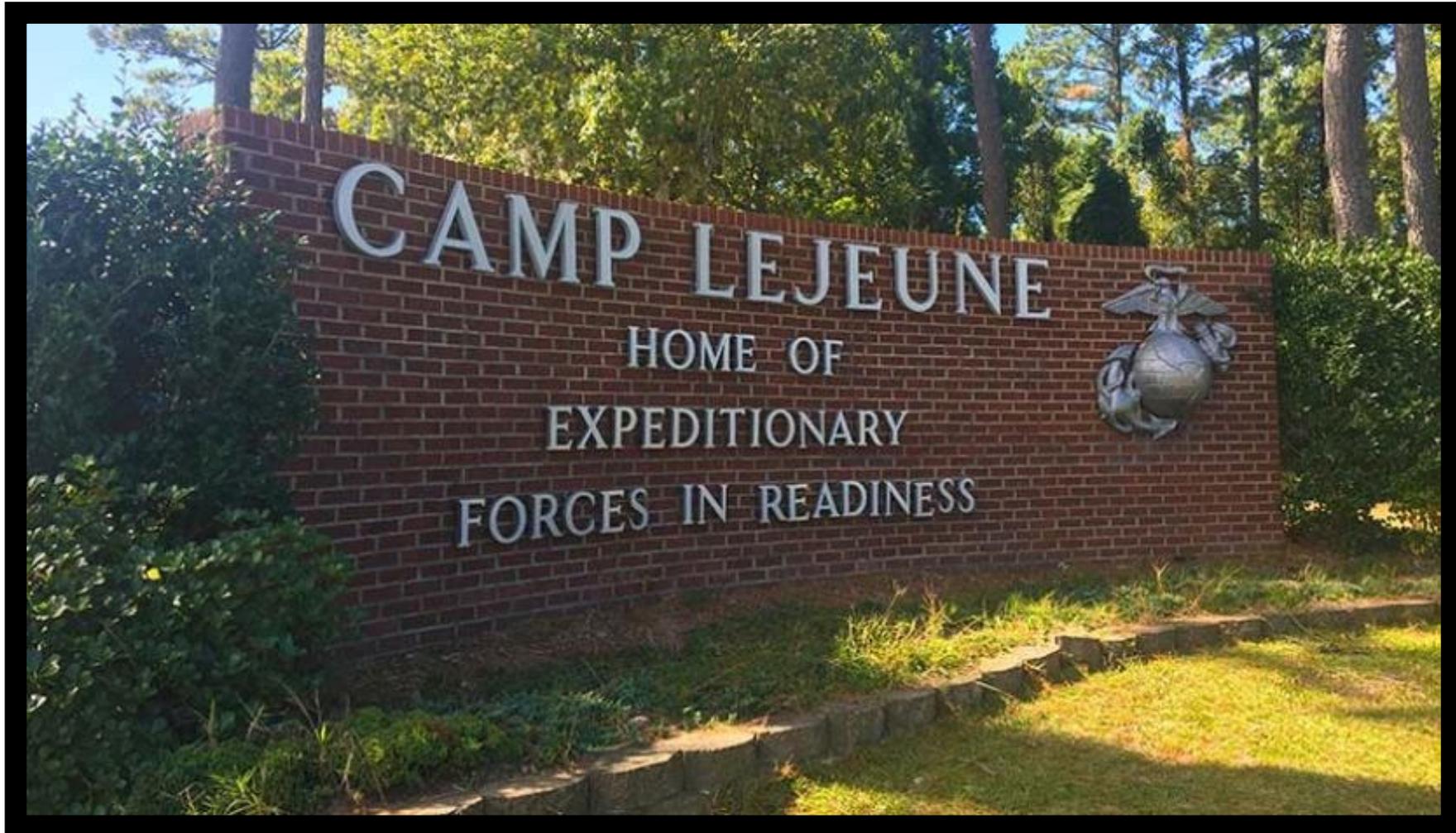
Presumptive AO Diseases

- 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
- 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)*

* Does not require manifestation at 10%



Camp Lejeune Water Contamination





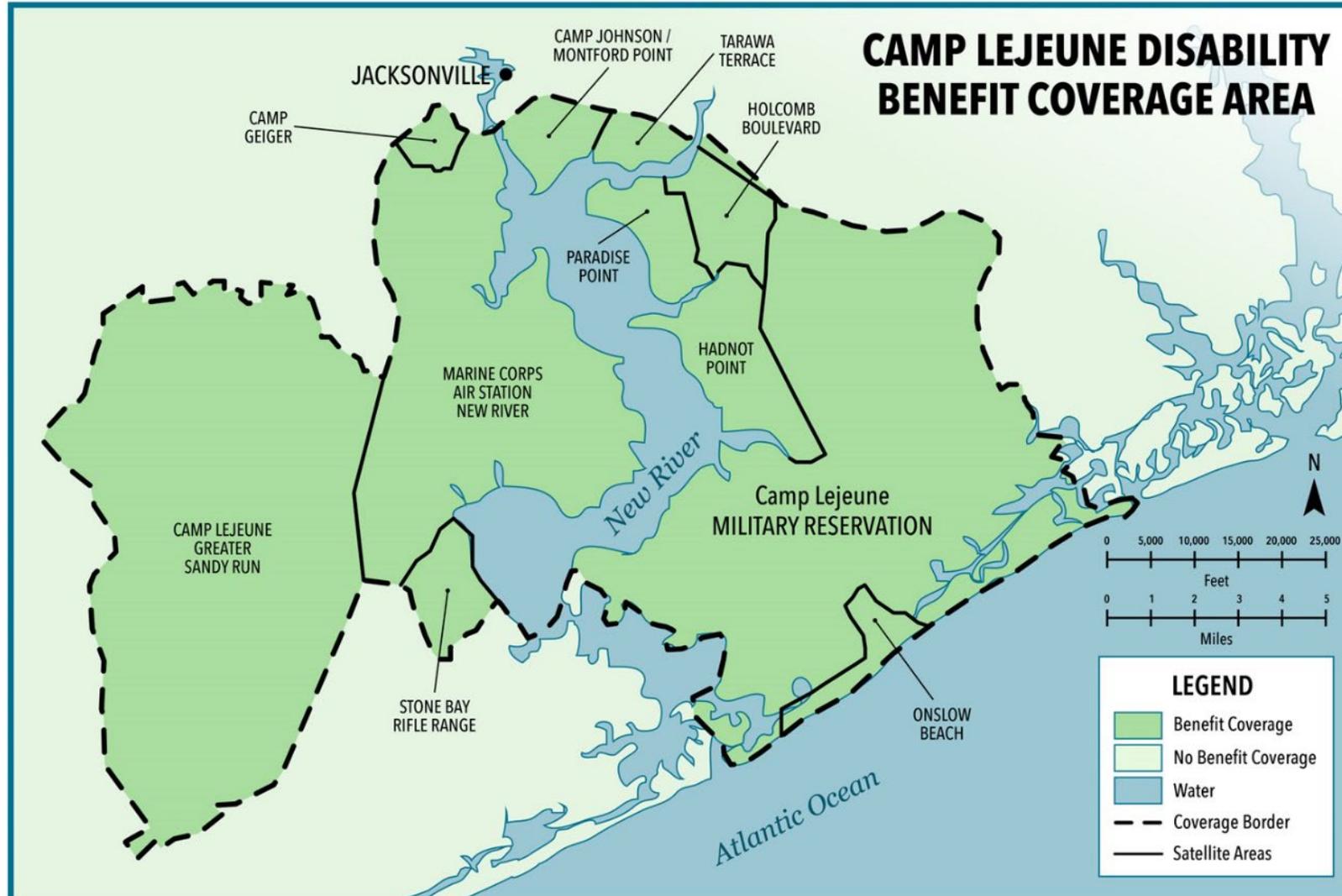
Camp Lejeune Water Contamination

- Contamination of water supply from 1953-1987
 - Trichloroethylene (TCE), Perchloroethylene (PCE), Benzene, Vinyl Chloride
- Eligibility:
 - Veteran/Reservist/National Guard served on Camp Lejeune (including USMC Air Station New River), for at least 30 cumulative days between August 1953 – December 1987
- Marine Corps Auxiliary Landing Field Bogue
- Must have orders or other proof
- **FTCA Claims –**
 - **408,963+ claims filed** (status: <https://camplejeunecourtinfo.com/status-reports/>)





Camp Lejeune Water Contamination





Camp Lejeune Water Contamination

- Presumed Service Connection is for 8 diseases only:
 1. Adult-onset Leukemia
 2. Aplastic Anemia
 3. Bladder Cancer
 4. Kidney Cancer
 5. Liver Cancer
 6. Multiple Myeloma
 7. Non-Hodgkin's Lymphoma
 8. Parkinson's Disease
- Other health care conditions considered by VA treatment purposes/priority groups at VHA





Persian Gulf War





Persian Gulf War



- 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.”
- “Persian Gulf Veterans”
 - 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
 - Added in 2022: Afghanistan, Egypt, Israel, Jordan, Syria, Turkey
- Effective Dates: 2 August 1990 - **Open**



Persian Gulf War



- Qualifying **Chronic Disabilities** – “undiagnosed illnesses”
 - “Chronic” = 6+ months
 - Examples of symptoms:
 - Fatigue; Headache; Muscle pain; Skin abnormalities; Joint pain; Neurologic abnormalities; Neuro-psychological symptoms; Respiratory symptoms; Sleep disturbances; Gastrointestinal symptoms; Cardiovascular symptoms; Abnormal weight loss; Menstrual disorders
- Medically Unexplained Chronic Multi-Symptom Illnesses (MUCMI)
 - Chronic Fatigue Syndrome
 - Fibromyalgia
 - Functional Gastrointestinal Disorders



Persian Gulf War



- **Infectious Diseases** listed in 38 C.F.R. § 3.317(c) presumed for certain Gulf War Veterans
 - VA does not extend presumption for infectious diseases to Veterans who served in Israel, Egypt, Turkey, Syria, and Jordan
- Diseases must manifest within one year of service in SWA Theater of Operations
 - Visceral Leishmaniasis and TB - No time limit





Burn Pits





Burn Pits

- 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
- No requirement that disease manifest during a certain period after service or to a certain disabling degree



Burn Pits

- **“Covered Veterans”**

- 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



Burn Pits

- **“Covered Veterans”**
- VA also considers an individual a “covered Veteran” if Veteran, 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





Burn Pits

Covered Diseases

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



Burn Pits

Newly-Added Diseases

- In January 2025, VA created two new presumptions of service connection for all “covered veterans”
 - Urinary bladder cancer, including over-lapping sites of the bladder
 - Ureter cancer, including uretic orifice and urachus
- In January 2025 – in a separate rulemaking – VA added five more presumptions of service connection for all “covered veterans”
 - Acute leukemias;
 - Chronic leukemias;
 - Multiple myelomas, including monoclonal gammopathy of undetermined significance (MGUS);
 - Myelodysplastic syndromes (MDS); and
 - Myelofibrosis



NVLSP

Five Theories of Service Connection

1. Direct Service Connection
2. Aggravation
3. Statutory Presumption – covered in next session
4. Secondary to Existing Service-Connected Disability
5. Caused by VA Medical Treatment



NVLSP

Secondary Service Connection

- 38 C.F.R. § 3.310(a)
 - “Except as provided in § 3.300(c), disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered part of the original condition.”



NVLSP

Secondary Service Connection

- Secondary SC can be established:
 1. Where an SC condition **CAUSES** (contributes to the creation of) a new disability, **OR**
 2. Where an SC disability **AGGRAVATES** (worsens) a non-service-connected condition



NVLSP

Secondary Service Connection

- In approaching secondary SC claims:
 - Make sure you look at not just whether SC condition directly causes or aggravates another condition, but also whether the SC condition impedes the treatment for another condition, or otherwise makes the condition worse
 - Be mindful of such things as medication side-effects, as well as the inability to treat a non-SC condition
 - *See Spicer v. McDonough*, 61 F.4th 1360 (Fed. Cir. 2023)



Secondary Service Connection Common Secondary Conditions

- Some Common Secondary Conditions (these are just a few) -
 - Obesity (as an “intermediate step” between SC disability and condition associated with obesity, e.g., sleep apnea, hypertension, heart disease, diabetes mellitus, stroke, gout, gallbladder disease/gallstones, osteoarthritis, asthma, some cancers)
 - Parkinsonism, including Parkinson’s disease, unprovoked seizures, certain dementias, depression, and diseases of hormone deficiency that result from hypothalamo-pituitary changes - as secondary to TBI (presumed per 38 C.F.R. § 3.310(d))
 - Heart/hypertension as secondary to PTSD
 - Headaches as secondary to PTSD
 - Sexual dysfunction as secondary to PTSD



Secondary Service Connection Drugs/Alcohol

- Disabilities involving alcohol and drug abuse
 1. Primary alcohol or drug abuse disabilities that develop during service
 - SC NOT permitted (*see 38 USC § 1110*)
 2. Alcohol or drug abuse disabilities that develop secondary to SC condition
 - SC permitted
 3. Disabilities that result from or are aggravated by the secondarily SC alcohol or drug abuse disability
 - SC permitted



Secondary Service Connection Drugs/Alcohol

- Advocacy Advice
- If Vet uses alcohol or drugs to self-etc.)—then the resulting disability should be SC
- Make sure VA appropriately considers effects of alcohol and drug use when assigning disability rating



NVLSP

Five Theories of Service Connection

1. Direct Service Connection
2. Aggravation
3. Statutory Presumption – covered in next session
4. Secondary to Existing Service - Connected Disability
5. **Caused by VA Medical Treatment**



1151 Defined

- Disability ***caused by*** VA medical care, VR&E, or CWT may be treated “as if” it is SC
 - CWT is VA compensated work therapy (under 38 USC § 1718)
 - VR&E is VA vocational readiness and employment (vocational rehabilitation) (under 38 USC Chapter 31)



Four Requirements of 1151 Claim

1. **Additional disability or death; AND**
2. Caused by hospital care, medical or surgical treatment, or examination (or as a result of VA Vocational Rehab or Compensated Work Therapy Program); **AND**
3. Care was furnished either by VA employee or in a VA facility; **AND**
4. Proximate cause of disability or death was:
 - Carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the VA in furnishing the hospital care, treatment, or examination; or
 - An event not reasonably foreseeable



Additional Disability or Death

- **Additional disability:** VA compares Veteran's condition immediately before care or treatment to condition after care or treatment
- An additional disability can include:
 - A new disability that results from treatment; or
 - A worsening of already existing condition (aggravation)
- "Disability" has the same meaning as SC claims



Four Requirements of 1151 Claim

1. Additional disability or death;
2. Caused by hospital care, medical or surgical treatment, or examination (or as a result of VA Vocational Rehab or Compensated Work Therapy Program);
3. Care was furnished either by VA employee or in a VA facility; AND
4. Proximate cause of disability or death was:
 - Carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the VA in furnishing the hospital care, treatment, or examination; or
 - An event not reasonably foreseeable



Caused by VA Medical Treatment, VR&E, or CWT

- Types of **qualifying VA care**:
 - Hospital care;
 - Medical or surgical treatment;
 - Medical examination;
 - Vocational training and rehab services;
 - Compensated Work Therapy (CWT)





Caused by VA Medical Treatment, VR&E, or CWT

- **Example –**

- Veteran undergoes medical treatment at VA facility for a knee condition
- While sitting on the examination table, a metal ceiling grate above the exam table falls on the veteran, causing additional injury to his knee
- The Court found that the veteran's additional disability was **not “caused” by the VA examination**
 - *See Loving v. Nicholson*, 19 Vet. App. 96 (2005)



Caused by VA Medical Treatment, VR&E, or CWT

- In determining whether a Veteran's condition was ***caused by*** hospital care or other medical treatment, look to the following factors:
 - Nature of services provided;
 - Degree of control over the patient;
 - Mental and physical conditions of patients;
 - Foreseeability of potential harms



4 Requirements of 1151 Claim

1. Additional disability or death;
2. Caused by hospital care, medical or surgical treatment, or examination (or as a result of VA Vocational Rehab or Compensated Work Therapy Program);
3. Care was furnished either by VA employee or in a VA facility;
AND
4. Proximate cause of disability or death was:
 - Carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the VA in furnishing the hospital care, treatment, or examination; or
 - An event not reasonably foreseeable



Care Furnished by VA Employee or at VA Facility

- VA employee: must be engaged in providing hospital care, medical or surgical treatment, or examination
 - Must relate to furnishing of **medical services**
 - Actions of non-health care workers do not count
 - Ex: janitors, security officers, engineers, administrators
- VA facility: a facility over which the Secretary has direct jurisdiction
 - If care is furnished in **VA facility**, it does not have to be provided by VA employee
 - Ex: non-VA contract personnel working in VA facility





Hypothetical

- Can Veteran receive compensation under Section 1151 when the additional disability was incurred during a procedure performed at a non-VA facility by a non-VA employee if VA employee recommended the procedure?
- In other words, can the “VA care” in a Section 1151 claim be the referral?



4 Requirements of 1151 Claim

1. Additional disability or death;
2. Caused by hospital care, medical or surgical treatment, or examination (or as a result of VA Vocational Rehab or Compensated Work Therapy Program);
3. Care was furnished either by VA employee or in a VA facility;
AND
4. Proximate cause of disability or death was:
 - Carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the VA in furnishing the hospital care, treatment, or examination; or
 - An event not reasonably foreseeable



Proximate Cause

- Proximate cause: “the action or event that directly caused the disability or death, as distinguished from a remote contributing cause” (38 C.F.R. § 3.361(d))
- Under 38 U.S.C. § 1151(a)(1)(A), proximate cause of disability must be:
 - Carelessness,
 - Negligence,
 - Lack of proper skill,
 - Error in judgment, or
 - Similar instance of fault



Establishing Proximate Cause

- Two ways to establish VA fault was proximate cause of additional disability or death:
 1. VA failed to exercise degree of care that would be expected of reasonable health care provider
 2. VA provided care without Veteran's or surrogate's informed consent



Failure to Exercise Reasonable Degree of Care

- Whether it is as likely as not that VA failed to exercise degree of care expected of reasonable health care provider
- Determination involves what constitutes standard medical practices
- Opinion on this issue must come from medical professional





Event Not Reasonably Foreseeable

- Event does not have to be completely unforeseeable, but one that a reasonable health care provider would not consider an ordinary treatment risk
- Consider whether health care provider would have disclosed possibility of an event occurring when providing **informed consent**
 - Ex: Earthquake occurs during surgery causing surgeon to accidentally sever a nerve



Informed Consent

- Practitioner must explain treatment in understandable language and discuss expected benefits; reasonably foreseeable risks, complications, or side effects; alternative treatment options; and results if no action is taken
- Consent can be implied
 - **Example: individual unconscious and immediate medical care needed to save life**



Federal Tort Claims Act

- Additional remedy available to some Veterans
- Waiver of sovereign immunity allows claimant to sue federal government for injury or death caused by negligence of government employee
- Claimant must first file administrative claim with VA
 - If admin claim is denied by VA, claimant can then file lawsuit in federal court





Federal Tort Claims Act

- Unlike Section 1151 claims, FTCA claims have a two-year statute of limitations and claimant must file within 6 months of agency's written denial
- Claimants can pursue simultaneously a claim for VA compensation under 38 U.S.C. § 1151, and a lawsuit under FTCA
- However, Section 1151 benefits will be **offset** by the total amount of an FTCA judgment or settlement



Unauthorized Practice of Law (UPL)

- Accredited VSOs practice administrative law – applying the facts to the pertinent laws and regulations, preparing, presenting and prosecuting claims and appeals before the agency (VA).
 - VA’s accreditation program allows non-lawyer VSOs to practice law consistent with the scope of the 21-22 and the standards of conduct.
- VSOs cannot provide any legal advice, recommendations, or other substantive information pertaining the prosecution of claims under the Federal Tort Claims Act.
 - This would constitute the unauthorized practice of law and could be subject to disciplinary action.
 - Possible criminal penalties for the unauthorized practice of law.



Federal Tort Claims Act

- So What Can a VSO say?

Hey, since we're talking about an 1151 claim, there's also a federal law that might apply to you if you wanted to take the issue to court. You should talk to a lawyer you trust or call the Ohio State Bar for referral if you are interested. Let me give you the number to the Bar.



NVLSP

