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The Impact of Spencer v. Brown and Routen v. Westand VAs handling of Gulf War Claims

The Gulf War veterans (GWV) need to remember the court cases of Spencer v. Brown for a very simple reason; it is how to fight the injustice they have been dispensed by the VBA. Yes, their claims denied on the grounds they could not reopen the claim as there was no "new and material evidence (N&M)". A GWV can use this when it comes to their claim filed under CFR 38 § 3.317 in some cases.

First thing is the GWV will need to have been given diagnosed with and then had the claim denied under CFR 38 § 3.317 for one or more of the following, Fibromyalgia (FM), Chronic Fatigue Syndrome (CFS) and Irritable Bowel Syndrome (IBS) before the presumptive law was passed took was in the CFR.

Next the veteran would need to have filed to reopen the claim after the new regulation effective date of March 2002 and have the VBA deny the claim on grounds of no N&M. Here congress and the VA created a new means of being granted benefits than before. Now benefits due to the changes in the law, the benefits are now a presumptive to the veteran's service in the Gulf war, something now afforded to them in the earlier claim and in light of both case of *Spencer v. Brown* & *Routen v. West* the GW-claim is actually an entirely new claim as per the case law. Under the law/ regulation and these two cases it does not need to be supported by new and material evidence because it is based on an intervening substantive change in VA regulations. As discussed in *Spencer v. Brown*, the Federal Circuit held:

When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied prior to the liberalizing law or regulation. The applicant's later claim, asserting rights which did not exist at the time of the prior claim, is necessarily a different claim.

In *Routen v. West*, the Federal Circuit reaffirmed its earlier decision in *Spencer V. Brown*:

There is a good argument that, if a new law provides for benefits not previously available, even though grounded on some but not all of the same facts adjudicated under an earlier law, a new cause of action is created along with a new entitlement to a remedy. Thus, if the old law required proof of facts A, B, and C, and the new law requires proof of facts A, B, and D, a veteran who lost the A, B, C case under the old law because he could not establish C would seem free to claim under the new law, assuming he can establish A, B, and D.

Here we can have:
A= proof the veteran served in the Gulf
B= Veterans is DX with FM at 10% or more
C= it started in the service. (If C could not be proven then the claim is denied)

2002 presumptive end date is 2011.

D= It is DX before Dec 31, 2011 (new D is now met from the denied claim of 1999) claim date is no earlier than March 2002. Date the benefit became effective.

It could also work on claim denied before 1997/8 when the symptoms of the undiagnosed illness did not start in the 2 year time frame. Then the VA changed it to 2006, but claim still was not allowed on the same grounds. Note you could not get the claims for FM, CFS and IBS. There is a letter back then on this.