

February 4, 2010

Director (00/21) In Reply Refer To: 211A

All VA Regional Offices Training Letter 10-01

SUBJ: Adjudicating Claims Based on Service in the Gulf War and Southwest Asia

Purpose

Compensation and Pension (C&P) Service is providing the following information and guidelines in order to promote regional office awareness, consistency, and fairness in the handling of disability claims from Veterans with service in Southwest Asia.

Background

The United States military presence in Southwest Asia began in 1990 with Operations Desert Shield and Desert Storm. Troops remain in the theater of operations and currently support Operations Enduring Freedom and Iraqi Freedom.

After the initial Operations Desert Shield and Desert Storm, Congress set forth statutory directives, codified at 38 U.S.C. § 1117, upon which the regulations at 38 C.F.R. § 3.317 are based. These laws address a range of chronic disabilities reported by Veterans who served in Southwest Asia that do not correspond to recognized categories of diseases. The directives and regulations defined such disabilities as “undiagnosed illnesses”; however, subsequent amendments to 38 U.S.C. § 1117 expanded the definition of a chronic disability to include certain diagnosed illnesses with inconclusive etiologies.

These statutory and regulatory provisions apply to any Veteran who served in Southwest Asia, even though their establishment arose from Operations Desert Shield and Desert Storm. As such, adjudication of disability claims for certain diagnosed chronic illnesses from Veterans who served in Southwest Asia differs from procedures for other disability claims.

Questions

Questions can be e-mailed to VAVBAWAS/CO/211/ENVIRO.

/s/

Bradley G. Mayes,

Director

Compensation and Pension Service

Adjudicating Claims Based on Service in the Gulf War and in Southwest Asia

I. Introduction

History of Disability Patterns Associated with Gulf War and Southwest Asia Service

The first Gulf War of 1990-1991, sometimes referred to as the Persian Gulf War, resulted in the liberation of Kuwait from the hostile military forces of Iraq. Operations Desert Shield and Desert Storm involved nearly 700,000 United States service personnel. The initial military operation was successful and relatively short-lived, but led to a continuing presence of United States military personnel in Southwest Asia, and ultimately to the current Gulf War's Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom in Iraq.

Following cessation of initial Gulf War military operations in 1991, Veterans of this conflict began to report patterns of chronic debilitating medical symptoms. They typically included some combination of chronic headaches, cognitive difficulties, widespread bodily pain, unexplained fatigue, chronic diarrhea, skin rashes, respiratory problems, and other abnormalities. These symptoms did not correspond easily to recognized categories of diseases and presented a problem for health care diagnoses and treatment procedures, as well as for regional office decision makers attempting to adjudicate claims for disability compensation. Because the problem involved a significant percentage of Gulf War Veterans, estimated at 25 percent, the Department of Veterans Affairs (VA) initiated studies seeking to explain these chronic illness patterns.

Numerous scientific studies have been conducted, including a series by the National Academy of Sciences' Institute of Medicine (IOM) and a recent study by the Research Advisory Committee on Gulf War Veterans' Illnesses (RAC). The goal of these studies has been to explain disability patterns associated with Gulf War service in terms of the potential health hazards experienced in the Southwest Asian environment. Among the environmental hazards linked to service during the initial Gulf War are: smoke and particles from over 750 Kuwaiti oil well fires; widespread pesticide and insecticide use, including personal flea collars; infectious diseases indigenous to the area, such as leishmaniasis; fumes from solvents and fuels; ingestion of pyridostigmine bromide tablets on a daily basis, as a nerve gas antidote; the combined effect of multiple vaccines administered upon deployment; and inhalation of ultra fine-grain sand particles. Although IOM studies have produced inconclusive results regarding the specific effects of the environmental hazards on Gulf War Veterans' health, the RAC study indicates that service in Southwest Asia may be associated with disturbances of the brain and central nervous system, including dysfunctions of the autonomic nervous system, neuromuscular system, neuroendocrine system, and sensory systems, as well as the immune system.

Although most studies have focused on the initial Gulf War, information is accumulating that indicates environmental hazards may also be widespread in the current theater of Gulf War operations and may contribute to the disability patterns typically associated with Southwest Asia service.

Gulf War Legislation and Regulations

In 1994, Congress enacted the “Persian Gulf War Veterans’ Benefits Act,” which is codified at 38 U.S.C. § 1117. This legislation sought to promote research on the medical disability patterns associated with Gulf War service and to provide compensation for “disabilities resulting from illnesses that cannot now be diagnosed or defined, and for which other causes cannot be identified.” Through this legislation, the term “undiagnosed illnesses” was introduced and incorporated into VA regulations at 38 C.F.R. § 3.317.

As more research was conducted and more knowledge of the disability patterns associated with Gulf War and Southwest Asia service accumulated, Congress amended § 1117 in 2001 by expanding the associated disabilities to include “medically unexplained chronic multisymptom illnesses.” The Congressional Joint Explanatory Statement accompanying this statutory amendment described the new terminology as “a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities.” This language was subsequently incorporated into the revised VA regulations at § 3.317. The result of this change was to include both “undiagnosed illnesses” and certain “diagnosed illnesses” under the overarching heading of “a qualifying chronic disability.” Examples of qualifying chronic disabilities were identified by Congress and incorporated into VA regulations. These included chronic fatigue syndrome, irritable bowel syndrome, and fibromyalgia.

Although these three chronic disabilities were intended by Congress to serve as examples, the amended regulation indicated that they were the only disability patterns available for consideration as medically unexplained chronic multisymptom illnesses. Because military personnel continue to operate in Southwest Asia and continue to be exposed to potential environmental hazards, including some not experienced during the initial 1990-1991 Gulf war, C&P Service has determined that an adjustment to the regulation is in order. Therefore, § 3.317 will be amended to clarify that the three currently listed medically unexplained chronic multisymptom illnesses are only examples and are not exclusive. This will allow medical examiners more latitude in evaluating disability patterns based on service in Southwest Asia.

II. Adjudication Guidelines for Regional Offices

Qualifying Veterans

Although the initial directives for adjudicating disability patterns associated with Gulf War service were intended to assist Veterans of the 1990-1991 Persian Gulf War, they remain in effect today and must be applied to all veterans with Southwest Asia service. The regulatory definition of a “Persian Gulf Veteran” provided in § 3.317 includes service in a large area of Southwest Asia, but does not include Afghanistan. Considering the importance of current U.S. military operations in Afghanistan and its environmental similarity to all other regions of Southwest Asia, C&P Service has determined that Veterans with service in Afghanistan fall under all laws related to Gulf War and Southwest Asia service. A regulatory amendment to make this official is forthcoming.

Types of Claims Involved

Disability claims based on Gulf War and Southwest Asia service are generally filed directly by the Veteran. Many were filed in the years following the initial 1990-1991 Gulf War and the rate of filing from these Veterans has diminished. However, such filings continue to occur because of the chronic nature of the disability patterns. Additionally, current evidence indicates that environmental hazards similar to those faced during the initial Gulf War, as well as new potential hazards, are faced by troops currently serving in Iraq and Afghanistan. Therefore, regional office personnel must be aware that a variety of disabilities may affect any Veteran with Southwest Asia service. This means that a thorough review of medical evidence associated with claims from these Veterans is necessary to identify any signs and symptoms potentially associated with Southwest Asia service that are not directly claimed.

Threshold Requirements for Service Connection

Veterans with objective indications of a qualifying chronic disability associated with service in Southwest Asia may be service connected only if the disability became manifest during military service in Southwest Asia or to a degree of 10 percent or more, not later than December 31, 2011. This date will likely be extended by Congressional action. In addition, to establish the chronic nature of the disability, it must exist for at least 6 months or exhibit intermittent episodes of improvement and worsening over at least a 6-month period.

Service connection will not be granted if there is affirmative evidence that the qualifying chronic disability: (1) was not incurred during active military service, (2) was caused by intervening conditions or events occurring between the Veteran's last service in Southwest Asia and the onset of the illness, or (3) is the result of the Veteran's own willful misconduct or the abuse of alcohol or drugs.

Qualifying Chronic Disabilities Associated with Service in Southwest Asia

Qualifying chronic disabilities include two distinct categories: (1) "undiagnosed illness" and (2) "medically unexplained chronic multisymptom illness." The first category, by definition, cannot be associated with a diagnosis. However, the second category refers to diagnosed illnesses that are without conclusive pathophysiology or etiology and are characterized by a cluster of signs and symptoms featuring fatigue, pain, disability out of proportion to physical findings, and inconsistent laboratory findings. Examples of unexplained chronic multisymptom illnesses are provided in § 1117. They include, but are not limited to: (1) chronic fatigue syndrome; (2) fibromyalgia; and (3) irritable bowel syndrome. Service connection is appropriate for any of these when diagnosed.

Although medically unexplained chronic multisymptom illnesses may be diagnosed, and are therefore different from undiagnosed illnesses, if the diagnosis is partially understood in terms of etiology or pathophysiology, then it will not be considered medically unexplained. This caveat represents the intention of Congress to exclude from § 1117 certain readily diagnosable illnesses such as diabetes and multiple sclerosis, which are considered to be of partially understood etiology. The issue of whether a Veteran's particular chronic multisymptom disability pattern is without a conclusive etiology, or represents a disability pattern with a partially understood etiology, must be determined on a case-by case basis and will require a medical opinion.

Signs and Symptoms of Qualifying Chronic Disabilities

Signs and symptoms that may be manifestations of both undiagnosed illnesses or medically unexplained chronic multi-symptom illnesses include, but are not limited to: (1) fatigue, (2) signs or symptoms involving skin, (3) headache, (4) muscle pain, (5) joint pain, (6) neurological signs or symptoms, (7) neuropsychological signs or symptoms, (8) signs or symptoms involving the upper or lower respiratory system, (9) sleep disturbances, (10) gastrointestinal signs or symptoms, (11) cardiovascular signs or symptoms, (12) abnormal weight loss, and (13) menstrual disorders.

Development in Claims based on Service in Southwest Asia

Development procedures are covered in M21-1MR at Part IV, Subpart ii, Chapter 1, Section E. The procedures are generally the same as those for any disability claimed by the Veteran or reasonably raised by the regional office. However, as stated previously, C&P Service is amending § 3.317 to clarify that chronic fatigue syndrome, irritable bowel syndrome, and fibromyalgia are not the only disability patterns that can be considered as medically unexplained chronic multisymptom illnesses. Therefore, until the amended regulation becomes final, regional office personnel will be required to hold any claim where the medical evidence shows a disability pattern that is not one of the three currently identified. These claims can be held under end product (EP) code 698 until the amended regulation is finalized. Initial development can proceed normally because the determination that a Southwest Asia Veteran's particular disability pattern is a previously unidentified medically unexplained chronic multisymptom illness cannot be made until after a VA medical examination has been conducted and a medical opinion rendered.

This Training Letter highlights and clarifies the development procedures most closely associated with service in Southwest Asia. They include: (1) procuring service treatment records, all relevant private medical records, and Gulf War Registry examination results, if applicable; (2) acquiring relevant non-medical and lay evidence; (3) verifying service in Southwest Asia; (4) identifying the specific nature of the disability; and (5) requesting a VA medical examination. Special efforts and inquiries may be necessary when procuring medical evidence in these claims because of the difficulties involved with determining whether or not a diagnosis has been established. Also, non-medical and lay statements take on greater importance. Therefore, extended development may be necessary and consideration must be given to evidence such as any time lost from work and any attempts by the Veteran to seek medical treatment for the disability pattern. Consideration must also be given to lay statements describing the Veteran's disability pattern from persons in a position to know the Veteran. Such statements may constitute probative evidence by describing changes in the Veteran's appearance, physical abilities, and mental or emotional status.

Rating Procedures

Rating procedures are covered in M21-1MR at Part IV, Subpart ii, Chapter 2, Section D. When service connection is in order, consideration must be given to assigning a diagnostic code that represents the greatest degree of disability. There may be instances where a chronic undiagnosed illness or diagnosed multi-system illness affect distinct body systems. In such a case, a determination should be made that is most consistent with the evidence and most beneficial to the Veteran.

A special hyphenated analogous diagnostic code system has been developed by VA to track disability claims based on Gulf War and Southwest Asia service. The system involves use of two four-digit number sets separated by a hyphen to identify a qualifying chronic disability. The first four-digit number set starts with the numbers “88,” and is followed by the first two numbers of the body system diagnostic code most closely associated with the disability pattern. If, for example, a disability pattern involves the bronchial pulmonary system, which begins its diagnostic code numbers with 66, the first four-digit number set would be 8866. The second four-digit number set would be the actual diagnostic code that most closely describes the Veteran’s disability pattern. In this example, the Veteran may have signs and symptoms resembling bronchial asthma and so diagnostic code 6602 for bronchial asthma would be used.

When the two four-digit number sets are combined, the hyphenated analogous diagnostic code would be 8866-6602. A more detailed explanation of this system is provided in M21-1MR. Once the disability pattern has been associated with a diagnostic code, the criteria in that code should be used to assign a rating percentage based on the level of disability experienced by the Veteran. This analogous diagnostic code number system has its historical roots in the disabilities that emerged following the 1990-1991 Gulf War. At the time, the associated disabilities were referred to as “undiagnosed illnesses.” The term has remained in common usage despite legislative changes that added diagnosed medically unexplained chronic multisymptom illnesses as a distinct category of qualifying disease. Therefore, regional office personnel must be aware that this number system applies to all qualifying chronic disability claims associated with service in Southwest Asia during the Gulf War, not just those where an undiagnosed illness is involved. Any claim made directly by a Veteran, or developed by the regional office based on the Veteran’s records, which involves a diagnosed medically unexplained chronic multi-symptom illness must also be rated using this number coding system.

VA Medical Examination Requests

Because of the non-specific etiology of disability patterns, special considerations must be given to the initial evidence associated with these claims and the issue of when to request a VA medical examination. Regarding the issue of establishing a Veteran’s current disability, which generally serves as the basis for requesting the VA examination, one of two scenarios may occur. Either there is evidence that the Veteran has previously sought medical treatment for the disability pattern and has been “diagnosed” with a condition or there is no evidence that the Veteran has previously been medically treated for the disability pattern.

If a Veteran has previously sought treatment for a multi-symptom illness from a private physician, it is not likely that a resulting medical report will describe the Veteran’s disability pattern as an “undiagnosed illness.” Medical personnel in general and physicians in particular are trained to produce a diagnosis as the basis for treatment. Therefore, a “diagnosis” may appear in the Veteran’s private medical report. However, such a diagnosis is not grounds for denying the claim because medically unexplained chronic multi-symptom illnesses are diagnosable. Regional office personnel must consider the nature of the diagnosis and the disability description provided in the medical report. If the diagnosis involves one of the chronic multi-symptom illnesses described in § 3.317, service connection is appropriate and a VA examination may be necessary to determine severity in order to assign a disability rating. Even if the disability pattern differs from one of the identified chronic multi-symptom illnesses, as would be the case with signs and symptoms of certain respiratory conditions, consideration must still be given to requesting a VA examination. In such a case, it is appropriate to proceed with a VA examination to determine if

the condition can be characterized as a disability pattern with an inconclusive etiology. It should also be kept in mind that when medical evidence shows a definite diagnosed condition for a Veteran with Southwest Asia service, that diagnosed condition could have been incurred or aggravated during service and would therefore be subject to service connection on a direct basis outside the provisions of § 3.317.

If there is no medical evidence that the Veteran has previously been treated for the disability pattern and the only significant evidence is the Veteran's lay statement describing the disability pattern, a VA examination is still warranted. Case law from the Court of Appeals for Veterans Claims (CAVC), interpreting 38 CFR § 3.159(c)(4), establishes a relatively low threshold for requesting VA medical examinations. In *McLendon v. Nicholson*, 20 Vet.App. 79 (2006), the Court identified four criteria that, when met, require VA to provide a medical examination. In summary, they are: (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, (2) evidence that a qualifying in-service event occurred, (3) an indication that the disability may be associated with the Veteran's service, and (4) insufficient competent medical evidence on file for a decision on the claim.

Regarding Gulf War Illness claims and the first criterion, CAVC has repeatedly held that statements describing visible injuries and pain provided by the Veteran serve as competent evidence for the existence of such injuries and pain. In *McLendon*, the Court specifically stated that the Veteran "is fully competent to testify to any pain he may have suffered." Therefore, in claims based on service in Southwest Asia, the Veteran's lay description of the pain or other signs and symptoms of the disability pattern is competent evidence sufficient to establish a current disability or persistent or recurrent symptoms of a disability. Regarding the second criterion, once service in Southwest Asia is verified, occurrence of the qualifying in-service event is established. The third criterion is a low threshold that involves establishing an indication that the disability pattern may be associated with the Veteran's period of service. This criterion is met by virtue of the Veteran's service in Southwest Asia and a statement of a current disability pattern, particularly when such a pattern is consistent with those set forth in § 3.317. The final criterion is met when the regional office does not have sufficient evidence on file to generate a rating decision. This would almost always be the case in these claims because the VA medical examination report is the most likely means for determining whether service connection can be granted under § 3.317.

When requesting VA medical examinations, send the claims file to the examiner, specify that the examiner is to conduct a general medical examination and any required specialty examinations, and include the following italicized language with the request.

Upon exam completion, rating personnel should be aware that VA examiners have been provided with the following language along with the examination request. The language identifies four possible disability patterns that may appear in the examination reports. If the examiner has determined the Veteran's disability pattern to be either (1) an undiagnosed illness or (2) a diagnosable but medically unexplained chronic multisymptom illness of unknown etiology, including but not limited to, chronic fatigue syndrome, fibromyalgia, or irritable bowel syndrome, then service connection must be granted based on § 3.317. If the examiner has determined the Veteran's disability pattern to be either (3) a diagnosable chronic multi-symptom illness with a partially explained etiology, or (4) a disease with a clear and specific etiology and diagnosis, then service connection cannot be granted under § 3.317 and may only be granted if the medical evidence is sufficient to establish service connection on a direct basis.

Notice to Examiners Regarding Gulf-War Related Disability Claims

Examiner,

VA statutes and regulations provide for service connecting certain chronic disability patterns based on exposure to environmental hazards experienced during military service in Southwest Asia. The environmental hazards may have included: exposure to smoke and particles from oil well fires; exposure to pesticides and insecticides; exposure to indigenous infectious diseases; exposure to solvent and fuel fumes; ingestion of pyridostigmine bromide tablets, as a nerve gas antidote; the combined effect of multiple vaccines administered upon deployment; and inhalation of ultra fine-grain sand particles. In addition, there may have been exposure to smoke and particles from military installation “burn pit” fires that incinerated a wide range of toxic waste materials.

The chronic disability patterns associated with these Southwest Asia environmental hazards have two distinct outcomes. One is referred to as “undiagnosed illnesses” and the other as “diagnosed medically unexplained chronic multisymptom illnesses” that are without conclusive pathophysiology or etiology. Examples of these medically unexplained chronic multi-symptom illnesses include, but are not limited to: (1) chronic fatigue syndrome, (2) fibromyalgia, and (3) irritable bowel syndrome. Diseases of “partially explained etiology”, such a diabetes or multiple sclerosis, are not considered by VA to be in the category of medically unexplained chronic multisymptom illnesses.

Additionally, signs and symptoms that may be manifestations of both undiagnosed illnesses or diagnosed medically unexplained chronic multi-symptom illnesses include, but are not limited to: (1) fatigue; (2) signs or symptoms involving the skin; (3) headache; (4) muscle pain; (5) joint pain; (6) neurological signs or symptoms; (7) neuropsychological signs or symptoms; (8) signs or symptoms involving the upper or lower respiratory system; (9) sleep disturbances; (10) gastrointestinal signs or symptoms; (11) cardiovascular signs or symptoms; (12) abnormal weight loss; and (13) menstrual disorders.

Please examine and evaluate this Veteran with Southwest Asia service for any chronic disability pattern. Please review the claims file as part of your evaluation and state that it was reviewed. The Veteran has claimed a disability pattern related to (insert symptoms described by Veteran). Please provide a medical statement explaining whether the Veteran’s disability pattern is: (1) an undiagnosed illness, (2) a diagnosable but medically unexplained chronic multisymptom illness of unknown etiology, (3) a diagnosable chronic multisymptom illness with a partially explained etiology, or (4) a disease with a clear and specific etiology and diagnosis.

If, after examining the Veteran and reviewing the claims file, you determine that the Veteran’s disability pattern is either (3) a diagnosable chronic multi-symptom illness with a partially explained etiology, or (4) a disease with a clear and specific etiology and diagnosis, then please provide a medical opinion, with supporting rationale, as to whether it is “at least as likely as not” that the disability pattern or diagnosed disease is related to a specific exposure event experienced by the Veteran during service in Southwest Asia