

## OAJ Social Security Section Article January 2015

### Introduction To VA Disability Benefits

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#### **1. The Veteran's Administration**

The VA has two major functions, to provide health care which falls under the Veterans Health Administration (VHA); and to provide benefits and compensation to veterans and their dependents which fall under the Veterans Benefits Administration (VBA).

Per the U.S. Census Bureau, in 2009, there were 21.9 million veterans. Of these, 2.3 million served in World War II. Additional information regarding the breakdown of veterans in the country can be found at [www1.va.gov/VETDATA](http://www1.va.gov/VETDATA).

As indicated by the name, the VA serves veterans. A veteran is defined as “a person who served in the active military, naval or air services, and who was discharged or released under condition other than dishonorable” 38 U.S.C.§101(2). This does include a person serving in the Coast Guard.

#### **2. The Main Types of VA Benefits Available to Veterans**

- A. VA Pension Benefits
- B. VA Vocational Benefits
- C. VA Compensation Benefits
- D. DIC Benefits
- E. Section 1151 Benefits
- F. Readjustment Benefits

Most practitioners handle claims for VA compensation which are also known as claims for service connection.

#### **3. VA Compensation Claims – Service Connection**

There are three criteria that a veteran must meet in order to receive service-connected compensation: 1) a current disability; 2) medical nexus evidence and 3) an event in service.

A. **Current disability** – there must be a current disability that has been diagnosed by a medical professional. Even if the veteran does not yet have medical documentation, you can still continue to assist the veteran in filing a claim for service connection. This is important because the filing date establishes the effective date upon which VA compensation will eventually be paid. Additionally, as long as the connection is plausible, the VA's duty to assist is triggered and the VA will assist the veteran in development of the claim.

Be aware that some disabilities cannot be service connected by law because they pre-existed or for other specific reasons established by law. For example, personality disorders, refractive error of the eye, or dental conditions are all excluded. The VA will also not connect on a direct basis any condition that is found to be the result of willful misconduct, e.g., alcohol or substance abuse disorder. The VA will not pay compensation for conditions proven to have existed prior to service and not aggravated by service.

There are two presumptions that aid veterans, however. The first is the Presumption of Soundness. The veteran will be presumed to have been in good health upon entering the service unless there is clear evidence to the contrary. The second is the Presumption of Aggravation. If a veteran is treated in service for a condition which pre-existed the service, the condition will be presumed to have been aggravated by service, unless there is clear evidence to the contrary.

B. With service connection, there must be evidence by way of military service records of some **precipitating disease, injury or event in service**. Because of this, it is very important to understand the medical condition upon which your client's claim for service-connected compensation is based. There is no other way to know what you are looking for in the military records. This becomes even more evident when you are dealing with a rare medical condition. You will need to educate yourself and the VA adjudicators.

All sources of military records need to be reviewed. Note that service records are kept separately from treatment records because of the bifurcation of the VA. Various government agencies periodically release records that were previously designated as classified. Because of this, requests for records should be sent every six to nine months.

C. There must be a **nexus or a link** between the current disability and the in-service disease, injury or event. This means the veteran must have medical evidence that the two are related.

The standard of proof needed by the veteran is "it is as likely as not." The reviewing doctor need only opine that there is a 50-50 likelihood of a relationship between the two. 38 U.S.C. §5107(b). This is a lower standard than found in the civilian world. It is important to note, however, that the VA will reject medical opinions as having little or no probative value if the opinion does not reflect a comprehensive review of the historical medical records.

Some conditions are "presumptively" service-connected by law. For example, if a veteran was exposed to Agent Orange in Vietnam and later develops specific types of cancer or diabetes mellitus, the VA will presume there is a nexus between the condition and the veteran's in-service exposure. Information regarding these presumptive conditions can be found on the VA's website and in 38 CFR §§3.307-3.309, 3.311, 3.313(b). There are other presumptions that must manifest themselves to a degree of 10% within a specified period of time after release from the service to be deemed service connected.

The nexus is also shown if a veteran can demonstrate treatment for a condition while in the service with continuous treatment for the condition into the present. Continuation of symptoms should be enough to satisfy the nexus criteria.

#### **4. DIC and Accrued Benefits**

The VA will pay monthly compensation which is known as Dependency and Indemnity Compensation (DIC) – to the surviving spouse or dependent children of a veteran entitled to service-connected compensation under the following circumstances:

- a. The veteran's primary or contributing cause of death was a condition that was service connected, or at a minimum, met all three criteria for entitlement to service-connected compensation; or
- b. The veteran had a 100% service-connected disability for ten years prior to his/her death.

The spouse must have been married to the veteran for 1 year prior to death to qualify for DIC. In addition, in order to qualify for the maximum amount, the claim must be filed within one year of the veteran's death. Otherwise, DIC will only be paid from the date the claim was submitted. A claim for Social Security survivor benefits, however, will be treated as a claim for VA benefits and may be used as a means to obtain retroactive DIC benefits.

Regarding accrued benefits, if the veteran was entitled to VA benefits before death but they had never been paid, the surviving spouse may be entitled to those accrued benefits. Many veterans die before their claim is finally adjudicated. The surviving spouse is entitled to pick up the claim as a new one in his/her own right. If successful, the VA will pay the spouse the money the veteran would have received. The spouse is limited to the evidence in the file at the time of death. Additionally, the claim for accrued benefits must be filed within one year of the death of the veteran.

## **5. VA Pension Claim: Non-service-Connected Pension**

VA pension is a needs-based program designed to supplement the income of a veteran who is unable to support themselves financially after becoming disabled. To be eligible, the veteran must have wartime service, low income, and a total and permanent disability. This disability need not be related or connected to military service. Veterans aged 65 years or older may also qualify for VA pension benefits.

There are five eligibility requirements:

- a. The veteran must be discharged under other than dishonorable conditions.
- b. An individual who enlisted after September 8, 1980, is required to complete a minimum period of service, either twenty-four months of continuous active duty or the "full period for which the veteran was called or ordered to active duty." The veteran must also have active service that includes a total of ninety days during one or more periods of war; or at least one day of wartime service that results in a discharge for a service-connected disability.
- c. The veteran must have limited income and a net worth that does not provide for adequate maintenance.
- d. The veteran must be totally and permanently disabled at the time of application.
- e. The permanent disability cannot be due to willful misconduct.

The VA determines need by calculating the income and net worth of the veteran. As of December 2013, a single veteran with no dependents would qualify for VA pension upon

showing yearly income of less than \$12,652 (a veteran with a dependent spouse is eligible to earn up to \$16,569). The pension rates are increased if the veteran has dependents, is housebound, is in a nursing home or who needs regular aid and attendance of another person. Medical expenses, including expenses for skilled nursing home care, may also be deducted from the veteran's income.

A veteran cannot receive VA compensation and pension benefits simultaneously. In situations where a veteran is entitled to both, the VA will pay the veteran the higher of the two amounts, unless the veteran expressly requests otherwise.

A veteran may initiate this claim by notifying the VA (the regional office) in writing that he or she is seeking all benefits to which he or she may be entitled, specifically pension, and by asking VA to provide the appropriate application form. The veteran should include his or her claim number or Social Security number. This should initiate the claim. VA will often invite the veteran to perfect the claim by completing a VA Form 21-526 Veteran's Application for Compensation or Pension. The veteran will also need to complete and sign form 21-527; Income, net worth and employment statement. Veterans may also apply online on the VA's website at [ebenefits.gov](http://ebenefits.gov). This site may then be used to follow the progression of the claim.

## 6. Secondary Service-connected Claims

Direct service connection has been outlined but there are also claims for **secondary service connection**. When a veteran has a service-connected condition and later develops another medical condition as a result of the service-connected condition, the second condition will also qualify as a service-connected condition and be eligible for compensation. The elements needed are: an existing service-connected condition; a current, second condition, and a medical opinion that the second condition was caused or aggravated by the direct service-connected condition. This type of claim is common in diabetes type II claims because of all the problems arising from diabetes such as neuropathy, retinopathy, etc.

Veterans may also file claims for **increased ratings (IR)** for service-connected conditions. A veteran can file a claim for this when he/she believes the service-connected condition has become more disabling. The VA must provide an examination of the condition to determine its current severity.

Another benefit type is a claim for total **disability based on individual unemployability**. A veteran whose service-connected disability completely prevents him/her from securing gainful employment will receive compensation at the 100 percent disability rating level, even if the medical condition itself does not warrant a 100 percent disability rating. These are referred to as claims for Total Disability based on Individual Unemployability (TDIU or IU). There are two primary issues: whether the service-connected disabilities satisfy certain percentage rating requirements and whether the veteran is prevented from securing or following a substantially gainful occupation because of the service-connected disabilities. The VA is prohibited from considering other factors such as age or non-service connected disabilities.

## 7. 1151 Benefits

Benefits under 38 USC 1151 are generally referred to as 1151 claims. These allow the VA to pay compensation for death or disability as if service-connected. 1151 benefits may be paid for:

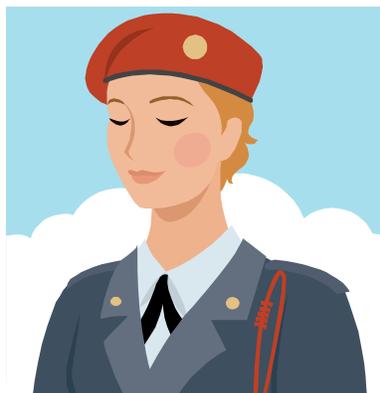
- a) injuries incurred or aggravated while receiving VA-sponsored medical treatment

b) injuries incurred or aggravated while pursuing a course of vocational rehabilitation under 38 USC Chapter 31 or participating in compensation work therapy under 38 USC 1718.

## 8. Other issues

Prior claims may be reopened with **new and material evidence**. When a veteran has a previously denied claim for service connection and the appeal period has expired, the veteran may reopen the claim with new and material evidence. New evidence is evidence that has never been submitted previously in connection with the claim. Material evidence is evidence that must relate to an unestablished fact necessary to substantiate the claim. New and material evidence cannot be cumulative or redundant of the evidence in the file at the time of the last denial and must raise a reasonable possibility of substantiating the claim.

A veteran can also file a request for revision based upon **clear and unmistakable error**. Claims for revision of a previous final VA Review Officer (VARO) or Board of Veteran Appeals (BVA) are referred to as claims based on clear and unmistakable error (CUE). A decision that reverses or revises a prior final adverse decision has the same effect as if the decision had been made on the date of the prior decision and, therefore, the effective date would be the date that would have been given to the previously denied claim. There is no time limit or statute of limitations for requesting a previous final decision be reviewed for CUE. CUE claims are rarely granted.



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