



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AP43

Presumption of Herbicide Exposure and Presumption of Disability During Service For Reservists Presumed Exposed to Herbicide

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulation governing individuals presumed to have been exposed to certain herbicides. Specifically, VA is expanding the regulation to include an additional group consisting of individuals who performed service in the Air Force or Air Force Reserve under circumstances in which they had regular and repeated contact with C-123 aircraft known to have been used to spray an herbicide agent (“Agent Orange”) during the Vietnam era. In addition, the regulation will establish a presumption that members of this group who later develop an Agent Orange presumptive condition were disabled during the relevant period of service, thus establishing that this service constituted “active, naval, military or air service.” The effect of this action is to presume herbicide exposure for these individuals and to allow individuals who were exposed to herbicides during reserve service to establish veteran status for VA purposes and eligibility for some VA benefits. The need for this action results from a recent decision by the Secretary of Veterans Affairs to acknowledge that individuals who had regular and

repeated exposure to C-123 aircraft that the United States Air Force used to spray the herbicides in Vietnam during Operation Ranch Hand were exposed to Agent Orange.

DATES: Effective Date: This interim final rule is effective on [insert date of publication in the Federal Register].

Applicability Dates: This interim final rule is applicable to any claim for service connection for an Agent Orange presumptive condition filed by a covered individual that is pending on or after [insert date of publication in the Federal Register].

Comment date: Comments must be received on or before [insert date 60 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Stephanie Li, Chief, Regulations Staff, Compensation Service (21C), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW, Washington DC, 20420, (202) 461-9700 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In 2014, VA commissioned the National Academy of Sciences' Institute of Medicine (IOM) to conduct a consensus study of all available scientific literature and knowledge on the subject of residual exposure to Agent Orange from service on aircraft formerly used during Operation Ranch Hand in Vietnam. VA commissioned this study to get a better understanding of the potential harmful exposures and health effects involved in serving on these aircraft after the conclusion of herbicide spraying operations in Vietnam. Specifically, VA requested that the IOM "determine whether there had been exposures that could lead to excess risk of adverse

health outcomes among [Air Force] Reserve personnel who flew in and/or maintained C-123 aircraft (outside of Vietnam) that had previously been used to spray Agent Orange.” See Institute of Medicine, National Academy of Sciences, POST-VIETNAM DIOXIN EXPOSURE IN AGENT ORANGE-CONTAMINATED C-123 AIRCRAFT 10 (2015), available at <http://www.publichealth.va.gov/exposures/agentorange/publications/institute-of-medicine.asp>.

According to the IOM’s 2015 report on C-123 exposures, from 1972 to 1982, approximately 1,500 to 2,100 Air Force Reserve personnel trained and worked on C-123 aircraft, of which approximately 30 had formally been used to spray herbicides in Vietnam. Id. at 9. The report noted that the aircraft had been assigned to a few Air Force Reserve units where they were used for military airlift, medical transport, and cargo transport operations in the United States and internationally. Id. at 26. Regarding the potential for harmful exposures, the IOM found that Reservists who served as flight crew (pilot, navigator, flight engineer, and loadmaster), ground maintenance crew, and aero-medical personnel had regular and repeated contact with the aircraft. Id. at 26-27. The report identified the specific aircraft and the Reserve units to which they were assigned, and concluded, “it is probable that the [herbicide] exposures of at least some [Air Force] Reservists exceeded levels equivalent to some guidelines established for office workers in enclosed settings.” Id. at 62. The IOM determined that it is “plausible that the C-123s did contribute to some adverse health consequences among [Air Force] Reservists who worked in [Operation Ranch Hand] C-123s after the planes returned from Vietnam.” Id. at 62-63.

Based upon the IOM report, the Secretary of Veterans Affairs has decided that VA will acknowledge exposure to Agent Orange for approximately 1,500 to 2,100 Air Force and Air Force Reserve personnel whose military service involved regular and repeated contact with the contaminated C-123 aircraft. Therefore, this interim final rule establishes a presumption of exposure to herbicides for individuals who performed service in the Air Force or Air Force Reserve under circumstances in which the individual concerned 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. However, most individuals with such service were members of the Air Force Reserve at the time. Basic eligibility for VA benefits requires that an individual be a “veteran” as that term is defined in 38 U.S.C. 101(2): “The term ‘veteran’ means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” Service as a member of a reserve component during a period of active duty for training or inactive duty training does not qualify an individual as a “veteran” because it does not constitute “active military, naval or air service” unless the individual is disabled or dies during that period of service as provided under 38 U.S.C. 101(24)(B) and (C).

Pursuant to the Secretary’s general rulemaking authority under 38 U.S.C. 501(a), VA has provided presumptions of service connection for diseases associated with exposure to an herbicide agent. 38 CFR 3.309(e). These presumptions of service connection are consistent with the disease-based presumptions under 38 U.S.C. 1116 for Vietnam Veterans with service in the Republic of Vietnam who are presumed by law to have been exposed to an herbicide agent during such service. Because an individual

must qualify as a “veteran” before they are eligible for presumptions of service connection, see Smith v. Shinseki, 24 Vet. App. 40, 44 (2010) (noting “[t]he Court has held that, without previously established veteran status, the presumptions of service connection . . . are inapplicable”), VA estimates that most of the servicemembers addressed by the IOM report are not presently eligible for the regulatory disease-based presumptions of service connection.

This interim final rule establishes factual presumptions that will allow Air Force Reservists who are presumed under this interim final rule to have been exposed to herbicide during their reserve service to establish veteran status as a result of that service. Although section 101(24) requires a period of active duty for training or inactive duty training “during which the individual concerned was disabled or died” for a period of active duty for training or inactive duty training to constitute “active military, naval, or air service,” the latent effects of herbicide exposure were unrecognized when section 101(24) was enacted in 1958. Operation Ranch Hand spraying commenced in 1962 and concluded in 1971, and Congress recognized the need for presumptions of service connection for Agent Orange-related conditions and regular evaluation of the science related to such conditions in the Agent Orange Act of 1991, Public Law 102-4. Pursuant to this law, the IOM in 1992 entered into an agreement with VA to review and summarize scientific evidence concerning the association between herbicide exposure during Vietnam service and conditions that might be associated with such exposure. It issued its first report on the subject in 1994. See Institute of Medicine, National Academy of Sciences, VETERANS AND AGENT ORANGE: HEALTH EFFECTS OF HERBICIDES USED IN VIETNAM (1994), available at

<http://www.publichealth.va.gov/exposures/agentorange/publications/>

[institute-of-medicine.asp](http://www.institute-of-medicine.gov). Thus, in enacting section 101(24), Congress was necessarily unaware of later scientific understanding of the potential latent effects of herbicide exposure. Indeed, Congress was necessarily informed by the science that existed at the time of enactment in 1958.

The legislative history regarding the enactment of section 101(24) does not specifically explain Congress' intent in requiring that the individual "was disabled or died" during the period of service. It is probable that Congress required a reserve component member to have been disabled "during" training because the medical science of the time understood that, if an in-service injury were to result in disability, at least some aspect of that disability generally would be manifest contemporaneous with the injury. However, subsequent developments with regard to herbicide use in Vietnam and advancements in medical understanding of the health effects of herbicide exposure raise a question regarding the application of section 101(24) to disability associated with such exposure. Viewing the generally beneficial purpose of section 101(24) in light of the evolved medical understanding, we believe it is reasonable to create a factual presumption that disability occurred during the period of service as required under section 101(24) when an individual has a present disability now scientifically associated with exposure to an herbicide agent. Specifically, the existing herbicide-related disease presumptions enumerated in 38 CFR 3.309(e), coupled with the potential for clinical uncertainty regarding when such diseases first manifested, provide a reasonable basis for presuming that disability occurred during a period of reserve service for purposes of satisfying the requirements under section 101(24)(B) or (C) in order to ensure

compensation and health care for reservists disabled as a result of herbicide exposure on reserve duty.

For the above reasons, we are amending 38 CFR 3.307 regarding disease associated with exposure to certain herbicide agents to add new paragraph (a)(6)(v). As amended, § 3.307 will presume exposure to herbicide for “[a]n individual who performed service in the Air Force or Air Force Reserve under circumstances in which the individual concerned 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.” Further, in consideration of the reserve component members with such service, VA will consider this presumed herbicide exposure to be an “injury” under section 101(24)(B) and (C). In turn, if such individual develops a presumptive disease listed in 38 CFR 3.309(e), as specified in 38 CFR 3.307(a)(6)(ii), “it will be presumed that the individual concerned became disabled during that service for purposes of establishing that the individual has active military, naval, or air service.” VA will make the factual presumption that the individual concerned was disabled during the qualifying service so that such individual’s service will constitute “active, military, naval, or air service.” As explained, we believe this is consistent with section 101(24) because herbicide exposure has uniquely latent effects which were largely unrecognized in 1958. Covered individuals may therefore establish veteran status for purposes of VA’s disability compensation, dependency and indemnity compensation, medical care, and burial benefits related to any Agent Orange-related presumptive condition.

Administrative Procedure Act

The Secretary of Veterans Affairs finds under 5 U.S.C. 553(b)(B) that there is good cause that advance notice and opportunity for public comment are impracticable, unnecessary, or contrary to the public interest and under 5 U.S.C. 553(d)(3) that there is good cause to publish this rule with an immediate effective date. This interim final rule provides a presumption of herbicide exposure for individuals who performed certain military service. This interim final rule also establishes a presumption that if such an individual develops a presumptive herbicide-related condition, the individual concerned became disabled during that service for purposes of establishing that the individual has active military, naval, or air service. These changes will make individuals who were exposed to herbicide during service eligible for some VA benefits for disabilities resulting from herbicide-related diseases. Based on the age of the individuals affected by this rule and the potential severity of the disabilities associated with their herbicide exposure, it is likely that affected individuals will have significant and urgent financial and medical needs. In order for these individuals to have access to VA benefits to include VA health care, it is essential that these rules be made effective as soon as possible.

For the above reasons, the Secretary issues this rule as an interim final rule. However, VA will consider and address comments that are received within 60 days of the date this interim final rule is published in the Federal Register.

Paperwork Reduction Act

This rule contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required in connection with the adoption of this interim final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act, 5 U.S.C. 601-612. Even so, the Secretary of Veterans Affairs certifies that this interim final rule will not directly affect any small entities. It will directly affect only VA beneficiaries. Accordingly, this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy,

a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined that it is not an economically significant regulatory action under Executive Order 12866. VA's regulatory impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its regulatory impact analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for “VA Regulations Published From FY 2004 Through Fiscal Year to Date.”

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on May 11, 2015, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: June 15, 2015

William F. Russo
Acting Director
Office of Regulation Policy & Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 3 to read as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A, continues to read as follows:

AUTHORITY: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.307 by adding paragraph (a)(6)(v) immediately after paragraph (a)(6)(iv) and revising the authority citation at the end of the section to read as follows:
§ 3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.

(a) * * *

(6) * * *

(v) An individual who performed service in the Air Force or Air Force Reserve under circumstances in which the individual concerned 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 shall be presumed to have been exposed during such service to an herbicide agent. For purposes of this paragraph, “regularly and repeatedly operated, maintained, or served onboard C-123 aircraft” means that the individual was assigned to an Air Force or Air Force Reserve squadron

when the squadron was permanently assigned one of the affected aircraft and the individual had an Air Force Specialty Code indicating duties as a flight, ground maintenance, or medical crew member on such aircraft. Such exposure constitutes an injury under 38 USC 101(24)(B) and (C). If an individual described in this paragraph develops a disease listed in 38 CFR 3.309(e) as specified in paragraph (a)(6)(ii) of this section, it will be presumed that the individual concerned became disabled during that service for purposes of establishing that the individual served in the active military, naval, or air service.

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(Authority: 38 U.S.C. 101(24), 501(a), 1116(a)(3), and 1821)

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