



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AP84

Extension of the Presumptive Period for Compensation for Gulf War Veterans

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this final rule to affirm its adjudication regulations regarding compensation for disabilities resulting from undiagnosed illnesses suffered by veterans who served in the Persian Gulf War. This amendment is necessary to extend the period during which disabilities associated with undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses must become manifest in order for a Veteran to be eligible for compensation. The intended effect of this amendment is to provide consistency in VA adjudication policy, preserve certain rights afforded to Persian Gulf War (GW) veterans, and ensure fairness for current and future GW veterans.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Janel Keyes, Policy Analyst, Regulations Staff (211D), Compensation Service, Veterans Benefits Administration, 810 Vermont Avenue NW, Washington, DC 20420, [Janel.Keyes@va.gov](mailto:Janel.Keyes@va.gov), (202) 461-9700. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION: On October 17, 2016, VA published in the Federal Register an interim final rule (81 FR 71382) amending its adjudication regulation regarding compensation for disabilities suffered by veterans who served in the Southwest Asia Theater of Operations during the GW. In order to ensure that benefits established by Congress are fairly administered, VA extended the evaluation period in which disabilities associated with undiagnosed illnesses and chronic multi-symptom illnesses must become manifest in order for a veteran to be eligible for compensation. Accordingly, VA removed the date, December 31, 2016, from 38 CFR 3.317(a)(1)(i) and added, in its place, December 31, 2021.

VA invited interested persons to submit written comments on or before December 16, 2016. VA received 22 comments in response to the interim final rule. VA received comments from military service members, veterans, family members, and one veteran service organization, which was Veterans of Foreign Wars. Some comments addressed more than one issue. In those instances, VA reviewed and considered each issue independently. VA also grouped together by similar topic all of the issues raised by the commenters that concerned at least one portion of the rule. VA organized the responses to the comments by topic. VA responds to all commenters as follows.

#### I. Supportive

VA received five comments expressing support for the extension. One commenter provided personal testimony as a GW veteran that his symptoms had

a delayed-onset; therefore, an extension was appropriate and justified. Another commenter provided personal testimony as a spouse of a GW veteran stating that her husband's symptoms have "steadily gotten worse over the years". VA appreciates the feedback and support. VA makes no change based on these comments.

## II. Elimination of expiration date

The majority of commenters, some of whom thanked VA for the extension, asserted that VA should eliminate the expiration date. One commenter stated, "I think that the deadline for [GW] presumptive claims should be totally taken away since there is still not an official end to the [GW] and we do not know when there will be one." Another stated, "It took about 5 years after getting out to see a pattern of illness and at a level to make me concerned. It took even longer to see and feel the full extent of my conditions." Additionally, Veterans of Foreign Wars requested an open-ended presumptive period "without an artificial time limit".

VA makes no change based on these comments. Section 102(7) of the Persian Gulf War Veterans' Benefits Act, Title I of the Veterans' Benefits Improvement Act of 1994, Public Law 103-446, states Congress' finding that further research must be undertaken to determine the causes of GW veterans' illnesses and that

pending the outcome of such research, veterans who are seriously ill as the result of such illnesses should be given the benefit of the doubt and be provided compensation to offset the impairment in earning capacities they may be experiencing.

Hence, Congress contemplated an ongoing process for investigating the nature and causes of GW veterans' illnesses that is reflected in the current statutory and regulatory scheme. See 38 U.S.C. 1117 and 38 CFR 3.317.

In section 1117(b), Congress provided the Secretary with discretion to prescribe a presumptive period based upon, among other things, a review of credible medical or scientific evidence. As stated in the interim final rule, there is a lack of scientific certainty surrounding the cause of illnesses suffered by GW veterans. Accordingly, VA believes that extending the presumptive period for a significant, but not indefinite, period to permit further investigation is consistent with the goals of this statutory scheme. Thus, the Secretary is exercising his discretion under section 1117 and extending the presumptive period to December 31, 2021, in order to provide more time for scientific and medical research regarding diseases and illnesses that may be related to service in the Southwest Asia Theater of Operations.

One commenter expressed concern about how the expiration date may be perceived as inconsistent with the important missions of the VA War Related Illness and Injury Study Center (WRIISC) and the Department of Defense Gulf War Illness Research Program (GWIRP). The WRIISC develops and provides post-deployment health expertise to veterans and their health care providers through clinical care, research, education, and risk communication. The GWIRP focuses on funding innovative, competitively peer-reviewed research to provide a better understanding of the pathobiology underlying GW illness and to improve

methods of diagnosis and treatment. Extending the manifestation period for purposes of compensation to December 31, 2021, would have no negative impact on the missions of WRIISC or GWIRP. As we noted above, continuing research while also setting an ending date for the presumptive period is fully consistent with Congress's intent to compensate veterans who are seriously ill but where more research is needed to understand the nature and cause of the illnesses. We note that this final rule does not foreclose further extensions of the presumptive period in the future if more time is needed for research beyond the currently prescribed expiration date.

### III. Longer extension

One commenter advocated for a longer extension period. This commenter stated, "I think it would be a mistake to close enrollment so soon." He further stated that some GW veterans might be in the beginning stages of illnesses, while others have been "suffering symptoms in silence". However, the commenter did not suggest a different date. The three previously established extensions, implemented by VA for medically unexplained chronic multi-symptom illnesses and undiagnosed illnesses that appeared in GW veterans, were 5-year periods. VA determined that it was appropriate to extend the period again by 5 years consistent with the extensions that have occurred in the past. Therefore, VA makes no change based on this comment.

VA also notes that the rule does not "close enrollment." The time limit prescribes when the claimed illness must become manifest. The rule does not

impose a limit on when a claim may be filed. For example, a future claimant will be allowed to present evidence showing manifestation that occurred within the time limit even if the claim is filed after the time limit has passed.

#### IV. More presumptive conditions

Two comments stated that VA should add more presumptive conditions to the list, but did not mention specific conditions. As scientific and medical research continues, VA will consider this issue for future regulatory updates. However, because VA regulations must be evidence-based in accordance with available scientific and medical research, it cannot amend the current list based on these comments. Therefore, VA makes no change to this rule based on these comments.

#### V. More research

Several comments discussed the need for additional research. One such commenter discussed a study that is currently underway in regards to “biomarkers associated with the conditions linked to service in the Gulf War” and stated, “[M]ore must be done.” Another commenter discussed other current studies and stated, “[F]ollow-on research is needed to further develop findings.” VA recognizes the need for further investigation, inclusive of scientific and medical research. To allow time for further research, this rulemaking finalizes an extension of the period in which manifestations of undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses must appear in GW

veterans to be presumed as service-connected diseases. VA, therefore, makes no change based on these comments.

#### VI. General comments

VA received general comments that were not associated with the extension of the period for VA to continue to evaluate undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses in GW veterans. One commenter requested VA move the elements of 38 CFR 3.317(c) to 38 CFR 3.307 and 3.309. This commenter also expressed concerns that private physicians completing GW General Medical Disability Benefits Questionnaire (DBQ) examinations will not know that GW undiagnosed illness and medically unexplained chronic multi-symptom illness do not apply to Afghanistan service; he was concerned that they would not know that only GW infectious disease presumptions apply to Afghanistan service. VA understands and agrees with this concern. For this reason, VA does not accept DBQs from private doctors for initial GW examinations; a Veterans Health Administration (VHA) clinician must perform the initial GW examination. This commenter also expressed concerns that Afghanistan was being included in the definition of the Southwest Asia theater of operations. In accordance with 38 U.S.C. 1117(f), VA acknowledges that the term “‘Persian Gulf veteran’ means a veteran who served on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War,” and as reflected in 38 CFR 3.317(e)(2), “[t]he Southwest Asia theater of operations refers to Iraq, Kuwait, Saudi Arabia, the neutral zone

between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations.” As such, VA requires the claims processors to verify qualifying locations of service prior to requesting a GW examination. Any concerns unrelated to extending the date for manifestation of undiagnosed illness or medically unexplained chronic multi-symptom illness are beyond the scope of this rulemaking. Therefore, VA makes no changes based on these comments.

Another comment requested “clarity and consistency” concerning the definitions of GW undiagnosed illness and medically unexplained chronic multi-symptom illness. Although the medical community has not settled on standardized case definitions, VA applies the legal definitions of these conditions, which are outlined in 38 U.S.C. 1117(a)(2) and (g). Another comment discussed historical events regarding the Agent Orange Act of 1991. One commenter expressed concerns regarding the definition of “presumptive” and provided personal testimony. Another commenter expressed concerns that her children (parented by an affected GW veteran) may have been biologically affected. These comments are not relevant to the current rule amendment; therefore, VA makes no changes to the rule based on these comments.

#### Executive Orders 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,” which requires review by the Office of Management and Budget (OMB), 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 final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

#### Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule will not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### 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 the 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 year. This 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 program number and title affected by this rule is 64.109, Veterans Compensation for Service-Connected Disability.

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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on September 25, 2017, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Veterans

The interim rule amending 38 CFR part 3, published October 17, 2016, at 81 FR 71382, is adopted as final without change.

Dated: September 25, 2017

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