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# **Board of Veterans' Appeals**

## **Lecture Series**

### **Herbicide Exposure**

**Prepared and Presented by**

*Susan Janec (DT3)*

*Tanya Smith (DT3)*

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## **CLAIMS BASED ON HERBICIDE EXPOSURE**

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**Authors: Board Counsel Susan Janec and Tanya Smith**

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### **I. INTRODUCTION**

**Beginning with legislation enacted in 1979, Congress authorized a number of epidemiological studies regarding the health effects of exposure to herbicides containing dioxin. These studies were authorized due to the lack of sound scientific evidence regarding the diseases that might be associated with such exposure, and the expressed concern of many veterans regarding the long term effects of herbicide exposure.**

**Veterans and their survivors continued to express concern regarding the difficulty in establishing entitlement to VA benefits based on herbicide exposure, which resulted in the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (the 1984 Act). The 1984 Act authorized the Secretary to establish guidelines and standards for evaluating the scientific studies and to issue regulations for adjudicating claims for VA benefits based on herbicide exposure. In doing so, the Secretary was to rely on advice provided by the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards, which the statute**

established, and make a determination regarding service connection for each disease then being studied. The statute also provided that at the time of passage there was some evidence that chloracne, porphyria cutanea tarda, and soft tissue sarcomas were associated with herbicide exposure. Under the authority of the 1984 Act, the Secretary issued regulations in August 1985 at 38 C.F.R. §§ 1.17 and 3.311a. *See Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation*, 50 Fed. Reg. 34,452 (August 26, 1985), effective September 26, 1985.

As a result of a class action lawsuit brought by veterans of the Vietnam war and their survivors, in a May 1989 decision the United States District Court for the Northern District of California (District Court) invalidated 38 C.F.R. § 3.311a (1989). The District Court found that VA had applied an overly restrictive standard in the regulation for determining what diseases should be presumptively service connected. The District Court found that the statute required only a significant statistical association, while the regulation called for evidence of causation. The District Court also voided all benefit denials that had been made under the invalidated 38 C.F.R. § 3.311a (1989). *See Nehmer v. United States Veterans' Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989) (*Nehmer I*). Based on the District Court's holdings in *Nehmer I*, in 1989 VA imposed a moratorium on the adjudication of all claims that were based on herbicide exposure, pending the publication of a new regulation.

In the interim, Congress passed the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991) (codified at 38 U.S.C.A. § 1116) (the 1991 Act). The 1991 Act established a presumption of herbicide exposure for veterans who served in Vietnam and who developed one of the listed diseases. The 1991 Act also established a presumption of service connection for non-Hodgkin's lymphoma (which had previously been subject to presumptive service connection by regulation 38 C.F.R. § 3.313), soft tissue sarcomas, and chloracne or any other acneform disease consistent with chloracne that manifests within one year of exposure.

**In February 1994 the regulation at 38 C.F.R. § 3.311a was eliminated and the provisions pertaining to herbicide exposure moved to 38 C.F.R. § 3.307(a)(6) (1994) and 38 C.F.R. § 3.309(e) (1994). *See* Disease Associated with Exposure to Certain Herbicide Agents, 59 Fed. Reg. 5106 (Feb. 3, 1994).**

**The statute was again amended by the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 987-988 (December 27, 2001). This amendment established a presumption of herbicide exposure for veterans who served in Vietnam, regardless of whether they developed a presumptive disease.**

**The 1991 Act also provided for a presumption of service connection for any disease that the Secretary determined, based on review of the scientific evidence, to be related to herbicide exposure. In making that determination, the Secretary is to rely on reports from the National Academy of Sciences (NAS) and all other sound medical and scientific information and analyses. The statute directs the Secretary to enter into an agreement with the NAS to review and evaluate the scientific evidence concerning the association between exposure to herbicides and each disease suspected of being related to such exposure. The NAS is to submit a report to the Secretary at least every two years, and within 60 days of receiving the report the Secretary must issue proposed regulations determining whether a presumption of service connection is warranted for each disease covered in the report. If the Secretary determines that a presumption is not warranted, the Secretary shall also publish notice of that determination in the Federal Register.**

**A disease will be presumed to have been caused by herbicide exposure if a significant statistical association is shown to exist between the occurrence of the disease and herbicide exposure. The factors to be applied in determining whether a significant statistical association exists and the standard to be applied in evaluating the evidence are described in 38 C.F.R. § 1.17 (2008).**

A list of the diseases for which a significant statistical association is shown to exist, for which a presumption of service connection has been established, and the effective date for each finding, is shown in Appendix A. A list of the diseases for which a significant statistical association is shown to not exist is shown in Appendix B.

## **II. EXPOSURE TO AN HERBICIDE AGENT**

### **A. Definition**

The term “herbicide agent” means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram. 38 C.F.R. § 3.307(a)(6) (2008). Although many color designations were made, the most prevalent was Agent Orange.

### **B. Presumption of Exposure to an Herbicide Agent in Vietnam**

1. **Presumption of Exposure** -- A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, will be presumed to have been exposed to an herbicide agent during such service, unless there is affirmative evidence that establishes that the veteran was not exposed to any such herbicide agent. *See* 38 U.S.C.A. § 1116(f) (West 2002); 38 C.F.R. § 3.307(a)(6)(iii) (2008). (Note: the dates of service in Vietnam for the purpose of presumed exposure are not the same as the statutory definition of the “Vietnam Era” in 38 U.S.C.A. § 101(29).)
2. **“Service in the Republic of Vietnam”** -- means actual service in-country, including service in the inland waterways, in Vietnam from January 9, 1962 through May 7, 1975, and includes service in the waters offshore, or service in other locations if the conditions of

*service involved duty or visitation in the Republic of Vietnam.*

38 C.F.R. § 3.307(a)(6)(iii) (2008) (emphasis added). See VAOPGCPREC 7-93 (holding that service in Vietnam does not include service of a veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace); and VAOPGCPREC 27-97 (holding that mere service on a deep-water naval vessel in waters off shore of the Republic of Vietnam is not qualifying service in Vietnam). This interpretation was recently challenged but upheld in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). Receipt of the Vietnam Service Medal is not evidence of in-country service – service members who were stationed on ships off-shore, or flew missions over Vietnam, were sometimes awarded the Vietnam Service Medal. (Note: claims involving service connection for non-Hodgkin’s lymphoma under 38 C.F.R. § 3.313 are outside the scope of *Haas*).

3. Length of Exposure -- There is no regulatory requirement as to how long the veteran was in Vietnam; even a few hours of service in country is sufficient to establish the presumption of exposure. The last date on which a veteran will be presumed to have been exposed to an herbicide agent will be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975. See 38 C.F.R. § 3.307(a)(6)(iii) (2008).

4. U.S.S. Ingersoll -- the National Archives and Records Administration (NARA) has confirmed that the Navy destroyer U.S.S. Ingersoll (DD 652) traveled into the inland waterways of Vietnam on October 24 and 25, 1965. You may presume exposure to herbicides for crewmembers that served aboard this ship on these dates.

### **C. Use of Herbicides Outside of Vietnam**

VA has received from the Department of Defense information concerning the operational use, testing, and disposal of Agent Orange and other herbicides outside of Vietnam.

1. **Korea** – Agent Orange was used along the demilitarized zone (DMZ) in Korea from April 1968 to July 1969. Fields of fire between the front line defensive positions and the south barrier fence were defoliated. The size of the treated area was a strip of land 151 miles long and up to 350 yards wide from the fence to north of the “civilian control line.” There was no indication that herbicides were sprayed in the DMZ itself. Herbicides were applied through hand spraying and by hand distribution of pelletized herbicides. Although restrictions were put in place to limit potential for spray drift, run-off, and damage to food crops, records indicate that the effects of spraying were sometimes observed as far as 200 meters down wind.

The estimated number of exposed personnel is 12,056. Units in the area during the period of use of the herbicides include the following:

- a. The combat brigades of the 2<sup>nd</sup> Infantry Division, which included the following units:
  - i. 1<sup>st</sup> Battalion, 38<sup>th</sup> Infantry
  - ii. 2<sup>nd</sup> Battalion, 38<sup>th</sup> Infantry
  - iii. 1<sup>st</sup> Battalion, 23<sup>rd</sup> Infantry
  - iv. 2<sup>nd</sup> Battalion, 23<sup>rd</sup> Infantry
  - v. 3<sup>rd</sup> Battalion, 23<sup>rd</sup> Infantry
  - vi. 2<sup>nd</sup> Battalion, 31<sup>st</sup> Infantry\*
  - vii. 3<sup>rd</sup> Battalion, 32<sup>nd</sup> Infantry\*
  - viii. 1<sup>st</sup> Battalion, 9<sup>th</sup> Infantry
  - ix. 2<sup>nd</sup> Battalion, 9<sup>th</sup> Infantry
  - x. 1<sup>st</sup> Battalion, 72<sup>nd</sup> Armor
  - xi. 2<sup>nd</sup> Battalion, 72<sup>nd</sup> Armor
  - xii. 1<sup>st</sup> Battalion, 12<sup>th</sup> Artillery
  - xiii. 1<sup>st</sup> Battalion, 15<sup>th</sup> Artillery



- xiv. 7<sup>th</sup> Battalion, 17<sup>th</sup> Artillery
- xv. 5<sup>th</sup> Battalion, 38<sup>th</sup> Artillery
- xvi. 6<sup>th</sup> Battalion, 37<sup>th</sup> Artillery

**\*Service records may show assignment to either the 2<sup>nd</sup> or the 7<sup>th</sup> Infantry Division.**

**b. The 3<sup>rd</sup> Brigade of the 7<sup>th</sup> Infantry Division, which included the following units:**

- i. 1<sup>st</sup> Battalion, 17<sup>th</sup> Infantry
- ii. 1<sup>st</sup> Battalion, 31<sup>st</sup> Infantry
- iii. 1<sup>st</sup> Battalion, 32<sup>nd</sup> Infantry
- vi. 2<sup>nd</sup> Battalion, 17<sup>th</sup> Infantry
- v. 2<sup>nd</sup> Battalion, 32<sup>nd</sup> Infantry
- vi. 1<sup>st</sup> Battalion, 73<sup>rd</sup> Armor
- vii. 2<sup>nd</sup> Battalion, 10<sup>th</sup> Cavalry

**c. The Division Reaction Force involving the 4<sup>th</sup> Squadron, 7<sup>th</sup> Cavalry, Counter Agent Company.**

**d. The United Nations Command Security Battalion-Joint Security Area (UNCSB-JSA).**

**e. The crew of the *U.S.S. Pueblo*.**

**f. Field Artillery, Signal, and Engineer troops were supplied as support personnel as required.**

**If the veteran alleges service along the DMZ, and was assigned to one of the units or ship noted above between April 1968 and July 1969, you may decide to concede exposure to herbicides on a factual basis. The ROs have been instructed to do precisely that under this scenario. See M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, 10.l.**

**If the veteran alleges service along the DMZ between April 1968 and July 1969, and was assigned to a unit other than those listed above, you need to develop to verify the location of the veteran's unit. Under this scenario, the ROs have been instructed to submit**

a request to the U.S. Army and Joint Services Records Research Center (JSRRC) for verification of the location of the veteran's unit. *See* M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, 10.1.

2. **Johnston Island** – Congress sought establishment of a presumption of herbicide exposure for all veterans who served on Johnston Island in the North Pacific between 1971 and 1977. Herbicides were stored in drums on Johnston Island between April 1972 and September 1977. VA concluded that a presumption of exposure was not warranted for veterans who served on Johnston Island. That determination was based on an analysis that indicated that the government's storage of herbicides on Johnston Island did not raise the same identification concerns as presented in Vietnam. Rather, the storage of herbicides on Johnston Island was more closely associated with the storage of herbicides at military installations in the United States and the spraying that occurred along the Korean DMZ in the late 1960s. Because military contractors were responsible for the inventory, very few veterans who served on Johnston Island had duties that involved the direct handling of herbicides. *See also* Supplement I, Fact Sheet on Agent Orange on Johnston Island.

Accordingly, for veterans who served on Johnston Island in the North Pacific between 1971 and 1977, exposure to herbicides must be verified as a presumption of exposure has not been established by VA.

3. **Okinawa** – There is no documentation of use or storage of Agent Orange or other herbicides in Okinawa. Rather, the movement of mustard and nerve agents occurred from Okinawa to Johnston Island for destruction in Operation Red Hat in 1971.

4. **Thailand** – Herbicides were used around the perimeter of American airbases to provide clear fields of fire to secure the base. No specific dates of use have been provided. Exposure to herbicides must be verified as a presumption of herbicide exposure has not been established by VA.

**5. Other Locations – See Supplement II.** The sites listed in the supplement reflect 70 to 85 percent of the locations of the operational use, testing, and disposal of herbicides outside of Vietnam and Korea. The list does include Thailand and indicates that testing occurred from 1964 to 1965. In most cases, Department of Defense service member participation appeared to be minimal. Exposure to herbicides must be verified as a presumption of herbicide exposure has not been established by VA.

#### **D. Ascertaining Exposure**

**1. Relevant Evidence –** to ascertain whether a veteran was exposed to herbicides through service in-country in Vietnam or duty or visitation in-country in Vietnam during the requisite period, or through service in other locations, look at the service personnel records, DD Form 214, military occupational specialties (MOS), dates, locations and units of assignment, flight manifests, ship and deck logs, official orders, Permanent Change of Station (PCS) records, unit records, morning reports (available for Army personnel from November 1912 to 1974 although some units discontinued preparation of such reports in 1972 while others continued to 1980; also available for Air Force personnel from September 1947 to June 1966), muster rolls, pay records, passports, oral testimony, written statements and/or oral testimony of the veteran, buddy statements, and other types of anecdotal evidence (*e.g.*, letters written to family members). Most of the challenging situations arise from cases involving United States Navy, Coast Guard, or Air Force personnel who allege some type of short-term or stopover duty in Vietnam. For example, a Navy veteran alleges that he spent a week in Vietnam awaiting transport out to a ship that was stationed in the waters off the shores of Vietnam (“blue-water vessels”), *etc.* A veteran’s credibility will need to be assessed and fully

discussed in a decision, particularly in the absence of any official service records confirming his/her allegations.

2. **Duty to Assist** – further information about military duties and the likelihood of exposure may need to be obtained from the Service Departments, the NPRC, the Commandant of the Marine Corps, the JSRRC, the NARA, and/or the Naval Historical Center in order to comply with the Veterans Claims Assistance Act of 2000 (VCAA). For example, it may be necessary to at least attempt to ascertain the type of ship a veteran served on and whether the logbooks indicate that the ship was ever docked at a Vietnamese port such that it would be feasible that a veteran may have had in-country duty or visitation during his/her tour.

3. **Combat Veterans** – determine combat status. If the record establishes that a veteran served in combat, his/her assertions of exposure, if consistent with the circumstances, conditions, or hardships of service may be sufficient to grant the presumption of exposure. 38 U.S.C.A. § 1154(b) (West 2002); 38 C.F.R. § 3.304(d) (2008). For example, compare the allegation of an Air Force pilot who flew combat missions over Vietnam that he had to make an emergency landing in Vietnam to the allegation of a Navy seaman who served aboard an aircraft carrier that he went ashore on one occasion for a secret mission that could not be included in his personnel file.

### **III. ADJUDICATION OF CLAIMS**

#### **A. General**

Service connection for a disease claimed to be due to exposure to an herbicide in service may be established in two ways:

- on a presumptive basis under 38 U.S.C.A. § 1116 and 38 C.F.R. § 3.309(e) by showing that the veteran was exposed to herbicides,

and s/he now has a disease that is presumed to be due to exposure to herbicides; or

- on a direct basis under 38 U.S.C.A. §§ 1110, 1131, and 38 C.F.R. § 3.303, by showing that the claimed disease was incurred in or aggravated by service, including exposure to herbicides.

**Note:** a complete adjudication of the claim may also require consideration of the presumptive provisions pertaining to chronic diseases pursuant to 38 U.S.C.A. §§ 1101, 1112, and 38 C.F.R. §§ 3.307, 3.309(a), if the claimed disease is also included in § 3.309(a).

#### **B. Presumptive Service Connection (herbicide-related diseases)**

If a veteran has one of the diseases listed in 38 C.F.R. § 3.309(e) (see Appendix A) and his/her exposure to an herbicide is either presumed, based on service in Vietnam, or otherwise proven by the evidence, the disease is presumed to be related to the in-service exposure (the regulation provides the nexus – *see Pearlman v. West*, 11 Vet. App. 443 (1998)) – provided it was manifested within the appropriate time frame. Hence, service connection should be granted.

1. **Rare at the Board Level** – these claims are usually straightforward and resolved at the Regional Office level. As additional diseases are included in 38 C.F.R. § 3.309(e), however, some cases may reach the Board for which a grant may then be appropriate (*e.g.*, AL amyloidosis, which was just added to 38 C.F.R. § 3.309(e), effective May 7, 2009).

2. **Time Limits** – all of the diseases listed in 3.309(e) need only become manifest to a degree of 10 percent or more at any time after service and the herbicide exposure, except that chloracne, porphyria cutanea tarda, and acute and sub-acute peripheral neuropathy must have become manifest to a degree of 10 percent or more within a year

after the last date on which the veteran was exposed to an herbicide in service (*i.e.*, his/her last date of service in Vietnam). Furthermore, non-Hodgkin's lymphoma need not become manifest to a degree of 10 percent or more. *See* 38 C.F.R. § 3.313 (2008).

3. Disease Specific – keep in mind that chronic peripheral neuropathy is different than acute and sub-acute peripheral neuropathy, and is not included in the list of presumptive diseases. Moreover, VA has specifically determined that persistent peripheral neuropathy is not a disease associated with exposure to herbicide agents. (Chronic peripheral neuropathy, however, may be found to be secondary to Type II diabetes mellitus under § 3.310(a) (2008)).

4. Intervening Causes – a veteran may establish that s/he was exposed to an herbicide, and be diagnosed with a disease that is listed in 3.309(e). Service connection is not warranted, however, if the evidence shows that the disease is due to an intervening cause. The presumption of service connection is rebuttable if competent affirmative evidence to the contrary establishes that the disease is due to an intercurrent disease or injury. For example, a medical statement relates the currently diagnosed Type II diabetes mellitus to a veteran's obesity. *See* 38 U.S.C.A § 1113(a) (West 2002); 38 C.F.R. § 3.307(d) (2008).

5. Metastasizing Cancer – a presumptive cancer that develops as a result of a metastasizing non-presumptive cancer may not be service-connected under 38 U.S.C.A. § 1116(a). *See* 38 U.S.C.A § 1113(a) (West 2002); *Darby v. Brown*, 10 Vet. App. 243 (1997) (providing that the presumption of service connection for lung cancer was rebutted by medical evidence showing that the stomach was the primary site); *see also* VAOPGCPREC 18-97 (presumptive service connection may not be established

under 38 U.S.C.A. § 1116 and 38 C.F.R. § 3.307(a) for a cancer listed in 38 C.F.R. § 3.309(e) as being associated with herbicide exposure if the cancer developed as the result of metastasis of a cancer that is not associated with herbicide exposure).

#### **C. Presumptive Service Connection (chronic diseases)**

Service connection can also be granted if the disease is one of the chronic diseases listed in C.F.R. § 3.309(a) and became manifest to a degree of 10 percent or more within one year of discharge. The adjudication of the claim should include an analysis of these provisions when appropriate. For example, diabetes mellitus is included in 3.309(a) and (e); skin cancer is not included in 3.309(e), but is included in 3.309(a).

#### **D. Direct Service Connection**

If the claimed disease is not one of the presumptive diseases listed in 38 C.F.R. § 3.309(e), but exposure to an herbicide is presumed or proven by the evidence, the veteran may establish service connection for the disease by (1) showing that the disease actually occurred in service; or (2) by submitting medical evidence of a nexus between the disease and his exposure to herbicides during military service (or another incident of service).

1. **Relevant Case Law** – *see Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994), which holds that a claimant is not precluded from establishing service connection for a disease with proof of direct causation. Although the *Combee* decision pertained to radiation claims, the same rationale applies to claims based on herbicide exposure. *See also McCartt v. West*, 12 Vet. App. 164, 167 (1999) (providing that the provisions set forth in *Combee* are equally applicable in cases involving claimed Agent Orange exposure).

**2. High Burden** – if the claimed disease is one of the diseases that the Secretary has determined to not be related to herbicide exposure, which are listed in Appendix B, it would seem highly unlikely that any medical opinion evidence a claimant may submit could be of sufficient weight to overcome the large body of evidence provided by the National Academy of Sciences / Institutes of Medicine (NAS / IOM) and relied upon by the Secretary in making the negative finding. In the past, judges have found that a separate medical opinion refuting a nexus was not required because the determination made by the Secretary constitutes a medical opinion that sufficiently outweighed the opinion of a private physician who otherwise had no specific scientific data or training to support his/her opinion.

However, Group 7 has advised that when a positive nexus opinion is presented, and the Board merely denies the claim giving more weight to the NAS / IOM body of evidence, a case appealed to the Court would be automatically remanded based on finding of insufficient reasons and bases. Hence, if the claim may not be allowed on the record, it may be more prudent to obtain a VHA opinion before proceeding on a merits decision in the case. (Since an examination is not necessary, this approach is more advisable than remanding for an opinion). *But see, Mariano v. Principi*, 17 Vet. App. 305, 312 (2003) (It is not permissible for VA to undertake additional development if the purpose was to obtain evidence against an appellant's case). In seeking out any additional opinion, you may need to explain why an opinion already of record is inadequate (*e.g.*, no rationale provided; no scientific data supporting the opinion is provided, *etc.*).



**3. Not on the List** – if the claimed disease is not included in the list of diseases that the Secretary has determined to not be related to herbicide exposure, the outcome is less clear; it is possible that the claimed disease has not been the subject of sufficient studies on which to base a determination one way or the other. A competent medical opinion is still required to establish service connection and it may be necessary to obtain a VHA opinion if indicated by the record.

**4. Duty to Assist** – approaches will vary by judge. We are obligated to obtain an opinion, however, only if an opinion is necessary to make a decision on the claim. *See* 38 U.S.C.A. § 5103A(d) (West 2002 & Supp. 2008); 38 C.F.R. § 3.159(c)(4) (2008); *McLendon v. Nicholson*, 20 Vet. App. 79 (2006). Because the Secretary has already determined, based on an analysis of the studies pertaining to herbicide exposure, that the listed diseases are not related to herbicide exposure, no further opinion is necessary to make a decision on the claim, unless, as noted above, the claimant has submitted a positive nexus opinion in support of the claim. In such an instance, it may be more prudent to obtain a VHA opinion before proceeding on the merits, unless the claim may be allowed.

**5. Beware of Speculative Opinions** – many medical opinions relating non-presumptive diseases to herbicide exposure are speculative and not sufficient to support a grant of service connection. *See Bostain v. West*, 11 Vet. App. 124, 127-28 (1998); *Obert v. Brown*, 5 Vet. App. 30, 33 (1993) (medical opinion expressed in terms of “may” also implies “may not” and is too speculative to establish medical nexus); *Warren v. Brown*, 6 Vet. App. 4, 6 (1993) (doctor’s statement framed in terms such as “could have been” is not probative); *Tirpak v. Derwinski*, 2 Vet. App. 609, 611 (1992) (“may or may not” language by physician is too speculative).

6. **Agent Orange Payment Program** – receipt of payments from the Agent Orange Veteran Payment Program does not constitute evidence of a nexus to service. *See Darby v. Brown*, 10 Vet. App. 243, 247 (1997), citing *Brock v. Brown*, 10 Vet. App. 155 (1997), *aff'd* No. 98-7037 (Fed. Cir. May 2, 2000) (non-precedential order), *vacated and remanded on other grounds* (Fed. Cir. Dec. 15, 2000).

#### **IV. CLAIMS FOR SPINA BIFIDA AND OTHER BIRTH DEFECTS**

##### **A. Public Law No. 104-204, § 421, 110 Stat. 2874, 2923-26 (1996)**

This law added a new chapter 18 to title 38, United States Code, authorizing VA to provide certain monetary and other benefits to children of Vietnam veterans for disability resulting from spina bifida in such children. The statute was effective October 1, 1997. VA has issued a regulation to implement the provisions of the statute, which is codified at 38 C.F.R. § 3.814.

1. **Monthly Monetary Allowance** – VA will pay a monthly monetary allowance, based on whether the severity of the disability is determined to be Level I, Level II, or Level III, to an individual suffering from spina bifida whose biological mother or father is a Vietnam veteran.

2. **Vietnam Veteran** – is defined as a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, without regard to the characterization of the person's service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

3. **Definition** – for the purposes of this section, the term “spina bifida” means any form and manifestation of spina bifida except spina bifida occulta.

a. In accordance with VAOPGCPREC 5-99, the term “spina bifida” refers to a defective closure of the boney encasement of the spinal cord, but does not include other neural tube defects such as encephalocele and anencephaly.

b. In accordance with the holding of the Court in *Jones v. Principi*, 16 Vet. App. 219 (2002), the statute provides for the award of benefits for “all forms and manifestations of spina bifida except spina bifida occulta.” See 38 U.S.C.A. § 1802 (West 2002). The Court found that in VAOPGCPREC 5-99 the General Counsel defined “spina bifida,” but that that definition does not apply to “all forms and manifestations,” and does not preclude the award of benefits for other neural tube defects. In *Jones*, the claimant submitted medical evidence showing that an occipital encephalocele is a “form or manifestation” of spina bifida. Following a July 1998 request from the RO, VA’s Chief Public Health and Environmental Hazards Officer (Dr. Mather) reviewed the analysis applied by the National Academy of Sciences that resulted in the statute authorizing VA benefits to children of Vietnam veterans. She found that it was the intent of the statute to include “all forms and manifestations” of spina bifida, including an occipital encephalocele. The Court found in *Jones* that, because the OGC had not expressly excluded other “forms and manifestations” from the presumption, the OGC opinion was not ripe for review regarding its validity.

**B. Public Law No. 104-204, § 421, 110 Stat. 2874, 2923-26 (1996)**

This law also authorizes VA to provide certain monetary and other benefits to a child whose biological mother is or was a Vietnam veteran and who has one or more covered birth defects. VA has issued a regulation to implement the provisions of the statute, which is codified at 38 C.F.R. § 3.815.

**1. Vietnam Veteran** – means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person's service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

**2. Covered Birth Defects** – include but are not limited to, the following:

- (i) Achondroplasia;
- (ii) Cleft lip and cleft palate;
- (iii) Congenital heart disease;
- (iv) Congenital talipes equinovarus (clubfoot);
- (v) Esophageal and intestinal atresia;
- (vi) Hallerman-Streiff syndrome;
- (vii) Hip dysplasia;
- (viii) Hirschprung's disease (congenital megacolon);
- (ix) Hydrocephalus due to aqueductal stenosis;
- (x) Hypospadias;
- (xi) Imperforate anus;
- (xii) Neural tube defects (including spina bifida, encephalocele, and anencephaly);
- (xiii) Poland syndrome;
- (xiv) Pyloric stenosis;
- (xv) Syndactyly (fused digits);
- (xvi) Tracheoesophageal fistula;
- (xvii) Undescended testicle; and
- (xviii) Williams syndrome.

**3. Intervening Cause** – no monetary allowance will be provided based on a particular birth defect if affirmative evidence establishes that the birth defect results from a cause other than the active military, naval, or air service of the individual's mother during the Vietnam era. In addition, the term 'covered birth defect' does not include a condition due to a familial disorder, including hereditary genetic conditions; birth-related injury; congenital malignant neoplasms; chromosomal disorders; developmental disorders; or fetal or neonatal infirmity with well-established causes.

**4. Monthly Monetary Allowance** – VA will pay a monthly monetary allowance, based on whether the severity of the disability is determined to be Level I, Level II, Level III, or Level IV.

## **V. REOPENING CLAIMS AND EFFECTIVE DATES**

### **A. Reopening Previously Denied Claims**

If a claim for service connection based on herbicide exposure was previously denied and that decision became final (see the *Nehmer* discussion below regarding finality of a prior denial), that claim can be reopened based on the receipt of new and material evidence pursuant to 38 U.S.C.A. § 5108.

### **B. New Basis of Entitlement**

New and material evidence is not required to reopen a previously denied claim if there has been an intervening change in the law that created a new basis of entitlement. *See Spencer v. Brown*, 4 Vet. App. 283, 288 (1993), *aff'd*, 17 F.3d 368 (Fed. Cir. 1994), *cert. denied* 513 U.S. 810 (1994). The Court has held that an expansion of the list of diseases to which the presumption of service connection applies based on herbicide exposure constitutes an intervening liberalizing law under *Spencer* that allows a claim to be re-adjudicated on the merits without consideration of new and material evidence. *See Pelegrini v. Principi*, 18 Vet. App. 112, 125-26 (2004).

### **C. Effective Date for the Grant of Service Connection**

Unless specifically provided otherwise in the statute, the effective date of an award based on an original claim for compensation benefits shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a) (West 2002); 38 C.F.R. § 3.400 (2008). The effective date of an award of disability compensation shall be the day following separation from service or the date entitlement arose if the claim is received within one year of separation, otherwise the date of

claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(b) (West 2002); 38 C.F.R. § 3.400(b)(2) (2008).

1. Liberalizing Law or VA Issue – if benefits are awarded pursuant to a liberalizing law or VA issue, the effective date may be one year prior to the date of receipt of the claim for benefits. Unless *Nehmer* applies, the effective date cannot be earlier than the effective date of the liberalizing law or VA issue and cannot be retroactive for more than one year from the date of application. 38 U.S.C.A. § 5110(g) (West 2002); *McCay v. Brown*, 9 Vet. App. 183 (1996), *aff'd* 106 F.3d 1577 (Fed. Cir. 1997); 38 C.F.R. § 3.114 (2008).

2. Effective Date of Liberalizing Law or VA Issue – if the liberalizing law or VA issue became effective on or after the date of its enactment, the veteran must meet the eligibility requirements (*i.e.*, a diagnosis) on the effective date of the liberalizing law or VA issue and continuously from that date.

3. Retroactivity – if the liberalizing law or VA issue became effective retroactively, the veteran need not meet the eligibility requirements on the effective date of the liberalizing law or VA issue, and s/he is entitled to an effective date based on when the eligibility requirements were met, not to exceed one year prior to the date of claim. *McCay*, 9 Vet. App. at 187.

#### **D. Effect of the *Nehmer* Decisions**

As previously stated, in a May 1989 decision the United States District Court for the Northern District of California (District Court) invalidated the regulation then in effect for adjudicating claims based on herbicide exposure, 38 C.F.R. § 3.311a (1989). The District Court also voided all benefit denials that had been made under that section of the regulation. See *Nehmer v. United States Veterans' Administration*, 712 F. Supp. 1404 (N.D. Cal. 1989) (*Nehmer I*).

Following the 1989 decision of the District Court, the parties entered into a stipulation agreement governing VA's re-adjudication of all claims that had been denied under the invalidated regulation, which

stipulation agreement was made an order of the court. Paragraph 3 of the stipulation and order provided:

[a]s soon as a final rule is issued service connecting, based on dioxin exposure, any . . . disease which may be service connected in the future pursuant to the Agent Orange Act of 1991, the VA shall promptly thereafter re-adjudicate all claims for any such disease which were voided by the Court's order of May 3, 1989, as well as adjudicate all similar claims filed subsequent to the Court's May 3, 1989 Order.

According to Paragraph 5 of the Stipulation and Order, the effective date for disability compensation based on the re-adjudication of a claim that was voided by the District Court shall be the date the voided claim was originally filed. The District Court subsequently interpreted the stipulation and order, in light of the 1989 decision, as requiring VA to re-adjudicate all claims voided in the 1989 decision if the disease was subsequently presumptively service connected, even if the original claim was not expressly based on herbicide exposure. The District Court also determined that, if the re-adjudication resulted in a grant of service connection, the effective date would be the date of the original claim. *See Nehmer v. United States Veterans' Administration*, 32 F.Supp.2d 1175 (N.D. Cal. 1999) (*Nehmer II*).

In a later decision the United States Court of Appeals for the 9<sup>th</sup> Circuit (9<sup>th</sup> Circuit) interpreted Paragraph 3 of the stipulation and order as applying to all claims voided by the District Court in the May 1989 order, *as well as all similar claims filed subsequent to the May 1989 order*. In addition, if the re-adjudication of a "similar claim" results in an award of benefits, the effective date for the grant of service connection is the date of the original claim. In other words, VA is bound by the provisions of Paragraph 3 of the stipulation and order, even if the original denial of benefits was based on a valid regulation that replaced the invalidated 38 C.F.R. § 3.311a. The disease at issue in the 9<sup>th</sup> Circuit decision was prostate cancer, which under the regulation in effect in 1994 was not subject to presumptive service connection. The regulation (38 C.F.R. § 3.309(e)) was revised in 1996 to include prostate cancer as a presumptive disease. *See Nehmer v. United States Veterans Administration*, 284 F.3d 1158, 1161 (9<sup>th</sup> Cir. 2002).

**1. Codification of the Nehmer Decisions** – the instructions for establishing an effective date for a claim based on herbicide exposure are located at 38 C.F.R. § 3.816 (2008). Those instructions incorporate the holdings of the District Court and the 9<sup>th</sup> Circuit.

**2. Effect on a Claim Filed Prior to September 26, 1985** – the *Nehmer* decisions are not applicable in determining an effective date based on a previously denied claim if that claim was denied prior to September 26, 1985, the effective date for 38 C.F.R. § 3.311a. The stipulation and order in *Nehmer* apply only to decisions that were vacated by the District Court in May 1989, *i.e.*, decisions rendered under the invalidated 38 C.F.R. § 3.311a, and subsequent decisions. *Williams v. Principi*, 15 Vet. App. 189 (2001) (en banc), *aff'd* (Fed. Cir. Nov. 13, 2002).

**Note:** In *Williams* the Court found that the Board had erred in assigning an effective date for service connection for the cause of the veteran's death (October 1989) prior to the effective date of the regulation establishing lung cancer as a presumptive disease (June 1994). The *Williams* decision, however, was rendered prior to the 9<sup>th</sup> Circuit's decision referenced above and should not be relied upon for that specific issue.

**3. Sunset of the Agent Orange Act of 1991** – the provision of the Agent Orange Act of 1991 that authorized the Secretary to establish a presumption of service connection for diseases shown to be statistically associated with herbicide exposure expired September 30, 2002. The *Nehmer* Stipulation and Order referred only to diseases found to be presumptively service connected pursuant to the authority of the Agent Orange Act of 1991. Although the authority to establish presumptive diseases has been extended to September 30, 2015, that authority was based on the Veterans Education and Benefits Expansion Act of 2001, not the Agent Orange Act of 1991. It is VA's position that the rules for establishing an effective date required by the Stipulation and Order do not, therefore, apply to any disease found to be presumptively service connected after September 30, 2002. This position has been challenged and ruled against. As the result of



December 1, 2005 and April 28, 2006 orders from the *Nehmer* Court, the *Nehmer* provisions have been expanded to include chronic lymphocytic leukemia, a disease added to the presumptive list after September 30, 2002 which was affirmed by the United States Court of Appeals for the Ninth Circuit. *See Nehmer v. VA*, 494 F.3d 846 (9<sup>th</sup> Cir. 2007). Regulation 38 C.F.R. § 3.816 (2008), however, has not been amended so it is not clear what VA's position will be with respect to any additional diseases (such as ALA) added to the presumptive list.

4. Effective Date – the effective date to be awarded based on the *Nehmer* provisions is still limited by the date entitlement arose. The effective date should be the date of the previously denied claim or the date entitlement arose (*i.e.*, a diagnosis), whichever is later.

5. Equal Protection Clause – the Court has also held that the denial of an effective date prior to the date of a liberalizing law or VA issue for a claim not affected by the *Nehmer* decisions does not constitute a denial of equal protection. *See Dorward v. West*, 13 Vet. App. 295 (2000).

## **APPENDIX A**

### ***Summary of Regulatory Changes Pertaining to Herbicide Exposure***

**Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34, 452 (August 26, 1985), effective September 26, 1985 (codified at 38 C.F.R. § 3.311a):**

**A veteran who served in the Republic of Vietnam during the requisite period was presumed to have been exposed to an herbicide.**

**Diseases to which the presumption of service connection applied:**

**Chloracne, manifested within three months from the date of exposure**

**Diseases to which the presumption of service connection did not apply:**

**Porphyria cutanea tarda**

**Soft tissue sarcomas.**

**Any other disease not specified as presumptive**

**Claims Based on Service in Vietnam, 55 Fed. Reg. 43,123 (Oct. 26, 1990), effective August 5, 1964 (retro) (codified at 38 C.F.R. § 3.313):**

**Diseases to which the presumption of service connection applied:**

**Non-Hodgkin's Lymphoma**

**Claims Based on Exposure to Herbicides Containing Dioxin (Soft-Tissue Sarcomas), 56 Fed. Reg. 51,651 (October 15, 1991), effective September 26, 1985 (retro) (codified at 38 C.F.R. § 3.311a):**

**Diseases to which the presumption of service connection applied:**

**A soft-tissue sarcoma manifested at any time after service, including--**

**Adult fibrosarcoma**

**Dermatofibrosarcoma protuberans**  
**Malignant fibrous histiocytoma**  
**Liposarcoma**  
**Leiomyosarcoma**  
**Epithelioid leiomyosarcoma (malignant leiomyoblastoma)**  
**Rhabdomyosarcoma**  
**Ectomesenchymoma**  
**Angiosarcoma (hemangiosarcoma and lymphangiosarcoma)**  
**Proliferating (systemic) angioendotheliomatosis**  
**Malignant glomus tumor**  
**Malignant hemangiopericytoma**  
**Synovial sarcoma (malignant synovioma)**  
**Malignant giant cell tumor of tendon sheath**  
**Malignant schwannoma, including malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas**  
**Malignant mesenchymoma**  
**Malignant granular cell tumor**  
**Alveolar soft part sarcoma**  
**Epithelioid sarcoma**  
**Clear cell sarcoma of tendons and aponeuroses**

**Disease Associated With Exposure to Certain Herbicide Agents, 59 Fed. Reg. 5106 (February 3, 1994), effective February 3, 1994 (codified at 38 C.F.R. §§ 3.307 and 3.309(e)):**

**A veteran who served in Vietnam during the requisite period and has a listed disease is presumed to have been exposed to an herbicide agent.**

**Diseases to which the presumption of service connection applies:**

**Chloracne manifested within one year of exposure.**  
**Hodgkin's disease**  
**Non-Hodgkin's lymphoma**  
**Porphyria cutanea tarda**  
**Additional soft-tissue sarcomas (excluding osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma)--**  
**Clear cell sarcoma of tendons and aponeuroses**  
**Extraskelatal Ewing's sarcoma**

**Congenital and infantile fibrosarcoma**  
**Malignant ganglioneuroma**  
**Disease Associated With Exposure to Certain Herbicide Agents**  
**(Multiple Myeloma and Respiratory Cancers), 59 Fed. Reg. 29,723**  
**(June 9, 1994), effective June 9, 1994:**

**Diseases to which the presumption of service connection applies:**

**Multiple myeloma**  
**Respiratory cancers (cancer of the lung, bronchus, larynx, or**  
**trachea) (within 30 years of service)**

**Diseases Associated With Exposure to Certain Herbicide Agents**  
**(Prostate Cancer and Acute and Subacute Peripheral Neuropathy), 61**  
**Fed. Reg. 57,586 (November 7, 1996), effective November 7, 1996:**

**Diseases to which the presumption of service connection applies:**

**Acute and subacute peripheral neuropathy (transient peripheral**  
**neuropathy that appears within weeks or months of exposure)**  
**Prostate cancer**

**Disease Associated With Exposure to Certain Herbicide Agents: Type 2**  
**Diabetes, 66 Fed. Reg. 23,166 (May 8, 2001), effective May 8, 2001**  
**(*Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir.**  
**2002):**

**Diseases to which the presumption of service connection applies:**

**Diabetes Mellitus, Type II**

**Disease Associated With Exposure to Certain Herbicide Agents:**  
**Chronic**  
**Lymphocytic Leukemia, 68 Fed. Reg. 59,540 (October 16, 2003),**  
**effective date October 16, 2003:**

**Diseases to which the presumption of service connection applies:**

## **Chronic lymphocytic leukemia**

**Presumptive Service Connection for Disease Associated with Exposure to Certain Herbicide Agents: AL Amyloidosis (ALA), 74 Fed. Reg. 21,258 (May 7 , 2009), effective date May 7, 2009:**

**Diseases to which the presumption of service connection applies:**

**AL amyloidosis (ALA)**

## **APPENDIX B**

### **Health Outcomes Not Associated With Exposure to Certain Herbicide Agents, 72 Fed. Reg. 32,395 (June 12, 2007):**

**Hepatobiliary cancers;**  
**Oral, nasal and pharyngeal cancer;**  
**Bone and joint cancer;**  
**Skin cancers (melanoma, basal, and squamous cell);**  
**Breast cancer;**  
**Female reproductive cancer (cervix, uterus, and ovary);**  
**Testicular cancer;**  
**Urinary bladder cancer;**  
**Renal cancer;**  
**Leukemia (other than chronic lymphocytic leukemia (CLL));**  
**Abnormal sperm characteristics and infertility;**  
**Spontaneous abortion;**  
**Neonatal or infant death and stillbirth in offspring of exposed individuals; Low birthweight in offspring of exposed individuals;**  
**Neurobehavioral disorders (cognitive and neuropsychiatric);**  
**Movement disorders including Parkinson's disease and amyotrophic lateral sclerosis (ALS);**  
**Chronic peripheral nervous system disorders;**  
**Respiratory disorders;**  
**Gastrointestinal, metabolic, and digestive disorders (changes in liver enzymes, lipid abnormalities, ulcers);**  
**Immune system disorders (immune suppression, autoimmunity);**  
**Circulatory disorders**  
**Endometriosis;**  
**Effects on thyroid homeostasis;**  
**Gastrointestinal tumors (esophagus, stomach, pancreas, colon, rectum);**  
**Brain tumors; and**  
**Any other condition for which the Secretary has not specifically determined a presumption of service connection is warranted.**