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**DEPARTMENT OF VETERANS
AFFAIRS**

38 CFR Part 3

RIN 2900-AK63

**Disease Associated With Exposure to
Certain Herbicide Agents: Type 2
Diabetes**

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations concerning presumptive service connection for certain diseases for which there is no record during service. This amendment is necessary to implement a decision of the Secretary of Veterans Affairs under the authority granted by 38 U.S.C. 1116 that there is a positive association between exposure to herbicides used in the Republic of Vietnam during the Vietnam era and the subsequent development of Type 2 diabetes. The intended effect of this amendment is to establish presumptive service connection for that condition based on herbicide exposure.

DATES: *Effective Date:* July 9, 2001.

FOR FURTHER INFORMATION CONTACT: Bill Russo, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273-7211.

SUPPLEMENTARY INFORMATION: VA published a proposal to amend 38 CFR 3.309(e) to establish presumptive service connection for Type 2 diabetes based on exposure to herbicides in the *Federal Register* of January 11, 2001 (66 FR 2376-80). Interested persons were invited to submit written comments concerning the proposal on or before March 12, 2001. We received 14 comments: one from the New York State Council of the Vietnam Veterans of America, one from the Wisconsin State Council of the Vietnam Veterans of America, and 12 from concerned individuals.

I. Comments on the Proposed Rule

Comments Supporting the Proposed Regulation

Three commenters stated that they supported the proposed regulation. One e-mail comment signed by 86 individuals also stated that they supported the proposed regulation. One commenter stated that he supported the proposed regulation and asked for swift implementation of the regulation.

Minimum 10% Rating

One commenter urged that all Vietnam veterans with Type 2 diabetes be awarded a minimum 10% disability rating.

This rule implements 38 U.S.C. 1116(c), which requires VA to establish a presumption of service connection when a positive association is found between exposure to certain herbicide agents and the subsequent development of a disease. The statute does not require VA to presume that such diseases result in any particular degree of disability. Further, under 38 CFR 3.307(a)(6)(ii), any disease must be manifest to a degree of disability of 10 percent or more before it may be presumed service connected based on herbicide exposure. In establishing presumptions of service connection for specific diseases based on herbicide exposure or other circumstances of service, Congress has consistently required that the disease be manifest to a degree of disability of 10 percent or more before the presumption applies. (See 38 U.S.C. 1116(a)(2)). We are aware of no justification for treating type 2 diabetes differently than other presumptive conditions in this regard. We therefore make no change based on this comment. We note that VA's rating schedule in 38 CFR 4.119, Diagnostic Code 7913, provides that a 10-percent rating will be assigned for diabetes which is "[m]anageable by restricted diet only."

Herbicide Exposure Outside Republic of Vietnam

One commenter urged that VA amend the proposed regulation to include veterans who did not serve in the Republic of Vietnam, but were exposed to herbicides during their military service.

Section 1116(a)(3) of title 38 of the United States Code establishes a presumption of exposure to certain herbicides for any veteran who served in the Republic of Vietnam between January 9, 1962 and May 7, 1975, and has one of the diseases on the list of diseases subject to presumptive service connection. **However, if a veteran who did not serve in the Republic of Vietnam, but was exposed to an herbicide agent defined in 38 CFR 3.307(a)(6) during active military service, has a disease on the list of diseases subject to presumptive service connection, VA will presume that the disease is due to the exposure to herbicides. (See 38 CFR 3.309(e)). We therefore believe that there is no need to revise the regulation based on this comment.**