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Presumptions of Service Connection Based on Herbicide Exposure

Q: What is the chronology in establishing presumptions of service connection, based on herbicide exposure?

A: Under the timetable established by 38 U.S.C. § 1116(c), when VA receives a report from the Institute of Medicine (IOM) concerning health effects of herbicide exposure, the Secretary has 60 days to determine whether a presumption of service connection is warranted for each health effect addressed in the report. If the Secretary finds in favor of the presumption, VA has another 60 days to publish a “notice of proposed rulemaking” to establish the presumption. This begins a 90 day period to publish a “final rule”. Consequently, there is a 210-day window after an IOM report has been issued for publication of a final rule.

Q: Will veterans lose benefits as a result of VA's failure to meet the final rule deadline?

A: Vietnam veterans suffering from one of the conditions for which the Secretary has announced an intention to create a presumption of service connection based on herbicide exposure can ensure that they will not lose any benefits due to delay in publication of a final rule by filing a claim for disability compensation now.

Under a stipulation entered into in the *Nehmer* litigation, and VA's implementing regulations at 38 C.F.R. § 3.816, Vietnam veterans are protected from any loss of benefits because VA can pay benefits back to the date of a pending or previously denied claim for a condition for which VA subsequently establishes a presumption of service connection based on herbicide exposure. To reiterate, the only way an eligible Vietnam veteran can lose out is if he or she delays filing or does not file a claim, as the effective date of benefits hinges on the date of actually filing of the claim.

Q: Why doesn't VA immediately issue an interim final rule to establish presumptions of service connection for the three conditions at issue?

A: In prescribing by statute (38 U.S.C. § 1116(c)) the procedure for establishment of new presumptions of service connection based on herbicide exposure, Congress clearly contemplated a procedure involving issuance of a proposed rule, provision of a period for public comment, and issuance of a final rule. VA is following that Congressionally-mandated procedure.

At this point in the Executive Branch clearance process, any attempt to change to an interim-final-rule approach, even if legally permissible, would only slow down the process of issuance of a final regulation. VA is committed to helping Veterans and ensuring they get the services and care they need and deserve.