

INTRODUCTION TO VETERANS LAW
& VA ACCREDITATION REQUIREMENTS

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INTRODUCTION.

The Department of Veterans Affairs (VA) is a cabinet level federal agency that has two major and distinct functions. First, the Veterans Health Administration provides medical care to veterans at VA Medical Centers. Second, the Veterans Benefits Administration provides benefits and compensation to veterans and their dependents. Veteran's law is located in title 38 of the United States Code and Code of Federal Regulations.

Attorneys can now represent veterans and dependants in their claims for compensation and pension for a fee at the VA regional offices. All initial claims for benefits are filed at the VA regional office (VARO) in the state where the veteran resides. However, representation can only commence after a notice of disagreement has been filed.

Generally, each condition for which a benefit is sought is called a claim and the file the VA keeps on the veteran is called a claims file or C File. The two basic types of benefits for veterans are compensation for service connected disabilities and pension for non-service connected disabilities that are totally disabling. Service connected means that the disability or death was incurred or aggravated during active service in the line of duty or that the death resulted from a disability that was incurred or aggravated in the line of duty during active military service. Pension may be awarded if the veteran is completely disabled by his condition but his disability is not related to service.

The most common survivor's benefits are Indemnity and Dependency Compensation (DIC), Accrued Benefits and Pension.

- I. Compensation service connected benefits.
 - A. To qualify for compensation, a veteran must have
 - 1. Served in active military, naval, or air service;
 - 2. Was discharged under conditions other than dishonorable. 38 U.S.C. sec. 101(2);
 - 3. Has a disease, injury or condition incurred or aggravated by service;
 - 4. The disability is not a result of willful misconduct or abuse of alcohol or drugs.
 - B. Most common compensation claims:
 - 1. Direct service connection.
 - 2. Presumptive service connection.
 - 3. Secondary service connection.
 - 4. Claim to reopen based on new and material evidence.
 - 5. Ratings including at time of initial award, later increase, and total disability.
 - C. 3 Elements of a basic claim:
 - 1. CURRENT DISABILITY
 - a. If the claim is plausible, VA has a duty to assist the veteran in developing the claim. Current disability can be established by lay evidence in some cases.
 - b. Unless it is a disability that cannot be service connected because it existed prior to service and was not aggravated by service or, for specific reasons established by law, cannot be service connected (i.e., personality disorder, tobacco and alcohol use, or dental conditions.)
 - c. 2 IMPORTANT PRESUMPTIONS

- i. PRESUMPTION OF SOUNDNESS the veteran will be presumed to have been in good health when he or she entered service unless there is clear evidence to the contrary, 38 U.S.C. sec. 1111; 38 C.F.R. sec. 3.304(b)
 - ii. PRESUMPTION OF AGGRAVATION if a veteran is treated in service for a condition which existed prior to service, the condition will be presumed to have been aggravated in service unless there is clear evidence to the contrary. 38 U.S.C. sec. 1153; 38 C.F.R. sec. 3.306.
2. Evidence of precipitating disease, injury or event in service.
 - a. Evidence of in-service treatment of symptoms related to currently diagnosed condition is in the service records
 - b. In-service incurrence presumed if
 - i. Condition became manifest within one year of discharge
 - ii. Condition related to exposure to Agent Orange for veterans who served in Vietnam or radiation for certain qualifying veterans.
3. Nexus between current condition and service.
 - a. Medical or sometimes lay evidence that links the current disability to the in-service disease, injury or event.
 - i. Medical nexus opinion must state it is at least “as likely as not” i.e. 50/50 chance that currently diagnosed condition caused by in service event or injury.
 - ii. Reasonable doubt must be resolved in favor of the veteran.
 - iii. VA will reject opinion not based on comprehensive review of medical records.

- b. Presumptive Service connection for certain conditions eliminates burden of proof for this element:
 - i. Nexus between a Vietnam veteran's exposure to Agent Orange and certain conditions such as Type II diabetes and certain cancers.
 - ii. Ionizing radiation exposure while in the Pacific Theater during WWII. 38 C.F.R. sec. 3.307-3.309, 3.311, 3.313(b).
 - iii. MS if manifest to a degree of 10% or more within specified period of time post-service.
- c. Continuity and chronicity of symptomatology: medical or lay evidence that a particular condition existed during service and treatment records or lay evidence of continuous treatment (or symptoms) to the present. 38 U.S.C. 1101(3), 38 C.F.R. secs. 3.303(b), 3.309(a).

D. Secondary Service Connection

- 1. When a veteran is service connected and later develops another medical condition as a result of the service connected condition, the second condition also qualifies as a service connected condition and is rated as a compensable disability secondary to the service connected disability.
- 2. Elements:
 - a. An existing service connected condition, e.g. Type II Diabetes
 - b. A current, second condition, e.g. diabetic neuropathy, retinopathy, etc.
 - c. A medical opinion stating it is 'at least as likely as not' that the second condition was caused or aggravated by the direct service connected condition.

E. Reopened Claims based on New and Material Evidence.

1. Veteran was previously denied service connection for a claimed condition and the one year appeal period has passed, he or she can reopen that claim by providing “new and material evidence.” 38 C.F.R. 3.156(a).
2. Elements:
 - a. New: the evidence must never have been submitted previously in connection with the claim being reopened;
 - b. Material: the evidence must, by itself, or when considered with other evidence, related to an unestablished fact necessary to establish the claim.

F. Request for revision based on Clear and Unmistakable Error (CUE)

1. Claim for revision of prior final VARO or BVA decision based on CUE.

Definition: “Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions in effect at the time were incorrectly applied... CUE is the sort of error which, had it not been made, would have manifestly changed the outcome...CUE is an error that is undebatable so it can be said that reasonable minds could only conclude that the original decision was incorrect when made.

2. Must be made with specificity but no time limit for making CUE claim but difficult to win.
3. Has same effect as if decision had been made on the date of the prior decision.
4. Only one CUE claim per issue.

G. Ratings Need not be totally disabled to receive service connected compensation benefits, unlike for Pension or Social Security.

1. Basic Ratings: 0-100% 38 C.F.R. Part 4: Rating Schedule for VA Disabilities

<http://www.vba.va.gov/bln/21/rates/comp01.htm>

- a. Retroactive to date of claim.
- b. Not taxed or offset by other disability payments or income.

- c. Appeal procedure similar to appeals for service connection claims.
 - d. If condition worsens, veteran can notify VA and VA is obligated to provide a medical exam to re-evaluate condition.
2. Combined disability ratings- complicated, i.e. 20 plus 20 does not equal 40.
3. Total Disability Based on Individual Unemployability (TDIU): Veteran can receive compensation at the 100% disability level even if the medical condition itself does not warrant a 100% rating. Elements:
- a. Service connected disabilities must satisfy the requisite percentage requirements, 38 C.F.R. sec. 4.16(a):
 - i. Single disability rated 60% or more
 - ii. Combined disabilities rated 70% or more with at least one condition rated at least 40%.
 - b. The veteran is prevented from securing or following a substantially gainful occupation because of the service connected disability/ies (employment below poverty threshold or odd jobs are not substantial gainful employment).
4. Special Monthly Compensation for veterans with certain severe disabilities.

<http://www.vba.va.gov/bln/21/rates/comp02.htm>

II. Pension

- A. Needs based program designed to supplement the income of veterans unable to support themselves financially due to total disability from a nonservice connected condition or conditions.
- B. Eligibility Requirements. 38 U.S.C. sec. 1513:
 - 1. Discharge under other than dishonorable conditions.

2. Active duty that includes a total of ninety days of military service at least one of which was during a period of war. 38 U.S.C. secs. 1101(2)(A), 1521(j), 38 C.F.R. sec. 3.2 (Definition of wartime).
3. Low income: i.e. single veteran with income of less than \$11,830 or veteran with dependent spouse with income less than \$15,493. Rates increase if veteran is housebound, has dependents, required aid and attendance, or is in a nursing home. (Costs for skilled nursing home care may be deducted from the veteran's income. 38 U.S.C. sec. 501(a); 38 C.F.R. sec. 3.272.)
4. Permanently and totally disabled but not due to willful misconduct. 38 U.S.C. sec. 1502; 38 C.F.R. sec. 4.17.
5. Veterans over age 65 may also qualify for pension benefits.
<http://www.vba.va.gov/bln/21/pension/index.htm>
6. Choice: Veteran may not receive both compensation and other payments simultaneously
 - a. If veteran is entitled to both compensation and pension, VA will pay the higher of the two amounts, unless the veteran expressly requests otherwise.
 - b. A veteran can receive both VA pension and SSI income concurrently.
 - c. Veteran also cannot receive both compensation and full military retirement benefits or compensation and active service pay for the same period of time.

C. Offsets based on income including disability payments.

<http://www.vba.va.gov/bln/21/Rates/pen01.htm>

*III. Survivor' s Benefits.**

A. Dependency and Indemnity Compensation (DIC) is paid to the surviving spouse or eligible dependents of a veteran entitled to service connected compensation where:

1. The primary or contributing cause of death was a condition that was service connected or, at a minimum, met all three criteria for entitlement to service connected compensation; or,
2. The veteran had a 100 percent service connected disability for a period of ten years prior to death.
3. The spouse must have been married to the veteran for a period of 1 year or more prior to veteran' s death.
4. To receive maximum benefits, the DIC claim must be filed within one year of the veteran' s death, otherwise it is only paid from the date the claim was submitted.
5. Rates http://www.va.gov/opa/publications/benefits_book/benefits_chap12.asp

B. Accrued Benefits.

1. Eligible survivors of veterans who had a pending claim at the time of their death.
 - a. Survivor can continue the pursuit by filing a new “accrued benefits claim” within one year of the veteran' s death. 38 U.S.C. sec. 5121(c); 38 C.F.R. 3.1000(c).
 - b. Evidence limited to what was in the claims file at the time of the veteran' s death. No new evidence may be added.

*[*http://www.tomah.va.gov/federal_benefits.pdf](http://www.tomah.va.gov/federal_benefits.pdf)*

2. If successful, the survivor can receive the total amount of monetary payment that was payable to the veteran if he or she had survived.

IV. Attorney Accreditation and Fees.

A. Accreditation

1. Accreditation is required to represent veterans: As of June 22, 2008, all representatives must be accredited *before* filing the 21-22a and assisting veterans in the preparation, presentation and prosecution of claims for benefits.
2. Eligibility (attorney):
 - a. All attorneys in good standing with a State Bar
 - b. Procedure:
 - i. Attorney: Apply for accreditation using VA form 21a. General requirements for payment of Attorneys Fees for representation (no exam);
 - ii. Non-Attorney, Form 21 (must take exam).

B. A veteran can be represented for a fee if

1. A Notice of Disagreement (NOD) for THAT CLAIM was filed on or after June 20, 2007, or,
2. If NOD was filed prior to June 20, 2007, representation can commence
 - a. Within one year of a final Board decision (not a remand), or
 - b. While the claim was pending at Court of Appeals for Veterans Claims.

C. How to commence representation before VA.

1. Submit form 21-22a and

2. Legal representation agreement

- ii. See sample in Appendix
- iii. Agreement must be filed with Office of General Counsel and Regional Office within 30 days of execution.

D. Payment for representation. Fees can be contingent, flat or hourly

- 1. A contingent fee of no more than 20% is presumed reasonable and VA will withhold that amount from past due benefits.
- 2. Must meet reasonableness requirement, 20% presumed reasonable (VA determines Reasonableness). 38 C.F.R. sec. 14.636(f)

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- Stolz, Zachary, Esq., Overview of VA Benefits, National Organization for Veterans Advocates New Practitioner Session (NOVA), Spring 2010. (Referenced with permission from NOVA).