

CHAPTER 5

STUDY PLAN

SERVICE-CONNECTED DISABILITY COMPENSATION

OBJECTIVE

To learn the basic rules of VA service-connected disability compensation.

REFERENCES

- Title 38, U.S. Code, Part II, Chapter 11, *Compensation for Service Connected Disability or Death*
- Title 38, U.S. Code, Part IV, Chapter 51, *Claims, Effective Dates and Payments*
- Title 38, U.S. Code, Part IV, Chapter 53, *Special Provisions Relating to Benefits*
- 38 Code of Federal Regulations Part 3 and Part 4
- Adjudication Manual M21-1MR (Manual Rewrite), Part III and Part IV.
- VA Pamphlet 80-13-1, Chapter 2, *Federal Benefits for Veterans, Dependents and Survivors*.
- Veterans Benefits Manual, Chapter 3, *Compensation for Veterans with Service-Connected Disabilities*
- VA Fast Letter 04-13, *Relationship Between Immunization with Jet Injectors and Hepatitis C Infection as it Relates to Service Connection*
- VA Forms:
 - 21-526EZ, *Application for Disability Compensation and Related Compensation Benefits*
 - 21-8940, *Veteran's Application for Increased Compensation Based on Unemployability*

INTRODUCTION

The term “Compensation and Pension” denotes VA monetary benefits paid on account of a veteran’s disability or death. Although the terms are often used more or less interchangeably, they are in fact separate and distinct sets of benefits.

When one refers to **compensation**, one generally is referring to monthly benefits for service-connected disabilities. When one refers to **pension**, one generally is referring to an income-based benefit for veterans who served during a period of war, are totally disabled or die from causes not related to service, and whose incomes do not exceed the limit set for VA purposes. Pension is discussed in **Chapter 8**.

BASIC ELIGIBILITY

In order to be eligible for service-connected disability compensation, a veteran must have been discharged “**under conditions other than dishonorable**”. Honorable and general (under honorable conditions) discharges are automatically considered to have been issued under “conditions other than dishonorable” for VA purposes. A veteran discharged with an other than honorable or a bad conduct discharge by special court-martial (but not by general court-martial) can have her/his military service reviewed by the VA for a determination whether the service should be considered “under conditions other than dishonorable”. This is known as a **Character of Discharge (COD) determination** and will be discussed in detail in Chapter 25.

There is no minimum length of service requirement for receiving service-connected disability compensation.

COMMONLY CONFUSED (AND CONFUSING!) TERMS

To be eligible for VA benefits, 38 U.S.C. § 101(2) states that veterans must have served in the military under “**conditions other than dishonorable**.” What does that mean?

- It does **not** mean that only veterans who received dishonorable discharges are ineligible for benefits.
- It **does** mean that veterans who received honorable, general, or uncharacterized discharges are eligible for benefits

THREE REQUIREMENTS OF SERVICE CONNECTION

Per 38 C.F.R. §3.303(a), service connection means *“the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if pre-existing such service, was aggravated therein.”* In order to be considered for service connection, a veteran **must** submit a claim with the VA. (38 C.F.R. §3.151, 38 U.S.C. § 5101(a).) Formal applications for service-connected disability compensation may be submitted using a completed VA Form 21-526EZ, *Application for Disability Compensation and Related Compensation Benefits* together with appropriate medical and other supporting evidence.

A disability **incurred** in service may be due to an injury or disability brought about by combat, or as a result of some *circumstance* in service (such as asbestos exposure). It may also be a disease or chronic condition with manifestations, *evident in one’s service treatment records*, sufficient to identify the disease.

REQUIREMENTS FOR SERVICE-CONNECTION:

1. **CURRENT DISABILITY:** The veteran has a *current, diagnosed* physical or mental health condition.
2. **IN-SERVICE EVENT OR INJURY:** There was an *incident* in service that caused the condition, or a condition was first made manifest during service, that was not a result of the veteran’s willful misconduct.
 - An incident can be almost anything—so long as the veteran was on active duty at the time of the incident, including events/injuries that occurred during leisure time.
 - Incidents include events, injuries, exhibiting symptoms of a medical condition, and being treated for a medical condition.
3. **NEXUS:** There is a *link* between the current condition and the in-service incident or initial manifestation of a condition.

1. CURRENT DISABILITY

To fulfill the first requirement, the veteran must have a current diagnosis. The diagnosis may come from a non-VA doctor or professional but the VA may take account of qualifications and credentials. VA evaluations may be considered more probative than non-VA evaluations. If the veteran does not have a current diagnosis, but provides competent lay evidence of

“persistent or recurrent symptoms of the disability,” the VA **may** provide him or her with a compensation and pension.



The VA’s Disability Benefits Questionnaires (DBQs) are used for claim processing. They are downloadable forms addressing a range of medical conditions. They are meant to streamline the collection of medical evidence with check boxes that use language of VA diagnostic codes, so the RVSR can make relatively quick and easy decisions. For veterans with private doctors, the VA encourages veterans to take the forms along to examination by those providers. There are more than 70 DBQs at this time.

2. IN-SERVICE PRECIPITATING DISEASE, INJURY, OR EVENT

The in-service injury may be proven by evidence in the **service treatment records** that document the injury. **Lay evidence** such as buddy statements and the veteran’s own statement may be adequate to prove an in-service injury or event if it is **competent**. Competent lay evidence is evidence that does not require specialized education, training, or experienced by the proponent. It must be provided by a person who has first-hand knowledge of facts or circumstances. (38 C.F.R. § 3.159(a)(2).) However, they will be weighed against other evidence including the absence of military records supporting the assertions. If the in-service injury or event occurred in **combat**, the veteran’s own statement is usually sufficient. (38 C.F.R. §§ 3.204(d), (f).)

The injury may not be a result of **willful misconduct**. Willful misconduct is “an act involving conscious wrongdoing or known prohibited action.” (38 C.F.R. § 3.1(n)). Disability or death that results from alcohol or drug use is generally considered willful misconduct. (38 C.F.R. §§ 3.301(c)(2), (3).) However, disability resulting from alcohol or drug abuse that is secondary to PTSD can receive compensation. (*Allen v. Principi*, 237 F.3d 1368 [Fed. Cir. 2001]) There is a presumption that an injury or death during active service is incurred in the line of duty and is not a result of willful misconduct. (*Smith v. Derwinski*, 2 Vet. App. 241, 244 (1992).)

3. A NEXUS BETWEEN THE IN SERVICE INJURY AND THE CURRENT DISABILITY

Nexus: Direct Service Connection (38 C.F.R. §§ 3.03 – 3.306)

Direct service connection means that an injury or event in service directly caused a current disability. Proving a nexus usually requires a positive **“linkage opinion”** from a competent medical professional that has reviewed the veteran’s military and civilian records. The evidence must demonstrate that it is **“as likely as not”** that the current disability is connected to the in-service injury or event. This is usually referred to as a nexus statement.

A nexus statement can create an equipoise (counterbalance) under 38 USCS 5107(b) Benefit of the doubt (conflicting medical opinions positive vs negative) resulting in the benefit of the doubt in favor of the veteran/claimant.

Some conditions need not actually manifest during service to be linked to service—i.e. in-service noise induced hearing loss, cancer caused by exposure to radiation in service, and post-traumatic stress disorder resulting from an in-service trauma.

A nexus statement is not required for certain diseases identified as “chronic” in 38 C.F.R. § 3.309. For these illnesses, the VA assumes that if it existed in service or during a presumptive period following service and it currently exists then there is a nexus between the two. For example, if a veteran was initially **diagnosed** with hypertension in service (diagnosis noted in service medical records), then no matter how long he takes after service

A **nexus** may be established using four theories:

1. Direct Service Connection
2. Aggravation
3. Secondary Service Connection
4. Presumptive Service

to first file the claim, service connection may be granted, but **only** from the date of receipt of the claim.

If there is no clear in-service diagnosis of the currently diagnosed chronic disease, then a showing of **continuity of symptomatology** beginning in service may suffice. Continuity of symptomatology

means that the symptoms caused by the condition recurred regularly, without an intervening cause, up to the date of the claim. (38 C.F.R. § 3.303(b).)



ADVOCACY TIP

The quality of the medical nexus opinion is crucial to a claim. The opinion should describe the information sources used to form the opinion, whether the veteran's own report or objective medical tests. The opinion should state all the factors that led the expert to conclude the current disability is connected to service. The doctor must be given as much information as possible in order to make his or her opinion. The opinion should be factually accurate, fully articulated and soundly reasoned. The opinion **must** state at minimum that it is "**at least as likely as not**" that the veteran's current disability is related to service.

Nexus: Aggravation (38 C.F.R. §§ 3.306, 3.322)

In general, a veteran is presumed, at entry in service, to be in sound condition "*except for the defects, infirmities, or disorders noted at entrance into service.*" However, this **presumption of soundness**, for conditions not listed at the entrance exam, may be **refuted by clear and convincing evidence** that the condition existed before the veteran entered service. (38 C.F.R. §3.304(b).)

A disease or disability that existed prior to service may be considered **aggravated** in service if medical records show that a veteran's time in service

increased the severity of the condition *beyond the natural progression of the disease*. 38 C.F.R. §§ 3.304, 3.305, and 3.306 provide additional guidance on aggravation of an existing condition.

Nexus: Secondary Service Connection (38 C.F.R. § 3.310)

Disabilities that are *proximately due to or the result of* a service connected disease or injury may also be claimed for service connection. Such disabilities may include complications of treatment, and aggravation (beyond normal progression) of non-service connected disabilities. Such claims should always be properly identified (i.e. sleep apnea secondary to diabetes mellitus II) and submissions should always include medical records or a doctor's statement showing the possible connection between the service-connected disability and the disease or disability being claimed.

Although there are diseases commonly known as developing secondary to certain disabilities, the VA will still need medical records showing the link or medical opinions explaining the relationship between the service-connected disability and the secondary disease or disability. Examples of commonly recognized secondary conditions include: peripheral neuropathy, erectile dysfunction, retinopathy or even kidney disease secondary to diabetes mellitus II; cardiovascular diseases secondary to amputation at or above the ankle or knee; and radiculopathy of the extremities secondary to degenerative disc disease (neck or back).



ADVOCACY TIP

Excerpts from medical textbooks, treatises, or journal articles can provide important support to a medical opinion. The VA accepts medical treatises as competent medical evidence that can establish a nexus. A veteran may also want to provide a medical treatise to a doctor in an effort to persuade them to provide a nexus letter.

Nexus: Presumptive Service Connection (38 C.F.R. §§ 3.307, 3.309, 3.317)

Certain post-service diseases will be *presumed* to have begun in service or be the result of certain incidents or circumstances in service. These presumptions are intended to allow service connection when the evidence (i.e., service treatment records) would not otherwise support it. The VA provides a list of diseases (38 C.F.R. §§3.309 and 3.317(c)) that can be considered for this type of service connection, depending on the circumstances outlined by 38 C.F.R. §§ 3.307, 3.308, and 3.317(c):

- **Chronic diseases**, listed at 38 C.F.R. § 3.309(a);
- **Tropical diseases**, listed at 38 C.F.R. § 3.309(b);
- **Former prisoner-of-war** associated diseases, listed at 38 C.F.R. § 3.309(c);
- **Radiation exposure**, listed at 38 C.F.R. § 3.309(d) & §3.311(b)(2)
- **Herbicide exposure (Agent Orange)**, listed at 38 C.F.R. § 3.309(e) [discussed in Chapter 7];
- **Mustard gas exposure**, listed at 38 C.F.R. § 3.16;
- **Persian Gulf and Southwest Asia** associated diseases, listed at 38 C.F.R. §§ 3.317(a), (b), and (c) [discussed in Chapter 7]; and
- **Amyotrophic Lateral Sclerosis (ALS)**, discussed in 38 C.F.R. § 3.318.

Some of the listed conditions must manifest to at least a degree of 10% within one year of service.

For the diseases listed under 38 C.F.R. § 3.309 and for ALS under § 3.318, the regulations require the veteran to have served at least 90 days during a war period *or* after December 31, 1946. (38 C.F.R. § 3.307(a)(1).) As for diseases listed under 38 C.F.R. § 3.317(c), specific to infectious diseases, the veteran should have served in the Southwest Asia theater of operations during the Persian Gulf War or in Afghanistan on or after September 19, 2001 (38 C.F.R. § 3.317(c)(3)(ii) and §3.317(e).)



Presumptive service connection is *limited only* to the diseases specifically listed, and evidence necessary to support these claims should include a clear and confirmed diagnosis of the disease and evidence or pertinent information providing the details of exposure.

ILLNESSES THAT CANNOT BE SERVICE CONNECTED:

- Transitory illnesses or superficial injuries, which resolve or heal with no ascertainable chronic or permanent residuals (38 C.F.R. § 3.303(b))
- Congenital or developmental defects such as a personality disorder or a simple refractive error of the eye (38 C.F.R. §§ 3.303(c), 4.9)
- Injuries which are either the immediate or the remote result of the veteran’s own willful misconduct (38 C.F.R. § 3.301(a))
- Any disability or death *solely* on the basis that it is the result of the veteran’s use of tobacco products during service (38 C.F.R. § 3.300)



“SERVICE-CONNECTION” FOR INJURY RESULTING FROM VA MEDICAL CARE (38 U.S.C. § 1151)

The VA treats injury, disability, or death resulting from VA medical care, vocational rehabilitation, or Compensated Work Therapy (CWT) as though it is service connected. The three requirements are: 1) a current injury, disability or death; 2) care was furnished by VA medical care, vocational rehabilitation, or CWT; and 3) the proximate cause of the disability was carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault.

A showing of additional disability is required in all § 1151 cases except those based on the veteran’s death. The VA compares the veteran’s functioning immediately before beginning VA care to the veteran’s functioning after VA care to determine whether there was additional disability. (38 C.F.R. § 3.361(b).)



One can demonstrate that the VA care proximately caused disability or death by establishing that it is **as likely as not** that VA failed to exercise the degree of care expected of a reasonable healthcare provider.

Claimants for benefits under § 1151 will soon be required to use a form designated specifically for that purpose. As of December 2015, the form and form number have not been made available to the public. Once established, compensation pursuant to § 1151 is rated and paid just like a service-connected injury, although ancillary benefits are limited in § 1151 cases: in general, they are restricted to the applicable priority medical care; a clothing allowance (where applicable); and, where the qualifying level of compensable disability is present, an automobile and appropriate special adaptive equipment under 38 U.S.C., Chapter 39 and specially adapted housing under 38 U.S.C., Chapter 21.

Compensation for disabilities under § 1151 may be combined with compensation for any service-connected conditions the veteran may also have.

The **Federal Tort Claims Act (FTCA)** provides an alternative remedy for veterans suffering harm due to VA medical care. A veteran can bring a civil suit in federal court against the federal government and the VA. Prior to the filing of the federal law suit, the veteran must first file an administrative claim with the VA within two years after such claim “accrues” (arises or comes into existence). The general rule is that an FTCA claim arises at the time of injury or death or at the time the plaintiff learns of the injury and its cause.

A veteran can pursue both an FTCA claim and compensation pursuant to §1151, but if a veteran receives a lump sum award under the FTCA, any §1151 benefits will be reduced by the total amount included in the FTCA award.

A veteran who seeks help from a CVSO regarding a 38 USC § 1151 claim should be advised that: he or she may have the option of filing a federal lawsuit under the FTCA, that there is a pressing statutory time limit by which it needs be filed, and that they should consult with an attorney that handles FTCA cases as soon as possible. VSRs should *never* offer to assist a veteran with a FTCA case; it is outside the scope of veterans’ benefits law.

SOME ISSUE-SPECIFIC CLAIMS

Certain claims for service connection **may** fall under **special rules**, if not diagnosed or treated in service:

- **Hearing loss and tinnitus** resulting from occupational exposure to noise is rampant among veterans. Veterans who can prove exposure to occupational noise may be able to establish service connection even if their service medical records do not indicate a hearing disability incurred in service. The key for such a claim is the identification of *acoustic trauma* in service that can be verified in their DD214s or personnel files (such as MOS, history of assignments, etc.). However, even with the confirmation of acoustic trauma, service connection may only be established if the current hearing



ADVOCACY TIP

Service-connected hearing loss must be severe before it becomes compensable. If a veteran comes to you for benefits assistance related to hearing loss, refer to 38 CFR §3.385 & §.85

loss meets the minimum levels considered by the VA as a disability under 38 C.F.R. § 3.385, and the VA examiner provides a positive medical opinion (at least as likely as not).

- **Asbestos-related diseases** (*pleural plaque, pleural effusion, asbestosis, lung cancer, mesothelioma*) may also be claimed for service-connection by veterans with military occupations that exposed them to asbestos (i.e., pipefitter, shipyard workers). It is important for the veteran to provide information, including description of activities, regarding his exposure to asbestos in service. Medical records in support of the claim should include a clinical diagnosis showing the history of the exposure and radiographic evidence of parenchymal lung disease.

- **Hepatitis C (HCV)** may be claimed when there is evidence the veteran was exposed to risk factors in service (such as blood transfusion before 1992, sharing of toothbrushes or razors, or accidental exposure to blood products through the skin or mucous membranes). It is important to identify the exposure to risk factors in service and provide current proof of diagnosis, confirmed by laboratory testing.
 - Many servicemembers in the 1960s and 1970s were immunized with unsterilized and bloody air jet “guns” (injectors) and could have been infected with Hepatitis C in that manner. The VBA considers that mode of infection to be “biologically plausible”, but not supported by scientific evidence. VA Fast Letter 04-13 (June 29, 2004) states: “The large majority of HCV infections can be accounted for by known modes of transmission, primarily transfusion of blood products before 1992, and injection drug use.” As a result, if jet gun is the only risk factor identified in service, and there is evidence of any non-service-connected risk factors, the VA is likely to deny service-connection.



STUDY QUESTIONS

Using the assigned references and reading materials, answer the following questions:

1. Service connection may not be established for any condition unless it is shown in the service records. (T/F) 38 C.F.R. § 3.303(d)
2. Cite the regulation which defines the level of severity required to establish service connection for hearing loss. 38 C.F.R. § 3.385
3. Is asthma a disease which can be service-connected if shown within one year after service even though there is no evidence of it in the service record? (Y/N) 38 C.F.R. § 3.309(a)
4. A person is considered to be healthy and in sound condition when entering service except for those defects actually shown on the entrance examination. This is called? 38 U.S.C. § 1111
5. If a pre-existing condition becomes symptomatic during or immediately after combat or while the veteran is a prisoner of war, that condition will be considered to have been aggravated. (T/F) 38 C.F.R. § 3.306(a), (b)(2)
6. All veterans who served in Vietnam or the waters offshore during the Vietnam-era are considered to have been exposed to herbicides. (T/F) 38 C.F.R. § 3.307(a)(6)(iii)
7. What is the presumptive period for diseases specific to former prisoners of war? 38 C.F.R. § 3.307(a)(5)
8. Is there a minimum length of service requirement for direct service connection? (Y/N) C.F.R. § 3.12a(d)(4)
9. What is the presumptive period for multiple sclerosis? C.F.R. § 3.307(a)(3)
10. What is the presumptive period for lung cancer for a Vietnam veteran? 38 C.F.R. § 3.307(a)(6)(ii)

11. Which of the following dental conditions may be service-connected for compensation purposes?

- a. Carious teeth
- b. Periodontal disease
- c. Replaceable missing teeth
- d. None of the above

38 C.F.R. § 3.381

12. For a veteran who was exposed to ionizing radiation in the course of his or her regular duties, only those conditions listed in 38 CFR § 3.311(b)(2) may be recognized as having been caused by radiation exposure. (T/F)

38 C.F.R. § 3.311(b)(4)

13. What is the minimum length of service requirement for entitlement to consideration under the presumptive provisions of the law?

38 C.F.R. § 3.307(a)(1)

14. What is the ending date for presumptions of service connection for undiagnosed illnesses in a Gulf War veteran?

38 C.F.R. § 3.317(a)(1)(i)