



DEPARTMENT OF VETERANS AFFAIRS

Mr. Aaron Hassay Salmon
518 Laidley St. Unit B
San Francisco, CA 94131

In Reply Refer To:
343/215s
[REDACTED]
Hassay, Aaron M
Aka Salmon, Aaron

August 27, 2015

Dear Mr. Salmon.

You have filed a Notice of Disagreement with our action. This is the first step in appealing to the Board of Veterans' Appeals (BVA). This letter and enclosures contain very important information concerning your appeal.

Statement of the Case

We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim. This summary will help you to make the best argument to the BVA on why you think our decision should be changed.

What You Need To Do

To complete your appeal, you must file a formal appeal. We have enclosed VA Form 9, Appeal to the Board of Veterans' Appeals, which you may use to complete your appeal. We will gladly explain the form if you have questions. Your appeal should address:

- the benefit you want
- the facts in the Statement of the Case with which you disagree; and
- the errors that you believe we made in applying the law.

When You Need To Do It

You must file your appeal with this office within 60 days from the date of this letter or within the remainder, if any, of the one-year period from the date of the letter notifying you of the action that you have appealed. **If we do not hear from you within this period, we will close your case.** If you need more time to file your appeal, you should request more time before the time limit for filing your appeal expires. See item 5 of the instructions in VA Form 9, Appeal to Board of Veterans' Appeals.

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file your appeal.

Representation

organization representatives on this website.

What We Will Do

including the transcript of the hearing, if you have a hearing.

Sincerely yours,

RO Director
VA Regional Office

CC: Disabled American Veterans

Enclosure: VA Form 9
Where to Send Written Correspondence

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ISSUES:

1. Service connection for mental health condition, also claimed as depression and anxiety.
2. Service connection for post traumatic stress disorder.
3. Service connection for spine condition, also claimed as low back condition
4. Entitlement to Total Disability Benefits Based on Unemployability.

EVIDENCE:

- Service Treatment Records May 20, 1994 to August 19, 2001
- VA Form 21-4138, Statement of intent to file Fully Developed Claim (FDC), received July 18, 2013
- Cover Memorandum from Disabled American Veterans, received July 18, 2013
- VA Form 21-22, Appointment of Disabled American Veterans as you representative, received July 18, 2013
- SF 180, Request Pertaining to Military Records, received July 18, 2013, duplicate received April 2, 2014 June 2014
- VA Form 21-526EZ, Original Claim, received September 9, 2013
- VA Form 21-22, Appointment of American Legion as you representative, 2 copies, received September 9, 2013
- Cover Memorandum from American Legion, 2 copies received September 9, 2013
- Statement from Constance Louie PhD, San Francisco Vet center, dated September 4, 2013 received September 9, 2013, duplicate copies received January 23, 2015, June 16, 2015 and June 22, 2015
- Copies of Navy Reserves Service Treatment Records, 2 copies with multiple copies of Entrance Medical Examination May 26, 1994 and Medical Examination dated June 10, 2000, received September 9, 2013,
- Copies of Navy Reserves Service Personnel Records, 2 copies received September 9, 2013
- VA Form 21-0781a, Statement in Support of Claim for PTSD Secondary to Sexual Assault, received September 9, 2013
- Treatment Records, Alameda County Medical Center, September 28, 2005
- Administrative Remarks NAVPERS 1070/613, discharge May 2, 2005, expiration of Reserve Enlistment, received September 9, 2013, duplicate received March 25, 2014, April 2, 2014
- VA Form 21-0820, Report of General Information, telephone contact: Veteran reports he is on Social Security, unable to work, and homeless, December 2, 2013
- VA Form 21-4138, Statement in Support of Claim, indicating possible name change, received December 24, 2013
- Copy of California driver's license received December 24, 2013
- E-mail correspondence regarding disqualification for transfer to Army, received December 24, 2013
- Amended copy of VA Form 21-0781a, Statement in Support of Claim for PTSD Secondary to Sexual Assault, received December 24, 2013

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- Treatment records, Alameda county Medical Center dated September 28, 2005, received December 24, 2013
- Treatment Records, VA San Francisco Health Care System, from December 24, 2014 to August 24, 2015
- VA Form 21-4138, Statement in Support of Claim, received March 3, 2014
- Muster roles for USS Sides (FFG-14) received March 3, 2014
- Certificate of Appointment, Navy grade advancement, received March 3, 2014, duplicate received April 1, 2014
- VA Letter, notification of disqualification from FDC program dated March 14, 2014
- VA internal email request to Records Management Center requesting copies of your service treatment records, dated March 14, 2014
- VA Form 21-3101 request to Defense Personnel Records Imaging System (DPRIS) requesting personnel and service treatment records, March 14, 2014
- San Francisco Vet Center response to request for records: no records available, received March 24, 2014
- VA Form 21-4138, Statement in Support of Claim, received March 25, 2014
- Cover Memorandum from American Legion, received March 25, 2014
- Copy of MEPS report processing for regular army 1998, printed from gmail July 31, 2013; failure for Army qualification based on spine/psych; duplicate received March 31, 2014, April 1, 2014, January 23, 2015
- Correspondence with enclosed duplicate email correspondence received from Veteran April 1, 2014
- Social Security Administration Work History Report, annotated by vet, received April 1, 2014
- Lay statement, Matt Smith, email dated February 2, 2014, received April 1, 2014
- Social Security Administration Notice of Award dated September 12, 2011, received April 1, 2014, duplicate copies received June 16, 2015 and June 22, 2015
- Response from Department of the Navy, no DD 214 of record for claimant, received April 2, 2014
- VA Form 21-8940, Application for Increased Compensation Based on Unemployability, received March 31, 2014, duplicate received April 2, 2014
- VA Form 21-4142, for Dr. Louie, San Francisco Vet Center, received April 2, 2014
- Copy of Naval Postgraduate School, Monterey, California, Thesis, A Cost Comparison Between Active and Naval Reserve Force FFG 7 Class Ships, Robert F. Dudolevitch, June 1993, received April 7, 2014
- RCS Medical, Dr. Louie summary of visits, to August 1, 2013 to April 7, 2014, received April 10, 2014
- Vet Statement, "Summary of my life" received April 11, 2014
- VA Form 21-4138, Statement in Support of Claim received January 23, 2015
- Excerpts from a master's thesis, Naval Postgraduate School, Monterey, California, A cost Benefit Analysis of the Naval Reserve Force Frigates, Jeffrey Davis, December 1994, with personal statement from Veteran attached, received April 14, 2014

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- VA Form 21-22, Appointment of Disabled American Veterans as you representative, received April 20, 2015
- Statement from Vet received April 21, 2014
- Rating Decision dated September 4, 2014 with notification letter dated September 8, 2014, to include all evidence cited.
- VA Form 9, Substantive Appeal form, annotated as accepted as Notice of Disagreement (NOD) received January 12, 2015
- VA Form 21-4138, Statement, received two copies, January 23, 2015
- VA Letter requesting clarification regarding disagreement dated February 10, 2015
- VA Letter acknowledging receipt of Notice of Disagreement, February 12, 2015
- Veterans Information Solution, verification of military service, Service in Navy Reserve, May 25, 1994 to June 15, 2002, Honorable, no Active Duty, no deployment, received February 26, 2015
- VA Form 21-0958, Notice of Disagreement, received March 6, 2015
- Copy of Table of Contents, Title 38-Veterans Benefits, received June 16, 2015
- VA Form 21-4138, Statement in Support of Claim received June 25, 2015
- VA Form 21-0781a, Statement in Support of Claim for PTSD Secondary to Sexual Assault, received June 26, 2015
- VA Form 21-0820, Report of General Information, telephone contact, informal conference, August 27, 2015

ADJUDICATIVE ACTIONS:

9-4-2014 Rating Decision

9-8-2014 Notification Letter

1-12-2015 VA Form 9 noted as accepted as Notice of Disagreement

3-6-2015 Notice of Disagreement received

PERTINENT LAWS; REGULATIONS; RATING SCHEDULE PROVISIONS:

Unless otherwise indicated, the symbol "§" denotes a section from title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief. Title 38 contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits.

§3.1 Definitions.

(a) **Armed Forces means** the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, **including their Reserve components.**

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(b) Reserve component means the Army, Naval, Marine Corps, Air Force, and Coast Guard Reserves and the National and Air National Guard of the United States.

(c) Reserves means members of a Reserve component of one of the Armed Forces.

(d) Veteran means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.

(1) For compensation and dependency and indemnity compensation the term veteran includes a person who died in active service and whose death was not due to willful misconduct.

(2) For death pension the term veteran includes a person who died in active service under conditions which preclude payment of service-connected death benefits, provided such person had completed at least 2 years honorable military, naval or air service, as certified by the Secretary concerned. (See §§3.3(b)(3)(i) and 3.3(b)(4)(i))
(Authority: 38 U.S.C. 501)

(e) Veteran of any war means any veteran who served in the active military, naval or air service during a period of war as set forth in §3.2.

(f) Period of war means the periods described in §3.2.

(g) Secretary concerned means:

- (1) The Secretary of the Army, with respect to matters concerning the Army;
- (2) The Secretary of the Navy, with respect to matters concerning the Navy or the Marine Corps;
- (3) The Secretary of the Air Force, with respect to matters concerning the Air Force;
- (4) The Secretary of Homeland Security, with respect to matters concerning the Coast Guard;
- (5) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and
- (6) The Secretary of Commerce, with respect to matters concerning the Coast and Geodetic Survey, the Environmental Science Services Administration, and the National Oceanic and Atmospheric Administration.

(h) Discharge or release includes retirement from the active military, naval, or air service.

(i) State means each of the several States, Territories and possessions of the United States, the District of Columbia, and Commonwealth of Puerto Rico.

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(j) Marriage means a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued.
(Authority: 38 U.S.C. 103(c))

(k) Service-connected means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(l) Nonservice-connected means, with respect to disability or death, that such disability was not incurred or aggravated, or that the death did not result from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(m) In line of duty means an injury or disease incurred or aggravated during a period of active military, naval, or air service unless such injury or disease was the result of the veteran's own willful misconduct or, for claims filed after October 31, 1990, was a result of his or her abuse of alcohol or drugs. A service department finding that injury, disease or death occurred in line of duty will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs. Requirements as to line of duty are not met if at the time the injury was suffered or disease contracted the veteran was:

(1) Avoiding duty by desertion, or was absent without leave which materially interfered with the performance of military duty.

(2) Confined under a sentence of court-martial involving an unremitted dishonorable discharge.

(3) Confined under sentence of a civil court for a felony as determined under the laws of the jurisdiction where the person was convicted by such court. (Authority: 38 U.S.C. 105)

Note: See §3.1(y)(2)(iii) for applicability of in line of duty in determining former prisoner of war status.

(n) Willful misconduct means an act involving conscious wrongdoing or known prohibited action. A service department finding that injury, disease or death was not due to misconduct will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the facts and the requirements of laws administered by the Department of Veterans Affairs.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

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(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (See §§3.301, 3.302.)

(o) Political subdivision of the United States includes the jurisdiction defined as a State in paragraph (i) of this section, and the counties, cities or municipalities of each.

(p) Claim — Application means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.

(q) Notice means written notice sent to a claimant or payee at his or her latest address of record.

(r) Date of receipt means the date on which a claim, information or evidence was received in the Department of Veterans Affairs, except as to specific provisions for claims or evidence received in the State Department (§3.108), or in the Social Security Administration (§§3.153, 3.201), or Department of Defense as to initial claims filed at or prior to separation. However, the Under Secretary for Benefits may establish, by notice published in the Federal Register, exceptions to this rule, using factors such as postmark or the date the claimant signed the correspondence, when he or she determines that a natural or man-made interference with the normal channels through which the Veterans Benefits Administration ordinarily receives correspondence has resulted in one or more Veterans Benefits Administration offices experiencing extended delays in receipt of claims, information, or evidence from claimants served by the affected office or offices to an extent that, if not addressed, would adversely affect such claimants through no fault of their own. (Authority: 38 U.S.C. 501(a), 512(a), 5110)

(s) On the borders thereof means, with regard to service during the Mexican border period, the States of Arizona, California, New Mexico, and Texas, and the nations of Guatemala and British Honduras. (Authority: 38 U.S.C. 101(30))

(t) In the waters adjacent thereto means, with regard to service during the Mexican border period, the waters (including the islands therein) which are within 750 nautical miles (863 statute miles) of the coast of the mainland of Mexico. (Authority: 38 U.S.C. 101(30))

(u) Section 306 pension means those disability and death pension programs in effect on December 31, 1978, which arose out of Pub. L. 86-211; 73 Stat. 432.

(v) Old-Law pension means the disability and death pension programs that were in effect on June 30, 1960. Also known as protected pension, i.e., protected under section 9(b) of the Veteran's Pension Act of 1959 (Pub. L. 86-211; 73 Stat. 432).

(w) Improved pension means the disability and death pension programs becoming effective January 1, 1979, under authority of Pub. L. 95-588; 92 Stat. 2497.

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(x) Service pension is the name given to Spanish-American War pension. It is referred to as a service pension because entitlement is based solely on service without regard to nonservice-connected disability, income and net worth. (Authority: 38 U.S.C. 1512, 1536)

(y) Former prisoner of war. The term former prisoner of war means a person who, while serving in the active military, naval or air service, was forcibly detained or interned in the line of duty by an enemy or foreign government, the agents of either, or a hostile force.

(1) Decisions based on service department findings. The Department of Veterans Affairs shall accept the findings of the appropriate service department that a person was a prisoner of war during a period of war unless a reasonable basis exists for questioning it. Such findings shall be accepted only when detention or internment is by an enemy government or its agents.

(2) Other decisions. In all other situations, including those in which the Department of Veterans Affairs cannot accept the service department findings, the following factors shall be used to determine prisoner of war status:

(i) Circumstances of detention or internment. To be considered a former prisoner of war, a serviceperson must have been forcibly detained or interned under circumstances comparable to those under which persons generally have been forcibly detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships or abuse, malnutrition, and unsanitary conditions. Each individual member of a particular group of detainees or internees shall, in the absence of evidence to the contrary, be considered to have experienced the same circumstances as those experienced by the group.

(ii) Reason for detainment or internment. The reason for which a serviceperson was detained or interned is immaterial in determining POW status, except that a serviceperson who is detained or interned by a foreign government for an alleged violation of its laws is not entitled to be considered a former POW on the basis of that period of detention or internment, unless the charges are a sham intended to legitimize the period of detention or internment.

(3) Central Office approval. The Director of the Compensation and Pension Service, VA Central Office, shall approve all VA regional office determinations establishing or denying POW status, with the exception of those service department determinations accepted under paragraph (y)(1) of this section.

(4) In line of duty. The Department of Veterans Affairs shall consider that a serviceperson was forcibly detained or interned in line of duty unless the evidence of record discloses that forcible detainment or internment was the proximate result of the serviceperson's own willful misconduct.

(5) Hostile force. The term hostile force means any entity other than an enemy or foreign government or the agents of either whose actions are taken to further or enhance anti-American

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military, political or economic objectives or views, or to attempt to embarrass the United States.
(Authority: 38 U.S.C. 101(32))

(z) Nursing home means

(1) Any extended care facility which is licensed by a State to provide skilled or intermediate-level nursing care,

(2) A nursing home care unit in a State veterans' home which is approved for payment under 38 U.S.C. 1742, or

(3) A Department of Veterans Affairs Nursing Home Care Unit.

(aa) Fraud:

(1) As used in 38 U.S.C. 103 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining, or assisting an individual to obtain an annulment or divorce, with knowledge that the misrepresentation or failure to disclose may result in the erroneous granting of an annulment or divorce; and (Authority: 38 U.S.C. 501)

(2) As used in 38 U.S.C. 110 and 1159 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for Department of Veterans Affairs benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits. (Authority: 38 U.S.C. 501)

§3.3 Pension.

(a) Pension for veterans.

(1) Service pension; Spanish-American War. A benefit payable monthly by the Department of Veterans Affairs because of service in the Spanish-American War. Basic entitlement exists if a veteran:

(i) Had 70 (or 90) days or more active service during the Spanish-American War; or

(ii) Was discharged or released from such service for a disability adjudged service connected without benefit of presumptive provisions of law, or at the time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability. (Authority: 38 U.S.C. 1512)

(2) Section 306 pension. A benefit payable monthly by the Department of Veterans Affairs because of nonservice-connected disability or age. Basic entitlement exists if a veteran:

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(i) Served 90 days or more in either the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era, or served an aggregate of 90 days or more in separate periods of service during the same or during different war periods, including service during the Spanish-American War (Pub. L. 87-101, 75 Stat. 218; Pub. L. 90-77, 81 Stat. 178; Pub. L. 92-198, 85 Stat. 663); or

(ii) Served continuously for a period of 90 consecutive days or more and such period ended during the Mexican border period or World War I, or began or ended during World War II, the Korean conflict or the Vietnam era (Pub. L. 87-101, 75 Stat. 218; Pub. L. 88-664, 78 Stat. 1094; Pub. L. 90-77, 81 Stat. 178; Pub. L. 91-588, 84 Stat. 1580; Pub. L. 92-198, 85 Stat. 663; Pub. L. 94-169, 89 Stat. 1013; Pub. L. 95-204, 91 Stat. 1455); or

(iii) Was discharged or released from such wartime service, before having served 90 days, for a disability adjudged service connected without the benefit of presumptive provisions of law, or at the time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability; and

(iv) Is permanently and totally disabled (a) from nonservice-connected disability not due to the veteran's own willful misconduct or vicious habits, or (b) by reason of having attained the age of 65 years or by reason of having become unemployable after age 65; and

(v)

(a) Is in receipt of section 306 pension; or

(b) Has an application for pension pending on December 31, 1978, or

(c) meets the age or disability requirements for such pension on December 31, 1978, and files a claim within 1 year of that date and also within 1 year after meeting the age or disability requirements.

(vi) Meets the income and net worth requirements of 38 U.S.C. 1521 and 1522 as in effect on December 31, 1978, and all other provisions of title 38, United States Code, in effect on December 31, 1978, applicable to section 306 pension.

Note: The pension provisions of Title 38 United States Code, as in effect on December 31, 1978, are available in any VA regional office.

(3) Improved pension; Pub. L. 95-588 (92 Stat. 2497). A benefit payable by the Department of Veterans Affairs to veterans of a period or periods of war because of nonservice-connected disability or age. The qualifying periods of war for this benefit are the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era and the Persian Gulf War. Payments are made monthly unless the amount of the annual benefit is less than 4 percent of the

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maximum annual rate payable to a veteran under 38 U.S.C. 1521(b), in which case payments may be made less frequently than monthly. Basic entitlement exists if a veteran:

(i) Served in the active military naval or air service for 90 days or more during a period of war (38 U.S.C. 1521(j)); or

(ii) Served in the active military, naval or air service during a period of war and was discharged or released from such service for a disability adjudged service-connected without presumptive provisions of law, or at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability (38 U.S.C. 1521(j)); or

(iii) Served in the active military naval or air service for a period of 90 consecutive days or more and such period began or ended during a period of war (38 U.S.C. 1521(j)); or

(iv) Served in the active military, naval or air service for an aggregate of 90 days or more in two or more separate periods of service during more than one period of war (38 U.S.C. 1521(j)); and

(v) Meets the net worth requirements under §3.274 and does not have an annual income in excess of the applicable maximum annual pension rate specified in §3.23 and

(vi)(A) Is age 65 or older; or

(B) Is permanently and totally disabled from nonservice-connected disability not due to the veteran's own willfull misconduct. For purposes of this paragraph, a veteran is considered permanently and totally disabled if the veteran is any of the following:

(1) A patient in a nursing home for long-term care because of disability; or

(2) Disabled, as determined by the Commissioner of Social Security for purposes of any benefits administered by the Commissioner; or

(3) Unemployable as a result of disability reasonably certain to continue throughout the life of the person; or

(4) Suffering from:

(i) Any disability which is sufficient to render it impossible for the average person to follow a substantially gainful occupation, but only if it is reasonably certain that such disability will continue throughout the life of the person; or

(ii) Any disease or disorder determined by VA to be of such a nature or extent as to justify a determination that persons suffering from that disease or disorder are permanently and totally disabled.(Authority: 38 U.S.C. 1502(a), 1513, 1521, 1522)

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(b) Pension for survivors.

(1) Indian war death pension. A monthly benefit payable by the Department of Veterans Affairs to the surviving spouse or child of a deceased veteran of an Indian war. Basic entitlement exists if a veteran had qualifying service as specified in 38 U.S.C. 1511. Indian war death pension rates are set forth in 38 U.S.C. 1534 and 1535.

(2) Spanish-American War death pension. A monthly benefit payable by the Department of Veterans Affairs to the surviving spouse or child of a deceased veteran of the Spanish-American War, if the veteran:

(i) Had 90 days or more active service during the Spanish-American War; or

(ii) Was discharged or released from such service for a disability service-connected without benefit of presumptive provisions of law, or at time of discharge had such a service-connected disability, as shown by official service records, which in medical judgment would have justified a discharge for disability. (Authority: 38 U.S.C. 1536, 1537)

(3) Section 306 death pension. A monthly benefit payable by the Department of Veterans Affairs to a surviving spouse or child because of a veteran's nonservice-connected death. Basic entitlement exists if:

(i) The veteran (as defined in §3.1(d) and (d)(2)) had qualifying service as specified in paragraph (a)(2)(i), (ii), or (iii) of this section; or

(ii) The veteran was, at time of death, receiving or entitled to receive compensation or retired pay for service-connected disability based on wartime service; and

Any disease or disorder determined by VA to be of such a nature or extent as to justify a determination that persons suffering from that disease or disorder are permanently and totally disabled. (Authority: 38 U.S.C. 1502(a), 1513, 1521, 1522)

(iii) The surviving spouse or child

(A) was in receipt of section 306 pension on December 31, 1978, or

(B) had a claim for pension pending on that date, or

(C) filed a claim for pension after that date but within 1 year after the veteran's death, if the veteran died before January 1, 1979; and

(iv) The surviving spouse or child meets the income and net worth requirements of 38 U.S.C. 1541, 1542 or 1543 as in effect on December 31, 1978, and all other provisions of title 38, United States Code in effect on December 31, 1978, applicable to section 306 pension.

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Note: The pension provisions of title 38, United States Code, as in effect on December 31, 1978, are available in any VA regional office.)

(4) Improved death pension, Public Law 95-588. A benefit payable by the Department of Veterans Affairs to a veteran's surviving spouse or child because of the veteran's nonservice-connected death. Payments are made monthly unless the amount of the annual benefit is less than 4 percent of the maximum annual rate payable to a veteran under 38 U.S.C. 1521(b), in which case payments may be made less frequently than monthly. Basic entitlement exists if:

(i) The veteran (as defined in §3.1(d) and (d)(2)) had qualifying service as specified in paragraph (a)(3)(i), (ii), (iii), or (iv) of this section (38 U.S.C. 1541(a)); or

(ii) The veteran was, at time of death, receiving or entitled to receive compensation or retired pay for a service-connected disability based on service during a period of war. (The qualifying periods of war are specified in paragraph (a)(3) of this section.) (38 U.S.C. 1541(a)); and

(iii) The surviving spouse or child meets the net worth requirements of 3.274 and has an annual income not in excess of the applicable maximum annual pension rate specified in §§3.23 and 3.24. (Authority: 38 U.S.C. 1541 and 542).

§3.4 Compensation.

(a) Compensation. This term means a monthly payment made by the Department of Veterans Affairs to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957, or under the circumstances outlined in paragraph (c)(2) of this section. If the veteran was discharged or released from service, the discharge or release must have been under conditions other than dishonorable. (Authority: 38 U.S.C. 101(2), (13))

(b) Disability compensation.

(1) Basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in line of duty. (Authority: 38 U.S.C. 1110, 1131)

(2) An additional amount of compensation may be payable for a spouse, child, and/or dependent parent where a veteran is entitled to compensation based on disability evaluated as 30 per centum or more disabling. (Authority: 38 U.S.C. 1115)

(c) Death compensation. Basic entitlement exists for a surviving spouse, child or children, and dependent parent or parents if:

(1) The veteran died before January 1, 1957; or

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(2) The veteran died on or after May 1, 1957, and before January 1, 1972, if at the time of death a policy of United States Government Life Insurance or National Service Life Insurance was in effect under waiver of premiums under 38 U.S.C. 1924 unless the waiver was granted under the first proviso of section 622(a) of the National Service Life Insurance Act of 1940, and the veteran died before return to military jurisdiction or within 120 days thereafter. (See §3.5(d) as to Public Health Service.) (Authority: 38 U.S.C. 1121, 1141)

§3.6 Duty periods.

(a) Active military, naval, and air service. This includes active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty or from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident which occurred during such training.

(b) "Active duty." This means:

(1) Full-time duty in the Armed Forces, other than active duty for training.

(2) Full-time duty (other than for training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service:

(i) On or after July 29, 1945, or

(ii) Before that date under circumstances affording entitlement to "full military benefits," or

(iii) At any time, for the purposes of dependency and indemnity compensation.

(3) Full-time duty as a commissioned officer of the Coast and Geodetic Survey or of its successor agencies, the Environmental Science Services Administration and the National Oceanic and Atmospheric Administration:

(i) On or after July 29, 1945, or

(ii) Before that date:

(a) While on transfer to one of the Armed Forces, or

(b) While, in time of war or national emergency declared by the President, assigned to duty on a project for one of the Armed Forces in an area determined by the Secretary of Defense to be of immediate military hazard, or

(c) In the Philippine Islands on December 7, 1941, and continuously in such islands thereafter, or

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(iii) At any time, for the purposes of dependency and indemnity compensation.

(4) Service at any time as a cadet at the United States Military, Air Force, or Coast Guard Academy, or as a midshipman at the United States Naval Academy.

(5) Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy for enlisted active-duty members who are reassigned to a preparatory school without a release from active duty, and for other individuals who have a commitment to active duty in the Armed Forces that would be binding upon disenrollment from the preparatory school;

(6) Authorized travel to or from such duty or service; and

(7) A person discharged or released from a period of active duty, shall be deemed to have continued on active duty during the period of time immediately following the date of such discharge or release from such duty determined by the Secretary concerned to have been required for him or her to proceed to his or her home by the most direct route, and, in all instances, until midnight of the date of such discharge or release. (Authority: 38 U.S.C. 106(c))

(c) Active duty for training.

(1) Full-time duty in the Armed Forces performed by Reserves for training purposes;

(2) Full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service:

(i) On or after July 29, 1945, or

(ii) Before that date under circumstances affording entitlement to "full military benefits," or

(iii) At any time, for the purposes of dependency and indemnity compensation.

(3) Full-time duty performed by members of the National Guard of any State, under 32 U.S.C. 316, 502, 503, 504, or 505, or the prior corresponding provisions of law or full-time duty by such members while participating in the reenactment of the Battle of First Manassas in July 1961;

(4) Duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to such duty for the purpose of training or a practice cruise under Chapter 103 of Title 10, United States Code.

(i) The requirements of this paragraph are effective:

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(A) On or after October 1, 1982, with respect to deaths and disabilities resulting from diseases or injuries incurred or aggravated after September 30, 1982, and

(B) October 1, 1983, with respect to deaths and disabilities resulting from diseases or injuries incurred or aggravated before October 1, 1982.

(ii) Effective on or after October 1, 1988, such duty must be prerequisite to the member being commissioned and must be for a period of at least four continuous weeks. (Authority: 38 U.S.C. 101(22)(D) as amended by Pub. L. 100-456)

(5) Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy by an individual who enters the preparatory school directly from the Reserves, National Guard or civilian life, unless the individual has a commitment to service on active duty which would be binding upon disenrollment from the preparatory school.

(6) Authorized travel to or from such duty. (Authority: 38 U.S.C. 101(22))

The term does not include duty performed as a temporary member of the Coast Guard Reserve.

(d) Inactive duty training. This means:

(1) Duty (other than full-time duty) prescribed for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by the Secretary concerned under 37 U.S.C. 206 or any other provision of law;

(2) Special additional duties authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned, and

(3) Training (other than active duty for training) by a member of, or applicant for membership (as defined in 5 U.S.C. 8140(g)) in, the Senior Reserve Officers' Training Corps prescribed under Chapter 103 of Title 10, United States Code.

(4) Duty (other than full-time duty) performed by a member of the National Guard of any State, under 32 U.S.C. 316, 502, 503, 504, or 505, or the prior corresponding provisions of law. The term "inactive duty training" does not include:

(i) Work or study performed in connection with correspondence courses,

(ii) Attendance at an educational institution in an inactive status, or

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(iii) Duty performed as a temporary member of the Coast Guard Reserve. (Authority: 38 U.S.C. 101(23))

(e) Travel status—training duty (disability or death from injury). Any individual:

(1) Who, when authorized or required by competent authority, assumes an obligation to perform active duty for training or inactive duty training; and

(2) Who is disabled or dies from an injury incurred while proceeding directly to or returning directly from such active duty for training or inactive duty training shall be deemed to have been on active duty for training or inactive duty training, as the case may be. The Department of Veterans Affairs will determine whether such individual was so authorized or required to perform such duty, and whether the individual was disabled or died from injury so incurred. In making such determinations, there shall be taken into consideration the hour on which the individual began to proceed or return; the hour on which the individual was scheduled to arrive for, or on which the individual ceased to perform, such duty, the method of travel performed; the itinerary; the manner in which the travel was performed; and the immediate cause of disability or death. Whenever any claim is filed alleging that the claimant is entitled to benefits by reason of this paragraph, the burden of proof shall be on the claimant. (Authority: 38 U.S.C. 106(d))

§3.12a Minimum active-duty service requirement.

(a) Definitions.

(1) The term “minimum period of active duty” means, for the purposes of this section, the shorter of the following periods.

(i) Twenty-four months of continuous active duty. Non-duty periods that are excludable in determining the Department of Veterans Affairs benefit entitlement (e.g., see §3.15) are not considered as a break in service for continuity purposes but are to be subtracted from total time served.

(ii) The full period for which a person was called or ordered to active duty.

(2) The term “benefit” includes a right or privilege but does not include a refund of a participant’s contributions under 38 U.S.C. Ch. 32.

(b) Effect on Department of Veterans Affairs benefits. Except as provided in paragraph (d) of this section, a person listed in paragraph (c) of this section who does not complete a minimum period of active duty is not eligible for any benefit under title 38, United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.

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(c) Persons included. Except as provided in paragraph (d) of this section, the provisions of paragraph (b) of this section apply to the following persons:

(1) A person who originally enlists (enlisted person only) in a regular component of the Armed Forces after September 7, 1980 (a person who signed a delayed-entry contract with one of the service branches prior to September 8, 1980, and under that contract was assigned to a reserve component until entering on active duty after September 7, 1980, shall be considered to have enlisted on the date the person entered on active duty); and

(2) Any other person (officer as well as enlisted) who enters on active duty after October 16, 1981, and who has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under 10 U.S.C. 1171 (early out).

(d) Exclusions. The provisions of paragraph (b) of this section are not applicable to the following cases:

(1) To a person who is discharged or released under 10 U.S.C. 1171 or 1173 (early out or hardship discharge).

(2) To a person who is discharged or released from active duty for a disability adjudged service connected without presumptive provisions of law, or who at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(3) To a person with a compensable service-connected disability.

(4) To the provision of a benefit for or in connection with a service-connected disability, condition, or death.

(5) To benefits under chapter 19 of title 38, United States Code.

(e) Dependent or survivor benefits:

(1) General. If a person is, by reason of this section, barred from receiving any benefits under title 38, United States Code (or under any other law administered by the Department of Veterans Affairs based on a period of active duty, the person's dependents or survivors are also barred from receiving benefits based on the same period of active duty.

(2) Exceptions. Paragraph (e)(1) of this section does not apply to benefits under chapters 19 and 37 of title 38, United States Code. (38 U.S.C. 5303A)

§3.102 Reasonable doubt.

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It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

§3.103 Procedural due process and appellate rights.

(a) Statement of policy. Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3, except that the provisions of this section governing hearings apply only to hearings conducted before the VA office having original jurisdiction over the claim. Hearings before the Board of Veterans' Appeals are governed by part 20 of this chapter.

(b) The right to notice —(1) General. Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

(2) Advance notice and opportunity for hearing. Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) Exceptions. In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

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(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in §3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see §3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see §3.654 regarding active service pay).

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a). (Authority: 38 U.S.C. 501(a))

(4) Restoration of benefits. VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

(c) The right to a hearing. (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees of the VA office having original jurisdiction over the claim to conduct the hearing and to be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more employees of the VA office having original jurisdiction over the claim who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

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(2) The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers material and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses are expected to be present. The Veterans Benefits Administration will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employee or employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record. (Authority: 38 U.S.C. 501)

(d) Submission of evidence. Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

(e) The right to representation. Subject to the provisions of §§14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) Notification of decisions. The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will include a summary of the evidence considered. (Authority: 38 U.S.C. 501, 1115, 1506, 5104)

§3.104 Finality of decisions.

(a) The decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §3.105 of this part.

(b) Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on

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the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

§3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a) Error. Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of §3.500(b)(2) will apply.

(b) Difference of opinion. Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under §3.2600 without being recommended to Central Office.

(c) Character of discharge. A determination as to character of discharge or line of duty which would result in discontinued entitlement is subject to the provisions of paragraph (d) of this section.

(d) Severance of service connection. Subject to the limitations contained in §§3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). (Where service connection is severed because of a change in or interpretation of a law or Department of Veterans Affairs issue, the provisions of §3.114 are for application.) A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the

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contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional evidence to show that service connection should be maintained. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued, if in order, effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires.

(Authority: 38 U.S.C. 5112(b)(6))

(e) Reduction in evaluation—compensation. Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires.

(Authority: 38 U.S.C. 5112(b)(6))

(f) Reduction in evaluation—pension. Where a change in disability or employability warrants a reduction or discontinuance of pension payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that pension benefits should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which the final rating action is approved.

(Authority: 38 U.S.C. 5112(b)(5))

(g) Reduction in evaluation—monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans or children of veterans with covered service in Korea. Where a reduction or discontinuance of a monetary allowance currently being paid under 38 U.S.C. chapter 18 is considered warranted, VA will notify the beneficiary at his or her latest address of record of the proposed reduction, furnish detailed reasons therefor, and allow the beneficiary 60 days to present additional evidence to show that the monetary allowance should be continued at the present level. Unless otherwise provided in paragraph (i) of this section, if VA does not receive additional evidence within that period, it will take final rating action and reduce

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the award effective the last day of the month following 60 days from the date of notice to the beneficiary of the proposed reduction.

(Authority: 38 U.S.C. 1805, 1815, 1821, 1832, 5112(b)(6))

(h) Other reductions/discontinuances. Except as otherwise specified at §3.103(b)(3) of this part, where a reduction or discontinuance of benefits is warranted by reason of information received concerning income, net worth, dependency, or marital or other status, a proposal for the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that the benefits should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final adverse action will be taken and the award will be reduced or discontinued effective as specified under the provisions of §§3.500 through 3.503 of this part.

(Authority: 38 U.S.C. 5112)

(i) Predetermination hearings. (1) In the advance written notice concerning proposed actions under paragraphs (d) through (h) of this section, the beneficiary will be informed that he or she will have an opportunity for a predetermination hearing, provided that a request for such a hearing is received by VA within 30 days from the date of the notice. If a timely request is received, VA will notify the beneficiary in writing of the time and place of the hearing at least 10 days in advance of the scheduled hearing date. The 10 day advance notice may be waived by agreement between VA and the beneficiary or representative. The hearing will be conducted by VA personnel who did not participate in the proposed adverse action and who will bear the decision-making responsibility. If a predetermination hearing is timely requested, benefit payments shall be continued at the previously established level pending a final determination concerning the proposed action.

(2) Following the predetermination procedures specified in this paragraph and paragraph (d), (e), (f), (g) or (h) of this section, whichever is applicable, final action will be taken. If a predetermination hearing was not requested or if the beneficiary failed without good cause to report for a scheduled predetermination hearing, the final action will be based solely upon the evidence of record. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant or beneficiary, death of an immediate family member, etc. If a predetermination hearing was conducted, the final action will be based on evidence and testimony adduced at the hearing as well as the other evidence of record including any additional evidence obtained following the hearing pursuant to necessary development. Whether or not a predetermination hearing was conducted, a written notice of the final action shall be issued to the beneficiary and his or her representative, setting forth the reasons therefor and the evidence upon which it is based. Where a reduction or discontinuance of benefits is found warranted following consideration of any additional evidence submitted, the effective date of such reduction or discontinuance shall be as follows:

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(i) Where reduction or discontinuance was proposed under the provisions of paragraph (d) or (e) of this section, the effective date of final action shall be the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final action expires.

(ii) Where reduction or discontinuance was proposed under the provisions of paragraphs (f) and (g) of this section, the effective date of final action shall be the last day of the month in which such action is approved.

(iii) Where reduction or discontinuance was proposed under the provisions of paragraph (h) of this section, the effective date of final action shall be as specified under the provisions of §§3.500 through 3.503 of this part.

(Authority: 38 U.S.C. 5112§3.156 New and material evidence.

(a) A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. (Authority: 38 U.S.C. 501, 5103A(f), 5108)

(b) New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of §20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. (Authority: 38 U.S.C. 501(a))

(c) Service department records. (1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

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(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim.

§3.159 Department of Veterans Affairs assistance in developing claims.

(a) Definitions. For purposes of this section, the following definitions apply:

(1) Competent medical evidence means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) Substantially complete application means an application containing the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income.

(4) For purposes of paragraph (c)(4)(i) of this section, event means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

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(5) Information means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) VA's duty to notify claimants of necessary information or evidence.

(1) When VA receives a complete or substantially complete application for benefits, it will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim. (hereafter in this paragraph referred to as the "notice") In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If VA does not receive the necessary information and evidence requested from the claimant within one year of the date of the notice, VA cannot pay or provide any benefits based on that application. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice, VA must readjudicate the claim. (Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. (Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a Notice of Disagreement; or

(ii) When, as a matter of law, entitlement to the benefit claimed cannot be established. (Authority: 38 U.S.C. 5103(a), 5103A(a)(2))

(c) VA's duty to assist claimants in obtaining evidence. Upon receipt of a substantially complete application for benefits, VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. In addition, VA will give the assistance described in paragraphs (c)(1), (c)(2), and (c)(3) to an individual attempting to reopen a finally decided claim. VA will not pay any fees charged by a custodian to provide records requested.

(1) Obtaining records not in the custody of a Federal department or agency. VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable efforts will generally consist of an initial request for the records and, if the records are not received, at least

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one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records. (Authority: 38 U.S.C. 5103A(b))

(2) Obtaining records in the custody of a Federal department or agency. VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records. (Authority: 38 U.S.C. 5103A(b))

(3) Obtaining records in compensation claims. In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal

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department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. (Authority: 38 U.S.C. 5103A(c))

(4) Providing medical examinations or obtaining medical opinions.

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) Paragraph (c)(4) applies to a claim to reopen a finally adjudicated claim only if new and material evidence is presented or secured. (Authority: 38 U.S.C. 5103A(d))

(d) Circumstances where VA will refrain from or discontinue providing assistance. VA will refrain from providing assistance in obtaining evidence for a claim if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

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(3) An application requesting a benefit to which the claimant is not entitled as a matter of law.
(Authority: 38 U.S.C. 5103A(a)(2))

(e) Duty to notify claimant of inability to obtain records.

(1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA. (Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any. (Authority: 38 U.S.C. 5102(b), 5103(a))

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations. (Authority: 38 U.S.C. 5103A(g))

§3.303 Principles relating to service connection.

(a) General. Service connection connotes many factors but basically it means that 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 preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a

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veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

(b) Chronicity and continuity. With chronic disease shown as such in service (or within the presumptive period under §3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.

(c) Preservice disabilities noted in service. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. Conditions of an infectious nature are to be considered with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, they will be held to have preexisted service. In the field of mental disorders, personality disorders which are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior, chronic psychoneurosis of long duration or other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis will be accepted as showing preservice origin. Congenital or developmental defects,

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refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation.

(d) Postservice initial diagnosis of disease. Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and Department of Veterans Affairs regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.

(e) Prisoners of war. Where disability compensation is claimed by a former prisoner of war, omission of history or findings from clinical records made upon repatriation is not determinative of service connection, particularly if evidence of comrades in support of the incurrence of the disability during confinement is available. Special attention will be given to any disability first reported after discharge, especially if poorly defined and not obviously of intercurrent origin. The circumstances attendant upon the individual veteran's confinement and the duration thereof will be associated with pertinent medical principles in determining whether disability manifested subsequent to service is etiologically related to the prisoner of war experience..

(f) Posttraumatic stress disorder. Service connection for posttraumatic stress disorder requires medical evidence diagnosing the condition in accordance with §4.125(a) of this chapter; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. The following provisions apply to claims for service connection of posttraumatic stress disorder diagnosed during service or based on the specified type of claimed stressor:

(1) If the evidence establishes a diagnosis of posttraumatic stress disorder during service and the claimed stressor is related to that service, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(2) If the evidence establishes that the veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(3) If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with

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the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. For purposes of this paragraph, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

(4) If the evidence establishes that the veteran was a prisoner-of-war under the provisions of §3.1(y) of this part and the claimed stressor is related to that prisoner-of-war experience, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

(5) If a posttraumatic stress disorder claim is based on in-service personal assault, evidence from sources other than the veteran's service records may corroborate the veteran's account of the stressor incident. Examples of such evidence include, but are not limited to: records from law enforcement authorities, rape crisis centers, mental health counseling centers, hospitals, or physicians; pregnancy tests or tests for sexually transmitted diseases; and statements from family members, roommates, fellow service members, or clergy. Evidence of behavior changes following the claimed assault is one type of relevant evidence that may be found in these sources. Examples of behavior changes that may constitute credible evidence of the stressor include, but are not limited to: a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause; or unexplained economic or social behavior changes. VA will not deny a posttraumatic stress disorder claim that is based on in-service personal assault without first advising the claimant that evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor and allowing him or her the opportunity to furnish this type of evidence or advise VA of potential sources of such evidence. VA may submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred. (Authority: 38 U.S.C. 501(a), 1154)

§3.304 Direct service connection; wartime and peacetime.

(a) General. The basic considerations relating to service connection are stated in §3.303. The criteria in this section apply only to disabilities which may have resulted from service in a period of war or service rendered on or after January 1, 1947.

(b) Presumption of soundness. The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence

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demonstrates that an injury or disease existed prior thereto and was not aggravated by such service. Only such conditions as are recorded in examination reports are to be considered as noted.
(Authority: 38 U.S.C. 1111)

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statement were not of record.
(Authority: 10 U.S.C. 1219)

(c) Development. The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination. In initially rating disability of record at the time of discharge, the records of the service department, including the reports of examination at enlistment and the clinical records during service, will ordinarily suffice. Rating of combat injuries or other conditions which obviously had their inception in service may be accomplished pending receipt of copy of the examination at enlistment and all other service records.

(d) Combat. Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation. (Authority: 38 U.S.C. 1154(b))

§3.306 Aggravation of preservice disability.

(a) General. A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless

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there is a specific finding that the increase in disability is due to the natural progress of the disease.
(Authority: 38 U.S.C. 1153)

(b) Wartime service; peacetime service after December 31, 1946. Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.

(1) The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability. (Authority: 38 U.S.C. 1154)

(c) Peacetime service prior to December 7, 1941. The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by reason of the inherent character of the condition, aside from any extraneous or contributing cause or influence peculiar to military service. Consideration will be given to the circumstances, conditions, and hardships of service.

§3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.

(a) General. A chronic, tropical, prisoner of war related disease, or a disease associated with exposure to certain herbicide agents listed in §3.309 will be considered to have been incurred in or aggravated by service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in §3.309(a) will be considered chronic.

(1) Service. The veteran must have served 90 days or more during a war period or after December 31, 1946. The requirement of 90 days' service means active, continuous service within or extending into or beyond a war period, or which began before and extended beyond December 31, 1946, or began after that date. Any period of service is sufficient for the purpose of establishing

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the presumptive service connection of a specified disease under the conditions listed in §3.309(c) and (e).

(2) Separation from service. For the purpose of paragraph (a)(3) and (4) of this section the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period. In claims based on service on or after January 1, 1947, the date of separation will be the date of discharge or release from the period of service on which the claim is based.

(3) Chronic disease. The disease must have become manifest to a degree of 10 percent or more within 1 year (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years) from the date of separation from service as specified in paragraph (a)(2) of this section.

(4) Tropical disease. The disease must have become manifest to a degree of 10 percent or more within 1 year from date of separation from service as specified in paragraph (a)(2) of this section, or at a time when standard accepted treatises indicate that the incubation period commenced during such service. The resultant disorders or diseases originating because of therapy administered in connection with a tropical disease or as a preventative may also be service connected. (Authority: 38 U.S.C. 1112)

(5) Diseases specific as to former prisoners of war. The diseases listed in §3.309(c) shall have become manifest to a degree of 10 percent or more at any time after discharge or release from active service. (Authority: 38 U.S.C. 1112)

(6) Diseases associated with exposure to certain herbicide agents. (i) For the purposes of this section, 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. (Authority: 38 U.S.C. 1116(a)(4))

(ii) The diseases listed at §3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall 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 agent during active military, naval, or air service.

(iii) 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, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall 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. "Service in the Republic of Vietnam" includes

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service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(iv) A veteran who, during active military, naval, or air service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. See also 38 CFR 3.814(c)(2). (Authority: 38 U.S.C. 501(a), 1116(a)(3), and 1821)

(b) Evidentiary basis. The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion. The chronicity and continuity factors outlined in §3.303(b) will be considered. The diseases listed in §3.309(a) will be accepted as chronic, even though diagnosed as acute because of insidious inception and chronic development, except: (1) Where they result from intercurrent causes, for example, cerebral hemorrhage due to injury, or active nephritis or acute endocarditis due to intercurrent infection (with or without identification of the pathogenic micro-organism); or (2) where a disease is the result of drug ingestion or a complication of some other condition not related to service. Thus, leukemia will be accepted as a chronic disease whether diagnosed as acute or chronic. Unless the clinical picture is clear otherwise, consideration will be given as to whether an acute condition is an exacerbation of a chronic disease. (Authority: 38 U.S.C. 1112)

(c) Prohibition of certain presumptions. No presumptions may be invoked on the basis of advancement of the disease when first definitely diagnosed for the purpose of showing its existence to a degree of 10 percent within the applicable period. This will not be interpreted as requiring that the disease be diagnosed in the presumptive period, but only that there be then shown by acceptable medical or lay evidence characteristic manifestations of the disease to the required degree, followed without unreasonable time lapse by definite diagnosis. Symptomatology shown in the prescribed period may have no particular significance when first observed, but in the light of subsequent developments it may gain considerable significance. Cases in which a chronic condition is shown to exist within a short time following the applicable presumptive period, but without evidence of manifestations within the period, should be developed to determine whether there was symptomatology which in retrospect may be identified and evaluated as manifestation of the chronic disease to the required 10-percent degree.

(d) Rebuttal of service incurrence or aggravation. (1) Evidence which may be considered in rebuttal of service incurrence of a disease listed in §3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression "affirmative evidence to the contrary" will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the

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consideration of all evidence of record, support a conclusion that the disease was not incurred in service. As to tropical diseases the fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

(2) The presumption of aggravation provided in this section may be rebutted by affirmative evidence that the preexisting condition was not aggravated by service, which may include affirmative evidence that any increase in disability was due to an intercurrent disease or injury suffered after separation from service or evidence sufficient, under §3.306 of this part, to show that the increase in disability was due to the natural progress of the preexisting condition. (Authority: 38 U.S.C 1113 and 1153)

§3.309 Disease subject to presumptive service connection.

(a) Chronic diseases. The following diseases shall be granted service connection although not otherwise established as incurred in or aggravated by service if manifested to a compensable degree within the applicable time limits under §3.307 following service in a period of war or following peacetime service on or after January 1, 1947, provided the rebuttable presumption provisions of §3.307 are also satisfied.

- Anemia, primary.
- Arteriosclerosis.
- Arthritis.
- Atrophy, progressive muscular.
- Brain hemorrhage.
- Brain thrombosis.
- Bronchiectasis.
- Calculi of the kidney, bladder, or gallbladder.
- Cardiovascular-renal disease, including hypertension. (This term applies to combination involvement of the type of arteriosclerosis, nephritis, and organic heart disease, and since hypertension is an early symptom long preceding the development of those diseases in their more obvious forms, a disabling hypertension within the 1-year period will be given the same benefit of service connection as any of the chronic diseases listed.)
- Cirrhosis of the liver.
- Coccidioidomycosis.
- Diabetes mellitus.
- Encephalitis lethargica residuals.
- Endocarditis. (This term covers all forms of valvular heart disease.)
- Endocrinopathies.
- Epilepsies.
- Hansen's disease.
- Hodgkin's disease.

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Leukemia.
 Lupus erythematosus, systemic.
 Myasthenia gravis.
 Myelitis.
 Myocarditis.
 Nephritis.
 Other organic diseases of the nervous system.
 Osteitis deformans (Paget's disease).
 Osteomalacia.
 Palsy, bulbar.
 Paralysis agitans.
 Psychoses.
 Purpura idiopathic, hemorrhagic.
 Raynaud's disease.
 Sarcoidosis.
 Scleroderma.
 Sclerosis, amyotrophic lateral.
 Sclerosis, multiple.
 Syringomyelia.
 Thromboangiitis obliterans (Buerger's disease).
 Tuberculosis, active.
 Tumors, malignant, or of the brain or spinal cord or peripheral nerves.
 Ulcers, peptic (gastric or duodenal) (A proper diagnosis of gastric or duodenal ulcer (peptic ulcer) is to be considered established if it represents a medically sound interpretation of sufficient clinical findings warranting such diagnosis and provides an adequate basis for a differential diagnosis from other conditions with like symptomatology; in short, where the preponderance of evidence indicates gastric or duodenal ulcer (peptic ulcer). Whenever possible, of course, laboratory findings should be used in corroboration of the clinical data.

§3.310 Disabilities that are proximately due to, or aggravated by, service-connected disease or injury.

(a) General. Except as provided in §3.300(c), disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition.

(b) Aggravation of nonservice-connected disabilities. Any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected. However, VA will not concede that a nonservice-connected disease or injury was aggravated by a service-connected disease or injury unless the baseline level of severity of the nonservice-connected disease or injury is established by medical evidence created before the onset of aggravation or by the earliest medical evidence created at any time between the onset of

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aggravation and the receipt of medical evidence establishing the current level of severity of the nonservice-connected disease or injury. The rating activity will determine the baseline and current levels of severity under the Schedule for Rating Disabilities (38 CFR part 4) and determine the extent of aggravation by deducting the baseline level of severity, as well as any increase in severity due to the natural progress of the disease, from the current level. (Authority: 38 U.S.C. 1110 and 1131)

(c) Cardiovascular disease. Ischemic heart disease or other cardiovascular disease developing in a veteran who has a service-connected amputation of one lower extremity at or above the knee or service-connected amputations of both lower extremities at or above the ankles, shall be held to be the proximate result of the service-connected amputation or amputations. (Authority: 38 U.S.C. 501, 1110–1131)

§3.321 General rating considerations.

(a) Use of rating schedule. The 1945 Schedule for Rating Disabilities will be used for evaluating the degree of disabilities in claims for disability compensation, disability and death pension, and in eligibility determinations. The provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability. (Authority: 38 U.S.C. 1155)

(b) Exceptional cases:

(1) Compensation. Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Chief Benefits Director or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

§3.322 Rating of disabilities aggravated by service.

(a) Aggravation of preservice disability. In cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree of disability existing at the time of entrance into active service, whether the particular condition was noted at the time of entrance into active service, or whether it is determined upon the evidence of record to have existed at that time. It is necessary to deduct from the present evaluation the degree, if ascertainable, of the disability existing at the time of entrance into active service, in terms of the rating schedule except that if the disability is total (100 percent) no deduction will be made. If the

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degree of disability at the time of entrance into service is not ascertainable in terms of the schedule, no deduction will be made.

(b) Aggravation of service-connected disability. Where a disease or injury incurred in peacetime service is aggravated during service in a period of war, or conversely, where a disease or injury incurred in service during a period of war is aggravated during peacetime service, the entire disability flowing from the disease or injury will be service connected based on the war service.

§3.340 Total and permanent total ratings and unemployability.

(a) Total disability ratings:

(1) General. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. Total disability may or may not be permanent. Total ratings will not be assigned, generally, for temporary exacerbations or acute infectious diseases except where specifically prescribed by the schedule.

(2) Schedule for rating disabilities. Total ratings are authorized for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation or, with less disability, where the requirements of paragraph 16, page 5 of the rating schedule are present or where, in pension cases, the requirements of paragraph 17, page 5 of the schedule are met.

(3) Ratings of total disability on history. In the case of disabilities which have undergone some recent improvement, a rating of total disability may be made, provided:

(i) That the disability must in the past have been of sufficient severity to warrant a total disability rating;

(ii) That it must have required extended, continuous, or intermittent hospitalization, or have produced total industrial incapacity for at least 1 year, or be subject to recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it must be the opinion of the rating agency that despite the recent improvement of the physical condition, the veteran will be unable to effect an adjustment into a substantially gainful occupation. Due consideration will be given to the frequency and duration of totally incapacitating exacerbations since incurrence of the original disease or injury, and to periods of hospitalization for treatment in determining whether the average person could have reestablished himself or herself in a substantially gainful occupation.

(b) Permanent total disability. Permanence of total disability will be taken to exist when such impairment is reasonably certain to continue throughout the life of the disabled person. The permanent loss or loss of use of both hands, or of both feet, or of one hand and one foot, or of the

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sight of both eyes, or becoming permanently helpless or bedridden constitutes permanent total disability. Diseases and injuries of long standing which are actually totally incapacitating will be regarded as permanently and totally disabling when the probability of permanent improvement under treatment is remote. Permanent total disability ratings may not be granted as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present one of the recognized combinations or permanent loss of use of extremities or sight, or the person is in the strict sense permanently helpless or bedridden, or when it is reasonably certain that a subsidence of the acute or temporary symptoms will be followed by irreducible totality of disability by way of residuals. The age of the disabled person may be considered in determining permanence.

(c) Insurance ratings. A rating of permanent and total disability for insurance purposes will have no effect on ratings for compensation or pension.

§3.2600 Review of benefit claims decisions.

(a) A claimant who has filed a timely Notice of Disagreement with a decision of an agency of original jurisdiction on a benefit claim has a right to a review of that decision under this section. The review will be conducted by an Adjudication Officer, Veterans Service Center Manager, or Decision Review Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under §3.103(c).

(d) The reviewer may grant a benefit sought in the claim notwithstanding §3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

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(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).

(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

(g) This section applies to all claims in which a Notice of Disagreement is filed on or after June 1, 2001. (Authority: 38 U.S.C. 5109A and 7105(d))

§4.15 Total disability ratings.

The ability to overcome the handicap of disability varies widely among individuals. The rating, however, is based primarily upon the average impairment in earning capacity, that is, upon the economic or industrial handicap which must be overcome and not from individual success in overcoming it. However, full consideration must be given to unusual physical or mental effects in individual cases, to peculiar effects of occupational activities, to defects in physical or mental endowment preventing the usual amount of success in overcoming the handicap of disability and to the effect of combinations of disability. Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation; Provided, That permanent total disability shall be taken to exist when the impairment is reasonably certain to continue throughout the life of the disabled person. The following will be considered to be permanent total disability: the permanent loss of the use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or permanently bedridden. Other total disability ratings are scheduled in the various bodily systems of this schedule.

§4.16 Total disability ratings for compensation based on unemployability of the individual.

(a) Total disability ratings for compensation may be assigned, where the schedular rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities: Provided, That, if there is only one such disability, this disability shall be ratable at 60 percent or more, and that, if there are two or more disabilities, there shall be at least one disability ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. For the above purpose of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability:

(1) Disabilities of one or both upper extremities, or of one or both lower extremities, including the bilateral factor, if applicable,

(2) Disabilities resulting from common etiology or a single accident,

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(3) Disabilities affecting a single body system, e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric,

(4) Multiple injuries incurred in action, or

(5) Multiple disabilities incurred as a prisoner of war.

It is provided further that the existence or degree of nonservice-connected disabilities or previous unemployability status will be disregarded where the percentages referred to in this paragraph for the service-connected disability or disabilities are met and in the judgment of the rating agency such service-connected disabilities render the veteran unemployable. Marginal employment shall not be considered substantially gainful employment. For purposes of this section, marginal employment generally shall be deemed to exist when a veteran's earned annual income does not exceed the amount established by the U.S. Department of Commerce, Bureau of the Census, as the poverty threshold for one person. Marginal employment may also be held to exist, on a facts found basis (includes but is not limited to employment in a protected environment such as a family business or sheltered workshop), when earned annual income exceeds the poverty threshold. Consideration shall be given in all claims to the nature of the employment and the reason for termination. (Authority: 38 U.S.C. 501(a))

(b) It is the established policy of the Department of Veterans Affairs that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled. Therefore, rating boards should submit to the Director, Compensation and Pension Service, for extra-schedular consideration all cases of veterans who are unemployable by reason of service-connected disabilities, but who fail to meet the percentage standards set forth in paragraph (a) of this section. The rating board will include a full statement as to the veteran's service-connected disabilities, employment history, educational and vocational attainment and all other factors having a bearing on the issue.

§4.18 Unemployability.

A veteran may be considered as unemployable upon termination of employment which was provided on account of disability, or in which special consideration was given on account of the same, when it is satisfactorily shown that he or she is unable to secure further employment. With amputations, sequelae of fractures and other residuals of traumatism shown to be of static character, a showing of continuous unemployability from date of incurrence, or the date the condition reached the stabilized level, is a general requirement in order to establish the fact that present unemployability is the result of the disability. However, consideration is to be given to the circumstances of employment in individual claims, and, if the employment was only occasional, intermittent, tryout or unsuccessful, or eventually terminated on account of the disability, present unemployability may be attributed to the static disability. Where unemployability for pension previously has been established on the basis of combined service-connected and nonservice-connected disabilities and the service-connected disability or disabilities have increased in severity, §4.16 is for consideration.

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§4.19 Age in service-connected claims.

Age may not be considered as a factor in evaluating service-connected disability; and unemployability, in service-connected claims, associated with advancing age or intercurrent disability, may not be used as a basis for a total disability rating. Age, as such, is a factor only in evaluations of disability not resulting from service, i.e., for the purposes of pension.

§19.32 Closing of appeal for failure to respond to Statement of the Case.

The agency of original jurisdiction may close the appeal without notice to an appellant or his or her representative for failure to respond to a Statement of the Case within the period allowed. However, if a Substantive Appeal is subsequently received within the 1-year appeal period (60-day appeal period for simultaneously contested claims), the appeal will be considered to be reactivated. (Authority: 38 U.S.C. 7105(d)(3))

§20.302 Rule 302. Time limit for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case.

(a) Notice of Disagreement. Except in the case of simultaneously contested claims, a claimant, or his or her representative, must file a Notice of Disagreement with a determination by the agency of original jurisdiction within one year from the date that that agency mails notice of the determination to him or her. Otherwise, that determination will become final. The date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed. (Authority: 38 U.S.C. 7105(b)(1))

(b) Substantive Appeal. Except in the case of simultaneously contested claims, a Substantive Appeal must be filed within 60 days from the date that the agency of original jurisdiction mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later. The date of mailing of the Statement of the Case will be presumed to be the same as the date of the Statement of the Case and the date of mailing the letter of notification of the determination will be presumed to be the same as the date of that letter for purposes of determining whether an appeal has been timely filed. (Authority: 38 U.S.C. 7105 (b)(1), (d)(3))

(c) Response to Supplemental Statement of the Case. Where a Supplemental Statement of the Case is furnished, a period of 60 days from the date of mailing of the Supplemental Statement of the Case will be allowed for response. The date of mailing of the Supplemental Statement of the Case will be presumed to be the same as the date of the Supplemental Statement of the Case for purposes of determining whether a response has been timely filed. Provided a Substantive Appeal has been timely filed in accordance with paragraph (b) of this section, the response to a Supplemental Statement of the Case is optional and is not required for the perfection of an appeal, unless the Supplemental Statement of the Case covers issues that were not included in the original

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Statement of the Case. If a Supplemental Statement of the Case covers issues that were not included in the original Statement of the Case, a Substantive Appeal must be filed with respect to those issues within 60 days in order to perfect an appeal with respect to the additional issues. (Authority: 38 U.S.C. 7105(d)(3))

§20.305 Rule 305. Computation of time limit for filing.

(a) Acceptance of postmark date. When these Rules require that any written document be filed within a specified period of time, a response postmarked prior to expiration of the applicable time limit will be accepted as having been timely filed. In the event that the postmark is not of record, the postmark date will be presumed to be five days prior to the date of receipt of the document by the Department of Veterans Affairs. In calculating this 5-day period, Saturdays, Sundays and legal holidays will be excluded.

(b) Computation of time limit. In computing the time limit for filing a written document, the first day of the specified period will be excluded and the last day included. Where the time limit would expire on a Saturday, Sunday, or legal holiday, the next succeeding workday will be included in the computation.

(Authority: 38 U.S.C. 7105)

38 USC Section 1110 Basic entitlement - Wartime

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the person's own willful misconduct or abuse of alcohol or drugs.

§38 USC Section 1154 Consideration to be accorded time, place, and circumstances of service

(a) The Secretary shall include in the regulations pertaining to service-connection of disabilities (1) additional provisions in effect requiring that in each case where a veteran is seeking service-connection for any disability due consideration shall be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence, and (2) the provisions required by section 5 of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (Public Law 98-542; 98 Stat. 2727).

(b) In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or

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injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

38 USC 1702 Presumptions: psychosis after service in World War II and following periods of war; mental illness after service in the Persian Gulf War

(a) Psychosis.— For the purposes of this chapter, any veteran of World War II, the Korean conflict, the Vietnam era, or the Persian Gulf War who developed an active psychosis

(1) within two years after discharge or release from the active military, naval, or air service, and

(2) before July 26, 1949, in the case of a veteran of World War II, before February 1, 1957, in the case of a veteran of the Korean conflict, before May 8, 1977, in the case of a Vietnam era veteran, or before the end of the two-year period beginning on the last day of the Persian Gulf War, in the case of a veteran of the Persian Gulf War, shall be deemed to have incurred such disability in the active military, naval, or air service.

(b) Mental Illness.— For purposes of this chapter, any veteran of the Persian Gulf War who develops an active mental illness (other than psychosis) shall be deemed to have incurred such disability in the active military, naval, or air service if such veteran develops such disability—

(1) within two years after discharge or release from the active military, naval, or air service; and

(2) before the end of the two-year period beginning on the last day of the Persian Gulf War.

38 USC Section 5107 (03/02) Claimant responsibility; benefit of the doubt

(a) CLAIMANT RESPONSIBILITY- Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary.

(b) BENEFIT OF THE DOUBT- The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.

{3.1, 3.3, 3.4, 3.6, 3.12a, 3.102, 3.103, 3.104, 3.105, 3.159, 3.303, 3.304, 3.306, 3.307, 3.309(a), 3.310, 3.321(a);(b)(1), 3.322, 3.340, 3.2600, 4.15, 4.16, 4.18, 4.19 19.32, 20.302, 20.305, 38 USC 1110, 38 USC 1154, 38 USC 1702, 38 USC 5107 (a) (b)}


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DECISION:

1. Service connection for mental health condition, also claimed as depression and anxiety, remains denied
2. Service connection for post traumatic stress disorder remains denied
3. Service connection for spine condition, also claimed as low back condition, remains denied.
4. Entitlement to Total Disability Benefits Based on Unemployability remains denied.

REASONS AND BASES:

VA, in determining all claims for benefits that have been reasonably raised by the filings and evidence, has applied the benefit-of-the-doubt and liberally and sympathetically reviewed all submissions in writing from the Veteran as well as all evidence of record.

 received a communication which was accepted as a timely notice of disagreement and you did not elect to participate in the Decision Review Officer review program. This decision is based on a traditional review of the evidence.

Your original claim was addressed in a Rating Decision dated September 4, 2014. You were notified of the decision and provided appeal rights on September 8, 2014. We received a VA Form 9, Substantive Appeal, on January 12, 2015. This form contained a vague statement and was not the correct form for a Notice of Disagreement, however it was very liberally interpreted as a Notice of Disagreement. Regulation requires that a Notice of Disagreement must identify rating decision and the specific issue or issues you disagree with. We received additional communications from you after that point in time, however there was no clear statement of disagreement until VA Form 21-0958 was received March 6, 2015.

On one statement you requested that your claim be addressed by the VA Oakland Regional Office. VA claims are considered associated with the Regional Office in the jurisdiction where the claimant resides, however we have a National Work Queue and allocate individual claims to the office with the available resources to handle the claim most expeditiously. A claim may be adjudicated by any Regional Office nationwide. All VA Regional Offices are governed by the same laws, rules, and regulations, and use the same tools and guidelines for decision making.

All of your service is Navy Reserve duty, with no identified active duty service. The provisions regarding limitations of VBA benefits for Reservists apply to your case. Your claim cannot be addressed as the claim of a Veteran with active duty service. Benefits for Reservists are limited and must meet specific requirements that are not the same as the requirements for Veterans with active duty service.

Of note, we have carefully considered your entire claims file in relation to your Notice of Disagreement. If a particular document is not discussed in detail, that does not mean it was overlooked or not considered. All documents were reviewed and considered. We are not clear as to the purpose of your submission of a copy of a Naval Postgraduate School thesis and excerpts from another regarding cost comparisons between active and naval reserve force ships, and a cost

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benefit analysis of the Naval Reserve force frigates. These documents were reviewed but have little probative value in relation to your claim.

1. Service connection for mental health condition, also claimed as depression and anxiety, was denied in a rating decision dated September 4, 2014 because the evidence shows no objective evidence that the psychiatric complaints and diagnosis of bipolar disorder were the direct result of an event or injury while on duty as a member of the Navy Reserves. A claim for any mental disorder is considered under the broad description of chronic acquired psychiatric disorder. Post traumatic stress disorder is addressed separately because there are additional criteria for service connection beyond those required for service connection of other mental disorders. You filed a Notice of Disagreement with the decision to deny service connection. We have reviewed your prior claims file, note that you were treated for psychiatric symptoms August 13, 1999 and that a Medical Examination report dated June 10, 2000 notes you received psychiatric treatment. The August 13, 1999 notes report a history of depression/bipolar disorder under treatment with lithium. There is no indication of an event related to military service that resulted in this diagnosis. The triggering event for the clinic visit was your breakup with a girlfriend. The June 2000 medical exam notes one visit with Navy doctors and referral to mental health. You complained that the military medical care was negligent and completely inadequate. Again, the evidence does not show the issues were related to military service. Generally Reservists obtain medical care for non-emergent non-military related issues in the civilian sector. The military provides comprehensive medical care for full time active duty servicemembers.

The post service records from Alameda Medical Center dated September 28, 2005 show a diagnosis of depression with psychotic features. The records do not show any indication that your psychiatric condition was related to your Reserve military service and there was no mention of military sexual assault. The evidence does not show a specific event or injury directly resulting in a diagnose psychiatric condition, and no line of duty determination was found relating to any such event occurring during your Reserve duty. Service connection for mental health condition, also claimed as depression and anxiety, remains denied

2. Service connection for post traumatic stress disorder (PTSD) was denied in a rating decision dated September 4, 2014 because the evidence shows no objective evidence or markers of a personal or sexual assault during your Reserve service.

Service connection for (PTSD requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link between current symptomology and the claimed inservice stressor. A diagnosis of PTSD must meet all diagnostic criteria as stated in the Diagnostic and Statistical Manual of Mental Disorders, 5th edition,(DSM-5) published by the American Psychiatric Association.

If the claimed inservice stressor is related to personal assault, you must submit credible supporting evidence that the claimed inservice stressor actually occurred. This means that there is

a legal standard that must be met and that the veteran's report of the incident must be supported by police or civilian documentation of the incident, or if that is not available, there must be other evidence that would lead to the reasonable conclusion that the incident occurred. Such other evidence would generally include military or civilian documentation of behavioral changes after the incident which could reasonably be expected from a person who had undergone a personal assault. Such changes include, but are not limited to: sudden requests for other duty assignments without justification, aggressive behavior (such as over or under eating), increased disrespect for military or civilian authority etc.

A PTSD claim based on personal assault or military sexual trauma can be very difficult to pursue for a veteran who has active duty service. It is much more difficult to substantiate for a member of the Reserves. In this case there is no credible evidence of a personal assault or military sexual trauma. The records identified in support of your claim document that you have psychiatric problems that have been diagnosed as bipolar disorder. The evidence does not show that this condition is the direct result of an event or injury during your Reserve service. The statement you have submitted in support of your claim initially identified the date of the event as June 2000, than a previous statement reported the event in June 1998, and a third statement reported the event in 1996. You refer to the Reserve treatment note dated August 13, 1999 showing your psychiatric condition. This document does show that you were treated for a psychiatric complaint during the time period you were in the Reserves, but it does not show that your psychiatric condition directly resulted from an event or injury in line of duty. The notes show you were diagnosed with bipolar disorder and had a breakup with a girlfriend. The treatment notes do not mention post traumatic stress disorder nor do they indicate that the psychiatric complaints are in any way related to or the direct result of your Reserve service.

Dr. Louie's letter includes a summary of her observations and your complaints. While Dr. Louie is qualified to provide a diagnosis of PTSD based on your report, VA must also verify or corroborate the claimed stressor before we can consider a grant of service connection. If the stressor is conceded, a VA Compensation and Pension examiner must confirm the PTSD diagnosis. In this case we do not have sufficient evidence to warrant a VA examination. The evidence does not include any objective report or documentation of any kind of assault, and the evidence is insufficient to corroborate or verify that you experienced a physical or sexual assault while you were on duty as a Reservist. For regular active duty service the overall records may show indicators clearly showing that some event occurred resulting in a significant change in behavior or other significant marker supporting a subjective report of military physical or sexual trauma. For a Reservist, the evidence must include a Line of Duty determination showing that the claimed event occurred and that it was in the line of duty while on Reserve duty. You contend that your attempt to get out of the Navy and transfer to the regular Army is such a marker. Unfortunately the decision to attempt to transfer from one branch of Service to another without further supporting documentation is not, in itself, sufficient to show that a documented event occurred while you were on duty as a member of the Reserves. Members of the Reserves continue civilian activities while serving as Reservists and there are many variables outside of military control that do not apply to full time active duty servicemembers. The law does not allow service connection for chronic diseases or mental conditions that happen to occur during the time of

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Reserve service. Service connection is limited to injuries or conditions directly resulting from an event that is found to be in the line of duty.

VA treatment records report that you talk at length about your PTSD and attempts to get compensation for yourself as well as your father's PTSD. There is no provision in the law that allows you to file a claim for your father's PTSD. Your father would have to file his own claim. You are not entitled to VA benefits based on any disability your father might have. You have made statements about your father not being in your life due to his PTSD. While that is unfortunate, we can only consider the impact that may have had in relation to your own claim for a mental disorder. The evidence of record does not show any basis for a grant of service connection for PTSD. Service connection for post traumatic stress disorder remains denied

3. Service connection for spine and/or low back condition was denied in a rating decision dated September 4, 2014 because the evidence shows no record of a back injury or event resulting in complaint of a back condition during your Reserve service. The rating decision explained the requirements for service connection and why service connection could not be granted. The decision also explained what evidence would be required to substantially support a claim for service connection. A review of the evidence and the decision shows the decision was correct. Your service treatment records and private records received in support of your claim did not show any evidence of a spine or low back condition. VA treatment records are available from December 24, 2014 through August 24, 2015. These records show degenerative disc disease with lumbar radiculopathy added to the active medical problem list as of January 14, 2015, and complaint of chronic low back pain added to the active medical problem list on February 17, 2015. The records do not show that the degenerative disc disease, radiculopathy, or back pain was the direct result of or caused by an event or injury during your military Reserve service. No Line of Duty determinations were found showing any kind of event or injury during your Reserve service. You refer to the medical entry profile for your request to transfer to the Regular Army in 1998. The printout shows disqualification for Regular Army due to spine, musculoskeletal/psych conditions. The document does not identify the specific spine or psych condition, and does not indicate the etiology of either condition. The evidence does not show either condition resulted from a specific event or injury while you were on duty in the Navy Reserves. Regulation allows service connection for an injury or disability resulting for an event which occurred while you were on inactive duty for training or during a drill period provided there is evidence to show the event occurred in the line of duty. No such event or injury was found in your records. There is no basis to grant service connection for a spine or low back condition. Service connection for spine condition, also claimed as low back condition, remains denied.

4. Entitlement to Total Disability Benefits Based on Unemployability was denied in a rating decision dated September 4, 2014 because the evidence shows you do not have any service connected disabilities. You were notified of the decision in a letter dated September 8, 2014. Upon acceptance of your Notice of Disagreement we reviewed your file. The evidence does not show that you have any service connected disabilities. When a claimant contends that they are unemployable and there is no eligibility for Total Disability Benefits Based on Unemployability,

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 also consider the issue of entitlement to pension which is a benefit addressing unemployability due to non service-connected disabilities. We considered this possibility in your case, however you do not meet the minimum criteria for eligibility for pension benefits as you did not service 24 months or a full term of active duty military service. There is no eligibility for VA pension benefits. It is noted that you are in receipt of Social Security disability benefits for a mood disorder as verified by multiple copies of a Social Security Administration Award Letter dated September 12, 2011. It is further noted that you denied that you were in receipt of the Social Security income in a social work assessment at VAMC San Francisco Entitlement to Total Disability Benefits. Please understand that Social Security considers whether or not you are able to work at all due to disability, regardless of the etiology of the disability. VA may only grant unemployability when the evidence shows a Veteran is unable to obtain and maintain gainful employment due to service connected disability(ies). Since you do not have any service connected disabilities there is no eligibility for this benefit. Entitlement to Total Disability Benefits Based on Unemployability remains denied.