



National Service & Legislative Headquarters
807 Maine Avenue, S.W.
Washington, D.C. 20024-2410
Phone (202) 554-3501
Fax (202) 554-3581
www.dav.org

**STATEMENT OF
SHANE L. LIERMANN
DEPUTY NATIONAL LEGISLATIVE DIRECTOR
OF THE DISABLED AMERICAN VETERANS
FOR THE RECORD OF THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
DECEMBER 9, 2020**

Chairwoman Luria, Ranking Member Bost, and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to provide written testimony for this hearing of the Subcommittee of Disability Assistance and Memorial Affairs on "The Toxic World of Presumptive Service Connection Determinations: Why Should Our Veterans Wait?"

DAV is a congressionally chartered national veterans' service organization of more than one million wartime veterans, all of whom were injured or made ill while serving on behalf of this nation. To fulfill our service mission to America's injured and ill veterans and the families who care for them, DAV directly employs a corps of National Service Officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at VA regional offices (VARO) as well as other VA facilities throughout the nation. Together with our chapter, department, transition and county veteran service officers, DAV has over 4,000 accredited representatives on the front lines providing free claims and appeals services to our nation's veterans, their families and survivors. We represent over one million veterans and survivors, more than any other veterans' service organization (VSO).

Madame Chair, the men and women who serve are often placed in situations that have long-term health effects that will impact their individual functioning, provide industrial impairments and require physical rehabilitation and future health care. When these men and women are subjected to toxins and environmental hazards, our sense of duty to them must be heightened as many of the illnesses and diseases due to these toxic exposures may not be identified for years, even decades after they have completed their service.

That is why we believe today's hearing on presumptive service connection is so important, to prevent these types of injustices from continuing. Our testimony will

address the presumptive process, a concession of exposure and the need for reforms for the entire presumptive process.

PRESUMPTIVE SERVICE CONNECTION

In order to better understand the presumptive process, we first need to know the requirements of direct service connection and the differences with presumptives. To establish direct service connection for a condition, a veteran must meet three requirements:

- (1) evidence of a current disability or condition;
- (2) evidence of an event or a disease or injury in the military; and
- (3) evidence of a medical link or opinion that the current diagnosed condition "is at least as likely as not," related to the event in-service.

The purpose of presumptives is to overcome evidentiary gaps of a veteran's specific exposure and the scientific association of diseases. The basis of presumptive service connection is predicated on the scientific association between a toxic exposure and a resultant disease or condition. This lightens the burden of proof and relieves the veteran of proving the disease or condition's relationship to the toxic exposure, the requirement for a medical link or nexus as noted in (3) above. The first presumptives were enacted into law via the Veterans' Dioxin and Radiation Exposure Compensation Standards Act in 1984.

The First Presumptives

The Dioxin Act was enacted to direct the Administrator of Veterans Affairs to establish guidelines and criteria for resolving claims for benefits resulting from a service-connected death or disability based on a veteran's exposure during service on active duty to: (1) herbicides containing dioxin in Vietnam during the Vietnam era; or (2) ionizing radiation from the detonation of a nuclear device either in connection with testing or the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946.

The Act dramatically altered the process governing veterans' exposure disability claims. Rather than have the VA determine in individual claims whether a particular veteran's disease was caused by radiation or Agent Orange exposure, the Act authorized the Administrator of the VA to conduct rulemaking to determine which diseases will be deemed service connected to Agent Orange exposure or radiation exposure, thus establishing the first presumptives.

In reference to Agent Orange exposure, VA interpreted the law as requiring a certain threshold of evidence for causation, and as a result denied presumptions between Agent Orange and all diseases except Chloracne. Veterans filed a lawsuit against the VA and as determined by district court in *Nehmer v US Veterans*

Administration, 1989, the Act was ambiguous and interpreted congressional intent as establishing a threshold of evidence for scientific association.

The Agent Orange Act of 1991, 38 U.S.C. § 1116, originally stated that each additional disease that the Secretary determines in regulations warrants a presumption of service connection by reason of having positive association with exposure to a herbicide agent. Unfortunately, this requirement of association was not carried forward and ended on October 1, 2015.

The National Academies of Science, Engineering, and Medicine (NASEM) "Veterans and Agent Orange" update was published in 2016. The committee elevated the scientific association for bladder cancer and hypothyroidism. Further, the study clarified that Vietnam veterans with "Parkinson-like symptoms," but without a formal diagnosis of Parkinson's disease, should be considered under the presumption that Parkinson's disease and the veterans' are service connected. In December 2018, the National Academies issued a report noting there was sufficient evidence of a relationship between hypertension and Agent Orange.

VA has repeatedly stated that additional review of evidence was required to establish these diseases as presumptive to Agent Orange. In January 2020, VA Secretary Wilkie stated VA needed to wait for published reports from VA studies, although the scientific community had already provided enough significant data, studies and associations linking these four diseases to Agent Orange exposure. Recently, VA advised that results of the two studies, the Vietnam Era Health Retrospective Observational Study, or VE-HEROeS, and the Vietnam Era Mortality Study, aren't expected until at least next year, and in the case of the mortality study, until mid-2021. These are the two studies Secretary Wilkie stated they needed to review before making a decision on the four presumptives.

Differences in Presumptive Processes

The presumptive processes and the presumptive decision-making process are not consistent among all of the different types of exposures; it varies from exposure to exposure. Which means that not all presumptive processes are the same when it comes to establishing concession of exposure, or in adding new diseases linked to the exposure, or requirements for additional studies, or requirements from the Secretary to act on adding new diseases linked to exposure.

For example, the presumptive exposures based on mustard gas and Camp Lejeune contaminated water were established by the Secretary via federal rule-making and not based on congressional action. Neither of these regulatory presumptive processes have requirements for additional studies to address potentially new diseases linked to toxic exposures. However, new diseases for these exposures can be added by statute or federal rulemaking, but there are no specific controls or requirements in doing so.

A major concern with the current presumptive processes is that any time-requirements for the Secretary's actions on adding new diseases that existed have expired. When the Agent Orange Act of 1991 was passed into law, it contained requirements for action by the Secretary when a report and recommendations from the National Academies was received. It noted the Secretary not later than 60 days after the date on which the Secretary receives a report, shall determine whether a presumption of service connection is warranted for each disease covered by the report. However, this expired on October 1, 2015. This means, the Secretary no longer has a required time frame for actions on recommended diseases to be added as a presumptive to Agent Orange.

Another example is the Persian Gulf War Veterans Act of 1998, codified at 38 U.S.C. § 1118, which originally had these same types of time-required actions by the Secretary. However, those requirements expired on October 1, 2011, as the date was not reauthorized. All of this means there are no current time requirements on the Secretary to act on recommendations made by the NASEM in reference to additional diseases related to toxic exposures.

Although this is a very small part of the story of presumptive diseases, it highlights the significant issues, inconsistencies, and the lack of time requirements for establishing presumptive diseases related to toxic exposures. It is clear that veterans need a way of establishing service connection for diseases related to toxins now and not wait for the scientific community or VA's bureaucratic processes.

DIRECT SERVICE CONNECTION AND CONCESSION OF EXPOSURE

One of the common denominators for all presumptive processes is the concession of exposure to a specific toxin or environmental hazard. There are requirements that must be met to concede the toxic exposure prior to establishing the presumptive process and thus the granting of association for diseases, illnesses and conditions.

When veterans have been exposed to toxins and current science and medical evidence fails to provide diseases or illnesses, they cannot use the presumptive process to establish service connection for their illnesses. Prior to the establishment of a presumptive process or disease list, the concession of exposure can provide an avenue to establish service connection for access to VA benefits and VA health care.

For example, there is not a presumptive service connection process for burn pit and airborne hazards exposures, thus veterans must seek direct service connection for diseases related to burn pit exposures. As we noted, direct service connection requires:

- (1) evidence of a current disability or condition;
- (2) evidence of an event or a disease or injury in the military; and
- (3) evidence of a medical link or opinion that the current diagnosed condition "is at least as likely as not," related to the event in-service.

According to VA, from June 2007 through May 2020, it adjudicated 12,517 direct service connection claims for diseases related to burn pit exposure. Roughly 80 percent of those claims have been denied. Over 50 percent of the denials, were not allowed as there was no evidence of a medical link between the exposure in service and the disease.

Although VA, in its M21-1 manual, has recognized the actual toxins these veterans are conceded to have been exposed to, they have not shared this information with veterans. It is only provided for the examiner, if VA requests an examination. Thus, this does not allow veterans to develop evidence or a medical link as they are not aware of what they were exposed to.

A concession of exposure for direct service connection would still require a veteran to provide a diagnosis of a current condition; however, by conceding exposure of those who served in areas of active burn pits to certain chemicals and toxins, including those recognized in VA's M21-1 adjudication manual, the veteran would not have to provide personal evidence of exposure. This lowers the burden of proof on the veteran. This will still require veterans to have a medical opinion linking the condition to the exposure. With a concession of exposure to the known toxins, a physician will now have a better ability to provide a medical opinion.

A concession of exposure can lighten the burden of proof now and assist veterans in establishing direct service connection without having to just wait for potential presumptive service connection based on these exposures. There is legislation moving through the Senate, S.2950 the Veterans Burn Pits Recognition Act, which can achieve this reform today.

Veterans have two paths for establishing service connection for diseases related to toxic exposures, presumptive and direct. As recently reported by the NASEM presumptive service connection for burn pits diseases does not seem plausible at this time due to a lack of scientific association. Therefore, veterans must seek claims on a direct basis. As history has shown us, it can take decades for the scientific evidence required for presumptives and we cannot stand by and let thousands of veterans continue to suffer without access to VA health care and VA benefits; for these reasons, we encourage the House to pass legislation establishing the concession of exposure.

REFORMS TO THE PRESUMPTIVE PROCESS

The current presumptive processes are inconsistent with each other and this leads to delayed VA actions which negatively impacts veterans in trying to establish entitlement to their earned benefits including VA health care. Below are DAV's recommendations in reforming the current presumptive processes and these could be all included into one new consistent streamline presumptive process.

1. Establish Access to VA Health Care

Establishing a service-connected disability is often the gateway for veterans to access VA health care and benefits. However, the lack of access to VA health care for those exposed to toxins including burn pits and airborne hazards and the hazards at Karshi-Khanabad Air Base, known as K2, who have not yet established a service-connected disability, is a major concern. Combat veterans who were discharged or released from active service on or after January 28, 2003, are eligible to enroll in the VA health care system for five years from the date of discharge or release. However, this does not address many of the illnesses or diseases that can develop after the five-year period, such as cancers and multisystem diseases. Veterans exposed to toxins have limited alternatives for health care beyond the established period.

To ensure access to health care for these veterans, we urge Congress to enact legislation to extend or eliminate the five-year period for VA health care for combat veterans or to extend eligibility for those exposed to burn pits. DAV supports H.R. 4137, the Jennifer Kepner HOPE Act, as it would amend title 38, United States Code, Section 1710 to include VA health care for veterans exposed to burn pits. The same should be accomplished for K2 veterans and all exposed to toxins even prior to the establishment of presumptive processes and disease.

2. Establish Concession of Exposure

When veterans have been exposed to toxins and current science and medical evidence fails to provide diseases or illnesses, they cannot use the presumptive process to establish service connection for their illnesses. So prior to the establishment of a presumptive process or disease list, the concession of exposure can provide an avenue to establish service connection for access to VA benefits and VA health care.

A concession of exposure would still require a veteran to provide a diagnosis of a current condition; however, by conceding veterans who served in known toxic areas, veteran would not have to provide personal evidence of exposure. This will still require veterans to have a medical opinion linking the condition to the exposure. By conceding their exposure to the known toxins, a physician will now have a better ability to provide a medical opinion as the toxins of exposure are known.

We are urging Congress to establish the concession of exposure for burn pits and it can be applied to all current and future toxic exposures and not require veterans to wait for the scientific community or the VA.

3. Requiring VA to Apply the Court's Holdings in *Combee* Whenever Applicable

Currently when the VA adjudicates a claim that associates a disease to a toxic exposure, but the disease is not one of the recognized presumptive diseases, it is usually denied. One of the most common reasons for this denial is that the disease is not listed as a presumptive. However, there is a means for this type of claim to be established based on direct service connection, as determined by the U.S. Court of Federal Appeals. In their decision of *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994); they held that notwithstanding the presumption provisions, a claimant is not precluded from establishing service connection with proof of direct causation.

While this precedent has existed since 1994, most VA regional offices fail to apply this legal standard. Additionally, some people in VBA (who have appeared before Congress on behalf of VBA) fail to acknowledge or understand *Combee* when discussing the presumptive process. When a veteran provides evidence of the disease, has a concession of the exposure, and even has an opinion with scientific and medical rationale linking the disease to the exposure, it is denied. These denials are then appealed to the Board of Veterans' Appeals and in many cases are granted by the Board based on the holdings of *Combee*. Many claims based on a toxic exposure for a disease not recognized as a presumptive can be resolved quickly based on *Combee* and would not add to the backlog of pending appeals.

4. Statutorily Require Future Studies on Toxic Exposures

Not all of the presumptives have requirements for future studies to be conducted for reviewing and potentially adding new diseases to the established presumptive diseases lists. In multiple reports, the NASEM has stated that additional scientific research and new medical processes continue to change. Therefore in order to ensure that diseases are properly associated with toxic exposures, any new presumptive processes should have a requirement for new studies every two years.

5. Time Requirement for Action from the Secretary.

As noted above, the statutory provisions that required the Secretary to respond and take actions on the recommendations from NASEM have expired. While Congress has the ability to reauthorize the law, or directly add presumptions, no such action has been taken in recent years. This lack of statutory mandate, unfortunately, has resulted in no action by VA on the recommendations on three presumptive diseases from 2016. These veterans with terminal illnesses are left with no action from the

Secretary. Such situations need to be avoided in the future. A future presumptive process must include timely action.

We recommend inclusion of the language previously found in 38 U.S.C. §§ 1116 and 1118. We recommend including, “the Secretary not later than 60 days after the date on which the Secretary receives a report from the National Academies, shall determine whether a presumption of service connection is warranted for each disease covered by the report. If the Secretary determines that such a presumption is warranted, the Secretary, not later than 60 days after making the determination, shall issue proposed regulations setting forth the Secretary's determination. If the Secretary determined that a presumption of service connection is not warranted, the Secretary, not later than 60 days after making the determination, shall publish in the Federal Register a notice of that determination. The notice shall include an explanation of the scientific basis for that determination. It further added that not later than 90 days after the date on which the Secretary issues any proposed regulations under this subsection, the Secretary shall issue final regulations.”

In closing, the presumptive process has significant issues, inconsistencies, and the lack of time requirements for establishing presumptive diseases related to toxic exposures. It is clear that veterans need a way of establishing service connection for diseases related to toxins now and not wait for the scientific community or VA's bureaucratic processes. We recommend reforms to the presumptive process, which should include access to VA health care, a concession of exposure, and time-required actions by the VA.

Madame Chair, this concludes my testimony on behalf of DAV. We stand ready to engage with the Subcommittee on the presumptive process for toxic exposures.