

The Toxic World of Presumptive Service Connection Determinations: Why Should Our Veterans Wait?

Dec 09, 2020

Statement of
Kristina Keenan, Associate Director
National Legislative Service
Veterans of Foreign Wars of the United States

For The Record

United States House of Representatives
Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

With Respect To

The Toxic World of Presumptive Service Connection Determinations: Why Should Our Veterans Wait?

WASHINGTON, D.C.

Chairwoman Luria, Ranking Member Bost, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide our position on the current presumptive service connection determination and adjudication process at the Department of Veterans Affairs (VA).

NATIONAL HEADQUARTERS

406 W. 34th Street
Kansas City, MO 64111
Office 816.756.3390
Fax 816.968.1157

WASHINGTON OFFICE

200 Maryland Ave., N.E.
Washington, D.C. 20002
Office 202.543.2239
Fax 202.543.6719

info@vfw.org
www.vfw.org

It is painful to know that there are veterans currently suffering from serious health conditions as a result of toxic exposures from military service. When a veteran files a VA disability claim for a condition with direct service connection, three things are required: a current disability, evidence of an in-service event, and a medical opinion linking the two. Direct service connection is nearly impossible to achieve for toxic exposure claims. Most veterans do not have a record of exposure in their Official Military Personnel File (OMPF) or other proof of the in-service event. Also, determining a nexus can be difficult for health care professionals who may not be aware of how certain chemicals or environmental factors are linked to a veteran's specific diseases or conditions. For claims involving toxic exposures, the burden of proof falls far too heavily on the veteran. This is a significant barrier to veterans' access to care.

From 2001 to 2005, thousands of U.S. service members were stationed at the Karshi-Khanabad base in Uzbekistan, commonly known as K2. The former Soviet base was heavily contaminated with remnants from chemical weapons, radioactive uranium and other toxic hazards. For veterans who developed cancers and other serious health conditions following their deployment to this base, there should be a clear path to direct service connection. Sadly, though many of these service members saw signs warning them of the contaminants, witnessed glowing pond water, and photographed what they saw, the proof has not been clear enough to receive VA benefits associated with these exposures. Veterans from K2 have reported high rates of cancers, neurological disorders, and other serious conditions that develop quickly and have led to permanent disability or death. There needs to be a better way to support veterans when toxic or environmental exposures occur.

Fortunately, we have seen that the obstacles identified in proving direct service connection can largely be overcome when Congress or VA establishes a presumption of service connection for specific health conditions. The *Agent Orange Act of 1991* provided VA with an effective pathway to review and promulgate regulations regarding conditions suspected to be caused by herbicide exposure. It first required VA to work with and review reports conducted by the National Academies of Sciences, Engineering, and Medicine (NASEM). The reports were based on studies of the available data to better understand links between herbicide exposure during service in Vietnam and specific diseases. The act then required the VA Secretary to review those findings and when a positive association was found, determine if presumptive service connection was justified. The Secretary was also required to provide an explanation of the reasoning if it was determined that presumptive service connection was not warranted.

The Agent Orange model provided VA with a clear timetable and guidance on how to apply the scientific findings of NASEM to expand the list of presumptive conditions when needed. Though the provisions of the Agent Orange Act expired in 2015, the VA Secretary still has broad authority to continue to add new diseases presumed to be connected to herbicide exposure based on a review of the current science. However, since 2015, VA is no longer required to use this process, nor is it bound by the specified timetable to respond to developments in the science. It is for these reasons the VFW supports enacting legislation that would build off what has worked in the past, and implement a practical and efficient framework for VA to support all veterans as new and unique exposures are reported.

The framework we suggest is very similar to that of the *Agent Orange Act of 1991*. First, the VFW recommends that a commission, independent from the Department of Defense (DOD) and VA, be established to identify environmental hazards and toxic exposures incident to military service. Once sufficient information exists regarding the presence of a toxic or environmental exposure, the commission would be charged with recommending a study on the adverse health effects associated with the exposure.

This proposal is consistent with a recommendation from the September 2020 NASEM report entitled *Respiratory Health Effects of Airborne Hazards Exposures in the Southwest Asia Theater of Military Operations*. In that report, the committee recommended that VA establish an independent panel of experts to evaluate diagnoses assumed to be associated with exposure to burn pits, including pulmonary pathologists, toxicologists, and epidemiologists to evaluate these diagnoses. The report states that, “...such a committee is critical to ensuring that VA has a consistent approach in establishing or denying a diagnosis and evaluating its possible service connection. The presence of such a committee should also reassure veterans that they are receiving a fair review that uses the best science.” This recommendation by the NASEM is in line with the VFW’s belief that conditions related to toxic exposures should be referred to an independent commission as part of the greater framework.

Second, the VFW recommends that NASEM review and evaluate the existing body of scientific research regarding specific diseases and exposure to toxic substances. NASEM is well-suited to perform this function, as it already possesses institutional experience gained through the implementation of the *Agent Orange Act of 1991*. For this reason, the VFW believes that NASEM is capable of conducting such analysis.

Finally, the VFW believes Congress should require VA to grant a presumption of service connection for the conditions deemed to be associated with toxic exposures and environmental hazards. To effectuate this requirement, VA should rely on its own principle of “reasonable doubt” as noted in 38 CFR 3.102. VA would, therefore, consider the conclusions reached by NASEM, resolving any doubt regarding associations in favor of veterans. In other words, VA should grant a presumption of service connection if the scientific evidence suggests that a disease is at least as likely as not to be associated with a toxic exposure or environmental hazard. This framework is described in detail in Senate bill S. 4393, *Toxic Exposure in the American Military (TEAM) Act of 2020*, which the VFW supports, and is in large part represented in the similar House bill H.R. 8506.

The VFW continues to be concerned with the high percentage of toxic exposure claims denials. One issue VFW service officers report is how presumptive conditions are applied within the context of a veteran’s complete list of symptoms. The VFW has found this to be of particular concern with Gulf War presumptive conditions. We recognize that Gulf War Illness (GWI), known also as chronic multi-symptom illness and undiagnosed illnesses, is often misdiagnosed as it presents itself as a conglomeration of symptoms. It is for that reason that during a 2017 Committee on Veterans’ Affairs joint subcommittee hearing, *Examining VA’s Processing of Gulf War Illness Claims*, the VFW testified on the need for a singular Disability Benefits Questionnaire specifically tailored to Gulf War Illness. This would be advantageous when a veteran presents with one or more of the related presumptive conditions to determine if the totality of the evidence meets the criteria for Gulf War Illness.

Currently, using a separate questionnaire for each condition greatly reduces the likelihood of accurately diagnosing this illness or increases the likelihood of a denial for service-connected benefits. It appears that VA develops claims in a way that results in overwhelming denials due to the misapplication of the presumptive conditions, complicated by how the symptoms manifest themselves. Although we brought this to the attention of VA several times, our concerns have gone unheeded. Even though presumptive conditions have been established for Gulf War Illness, the process of evaluating those conditions requires a modified approach to address the unique nature of this and related illnesses.

The toxic exposure adjudication process at VA is simply not working and creates an unfair burden of proof on our veterans. The VFW believes the best way to address toxic exposure claims is the previously mentioned framework. This would streamline the presumptive service connection determination process, and provide VA with the guidance necessary to

assess current exposures and any that may surface in the future.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, the VFW has not received any federal grants in Fiscal Year 2020, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.