

**POLICY UPATE/  
NEW LAWS AND  
REGULATIONS**

(Jul 2009 to Mar 2010)

**SPRING CONFERENCE  
2010**

**TEXAS VETERANS  
COMMISSION**

# GENERAL PROVISIONS

## TRACKING CLAIMS ON VA WEBSITE

In April 2010, VBA plans on releasing an update to the eBenefits website that will allow Veterans to check their claim status online. VBA is doing this in an effort to provide better customer service and reduce the volume of phone calls to our National Call Centers. Veterans will be able to view the following information online through eBenefits:

- Date of Claim,
- Claim Type,
- Claim Status,
- Power of Attorney,
- Regional Office of Jurisdiction,
- Current Processing Location (if there is a temporary Station of Jurisdiction),
- Contentions

The eBenefits website can be located at: <https://www.ebenefits.va.gov>

[C&P Bulletin, Feb 2010]

## AUTHORIZATION TO DISCLOSE INFORMATION TO A THIRD PARTY

The new VA Form 21-0845, *Authorization to Disclose Personal Information to a Third Party*, allows National Call Centers (NCCs) and Regional Offices (ROs) to release specified information normally protected under privacy provisions to family members or other designated persons who are not powers of attorney, agents, or fiduciaries. This information can be unlimited or limited (e.g., the status of claims, benefit information, payment history, payment rate, debt owed VA, or any other information specified by the authorizer). The form also allows such designated individuals to provide certain information to VA (e.g., such as changes in address or direct deposit accounts). Designated persons must correctly answer a security question chosen by the claimant or beneficiary to confirm their authorization.

Only one VA Form 21-0845 may be valid at a time.

Revocation of the authorization may be written or oral.

[VA FAST LETTER 09-51, 22 DEC 2009]

## **NATIONAL RESOURCE DIRECTORY**

This website is joint effort by DoD, VA and Department of Labor.

It provides information on over 11,000 services and resources to support recovery, rehabilitation, and community reintegration. It addresses the following:

- Benefits and compensation
- Education
- Employment and training
- Family and caregiver support
- Health
- Housing and transportation
- Services and resources
- Key contact information

The web address is: [www.nationalresourcedirectory.gov](http://www.nationalresourcedirectory.gov)

[National Resource Directory website and Defense Authorization Act of 2009, Sec 561]

## **SOCIAL SECURITY COMPASSIONATE ALLOWANCE**

Claimants for Social Security disability with medical conditions so severe that approval is certain can have their claims processed in days rather than months or years.

There are currently about 50 conditions that qualify for this special consideration, and more are being reviewed. A complete list is found at:

[www.socialsecurity.gov/compassionateallowances/conditions.htm](http://www.socialsecurity.gov/compassionateallowances/conditions.htm)

[Social Security website]

# **STATE BENEFITS**

## **HAZELWOOD ENHANCEMENTS**

Presented by the Education Staff

### **MORTGAGE CREDIT FOR VETERANS**

The Texas Mortgage Credit Program allows a deduction of up to \$ 2,000 from their state tax liability under the following conditions:

Veteran must be honorably discharged, or be a first time home buyer

Veteran's income cannot exceed 115% of the area median family income (higher limit in some designated areas)

Deduction is 30% of the annual interest paid, with a maximum of \$ 2,000

[Texas Department of Housing and Community Affairs News Release, 9 Feb 2010]

# **VETERANS LEAVING ACTIVE DUTY**

## **MEDICAL SEPARATION FROM ACTIVE DUTY DUE TO PTSD**

The 2008 Defense Authorization Act required DoD to use the VA rating standards without alteration [14 Oct 2008]

38 CFR, Para 4.129 states:

When a mental disorder that develops in service as a result of a highly stressful event is severe enough to bring about the veteran's release from active military service, the rating agency shall assign an evaluation of not less than 50 percent and schedule an examination within the six month period following the veteran's discharge to determine whether a change in evaluation is warranted.

This has been done since October 2008.

However, a lawsuit was filed to apply this policy to veterans separated for PTSD from 17 Dec 2002 to 13 Oct 2008. In an agreement settlement, DoD agreed to review these cases (about 4,300). Veterans so identified will be notified, and must "opt in" by 24 July 2010 to be included in this settlement and review.

Veterans who do not receive a notice but think they qualify should send a copy of their PEB findings to:

National Veterans Legal Services Program  
c/o SABO SCREENING  
P.O. Box 65762  
Washington, DC 20035  
Facsimile: 202-223-9199

[Sabo, et al, v United States, No 08-899C, U.S. Court of Federal Claims, and NVLSP website <http://www.ptsdlawsuit.com>]

## **CHAPTER 35 BENEFITS FOR ACTIVE DUTY FAMILIES**

For severely disabled service members who are pending discharge from the military, dependent education benefits (Chapter 35) may be used prior to discharge provided the service member is:

Receiving medical care and

Has a total, permanent service connected disability and

Is likely to be removed from active duty

[VA Fast Letter 10-03, 7 Jan 2010]

### **PHYSICAL DISABILITY BOARD OF REVIEW UPDATE**

This board is reviewing all medical separations from the armed forces between 11 SEP 2001 and 31 DEC 2009. The purpose is to determine if medical retirement (an unfitting disability of 30% or more) is more appropriate.

Veterans must apply for this review using DD Form 294. Approximately 77,000 are potentially eligible.

As of 3 March 2010, the approval rate has been 61%

[Air Force PR article, 3 March 2010]

### **STOP LOSS COMPENSATION**

Service members involuntarily retained on active duty (Stop Loss) since 11 Sep 2001 thru 30 Sep 2009, can apply for a special compensation of \$ 500 per month for each month they were retained past the end of their enlistment.

Applications must be received by 20 Oct 2010.

Each service department has their own website with further information.

[2009 Defense Appropriations Bill and American Legion Bulletin 26-09, 22 Oct 2009]

# MILITARY RETIREES

## RETIRED PAY RECOUPMENT

Pending a formal legal review, service members who (1) received VSI (Voluntary Separation Incentive), SSB (Special Separation Benefit), or severance pay due to force reduction and (2) subsequently qualified for military retirement status, will not have these separation bonuses repaid out of their retired pay.

Due to the financial hardship, reductions have been held in abeyance since 1 June 2009.

A formal decision will be made on this issue.

[DFAS website, July 2009]

## EXTENDED PERIOD TO FILE TAX AMMENDMENTS

For veterans who receive retroactive VA payments, the time period to file an amended tax return has apparently been extended to four years.

For VA decisions dated 18 Jun 2008 or later, you have one year from the date of decision to file the amended return.

***THIS IS A CORRECTION TO THE FALL 2009 STATEMENT THAT VETERANS WOULD HAVE UP TO FIVE YEARS; THE IRS GUIDANCE IS FOUR CALENDAR TAX YEARS.***

[HR 6081, 17 JUN 2008, and IRS website]

# **SURVIVORS/FAMILY**

## **SBP/DIC OFFSET ELIMINATED FOR WIDOW(ER)S WHO REMARRY AFTER AGE 57**

Since 2004, this category of surviving spouses receives DIC under a different provision of law than all others. In August 2009, the U.S. Court of Appeals confirmed that the correct interpretation of the law is that there is no SBP offset for individuals in this category.. DoD has declined to carry the case to the Supreme Court, so this is a final decision. In practice, any surviving spouse receiving DIC who remarries after their 57<sup>th</sup> birthday, will not have an offset.

[Sharp, Haverkamp, and Rogers v. United States, August 26, 2009, No 2008-5105]

## **SOCIAL SECURITY CLAIM CAN ESTABLISH DIC EFFECTIVE DATE**

Under the provisions of 38 U.S.C. § 5101(a), 38 CFR 3.152(a) and 3.153, an application on a form jointly prescribed by the Secretary and the Commissioner of Social Security filed with the Social Security Administration (SSA) on or after January 1, 1957, will be considered a claim for death benefits, and to have been received in the Department of Veterans Affairs as of the date of receipt in Social Security Administration. VA and SSA have the jointly prescribed form *SSA-24, Application for Survivor's Benefits*, for that purpose. The receipt of such an application (or copy thereof) by the Department of Veterans Affairs will not preclude a request for any necessary evidence.

[Van Valkenburg v. Shinseki, U.S. Vet. App. No. 07-2670 (July 24, 2009)]

## **DEATH CERTIFICATES**

A death certificate will be issued by the State without charge if used for a claim against the government (VA survivor's benefits, burial benefits, Social Security).

This no fee death certificate must be requested by a TVC counselor or County Service Officer using a TVC Form 14.

[Texas Health and Safety Code, para 191.0046 (b)]

## **NEW VA FORM 21-534**

The new Form 21-524 is dated March 2009. Previous editions will not be used.

[TVC Memo, 4 Feb 2010]

# **RATING ISSUES**

## **AGENT ORANGE PRESUMPTIVE CONDITIONS ADDED**

The following conditions have been added as presumptive due to Agent Orange exposure:

B cell leukemias such as hairy cell leukemia

Parkinson's disease

Ischemic heart disease [with a very liberal interpretation of this condition...ischemia means a local loss of blood supply, so a diagnosis like coronary artery disease should be seen as acceptable]

For new claims, effective date is still uncertain; should be no later than May 2010. Based on the successful lawsuit regarding effective date for diabetes due to Agent Orange, the effective date may be as early as 13 Oct 2009.

For claims previously denied, or currently under appeal, provided that the veteran meets the presumptive requirements, the effective date should be original date of claim.

DIC claims that were denied should be reopened.

[VA News Release 13 Oct 09]

## **OSTEOPOROSIS PRESUMPTIVE FOR MOST POW'S**

Osteoporosis is now a presumptive condition for former POW's whose osteoporosis is at least 10% disabling, and either were detained or interned for at least 30 days, or have a service connected diagnosis of PTSD. Change is effective 28 Sep 2009.

[Federal Register 28 Aug 09, Vol 74, Number 166 Rules and Regulations Page 44288-44289]

## **"BROWN WATER" NAVY**

Attached is a list of those vessels that conducted operations inland in Vietnam. Any veteran who served on these ships during these periods is presumed to be exposed to Agent Orange.

This list is not complete. If you served on a ship that entered the inland waterways of Vietnam, please contact [navy@bluewaternavy.org](mailto:navy@bluewaternavy.org) with as much detail as possible so they can provide this information to the DVA for processing and inclusion in their data base.

[Compensation & Pension Service Bulletin Jan 2010]

## **GULF WAR ILLNESS EXPANDED**

Recent amendments to the law that governs 38 CFR 3.317 have expanded the definition to include certain diagnosed illnesses with inconclusive etiologies, signs or symptoms which may be manifestations of undiagnosed illness or medically unexplained chronic multisymptom illnesses.

The term *medically unexplained chronic multisymptom illness* means a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. Chronic multisymptom illnesses of partially understood etiology and pathophysiology will not be considered medically unexplained.

Signs and symptoms include, but are not limited to: (1) Fatigue, (2) Signs or symptoms involving skin, (3) Headache, (4) Muscle pain, (5) Joint pain, (6) Neurologic signs or symptoms, (7) Neuropsychological signs or symptoms, (8) Signs or symptoms involving the respiratory system (upper or lower), (9) Sleep disturbances, (10) Gastrointestinal signs or symptoms, (11) Cardiovascular signs or symptoms, (12) Abnormal weight loss. (13) Menstrual disorders.

[38.CFR 3.317 and VA Training Letter 10-01, 4 Feb 2010]

## **INFORMAL CLAIM REQUIRES SPECIFICATION OF THE BENEFIT BEING REQUESTED**

An informal claim is any written “communication or action” that requests a determination of entitlement or evidences a belief in entitlement to a benefit, and adequately identifies the benefit sought.

It is not enough to state “this is an informal claim for compensation” or “all disabilities of record”; the nature of the disability must be described. The informal claim requirement is satisfied by referring to the body part or system that is disabled or by describing symptoms of the disability.

For pension, it is sufficient to state “this is an informal claim for pension”.

[Brokowski v. Shinseki, 23 Vet App 79 (2009), CAVC]

## **LIBERAL READING OF CLAIMS/SPECIFIC DIAGNOSIS NOT REQUIRED**

VA cannot expect claimants to possess the sophistication to know the difference in medical terminology, therefore a claim for arthritis of the knee that shows no arthritis but does result in other knee diagnoses is considered an informal claim for those other knee conditions. A claim for hearing loss that also results in a diagnosis of tinnitus is also an informal claim for tinnitus.

If service connection is granted, the effective date is the date of the informal claim.

This is not a change in policy, simply a reaffirmation of the VA's duty to sympathetically read all claims.

[COMPENSATION AND PENSION BULLETIN, MAR 2009]

## **PTSD CLAIM MUST CONSIDER ANY OTHER PSYCHOLOGICAL CONDITIONS**

The Court held that a service connection claim that only identifies post traumatic stress disorder (PTSD) cannot only be limited to that diagnosis, but must be considered a claim for any mental disability that may be reasonably raised by several factors, to include the veteran's description of the claim and/or symptoms and any information and evidence submitted by the veteran or obtained by VA.

The Court explained that because a veteran was reasonably requesting benefits for symptoms of a mental condition that he was not competent to medically identify, the adjudication of the claim does not end in the face of currently diagnosed mental conditions that are different from his lay hypothesis on the claim form. The Court noted that it is generally within the province of medical professionals to diagnose or label a mental condition, not the claimant.

[Clemons v. Shinseki, February 17, 2009, No. 07-0558, CAVC]

## **CRITERIA FOR EXTRA-SCHEDULAR RATING CONSIDERATION**

The first determination is that there must be "an exceptional disability picture that renders available schedular evaluations for service-connected disability as inadequate".

Second, ) if exceptional disability is found, it must be determined whether the exceptional disability picture exhibits other related factors such as those provided by § 3.321(b)(1) as governing norms ("marked interference with employability" and "frequent periods of hospitalization")

If both of these are true, the case must be referred to Compensation and Pension Service to determine whether or not to assign an extra-schedular rating.

[Thun v. Peake, April 23, 2008, No. 05-2066, CAVC]

## **IU AND STATUTORY HOUSEBOUND RATE**

The statutory housebound rate is awarded when there is (1) one service connected condition rated at 100%, and an additional disability or disabilities independently ratable at 60% or more.

The Court has ruled that a determination of IU (individual unemployability), if made on the basis of a single disability, satisfies the 100% condition. Multiple service connected disabilities that establish IU cannot be used in this manner.

[Bradley v. Peake, November 26, 2008, No. 06-1854, CAVC and VA Fast Letter 09-33, July 2009]

## **TINNITUS MAY NOT REQUIRE A NEXUS OPINION**

If service treatment records mention a complaint of tinnitus and the veteran claims tinnitus and has current complaints of tinnitus, a medical opinion regarding possible causation is not required. Service connection can be established without a specific opinion.

[VA TRAINING LETTER 09-05, 5 AUG 2009]

## **TMJ RATING AND THE DELUCA DECISION**

The DeLuca decision stated that impairment of joint function is determined by actual range of joint motion as reported in the physical examination and additional limitation of joint function during flare-ups or following repetitive motion caused by the following factors:

- Pain, including pain on repeated use
- Fatigue
- Weakness
- Lack of endurance
- Incoordination

VA has clarified that this standard also applies to TMJ and requires the examiner to express the additional limitation in millimeters of inter-incisal range or lateral excursion.

[COMPENSATION AND PENSION BULLETIN, AUG 2009]

## **AGENT ORANGE EXPOSURE IN THAILAND**

Herbicides were used within the fenced perimeters of airbases throughout Thailand. Because of this evidence, the memorandum advises Regional Offices of the likelihood that airbase security personnel who patrolled the perimeters, and especially security dog handlers, were exposed to the herbicides present in the fenced areas. To promote consistency in the evaluation of these types of claims, C&P Service has developed the following policy:

When a Veteran with Thailand service during the Vietnam Era files a disability claim based on herbicide exposure and service records show that the Veteran's military occupational specialty (MOS) was Security Policeman or Security Dog Handler, or the Veteran had another MOS that would have required work near the airbase perimeter, VA regional offices should e-mail the Agent Orange Mailbox with a summary of the evidence contained in the claims files. C&P Service will then review the claim to determine the likelihood of herbicide exposure based on the facts of the case and available Department of Defense documents.

[COMPENSATION AND PENSION BULLETIN, AUG 2009]

## **VERIFICATION OF "SPECIAL OPERATIONS" INCIDENTS**

The veteran must provide at least the location and a two month period in which the incident took place. The Special Operations Command will research each claimed incident and provide either a "sanitized" summary or a negative reply. For some instances, the Command may advise that it cannot release any information.

[VA Fast Letter 09-52, 9 Dec 2009]

## **MISSING CLAIMS FOLDERS WITH PENDING CLAIMS**

When there is a pending claim, and the claims folder is identified as missing, regional office (RO) and Pension Management Center (PMC) personnel are required to initiate rebuilding missing claims folders no more than 60 days from the date the RO/PMC is notified of the claim.

M21-1MR, Part III, Subpart ii, 4.D, will be amended to reflect this policy.

[COMPENSATION AND PENSION BULLETIN, October 2009]

## **NEW FORM 9, FORMAL APPEAL TO BVA**

New form is dated Nov 2009. Makes more clear that a BVA hearing is an optional part of the process. If a hearing is requested, encourages a video hearing since it is quicker.

Previous versions of the Form 9 will not be used.

Form available on VA website.

[Va Training Circular 09-33, December 2009]

### **NEW FORM 21-526C FOR ACTIVE DUTY INITIAL CLAIMS**

This form is to be used only for active duty members using the BDD or Quick Start programs (i.e. filing an initial claim within 180 days of their projected date of release from active duty).

If the service member is married, a 686C must also be completed.

Continue to use the 21-526 for anyone not on active duty.

[Compensation and Pension Bulletin, Feb 2010]

### **AN APPELLATE DECISION ALSO APPLIES TO ACTIVE EARLIER APPEALS ON THE SAME ISSUE**

The Court held that VA's failure to provide appellate review for a claim that has been placed into appellate status by virtue of a Notice of Disagreement (NOD) is resolved by a subsequent appellate adjudication by the Board of Veterans' Appeals (Board) on a later claim where both claims stem from the same underlying disorder and the claimed disabilities are identical or substantially similar. Such claim is no longer pending and has been rendered final with the Board's adjudication.

[Jones v. Shinseki, June 18, 2009, No. 06-2036]

The Federal Circuit held that factors bearing on whether an adjudication that specifically addresses one claim implicitly denied another include whether VA provided sufficient information for a reasonable claimant to know benefits for the asserted disability were denied; the relatedness of the claims, such as whether the disabilities involved are closely related; and the timing of the claims, such as whether the claims were closely associated both in time and in the manner in which they were presented to VA.

[Adams v. Shinseki, June 15, 2009, No. 2008-7162]

### **DISABILITY PERCENTAGE IS BASED ON IMPAIRMENT OF EARNINGS ONLY**

The Federal Circuit, noting that 38 U.S.C. § 1155 focuses entirely upon impairment in earnings capacity, also held that VA is not required to inform a veteran that he or she may submit evidence of the effect his disability has on "daily life" as there is nothing in the statute that indicates that daily life is relevant to the ratings schedule.

[Vazquez-Flores Shinseki, September 4, 2009, No. 2008-7150, (consolidated with Schultz v. Shinseki, No. 2008-7115), CAVC]

## **LAY TESTIMONY MAY BE SUFFICIENT TO ESTABLISH A NEXUS**

The Federal Circuit told the VA that they were wrong to always require a medical opinion to prove nexus between a veteran's death and an in-service disease. 38 U.S.C. § 1154(a) requires that VA give "due consideration" to "all pertinent medical and lay evidence" in evaluating a claim to disability or death benefits and VA ignored the Court's precedent in *Jandreau* and *Buchanan* in categorically stating that a "valid medical opinion" was required, and that the appellant was not competent to provide testimony as to nexus because she was a layperson.

The Federal Circuit held that the Veterans Court ignored its precedent in *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007) and *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006) and incorrectly interpreted 38 U.S.C. § 1154(a).

.[Davidson v. Shinseki, September 14, 2009, No. 2009-7075, CAVC]

## **POW'S AND NURSING HOME CARE**

All former POW's, even those without a service connected disability, are eligible for VA hospital and nursing home care, regardless of their ability to pay. They are also eligible for outpatient care on a priority basis.

[VA POW Factsheet, October 2008]

## **UNREIMBURSED MEDICAL EXPENSES**

Effective 1 Jan 2009, all fiduciary fees paid from a veteran's benefits are considered unreimbursed medical expenses. This includes federal fiduciary fees and legal expenses associated with a court-appointed fiduciary.

[Compensation and Pension Bulletin, Feb 2010]

## “BROWN WATER” NAVY

- All vessels of Inshore Fire Support [IFS] Division 93 during their entire Vietnam tour
  - a.) USS Carronade (IFS 1)
  - b.) USS Clarion River (LSMR 409) [Landing Ship, Medium, Rocket]
  - c.) USS Francis River (LSMR 525)
  - d.) USS White River (LSMR 536)
- All vessels with the designation LST [Landing Ship, Tank] during their entire tour [WWII ships converted to transport supplies on rivers and serve as barracks for brown water Mobile Riverine Forces]
- All vessels with the designation LCVP [Landing Craft, Vehicle, Personnel] during their entire tour
- All vessels with the designation PCF [Patrol Craft, Fast] during their entire tour [Also called Swift Boats, operating for enemy interdiction on close coastal waters]
- All vessels with the designation PBR [Patrol Boat, River] during their entire tour [Also called River Patrol Boats as part of the Mobile Riverine Forces operating on inland waterways and featured in the Vietnam film “Apocalypse Now”]
- USS Ingersoll (DD-652) [Destroyer] [Operated on Saigon River, OCT 24-25, 1965]
- USS Mansfield (DD-728) [Destroyer] [Operated on Saigon River AUG 8-19, 1967 and DEC 21-24, 1968]
- USS Richard E. Kraus (DD-849) [Destroyer] [Operated on coastal inlet north of Da Nang, JUN 2-5, 1966, protecting Marines holding a bridge]
- USS Basilone (DD-824) [Destroyer] [Operated on Saigon River, MAY 24-25, 1966]
- USS Hamner (DD-718) [Destroyer] [Operated on Song Lon Tao and Long Song Tao Rivers, AUG 15-SEP 1, 1966]
- USS Conway (DD-507) [Destroyer] [Operated on Saigon River, early AUG 1966]
- USS Fiske (DD-842) [Destroyer] [Operated on Mekong River, JUN 16-21, 1966]
- USS Black (DD-666) [Destroyer] [Operated on Saigon River, JUL 13-19, 1966]
- USS Providence (CLG-6) [Cruiser, Light, Guided Missile] [Operated on Saigon River 3 days during JAN 1964]
- USS Mahan (DLG-11) [Guided Missile Frigate] [Operated on Saigon River OCT 24-28, 1964]
- USS Okanogan (APA-220) [Attack Transport] [Operated on Saigon River JUL 22-23, 29-30, 1968 and AUG 5-6, 1968]
- USS Niagara Falls (AFS-3) [Combat Stores Ship] [Unloaded supplies on Saigon River and Cam Ranh Bay, APR 22-25, 1968]. Also, Cam Ranh Bay is a qualifying location for "inland waterway" service.

If you served on any of those vessels during the times specified, you will be granted, without further development and delay, a presumptive exposure to herbicides for the purpose of health care and monetary compensation. **Note:**

This list is not complete. If you served on a ship that entered the inland waterways of Vietnam, please contact [navy@bluewaternavy.org](mailto:navy@bluewaternavy.org) with as much detail as possible so they can provide this information to the DVA for processing and inclusion in their data base