

CAMP LEJEUNE WATER CONTAMINATION AND RELATED ISSUES

INTRODUCTION

We will be talking about -

- ▶ Recent legal developments concerning VA Hospital Care and Medical Services for Camp Lejeune vets.
- ▶ Recent legal developments (related to payment or reimbursement for certain medical expenses) for Camp Lejeune family members.
- ▶ VA regulations issued in September 2014.

INTRODUCTION

We will be talking about (continued) -

- ▶ Congress' December 2014 change to the eligibility start date for Camp Lejeune vets.
- ▶ Recommendations regarding compensation claims (for Camp Lejeune vets and vets who were exposed to hazardous substances at other military bases).
- ▶ New Developments (calls for presumptive SC and recent VA press release)

AUGUST 2012 - LEGISLATION ENACTED

- ◉ In August 2012, Congress passed (and the President signed) the “Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012.”
- ◉ Cite: Pub. L. No. 112-154, 126 Stat. 1165 (Aug. 6, 2012)

AUGUST 2012 - LEGISLATION ENACTED

- ⦿ Congress extended hospital and medical services coverage for certain illnesses or conditions to eligible vets and family members who served on active duty or resided at Camp Lejeune, North Carolina.
- ⦿ Period begins on January 1, 1957 (later changed to August 1, 1953), and ends on December 31, 1987.
- ⦿ Must be there for at least 30 days.

WHY WAS THE LEGISLATION ENACTED?

- As discussed in the Proposed Rule (implementing the legislation) issued in September 2013 -
 - The purpose of the law was to ensure that veterans receive care for illnesses and conditions that may have been the result of drinking contaminated water while stationed at Camp Lejeune.
- *See* 78 Fed. Reg. 55,671 (Sept. 11, 2013)

WHY WAS THE LEGISLATION ENACTED?

- ◉ From at least 1953-1987, drinking water systems that supplied Camp Lejeune were contaminated with industrial chemicals.
- ◉ The contaminated wells were shut down in February 1985.
- ◉ Primary chemicals found were
 - perchloroethylene,
 - trichloroethylene, benzene, and
 - vinyl chloride.

WHY WAS THE LEGISLATION ENACTED?

- ◉ Duration/intensity of individual exposure is unknown and cannot be positively determined.
- ◉ Geographic extent of contamination is unclear.
- ◉ National Academy of Sciences (NAS) issued a 2009 report that found that it could not be determined reliably whether diseases and disorders were associated with exposure to water contaminants.

WHY WAS THE LEGISLATION ENACTED?

- ◉ NAS report concluded that conclusion was due to data shortcomings and methodological limitations - which could not be overcome with additional study.
- ◉ NAS report recommended that policy changes or administrative actions should not wait for further studies.
- ◉ Law provides for health care for Camp Lejeune vets
 - ◉ The law also provides for health care for certain family members.

VA PROPOSES AND FINALIZES REGULATIONS FOR VETERANS

- ◉ VA proposed regs governing hospital and medical services for Camp Lejeune vets.
 - *See* 78 Fed. Reg. 55,671 (Proposed Rule) (Sept. 11, 2013).

- ◉ Proposed regs only covered vets.

- ◉ Final regs issued Sept. 24, 2014.
 - *See* 79 Fed. Reg. 57,410 (Final Rule) (Sept. 24, 2014).

VA ISSUES INTERIM FINAL RULE FOR FAMILY MEMBERS

- ◉ VA issued Interim Final Rule on Sept. 24, 2014.
 - Provides for Payment or Reimbursement of Certain Medical Expenses for Camp Lejeune Family Members.
 - Effective date - Oct. 24, 2014
 - Comment due date - Nov. 24, 2014
 - *See* 79 Fed. Reg. 57,415 (Interim Final Rule) (Sept. 24, 2014).

CONGRESS CHANGES ELIGIBILITY START DATE

- ◉ In a law signed on December 16, 2014, Congress changed the eligibility start date for Camp Lejeune vets from January 1, 1957, to August 1, 1953.
- ◉ *See* Pub. L. No. 113-235 (Dec. 16, 2014)
- ◉ Note: In 2013, the Senate introduced, but never voted on, a bill (S. 529) to change the eligibility start date to August 1, 1953.

WHY WAS THE ELIGIBILITY START DATE CHANGED?

- In a May 2013 Senate Committee on Veterans' Affairs hearing, Senator Richard Burr (NC) cited a letter from the Director of the National Center for Environmental Health, Agency for Toxic Substances and Disease Registry, to the VA Under Secretary for Benefits that stated: "according to our water modeling, we estimate that the first month any VOC (volatile organic compounds) exceeded the current EPA MCL (maximum contaminant level) in finished water was August 1953, and at least one VOC exceeded its current MCL in Hadnot Point drinking water from August 1953 through January 1985."

LET'S WALK THROUGH THE RULES

- ▶ Now that we've covered the background, let's walk through the rules.
- ▶ Who is covered?
- ▶ What is covered?
- ▶ Compensation issues?

WHERE IS CAMP LEJEUNE?

- Camp Lejeune is defined as:
 - Any area within the borders of the U.S. Marine Corps Base Camp Lejeune or Marine Corps Air Station New River, North Carolina.
 - *See* 38 C.F.R. § 17.400(b)

WHO IS A CAMP LEJEUNE VETERAN?

- ◎ Camp Lejeune vet is defined as: -
 - ◎ Any veteran who served at Camp Lejeune on active duty (as defined in 38 U.S.C. § 101(21)), in the Armed Forces.
 - ◎ For at least 30 days.
 - ◎ Consecutive or nonconsecutive
 - ◎ During the period beginning on August 1, 1953, and ending on December 31, 1987.

WHO IS A CAMP LEJEUNE VETERAN? (CONTINUED)

- ⦿ A veteran “served” at Camp Lejeune if....
 - ⦿ He or she was stationed at Camp Lejeune, OR
 - ⦿ Traveled to Camp Lejeune as part of his or her professional duties.
- ⦿ *See* 38 C.F.R. § 17.400(b).

WHAT DISEASES ARE COVERED?

- For a Camp Lejeune vet, VA will assume that the illnesses or conditions (discussed in later slides) are attributable to the vet's active duty in the Armed Forces....
- UNLESS it is clinically determined, under VA clinical practice guidelines, that such illness/condition is not attributable to vet's service.

WHAT DISEASES ARE COVERED?

- One comment to the proposed rule noted that lung cancer (Camp Lejeune illness) could be erroneously related to cigarette smoking rather than Camp Lejeune.
- VA stated that medical science cannot definitively distinguish clinically whether the origin of a person's lung cancer is the result of Camp Lejeune service or smoking.

WHAT DISEASES ARE COVERED?

- ⦿ Therefore, VA would not be able to rule out the clinical possibility that lung cancer was caused by service at Camp Lejeune.
- ⦿ Vet would receive treatments under law.
- ⦿ This would be true even if smoking were more likely than not the cause of lung cancer.

WHAT DISEASES ARE COVERED?

There is a lengthy list of diseases covered - the list is the same for both vets and family members:

- ⦿ Esophageal cancer;
- ⦿ Lung cancer;
- ⦿ Breast cancer;
- ⦿ Bladder cancer;
- ⦿ Kidney cancer;
- ⦿ Leukemia;
- ⦿ Multiple myeloma;

WHAT DISEASES ARE COVERED? (CONTINUED)

- Myodysplastic syndromes;
- Renal toxicity;
- Hepatic steatosis;
- Female infertility;
- Miscarriage;
- Scleroderma;
- Neurobehavioral effects; and
- Non-Hodgkin's Lymphoma.

WHAT IS PROVIDED?

- Hospital care and medical services for vets
- Reimbursement of copayments paid to VA for hospital care and medical services provided for specified illnesses/conditions.
- Some conditions for reimbursement -
 - a. Vet must request “Camp Lejeune status” on VA Form 10-10EZ (form has been modified with checkbox for Camp Lejeune status although the eligible start date is still listed as Jan. 1, 1957).
 - b. Vet must request status no later than Sept. 24, 2016.
 - c. VA provided care/medical services to vet on or after Aug. 6, 2012.

FAMILY MEMBERS

- Interim Rule provides for payment or reimbursement of hospital care and medical services by non-VA providers to family members of Camp Lejeune vets.

- “Camp Lejeune family member” means -
 - Resided at Camp Lejeune (or was in utero while his/her mother resided or served at Camp Lejeune under 38 C.F.R. § 17.400(b)) for at least 30 (consecutive or nonconsecutive) days during the period from Jan. 1, 1957 (although Congress changed the start date to Aug. 1, 1953), and ending on Dec. 31, 1987, and
 - a. Is related to a Camp Lejeune vet by birth;
 - b. Was married to a Camp Lejeune vet; or
 - c. Was legal dependent of a Camp Lejeune vet.

FAMILY MEMBERS

- ◎ VA will provide payment or reimbursement for hospital care/medical services so long as the following takes place:
 - a. Family member submits VA Form 10-10068, "Camp Lejeune Family Member Health Care Program Application;"
 - b. Hospital care/medical services must have been provided no more than 2 years prior to date VA receives application and not prior to Mar. 26, 2013; and
 - c. Claim for reimbursement received no more than 60 days after VA approves application.

FAMILY MEMBERS

- For medical care/hospital services provided after the date VA Form 10-10068 is received by VA, the claim for payment or reimbursement must be received by VA no more than 2 years after the later of -
 - Either the date of discharge from hospital or
 - Date that medical services were rendered.

FAMILY MEMBERS

- ◎ Additional requirements include:
 - a. Certification by physician regarding condition;
 - b. VA clinical finding that condition did not result from cause other than Camp Lejeune residency; and
 - c. Family member has exhausted without success all claims and remedies reasonably available to family member or provider against third party, including health-care contracts.

FAMILY MEMBERS

- ◎ VA made policy determination that it would be in the best interests of Camp Lejeune family members to receive hospital care/medical services from private providers chosen by family.
- ◎ VA explained that since law only authorizes medical care for 15 conditions, rather than “whole patient,” it could be unethical/bad for patient in many cases to treat a specific illness while disregarding other medical issues.

FAMILY MEMBERS

- If a third party is partially liable for the claimed hospital care/medical services, VA will pay or reimburse the *lesser* of the amount for which the family member remains personally liable or the amount for which VA would pay for such care under 38 C.F.R. §§ 17.55, 17.56
- Since this program only covers the 15 listed conditions, VA implores family members not to cancel their health insurance, because this program does not meet the minimum standard for health coverage under the Affordable Care Act

FAMILY MEMBERS

- Differs from statute - requires VA to furnish hospital care/medical services to family members.
- Time will tell whether VA's interpretation of the law - if challenged - will survive.

WHAT ABOUT COMPENSATION?

- The law only provides for medical care - not compensation - for Camp Lejeune vets.
 - There is no presumptive SC.
- However, an advocate could argue that vet's illness is related to Camp Lejeune service; the fact that VA recognizes Camp Lejeune for medical care purposes helps.

WHAT ABOUT COMPENSATION?

- ◎ An advocate would need to present evidence of -
 - a. A current disability;
 - b. In-service incident or incurrence; and
 - c. Medical nexus.

WHAT ABOUT COMPENSATION?

- Medical nexus is key in a Camp Lejeune case
 - As with any case for SC.

- The medical science supporting the law regarding medical care...also would support a claim for compensation.
 - a. As to in-service exposure to toxins; and
 - b. Related to medical linkage.

WHAT ABOUT COMPENSATION?

- However, it is recommended that an advocate have a physician:
 - Review the vet's claims file and
 - Provide comprehensive medical opinion linking the disability with Camp Lejeune service.

WHAT ABOUT COMPENSATION?

- ◎ The doctor should provide a detailed rationale for his or her positive nexus opinion
 - Depending on the condition, have the doctor eliminate other non-service related risk factors if possible (ex. smoking, poor eating habits, etc.)
- ◎ Remind the VA of the benefit of the doubt rule -> if the positive and negative evidence is about equal, the VA must grant the claim

WHAT ABOUT COMPENSATION?

- If the VA denies a claim, consider filing a Notice of Disagreement so as to bring the case to the Board of Veterans' Appeals (and ultimately the Court of Appeals for Veterans Claims if necessary).

WHAT ABOUT PRESUMPTIVE SERVICE CONNECTION?

- According to the VA, there is “limited and suggestive evidence of an association between certain diseases and the chemical compounds found at Camp Lejeune”
- Based on this claimed lack of scientific and medical evidence, neither Congress nor the VA has established a presumption of service connection for certain diseases based on exposure to the water contamination at Camp Lejeune

WHAT ABOUT PRESUMPTIVE SERVICE CONNECTION?

- ⦿ However, there have been calls for establishing such a presumption, including a specific proposal in a 2012 law review article

WHAT ABOUT PRESUMPTIVE SERVICE CONNECTION?

- Presumptive SC Proposal

- VA should create a presumption of exposure to all of the contaminants in Camp Lejeune's water for all veterans who were stationed there during the time period of the contamination
- Congress should require VA to review future epidemiological reports on Camp Lejeune by the Agency for Toxic Substances and Disease Registry (ATSDR)

WHAT ABOUT PRESUMPTIVE SERVICE CONNECTION?

- Presumptive SC Proposal (continued)
 - The VA should use the findings from the ATSDR reports as well as other sound medical evidence to establish presumptive service connection for diseases that have a *positive association* with exposure to contaminants found at Camp Lejeune

WHAT ABOUT PRESUMPTIVE SERVICE CONNECTION?

- Presumptive SC Proposal (continued)
 - “A positive association should not require evidence of a causal association but only credible evidence that exposure to the contaminants is associated with increased incurrence of the disease.”
 - VA should contract with the ATSDR to have epidemiological studies conducted every two years

WHAT ABOUT PRESUMPTIVE SERVICE CONNECTION?

- ◉ The author based much of her proposal on how the VA established presumptive service connection based on exposure to Agent Orange and other herbicides
- ◉ Unfortunately, as of today, efforts to establish such a presumption based on exposure to the contaminants in Camp Lejeune's drinking water have been unsuccessful (but there is some hope . . .)

VA PRESS RELEASE

- On August 3, 2015, the VA issued a press release that stated it is starting “the process of amending its regulations to establish presumptions of service connection for certain conditions resulting from exposure to contaminated drinking water at the U.S. Marine Corps Based Camp Lejeune in North Carolina”
- The following diseases are currently being reviewed for potential presumptive SC
 - Kidney cancer
 - Angiosarcoma of the liver
 - Acute myelogenous leukemia

VA PRESS RELEASE

- ◉ The VA will also work with the Agency for Toxic Substances and Disease Registry (ATSDR) and potentially the National Academy of Sciences to evaluate the body of scientific research related to exposure to the chemicals at Camp Lejeune and subsequent development of diseases

WHAT ABOUT OTHER MILITARY BASES CONTAINING HAZARDOUS SUBSTANCES

- According to the law review article, there are 130 military bases on the Environmental Protection Agency's (EPA) National Priorities List (NPL)
 - The NPL is a list of sites that are considered priorities by the EPA for further investigation based on the release or threatened release of hazardous substances at the site

WHAT ABOUT OTHER MILITARY BASES CONTAINING HAZARDOUS SUBSTANCES

- ◉ In addition to Camp Lejeune, El Toro Marine Corps Air Station in California is one of the military bases listed on the NPL
- ◉ El Toro was decommissioned as an active base in 1999
- ◉ It is suspected that PCBs, battery acids, leaded fuels, and other hazardous substances were dumped or spilled at El Toro. Fortunately, no drinking water sources were contaminated.

ADVOCACY ADVICE

- ◉ Especially if a veteran served at one of the military bases on the NPL, research what types of hazardous substances were released at the site (this can be done on the EPA's web site). Then research if there are any scientific studies linking the disease for which the veteran is seeking service connection, with exposure to the substances released at the base.

ADVOCACY ADVICE

- ◉ If a veteran was exposed to similar chemicals as those found at Camp Lejeune, once again, it will help that the VA recognizes the drinking water contamination at Camp Lejeune for health care purposes
- ◉ However, a physician's opinion linking the veteran's disease to his or her in-service hazardous substance exposure will be very important in establishing service connection

ADVOCACY ADVICE

- ⦿ Remember, in providing a medical opinion, the physician does not need to believe to a reasonable degree of medical certainty that the veteran's disease is related to his or her in-service hazardous substance exposure
 - The standard is just "*at least as likely as not*"

QUESTIONS?