



DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

August 14, 2014

Director (00/21)
All VA Regional Offices and Centers

In Reply Refer To: 212B
Fast Letter 14-08

SUBJ: Final Rule: Disease Associated With Exposure to Certain Herbicide Agents: Peripheral Neuropathy

Purpose

This fast letter provides guidance on the regulatory change incorporating the provisions of final rule, RIN 2900-AO32, *Disease Associated With Exposure to Certain Herbicide Agents: Peripheral Neuropathy*. The final rule was published in the Federal Register on September 6, 2013.

Background

The Agent Orange Act of 1991 requires the Department of Veterans Affairs (VA) to obtain a report from the National Academy of Sciences (NAS) on the possible associations between the occurrence of disease in humans and exposure to Agent Orange. This report is received every two years. Based on the September 2010 Institute of Medicine (IOM) report on Agent Orange from NAS, the Secretary of Veterans Affairs determined there was sufficient evidence to support a positive association for early-onset peripheral neuropathy.

NAS concluded that early-onset peripheral neuropathy associated with herbicide exposure is not necessarily a transient condition. However, NAS reaffirmed the conclusion in each of its prior reports that no data suggests exposure to herbicides can lead to the development of delayed-onset chronic neuropathy many years after termination of exposure in Veterans who did not originally experience early-onset neuropathy.

Changes Made to VA Regulations

VA replaced the terms "acute and subacute peripheral neuropathy" in 38 CFR § 3.309(e) with the term "early-onset peripheral neuropathy" and removed the note to the regulation requiring that neuropathy be "transient." This amendment removed the previous requirements that peripheral neuropathy appear "within weeks or months" after exposure and that the condition resolve within

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two years of the date of onset in order for the presumption to apply. For purposes of consistency, VA also replaced the terms "acute and subacute" with "early-onset" in 38 CFR § 3.307(a)(6)(ii). However, VA still requires that peripheral neuropathy manifest to a degree of ten percent or more within one year after the Veteran's last in-service herbicide exposure in order to qualify for the presumption of service connection under § 3.309(e).

Under the new regulation, early-onset peripheral neuropathy resulting from herbicide exposure is no longer considered a "transient" disability. An individual who has symptoms for many years after exposure may now qualify for the presumption.

Notably, NAS did not find a link between herbicide exposure and delayed onset peripheral neuropathy. Thus, VA made no change to the requirement that the condition become manifest to a compensable degree within one year of exposure.

Guidance for New Claims (Non-*Nehmer* Claims)

Regional offices must thoroughly review all incoming Vietnam Veterans' and their eligible survivors' peripheral neuropathy claims to ensure the claims are not subject to the *Nehmer* stipulations. Any claim not meeting the criteria for a *Nehmer* claim as described in the next section is a non-*Nehmer* claim and should be processed under normal procedures using a traditional end product (EP).

Guidance for Previously Denied Claims (*Nehmer* Claims)

The Federal court decision in *Nehmer v. U.S. Department of Veterans Affairs* applies to Vietnam Veterans' and their survivors' previously denied claims, adjudicated or pending adjudication on or after September 25, 1985. *Nehmer* requires that when VA adds a new presumptive condition to the list of disabilities associated with exposure to herbicides used in Vietnam it must re-adjudicate the previously denied claims of Vietnam Veterans or eligible survivors. In appropriate cases, VA must pay benefits retroactive to the date of receipt of the denied claim. *Nehmer* also applies to claims previously filed and pending on the date VA establishes a new presumption for a disease related to herbicide exposure, such as claims filed in anticipation of VA's final rule. When warranted, VA must pay benefits retroactive to the date of receipt of the pending claim, even though that date precedes the effective date of the final rule.

Compensation Service issued guidelines for the readjudication of previously denied claims subject to the *Nehmer* court decision in the [Training Letter 10-04 Addendum #2 – Peripheral Neuropathy](#). Compensation Service conducts a daily data report to identify any new peripheral neuropathy rating decisions for potential *Nehmer* class members, and these cases will be reviewed for potential readjudication under the *Nehmer* stipulation.

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Development

Establishing a Claim

Claims for early-onset peripheral neuropathy received on or after September 6, 2013 should be controlled with a traditional EP (e.g., 010, 110, or 020). Regional offices must use the contention-level special issue indicator, “Non-Nehmer AO Peripheral Neuropathy.” Additional claimed disabilities should be incorporated under the established EP.

Determining Eligibility

A Personnel Information Exchange System (PIES) request may be required to determine the Veteran’s last date of Agent Orange and other tactical herbicide exposure. To establish service connection for early-onset peripheral neuropathy on a presumptive basis, the evidence must show:

- (1) diagnosis or symptoms of peripheral neuropathy within one year after herbicide exposure;
- (2) symptoms manifested to a degree of 10 percent or more within that one-year period; *and*
- (3) a current disability, which has persisted continuously from the early-onset peripheral neuropathy (i.e., a chronic, not transient, condition that results in current disability).

Obtaining Evidence

Upon receipt of a claim for benefits for peripheral neuropathy, regional offices must fulfill VA’s duties to notify and assist the claimant. If necessary, initiate development for service treatment records, personnel records, private medical records, and any other identified, relevant evidence. Do not request a VA compensation and pension examination unless herbicide exposure has been verified by virtue of qualifying Vietnam service or other specific facts. The evidence in each individual case should be carefully considered when determining whether a VA examination or opinion is required.

In some cases, credible lay evidence of current peripheral neuropathy symptoms considered along with medical evidence that suggests peripheral neuropathy manifested within one year of exposure may trigger a VA examination/opinion. Lay evidence should be supported by objective evidence and describe the material and relevant facts as to the Veteran’s disability observed within such period, not merely conclusions based upon opinion.

Consider the following example:

***Example:** After receiving a Section 5103 notice, the Veteran submits a statement indicating that he began experiencing numbness and tingling in the upper extremities shortly after returning from Vietnam in June of 1968, and he currently experiences numbness and tingling. Medical evidence of record reveals the Veteran was diagnosed*

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with peripheral neuropathy (with no etiology identified) in the early 1980s. A review of the service treatment records reveals complaints of numbness in the extremities at discharge. In this case, a VA examination and opinion are warranted.

Rationale: *An examination is warranted in this case because the Veteran's lay statement together with medical evidence shows the onset of symptoms within one year of exposure, current symptoms, and a diagnosis of peripheral neuropathy of unknown etiology.*

Note: *If the service treatment records did **not** show complaints of numbness in the extremities at discharge and there is no other objective evidence of peripheral neuropathy within one year of last exposure, an examination is **not** warranted.*

Rating

In reviewing medical evidence associated with a claim for peripheral neuropathy, no specific terminology for the diagnosis is required to establish service connection, provided that the condition manifested to the required degree within one year of the last date of exposure and there is a current disability related to that same condition. Because it is not likely that a medical professional would have identified the etiology of a neuropathy attributable to, and originating shortly after, exposure to herbicides, various diagnoses such as generalized neuropathy, polyneuropathy, idiopathic peripheral neuropathy, etc. may be documented shortly following the date of the last exposure. However, peripheral neuropathy onset more than one year after exposure is not subject to service connection. Objective evidence must show symptoms and/or diagnosis of peripheral neuropathy within one year of last exposure to herbicides.

Carefully review all the evidence of record to determine the nature of any peripheral neuropathy experienced by the Veteran during and/or after service. If the evidence shows that the Veteran's peripheral neuropathy is attributed to a specific disease or injury (e.g., peripheral neuropathy secondary to degenerative disk disease, diabetes, cold injuries, etc.), rather than exposure to Agent Orange or other tactical herbicides, then presumption of service connection is not warranted under this new rule. In such cases, VA should find, pursuant to 38 C.F.R. § 3.307(d), that "affirmative evidence to the contrary" shows the peripheral neuropathy is related to a cause other than tactical herbicide exposure in service. The issues of direct and secondary service connection must be considered whenever indicated by the evidence.

Service connection will typically be warranted in cases where the etiology of peripheral neuropathy is unclear or unexplained. However, the evidence must show peripheral neuropathy manifested to a compensable degree within one year of last exposure to herbicides and persisted through the current disability. In all cases, the benefit of reasonable doubt must be resolved in the Veteran's favor.

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Processing Rating Decision

Rating Veterans Service Representatives should process all claims exclusively in the Veterans Benefits Management System – Rating (VBMS-R).

Questions

Questions on this issue should be submitted through the Veterans Service Center Manager and e-mailed to VAVBAWAS/CO/21Q&A.

/S/

Thomas J. Murphy
Director
Compensation Service

Attachment: Rating Decision Analysis Text

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Rating Decision Text – Live Service Connection

General denial paragraph for Agent Orange Act of 1991, which applies to all issues of denial of service connection as not established by presumption and for cause of death:

Under the authority granted by the Agent Orange Act of 1991, VA has determined that presumption of service connection based on exposure to herbicides used in Vietnam is not warranted for any conditions other than those for which VA has found a positive association between the condition and such exposure. VA has determined that a positive association exists between exposure to herbicides and the subsequent development of the following conditions: AL amyloidosis; chloracne or other acneform disease consistent with chloracne; type 2 diabetes (also known as type II diabetes mellitus or adult-onset diabetes); Hodgkin's disease; ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction, atherosclerotic cardiovascular disease including coronary artery disease, including coronary spasm, and coronary bypass surgery, and stable, unstable and Prinzmetal's angina); all chronic B-cell leukemias (including but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia); multiple myeloma; non-Hodgkin's lymphoma; Parkinson's disease; early-onset peripheral neuropathy; porphyria cutanea tarda (PCT); prostate cancer; respiratory cancers (cancer of the lung, bronchus, larynx, or trachea); and soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). PCT, chloracne, and early-onset peripheral neuropathy are required to become manifest to a compensable degree within one-year from last exposure.