

**STATEMENT OF
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**BEFORE THE
SENATE COMMITTEE ON VETERANS' AFFAIRS**

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Opening Remarks

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee, thank you for the opportunity to discuss the Department of Veterans Affairs' (VA) process for establishing service connection presumptions. My testimony will provide an overview of presumptive service connection and explain the types of presumptions, the legislative authority for establishing presumptive service connection, regulatory implementation of presumptive service connection, and the science and rationale behind presumptive service connection. I am accompanied by Doctor Ralph Erickson, Director, Pre-9/11 Era, Post Deployment Health.

Overview of Presumptive Service Connection

Service connection requires medical evidence of a current disability; lay or medical evidence establishing the occurrence of an injury, disease, or event during active military, naval, or air service; and, medical or scientific evidence establishing a link or nexus between the two. A presumption of service connection relieves the Veteran of the burden of producing evidence that directly establishes one or more of these elements. These presumptions fill an evidentiary gap in cases where VA knows

that necessary facts may not be documented in the Veteran's individual records. They are generally only rebuttable by clear and convincing evidence to the contrary. This is a high bar, and they are rarely rebutted.

Statutory Authority for Presumptions

VA's authority to establish presumptions derives from statute. There are statutes specific to a particular event, or location, or set of circumstances, such as those addressing status as a former prisoner of war or participation in radiation risk activities (38 U.S.C. § 1112), exposure to herbicides in the Republic of Vietnam (38 U.S.C. § 1116), and service in the Southwest Asia theater of operations during the Persian Gulf War (38 U.S.C. § 1118). These statutes establish presumptions that allow VA to deliver disability compensation where otherwise-necessary evidence of exposure or incurrence of injury or disease might be incomplete.

Section 1112 establishes several presumptions, each applicable to a different cohort of Veterans. Paragraph (a) establishes entitlement to service connection for chronic or other listed disease if manifest to a compensable degree within a specified number of years following separation from service. This presumption is available to every Veteran with 90 or more days continuous active service during a period of war or after December 31, 1946. Paragraph (b) establishes former prisoner of war entitlement to service connection for listed disabilities if manifest to a compensable degree at any time following separation from service. Paragraph (c) establishes entitlement to service connection for listed radiation-related disabilities if manifest at any time following

participation in a radiation risk activity, which is also defined in that section. Under this statute, once the Veteran establishes qualifying service, the law provides a presumed nexus to that service for any listed disability.

Section 1116 codifies the *Agent Orange Act of 1991* and subsequent amendments. This section establishes a presumption of herbicide exposure for Veterans who served in the Republic of Vietnam from January 9, 1962, through May 7, 1975, and charges the Secretary of Veterans Affairs with prescribing regulations which provide a presumption of service connection for diseases related to those herbicides. It covers both the in-service incurrence and the nexus elements necessary to substantiate a claim for service connection.

Section 1118 charged the Secretary with prescribing regulations that provide a presumption of service connection for diseases related to exposure to biological, chemical, or other toxic agents, environmental or wartime hazards, or preventive medicine or vaccine associated with service in the Southwest Asia theater of operations during the Persian Gulf War.

Based on the mandates set forth in sections 1116 and 1118, VA relies on reports from the National Academy of Sciences (NAS) and other sound medical and scientific information, where available, to establish presumptions of service connection. Upon review of such information, if the Secretary determines that a positive association exists between service in a given location and exposure to a particular agent, hazard, or other

foreign substance, VA issues, to the public for notice and comment, a proposed regulation regarding the presumption. The proposed regulation outlines the scientific and/or medical basis for the presumption, as well as the eligibility criteria to qualify for the presumption. Once VA has received and reviewed the public comments, VA publishes a final regulation establishing the presumption.

Scientific Basis

In preparing its reports for both Agent Orange and Gulf War health issues, NAS committees conduct comprehensive searches of all medical and scientific studies on the health effects of the environmental exposure being reviewed. In the course of this literature search and review, it is not uncommon for these committees to cover thousands of abstracts of scientific and medical articles, eventually narrowing their review to the hundreds of peer-reviewed journal articles which are the most relevant and informative to the question at hand. At this stage, the NAS committee scores the strength of the total medical and scientific evidence available by utilizing broad categories of association such as “inadequate or insufficient evidence of an association” or “limited or suggestive evidence of an association” or “sufficient evidence of an association.” Of note is that the NAS committees do not make direct recommendations for new presumptions.

Upon receipt of the finished NAS reports, VA establishes task-organized technical work groups comprised of experts in medicine, disability compensation, health care, occupational and environmental health, toxicology, epidemiology, and law. These

technical work groups, along with senior VA leaders who comprise a standing task force for this purpose, review in detail the NAS reports and all available scientific and medical information before making recommendations to the Secretary regarding the determination of presumptions. These recommendations to the Secretary are based on the strength and preponderance of the medical and scientific evidence.

Regulatory Implementation

VA, like other federal agencies, must draft regulations to implement the authority granted by Congress. VA's regulations describing the requirements for service connection are generally located in sections 3.303 through 3.318 of title 38, Code of Federal Regulations. Regulations implementing presumptions are generally found here as well.

The Secretary also has at his disposal a general rulemaking authority, prescribed in section 501, title 38, United States Code. Section 501 authorizes the Secretary to prescribe any rules and regulations necessary or appropriate to carry out the laws administered by the Department. Under this broad authority, VA has used the rulemaking process to craft numerous presumptions necessary to streamline its delivery of benefits to certain Veterans, including:

- former Reservists with regular and repeated contact with contaminated C-123 aircraft used to spray Agent Orange in Vietnam who are presumed to have been exposed to herbicides and are entitled to benefits as Veterans (38 C.F.R. § 3.307(a)(6)(v) (published June 19, 2015));

- Veterans serving on the Korean demilitarized zone who are presumed to have been exposed to Agent Orange and other tactical herbicides between April 1, 1968, and August 31, 1971 and are thus entitled to service connection for Agent Orange disabilities on a presumptive basis (38 C.F.R. § 3.307(a)(6)(iv); and
- Veterans with full body exposure to mustard gas who are entitled to a presumption of service connection for certain respiratory and other disorders (38 C.F.R. § 3.316).

VA also uses regulations to prescribe the rules that are necessary to fully implement broad statutory authority, such as the determination under section 1116 that Veterans who served in the Republic of Vietnam are entitled to a presumption of exposure to Agent Orange.

Agent Orange

VA's current policy, established through notice and comment rulemaking, extends the presumption of Agent Orange exposure to Veterans with "duty or visitation" within the Republic of Vietnam, or on its inland waterways, between January 9, 1962 and May 7, 1975. The "duty or visitation" requirement was incorporated in VA regulations issued in 1994 to implement the Agent Orange Act of 1991. Prior to 2002, internal VA policies allowed receipt of the Vietnam Service Medal (VSM) to be accepted as proof of Vietnam service. That medal, however, was awarded for "support" of the Vietnam War in various geographic locations rather than for service in Vietnam itself. In

2002, VA revised its internal policy to clarify that “duty or visitation” in Vietnam refers to presence within the Republic of Vietnam, on land or inland waterways.

This rationale and interpretation of Vietnam service was upheld by the United States Court of Appeals for the Federal Circuit in *Haas v. Peake*, 525 F.3d 1168 (2008), *cert. denied*, 555 U.S. 1149 (2009). VA’s position on various legislative proposals that would extend the presumption of exposure to Veterans whose only service was on Vietnam’s offshore waters, such as S. 681, 114th Cong., has been consistent with VA’s current policy.

Under the general policy described above, VA necessarily has distinguished “inland waterways” from “offshore waters.” In April 2015, the U.S. Court of Appeals for Veterans Claims issued its decision in *Gray v. McDonald*, 27 Vet. App. 313 (2015), which required VA to review and clarify its policies for determining whether coastal bodies of water, such as Da Nang Harbor, constituted “inland waterways” or “offshore waters” for purposes of applying the presumption of herbicide exposure. Shortly after the court’s decision, VA began the very deliberate process of thoroughly evaluating and clarifying its policies regarding such determinations.

Camp Lejeune

Similarly, VA recently announced that it will start 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 Base

Camp Lejeune in North Carolina. This process is in addition to the healthcare VA already provides for 15 conditions to eligible Veterans who were stationed at Camp Lejeune for at least 30 days between August 1, 1953, and December 31, 1987, as a result of the *Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012*. VA also provides reimbursement of healthcare expenses for those 15 conditions to eligible family members who resided at Camp Lejeune during that time period.

The diseases that are currently being reviewed for potential presumptive service connection include kidney cancer, angiosarcoma of the liver, and acute myelogenous leukemia, which are known to be related to long-term exposure to the chemicals that were in the water at Lejeune from the 1950s through 1987. The chemicals are Benzene, Vinyl Chloride, Trichloroethylene and Perchloroethylene, which are known as volatile organic compounds, used in industrial solvents and components of fuels.

VA is working with the Agency for Toxic Substances and Disease Registry, and potentially will work with NAS, to evaluate the body of scientific knowledge and research concerning exposure to these chemicals and potentially related diseases.

VA will carefully consider all public comments received when determining the final scope of any presumptions. Because there is no specific statutory authority for this undertaking, VA will draft necessary and appropriate rules under the general rulemaking authority prescribed in section 501.

The Department has previously provided its views on S.901 to this committee on June 24, 2015.

Closing Remarks

VA takes very seriously its obligation to care for disabled Veterans, their families, and their survivors. Some of the tools we use are the laws authorizing presumptive service connection. These laws fill a critical evidentiary gap when suspected exposures to toxic substances cannot be specifically documented in a Veteran's service records or by other contemporaneous evidence. We look forward to resolving these complicated legal and scientific matters through continued partnership with Congress, NAS, and other concerned stakeholders.

This concludes my testimony, Mr. Chairman. I would be pleased to address any questions you or other Members of the Committee may have.