Focus on Military and Veterans Law

by Eric Gang

Obtaining Disability Compensation for Disabled Veterans

For more than 20 years, Stone Mountain, Ga., resident Lamar Johnson sought back pay for the post-traumatic stress disorder suffered while serving in the Marine Corps during the Vietnam War.

"In 1975, I started having nightmares and waking up in a cold sweat," Johnson said. "I could see the Viet Cong coming after me, and I could hear the mortar fire. I could never forget the mortar fire."

Air Force veteran Jim Gabbard of Corvallis, Ore., was exposed to lead and other chemicals while serving in Turkey in the 1970s. But because his symptoms didn't begin until decades later, he struggled to get help from the Department of Veterans Affairs (VA).

These two aren't alone. Not in the disabilities they suffer from nor in their struggles to get help from the VA. The problem is only getting worse as the nation has endured the wars in Iraq and Afghanistan.

There are about 23 million living veterans.[1] And according to the VA, the number receiving disability pay has risen sharply since 2002.[2] Not only are the numbers of veterans receiving disability on the rise, but so is the severity. During the same time period, the number of veterans receiving a disability rating between 70 and 100 percent has skyrocketed to more than 1 million, from less than 400,000 in 2002. That's a nearly threefold increase over the past decade.

Indeed, the seriousness of the problems facing U.S. veterans is tragically highlighted by the suicide statistics. The number of young veterans taking their own lives has increased dramatically from 2009 to 2011. On average, every day in America, 22 veterans take their own lives.[3] This rate is more than double compared to the population at large.

But getting the help they need is an ongoing challenge. Despite an increasing need for assistance, veterans find themselves frustrated by VA backlogs and lengthy appeals. The department had more than 900,000 pending disability claims in January 2013.[4] Moreover, the data suggests that between 2000 and 2012, the total time to appeal a claim to the Board of Veterans' Appeals increased from 1,131 days to 1,698 days.[5] This is a nearly a five-year wait—not counting the time it takes to appeal to the U.S. Court of Appeals for Veterans Claims if the Board of Veterans' Appeals denies the claim. In fact, most veterans' benefits practitioners encounter appealed cases that take a decade or more to resolve. Considering the problems, the need for effective advocacy is critical—especially at this historic point in U.S. history as our nation attempts to assimilate a new generation of veterans with the signature injuries of the Iraq/Afghanistan conflict. All this is why our nation's veterans need strong advocates working on their behalf.

Who Is a Veteran?

With any public benefit, basic eligibility is a key question. Not everyone who has worn a military uniform is eligible for VA benefits, for instance. Most VA benefits are available to a veteran or a dependent or survivor of a veteran. A veteran is defined by statute as one who has served in active military, naval, or air service and who was discharged or released from the service under conditions other than dishonorable.[6]

Military, naval, and air service includes conventional service in the five branches of the armed forces as well cadets in the service academies.[7] Active service also includes members of the Reserve or National Guard, subject to certain requirements. In general, a member of the Reserve will be deemed a veteran if he or she had active duty for training and died or was disabled from a disease or injury incurred or aggravated in the line of duty.[8] Similarly, a member of the Reserve will also have qualifying service for periods of inactive duty for training where he or she died or was disabled from an injury that took place while in the line of duty, among other requirements.[9] Members of the National Guard are eligible for VA benefits if they are activated for federal purposes.[10] Finally, assuming a service member has qualifying active service, he or she must be discharged under "conditions other than dishonorable."[11] Generally, if a service member receives a dishonorable discharge, the VA will not consider him to have veteran status.

Three Requirements for Service Connection

To obtain disability compensation, a veteran's disability or death must be service connected. Service connection means that the disability or death was incurred in or aggravated during active service in the line of duty or that the death was caused by a disability incurred in or aggravated in the line of duty during active service.[12] It refers to any disease or injury incurred from the date of induction to the date of separation from active service—unless it is the result

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of the veteran's own willful misconduct or abuse of drugs or alcohol. So, a veteran can seek compensation not only for a shell fragment wound suffered in combat, but also for a knee injury suffered playing basketball while off duty. This also means that a veteran may be eligible to receive service-connected compensation for diseases that first manifest during active duty—even though there is no correlation between the veteran's activities and the onset of the disease. The statutory provisions are broad because service members are not otherwise entitled to workers compensation or long-term disability insurance benefits.

To obtain service connection, a veteran must satisfy three basic criteria. The first is medical evidence of a current disability.[13] The second requires medical evidence, or in some cases, lay evidence of a disease or injury. And the third is the nexus between the in-service injury or disease and the present disability.[14] Essentially, service connection means that the evidence establishes that a disabling disease or injury was "incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein."[15]

Medical Evidence of a Current Disability

Unlike tort claims, a veteran is not eligible for disability compensation simply because he suffered an injury or disease while on active duty.[16] A veteran cannot obtain compensation for an illness or injury that heals without chronic effects. Frequently, veterans will seek compensation for injuries such as a broken bone. But the VA correctly denies these types of claims because there is no current disability. In other words, the injury or illness healed without any ongoing problems. The VA will not pay compensation for temporary pain and suffering.

In other situations, veterans have failed to meet the current disability requirement when their disability is merely pain without a corresponding diagnosis. The Court of Appeals for Veterans Claims has held that mere pain "without a diagnosed or identifiable underlying malady or condition, does not in and of itself constitute a disability for which service connection may be granted."[17] For instance, if a veteran presents with both neck and back pain and an MRI shows herniated discs in the lumbar spine but not in the cervical spine, then VA will likely find the current disability requirement satisfied as to the lumbar but not the cervical spine. In this scenario, the radiographs demonstrate an underlying pathology in the lumbar spine that would explain the pain. Hence, the current disability requirement would be satisfied. On the other hand, if diagnostic testing of the cervical spine failed to reveal any underlying malady, then the veteran—despite chronic pain—would likely fail in meeting the current disability requirement. It is critical, therefore, that attorneys representing disabled veterans secure a bona fide diagnosis from a medical practitioner that explains the current symptoms. Without such evidence, the claim will fail.

Additionally, there are situations where a veteran's chronic disability has improved by the time the VA grants the claim. This will not defeat the claim. So long as the veteran had a chronic disability that existed at the time he filed his claim, or during the pendency of the claim, the current disability requirement is satisfied.[18] Recently, the Court of Appeals for Veterans Claims clarified that a medical diagnosis of a chronic disability just prior to the date a veteran files a claim is relevant to the determination of the presence of a current disability.[19]

What types of evidence will suffice to establish the current disability? It must be competent.[20] In practical terms, this means that a medical professional should provide the diagnosis. But this does not always mean a medical doctor. The Court of Appeals for Veterans Claims has observed that nurse practitioners are qualified to provide medical evidence.[21] As such, competent medical evidence of a current disability can be provided by anyone who, by virtue of education, training, and experience, is qualified to make medical statements or opinions.[22]

In rare cases, veterans have succeeded without obtaining an opinion of a medical professional.The Court of Appeals for Veterans Claims has held that the existence of diseases or injuries that have lay-observable features can be established without a medical professional's opinion. Examples of these situations include ear fungus, flat feet, tinnitus, and varicose veins.[23] Despite the court's case law, practitioners are still advised to obtain the opinion of a medical professional.

The "Something-Happened-in-Service" Requirement

A veteran also must prove that an injury or aggravation of an existing condition occurred while in service. This means that a veteran must show that something happened in service that served as the cause for his current disability. The evidence for a disability must be relevant, too. For example, a veteran seeking compensation for hearing loss should submit evidence documenting his exposure to loud noise during service. A veteran with a radiogenic disease must submit evidence documenting his exposure to ionizing radiation. And a veteran seeking service connection for arthritis should submit evidence of an injury to the affected joint. In practice, the VA places significant weight on the contents of the service treatment records. If a veteran claims that he injured his knee during service, and the service treatment records do not document complaints of knee pain, then the VA will likely view the claim skeptically.

Although the VA prefers documentation in the service treatment records of an in-service injury or disease, the agency cannot require other evidence to be corroborated by official medical records. In other words, if a veteran claims a low back injury after heavy lifting in service, the VA cannot reject his claim merely because the service treatment records lack documentation of the back injury.[24] Lay evidence can suffice to establish an in-service event, and it is

wrong for the VA to require supportive medical evidence.[25] Again, in practice, the VA is reluctant to grant a claim that is predicated solely on uncorroborated evidence.

But there are circumstances where the VA must generally accept a veteran's assertions regarding in-service injuries. If a veteran is a combat veteran, his statements regarding what happened during combat will be sufficient.[26] In this regard, a combat veteran has an advantage over a noncombat veteran: the VA must generally accept his evidence of an injury so long as it is consistent with the circumstances, conditions, and hardships of service. Due to the nature of most combat engagements, official records often do not document every injurious event that a veteran encounters. As such, Congress has provided a statutory provision to address the reality of combat scenarios.

Given the statutory advantage of being a combat veteran, practitioners should fully investigate the existence of their clients' combat encounters. Typically, combat status can be demonstrated by the presence of medals, badges, ribbons, or other decorations indicative of combat.[27] But the lack of combat-action related awards is not dispositive of the absence of combat action.[28] The question is whether the veteran participated in bringing fire upon the enemy or was fired upon.[29] This can be established, for instance, by reference to the veteran's military occupational specialty together with evidence showing participation in a major campaign, such as the Tet Counter Offensive. The implication is that firing on the enemy is inherent to the nature of the veteran's job. The key aspect of the combat analysis is whether the veteran engaged in an actual fight or encounter with the enemy but does not require him to have received enemy fire.[30]

The Nexus Requirement

The final—and perhaps most challenging—requirement is to prove a nexus between the in-service injury and the current disability. The absence of a nexus is probably the most common reason why VA denies disability compensation claims. There are four basic methods of establishing a link between active duty and a current disability. Service connection is also available for additional disabilities due to VA medical negligence.[31]

The first method of linking a disability to service is by direct service connection. This is the simplest approach, and it involves situations where the medical corps diagnoses a disabling condition during service or a medical expert links the current disability to an event during service. An example: a veteran fractures his ankle during service. It heals and the medical corps does not find any chronic symptoms at separation from service. Years later the veteran develops osteoarthritis in the ankle, and his doctor concludes it is due to the earlier in-service trauma and ankle fracture. In this scenario, with his doctor's opinion, the veteran would establish sufficient evidence of the connection. Another example is a situation where a veteran injures his lower back and an MRI study, during service, confirms the presence of herniated discs. The veteran's subsequent claim for his spine condition would be well supported due to the presence of an in-service diagnosis confirmed by radiographic evidence.

Another method of establishing direct service connection involves demonstrating that the condition was found to be chronic during service. If a chronic condition is diagnosed during service, then any later manifestation of the same condition, no matter how distant, will be service connected absent a clear showing of an intervening cause.[32] For instance, if a veteran is diagnosed during service with a peptic ulcer, any later, post-service manifestation of the ulcer would be eligible for service connection.

Besides chronicity, a veteran can also establish a nexus based on continuity of the symptoms. The continuity concept refers to a veteran experiencing persistent symptoms from the time of the incident until the time of the claim. The veteran would typically submit evidence in the form of lay statements or medical records documenting regular symptoms and complaints over a period of time. The use of continuity of symptoms as a means to establish a nexus applies only to conditions deemed chronic by VA regulation.[33] In addition, unless the disabling condition has lay-observable features, the veteran will still need a medical opinion linking the continuous symptoms to the events in service.[34] In general, practitioners would be wise to obtain a medical opinion addressing the nexus issue, regardless of the nature of the disability.

The next method of establishing a nexus is by way of aggravation. Assuming a medical condition was found to exist at the time of military induction, a veteran can seek to establish that the condition increased in severity during service.[35] If he can show an in-service worsening of the condition, then VA regulations will presume that the condition was aggravated by service unless there is a specific finding that the increased severity is due to the natural progression of the disease.[36] Like most other methods of establishing service connection, using the services of a medical expert to establish aggravation is advisable.

Medical experts should also be used to establish a secondary service connection, which is the third method of linking a disability to service.[37] A veteran can obtain compensation for any disability caused by an existing service-connected disability. A common example involves veterans who are service connected for diabetes mellitus and subsequently develop diabetic complications, such as peripheral neuropathy or diabetic retinopathy. The additional disabilities involving the extremities or the eyes would clearly be linked to the underlying service-connected condition and thus eligible for service connection under the secondary theory.

Finally, no medical nexus opinion is required when pursuing service-connection under a presumptive theory. Congress has deemed certain categories of disabilities to be presumptively associated with service. Essentially, presumptive service connection recognizes the idea that certain diseases that are first manifest subsequent to service likely had their origins during service or are due to an event in service. In general, the presumptive categories address chronic diseases that become manifest to a degree of 10 percent or more within one year of discharge,[38] tropical diseases,[39] diseases associated with prisoner-of-war status,[40] diseases associated with service in the Persian Gulf War,[41] and diseases associated with radiation and herbicide exposure.[42] If a veteran can establish the elements of the presumptive statute, he will not need to otherwise submit evidence of a nexus.

Conclusion

Obtaining disability compensation for a disabled veteran involves establishing the presence of a current disability and causation with an event or occurrence during active military duty. The advocate is tasked with the challenge of building a case to support a nexus with service. Considering the urgent needs facing the veterans' community, and the complexity of the VA's regulations, advocates are encouraged to undertake this task with tenacity. ⊙

Endnotes

[1]Department of Veterans Affairs, Office of Policy and Planning, "Analysis of Unique Veterans Utilization of VA Benefits and Services," (2009).

[2]Department of Veterans Affairs, Veterans Benefits Administration Annual Benefits Reports, 1986-2012; Office of Policy and Planning, Office of the Actuary, Veteran Population Projection Model (VetPop), 2007 and 2011.

[3]Stars and Stripes by Leo Shane III; Jan. 9, 2014. "Report: Suicide Rate Spikes Among Young Veterans."

[4]Veterans Benefits Administration (2013). Data from compensation and pension claims. Retrieved from www.vba.va.gov/reports/mmwr.

[5]Government Accountability Office. (2010). Retrieved from www.gao.gov/assets/310/300398.pdf.

[6]38 U.S.C.S. § 101(2).

[7]38 U.S.C.S. § 101(21)(D).

[8]38 U.S.C.S. § 101(24).

[9]38 U.S.C.S. § 101(24)(C).

[10]*See* 38 U.S.C.S. §§ 101(21), (22)(C), (23).

[11]38 U.S.C.S. § 101(2).

[12]38 U.S.C.S. § 101(16)

[13]*Hickson v. West*, 12 Vet. App. 247, 253 (1999).

[14]*Id.*

[15]38 C.F.R. § 3.303(a) (2013).

[16]*Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

[17]*Sanchez-Benitez v. West*, 13 Vet. App 282, 285 (1999).

[18]*McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007).

[19]*Romanowsky v. Shinseki*, 26 Vet. App. 289 (2013).

[20]38 C.F.R. § 3.159(a)(1) (2013).

[21]*Cox v. Nicholson*, 20 Vet. App. 563 (2007).

[22]38 C.F.R. § 3.159(a)(1) (2013).

[23]*Bruce v. West*, 11 Vet. App. 405 (1999); *Falzone v. Brown*, 8 Vet. App. 398 (1995); *Charles v. Principi*, 16 Vet. App. 370 (2002); *Barr v. Nicholson*, 21 Vet. App. 303 (2007).

[24]*Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006).

[25]*Horowitz v. Brown*, 5 Vet. App. 217 (1993).

[26]38 U.S.C.S. § 1154(b)

[27]*M21-1MR*, Part IV, Subpart ii, 1.D.13(d); *M21-MR*, Part III, Subpart iv, 4.H.29(c).

[28]*Dizoglio v. Brown*, 9 Vet. App. 163 (1996).

[29]*Daye v. Nicholson*, 20 Vet. App. 512 (2006).

[30]VA Gen. Coun. Prec. 12-99 (Oct. 18, 1999).

[31]38 U.S.C.S. § 1151.

[32]38 C.F.R. § 3.303(b) (2013); 38 C.F.R. § 3.309(a) (2013).

[33]*Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

[34]*Savage v. Gober*, 10 Vet. App. 488 (1997).

[35]38 U.S.C.S. § 1153.

[36]*Id.*

[37]38 C.F.R. § 3.310(2013).

[38]38 U.S.C.S § 1112(a).

[39]38 U.S.C.S § 1112(a)(2); *see also* 38 C.F.R. § 3.307(a)(4) (2013).

[40]38 C.F.R. § 3.307(a)(5).

[41]38 U.S.C.S. § 1117.

[42]38 U.S.C.S. § 1112(c); 38 U.S.C.S. § 1118.