Legal Issues Related to Proving "Service Connection" for VA Disability Compensation: Statutory Presumptions

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Summary

Among the many types of benefits available to eligible veterans is disability compensation. This report provides a basic overview of various statutory presumptions that help veterans substantiate a service-connected claim for disability compensation. Disability compensation is a monthly benefit paid to a veteran by the Department of Veterans Affairs (VA) because of injuries or diseases that were incurred while on active duty, or were made worse by active military service.

The VA obligated approximately $46 billion to veterans in the form of monthly pension and disability compensation payments during FY2009. Approximately $42 billion went to veterans in the form of disability compensation. Disability compensation payments comprised approximately 40% of the total amount of funds the VA obligated to veterans (approximately $104.7 billion). To receive such monthly compensation, a veteran must meet basic eligibility requirements.

To be eligible for VA disability compensation, a claimant must prove that he/she is a "veteran," *and* demonstrate that the disability for which he/she is seeking compensation is "service-connected." To establish service connection, a veteran must provide evidence of (1) a current disability, (2) an injury or disease that was incurred or aggravated during service, and (3) a nexus (causal relationship) between this injury and the veteran's current disability. A veteran must prove each of the aforementioned elements before the veteran can receive disability compensation.

In the context of claims for VA disability compensation, the veteran bears the burden of proof with respect to each of the aforementioned elements. To reduce the veteran's burden of establishing service connection, Congress has enacted several procedural devices referred to as statutory presumptions that, where applicable, presume the existence of a fact despite the lack of specific evidence of the fact's existence. Where a statutory presumption applies, the burden shifts to the VA to rebut the existence of the presumed fact with specific evidence.

Depending on the factual circumstances surrounding a veteran's claim for disability compensation, statutory presumptions can help a veteran prove that his/her current medical condition is service-connected. For example, if a veteran can prove that he/she was engaged in combat with the enemy, and that the injury for which he/she seeks compensation is consistent with the circumstances of combat, the fact that the injury was incurred during the veteran's active service is presumptively established even where there is no official record of the veteran's injury. Consequently, the burden then shifts to the VA to rebut the presumption that the veteran was injured during active service. If the VA cannot rebut the presumption, the veteran has met one-third of his/her overall evidentiary burden without submitting any specific evidence of his/her in-service injury.

This report focuses on several statutory presumptions that relate to the second element of a service-connected claim for disability compensation, and synthesizes the legal principles that guide the VA's application of the statutory presumptions during the claims adjudication process. Specifically, this report will discuss the "presumption of soundness," the presumption of aggravation of a pre-existing injury or disease, the "line of duty" presumption, and finally, the "combat veteran" presumption, all of which are codified at Title 38 of the United States Code.

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Introduction

After a veteran is discharged from active service, the veteran may be eligible for various types of benefits that are administered by the Department of Veterans Affairs (VA). An entire section of the United States Code—Title 38—deals with veterans benefits. There are many different types of benefits available to eligible veterans. One of the benefits provided by Title 38 is disability compensation, which is paid monthly to a veteran by the VA because of injuries or diseases that were incurred while on active duty, or were made worse by active military service. Eligible veterans receive disability compensation on a tax-free basis.

To establish entitlement to VA disability compensation, a claimant must prove that he is a veteran for the purposes of Title 38, *and* the claimant must demonstrate that the disability for which he/she is seeking compensation is "service-connected." To establish service-connection, a veteran must provide evidence of (1) a current disability, (2) an injury or disease that was incurred or aggravated during service, and (3) a nexus (causal relationship) between this injury and the veteran's current disability. If a veteran fails to prove each of these elements, the VA will deny his/her claim for disability compensation.

In the context of claims for VA disability compensation, the claimant generally bears the burden of proof with respect to each element. To reduce the claimant's burden of establishing service-connection, Congress has enacted several procedural devices referred to as statutory presumptions that, where applicable, presume the existence of a fact despite the lack of specific evidence of the fact's existence. Where a statutory presumption applies, the burden shifts to the VA to rebut the existence of the presumed fact with specific evidence.

This report will provide a brief overview of the VA claims adjudication process with a focus on some of the legal issues related to proving service connection. To that end, this report will further examine several statutory presumptions that relate to the second element of a service-connected claim for disability compensation (i.e., in-service incurrence or aggravation of an injury or disease), and the legal principles that guide the VA's application of the statutory presumptions during the VA's claims adjudication process. Specifically, this report will discuss the presumption of soundness, the line of duty presumption, the presumption of aggravation, and finally, the combat veteran presumption. But first, to put this discussion in context, the report provides a brief overview of the VA claims adjudication process.

From Claim to Compensation: The VA's Adjudication Process

Prior to awarding disability compensation to a claimant, the VA analyzes each claim for disability compensation at the VA regional office[1] closest to the claimant's residence through a process referred to as the "local determination." The regional office's local determination involves a four-step adjudication process of the claim. The first two steps relate to the claimant's eligibility for disability compensation, and the last two steps relate to the amount of compensation that an

[1] The VA maintains 57 Regional Offices throughout the United States. For an interactive map of the Regional Office locations *see* http://www2.va.gov/directory/guide/division_flsh.asp?dnum=3. (Web-based interactive map of VA Regional Offices).

eligible claimant is entitled to receive from the VA. Findings adverse to the interests of the claimant may be appealed administratively.[2]

Step One: Is the Claimant a "Veteran"?

First, the VA determines the claimant's basic eligibility to receive VA benefits. That is, the VA must determine whether the claimant is a "veteran" for the purposes of VA disability compensation.[3] In this context, a veteran is "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."[4] The term "veteran" also includes persons "who died in the active military, naval, or air service."[5] A determination is also made as to whether the claimant's current disability is based upon the veteran's willful misconduct.[6]

The question of whether a claimant's injury was caused by his own willful misconduct is a key determination. As we will see later in this report, even if a claimant proves that he/she is a "veteran" for the purposes of VA disability compensation, evidence indicating that his in-service injury was caused by his own willful misconduct disqualifies the veteran from receiving compensation for the injury in question.

Step Two: Is the Veteran's Current Disability "Service-Connected"?

Second, if the claimant satisfies the basic eligibility criteria for VA disability benefits, the VA then determines whether the veteran qualifies for disability compensation. This second step requires the veteran to demonstrate that his/her current disability is "service-connected." The VA has interpreted the term "service connection" to mean that "the facts, as shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein."[7] To assist veterans with establishing service connection, Congress has codified several statutory presumptions.[8] This

[2] Veterans may appeal adverse VA decisions to the Board of Veteran's Appeals (BVA). Final decisions of the BVA may then be appealed to the U.S. Court of Appeals for Veterans Claims (CAVC). The U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has limited jurisdiction over final decisions of the CAVC. Finally, the veteran may appeal an adverse decision by the Federal Circuit to the United States Supreme Court. *See* 38 U.S.C. § 7104(a) (Board of Veterans Appeals jurisdiction over final decisions by VA); 38 U.S.C. § 7252(a) ("The Court of Appeal for Veterans Claim[s] shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals"); and 38 U.S.C. § 7292 (U.S. Court of Appeals for the Federal Circuit jurisdiction over final decisions of CAVC).

[3] Once the VA determines that a claimant meets the basic eligibility requirements for disability compensation, the claimant is considered a "veteran" for purposes of VA benefits. 38 U.S.C. §§ 1110 (wartime disability) and § 1131 (peacetime disability). In the ensuing discussion, the author assumes that a claimant has already established that he/she is a veteran. Accordingly, for the remainder of this report the term "veteran" will be used instead of the word "claimant."

[4] 38 U.S.C. § 101.

[5] 38 U.S.C. § 1101(1).

[6] 38 U.S.C. §§ 1110 (wartime disability) and 1131 (peacetime disability). For a discussion of "active service" and "willful misconduct," *see* CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer.

[7] 38 C.F.R. § 3.303(a).

[8] For a broader discussion of presumptive service connection, *see* CRS Report R41405, *Veterans Affairs: Presumptive Service Connection and Disability Compensation*, coordinated by Sidath Viranga Panangala. *See also* CRS Report RL34370, *Veterans Affairs: Health Care and Benefits for Veterans Exposed to Agent Orange*, by Sidath Viranga Panangala and Douglas Reid Weimer.

report will highlight legal principles established by courts with appellate jurisdiction over final VA decisions—the U.S. Court of Appeals for Veterans Claims (CAVC or Veterans Court) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit)—to illustrate how certain presumptions can help veterans establish service connection.[9]

Step Three: What is the Extent of the Veteran's Service-Connected Medical Condition?

Third, if the veteran proves to the VA that his/her current disability is service-connected, the VA then evaluates the extent of the disability and makes a determination of the percentage, based on 10% increments, of the disability based upon the "Schedule for Rating Disabilities."[10]

Step Four: When Did the Veteran's Current Medical Condition Manifest?

Finally, the VA establishes the effective date for the award of disability compensation.

A Closer Look at Step Two of the VA Claims Adjudication Process: Proving Service Connection

The second phase (i.e., "Step Two") of the VA claims adjudication process requires the veteran to prove that his/her current disability is service-connected. It is at this phase where various statutory presumptions may apply. When applicable, the statutory presumptions codified at Title 38 effectively serve to obviate the need for a veteran to provide medical evidence that his/her injury was incurred or aggravated by active service in the Armed Forces.[11] Such presumptions can be used by a veteran to establish an element of a service-connected claim for VA disability compensation when credible medical evidence is otherwise lacking. Before discussing statutory presumptions in detail and how they operate in the context of a claim for VA disability compensation, the basic elements of a service-connected claim should be briefly explained.

Elements of a Service-Connected Claim for VA Disability Compensation

Pursuant to 38 U.S.C. sections 1110 and 1131, veterans are entitled to disability compensation from the VA if they develop a disability "resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty."[12] Courts have construed sections 1110 and 1131 of Title 38 to require veterans to

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[9] For a more detailed discussion of the VA appeals process, *see* CRS Report RL33704, *Veterans Affairs: The Appeal Process for Veterans' Claims*, by Douglas Reid Weimer.

[10] 38 U.S.C. § 1155; 38 C.F.R. § 4.

[11] 38 U.S.C. § 501(a)(1).

[12] *See* 38 U.S.C. §§ 1110 (wartime service), 1131 (peacetime service). In its entirety section 1110 provides:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, *during a period of war*, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in [38 U.S.C. §§ 1110 *et seq.*], but no compensation shall be

(continued...)

establish three elements to qualify for disability compensation from the VA: (1) the existence of a current disability, (2) evidence of an in-service incurrence or aggravation of an injury or disease, and (3) a causal nexus between this injury or disease and the veteran's current disability.[13] If a veteran fails to establish *each* element, his claim for VA disability compensation will be denied.

Element I: Evidence of a Current Disability

A veteran may provide medical records to establish that he/she has a current disability. The VA is obligated by statute to assist the veteran with establishing a claim for VA disability compensation.[14] Thus, if a veteran requests a medical examination to diagnose a current disability, the VA must provide one.[15] It should be noted that a diagnosis of a current disability may be provided either by a VA-affiliated physician or by a private physician. Plainly stated, the veteran need only supply an opinion from a licensed physician stating that the veteran is currently disabled to satisfy "Element I."

Element II: Evidence of an Injury or Disease Incurred or Aggravated During Active Service

To establish that he/she incurred an injury or disease or that he/she aggravated a pre-existing medical condition during active service, the veteran must generally provide credible medical evidence indicating that he/she was injured in-service or that his/her pre-existing injury worsened during service. Such evidence typically takes the form of service medical records. Unless a presumption applies, a veteran must generally provide service medical records to establish "Element II." Again, as stated above, the VA Secretary is obligated by statute to assist the veteran in locating his/her service medical records.[16] However, in certain circumstances, a veteran may be able to avail himself/herself of a statutory presumption, in which case he/she need not supply service medical records to establish this element of his/her claim. These statutory presumptions are discussed in greater detail below.

(...continued)

> paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1110 (emphasis supplied). Similarly, section 1131 provides in its entirety:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, *during other than a period of war*, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in [38 U.S.C. §§ 1131 *et seq*.], but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1131 (emphasis supplied).

[13] *See* Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004); *see also* Caluza v. Brown, 7 Vet. App. 498, 506 (1995). For a broader discussion of the three elements of a service-connected claim for VA disability compensation, *see* CRS Report RL33323, *Veterans Affairs: Benefits for Service-Connected Disabilities*, by Douglas Reid Weimer.

[14] 38 U.S.C. § 5103A.

[15] *Id.*

[16] *Id.*

Element III: Evidence of a Causal Nexus

A veteran can establish that his/her current disability is causally related to his/her in-service injury or disease by proving: a direct connection between the current disability and an incident that happened during the period of military service;[17] that his/her current disability, which existed prior to service, was aggravated during service;[18] that his/her current disability, which did not appear during military service, is presumed by statute or VA regulation to have begun during service or is connected with something that occurred during service;[19] that his/her current disability is the result of a primary medical condition, which is connected to a period of military service;[20] or that the current disability is the result of an injury caused by VA health service, VA training/rehabilitation services, or by participation in a VA sponsored work therapy program.[21]

Substantiating a Service-Connected Claim: Evidence (or Lack Thereof) of an In-Service Injury and its Causal Relationship to the Veteran's Current Disability

From an evidentiary standpoint, the second and third elements—in-service incurrence or aggravation of an injury or disease and causal nexus—of a service-connected claim can be difficult for a veteran to substantiate. For example, a veteran's service medical records—which would typically serve as evidence of an in-service injury—may be deficient in that they are missing, illegible, or contain no mention of an injury incurred during service.[22] Regarding the third element (causal nexus), scientific findings may not conclusively establish a cause-and-effect relationship between a veteran's current disability and the veteran's initial injury or exposure to an environmental stimulus.

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[17] 38 C.F.R. §§ 3.303(a), 3.304, 3.305. See also 38 U.S.C. § 1154. In determining whether the current disability relates to the in-service problem, the VA determines whether the problem is *acute* or *chronic*. An acute problem is considered to be a problem of relatively short duration. A chronic condition is of lengthy duration and may return.

[18] 38 U.S.C. § 1153; 38 C.F.R. § 3.306(a). If the disability existed prior to service, the VA must ascertain whether there was an *increase in the disability during service*. The preexisting problem will not be considered to be aggravated by service if the VA determines that the exacerbation resulted from the natural progression of the disease.

[19] 38 U.S.C. §§ 1112, 1116, 1133; 38 C.F.R. §§ 3.307-3.309; 38 C.F.R. § 3.313(b). If the disability claimed is a disease which was not diagnosed or recorded on the veteran's service record, the VA is required to ascertain whether the *incubation time* for the disease could have started during in-service time (38 C.F.R. § 3.03(d)).

[20] 38 C.F.R. § 3.310(a). If the disability claimed cannot be determined to be in-service, either directly or by exacerbation, the VA will then decide whether the problem may be *service-connected on a secondary basis*. This reasoning is based on the theory that it was proximately caused by a service-connected condition. For instance, a primary disease is contracted in-service. A related, secondary disease develops as a result of the primary disease.

[21] 38 U.S.C. § 1151.

[22] As an illustration of the difficulty certain veterans may face in producing medical records of in-service incurrence of an injury or disease, Vietnam veteran and Congressional Medal of Honor recipient Sammy Davis noted:

> The [herbicide-related] skin condition I had should have been [recorded], but we were a very remote-type unit and our medic took care of almost all of our ills except for gunshots, and obvious wounds, and [a] skin condition or runny sores on your head was the least of your problems. So I don't know if the record was ever written down.

Vietnam Veterans Agent Orange Relief Act: Hearing on H.R. 1961 Before the Subcomm. on Compensation, Pension, and Insurance of the H, Comm. on Veterans Affairs, 98th Cong. 43 (1983) (statement of Sammy Davis, Vietnam veteran and Cong. Medal of Honor recipient).

Consistent with the overall purpose of the VA disability compensation program, various statutory presumptions operate in connection with Title 38 to help veterans demonstrate their entitlement to disability compensation, especially when evidence relating to elements two (i.e., in-service injury/aggravation of a pre-existing injury) and three (i.e., causal nexus) is lacking or otherwise insufficient. The remainder of this report focuses on the statutory presumptions that operate to help veterans prove that they incurred or aggravated an injury or disease during active service. Before detailing some of the statutory presumptions contained in Title 38, the general concept of statutory presumptions should be briefly explained.

Congress has enacted statutes creating presumptions so that, in certain circumstances, veterans need not provide actual medical evidence that their injury or disease was incurred or aggravated during active service in the armed forces. Instead, the statutory presumptions obviate the need for a veteran to prove that his injury was incurred or aggravated by active service in the Armed Forces.[23] Such presumptions can be used by a veteran to establish an element of a service-connected claim for VA disability compensation when credible medical evidence is otherwise lacking.

In 1993, the VA analyzed statutory presumptions in a report for Congress entitled *Analysis of Presumptions of Service Connection*. In that report, the VA provided a description of presumptions:

> Generally, a legal presumption is a procedural device which shifts the burden of proof by attaching certain consequences to the establishment of certain basic evidentiary facts. When the party invoking a presumption establishes the basic fact(s) giving rise to the presumption, the burden of proof shifts to the other party to prove the nonexistence of the presumed fact. A presumption, as used in the law of evidence, is a direction that if fact A (*e.g.*, manifestation within the specified period of a disease for which a presumption of service connection is available) is established, then fact B (service connection) may be taken as established, even where there is no specific evidence proving fact B (*i.e.*, no medical evidence of a connection between the veteran's disease and the veteran's military service).[24]

In sum, where a presumption applies, a veteran is relieved of the burden of proving a particular fact—such as in-service incurrence of an injury—with direct, specific evidence. Once a fact is presumptively established, the burden of proof then shifts to the VA to disprove the existence of the presumed fact.

Statutory Presumptions Establishing In-Service Incurrence or Aggravation of an Injury or Disease (Element II of a Service-Connected Claim)

This section will highlight several presumptions enacted by Congress which require the VA to presume in-service incurrence of an injury or disease, or aggravation of a pre-existing injury or disease. Where applicable, these statutory presumptions allow the veteran to establish that an

[23] 38 U.S.C. § 501(a)(1).

[24] Dept. of Veterans Affairs, *Analysis of Presumptions of Service Connection*, report to the S. Comm. on Veterans' Affairs at *i* (December 23, 1993).

injury or disease was incurred in or aggravated by active military service even though the veteran is unable to produce specific evidence of such incurrence or aggravation. It should be noted that a veteran who establishes the second element of a service-connected claim through a statutory presumption still has the burden of producing evidence of a current disability (i.e., the first element of a service-connected claim), and evidence that the veteran's current disability was caused by the injury that was presumptively incurred during or aggravated by active military service (i.e., the third element of a service-connected claim).

Presumption of Soundness (38 U.S.C. §§ 1111 and 1132)

One of the oldest statutory presumptions is the so-called "presumption of soundness," which is codified at sections 1111 (wartime) and 1132 (peacetime) in Title 38. The presumption of soundness applies to all veterans and dictates that a veteran shall be presumed to have been in sound condition when entering service, except as to disorders noted during the veteran's entrance medical examination.[25] For the purposes of disability compensation under sections 1110 and 1131 of Title 38, the presumption of soundness relates to showing that the injury or disease was incurred or aggravated during active service (i.e., the second element of a service-connected claim for VA disability compensation).

The presumption of soundness operates when it is unclear whether a veteran's medical problems predate the veteran's service.[26] If the basis of the VA's denial of a claim for disability compensation rests upon the fact that the veteran's disability pre-existed his service, then on appeal, the veteran may point to his "clean" entrance medical examination to prove that he/she was in sound condition at the inception of his service.

The Veterans Court decision in *McKinney v. Nicholson*[27] illustrates the operation of the presumption of soundness. In *McKinney*, a veteran sought disability compensation for a disease, which—according to the veteran—was contracted during service. The veteran's disease was first diagnosed during service, but the VA denied the veteran's disability compensation claim based on a finding by a VA medical examiner that the veteran's disease resulted from his pre-service intravenous drug use (thus, not incurred "in line of duty" as required by 38 U.S.C. § 1110). The veteran provided enough evidence to prove that he was currently afflicted with the disease (thus establishing the "current disability" element of a service-connected claim), and that his current disability was causally related to the veteran's disease (thus establishing the "causal nexus" element of a service-connected claim). The issue in dispute was whether the veteran contracted the disease prior to, or during, his military service. The Veterans Court overruled the VA's denial, holding that the VA's failure to apply the presumption of soundness was improper because the veteran's service medical records plainly indicated that the veteran did not have the disease upon his entry into service, and that the veteran was first diagnosed with the disease during service.

Plainly stated, when a veteran argues that he/she was injured during service, *and* the VA contends that the veteran's injury occurred prior to service, *and* the injury is not noted on the veteran's entrance medical examination, the presumption of soundness applies.[28] In such cases, the injury is

[25] *See* 38 U.S.C. §§ 1111 (wartime) and 1132 (peacetime).

[26] Dye v. Mansfield, 504 F.3d 1289, 1293 (Fed. Cir. 2007) ("Dye").

[27] 2007 U.S. App. Vet. Claims LEXIS 1333 (Vet. App. 2007) (unpublished opinion) ("McKinney").

[28] *Id.*

presumed by the VA to have been incurred in service, unless "clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment *and* was not aggravated by such service."[29]

However, like all statutory presumptions, the presumption of soundness is rebuttable.[30] To rebut the presumption of soundness, the VA must show by clear and unmistakable evidence that the veteran's disability existed prior to service, and that the pre-existing disability was not aggravated during service.[31] The VA may prove that a pre-existing disability was not aggravated during service by establishing that there was no increase in disability during service, or that any increase in disability during service was due to the natural progression of the pre-existing condition.[32]

Aggravation of Preexisting Injury (38 U.S.C. § 1153)

Veterans with injuries or diseases that pre-date active service may also be entitled to disability compensation through section 1153 of Title 38. A veteran with a pre-existing injury (e.g., a surgically repaired knee) is permitted to establish service connection under Title 38 by showing that the injury was aggravated by active service:

> A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, *where there is an increase in disability during such service*, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.[33]

Thus, if a veteran can show that his pre-existing injury worsened during service, the VA must presume that the injury was aggravated by service.[34] This presumption is useful for veterans who have an injury or disease that was noted upon entry into active service, but have limited service medical records indicating a degeneration of the injury or disease. Unlike the "line of duty" presumption discussed below, courts appear to have construed this presumption somewhat narrowly.

As illustrated by *Hunt v. Derwinski*,[35] section 1153 expressly precludes a finding of aggravation where any increase in disability is attributed to the natural progression of the pre-existing medical condition. In *Hunt*, a veteran sought to establish service connection under section 1153. According to the Veterans Court's summary of the relevant facts, the veteran suffered a knee injury one month prior to his induction into service, which was noted on his entrance medical examination. During service, the veteran sought medical treatment on several occasions for symptoms associated with his pre-service knee injury. Upon discharge from service, the Army

[29] 38 U.S.C. § 1111 (emphasis supplied). *See* Dye, 504 F.3d at 1293.

[30] *See* Kent v. Principi, 389 F.3d 1380, 1383 (Fed. Cir. 2004) ("The presumption of soundness is rebuttable even in the face of an entrance [medical] examination affirmatively indicating that the condition in question was tested and found not to exist upon the service member's entry into service").

[31] Wagner v. Principi, 370 F.3d 1089, 1097 (Fed. Cir. 2004) (*holding* that correct standard for rebutting presumption of soundness requires VA to show by clear and unmistakable evidence that veteran's injury predates service and that pre-existing injury was not aggravated by service).

[32] *Id.* at 1096.

[33] 38 U.S.C. § 1153 (emphasis supplied); 38 C.F.R. § 3.306(a).

[34] Davis v. Principi, 276 F.3d 1341, 1344 (Fed. Cir. 2002).

[35] 1 Vet. App. 292 (1991)("Hunt").

noted that although the veteran's knee injury was still present, there was no structural deterioration of the knee and its surrounding muscles and ligaments. The veteran sought VA disability compensation for his "trick knee" because, according to the veteran, it was aggravated by his service in the Army. The VA eventually denied the veteran's claim for disability compensation because the veteran's medical records did not show that his knee condition worsened during service. According to the Veterans Court, the VA's denial was proper because, for the purposes of section 1153, "temporary or intermittent flare-ups during service of a preexisting injury or disease are not sufficient to be considered aggravation in service unless the underlying condition, as contrasted to symptoms, is worsened."[36]

If, however, the veteran's medical records indicate a worsening of a pre-service injury or disease, then the VA must presume that the veteran's pre-existing medical condition was aggravated by service.[37] As with the presumption of soundness, the VA may rebut the presumption of aggravation with "clear and unmistakable evidence" that the veteran's injury did not worsen during service.[38] The VA may prove that a pre-existing disability did not worsen during service by establishing (a) that there was no increase in disability during service, or (b) that any increase in disability during service was due to the natural progression of the pre-existing condition.[39]

Line of Duty Presumption (38 U.S.C. § 105)

One of the fundamental requirements for an award of VA disability compensation under sections 1110 (wartime) and 1131 (peacetime), is that the injury must be incurred by the veteran "in line of duty."[40] Accordingly, an injury incurred by a veteran during his active service, but outside of the "line of duty" is not compensable. Under section 105(a) of Title 38, "[a]n injury or disease incurred during active military … service *will be deemed to have been incurred in line of duty*"[41] and not the result of the veteran's own misconduct or abuse of alcohol or drugs.[42] As the Federal

[36] *Id.* at 297.

[37] *See generally*, Townsend v. Derwinski, 1 Vet. App. 408 (1991) (section 1153 requires finding of aggravation where veteran's medical records show worsening of pre-existing medical condition during veteran's service).

[38] 38 C.F.R. § 3.306(b) provides:

> Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.

[39] Wagner v. Principi, 370 F.3d at 1096.

[40] 38 U.S.C. §§ 1110 and 1131.

[41] 38 U.S.C. § 105(a) (emphasis added). Regarding the meaning of the term "incurred in line of duty," the Federal Circuit has held that the term has the same meaning as the term "service-connected" as defined in 38 U.S.C. § 101(16). Shedden v. Principi, 381 F.3d 1163, 1166 (Fed. Cir. 2004).

[42] *See* 38 U.S.C. § 105(a). In its entirety, section 105(a) provides:

> An injury or disease incurred during active military, naval, or air service will be deemed to have been incurred in line of duty and not the result of the veteran's own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, or air service, whether on active duty or on authorized leave, unless such injury or disease was a result of the person's own willful misconduct or abuse of alcohol or drugs. Venereal disease shall not be presumed to be due to willful misconduct if the person in service complies with the regulations of the appropriate service department requiring the person's to report and receive treatment for such disease.

(continued...)

Circuit explained in *Holton v. Shinseki*,[43] the line of duty presumption should be construed broadly:

> [S]ection 105(a) makes clear that an injury or disease will be deemed to have been incurred in the line of duty if it occurred at almost any time during a veteran's active service—even during authorized leave. Thus, a veteran need not show that his injury occurred while he was performing service-related duties or acting within the course and scope of his employment in order to receive disability benefits; for purposes of disability compensation, a service member's workday never ends.[44]

Thus, if there is no dispute about *when* the veteran's injury or disease was incurred, it is presumed that it did not result from the veteran's own misconduct or abuse of alcohol or drugs.[45] To rebut this presumption, the VA must show that the veteran's injury or disease was caused by the veteran's own willful misconduct or abuse of alcohol or drugs, by a "preponderance of the evidence."[46] In other words, the VA must produce evidence which taken as a whole, shows that the veteran's own willful misconduct, or alcohol or drug use, was—more likely than not—the cause of his/her in-service injury.[47]

It should be noted, however, that even if the veteran proves that he was injured or contracted a disease during service, and the VA is unable to rebut the presumption that it was "incurred in line of duty," the veteran has only established one out of the three elements of a service-connected claim for disability compensation.[48] The veteran must still establish the other two elements (i.e., current disability, and a causal nexus between current disability and the in-service injury or disease) to be eligible for an award of VA disability compensation.[49]

Presumption of Incurrence or Aggravation of an Injury or Disease Based on Time and Place of Service (38 U.S.C. § 1154(b))

Another powerful presumption that helps veterans demonstrate in-service incurrence or aggravation is the "combat veteran" presumption, which is codified at section 1154(b) in Title 38.[50] As its namesake implies, this presumption is only available to combat veterans. Unlike the

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See also Conley v. Peake, 543 F.3d 1301, 1304 (Fed. Cir. 2008) (summarizing text of 38 U.S.C. § 105(a)).

[43] 557 F.3d 1362 (Fed. Cir. 2009) ("Holton").

[44] Holton, 557 F.3d at 1366.

[45] *See* Dye, 504 F.3d at 1292 (Fed. Cir. 2007) (line of duty presumption "deals with the situation where there is a question whether the in-service medical condition was incurred in 'line of duty' or outside such duty because it resulted from the veteran's own misconduct").

[46] Holton, 557 F.3d at 1367; *see also* Thomas v. Nicholson, 423 F.3d 1279, 1284-85 (Fed. Cir. 2005).

[47] The term "willful misconduct" is not expressly defined in Title 38 or its regulations. However, evidence of a veteran repeatedly disobeying a direct order from a superior officer (and sustaining injuries as a result of that disobedience) is sufficient to support a finding that a veteran's injury was caused by his own willful misconduct. *See* Thomas v. Nicholson, 423 F.3d at 1281-1282.

[48] Holton at 1367; *see also* Conley v. Peake, 543 F.3d 1301, 1305 (Fed. Cir. 2008).

[49] Holton at 1367; *see also* Shedden v. Principi, 381 F.3d at 1167.

[50] 38 U.S.C. § 1154(b). In its entirety, section 1154(b) provides:

> In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the

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previous presumptions discussed in this report, the combat veteran presumption allows veterans to demonstrate in-service incurrence or aggravation with credible "lay or other evidence" provided that the veteran establishes the following conditions: (1) the veteran must have been engaged in combat with the enemy, and (2) the injury must be consistent with the "circumstances, conditions, or hardships of such [combat] service."[51] This presumption is especially useful for veterans who have incurred injuries during combat—such as hearing loss or post traumatic stress disorder (PTSD)—that tend to manifest well after the veteran's initial exposure to a particular stressor.

A veteran seeking to establish service-connection through section 1154(b) must first prove that he/she "engaged in combat with the enemy."[52] To establish combat status, a veteran must prove that he/she "personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality, as determined on a case-by-case basis."[53] It should be noted that section 1154(b) does not create a relaxed evidentiary standard of proof for determining whether a veteran engaged in combat.[54]

For example, in *Moran v. Peake*,[55] a veteran argued that the VA misapplied section 1154(b) because, according to the veteran, his current disability (PTSD) was initially incurred while he was engaged in combat with the enemy during the Vietnam War. However, the veteran's service records plainly indicated that he served as a cook and was not involved in combat while stationed in Vietnam.[56] Other than his presence in Vietnam during the Vietnam War, the veteran was unable to produce any credible evidence (beyond his own assertions) that he was "engaged in combat with the enemy" for the purposes of section 1154(b).[57] The veteran argued that evidence of his presence in a combat zone was sufficient to trigger the evidentiary benefit of section 1154(b).[58]

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> Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service-connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service-connection in each case shall be recorded in full.

[51] Wood v. Derwinski, 1 Vet. App. 406, 407 (1991) (*stating* elements of 38 U.S.C. 1154(b) presumption).

[52] 38 U.S.C. § 1154(b). Stone v. Nicholson, 480 F.3d 1111, 1113 (Fed. Cir. 2007) ("[A] veteran's participation in combat is a prerequisite for the application of § 1154(b)") ("Stone").

[53] Moran v. Peake, 525 F.3d 1157, 1159 (Fed. Cir. 2008) ("Moran"). It should be noted that a veteran with a medal, such as a Combat Action Ribbon or a Purple Heart, has all the evidence of "combat status" he needs because the VA accepts such decorations as *prima facie* evidence of combat participation. *See* Shaw v. Principi, 3 Vet. App. 365, 367 ("[G]iven the veteran's Purple Heart, the [VA] was obligated either to accept the veteran's lay evidence of service incurrence under section 1154(b), or to explain why that section did not apply"). Other veterans, who may have equally compelling personal combat experience, but with no such decorations may have a more difficult time proving their participation in combat. The VA has issued regulations to ease the burden of proving combat participation for the purposes of 1154(b) for veterans diagnosed with PTSD. *See generally* 38 C.F.R. §§ 3.304(f)(1) through (5).

[54] Stone, 480 F.3d at 1113 ("[38 U.S.C. § 1154(b)] does not provide a relaxed standard of proof for determining whether a veteran engaged in combat").

[55] 525 F.3d 1157 (Fed. Cir. 2008).

[56] Moran, 525 F.3d at 1158, n. 1.

[57] In addition to the veteran's occupation and service records, the VA based its determination on the veteran's personal statements that he did not participate in combat while serving in Vietnam. Moran, 525 F.3d at 1158, n. 1.

[58] *Id.* at 1159.

The Federal Circuit disagreed, and held that the veteran's mere presence in Vietnam during the Vietnam War did not automatically establish that he was "engaged in combat with the enemy."[59] Since the veteran did not carry his evidentiary burden to establish the first prong of the "combat veteran" presumption (i.e., his combat status), the Federal Circuit held that section 1154(b) was inapplicable to the veteran's claim for VA disability compensation for PTSD.[60]

Had the veteran in *Moran* established he was engaged in combat with the enemy while serving in Vietnam, he would have been able to use "lay or other" evidence (e.g., statements by fellow service members who witnessed the veteran's injury) to prove that he was injured during combat with the enemy.[61] However, because he was unable to prove that he engaged in combat with the enemy, he was required to introduce credible corroborative evidence of his alleged in-service stressors to prove the second element of a service-connected claim for VA disability compensation.[62] If a veteran is able to prove his/her combat status, the burden then shifts to the VA to determine whether the alleged in-service injury is consistent with the circumstances, conditions, or hardships of service.

To assess whether the veteran's injury is consistent with the circumstances of combat, the VA must undertake a 3-step analysis: (a) the VA must first assess the credibility of the veteran's lay evidence, (b) the VA must then determine whether evidence of an in-service injury proffered by the veteran is "consistent with the circumstances, conditions, or hardships of [combat] service," and (c) the VA may elect to rebut the veteran's evidence with "clear and convincing evidence" to the contrary.[63]

Conclusion

During FY2009, the VA obligated approximately $46 billion of its annual budget to veterans in the form of monthly pension and disability compensation payments.[64] Of that $46 billion, approximately $42 billion was paid to veterans in the form of disability compensation.[65] Disability compensation payments comprised approximately 40% of the VA's total amount of funds obligated to veterans (approximately $104.7 billion).[66] As mentioned, veterans receive VA disability compensation on a tax-free basis. However, before a veteran can receive disability compensation from the VA, he must prove that his current medical condition is service-connected.

[59] Moran, 525 F.3d at 1159 ("Moran's position would require [the Federal Circuit] to replace the words 'engaged in combat with the enemy' in § 1154(b) with 'in a combat zone'").

[60] *Id.*

[61] 38 C.F.R. § 3.304(f).

[62] 38 C.F.R. § 3.304(f); *see also* Cohen v. Brown, 10 Vet. App. 128, 142 (1997).

[63] Collette v. Brown, 82 F.3d 389, 392-394 (Fed. Cir. 1996) (discussion of 3-step analysis under section 1154(b)).

[64] *Fiscal Year 2009 Performance and Accountability Report*, Part III: Financials, Department of Veterans Affairs (Nov. 16, 2009). Available at http://www4.va.gov/budget/report/. It should be noted that the 2010 report does not provide a dollar amount breakdown for monthly pension and disability compensation payments (*Fiscal Year 2010 Performance and Accountability Report*, Part III: Financials: Department of Veterans Affairs (Nov. 15, 2010) at pp. 32, 36. Available at http://www4.va.gov/budget/report/.

[65] *Id.*

[66] *Id.*

Procedural devices codified at Title 38, such as the statutory presumptions discussed in this report, help ease a veteran's evidentiary burden of establishing the three elements of a service connected claim (i.e., current disability, in-service incurrence or aggravation of an injury or disease, causal nexus between current condition and in-service incurrence or aggravation of an injury or disease). In the absence of specific evidence proving the existence of each of the three elements of a service-connected claim, the application of a statutory presumption could mean the difference between a veteran establishing service connection—and receiving a monthly, tax-free check from the VA—and being denied disability compensation altogether.

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