



Service-Connected Disability Claims Before the U.S. Department of Veterans Affairs

A Brief Tutorial

By Kristina Derro

As of 2013, more than 22 million veterans were living in America; nearly 16.7 million of them served during a period of war.¹ Collectively, these veterans have had a variety of experiences in the military. A small percentage has actually seen combat and a much larger group has supported that combat effort. Regardless, all veterans have experienced rigorous training and discipline during their period of service and almost all veterans,² depending on their character of discharge, qualify for education loans, home loans, and burial benefits available through

the U.S. Department of Veterans Affairs (VA).³ Some veterans qualify for healthcare benefits, although the eligibility requirements are complicated and involve character of discharge, periods of service, income level, and service-connected disabilities.⁴

VA offers veterans two types of disability benefits: nonservice-connected pension benefits and service-connected compensation benefits. Nonservice-connected pension benefits are monthly payments made to veterans who served during a congressionally defined period of war, are permanently and totally disabled, and

meet a certain income threshold; these disabilities do not have to be related to the veteran's period of service.⁵ Service-connected compensation benefits—the focus of this article—are paid to veterans with disabilities that were incurred or aggravated during a period of military service or arose as a result of fault by a VA medical facility.⁶ These benefits are similar to Social Security disability benefits; however, Social Security benefits require total disability while veterans are rated by VA at percentages ranging from zero to 100 percent depending on the severity of the condition.

Overview

For a veteran to become service-connected for a disability or injury, he or she must have (1) evidence of an occurrence or aggravation of a disease or injury in service, (2) a medical diagnosis of a current disability, and (3) a medical nexus between the in-service injury or disease and the current disability.⁷ Veterans may also be service-connected through an instance of fault on the part of a VA hospital.⁸ When a veteran becomes service-connected for a particular injury or disability, he or she will receive free healthcare from VA for that specific disability.⁹ Veterans who are rated at a combined rating of 30 percent or more (adding together all of a veteran's service-connected disabilities) qualify to receive extra money each month for their dependents.¹⁰ At a combined rating of 50 percent, veterans will receive free healthcare from VA for *all* of their medical conditions, regardless of whether a disability is service-connected.¹¹

Process

Initially, a veteran makes a claim for disability benefits at his or her local VA regional office.¹² There is at least one regional office in every state; veterans living in other countries file claims at certain offices to which foreign claims are funneled. Once the regional office issues a preliminary rating decision, the veteran can disagree with any aspect of it, such as the denial of service connection, the rating assigned, or the effective date of the award of benefits, and request another review by the office.¹³ After further review, the office will issue a "Statement of the Case," and any dispute the veteran has with that decision can be advanced to the Board of Veterans' Appeals in Washington, D.C.¹⁴ The board, comprised of veterans law judges, reviews the facts, evidence, and law, and issues a new decision.¹⁵ Any disagreement with the board's determination can be appealed by the veteran to the U.S. Court of Appeals for Veterans Claims in Washington, D.C.—a specialty court established under Article I of the U.S. Constitution by the Veterans' Judicial Review Act (1998).¹⁶ A veteran has two additional opportunities to appeal a decision, assuming there is an issue of law: the U.S. Court of Appeals for the Federal Circuit and the United States Supreme Court.¹⁷

Through the entire adjudication, a veteran can proceed pro se. The VA system was structured so veterans could be assisted for free while at the VA regional office or board by veteran service

FAST FACTS

VA offers veterans two types of disability benefits: nonservice-connected pension benefits and service-connected compensation benefits. Service-connected benefits are awarded to veterans who have an occurrence or aggravation of a disease or injury during service, a current disability, and a medical nexus between the in-service injury or disease and the current disability.

organizations such as the American Legion, Disabled American Veterans, or Veterans of Foreign Wars.¹⁸

Previously, many attorneys did not practice in this area of law, even if they felt comfortable handling claims in a system in which they were not welcomed, because they were unable to charge a fee greater than \$10 to represent veterans.¹⁹ In 2006, however, Congress permitted veterans law attorneys to charge a fee after filing a notice of disagreement, allowing more attorneys to become involved in the process.²⁰ Lawyers now assist regularly at VA regional offices and the board; to represent veterans with their claims, attorneys must be accredited by VA.²¹ Concerning claims at the Court of Appeals for Veterans Claims, attorneys have consistently been involved in the process since its inception.

Initial claim

After a veteran files the paperwork to initiate a claim, it is advisable to submit evidence to prove that the veteran has a current disability that either arose or was aggravated during his or her period of service, the disability has worsened and a higher rating is warranted, or the wrong effective date was chosen by VA. Medical records, medical opinions from treating physicians, medical treatise, lay testimony from the veteran or family members and friends addressing the veteran's level of functioning, statements from individuals who served with the veteran, and employment records can all be submitted to support a claim.

VA has a "[d]uty to assist"²² the veteran in developing the claim, yet may fail to properly advance the claim and hinder the veteran through lack of progress. VA is required to get any federal records unless efforts to obtain them are futile (for example, VA must obtain the veteran's Social Security disability records unless informed by the Social Security Administration that the records were destroyed).²³ VA must attempt to obtain identified private medical records, although ultimately it is the veteran's responsibility to ensure that the records are associated with the file.²⁴ VA



is also required to gather service-related records such as medical records, personnel records, and identified Department of Defense records unless efforts would be futile.²⁵ In most instances, VA is even required to provide the veteran with a medical examination to determine the etiology of his or her medical condition.²⁶

VA is also required to sympathetically develop a claim.²⁷ The majority of veterans are not legal or medical professionals and may not clearly or explicitly state what service-connected disability benefits they are seeking when a claim is filed. A veteran may claim entitlement for leg pain when, in actuality, the pain is radiculopathy caused by nerve impingement in the veteran's back from an in-service accident. Because of the duty to sympathetically develop a claim, VA has to recognize and adjudicate such implied claims.

Working with veterans involves a unique set of challenges. Two of the biggest problems facing veterans are the lack of evidence of treatment for a disability during service and lack of evidence of treatment in the years following service. Veterans frequently do not receive treatment for medical conditions because of their general stoic nature and the stigma attached to treatment for some disabilities. Recordkeeping by the military for veterans' medical injuries during combat operations is haphazard. Often, post-service treatment records are destroyed because of the length of time that has passed since treatment or because the private physician has retired or is deceased. Compounding the problem is the fact that in 1973, the National Personnel Records Center, where millions of veterans' service records are stored, suffered a fire that

destroyed the records of 16–18 million veterans.²⁸ Since there is no deadline by which a veteran must make a claim after discharge from service, missing or destroyed records are often a problem in claims. These instances require creative advocacy by the attorney.

Appeals

Once the veteran appeals a decision and while the claim is in appellate status working its way through the system from the VA regional office to the board, the veteran has additional time to submit supportive evidence, legal argument, and evidence refuting the VA's conclusions. Although all regional offices follow the same regulations, they do not give the same interpretation to statutes, regulations, or caselaw. So a veteran with the same set of facts as another veteran living in a different state may get a different determination by VA. Ensuring that VA follows its own regulations is an important job for the attorney.

The entire adjudication process with VA is purportedly pro-claimant²⁹ and has a lower burden of proof than normal civil litigation. However, it can be an increasingly confusing and complex process for the veteran—one that involves decisions and correspondence from VA filled with seemingly contradictory regulations and statements. These difficulties, especially when coupled with significant delays, increase the veteran's overall frustration. Currently, there is a tremendous backlog of claims at VA, and it can take many years for a claim to work its way through the system.³⁰

Types of claims

There are several types of claims veterans can file to maximize their benefits from VA. A service-connected claim can be granted

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on the theory of a direct relationship to service—the disability first manifested itself during the veteran's period of service.³¹ This also includes service connection based on a theory of aggravation of a disability that existed before the veteran's enlistment.³² If that preexisting disability was aggravated "beyond its natural progression" by the veteran's period of service, the veteran can be service-connected for that disability.³³

Incapacities that occur as a result of a service-connected disability can also be service-connected on a secondary basis.³⁴ For example, if the veteran was service-connected for his back and bilateral hips and had an altered gait, and the gait caused the veteran to develop bilateral knee problems, the bilateral knees can be service-connected as well. This can occur when a service-connected condition contributes to the creation of a new disability or aggravates a nonservice-connected condition.

Once a veteran is service-connected for a disability, the attorney must ensure the veteran is appropriately rated. Evidence can be submitted to show that a veteran's condition has worsened and warrants a higher rating. For veterans whose service-connected disabilities prevent "substantially gainful employment," a total disability rating is available, even if the disabilities normally don't meet the criteria for a 100 percent rating based on symptoms alone.³⁵ Similarly, if a veteran's disability is such an "exceptional or unusual disability picture" that the regular schedular rating criteria is rendered impractical, a request for an extraschedular rating can be claimed.³⁶ Finally, special monthly compensation—an additional compensation above the regular rating schedule—can be assigned for veterans with service-connected special disabilities or hardships, such as the loss of both feet or hands or requiring the care of others to complete his or her activities of daily living.³⁷

This practice is funded primarily by a contingency fee on back-pay awards.³⁸ VA will pay the disputed benefits from the initial claim to the date of award. If a case is remanded or won at the Court of Appeals for Veterans Claims, the attorney will be entitled to an hourly rate under the Equal Access to Justice Act.³⁹

Conclusion

Veterans disability law is a unique blend of regulatory interpretation and caselaw from the past 25 years. Practice in this area requires considerable detective skills to locate supportive service records, medical records, and buddy statements. The practice also requires a solid medical understanding of diseases and disabilities. The final ingredient is patience, as the process from claim to successful award can take years.

This contingency practice can be financially sustainable and, more importantly, emotionally rewarding. When a veteran has been struggling financially for years, a significant back-pay award and future benefits can change his or her life. Lawyers can help those who deserve assistance obtain the benefits they have earned through service to our country. ■



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ENDNOTES

1. U.S. Department of Veterans Affairs, *Veteran Population* <http://www.va.gov/vetdata/Veteran_Population.asp>. All websites cited in this article were accessed January 12, 2015.
2. See 38 USC 101(2).
3. U.S. Department of Veterans Affairs, *Veterans Benefits Administration* <<http://www.benefits.va.gov/benefits>>.
4. U.S. Department of Veterans Affairs, *Health Benefits* <<http://www.va.gov/HEALTHBENEFITS/apply/veterans.asp>>.
5. Stichman, Abrams & George, eds, *Veterans Benefits Manual* (Charlottesville: LexisNexis, 2013), ch 1.3.1, p 13.
6. *Id.*
7. 38 USC 1110.
8. 38 USC 1151.
9. 38 USC 1710(a)(1)(A).
10. 38 USC 1115.
11. 38 USC 1710.
12. 38 USC 7105(b)(1) and (d)(1).
13. *Veterans Benefits Manual*, p 927.
14. *Id.*
15. *Id.*
16. 38 USC 7252.
17. 38 USC 7292.
18. 38 CFR 14.626 through 38 CFR 14.628.
19. See Act of July 4, 1864, §§ 12–13, 13 Stat 387 and 389.
20. 38 USC 5904(c)(2).
21. 38 CFR 14.629.
22. 38 USC 5103A(a)(1).
23. 38 CFR 3.159(c)(2).
24. 38 CFR 3.159(c)(1).
25. 38 CFR 3.159(c)(2).
26. 38 USC 5103A(d); *McLendon v Nicholson*, 20 Vet App 79 (2006).
27. See 38 CFR 3.103(a); *Roberson v Principi*, 251 F3d 1378 (CA Fed, 2001).
28. National Archives, *The 1973 Fire, National Personnel Records Center* <<http://www.archives.gov/st-louis/military-personnel/fire-1973.html>>.
29. See *Hodge v West*, 155 F3d 1356, 1362 (CA Fed, 1998).
30. U.S. Department of Veterans Affairs, *Veterans Benefits Administration Reports: Claims Backlog* <http://benefits.va.gov/reports/mmwr_va_claims_backlog.asp>.
31. 38 CFR 3.303.
32. 38 USC 1153.
33. *Id.*
34. 38 CFR 3.306.
35. 38 CFR 4.16(a).
36. 38 CFR 3.321(b)(1).
37. 38 CFR 3.350.
38. 38 CFR 14.636(g).
39. 28 USC 2412(d).