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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 92

Covering period of *Federal Register* issues
through September 3, 2010

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Custom Federal Regulations Service™

Supplemental Materials for *Book B*

Code of Federal Regulations

Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 92

5 September 2010

Covering the period of Federal Register issues
through September 3, 2010

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FILING INSTRUCTIONS

**Book B, Supplement No. 92
September 5, 2010**

*Remove these
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3.303-1 to 3.303-2

3.303-1 to 3.303-2

§3.303 (technical
correction)

3.309-1 to 3.309-8

3.309-1 to 3.309-8

§3.309

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HIGHLIGHTS

Book B, Supplement No. 92 September 5, 2010

Note: Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

Supplement frequency: This Book B (*Adjudication*) was originally supplemented four times a year, in February, May, August, and November. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

Modifications in this supplement include the following:

1. On 31 August 2010, the VA published a final rule, effective that same date, to amend the VA adjudication regulations concerning presumptive service connection for certain diseases based upon the most recent National Academy of Sciences Institute of Medicine committee report, *Veterans and Agent Orange: Update 2008*. This amendment is necessary to implement the decision of the Secretary of Veterans Affairs that there is a positive association between exposure to certain herbicides and the subsequent development of hairy cell leukemia and other chronic B-cell leukemias, Parkinson’s disease, and ischemic heart disease. Changes:

- In §3.309, revised paragraph (e), and added a new Note 3 at the end of the section.

24

Ratings and Evaluations; Service Connection

3.303	Principles relating to service connection	3.303-1
3.304	Direct service connection; wartime and peacetime	3.304-1
3.305	Direct service connection; peacetime service before January 1,1947	3.305-1
3.306	Aggravation of pre-service disability.....	3.306-1
3.307	Presumptive service connection for chronic, tropical, or prisoner-of-war-related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1,1947	3.307-1
3.308	Presumptive service connection; peacetime service before January 1 1947.....	3.308-1
3.309	Disease subject to presumptive service connection.....	3.309-1
3.310	Disabilities that are proximately due to, or aggravated by, service-connected disease or injury	3.310-1
3.311	Claims based on exposure to ionizing radiation.....	3.311-1
3.312	Cause of death.....	3.312-1
3.313	Claims based on service in Vietnam.....	3.313-1
3.314	Basic pension determinations	3.314-1
3.315	Basic eligibility determinations; dependents, loans, education	3.315-1
3.316	Claims based on chronic effects of exposure to mustard gas	3.316-1
3.317	Compensation for certain disabilities due to undiagnosed illnesses.....	3.317-1
3.318–3.320 [Reserved]		
3.321	General rating considerations	3.321-1
3.322	Rating of disabilities aggravated by service	3.322-1
3.323	Combined ratings.....	3.323-1
3.324	Multiple noncompensable service-connected disabilities.....	3.324-1
3.325	[Reserved]	
3.326	Examinations	3.326-1
3.327	Reexaminations	3.327-1
3.328	Independent medical opinions	3.328-1
3.329	[Removed]	
3.330	Resumption of rating when veteran subsequently reports for Department of Veterans Affairs examination.....	3.330-1
3.331–3.339 [Reserved]		
3.340	Total and permanent total ratings and unemployability.....	3.340-1
3.341	Total disability ratings for compensation purposes	3.341-1
3.342	Permanent and total disability ratings for pension purposes	3.342-1
3.343	Continuance of total disability ratings	3.343-1
3.344	Stabilization of disability evaluations.....	3.344-1

§3.303 Principles relating to service connection.

(a) *General.* Service connection connotes many factors but basically it means that the facts, 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. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

(b) *Chronicity and continuity.* With chronic disease shown as such in service (or within the presumptive period under §3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "Chronic." When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.

(c) *Preservice disabilities noted in service.* There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. Conditions of an infectious nature are to be considered with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, they will be held to have preexisted service. In the field of mental disorders, personality disorders which are characterized by developmental defects or pathological trends in the personality structure manifested by a

§3.309 Disease subject to presumptive service connection.

(a) *Chronic diseases.* The following diseases shall be granted service connection although not otherwise established as incurred in or aggravated by service if manifested to a compensable degree within the applicable time limits under §3.307 following service in a period of war or following peacetime service on or after January 1, 1947, provided the rebuttable presumption provisions of §3.307 are also satisfied.

Anemia, primary.
Arteriosclerosis.
Arthritis.
Atrophy, Progressive muscular.
Brain hemorrhage.
Brain thrombosis.
Bronchiectasis.
Calculi of the kidney, bladder, or gallbladder.
Cardiovascular-renal disease, including hypertension. (This term applies to combination involvement of the type of arteriosclerosis, nephritis, and organic heart disease, and since hypertension is an early symptom long preceding the development of those diseases in their more obvious forms, a disabling hypertension within the 1-year period will be given the same benefit of service connection as any of the chronic diseases listed.)
Cirrhosis of the liver.
Coccidioidomycosis.
Diabetes mellitus.
Encephalitis lethargica residuals.
Endocarditis. (This term covers all forms of valvular heart disease.)
Endocrinopathies.
Epilepsies.
Hansen's disease.
Hodgkin's disease.
Leukemia.
Lupus erythematosus, systemic.
Myasthenia gravis.
Myelitis.
Myocarditis.
Nephritis.
Other organic diseases of the nervous system.
Osteitis deformans (Paget's disease).
Osteomalacia.
Palsy, bulbar.
Paralysis agitans.
Psychoses.
Purpura idiopathic, hemorrhagic.
Raynaud's disease.
Sarcoidosis.
Scleroderma.

Sclerosis, amyotrophic lateral.
 Sclerosis, multiple.
 Syringomyelia.
 Thromboangiitis obliterans (Buerger's disease).
 Tuberculosis, active.
 Tumors, malignant, or of the brain or spinal cord or peripheral nerves.
 Ulcers, peptic (gastric or duodenal) (A proper diagnosis of gastric or duodenal ulcer (peptic ulcer) is to be considered established if it represents a medically sound interpretation of sufficient clinical findings warranting such diagnosis and provides an adequate basis for a differential diagnosis from other conditions with like symptomatology; in short, where the preponderance of evidence indicates gastric or duodenal ulcer (peptic ulcer). Whenever possible, of course, laboratory findings should be used in corroboration of the clinical data.

(b) *Tropical diseases.* The following diseases shall be granted service connection as a result of tropical service, although not otherwise established as incurred in service if manifested to a compensable degree within the applicable time limits under §3.307 or §3.308 following service in a period of war or following peacetime service provided the rebuttable presumption provisions of §3.307 are also satisfied.

Amebiasis.
 Blackwater fever.
 Cholera.
 Dracontiasis.
 Dysentery.
 Filariasis.
 Leishmaniasis, including kala-azar.
 Loiasis.
 Malaria.
 Onchocerciasis.
 Oroya fever.
 Pinta.
 Plague.
 Schistosomiasis.
 Yaws.
 Yellow fever.

Resultant disorders or diseases originating because of therapy administered in connection with such diseases or as a preventative thereof.

(c) *Diseases specific as to former prisoners of war.*

(1) If a veteran is a former prisoner of war, the following diseases shall be service connected if manifest to a degree of disability of 10 percent or more at any time after discharge or release from active military, naval, or air service even though there is no record of such disease during service, provided the rebuttable presumption provisions of §3.307 are also satisfied.

Psychosis.

Any of the anxiety states.

Dysthymic disorder (or depressive neurosis).

Organic residuals of frostbite, if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite.

Post-traumatic osteoarthritis.

Atherosclerotic heart disease or hypertensive vascular disease (including hypertensive heart disease) and their complications (including myocardial infarction, congestive heart failure, arrhythmia).

Stroke and its complications.

On or after October 10, 2008, Osteoporosis, if the Secretary determines that the veteran has posttraumatic stress disorder (PTSD).

(2) If the veteran:

(i) Is a former prisoner of war and;

(ii) Was interned or detained for not less than 30 days, the following diseases shall be service connected if manifest to a degree of 10 percent or more at any time after discharge or release from active military, naval, or air service even though there is no record of such disease during service, provided the rebuttable presumption provisions of §3.307 are also satisfied.

Avitaminosis.

Beriberi (including beriberi heart disease).

Chronic dysentery.

Helminthiasis.

Malnutrition (including optic atrophy associated with malnutrition).

Pellagra.

Any other nutritional deficiency.

Irritable bowel syndrome.

Peptic ulcer disease.

Peripheral neuropathy except where directly related to infectious causes.

Cirrhosis of the liver.

On or after September 28, 2009, Osteoporosis. (Authority: 38 U.S.C. 501(a) and 1112(b))

(d) *Diseases specific to radiation-exposed veterans.*

(1) The diseases listed in paragraph (d)(2) of this section shall be service-connected if they become manifest in a radiation-exposed veteran as defined in paragraph (d)(3) of this section, provided the rebuttable presumption provisions of §3.307 of this part are also satisfied.

(2) The diseases referred to in paragraph (d)(1) of this section are the following:

- (i) Leukemia (other than chronic lymphocytic leukemia).
- (ii) Cancer of the thyroid.
- (iii) Cancer of the breast.
- (iv) Cancer of the pharynx.
- (v) Cancer of the esophagus.
- (vi) Cancer of the stomach.
- (vii) Cancer of the small intestine.
- (viii) Cancer of the pancreas.
- (ix) Multiple myeloma.
- (x) Lymphomas (except Hodgkin's disease).
- (xi) Cancer of the bile ducts.
- (xii) Cancer of the gall bladder.
- (xiii) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).
- (xiv) Cancer of the salivary gland.
- (xv) Cancer of the urinary tract.
- (xvi) Bronchiolo-alveolar carcinoma.
- (xvii) Cancer of the bone.
- (xviii) Cancer of the brain.
- (xix) Cancer of the colon.
- (xx) Cancer of the lung.
- (xxi) Cancer of the ovary.

Note: For the purposes of this section, the term *urinary tract* means the kidneys, renal pelves, ureters, urinary bladder, and urethra. (Authority: 38 U.S.C. 1112(c)(2))

(3) For purposes of this section:

(i) The term *radiation-exposed veteran* means either a veteran who, while serving on active duty, or an individual who while a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a radiation-risk activity.

(ii) The term *radiation-risk activity* means:

(A) Onsite participation in a test involving the atmospheric detonation of a nuclear device.

(B) The occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946.

(C) Internment as a prisoner of war in Japan (or service on active duty in Japan immediately following such internment) during World War II which resulted in an opportunity for exposure to ionizing radiation comparable to that of the United States occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning on August 6, 1945, and ending on July 1, 1946.

(D) (1) Service in which the service member was, as part of his or her official military duties, present during a total of at least 250 days before February 1, 1992, on the grounds of a gaseous diffusion plant located in Paducah, Kentucky, Portsmouth, Ohio, or the area identified as K25 at Oak Ridge, Tennessee, if, during such service the veteran:

(i) Was monitored for each of the 250 days of such service through the use of dosimetry badges for exposure at the plant of the external parts of veteran's body to radiation; or

(ii) Served for each of the 250 days of such service in a position that had exposures comparable to a job that is or was monitored through the use of dosimetry badges; or

(2) Service before January 1, 1974, on Amchitka Island, Alaska, if, during such service, the veteran was exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests.

(3) For purposes of paragraph (d)(3)(ii)(D)(1) of this section, the term "day" refers to all or any portion of a calendar day.

(E) Service in a capacity which, if performed as an employee of the Department of Energy, would qualify the individual for inclusion as a member of the Special Exposure Cohort under section 3621(14) of the Energy Employees Occupational Illness Compensation Program Act of 2000 (42 U.S.C. 73841(14)).

(iii) The term *atmospheric detonation* includes underwater nuclear detonations.

(iv) The term *onsite participation* means:

(A) During the official operational period of an atmospheric nuclear test, presence at the test site, or performance of official military duties in connection with ships, aircraft or other equipment used in direct support of the nuclear test.

(B) During the six month period following the official operational period of an atmospheric nuclear test, presence at the test site or other test staging area to perform official military duties in connection with completion of projects related to the nuclear test including decontamination of equipment used during the nuclear test.

(C) Service as a member of the garrison or maintenance forces on Eniwetok during the periods June 21, 1951, through July 1, 1952, August 7, 1956, through August 7, 1957, or November 1, 1958, through April 30, 1959.

(D) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(v) For tests conducted by the United States, the term *operational period* means:

- (A) For Operation *TRINITY* the period July 16, 1945 through August 6, 1945.
- (B) For Operation *CROSSROADS* the period July 1, 1946 through August 31, 1946.
- (C) For Operation *SANDSTONE* the period April 15, 1948 through May 20, 1948.
- (D) For Operation *RANGER* the period January 27, 1951 through February 6, 1951.
- (E) For Operation *GREENHOUSE* the period April 8, 1951 through June 20, 1951.
- (F) For Operation *BUSTER-JANGLE* the period October 22, 1951 through December 20, 1951.
- (G) For Operation *TUMBLER-SNAPPER* the period April 1, 1952 through June 20, 1952.
- (H) For Operation *IVY* the period November 1, 1952 through December 31, 1952.
- (I) For Operation *UPSHOT-KNOTHOLE* the period March 17, 1953 through June 20, 1953.
- (J) For Operation *CASTLE* the period March 1, 1954 through May 31, 1954.
- (K) For Operation *TEAPOT* the period February 18, 1955 through June 10, 1955.
- (L) For Operation *WIGWAM* the period May 14, 1955 through May 15, 1955.
- (M) For Operation *REDWING* the period May 5, 1956 through August 6, 1956.
- (N) For Operation *PLUMBBOB* the period May 28, 1957 through October 22, 1957.
- (O) For Operation *HARDTACK I* the period April 28, 1958 through October 31, 1958.
- (P) For Operation *ARGUS* the period August 27, 1958 through September 10, 1958.
- (Q) For Operation *HARDTACK II* the period September 19, 1958 through October 31, 1958.
- (R) For Operation *DOMINIC I* the period April 25, 1962 through December 31, 1962.
- (S) For Operation *DOMINIC III/ PLOWSHARE* the period July 6, 1962 through August 15, 1962.

(vi) The term *occupation of Hiroshima or Nagasaki, Japan, by United States forces* means official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, which were required to perform or support military occupation functions such as occupation of territory, control of the population, stabilization of the government, demilitarization of the Japanese military, rehabilitation of the infrastructure or deactivation and conversion of war plants or materials.

(vii) Former prisoners of war who had an opportunity for exposure to ionizing radiation comparable to that of veterans who participated in the occupation of Hiroshima or Nagasaki, Japan, by United States forces shall include those who, at any time during the period August 6, 1945, through July 1, 1946:

- (A) Were interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki, or

- (B) Can affirmatively show they worked within the areas set forth in paragraph (d)(3)(vii)(A) of this section although not interned within those areas, or
- (C) Served immediately following internment in a capacity which satisfies the definition in paragraph (d)(3)(vi) of this section, or
- (D) Were repatriated through the port of Nagasaki. (Authority: 38 U.S.C. 1110, 1112, 1131)

(e) *Disease associated with exposure to certain herbicide agents.* If a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of §3.307(a)(6) are met even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of §3.307(d) are also satisfied.

AL amyloidosis

Chloracne or other acneform disease consistent with chloracne

Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes)

Hodgkin's disease

Ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and Prinzmetal's angina)

All chronic B-cell leukemias (including, but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia)

Multiple myeloma

Non-Hodgkin's lymphoma

Parkinson's disease

Acute and subacute peripheral neuropathy

Porphyria cutanea tarda

Prostate cancer

Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea)

Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma)

Note 1: The term *soft-tissue sarcoma* includes the following:

Adult fibrosarcoma

Dermatofibrosarcoma protuberans

Malignant fibrous histiocyoma

Liposarcoma

Leiomyosarcoma

Epithelioid leiomyosarcoma (malignant leiomyoblastoma)

Rhabdomyosarcoma

Ectomesenchymoma

Angiosarcoma (hemangiosarcoma and lymphangiosarcoma)
 Proliferating (systemic) angioendotheliomatosis
 Malignant glomus tumor
 Malignant hemangiopericytoma
 Synovial sarcoma (malignant synovioma)
 Malignant giant cell tumor of tendon sheath
 Malignant schwannoma, including malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas
 Malignant mesenchymoma
 Malignant granular cell tumor
 Alveolar soft part sarcoma
 Epithelioid sarcoma
 Clear cell sarcoma of tendons and aponeuroses
 Extraskeletal Ewing's sarcoma
 Congenital and infantile fibrosarcoma
 Malignant ganglioneuroma

Note 2: For purposes of this section, the term acute and subacute peripheral neuropathy means transient peripheral neuropathy that appears within weeks or months of exposure to an herbicide agent and resolves within two years of the date of onset.

Note 3: For purposes of this section, the term ischemic heart disease does not include hypertension or peripheral manifestations of arteriosclerosis such as peripheral vascular disease or stroke, or any other condition that does not qualify within the generally accepted medical definition of Ischemic heart disease.

[41 FR 55873, Dec. 23, 1976 and 47 FR 11656, Mar. 18, 1982, as amended at 47 FR 54436, Dec. 3, 1982; 49 FR 47003, Nov. 30, 1984; 53 FR 23236, June 21, 1988; 54 FR 26029, June 21, 1989; 57 FR 10426, Mar. 26, 1992; 58 FR 25564, Apr. 27, 1993; 58 FR 29109, May 19, 1993; 58 FR 41636, Aug. 5, 1993; 59 FR 5107, Feb. 3, 1994; 59 FR 25329, May 16, 1994; 59 FR 29724, June 9, 1994; 59 FR 35465, July 12, 1994; 60 FR 31252, June 14, 1995; 61 FR 57589, Nov. 7, 1996; 65 FR 43700, July 14, 2000; 66 FR 23168, May 8, 2001; 67 FR 3615, Jan. 25, 2002; 67 FR 67793, Nov. 7, 2002; 68 FR 42603, July 18, 2003; 68 FR 59542, Oct. 16, 2003; 69 FR 31882, June 8, 2004; 69 FR 60089, Oct. 7, 2004; 70 FR 37040, June 28, 2005; 71 FR 44918, Aug. 8, 2006; 73 FR 30485, May 28, 2008; 73 FR 31753, June 4, 2008; 74 FR 21260, May 7, 2009; 74 FR 44289, Aug. 28, 2009; 75 FR 53216, Aug. 31, 2010]

Supplement Highlights references: 7(6, 8), 10(1), 11(1), 12(1,5), 16(3), 24(3), 43(1), 46(2), 50(1), 56(2), 58(1), 60(2), 62(1), 64(1), 67(1), 72(2), 79(2), 80(1), 86(1), 89(1), 92(1).