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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 93

Covering period of *Federal Register* issues
through October 1, 2010

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Code of Federal Regulations

Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 93

5 October 2010

Covering the period of Federal Register issues
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October 5, 2010**

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B-11 to B-12	B-11 to B-12	Contents for Book B
3.303-1 to 3.303-2	3.303-1 to 3.303-2	Contents entry
3.309-7 to 3.309-8	3.309-7 to 3.309-8	§3.309
3.316-1 to 3.317-3	3.316-1 to <u>3.317-7</u>	§3.317
3.361-3 to 3.362-3	3.361-3 to 3.362-3	§3.362
3.800-1 to 3.800-4	3.800-1 to 3.800-4	§3.800
3.809-1 to 3-809a-1	3.809-1 to 3-809a-1	§§3.809 & 3.809a

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HIGHLIGHTS

Book B, Supplement No. 93 October 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 23 September 2010, the VA published a final rule, effective 25 October 2010, to adopt as final a proposed rule to amend the adjudication regulations regarding specially adapted housing and special home adaptation grants. Changes:

- In §3.362, revised paragraph (e);
- In §3.800, revised paragraph (a)(4);
- In §3.809, revised the introductory text and paragraphs (a) and (b); removed paragraph (c); and redesignated paragraph (d) as paragraph (c); and
- In §3.809a, revised the introductory text and paragraphs (a) and (b); and removed paragraph (c).

2. On 29 September 2010, the VA published a final rule, effective that same date, to amend its adjudication regulations concerning presumptive service connection for certain diseases in order to implement a decision of the Secretary of Veterans Affairs that there is a positive association between service in Southwest Asia during certain periods and the subsequent development of certain infectious diseases in response to an October 16, 2006, report of the National Academy of Sciences (NAS), titled *Gulf War and Health Volume 5: Infectious Diseases*. Change:

- Revised §3.317.

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 occurring in Persian Gulf veterans.....	3.317-1
3.318	Presumptive Service Connection for Amyotrophic Lateral Sclerosis	3.318-1
3.319	[Reserved	3.319-1
3.320	[Reserved	3.320-1
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

Ratings for special purposes

3.350	Special monthly compensation ratings	3.350-1
3.351	Special monthly dependency and indemnity compensation, death compensation, pension and spouse's compensation ratings	3.351-1
3.352	Criteria for determining need for aid and attendance and "permanently bedridden"	3.352-1
3.353	Determinations of incompetency and competency	3.353-1
3.354	Determinations of insanity.....	3.354-1
3.355	Testamentary capacity for insurance purposes	3.355-1
3.356	Conditions which determine permanent incapacity for self-support	3.356-1
3.357	Civil service preference ratings	3.357-1
3.358	Compensation for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training (§3.800)	3.358-1
3.359	Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.....	3.359-1
3.360	Service-connected health-care eligibility of certain persons administratively discharged under other than honorable condition.....	3.360-1
3.361	Benefits under 38 U.S.C. 1151(a) for additional disability or death due to	

B-12

	hospital care, medical or surgical treatment, examination, training and rehabilitation services, or compensated work therapy program	3.361-1
3.362	Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a)	3.362-1
3.363	Bar to benefits under 38 U.S.C. 1151	3.363-1

Rating considerations relative to specific diseases

3.370	Pulmonary tuberculosis shown by X-ray in active service	3.370-1
3.371	Presumptive service connection for tuberculous disease; wartime and service on or after January 1,1947	3.371-1
3.372	Initial grant following inactivity of tuberculosis	3.372-1
3.373	[Reserved]	
3.374	Effect of diagnosis of active tuberculosis	3.374-1
3.375	Determination of inactivity (complete arrest) in tuberculosis	3.375-1
3.376-3.377	[Reserved]	
3.378	Changes from activity in pulmonary tuberculosis pension cases	3.378-1
3.379	Anterior poliomyelitis.....	3.379-1
3.380	Diseases of allergic etiology	3.380-1
3.381	Service connection of dental conditions for treatment purposes	3.381-1
3.382	[Reserved]	
3.383	Special consideration for paired organs and extremities	3.383-1
3.384	Psychosis.....	3.384-1
3.385	Disability due to impaired hearing.....	3.385-1

Effective Dates

3.400	General.....	3.400-1
3.401	Veterans	3.401-1
3.402	Surviving spouse.....	3.402-1
3.403	Children	3.403-1
3.404	Parents.....	3.404-1
3.405	Filipino veterans and their survivors; benefits at the full-dollar rate.....	3.405-1

Apportionments

3.450	General.....	3.450-1
3.451	Special apportionments.....	3.451-1
3.452	Situations where benefits may be apportioned.	3.452-1
3.453	Veterans compensation or service pension or retirement pay.....	3.453-1
3.454	Veterans disability pension.....	3.454-1
3.458	Veteran’s benefits not apportionable.	3.458-1
3.459	Death compensation.....	3.459-1
3.460	Death pension.	3.460-1
3.461	Dependency and indemnity compensation.	3.461-1

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 occurring in Persian Gulf veterans.....	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

- (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 histiocytoma

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; 75 FR 54496, Sept. 8, 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).

§3.316 Claims based on chronic effects of exposure to mustard gas.

(a) Except as provided in paragraph (b) of this section, exposure to the specified vesicant agents during active military service under the circumstances described below together with the subsequent development of any of the indicated conditions is sufficient to establish service connection for that condition:

(1) Full-body exposure to nitrogen or sulfur mustard during active military service together with the subsequent development of chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: Nasopharyngeal; laryngeal; lung (except mesothelioma); or squamous cell carcinoma of the skin.

(2) Full-body exposure to nitrogen or sulfur mustard or Lewisite during active military service together with the subsequent development of a chronic form of laryngitis, bronchitis, emphysema, asthma or chronic obstructive pulmonary disease.

(3) Full-body exposure to nitrogen mustard during active military service together with the subsequent development of acute nonlymphocytic leukemia.

(b) Service connection will not be established under this section if the claimed condition is due to the veteran's own willful misconduct (See §3.301(c)) or there is affirmative evidence that establishes a nonservice-related supervening condition or event as the cause of the claimed condition (See §3.303).

[57 FR 33877, July 31, 1992, as amended at 59 FR 42499, Aug. 18, 1994]

Supplement *highlights* reference: 12(8)

§3.317 Compensation for certain disabilities occurring in Persian Gulf veterans.

(a) *Compensation for disability due to undiagnosed illness and medically unexplained chronic multisymptom illnesses.*

(1) Except as provided in paragraph (a)(7) of this section, VA will pay compensation in accordance with chapter 11 of title 38, United States Code, to a Persian Gulf veteran who exhibits objective indications of a qualifying chronic disability, provided that such disability:

(i) Became manifest either during active military, naval, or air service in the Southwest Asia theater of operations, or to a degree of 10 percent or more not later than December 31, 2011; and

(ii) By history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

(2) (i) For purposes of this section, a *qualifying chronic disability* means a chronic disability resulting from any of the following (or any combination of the following):

(A) An undiagnosed illness;

(B) The following medically unexplained chronic multisymptom illnesses that are defined by a cluster of signs or symptoms:

(1) Chronic fatigue syndrome;

(2) Fibromyalgia;

(3) Irritable bowel syndrome; or

(4) Any other illness that the Secretary determines meets the criteria in paragraph (a)(2)(ii) of this section for a medically unexplained chronic multisymptom illness.

(ii) For purposes of this section, the term *medically unexplained chronic multisymptom illness* means a diagnosed illness without conclusive pathophysiology or etiology that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities. Chronic multisymptom illnesses of partially understood etiology and pathophysiology will not be considered medically unexplained.

(3) For purposes of this section, “objective indications of chronic disability” include both “signs,” in the medical sense of objective evidence perceptible to an examining physician, and other, non-medical indicators that are capable of independent verification.

(4) For purposes of this section, disabilities that have existed for 6 months or more and disabilities that exhibit intermittent episodes of improvement and worsening over a 6-month period will be considered chronic. The 6-month period of chronicity will be measured from the earliest date on which the pertinent evidence establishes that the signs or symptoms of the disability first became manifest.

(5) A qualifying chronic disability referred to in this section shall be rated using evaluation criteria from part 4 of this chapter for a disease or injury in which the functions affected, anatomical localization, or symptomatology are similar.

(6) A qualifying chronic disability referred to in this section shall be considered service connected for purposes of all laws of the United States.

(7) Compensation shall not be paid under this section for a chronic disability:

(i) If there is affirmative evidence that the disability was not incurred during active military, naval, or air service in the Southwest Asia theater of operations; or

(ii) If there is affirmative evidence that the disability was caused by a supervening condition or event that occurred between the veteran's most recent departure from active duty in the Southwest Asia theater of operations and the onset of the disability; or

(iii) If there is affirmative evidence that the disability is the result of the veteran's own willful misconduct or the abuse of alcohol or drugs.

(b) *Signs or symptoms of undiagnosed illness and medically unexplained chronic multisymptom illnesses.* For the purposes of paragraph (a)(1) of this section, signs or symptoms which may be manifestations of undiagnosed illness or medically unexplained chronic multisymptom illness include, but are not limited to:

- (1) Fatigue.
- (2) Signs or symptoms involving skin.
- (3) Headache.
- (4) Muscle pain.
- (5) Joint pain.
- (6) Neurological signs or symptoms.
- (7) Neuropsychological signs or symptoms.
- (8) Signs or symptoms involving the respiratory system (upper or lower).
- (9) Sleep disturbances.
- (10) Gastrointestinal signs or symptoms.
- (11) Cardiovascular signs or symptoms.
- (12) Abnormal weight loss.
- (13) Menstrual disorders.

(c) *Presumptive service connection for infectious diseases.*

(1) Except as provided in paragraph (c)(4) of this section, a disease listed in paragraph (c)(2) of this section will be service connected if it becomes manifest in a veteran with a qualifying period of service, provided the provisions of paragraph (c)(3) of this section are also satisfied.

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

- (i) Brucellosis.
- (ii) *Campylobacter jejuni*.
- (iii) *Coxiella burnetii* (Q fever).
- (iv) Malaria.
- (v) *Mycobacterium tuberculosis*.
- (vi) Nontyphoid *Salmonella*.
- (vii) *Shigella*.
- (viii) Visceral leishmaniasis.
- (ix) West Nile virus.

(3) The diseases listed in paragraph (c)(2) of this section will be considered to have been incurred in or aggravated by service under the circumstances outlined in paragraphs (c)(3)(i) and (ii) of this section even though there is no evidence of such disease during the period of service.

(i) With three exceptions, the disease must have become manifest to a degree of 10 percent or more within 1 year from the date of separation from a qualifying period of service as specified in paragraph (c)(3)(ii) of this section. Malaria must have become manifest to a degree of 10 percent or more within 1 year from the date of separation from a qualifying period of service or at a time when standard or accepted treatises indicate that the incubation period commenced during a qualifying period of service. There is no time limit for visceral leishmaniasis or tuberculosis to have become manifest to a degree of 10 percent or more.

(ii) For purposes of this paragraph (c), the term qualifying period of service means a period of service meeting the requirements of paragraph (e) of this section or a period of active military, naval, or air service on or after September 19, 2001, in Afghanistan.

(4) A disease listed in paragraph (c)(2) of this section shall not be presumed service connected:

(i) If there is affirmative evidence that the disease was not incurred during a qualifying period of service; or

(ii) If there is affirmative evidence that the disease was caused by a supervening condition or event that occurred between the veteran's most recent departure from a qualifying period of service and the onset of the disease; or

(iii) If there is affirmative evidence that the disease is the result of the veteran's own willful misconduct or the abuse of alcohol or drugs.

(d) *Long-term health effects potentially associated with infectious diseases.*

(1) A report of the Institute of Medicine of the National Academy of Sciences has identified the following long-term health effects that potentially are associated with the infectious diseases listed in paragraph (c)(2) of this section. These health effects and diseases are listed alphabetically and are not categorized by the level of association stated in the National Academy of Sciences report (see Table to §3.317). If a veteran who has or had an infectious disease identified in column A also has a condition identified in column B as potentially related to that infectious disease, VA must determine, based on the evidence in each case, whether the column B condition was caused by the infectious disease for purposes of paying disability compensation. This does not preclude a finding that other manifestations of disability or secondary conditions were caused by an infectious disease.

(2) If a veteran presumed service connected for one of the diseases listed in paragraph (c)(2) of this section is diagnosed with one of the diseases listed in column “B” in the table within the time period specified for the disease in the same table, if a time period is specified or, otherwise, at any time, VA will request a medical opinion as to whether it is at least as likely as not that the condition was caused by the veteran having had the associated disease in column “A” in that same table.

Table to § 3.317—Long-Term Health Effects Potentially Associated With Infectious Diseases

<i>A</i>	<i>B</i> <i>Disease</i>
Brucellosis	<ul style="list-style-type: none"> • Arthritis. • Cardiovascular, nervous, and respiratory system infections. • Chronic meningitis and meningoencephalitis. • Deafness. • Demyelinating meningovascular syndromes. • Episcleritis. • Fatigue, inattention, amnesia, and depression. • Guillain-Barr syndrome. • Hepatic abnormalities, including granulomatous hepatitis. • Multifocal choroiditis. • Myelitis-radiculoneuritis. • Nummular keratitis. • Papilledema. • Optic neuritis. • Orchioepididymitis and infections of the genitourinary system. • Sensorineural hearing loss. • Spondylitis. • Uveitis.
Campylobacter jejuni	<ul style="list-style-type: none"> • Guillain-Barr syndrome <i>if manifest within 2 months of the infection.</i>

- Reactive Arthritis *if manifest within 3 months of the infection.*
 - Uveitis *if manifest within 1 month of the infection.*
- Coxiella burnetii (Q fever)
- Chronic hepatitis.
 - Endocarditis.
 - Osteomyelitis.
 - Post-Q-fever chronic fatigue syndrome.
 - Vascular infection.
- Malaria
- Demyelinating polyneuropathy.
 - Guillain-Barr syndrome.
 - Hematologic manifestations (particularly anemia after falciparum malaria and splenic rupture after vivax malaria).
 - Immune-complex glomerulonephritis.
 - Neurologic disease, neuropsychiatric disease, or both.
 - Ophthalmologic manifestations, particularly retinal hemorrhage and scarring.
 - *Plasmodium falciparum.*
 - *Plasmodium malariae.*
 - *Plasmodium ovale.*
 - *Plasmodium vivax.*
 - Renal disease, especially nephrotic syndrome.
- Mycobacterium tuberculosis
- Active tuberculosis.
 - Long-term adverse health outcomes due to irreversible tissue damage from severe forms of pulmonary and extrapulmonary tuberculosis and active tuberculosis.
- Nontyphoid Salmonella
- Reactive Arthritis *if manifest within 3 months of the infection.*
- Shigella
- Hemolytic-uremic syndrome *if manifest within 1 month of the infection.*
 - Reactive Arthritis *if manifest within 3 months of the infection.*
- Visceral leishmaniasis
- Delayed presentation of the acute clinical syndrome.
 - Post-kala-azar dermal leishmaniasis *if manifest within 2 years of the infection.*
 - Reactivation of visceral leishmaniasis in the context of future immunosuppression.
- West Nile virus
- Variable physical, functional, or cognitive disability.

(e) *Service.* For purposes of this section:

(1) The term *Persian Gulf veteran* means a veteran who served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War.

(2) The *Southwest Asia theater of operations* refers to Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations. (Authority: 38 U.S.C. 1117, 1118).

[60 FR 6665, Feb. 3, 1995, as amended at 62 FR 23139, Apr. 29, 1997; 63 FR 11122, Mar. 6, 1998; 66 FR 56615, Nov. 9, 2001; 67 FR 78979, Dec. 27, 2002; 68 FR 34541, June 10, 2003; 71 FR 75672, Dec. 18, 2006; 72 FR 68507, Dec. 5, 2007; 75 FR 59970, Sept. 29, 2010]

Supplement *Highlights* references: 14(5), 29(1), 48(2), 57(1), 74(3), 75(1), 77(1), 93(1).

Reserved

(e) *Department employees and facilities.*

(1) *A Department employee is an individual:*

- (i) Who is appointed by the Department in the civil service under title 38, United States Code, or title 5, United States Code, as an employee as defined in 5 U.S.C. 2105;
- (ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and
- (iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) *A Department facility* is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) *Activities that are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility.* The following are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of 38 U.S.C. 1151(a):

- (1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703.
- (2) Nursing home care furnished under 38 U.S.C. 1720.
- (3) Hospital care or medical services, including examination, provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction.

(g) *Benefits payable under 38 U.S.C. 1151 for a veteran's death.*

(1) *Death before January 1, 1957.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring before January 1, 1957, is death compensation. See §§3.5(b)(2) and 3.702 for the right to elect dependency and indemnity compensation.

(2) *Death after December 31, 1956.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring after December 31, 1956, is dependency and indemnity compensation. (Authority: 38 U.S.C. 1151)

[69 FR 46433, Aug. 3, 2004]

Supplement *Highlights* reference: 63(1).

§3.362 Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors.

(b) *Offset of veterans' awards of compensation.* If a veteran's disability is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any compensation awarded under 38 U.S.C. 1151(a) is the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees.

(c) *Offset of survivors' awards of dependency and indemnity compensation.* If a veteran's death is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a) to a survivor is only the amount of the judgment, settlement, or compromise representing damages for the veteran's death the survivor receives in an individual capacity or as distribution from the decedent veteran's estate of sums included in the judgment, settlement, or compromise to compensate for harm suffered by the survivor, plus the survivor's proportional share of attorney fees.

(d) *Offset of structured settlements.* This paragraph applies if a veteran's disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered on or after December 1, 1962.

(1) *The amount to be offset.* The amount to be offset under 38 U.S.C. 1151(b) from benefits awarded under 38 U.S.C. 1151(a) is the veteran's or survivor's proportional share of the cost to the United States of the settlement or compromise, including the veteran's or survivor's proportional share of attorney fees.

(2) *When the offset begins.* The offset of benefits awarded under 38 U.S.C. 1151(a) begins the first month after the structured settlement or structured compromise has become final that such benefits would otherwise be paid. (Authority: 38 U.S.C. 1151)

(e) *Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39.*

(1) If a judgment, settlement, or compromise covered in paragraphs (b) through (d) of this section becomes final on or after December 10, 2004, and includes an amount that is specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapter 21 (38 CFR 3.809 and 3.809a) or 38 U.S.C. chapter 39 (38 CFR 3.808), and if VA awards 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39 benefits after the date on which the judgment, settlement, or compromise becomes final, the amount of the award will be reduced by the amount received under the judgment, settlement, or compromise for the same purpose.

(2) If the amount described in paragraph (e)(1) of this section is greater than the amount of an award under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39, the excess amount received under the judgment, settlement, or compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11. (Authority: 38 U.S.C. 1151)

[69 FR 46433, Aug. 3, 2004, as amended at 71 FR 44918, Aug. 8, 2006; 75 FR 57861, Sept. 23, 2010]

Supplement *Highlights* references: 63(1), 72(2), 93(1).

Reserved

Special Benefits

3.800	Disability or death due to hospitalization, etc.....	3.800-1
3.801	Special acts	3.801-1
3.802	Medal of Honor.....	3.802-1
3.803	Naval pension	3.803-1
3.804	Special allowance under 38 U.S.C 1312.	3.804-1
3.805	Loan guaranty for surviving spouses; certification.....	3.805-1
3.806	Death gratuity; certification	3.806-1
3.807	Dependents' educational assistance; certification	3.807-1
3.808	Automobiles or other conveyances; certification	3.808-1
3.809	Specially adapted housing under 38 U.S.C. 801(a)	3.809-1
3.809a	Special home adaptation grants under 38 U.S.C. 801(b)	3.809a-1
3.810	Clothing allowance	3.810-1
3.811	Minimum income annuity.....	3.811-1
3.812	Special allowance payable under section 156 of Pub. L. 97-377	3.812-1
3.813	Interim benefits for disability or death due to chloracne or porphyria cutanea tarda.....	3.813-1
3.814	Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran.....	3.814-1
3.815	Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.....	3.815-1
3.816	Awards under the Nehmer Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure.....	3.816-1

§3.800 Disability or death due to hospitalization, etc.

This section applies to claims received by VA before October 1, 1997. For claims received by VA on or after October 1, 1997, see §§3.362 and 3.363.

(a) Where disease, injury, death or the aggravation of an existing disease or injury occurs as a result of having submitted to an examination, medical or surgical treatment, hospitalization or the pursuit of a course of vocational rehabilitation under any law administered by the Department of Veterans Affairs and not the result of his (or her) own willful misconduct, disability or death compensation, or dependency and indemnity compensation will be awarded for such disease, injury, aggravation, or death as if such condition were service connected. The commencing date of benefits is subject to the provisions of §3.400(i). (Authority: 38 U.S.C. 1151)

(1) Benefits under paragraph (a) of this section will be in lieu of any benefits the veteran may be entitled to receive under the Federal Employees' Compensation Act inasmuch as concurrent payments are prohibited. (See §3.708.)

(2) Where any person is awarded a judgment on or after December 1, 1962, against the United States in a civil action brought pursuant to 28 U.S.C. 1346(b), or enters into a settlement or compromise on or after December 1, 1962, under 28 U.S.C. 2672 or 2677, by reason of a disability, aggravation or death within the purview of this section, no compensation or dependency and indemnity compensation shall be paid to such person for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the total amount of benefits which would be paid except for this provision equals the total amount included in such judgment, settlement, or compromise. The provisions of this paragraph do not apply, however, to any portion of such compensation or dependency and indemnity compensation payable for any period preceding the end of the month in which such judgment, settlement or compromise becomes final. (Authority: 38 U.S.C. 501(a))

(3) If an administrative award was made or a settlement or compromise became final before December 1, 1962, compensation or dependency and indemnity compensation may not be authorized for any period after such award settlement, or compromise whether before or after December 1, 1962. There is no bar to payment of compensation or dependency and indemnity compensation and no set-off because of a judgment which became final before December 1, 1962, unless specified in the terms of the judgment.

(4) *Offset of award of benefits under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39.*

(i) If a judgment, settlement, or compromise covered by paragraph (a)(2) of this section becomes final on or after December 10, 2004, and includes an amount that is specifically designated for a purpose for which benefits are provided under 38 U.S.C. chapter 21 (38 CFR 3.809 and 3.809a) or 38 U.S.C. chapter 39 (38 CFR 3.808), and if VA awards 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39 benefits after the date on which the judgment, settlement, or compromise becomes final, the amount of the award will be reduced by the amount received under the judgment, settlement, or compromise for the same purpose.

(ii) If the amount described in paragraph (a)(4)(i) of this section is greater than the amount of an award under 38 U.S.C. chapter 21 or 38 U.S.C. chapter 39, the excess amount received under the judgment, settlement, or compromise will be offset against benefits otherwise payable under 38 U.S.C. chapter 11. (Authority: 38 U.S.C. 1151(b)(2))

(b) (1) If death occurred prior to January 1, 1957, the benefit payable will be death compensation. See §§3.5(b)(2) and 3.702 as to right of election to dependency and indemnity compensation.

(2) If death occurs on or after January 1, 1957, the benefit payable will be dependency and indemnity compensation.

[26 FR 1604, Feb. 24, 1961, as amended at 27 FR 11892, Dec. 1, 1962; 29 FR 16252, Dec. 4, 1964; 39 FR 34532, Sept. 26, 1974; 53 FR 23237, June 21, 1988; 63 FR 45007, Aug. 24,

1998; 64 FR 1132, Jan. 8, 1999; 69 FR 46435, Aug. 3, 2004; 71 FR 44919, Aug. 8, 2006; 75 FR 57861, Sept. 23, 2010]

Cross references: Claims; injury due to hospital treatment, etc. See §3.154. Effective dates; disability or death due to hospitalization, etc. See §3.400(i).

Supplement *Highlights* references: 33(1), 36(1), 63(1), 72(2), 93(1).

Reserved

§3.809 Specially adapted housing under 38 U.S.C. 2101(a).

A certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a) or 2101A(a) may be extended to a veteran or a member of the Armed Forces serving on active duty if the following requirements are met:

(a) *Eligibility.* A veteran must have had active military, naval, or air service after April 20, 1898. Benefits are not restricted to veterans with wartime service. On or after December 16, 2003, the benefit under this section is also available to a member of the Armed Forces serving on active duty.

(b) *Disability.* A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total. In either case, the disability must be due to:

(1) The loss, or loss of use, of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or

(2) Blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity, or

(3) The loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or;

(4) The loss or loss of use of one lower extremity together with the loss or loss of use of one upper extremity which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or;

(5) The loss or loss of use of both upper extremities such as to preclude use of the arms at or above the elbow, or

(6) Full thickness or subdermal burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk.

(c) *“Preclude locomotion.”* This term means the necessity for regular and constant use of a wheelchair, braces, crutches or canes as a normal mode of locomotion although occasional locomotion by other methods may be possible. (Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A)

[26 FR 1606, Feb. 24, 1961, as amended at 34 FR 9560, June 18, 1969; 43 FR 14018, Apr. 4, 1978; 46 FR 47543, Sept. 29, 1981; 75 FR 57861, Sept. 23, 2010]

Cross reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§36.4400 through 36.4410 of this chapter.

Supplement *Highlights* reference: 93(1)

Next Section is §3.809a

Reserved

§3.809a Special home adaptation grants under 38 U.S.C. 2101(b).

A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, on or after October 28, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 2101(b) or 2101A(a) may be issued to a veteran who served after April 20, 1898, or to a member of the Armed Forces serving on active duty who is eligible for the benefit under this section on or after December 16, 2003, if the following requirements are met:

(a) The member of the Armed Forces serving on active duty or veteran is not entitled to a certificate of eligibility for assistance in acquiring specially adapted housing under §3.809 nor had the member of the Armed Forces serving on active duty or veteran previously received assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a). A member of the Armed Forces serving on active duty or veteran who first establishes entitlement under this section and who later becomes eligible for a certificate of eligibility under §3.809 may be issued a certificate of eligibility under §3.809.

(b) A member of the Armed Forces serving on active duty must have a disability rated as permanent and total that was incurred or aggravated in line of duty in active military, naval, or air service. A veteran must be entitled to compensation under chapter 11 of title 38, United States Code, for a disability rated as permanent and total. In either case, the disability must:

(1) Include the anatomical loss or loss of use of both hands, or

(2) Be due to:

(i) Blindness in both eyes with 5/200 visual acuity or less, or

(ii) Deep partial thickness burns that have resulted in contractures with limitation of motion of two or more extremities or of at least one extremity and the trunk, or

(iii) Full thickness or subdermal burns that have resulted in contracture(s) with limitation of motion of one or more extremities or the trunk, or

(iv) Residuals of an inhalation injury (including, but not limited to, pulmonary fibrosis, asthma, and chronic obstructive pulmonary disease). (Authority: 38 U.S.C. 1151(c)(1), 2101, 2101A, 2104)

Cross-Reference: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§36.4400 through 36.4410 of this chapter.

[46 FR 47543, Sept. 29, 1981, as amended at 53 FR 23237, June 21, 1988; 75 FR 57861, Sept. 23, 2010]

Supplement *Highlights* reference: 93(1)

Next Section is §3.810