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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 89

Covering period of *Federal Register* issues
through September 5, 2009

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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. 89

5 September 2009

Covering the period of Federal Register issues
through September 5, 2009

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FILING INSTRUCTIONS

**Rook B, Supplement No. 89
September 5, 2009**

*Remove these
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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. 89 September 5, 2009

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 53.263. 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 28 August 2009, the VA published a final rule, effective 28 September 2009, to establish a presumption of service connection for osteoporosis for former Prisoners of War who were detained or interned for at least 30 days and whose osteoporosis is at least 10 percent disabling. Changes:

- In 53.309, revised paragraphs (c)(1) and (c)(2)(ii).

§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 53.307 or §3.308 following service in a period of war or following peacetime service provided the rebuttable presumption provisions of 53.307 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 53.307 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) (I) 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 Canniltin 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. 7384l(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 II/ 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
- Chronic lymphocytic leukemia
- Multiple myeloma
- Non-Hodgkin's lymphoma
- 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

Extraskelatal 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.

[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]

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).