

HOUSE OF REPRESENTATIVES

Under clause 2 of Rule XIV, executive communications were taken from the Speaker's table as follows:

COMMUNICATION 03160 from the

Director of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs,

transmitting

the Department's final rule - Disease Associated With Exposure to Certain Herbicide Agents: Peripheral Neuropathy (RIN: 2900-AO32) September 12, 2013, pursuant to 5 U.S.C. 801(a) (1) (A).

Referred to the Committee on Veterans' Affairs. September 30, 2013.



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Vets AFS
FD3356

Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☒ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

Department of Veterans Affairs

Veterans Benefits Administration

3. Rule Title

Disease Associated With Exposure to Certain Herbicide Agents: Peripheral Neuropathy

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) 2900-AO32

5. Major Rule ☐ Non-major Rule ☒

6. Final Rule ☒ Other ☐

7. With respect to this rule, did your agency solicit public comments? Yes ☒ No ☐ N/A ☐

8. Priority of Regulation (fill in one)

☒ Economically Significant; or
Significant; or
Substantive, Nonsignificant

☐ Routine and Frequent or
Informational/Administrative/Other
(Do not complete the other side
of this form if filled in above.)

9. Effective Date (if applicable) Effective the date of publication in the Federal Register.

10. Is a concise Summary of the Rule provided? Yes ☐ No ☒

Submitted by: Robert C. McFetridge (signature)

Name: Robert C. McFetridge

Title: Director of Regulation Policy and Management

Office of the General Counsel

2013 SEP 12 PM 9:41
RECEIVED
LEGISLATIVE COUNCIL
U.S. HOUSE OF REPRESENTS.

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

11/09/99

Yes No N/A

- A. With respect to this rule, did your agency prepare an analysis of costs and benefits? ☒ Yes ☐ No ☐ N/A
- B. With respect to this rule, at the final rulemaking stage, did your agency
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)? ☒ Yes ☐ No ☐ N/A
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)? ☐ Yes ☒ No ☐ N/A
- C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995? ☒ Yes ☐ No ☐ N/A
- D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)? ☐ Yes ☐ No ☒ N/A
- E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995? ☐ Yes ☒ No ☐ N/A
- F. Did you discuss any of the following in the preamble to the rule?
- E.O. 13132, Federalism ☐ Yes ☒ No ☐ N/A
- E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights ☐ Yes ☒ No ☐ N/A
- E.O. 12866, Regulatory Planning and Review ☒ Yes ☐ No ☐ N/A
- E.O. 12988, Civil Justice Reform ☐ Yes ☒ No ☐ N/A
- E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks ☐ Yes ☒ No ☐ N/A
- Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

38 CFR Part 3

RIN 2900-AO32

Disease Associated With Exposure to Certain Herbicide Agents: Peripheral Neuropathy

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as a final rule its proposal to amend its adjudication regulations by clarifying and expanding the terminology regarding presumptive service connection for acute and subacute peripheral neuropathy associated with exposure to certain herbicide agents. This amendment implements a decision by the Secretary of Veterans Affairs based on findings from the National Academy of Sciences (NAS) Institute of Medicine report, Veterans and Agent Orange: Update 2010. It also amends VA's regulation governing retroactive awards for certain diseases associated with herbicide exposure as required by court orders in the class action litigation of Nehmer v. U.S. Department of Veterans Affairs.

DATES: Effective Date: This rule is effective [insert date of publication in the FEDERAL REGISTER].

Applicability Date: This final rule shall apply to claims received by VA on or after [insert date of publication in the FEDERAL REGISTER] and to claims pending before VA on that date. Additionally, VA will apply this rule in readjudicating certain previously denied claims as required by court orders in Nehmer v. Department of Veterans Affairs.

FOR FURTHER INFORMATION CONTACT: Dr. Nick Olmos-Lau, Medical Officer, Regulations Staff (211D), or Nancy Copeland, Consultant, Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-9700. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: As required by the Agent Orange Act of 1991, codified in part at 38 U.S.C. 1116, the Department of Veterans Affairs (VA) asks the National Academy of Sciences (NAS) to evaluate scientific literature regarding possible associations between the occurrence of a disease in humans and exposure to an herbicide agent. Congress mandated that NAS to the extent possible determine (1) Whether there is a statistical association between exposure to herbicide agents and the illness, taking into account the strength of the scientific evidence and the appropriateness of the scientific methodology used to detect the association; (2) the increased risk of illness among individuals exposed to herbicide agents during service in the Republic of Vietnam during the Vietnam era; and (3) whether a plausible biological mechanism or other evidence

of a causal relationship exists between exposure to the herbicides and the illness. That statute provides that whenever the Secretary determines, based on sound medical and scientific evidence, that a positive association (i.e., the credible evidence for the association is equal to or outweighs the credible evidence against the association) exists between an illness and exposure to herbicide agents in an herbicide used in support of U.S. military operations in the Republic of Vietnam, the Secretary will publish regulations establishing presumptive service connection for that illness. On August 10, 2012, VA published a proposed rule in the Federal Register (77 FR 47795), to amend its adjudication regulations regarding presumptive service connection for acute and subacute peripheral neuropathy associated with exposure to certain herbicide agents. Specifically, based on findings from the September 29, 2010 NAS report titled, Veterans and Agent Orange: Update 2010 (hereinafter "Update 2010"), which concluded that early-onset peripheral neuropathy associated with herbicide exposure is not necessarily a transient condition, we proposed replacing the terms "acute and subacute" in 38 CFR 3.307(a)(6)(ii) and 38 CFR 3.309(e) with the term "early-onset" and removing the Note to 38 CFR 3.309(e) requiring that the neuropathy be "transient." This change would remove the requirement that acute and subacute peripheral neuropathy appear "within weeks or months" after exposure and that the condition resolve within two years of the date of onset in order for the presumption to apply.

This amendment clarifies that VA will not deny presumptive service connection for early-onset peripheral neuropathy solely because the condition persisted for more than two years after the date of the last herbicide exposure. However, it does not change the requirement that peripheral neuropathy must have become manifest to a degree of ten percent or more within one year after the veteran's last in-service exposure in order to qualify for the presumption of service connection. In Update 2010, NAS found that evidence did not support an association between herbicide exposure and delayed-onset peripheral neuropathy, which NAS defined as having its onset more than one year after exposure.

We also proposed amending 38 CFR 3.816(b)(2), the regulation governing retroactive awards for certain diseases associated with herbicide exposure as required by court orders in the class action litigation in Nehmer v. U.S. Veterans' Admin. 712 F. Supp. 1404 (N.D. Cal. 1989) (incorporating Final Stipulation and Order, May 14, 1991) (Nehmer I), enforced, Nehmer v. U.S. Veterans' Admin., 32 F. Supp. 2d 1175 (N.D. Cal. 1999) (Nehmer II), aff'd sub nom., Nehmer v. Veterans' Admin. of Gov't of U.S., 284 F.3d 1158 (9th Cir. 2002) (Nehmer III); Nehmer v. U.S. Dep't of Veterans Affairs, 494 F.3d 846, 850 (9th Cir. 2007) (Nehmer IV).

Currently, the regulation states that the Nehmer court orders apply to presumptions established before October 1, 2002, and lists the diseases covered by those presumptions, including “acute and subacute peripheral neuropathy.” The courts invalidated the date restriction and corresponding listing of presumptive conditions because they were not inclusive of all the conditions VA has determined to be presumptively service connected based on herbicide exposure under the Agent Orange Act of 1991. Rather than revising and maintaining separate lists of diseases covered, VA is removing the list of conditions in 38 CFR 3.816 and the October 1, 2002, date and inserting language clarifying that the Nehmer court orders apply to the presumptions listed in 38 CFR 3.309(e).

We provided a 60-day comment period and interested persons were invited to submit comments on or before October 9, 2012. We received 111 written comments, including 3 from Veterans Service Organizations and advocacy groups.

The majority of commenters expressed support for VA’s proposed amendments. However, many felt that the action does not go far enough and urged VA to eliminate the requirement that peripheral neuropathy manifest to a degree of at least ten percent disabling within the first year after the veteran’s last in-service exposure to herbicides. VA appreciates these comments. However, in

Update 2010, NAS concluded that there is inadequate or insufficient evidence to determine whether there is an association between exposure to herbicides (including Agent Orange) and delayed-onset chronic neuropathy. NAS reaffirmed the conclusion in each of its prior reports that there are no data to suggest that exposure to herbicides can lead to the development of delayed-onset chronic peripheral neuropathy many years after termination of exposure in those who did not originally experience early-onset neuropathy. NAS went on to state that “[t]he committee considers a neuropathy to be early onset if abnormalities appear within a year after external exposure has ended.” Therefore, we make no changes based on these comments.

Several commenters advocated that VA expand the list of presumptive conditions for veterans exposed to Agent Orange. Some asserted that veterans exposed to Agent Orange during service should be granted entitlement to service connection for all disabilities they currently have and one commenter stated that all Vietnam era veterans should be automatically entitled to 100 percent compensation. A service organization urged that hypertension be added based on the benefit of the doubt doctrine. The organization contends that, because some studies link hypertension to herbicide exposure while others do not, the evidence is in equipoise and veterans should be given the benefit of the doubt. Another service organization asserted that VA’s proposed rule fails to provide the most favorable interpretation of the existing science.

In response, VA notes that the Agent Orange Act of 1991, codified at 38 U.S.C. 1116, established a deliberate process for determining when a disease should be added. Specifically, the Secretary must determine, based on sound medical and scientific evidence, that there is a “positive association” between an illness and exposure to herbicide agents used in support of U.S. military operations in the Republic of Vietnam. The Secretary must take into account reports from NAS and “all other sound medical and scientific information and analyses available to the Secretary.” In evaluating any study, the Secretary must “take into consideration whether the results are statistically significant, are capable of replication, and withstand peer review.” The law further provides that a positive association exists if “the credible evidence for the association is equal to or outweighs the credible evidence against the association.” VA adheres to this process. Following the issuance of Update 2010, VA issued a negative notice on August 10, 2012, explaining why no additional diseases were being added to its list of conditions associated with exposure to herbicides in Vietnam (77 FR 47924). This notice provided an explanation of VA’s decision to not create presumptions of service connection for a variety of other diseases, including hypertension. This rulemaking is limited to clarifying and expanding the terminology regarding presumptive service connection for acute and subacute peripheral neuropathy associated with exposure to certain herbicides. See 77 FR 47795. As such, the addition of diseases other than early-onset peripheral neuropathy to VA’s presumptive list is beyond the scope of this rulemaking. Therefore, we make no changes based on these comments.

Three commenters, including one service organization, urged VA to recognize chronic delayed-onset peripheral neuropathy as due to Agent Orange exposure when no other cause can be established. As explained earlier, NAS found that there are no data to suggest that exposure to herbicides can lead to the development of delayed-onset chronic peripheral neuropathy many years after termination of exposure in those who did not originally experience early-onset neuropathy. NAS also noted that some neuropathies are often labeled as idiopathic or of unknown or spontaneous origin because, in 30 percent of the cases of chronic neuropathies, there is no apparent cause. Therefore, we make no changes based on these comments.

We received many comments from veterans who served in the Republic of Vietnam regarding their individual claims for veterans benefits and comments from family members and friends in support of veterans who served in the Republic of Vietnam. These comments are beyond the scope of this rulemaking. Therefore, VA makes no changes based on these comments.

Some commenters, including one service organization, support the rule but advocate for more research and point to other entities and studies as additional resources. The service organization also urged VA to fund well-designed epidemiologic studies of Vietnam veterans. VA acknowledges the need for ongoing research and continues to carefully evaluate ongoing NAS

herbicide exposure studies, medical and scientific research findings, discoveries, and recommendations as they occur. In addition, VA conducts ongoing research on the health effects of herbicides and supports epidemiologic studies of Vietnam veterans through grants to outside scientists. We make no changes based on these comments.

One commenter disagreed with VA's proposed rule, stating that he is not a veteran and that he was diagnosed with peripheral neuropathy as the result of shingles. VA recognizes that peripheral neuropathy is not unique to veterans or exposure to Agent Orange. However, as explained above, pursuant to the Agent Orange Act of 1991, whenever the Secretary determines, based on sound medical and scientific evidence, that there is a positive association (i.e., the credible evidence for the association is equal to or outweighs the credible evidence against the association) between an illness and exposure to herbicide agents, the Secretary will publish regulations establishing presumptive service connection for that illness. Thus, VA makes no changes based on this comment.

One commenter suggested that VA should add a regulatory "discovery rule" to the current requirement that peripheral neuropathy become manifest to a degree of ten percent or more within one year after the veteran's last in-service exposure. The commenter clarified that his proposed "discovery rule" would provide for a tolling of the current one-year manifestation requirement until after the veteran is first diagnosed with peripheral neuropathy (i.e., the veteran first

“discovers” that he or she has peripheral neuropathy). The commenter asserted that adding a “discovery rule” to the one-year period would give relief to veterans with peripheral neuropathy whose symptoms were not recognized until many years after exposure while also balancing cost concerns. In response, VA notes that the existing statutory and regulatory framework governing the administration of VA compensation benefits does not limit the time period during which veterans may file claims for benefits. Moreover, whether a condition became manifest to a degree of ten percent or more within one year of the veteran’s last in-service exposure to herbicides is a factual determination that must be made on a case-by-case basis, considering all the available evidence. Additionally, even if a veteran is not able to avail himself of the presumption of service connection, he may still be able to establish service connection on a direct basis under 38 U.S.C. 1110 and 38 CFR 3.303(d). To the extent the comment recommends changes to VA’s overall scheme for administering benefits, such changes would require legislation which is beyond the scope of this rulemaking. Thus, VA makes no changes based on this comment.

One commenter stated that he had type 2 diabetes and asked why a time limit is being imposed on the onset of peripheral neuropathy, given that it may result from type 2 diabetes that arises many years after the initial diagnosis of that condition. Several other commenters also stated that they had diabetes and asserted that they should be able to receive compensation for both diabetes and peripheral neuropathy. These commenters may be confused as to how the

peripheral neuropathy presumption relates to cases where peripheral neuropathy arises secondary to service-connected type 2 diabetes. In such cases, service connection can be awarded under 38 CFR 3.310 if the peripheral neuropathy is found to be secondary to service-connected type 2 diabetes. As a result, the “early onset” time limitation contained in the amended 38 CFR 3.307(a)(6)(ii), would not apply to these cases.

One organization commented that there is a disparity between the law and actual practice and stated that the Board of Veterans’ Appeals has considered the latent nature of peripheral neuropathy and found in favor of disabled veterans on many occasions. Decisions of the Board are not considered precedential and are binding only with regard to the specific case addressed in each decision. Moreover, as discussed above, determinations regarding entitlement to service connection are made on an individual basis, dependent on the facts of each case. Even if a veteran is unable to avail himself of the presumption afforded by 38 U.S.C. 1116, he may still be able to establish entitlement on a direct basis. This is particularly important when there is an approximate balance of positive and negative evidence in a claimant’s particular case because a claimant is entitled to the benefit of the doubt. (38 U.S.C. 5107(b)) The fact that VA has made favorable determinations underscores its adherence to this principle when deciding the merits of each case. VA makes no changes based on this comment.

One organization stated that using the term “early-onset” in 38 CFR 3.307(a)(6)(ii) is unnecessary and confusing because the requirement in that regulation that the disease be manifest to a ten percent degree within one year of exposure is sufficient to indicate that the presumption applies only to early-onset peripheral neuropathy. However, we believe that using the term “early-onset peripheral neuropathy” is necessary and helpful in 38 CFR 3.309(e), which lists the diseases presumptively associated with herbicide exposure, and we believe that using consistent terminology in 38 CFR 3.307(a)(6)(ii) and 3.309(e) will minimize confusion rather than creating it. The commenter also asserted that the changes to 38 CFR 3.816(b)(2) are unrelated to NAS’ findings regarding peripheral neuropathy and that cross-referencing between 38 CFR 3.816 and 38 CFR 3.309 appears to obfuscate the diseases that receive a presumptive service connection and may serve to undermine the Agent Orange Act of 1991. We have considered the language used and believe it is clear and accurate. As explained in the proposed rule, we are revising 3.816(b)(2) to comport with the Nehmer court orders and believe that cross-referencing 38 CFR 3.816 and 38 CFR 3.309 will simplify updating the list of diseases covered. This revision will clarify that Nehmer court orders apply to all presumptive conditions covered by § 3.309(e). As such, we make no change based on these comments.

Based on the rationale set forth in the proposed rule and this document, we are adopting the proposed rule as a final rule with no changes.

Administrative Procedure Act

The Secretary finds good cause to dispense with the delayed-effective-date requirement of 5 U.S.C. 553(d) because 38 USC 1116 (c)(2) requires that final regulations establishing presumptions of service connection for diseases associated with exposure to certain herbicide agents “shall be effective on the date of issuance.”

Paperwork Reduction Act

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule will not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including

potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866 because it raises novel legal or policy issues.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www1.va.gov/orpm/>, by following the link for "VA Regulations Published."

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program number and title for this rule is 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority


The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the

Department of Veterans Affairs. Jose D. Rojas, Interim Chief of Staff, approved this document on April 22, 2013, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: September 3, 2013


Robert C. McFetridge,
Director of Regulations Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 38 CFR part 3 as follows:

PART 3 — ADJUDICATION

Subpart A-Pension, Compensation, and Dependency and Indemnity

Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.307(a)(6)(ii), remove the term “acute and subacute peripheral neuropathy” and add, in its place, “early-onset peripheral neuropathy”.

3. Amend § 3.309(e) by:

- a. Removing the term “Acute and subacute peripheral neuropathy” and adding, in its place, “Early-onset peripheral neuropathy”.

- b. Removing Note 2.

- c. Redesignating Note 3 as Note 2.

4. Amend § 3.816(b)(2) by:

- a. In the introductory text, removing “before October 1, 2002.”

b. In the introductory text, removing the period after "chloracne" and all that follows through the end of the introductory text and adding, in its place, ", as provided in § 3.309(e)."

c. Removing paragraphs (i) through (ix).



**DEPARTMENT OF VETERANS AFFAIRS
Regulation Policy and Management (02REG)
Office of the General Counsel
Washington, D.C. 20420**

In Reply Refer to: 02REG

Date: June 25, 2013

From: Chief Impact Analyst (02REG)

Subj: Economic Impact Analysis for RIN 2900-AO32 Disease Associated with
Exposure to Certain Herbicide Agents: Peripheral Neuropathy.

To: Director, Regulations Management (02REG)

I have reviewed this rulemaking package and determined the following.

1. This rulemaking will not have an annual effect on the economy of \$100 million or more, as set forth in Executive Order 12866.
2. This rulemaking will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601-612.
3. This rulemaking will not result in the expenditure of \$100 million or more by State, local, and tribal governments, in the aggregate, or by the private sector, under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532.
4. Attached please find the relevant cost impact documents.

(Attachment 1): Agency's Impact Analysis, dated February 8, 2012

(Attachment 2): CFO Concurrence memo, dated January 19, 2012

Approved by:

Michael P. Shores (02REG)
Chief, Impact Analyst
Regulation Policy & Management
Office of the General Counsel

(Attachment 1)

Impact Analysis for RIN 2900-AO32

Title of Regulation: Disease Associated with Exposure to Certain Herbicide Agents: Peripheral Neuropathy

Purpose: To determine the economic impact of this rulemaking.

Background: This rulemaking is the result of a decision by the Secretary of Veterans Affairs to clarify and expand the terminology regarding presumption of service connection for peripheral neuropathy associated with service in the Republic of Vietnam and the subsequent development of that condition.

This decision is based on findings from the September 29, 2011, public release of the National Academy of Sciences (NAS) report titled: Veterans and Agent Orange: Update 2010. NAS concluded that there is evidence of early-onset peripheral neuropathy and "limited or suggestive evidence of an association" between exposure to chemicals of interest and early-onset peripheral neuropathy that may be persistent. NAS also recognized that the diagnosis of acute-onset neuropathy after exposure was more significant than that of a transient nature, and as such, NAS decided to remove the term "transient" as imprecise.

In order to align the adjudication regulations with the Secretary's determination, VA proposes to amend 38 C.F.R. §3.309(e) by replacing the terms "acute and subacute," with the term "early-onset" and remove the Note to the regulation requiring that the neuropathy be "transient." Accordingly, VA proposes to remove the current requirement that acute and subacute peripheral neuropathy appear "within weeks or months" after exposure and remove the requirement that the condition resolve within two years of the date of onset in order for the presumption to apply.

For purposes of consistency, VA further proposes to replace the terms "acute and Subacute" with "early-onset" in 38 C.F.R. §3.307(a)(6)(ii) requiring peripheral neuropathy to become manifest to a degree of 10 percent or more within one year after the last date of herbicide exposure in order to be subject to presumptive service connection under 38 C.F.R. §3.309(e) and in §3.816(b)(2)(v) pertaining to effective-date rules required by court orders in Nehmer.

Methodology/Assumptions: To estimate the transfer from the federal government to Veterans that is brought about by this rulemaking, we considered retroactive payments for Veterans, increases for Veterans currently on the compensation rolls, and potential accessions for Veterans. Peripheral Neuropathy is not considered a terminal condition; therefore, survivor caseload and obligations would not be impacted.

Vietnam Veterans Previously Denied

According to the Office of Performance Analysis and Integrity (PA&I), there are 67,841 Vietnam Veterans previously denied service connection for peripheral neuropathy and 58,299 are living Vietnam Veterans. Of the previously denied Veterans, 47,620 or approximately 70 percent are currently on the rolls for other service-connected disabilities. The remaining 10,679 Veterans are currently not on the compensation rolls. Compensation Service assumes that Veterans will receive an average 10 percent degree of disability rating for peripheral neuropathy. An increase of a 10 percent rating will result in an increase in payment for those Veterans currently on the rolls and rated zero to 50 percent based on the combined rating table. Compensation Service assumes that approximately 50 percent of the Veterans currently on the rolls with a combined rating disability at 60 to 90 percent will likely have a previous 10 percent rating that did not increase their benefit payment. If they receive an additional 10 percent for peripheral neuropathy it will result in a payment increase based on the combined rating table.

Under current regulations, 38 CFR 3.307(a)(6)(ii), Veterans who have the disease manifest to a compensable degree within one year of the last date of exposure and have medical evidence that supports this are eligible to receive service-connection for peripheral neuropathy. Compensation Service assumes that one percent of Veterans with peripheral neuropathy will meet service-connection eligibility requirements. As a result of this rulemaking, these Veterans who were previously denied will be eligible to receive retroactive payments under the provisions of 38 C.F.R. 3.816 (*Nehmer*).

To determine the caseload for previously denied Veterans currently not on the rolls, we applied the one percent eligibility to the 10,679, and applied mortality rates. Mortality rates from the Centers of Disease Control (CDC) for the male population at age 66 (0.020089) were applied to the 107 (10,679 multiplied by 1 percent) previously denied Veterans that are currently not on the rolls resulting in an estimated 105 Veterans that will be granted and paid retroactively. An estimated 105 Veterans currently not on the rolls will be granted benefits and be paid retroactively. Based on actual experience in FY 2011 for the other Agent Orange presumptive conditions, we estimate an average retroactive payment of approximately 3.19 years for Veterans whose claims were previously denied. The retroactive payment of 3.19 years was based on the most recent Agent Orange presumptive conditions related experience in FY 2011 since there is insufficient data available suggesting when Veterans were denied for peripheral neuropathy. It was also based on knowing that since 1991, the VA has been required to follow special retroactive benefit rules whenever it grants a disability compensation claim under the VA's Agent Orange rules as result of the 1986 *Nehmer* court decision.

Obligations for retroactive payments were calculated by applying the caseload (105) by \$4,861 (the 10 percent degree of disability x 3.19 years).

For those Veterans currently on the rolls for other service-connected disabilities, we assume they would receive a retroactive award based on the higher combined disability rating. For example, a Veteran who is on the rolls and rated 20 percent disabled who establishes presumptive service connection for peripheral neuropathy will result in a higher combined rating of 30 percent and receive a retroactive award for the difference.

For purposes of this estimate, we assumed that Veterans previously denied service connection for this condition who are currently receiving benefits were awarded benefits for another disability concurrently.

PA&I provided the degree of disability distribution for Veterans currently on the compensation rolls for other service-connected conditions and that were previously denied service connection for peripheral neuropathy. Of the total 47,620 Veterans, 20,882 Veterans fall between zero and 50 percent degree of disability, and 17,944 fall between 60 and 90 percent disability. Based on Compensation Service's assumption, 50 percent of the 17,944 (8,972) already have a previous 10 percent disability rating; combined with the additional 10 percent for peripheral neuropathy will qualify them for an overall increase in combined disability rating. With the one percent eligibility assumption and mortality applied, an estimated 293 Veterans will have their claims reopened and will receive a higher disability rating (see chart below). Obligations were calculated by applying the increased combined degree of disability for those currently rated zero to 90 percent. Veterans currently on the rolls with a combined disability of 100 percent will not receive an overall increase in disability rating. Therefore, this population will not be affected.

Retroactive caseload obligations for Veterans become a recurring cost and are reflected in out-year estimates. Mortality rates are applied in the out-years to determine caseload.

Veterans Previously Denied and Currently on the Rolls By Degree of Disability		
Combined Degree of Disability	Total	With Eligibility and Mortality Applied
0%	38	0
10%	3,194	31
20%	5,748	56
30%	4,077	40
40%	4,777	47
50%	3,048	30
60%	4,717	23
70%	5,835	29
80%	4,916	24
90%	2,476	12
100%	8,794	N/A
Total	47,620	293

Previously Denied Veterans				
FY	Caseload		Obligations (\$ in 000's)	
	On the Rolls	Not on the Rolls as of 2013	Retroactive	Total
2013	293	105	\$3,682	\$3,682
2014	286	102		\$1,176
2015	279	100		\$1,171
2016	272	97		\$1,163
2017	264	95		\$1,154
TOTAL			\$3,682	\$8,346

Vietnam Veterans Accessions and Reopened Claims

According to the Defense Manpower Data Center (DMDC), there were 2.6 million in-country Vietnam Veterans, of whom 2.38 million were alive in 1999. With mortality applied, an estimated 2.0 million will be alive in 2013. According to the Journal of the American Board of Family Medicine (Mold et al., 2004: www.jabfm.org) the prevalence rate for peripheral neuropathy is 26 percent for people at least 65 years old who do not have a predisposed condition such as diabetes. With this prevalence rate applied, an estimated 526,665 Veterans will likely have the condition. This number is reduced by the number of Veterans identified in the previous estimate for retroactive claims (58,299) resulting in a total of 468,366 Veterans. Compensation Service identified 485,605 living Veterans currently receiving compensation for peripheral neuropathy and assumes 30 percent or 145,682 of these Veterans are Vietnam Era. The calculated total number of Veterans identified above (468,366) is further reduced by 145,682, resulting in total of 322,685 Veterans. With an assumption that 30 percent of Vietnam Veterans with peripheral neuropathy will apply for service connection and with the one percent eligibility assumption, an estimated 968 Veterans will be eligible in FY 2013.

Based on the distribution of the denied Veterans currently on rolls that were identified previously, we assume a similar percentage of 70 percent or 680 Veterans are on the rolls and will reopen their claims. Of the 680, (with mortality applied) an estimated (292) Veterans who have a combined degree of disability of zero percent to 50 percent will receive an increase based on their higher combined rating. There are 256 Veterans that fall between the 60 to 90 percent disability rating. Of the 256, (with mortality applied) an estimated 50% or (125) Veterans will receive an increase ($125 + 292 = 417$). Veterans currently rated 100 percent will not receive additional compensation. The remaining 30 percent of the total Veterans not on the rolls (289) will receive a benefit payment at the ten percent disability rating starting in 2013.

We assume the average age of a Vietnam Veteran is 66 years in FY 2013. Age adjusted mortality has been applied starting in 2013 and in out-years.

Veteran Accessions			
FY	Caseload		Obligations (\$ in 000's)
	On Rolls	Not on the Rolls as of 2013	
2013	417	289	\$1,900
2014	408	283	\$1,895
2015	399	277	\$1,888
2016	388	270	\$1,876
2017	377	263	\$1,862
Total			\$9,421

Caseload and Obligations Summary					
FY	Previously Denied		New to Rolls and Reopens		Total Obligations (in 000's)
	Total Caseload	Obligations (\$ in 000's)	Total Caseload	Obligations (\$ in 000's)	
2013	397	\$3,682	706	\$1,900	\$5,582
2014	388	\$1,176	691	\$1,895	\$3,070
2015	379	\$1,171	675	\$1,888	\$3,058
2016	369	\$1,163	658	\$1,876	\$3,039
2017	359	\$1,154	640	\$1,862	\$3,016
5 year total		\$8,346		\$9,421	\$17,766

Estimated Impact: Transfers are estimated to be \$5.6 million during the first year and \$17.8 million for five years. Of the transfers identified in FY 2013, \$3.7 million account for retroactive payments.

Submitted by:

Jenai Williams, Management Analyst
Compensation Service, Budget Staff
February 8, 2012

References:

1. Compensation and Pension Service
1. Performance Analysis and Integrity (PA&I)
2. Centers for Disease Control Website: www.cdc.gov
3. Defense Manpower and Data Center (DMDC)
4. Mold, James W., Sara K. Vesely, Barbara A. Keyl, Joan B. Schenk and Michelle Roberts. "The Prevalence, Predictors and Consequences of Peripheral Sensory Neuropathy in Older Patients." *Journal of the American Board of Family Medicine* 17(5): September 1, 2004: www.jabfm.org.

**Department of
Veterans Affairs**

Memorandum

Date: **JAN 19 2012**

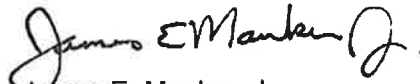
From: Chief Financial Officer (24)

Subj: Peripheral Neuropathy

To: Director, Compensation and Pension Service (21)

1. The Office of Resource Management has reviewed and concurs with the submitted impact analysis associated with C&P's proposed rulemaking to clarify and expand terminology regarding the presumption of service connection for acute and sub-acute peripheral neuropathy associated with exposure to certain herbicide agents. There are benefit costs associated with this rulemaking, and they are outlined in the cost benefit methodology.

2. Questions regarding this cost analysis may be directed to Michael Zaczek, Office of Resource Management (244A).



James E. Manker, Jr.