

STATEMENT OF RICHARD V. SPATARO
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BEFORE THE JOINT HEARING OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
AND
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND
MEMORIAL AFFAIRS

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*Twenty Five Years After the Persian Gulf War: An Assessment of VA's
Disability Claim Process with Respect to Gulf War Illness*

Executive Summary

National Veterans Legal Services Program (NVLSP) has two main areas of concern with respect to the VA's disability claim process related to Gulf War Illness. First, the Department of Veterans Affairs (VA) repeatedly commits certain types of errors when adjudicating Persian Gulf War veterans' claims for disability compensation for chronic undiagnosed illnesses. Second, the VA should extend the end date of the period during which symptoms of a qualifying chronic disability must first manifest in order to qualify for presumptive service connection.

VA's Handling of Claims Related to Gulf War Illness. The VA frequently commits errors when adjudicating claims for disability compensation for a chronic disability resulting from an undiagnosed illness. The four most common types of errors NVLSP sees VA adjudicators commit are:

- 1) failing to consider the favorable rules for presumptive service connection for an undiagnosed illness under 38 U.S.C. § 1117(a)(2)(A) and 38 C.F.R. § 3.317(a)(2)(i)(A), when a Persian Gulf War veteran does not explicitly claim benefits for Gulf War Illness, but that theory of entitlement is reasonably raised by the evidence;
- 2) erroneously attributing a symptom that has not been medically linked to a diagnosed disability with a diagnosed disability unrelated to military service;
- 3) denying the claim due to the lack of medical nexus evidence, when medical nexus evidence is not required to establish entitlement to service connection under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317; and
- 4) denying the claim due to the absence of "objective indications" of a chronic disability, without considering non-medical indicators capable of independent verification, which are sufficient to satisfy the "objective indications" requirement for establishing service connection under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317.

Extension of the Date by Which an Undiagnosed Illness or Medically Unexplained Chronic Multi-Symptom Illness Must Manifest to a Disabling Degree of 10 percent. Under 38 U.S.C. § 1117(b), the Secretary of Veterans Affairs must establish the period during which a qualifying chronic disability must manifest to a disabling degree of at least 10 percent following service in the Southwest Asia theater of operations during the Persian Gulf War in order to qualify for presumptive service connection. After initially establishing a 2-year presumptive period, the VA has repeatedly extended the end date of the presumptive period, which is currently December 31, 2016. The scientific community is still uncertain about the cause of illnesses suffered by Persian Gulf War veterans and the time period during which symptoms of such illnesses might first manifest. NVLSP, therefore, believes that the VA should again extend the end date of the presumptive period during which symptoms of a qualifying chronic disability must first manifest, if not indefinitely, to at least December 31, 2021.

Messrs. Chairmen and Members of the Committees:

I am pleased to have the opportunity to submit this testimony on behalf of the National Veterans Legal Services Program (NVLSP). NVLSP is a nonprofit veterans service organization founded in 1980 that has represented thousands of claimants before the Department of Veterans Affairs (VA), the United States Court of Appeals for Veterans Claims (CAVC), and other federal courts. NVLSP's efforts over the last 35 years have resulted in billions of dollars in VA disability and death benefits for veterans and their families.

NVLSP also recruits and trains volunteer attorneys, and trains service officers from such veterans service organizations as The American Legion, Military Order of the Purple Heart, and Vietnam Veterans of American. NVLSP has trained thousands of these veterans advocates in veterans law. NVLSP publishes numerous advocacy materials that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants. On behalf of The American Legion, NVLSP conducts local outreach and quality reviews of VA regional office claims adjudications.

NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which recruits and trains volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. NVLSP attorneys also mentor the Pro Bono Program's volunteer attorneys.

I. VA's Handling of Claims Related to Gulf War Illness

NVLSP has vast experience with veterans' claims for VA disability compensation under 38 U.S.C. § 1117, the statute that provides for presumptive service connection of qualifying chronic disabilities in Persian Gulf War veterans, and VA's associated regulation, 38 C.F.R. § 3.317. We have represented many veterans with such claims before the CAVC, the Board of Veterans' Appeals, and VA regional offices. We have mentored attorneys in their representation of veterans with such claims before the VA through our Lawyers Serving Warriors program. We have mentored attorneys representing veterans with such claims at the CAVC through the Veterans Consortium Pro Bono Program. Nearly all of our representation and mentoring has occurred after the VA denied the claim. Our work on these cases has revealed that the VA frequently commits errors when adjudicating Gulf War Illness claims.

38 U.S.C. § 1117 requires the VA to pay compensation on a presumptive basis to Persian Gulf War veterans for three types of chronic disabilities: (1) undiagnosed illnesses; (2) medically unexplained chronic multi-symptom illnesses, such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome; and (3) diagnosed illnesses that the Secretary of Veterans Affairs determines warrant a presumption of service connection, which presently consist of brucellosis, campylobacter jejuni, coxiella burnetii (Q fever), malaria, mycobacterium tuberculosis, nontyphoid salmonella, shigella, visceral leishmaniasis, and West Nile virus. *See* 38 C.F.R. § 3.317. NVLSP has seen

relatively few problems with the VA's adjudication of claims for service connection of the second and third types of chronic disabilities—medically unexplained chronic multi-symptom illnesses and diagnosed disabilities that the Secretary has determined warrant a presumption of service connection. In our experience, however, the VA frequently commits errors when adjudicating claims for disability compensation for a chronic disability resulting from an undiagnosed illness.

As background, it is important to know the requirements a Persian Gulf War veteran must satisfy to establish service connection for a chronic disability resulting from an undiagnosed illness. As the CAVC explained in *Gutierrez v. Principi*, 19 Vet. App. 1, 7 (2004), a case in which the veteran was represented by NVLSP, in order to establish service connection for a chronic disability resulting from an undiagnosed illness under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317, the veteran must present evidence that he or she:

- (1) exhibits objective indications;
- (2) of a chronic disability such as those listed in paragraph (b) of 38 C.F.R. § 3.317 [fatigue, signs and symptoms involving skin, headache, muscle pain, joint pain, neurologic signs or symptoms, neuropsychological signs or symptoms, signs or symptoms involving the respiratory system, sleep disturbances, gastrointestinal signs or symptoms, cardiovascular signs or symptoms, abnormal weight loss, and menstrual disorders];
- (3) which became manifest either during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10% or more not later than December 31, 2006 [later extended by the VA to December 31, 2016]; and
- (4) such symptomatology by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

It has been over two decades since § 1117 was added to Title 38 of the United States Code, yet VA adjudicators still have a difficult time adjudicating “undiagnosed illness” claims. Although not the only types of errors committed by the VA when adjudicating “undiagnosed illness” claims, in our experience, the following are the most common errors:

A. Failing to address the veteran's entitlement to service connection for an undiagnosed illness

One of the most common errors we see is VA adjudicators failing to consider the favorable rules for presumptive service connection for an undiagnosed illness under 38

U.S.C. § 1117(a)(2)(A) and 38 C.F.R. § 3.317(a)(2)(i)(A), when a Persian Gulf War veteran does not explicitly claim benefits under that theory of service connection. This type of error typically occurs when the veteran claims entitlement to service connection for a particular diagnosis the veteran thinks he or she has (for example, “knee arthritis”), or more generally describes the anatomical area of the disability (for example, “a shoulder disability”), but does not refer to Gulf War Illness. In such cases, if the evidence ultimately shows that the veteran’s chronic complaints cannot be attributed to a known diagnosis, the VA adjudicator sometimes denies the veteran’s claim due to the lack of a diagnosed disability, which is a requirement for establishing service connection under all *other* theories of entitlement. Although VA adjudicators have an affirmative duty to consider all reasonably raised theories of service connection (*see, e.g., Robinson v. Mansfield*, 21 Vet. App. 545, 552 (2008), *aff’d sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009)), they often fail to consider service connection for an undiagnosed illness under 38 U.S.C. § 1117(a)(2)(A) and 38 C.F.R. § 3.317(a)(2)(i)(A), when that theory of entitlement is reasonably raised by the evidence.

Similarly, we sometimes see cases in which the VA fails to consider a Persian Gulf War veteran’s entitlement to service connection for an undiagnosed illness manifested by symptoms of chronic fatigue under 38 U.S.C. § 1117(a)(2)(A) and 38 C.F.R. § 3.317(a)(2)(i)(A), when the veteran claims entitlement to service connection for “chronic fatigue” or “chronic fatigue syndrome,” but is ultimately found not to meet the full diagnostic criteria for chronic fatigue syndrome. Persian Gulf War veterans are entitled to presumptive service connection for chronic fatigue syndrome as a medically unexplained chronic multi-symptom illness under 38 U.S.C. § 1117(a)(2)(B) and 38 C.F.R. § 3.317(a)(2)(i)(B). However, if the veteran suffers from symptoms of chronic fatigue that are not attributable to a diagnosed illness such as chronic fatigue syndrome, the veteran is likely entitled to service connection for an undiagnosed illness manifested by symptoms of chronic fatigue. We have seen multiple VA adjudicators deny a veteran’s claim solely on the basis that he or she is not diagnosed with chronic fatigue syndrome, without addressing the veteran’s entitlement to service connection for an undiagnosed illness manifested by the symptom of chronic fatigue.

B. Attributing symptoms that have not been associated with a diagnosed condition to a diagnosed condition.

VA adjudicators often erroneously attribute a symptom that has not been medically linked to a diagnosed disability with a diagnosed disability unrelated to military service. The VA then denies the claim on the basis that the veteran does not have an undiagnosed illness, because all of the veteran’s disability symptoms are associated with known diagnoses. We have seen several cases like this in which a careful review of the medical evidence shows that, contrary to the VA’s finding, not all of the symptoms identified by the veteran are linked to a specific diagnosis. In some cases, the medical evidence is equivocal regarding the cause of the symptom. In other cases, the medical evidence attributes some, but not all of the veteran’s symptoms to a diagnosed disability, and the VA adjudicator over-broadly interprets the medical evidence as showing that *all* of the veteran’s symptoms are attributable to the diagnosis, even those not specifically

listed by the medical expert. In one of our cases, the VA denied the veteran's claim for an undiagnosed liver disability on the basis that he was diagnosed with hepatitis C. The only medical record that provided the hepatitis diagnosis, however, was for a different person and had been erroneously associated with the veteran's claims file. There are many possible reasons why VA adjudicators commit this type of error, but the most likely is simple lack of attention to detail.

C. Denying the claim due to the absence of medical nexus evidence or the presence of negative nexus evidence

Under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317, a Persian Gulf War veteran is entitled to the *presumption* of service connection for a chronic undiagnosed illness if certain requirements are met. In 2004, the CAVC emphasized that medical evidence specifically linking the disability to military service or the Persian Gulf War is not one of those requirements. *See Gutierrez v. Principi*, 19 Vet. App. 1, 19 (2004). Rather, as noted above, service connection is warranted if the veteran: (1) exhibits objective indications; (2) of a chronic disability such as fatigue, headache, muscle pain, joint pain, etc.; (3) which became manifest either during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10% or more not later than December 31, 2016; and (4) such symptomatology by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis. *See Gutierrez*, 19 Vet. App. at 7.

The VA, however, continues to deny some claims for service connection for undiagnosed illnesses under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317, due to the erroneous imposition of a medical nexus requirement. We have seen VA decisions stating that symptoms for which a medical explanation has not been found must be linked by a medical expert to an undiagnosed illness. We have seen claims denied because the veteran did not present medical evidence of a relationship between his symptoms and an undiagnosed illness or service in Southwest Asia. We have seen decisions in which the VA denied the claim because a medical expert expressed an opinion that the symptoms were less likely than not related to the veteran's Persian Gulf War service, without offering a diagnosis or alternative etiology for the symptoms. All of these denials were erroneous, because medical nexus evidence is not required to establish entitlement to service connection under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317.

D. Denying the claim due to the absence of "objective indications" of a chronic disability, without considering non-medical indicators capable of independent verification.

As noted above, in order to establish entitlement to service connection for an undiagnosed illness, the veteran must exhibit "objective indications" of a chronic disability. "Objective indications" 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.**" 38 C.F.R. § 3.317(a)(3) (emphasis added). We have identified multiple cases in which the VA erroneously denied the veteran's

claim for entitlement to service connection for an undiagnosed illness on the basis that the veteran did not exhibit “objective indications” of a chronic disability, solely due to the lack of objective evidence perceptible to a VA physician at a Compensation and Pension examination, without considering other, non-medical indicators that are capable of independent verification. In these cases, the VA adjudicators relied on the findings in the VA Compensation and Pension examination report. The adjudicators, however, ignored corroborating lay statements about the veteran’s observable symptoms, such as joint swelling, twitching, and complaints of pain; and ignored records showing that the veteran sought medical treatment for the symptoms. Such lay statements and medical treatment records are “indicators that are capable of independent verification” sufficient to satisfy the “objective indications” requirement for establishing service connection under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317.

II. Extension of the Date by Which an Undiagnosed Illness or Medically Unexplained Chronic Multi-Symptom Illness Must Manifest to a Disabling Degree of 10 percent.

In 38 U.S.C. § 1117(b), Congress directed the Secretary of Veterans Affairs to prescribe by regulation the period of time following service in the Southwest Asia theater of operations during the Persian Gulf War that the Secretary determines is appropriate for the presumption of service connection for qualifying chronic disabilities. The Secretary initially established a 2-year post-Persian Gulf War service period during which symptoms of an undiagnosed illness needed to manifest to a degree of 10 percent in order to qualify for presumptive service connection. *See* Compensation for Certain Undiagnosed Illnesses, 60 Fed. Reg. 6660 (Feb. 3, 1995). In 1997, the Secretary updated 38 C.F.R. § 3.317 to require manifestation of the symptoms no later than December 31, 2001. *See* Compensation for Certain Undiagnosed Illnesses, 62 Fed. Reg. 21,138 (Apr. 29, 1997) (Interim Final Rule). In 2001, the VA extended the end date of the presumptive period to December 31, 2006. Extension of the Presumptive Period for Compensation for Gulf War Veterans’ Undiagnosed Illnesses, 66 Fed. Reg. 56614 (Nov. 9, 2001) (Interim Final Rule). In 2006, the VA extended the end date of the presumptive period to December 31, 2011. Extension of the Presumptive Period for Compensation for Gulf War Veterans, 71 Fed. Reg. 75669 (Dec. 18, 2006) (Interim Final Rule).

Most recently, in 2011, the VA extended the end date of the presumptive period to December 31, 2016. Extension of Statutory Period for Compensation for Certain Disabilities Due to Undiagnosed Illnesses and Medically Unexplained Chronic Multi-Symptom Illnesses, 76 Fed. Reg. 81,834 (Dec. 29, 2011) (Interim Final Rule). The VA noted that the scientific and medical literature available at that time suggested that “while the prevalence of chronic multi-symptom illness may decrease over time following deployment to the Gulf War, the prevalence remains significantly elevated among deployed veterans more than a decade after deployment. At present, there is not a sufficient basis to identify the point, if any, at which the increased risk of chronic multi-symptom illness may abate.” *Id.* at 81835. The VA concluded that extension of the presumptive period was warranted because “scientific uncertainty remains as to the cause of illnesses suffered by Persian Gulf War veterans and the time period in which such

veterans have an increased risk of chronic multi-symptom illness” as well as the fact that National Academy of Sciences reviews were ongoing. *Id.*

A review of the most recent report of the Institute of Medicine of the National Academies of Science, Engineering, and Medicine, Gulf War and Health, Volume 10, Update of Health Effects of Serving in the Gulf War, 2016 (prepublication copy), reveals that little has changed with respect to the level of scientific certainty regarding the cause of illnesses suffered by Persian Gulf War veterans and the time period during which symptoms of such illnesses might first manifest. Due to this continued state of uncertainty in the scientific community, NVLSP believes that the VA should again extend the end date of the presumptive period during which symptoms of a qualifying chronic disability must first manifest to a disabling degree of at least 10 percent. NVLSP believes that end date should be extended indefinitely, but at the very least to December 31, 2021.

I would be pleased to answer any questions you may have.

Thank you.