

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Statement for the Record**

**Before the**

**House Committee on Veterans' Affairs  
Subcommittee on Disability Assistance and Memorial Affairs**

**Concerning**

**“The Toxic World of Presumptive Service Connection Determinations: Why  
Should Our Veterans Wait?”**

**December 9, 2020**

Chairman Luria, Ranking Member Bost, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) would like to thank you for the opportunity to offer our views on VA's presumptive determination process and toxic exposure-related adjudication process.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents nearly 650 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award. NOVA operates a full-time office in Washington, DC.

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On a daily basis, NOVA members across the country handle disability claims and appeals for veterans and their survivors based on a wide variety of toxic exposures experienced during military service. These include, but are not limited to, exposures to radiation, Agent Orange and other herbicides in Southeast Asia and beyond, airborne hazards and burn pit toxins in Southwest Asia, and contaminated water at Camp Lejeune. NOVA members advocate for veterans and their families at all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims, U.S. Court of Appeals for the Federal Circuit, and Supreme Court of the United States. As a result of this ongoing advocacy, NOVA members are all too familiar with the failures of both the presumptive determination process and toxic exposure-related adjudication process as they seek justice for their clients.

### **VA's Presumptive Determination Process**

The establishment of presumptive conditions is valuable because it allows for a consistent and fair process for adjudicating certain veterans' benefits claims, particularly given the size of the agency, the large numbers of adjudicators, and the fact that neither Regional Office decisions nor Board of Veterans' Appeals decisions carry any precedential value. In other words, absent presumptions for conditions related to toxic exposure, veterans in identical circumstances often end up with very different results.

Despite the advantage of these presumptions, however, VA's presumptive determination process simply takes too long, as demonstrated by its history of creating presumptions. Often, litigation or legislation is required to force VA to recognize presumptions. For decades, service members have been exposed to a variety of toxic substances. Sadly, the

length of time from exposure to VA's recognition of conditions related to that exposure significantly lags the emergence of illnesses and deaths experienced by exposed service members. For example, World War II veterans finally received presumptive service connection for an array of conditions related to mustard gas and lewisite exposure in 1992. 38 C.F.R. § 3.316. Vietnam veterans are still fighting for Agent Orange presumptions arising out of their service 50 years ago, as described in more detail below. Veterans exposed to contaminated water at Camp Lejeune from the 1950s through the 1980s fought until VA finally recognized eight presumptive conditions in 2017. 38 C.F.R. § 3.309(f). At least twice in the past two years, this committee has heard testimony highlighting problems with the presumptive determination process in the context of toxic exposures in Southwest Asia. See House Committee on Veterans Affairs, Subcommittee on Disability Assistance and Memorial Affairs, *Toxic Exposures: Examining Airborne Hazards in the Southwest Asia Theater of Military Operations*, 116<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (September 23, 2020); House Committee on Veterans Affairs, Subcommittee on Health, *An Assessment of the Potential Health Effects of Burn Pit Exposure Among Veterans*, 115<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (June 7, 2018).

Furthermore, new toxic exposures have come to light recently and each one will likely require a presumptive determination process. For example, the Department of Defense (DoD) has identified at least 401 military installations that were potentially contaminated with per- and polyfluoroalkyl substances, commonly known as PFASs. See, e.g., Kime, P., *The list of military sites with suspected 'forever chemicals' contamination has grown*, Military Times (November 20, 2019) (available at <https://www.militarytimes.com/news/your-military/2019/11/20/the-list-of-military-sites-with-suspected-forever-chemicals-contamination-has-grown/>); United States Environmental Protection Agency, PFOA, PFOS and Other PFASs, Basic Information on PFAS, <https://www.epa.gov/pfas/basic-information-pfas> (last checked December 3, 2020) ("There is evidence that exposure to PFAS can lead to adverse health outcomes in humans."). In addition, special operations forces deployed to Uzbekistan from 2001 through 2005 were exposed to a myriad of toxic substances. See, e.g., Copp, T., *Cancers strike veterans who deployed to Uzbek base where black goo oozed, ponds glowed*, McClatchy (December 19, 2019) (available at <https://www.mcclatchydc.com/news/nation-world/national/national-security/article238510218.html>); Department of Veterans Affairs, Public Health, Military Exposures, *Karshi Khanabad (K-2) Air Base*, <https://www.publichealth.va.gov/exposures/karshi-khanabad.asp> (last checked December 3, 2020) (VA states "[s]ervice members at K-2 may have encountered several hazardous exposures" to substances including jet fuel, volatile organic compounds, particulate matter and dust, depleted uranium, asbestos, and lead-based paint). It is critically important, therefore, that VA improve its current and future processes so veterans do not die before receiving the benefits they have earned.

## **VA should issue regulations for the four pending Agent Orange conditions immediately.**

Until the recent discussion surrounding the four latest conditions under consideration, VA's policy for adding conditions to the Agent Orange presumptive list has been to rely on the reports of the National Academies of Sciences, Engineering, and Medicine (NASEM) and establish a presumption upon a release of scientific evidence demonstrating a disability meets at least the limited to suggestive evidence standard. In 2016 and 2018, NASEM issued reports providing such evidence for the addition of new diseases to the Agent Orange presumptive list. NASEM concluded in 2016 that there was "limited to suggestive" evidence of an association for bladder cancer and hypothyroidism, and further determined there "is no rational basis for exclusion of individuals with Parkinson's-like symptoms from the service-related category denoted as Parkinson's disease." National Academies of Sciences, Engineering, and Medicine, *News Release: Latest and Final Biennial Review of Health Problems That May Be Linked to Agent Orange Exposure During Vietnam War* (March 10, 2016) (available at <https://www.nationalacademies.org/news/2016/03/latest-and-final-biennial-review-of-health-problems-that-may-be-linked-to-agent-orange-exposure-during-vietnam-war>). In 2018, NASEM further upgraded the evidence category classification for hypertension to "sufficient" from "limited to suggestive." The sufficient category "indicates there is enough epidemiologic evidence to conclude that there is a positive association" between hypertension and Agent Orange exposure. National Academies of Sciences, Engineering, and Medicine, *News Release: Hypertension Upgraded in Latest Biennial Review of Research on Health Problems in Veterans That May Be Linked to Agent Orange Exposure During Vietnam War* (November 15, 2018) (available at <https://www.nationalacademies.org/news/2018/11/vietnam-veterans-and-agent-orange-exposure-new-report>).

As noted, VA has established presumptive conditions where there has been only limited to suggestive evidence of association in the past. For these four conditions, however, VA has repeatedly delayed a decision to add the conditions, insisting on additional studies and expressing concern about the cost of expanding the list. It has been reported that there are 83,000 Vietnam veterans suffering from bladder cancer, hypothyroidism, and Parkinson's-like symptoms. Shane III, L., and J. Gould, *Vietnam veterans with bladder cancer, other serious illnesses would get presumptive benefit status in final defense budget bill*, *Military Times* (December 2, 2020) (available at <https://www.militarytimes.com/news/pentagon-congress/2020/12/02/vietnam-veterans-with-high-blood-pressure-other-serious-illnesses-would-get-presumptive-benefit-status-in-final-defense-budget-bill/>). Every day of delay results in more veterans being denied and more aging Vietnam veterans dying. If VA fails to issue regulations and these conditions are not granted via the National Defense

Authorization Act, Congress should pass other pending legislation that would require VA to do so.

In addition, this issue might be avoided in the future if Congress reestablished the timeline found in the original Agent Orange legislation that expired in 2015. That provision required the Secretary to determine whether a presumption was warranted and issue regulations (or provide a scientific basis for not doing so) within a specific period of time after scientific findings were released. Agent Orange Act of 1991, P.L. 102-4, § 312, 105 Stat. 11, 12 (February 6, 1991).

**Congress should provide authorization for further study and process for conditions related to exposure at Camp Lejeune, as well as any new exposures considered in the future.** Similar to the original Agent Orange legislation, Congress should provide authorization for further study of conditions related to contaminated water at Camp Lejeune and a timetable for Secretarial action. For example, there are currently 15 conditions for which veterans can receive free VA health care, but only eight conditions are eligible for presumptive service connection. As science evolves, there should be a mechanism in place for quickly and smoothly adding diseases to the list. Such an approach should also be adopted for any recently identified toxic exposures, e.g., PFAS contamination and exposure at the K-2 Air Base, that warrant service connection in the future.

**Given there is limited or suggestive evidence of an association between service in Southwest Asia and respiratory symptoms, presumptions should be established for respiratory conditions.** For veterans who served in Southwest Asia, the list of potential exposures is a long one. As noted by NASEM committee member Dr. Sverre Vedal, in his 2020 testimony before this subcommittee, these potentially hazardous airborne agents include the following: (1) dust and sand; (2) emissions from burning oil wells and open burn pits; (3) exhaust from vehicles and aircraft; (4) indigenous biologic agents and allergens; (4) depleted uranium particles liberated from munitions and armor; (5) air pollution from local and regional industry, power generation, and agricultural activities; (6) vapors, gases, dust, and fumes from chemical agents used in military job tasks; and (7) exposures that were specific to a particular wartime incident, such as the nerve agents released during the demolition of the Khamisiyah, Iraq, storage complex in 1991 and emissions from the Al-Mishraq, Iraq, sulfur plant fire in 2003. Statement of Dr. Sverre Vedal, Professor Emeritus, Department of Environmental and Occupational Health Sciences, University of Washington School of Public Health, Before the House Committee on Veterans' Affairs, Subcommittee on Disability and Memorial Affairs (September 23, 2020). While NASEM's 2020 report found none of the 27 health outcomes considered in their literature review met the criteria for sufficient evidence of an association, it did conclude "the evidence for respiratory systems – which included chronic persistent cough,

shortness of breath (dyspnea), and wheezing – met the criteria for limited or suggestive evidence of an association for both veterans who served in the 1990-1991 Gulf War and those who served in the post-9/11 conflicts.” National Academies of Sciences, Engineering, and Medicine, *Respiratory Health Effects of Airborne Hazards Exposures in the Southwest Theater of Military Operations* 4 (2020) (NASEM 2020 Report). On the basis of this finding, Congress should take up pending bills that provide presumptive service connection for respiratory conditions, such as H.R. 4574, Veterans’ Right to Breathe Act, or H.R. 8261, Presumptive Benefits for War Fighters Exposed to Burn Pits and Other Toxins Act of 2020.

**Better coordination and communication between DoD and VA are required.** VA is not the only agency with responsibility in the presumptive determination process. Regarding the risks related to exposure in Southwest Asia, in 2018, the Government Accountability Office (GAO) issued an update to a previous report finding DoD had not assessed risks, in spite of its own guidance mandating assessment, and stated:

With respect to our recommendation to sponsor research, in coordination with the Secretary of Veterans Affairs, to specifically examine the relationship between burn pit exposure and potential health-related issues, DOD partially concurred, stating that a considerable volume of research studies had already been completed, were ongoing, or were planned in collaboration with the Department of Veterans Affairs and other research entities to improve the understanding of burn pit and other ambient exposures to potential long-term health outcomes and that the studies, where applicable, consider and incorporate the methodology outlined in the 2011 Institute of Medicine study. In a May 2018 status update regarding this recommendation, the department stated that DOD and the Department of Veterans Affairs continue to collaborate with each other and other entities on research activities that address burn pit and other airborne exposures, and potential long-term health outcomes. Specifically, the department cited a DOD/Veterans Affairs Airborne Hazards Symposium held in May 2017; an update to the Veterans Affairs/DOD Deployment Health Working Group “Airborne Hazards Joint Action Plan” to be completed by the 3<sup>rd</sup> quarter of fiscal year 2018; and the completion of research to examine airborne hazard exposures and potential health-related issues.

United States Government Accountability Office, Statement for the Record to the Subcommittee on Health, Committee on Veterans’ Affairs, House of Representatives, *Waste Management: DOD Needs to Fully Assess the Health Risks of Burn Pits* 8-9 (June 7, 2018).

The testimony of DoD and VA before this subcommittee two years later is devoid of any specifics related to GAO’s findings from 2016 and 2018, significant progress with studies,

or its “Airborne Hazards Joint Action Plan.” *See* Prepared Statement for the Record Regarding Toxic Exposures: Examining Airborne Hazards in the Southwest Asia Theater of Military Operations Before the House Veterans Affairs Committee Subcommittee on Disability Assistance and Memorial Affairs (September 23, 2020) (DoD statement addressing symposia, registry, and development of Individual Longitudinal Exposure Record (ILER) in general terms); Statement of Laurine Carson, Deputy Executive Director, Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs Before the Committee on Veterans’ Affairs, Subcommittee on Disability Assistance and Memorial Affairs, U.S. House of Representatives (September 23, 2020) (“Among the questions we hope to address in the future are what aspects of the deployment experience may contribute to poor health outcomes and whether potential airborne hazards are the result of particulate matter, the burn pits themselves, blast overpressure, an infectious agent or a combination of these exposures.”) (hereinafter Carson Statement). For veterans who served in toxic environments in Southwest Asia over the past two decades, the future is now. Congress must press these two agencies to move faster and provide answers. Alternatively, Congress should consider the recommendations previously made by Burn Pits 360 in 2018 to create a Burn Pits Exposure Research Program. *See* Statement for the Record of Le Roy Torres, Iraq War Veteran and Co-Founder, Burn Pits 360, Before the U.S. House of Representatives, Committee on Veterans’ Affairs, Subcommittee on Health for Hearing Entitled: “An Assessment of the Potential Health Effects of Burn Pit Exposure Among Veterans” 10-11 (June 7, 2018).

### **VA’s Toxic Exposure-Related Adjudication Process**

As addressed in more detail below, the adjudication process lack consistency even where presumptive regulations exist. And, where veterans claim a non-presumptive condition by direct service connection, the process is also inconsistent.

**VA adjudicators inconsistently decide presumptive claims.** Even with presumptions, VA adjudicators sometimes struggle with applying them. For example, there is frequent confusion regarding application of the presumptive conditions originally provided for veterans of the 1990-91 Persian Gulf War, which include undiagnosed illnesses and medically unexplained chronic multisymptom illness defined by a cluster of signs and symptoms, such as chronic fatigue syndrome, fibromyalgia, and functional gastrointestinal diseases. 38 C.F.R. § 3.317. The presumptions were originally created to address the concerns of Persian Gulf War veterans, but have been extended to OIF and OEF veterans as well. Some adjudicators are unclear about the scope of the regulation or misapply it. For example, a Gulf War veteran represented by a NOVA member recently received a decision that clearly misapplied 38 C.F.R. § 3.317. Although the VA examiner determined the veteran’s skin condition, for which he was receiving ongoing treatment,

was related to service with “no clear etiology,” the VA adjudicator denied the claim because the service treatment records failed to indicate treatment for a skin condition.

**VA adjudicators inconsistently decide direct service connection claims based on toxic exposure.** When a veteran claims any non-presumptive condition related to toxic exposure for any period of service, VA must still consider whether the condition is directly connected to the veteran’s service. *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994) (veteran can still prove direct service connection for condition that is not subject to presumption). Establishing service connection on a direct basis requires the veteran to demonstrate a current diagnosis, an event or exposure that took place during service, and a medical nexus between those events. Some adjudicators fail to make this analysis, and there is inconsistent application of the law when they do. These claims have less likelihood of success. For example, in the context of burn pit claims, VA testified that, from June 2007 through July 2020, only 2,828 veterans of the 12,582 that applied for benefits related to this exposure were successful. Carson Statement 3.

These inconsistencies are complicated by the fact that VA often fails to provide an adequate examination when a veteran claims service connection directly for a condition related to toxic exposure. Faced with this uphill battle, veterans frequently seek private medical opinions. *See, e.g.*, Citation Nr: 19161167 (August 7, 2019) (BVA granted direct service connection for bladder cancer based on private medical opinion; VA examiner concluded condition was not a presumptive one and failed to consider direct service connection). It is not uncommon for VA, however, to reject favorable private medical opinions and rely on a negative VA opinion(s). *See, e.g.*, Citation Nr: 20000790 (October 6, 2020) (BVA denied service connection for scleroderma related to contaminated water exposure at Camp Lejeune based on VA examination, finding it more probative than two private physician opinions, one of whom had followed the veteran for two years).

**Congress should provide for a concession of exposure in burn pit claims.** Although VA stated that it “requires minimal information to verify exposure to burn pits” and “claims adjudicators generally concede that exposure” when a veteran was deployed to Southwest Asia and indicates burn pit exposure, *see* Carson Statement at 3, Congress should ensure that this concession is uniform. Absent passage of presumptive conditions as outlined above, Congress should pass the Veterans Burn Pits Exposure Recognition Act, which requires a concession of exposure and provision of an examination that “shall consider the total potential exposure through all applicable military deployment, and the synergistic effect of all combined toxic substances through inhalation, dermal exposure, and ingestion.” S. 2950, Veterans Burn Pits Exposure Recognition Act, 116<sup>th</sup> Cong. (2019).



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NOVA is committed to continue working on behalf of veterans wrongly denied benefits they have earned as a result of in-service toxic exposure. We again thank the Subcommittee for allowing us to provide our views on this important issue. For questions regarding this testimony or if you would like to request additional information, please contact:

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