Aggravation of Pre-Existing Disability (Post Challenge)

Instructor Lesson Plan

Time Required: 3 Hours

**Table of Contents**

[Lesson Description 2](#_Toc439916169)

[Topic 1: Aggravation 5](#_Toc439916170)

[Topic 2: Analyzing Claims 8](#_Toc439916171)

[Practical Exercise 12](#_Toc439916173)

[Lesson Review, Assessment, and Wrap-up 12](#_Toc439916174)

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| Lesson Description | |
| The information below provides the instructor with an overview of the lesson and the materials that are required to effectively present this instruction. | |
| TMS # | 1202934 |
| Prerequisites | Prior to this lesson, the Rating Veteran Service Representatives (RVSRs) should have completed RVSR training. . |
| target audience | The target audience for Aggravation of a Pre-Existing Disability is RVSR, Intermediate or Journey Level.  Although this lesson is targeted to teach the RVSR Intermediate or Journey Level employee, it may be taught to other VA personnel as mandatory or refresher type training. |
| Time Required | 3 hours |
| Materials/ TRAINING AIDS | Lesson materials:   * Aggravation of Pre-Existing Disability PowerPoint Presentation * Aggravation of Pre-Existing Disability Trainee Handouts |
| Training Area/Tools | The following are required to ensure the trainees are able to meet the lesson objectives:   * Classroom or private area suitable for participatory discussions * Seating, writing materials, and writing surfaces for trainee note taking and participation * Handouts, which include a practical exercise * Large writing surface (easel pad, chalkboard, dry erase board, overhead projector, etc.) with appropriate writing materials * Computer with PowerPoint software to present the lesson material   Trainees require access to the following tools:   * VA TMS to complete the assessment |
| Pre-Planning | * Become familiar with all training materials by reading the Instructor Lesson Plan while simultaneously reviewing the corresponding PowerPoint slides. This will provide you the opportunity to see the connection between the Lesson Plan and the slides, which will allow for a more structured presentation during the training session. * Become familiar with the content of the trainee handouts and their association to the Lesson Plan. * Practice is the best guarantee of providing a quality presentation. At a minimum, do a complete walkthrough of the presentation to practice coordination between this Lesson Plan, the trainee handouts, and the PowerPoint slides and ensure your timing is on track with the length of the lesson. * Ensure that there are copies of all handouts before the training session. * When required, reserve the training room. * Arrange for equipment such as flip charts, an overhead projector, and any other equipment (as needed). * Talk to people in your office who are most familiar with this topic to collect experiences that you can include as examples in the lesson. * This lesson plan belongs to you. Feel free to highlight headings, key phrases, or other information to help the instruction flow smoothly. Feel free to add any notes or information that you need in the margins. |
| Training Day | * Arrive as early as possible to ensure access to the facility and computers. * Become familiar with the location of restrooms and other facilities that the trainees will require. * Test the computer and projector to ensure they are working properly. * Before class begins, open the PowerPoint presentation to the first slide. This will help to ensure the presentation is functioning properly. * Make sure that a whiteboard or flip chart and the associated markers are available. * The instructor completes a roll call attendance sheet or provides a sign-in sheet to the students. The attendance records are forwarded to the Regional Office Training Managers. |

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| Introduction to Aggravation of Pre-Existing Disability | | |
| INSTRUCTOR INTRODUCTION | | Complete the following:   * Introduce yourself * Orient learners to the facilities * Ensure that all learners have the required handouts |
| time required | | 0.5 hour |
| Purpose of Lesson  Explain the following: | | This lesson is intended to teach the trainees the evidentiary requirements for determining whether a claimed disability was aggravated by the Veteran’s service. This lesson will contain discussions and exercises that will allow you to gain a better understanding of:   * Aggravation * Analyzing Claims |
| Lesson Objectives  Discuss the following:  Slide 2  Handout 2 | In order to accomplish the purpose of this lesson, the RVSR will be required to accomplish the following lesson objectives.  The RVSRwill be able to:   * Define and identify the principles of presumption of soundness and aggravation * Analyze claim information to determine whether service connection is warranted on the basis of aggravation | |
| Explain the following: | Each learning objective is covered in the associated topic. At the conclusion of the lesson, the learning objectives will be reviewed. | |
| Motivation | Tell the trainees about an incident where a mishandling of an aggravated claim caused a remand or didn’t properly service a Veteran. | |
| STAR Error code(s) | TBD | |
| References  Slide 3  Handout 3 | Explain where these references are located in the workplace.   * [38 USC 1111 Presumption of Sound Condition](https://www.law.cornell.edu/uscode/text/38/1111) * [38 USC1153 Aggravation](https://www.law.cornell.edu/uscode/text/38/1153) * [38 CFR 3.304(b)(1) Direct service connection; wartime and peacetime](http://www.ecfr.gov/cgi-bin/text-idx?SID=ad275643432556b9dda942343fb89296&mc=true&node=pt38.1.3&rgn=div58#se38.1.3_1304) * [38 CFR 3.306 Aggravation of preservice disability](http://www.ecfr.gov/cgi-bin/text-idx?SID=ad275643432556b9dda942343fb89296&mc=true&node=pt38.1.3&rgn=div58#se38.1.3_1306) * [38 CFR 4.22 Rating of disabilities aggravated by active service](http://www.ecfr.gov/cgi-bin/text-idx?SID=ad275643432556b9dda942343fb89296&mc=true&node=pt38.1.4&rgn=div5#se38.1.4_122) * [M21, Part IV, Subpart ii, 2.B](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014553/M21-1-Part-IV-Subpart-ii-Chapter-2-S) | |

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| Topic 1: Aggravation | |
| Introduction | This topic will allow the trainee to define and discuss presumption of soundness, incresase in disability, and natural progression of a disease. |
| Time Required | 0.5 hour |
| OBJECTIVES/ Teaching Points | Topic objectives:   * Define aggravation * Define service-connection   The following topic teaching points support the topic objectives:   * Soundness of the Veteran at the time of entry into service * Whether the disability was aggravated by service * Proper rating procedures |
| 38 USC 1111  Slide 4  Handout 4 | For purposes of basic entitlement to service-connection, **38 U.S.C. 1111** provides that every Veteran is considered to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.  Notwithstanding the provisions of 38 U.S.C. 1132, the provisions of 38 U.S.C. 1111 shall be applicable in the case of any Veteran who served in the active military, naval, or air service after December 31, 1946. |
| 38 USC 1153  Slide 5  Handout 4 | For claims for service connection involving a preexisting injury or disease, 38 U.S.C. 1153 provides that a preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, when the disability increases during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.  When no preexisting condition is noted upon entry into service, the Veteran is presumed to have been sound upon entry and the presumption of soundness arises. The burden then shifts to VA to rebut the presumption of soundness by clear and unmistakable evidence that the Veteran’s disability was both *preexisting* and *not aggravated* by service. *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) (emphasis added).  If a preexisting disability is noted upon entry into service, the Veteran cannot bring a claim for service connection for that disability, but the Veteran may bring a claim for aggravation of that disability. In that case, section 1153 applies and the burden falls on the Veteran to establish aggravation. *See Jensen v. Brown*, 19 F.3d 1413, 1417 (Fed. Cir. 1994). |
| Definition of Aggravation | Have the trainees review the handout with 38 CFR 3.304(b)(1) and 38 CFR 3.306. |
| 38 CFR 3.304(b)(1)  Slide 6  Handout 5 | **38 CFR 3.304 Direct service connection; wartime and peacetime**   1. *Presumption of soundness.* The Veteran will be considered to have been in sound condition when examined, accepted and enrolled for service except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto and was not aggravated by such service. Only such conditions as are recorded in examination reports are to be considered as noted. (Authority: 38 U.S.C. 1111)    1. History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof. |
| 38 CFR 3.306  *Slide 6*  *Handout 5* | **38 CFR 3.306 Aggravation of a preservice disability**  General. A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. (Authority: 38 U.S.C. 1153)  Wartime service; peacetime service after December 31, 1946. Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.  The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.  (2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability. (Authority: 38 U.S.C. 1154)  (c) Peacetime service prior to December 7, 1941. The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by reason of the inherent character of the condition, aside from any extraneous or contributing cause or influence peculiar to military service. Consideration will be given to the circumstances, conditions, and hardships of service. |

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| Topic 2: Analyzing Claims | | | | | |
| Introduction | | This topic will allow the trainee to identify certain requirements which must be met before establishing service- connection for a pre-existing disability. | | | |
| Time Required | | 0.5 hour | | | |
| OBJECTIVES/ Teaching Points | | Topic objectives:   * Review the requirements for analyzing a claim   The following topic teaching points support the topic objectives:   * Certain requirements must be met before establishing service- connection for a pre-existing disability. | | | |
| Reminder to the trainees | | Note: A history of preservice existence of a condition recorded at the time of the examination does not constitute a notation of such conditions. (38 CFR 3.304) In other words, the Veteran’s own account of the preservice existence of a psychiatric disorder does not constitute evidence that the disorder did in fact pre-exist service. (Paulson v. Brown, 7 VET. App. 466, 470 (1955)). | | | |
| Pertinent laws  Slide 7  Handout 6 | | For the presumption of aggravation, 38 U.S.C. 1153 provides that a preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, *where there is an increase in disability during such service*, *unless there is a specific finding that the increase in disability is due to the natural progress of the disease*.  Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service. 38 C.F.R. § 3.306(b).  In cases involving aggravation by active service, the rating will reflect only the degree of disability **over and above** the degree existing at the time of entrance into the active service. This is true regardless of whether the particular condition was noted at the time of entrance into the active service or it is determined upon the evidence of record to have existed at that time. Therefore, it is necessary in all cases like this to deduct from the present degree of disability the degree, if ascertainable, of the disability existing at the time of entrance into active service. The exception to this rule is if the disability is total (100 percent), then no deduction will be made. The resulting difference will be recorded on the rating sheet. If the degree of disability at the time of entrance into the service is not ascertainable in terms of the schedule, no deduction will be made. 38 CFR 4.22 | | | |
| Burden of proof  Slide 8  Handout 7 |  | The burden falls on the Veteran to establish aggravation. See Jensen v. Brown, 19 F.3d 1413, 1417 (Fed. Cir. 1994). If there is no evidence of injury, complaints, or treatment of the preexisting disability in service, the Veteran’s burden of proof is not met. | | | |
| Increase in severity  Slide 9  Handout 7 | | 38 U.S.C. 1153 requires some increase in the severity of the preexisting condition causally related to military service. *Jensen v. Brown,* 19 F.3d 1413, 1417 (Fed. Cir. 1994)*.*  Independent medical evidence is needed to support a finding that the preexisting disorder increased in severity in service. *See Paulson v. Brown*, 7 Vet. App. 466, 470-471 (1995); *Crowe v. Brown*, 7 Vet. App. 238, 246 (1994).  In cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree existing at the time of entrance into the active service. 38 CFR 4.22. | | | |
| Other issues with aggravation  Slide 10  Handout 7 | | **No presumption of aggravation without increase in severity shown** – The question of whether there has been an increase in disability during service must be answered in the affirmative before presumption of aggravation attaches, so that presumption is unaffected by rule on service connection for increase in disability during service. Verdon v. Brown, 8 Vet. App. 529 (1996); see also Falzone v. Brown, 8 Vet. App. 398, 402 (1995) (holding that the presumption of aggravation created by section 3.306 applies only if there is an increase in severity during service).  See Browden v Brown, No 91-1209 (1993), which the Court remanded the case back to BVA for an explanation as to whether the Veteran’s eye condition had been aggravated by service and worsened. The Court held that the presumption of aggravation contained in 38 CFR 3.306(b) may apply “where there was a worsening of the disability regardless of whether the degree of worsening was enough to warrant compensation”, and that the evidence clearly showed the right eye vision did worsen in service.  **Recurrence (temporary flare-ups) of symptoms does not constitute an increase in severity** - 38 U.S.C.1153 requires an increase in the severity of the preexisting condition, as distinguished from the mere recurrence of manifestations of the pre-service condition. Davis v. Principi, 276 F.3d 1341, 1345 (Fed. Cir. 2002) see Jensen v. Brown, 4 Vet. App. 304, 306-307 (1993); Hunt v. Derwinski, 1 Vet. App. 292 (1991). | | | |
| Evidence demonstrating no increase in severity  Slide 10  *Handout 8* | | **Absence of evidence** – There is nothing in service to show increase of preexisting disease or disability. Evidence of a prolonged period without medical complaint can be considered, along with other factors concerning the Veteran’s health and medical treatment during and after military service, as evidence of whether a preexisting condition was aggravated by military service. *Maxson v. Gober*, 230 F.3d 1330 (Fed. Cir. 2000)  **Affirmative evidence of no increase in severity** includes normal clinical findings on separation examination, no complaints at separation examination, and where an evaluation of condition is shown to be the same as it was on entrance examination.  **Medical opinion –** Disease or disability was not aggravated during service. | | | |
| Increase in severity  Slide 11  *Handout 8* | | **Medical and Surgical Treatment in Service *May* Demonstrate Increase**  The usual effects of medical and surgical treatment in service having the effect of ameliorating diseases or other conditions incurred before enlistment, including postoperative scars, absent or poorly functional parts or organs will not be considered service connected unless the disease or injury is otherwise aggravated by service. 38 CFR 3.306(b)(1).  If the medical or surgical treatment in service **worsened** an aspect of the preexisting condition, this would constitute evidence of an increase in service. In *Verdon*, the Veteran alleged that a bunionectomy performed in service had left him with right-foot numbness and limitation of motion of his right great toe. The Court remanded this matter for an examination to determine the degree of worsening, if any, of the Veteran’s preexisting right-foot condition by the time of his discharge from service. *Verdon v. Brown,* 8 Vet. App. 529 (1996).  **Combat as Proof of Increase in Severity**  Satisfactory lay or other evidence that an injury or disease was incurred *or aggravated* in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation. 38 CFR 3.304(d).  38 C.F.R. 3.304(d) creates an evidentiary presumption in favor of combat Veterans. Aggravation will be established if a Veteran produces satisfactory lay or other evidence of symptomatic manifestations of a preexisting disability during or proximate to combat.  Once a combat Veteran provides lay testimony or other informal evidence of symptomatic manifestations, whether temporary or otherwise, of incurrence or aggravation, the government has the burden to rebut by clear and convincing proof that there has been no increase in the severity of the preexisting condition, thereby establishing lack of a statutory requirement, or that any increase was the result of natural progression. *Jensen v. Brown*, 19 F.3d 1413 (Fed. Cir. 1994).  In *Maxson*, the Court upheld a Board determination that there was clear and convincing evidence of no permanent increase in disability during service based on the lack of any service or post-service treatment records showing a permanent increase in disability, and on a medical opinion that there was no evidence of an increased level of disability associated with service. *Maxson v. West*, 12 Vet. App. 453, 459(1999). | | | |
| Practical Exercise | | | | |
| Time Required | | | | 1.25 hours |
| EXERCISE | | | | Have the students read and complete the scenarios in the Aggravation Trainee Handout. Have them discuss their responses.  Ask if there are any questions about the information presented in the exercise, and then proceed to the Review. |
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| Lesson Review, Assessment, and Wrap-up | | | | |
| Introduction  Discuss the following: | | | The Aggravation of Pre-Existing Disability lesson is complete.  Review each lesson objective and ask the trainees for any questions or comments. | |
| Time Required | | | .25 hours | |

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| Lesson Objectives | You have completed the Aggravation of Pre-Existing Disability lesson.  The trainee should be able to:   * Define and identify the principles of presumption of soundness and aggravation * Analyze claim information to determine whether service connection is warranted on the basis of aggravation |
| Assessment | Remind the trainees to complete the on-line assessment in TMS to receive credit for completion of the course.  The assessment will allow the participants to demonstrate their understanding of the information presented in this lesson. |