Claims Based on Ionizing Radiation Exposure

Trainee Handout

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Objectives

* Using 38 CFR and M21-1 as references, recognize a claim based on exposure to ionizing radiation due to the claimed issues
* Using M21-1 as a reference, determine a course of action and accurately complete the process of routing the claim to the correct processing center

References

* [38 CFR 3.309, Disease subject to presumptive service connection](http://www.ecfr.gov/cgi-bin/text-idx?SID=ad275643432556b9dda942343fb89296&mc=true&node=pt38.1.3&rgn=div58" \l "se38.1.3_1309)
* [38 CFR 3.311](http://www.ecfr.gov/cgi-bin/text-idx?SID=ad275643432556b9dda942343fb89296&mc=true&node=pt38.1.3&rgn=div58" \l "se38.1.3_1309), Claims based on exposure to ionizing radiation
* [M21-1, Part IV, Subpart ii, Chapter 1, B](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014904/M21-1-Part-IV-Subpart-ii-Chapter-1-S), Claims for Service Connection for Radiogenic Diseases Under 38 CFR 3.309(d)
* [M21-1, Part IV, Subpart ii, Chapter 1, C](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/#!agent/portal/554400000001034/article/554400000014905/M21-1-Part-IV-Subpart-ii-Chapter-1-S), Claims for Service Connection for Disabilities Resulting from Ionizing Radiation Exposure Under 38 CFR 3.311

Topic 1: List of Radiogenic Diseases and Presumptive Cancers

**38 C.F.R 3.309(d) ~ Presumptive Service Connection**

A radiation-exposed veteran is one who, while serving on active duty, or as an individual who, while a member of the reserve component of the Armed Forces during a period of ACDUTRA or INACDUTRA, participated in a *radiation risk activity.*

Radiation risk activity means:

* onsite participation involving the atmospheric detonation of a nuclear device;
* the occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period from August 6, 1945 to July 1, 1946; or
* internment as a POW in Japan (or active duty service in Japan immediately following such internment) during World War II, which resulted in an opportunity for exposure to ionizing radiation comparable to that of the United States forces in Hiroshima or Nagasaki, Japan, from August 6, 1945 to July 1, 1946.
* At a gaseous diffusion plant located in Paducah, KY, Portsmouth, OH, or the area identified as K25 at Oak Ridge, TN prior to February 1, 1992 for 250 days

The following diseases shall be service-connected if they become manifest in a radiation-exposed veteran:

* Leukemia (other than chronic lymphocytic leukemia)
* Cancer of the thyroid
* Cancer of the breast
* Cancer of the pharynx
* Cancer of the esophagus
* Cancer of the stomach
* Cancer of the small intestine
* Cancer of the pancreas
* Multiple myeloma
* Lymphomas (except Hodgkin's disease)
* Cancer of the bile ducts
* Cancer of the gall bladder
* Primary liver cancer (except if cirrhosis or hepatitis B is indicated)
* Cancer of the salivary gland
* Cancer of the urinary tract
* Bronchiolo-alveolar carcinoma
* Cancer of the bone
* Cancer of the brain
* Cancer of the colon
* Cancer of the lung
* Cancer of the ovary

If a radiation-exposed veteran develops one of the diseases listed above, service connection is warranted under the provisions of 38 C.F.R. 3.307.

Verification that the claimed condition is an acknowledged radiogenic disease must be completed before any other actions take place. Once it is determined there is evidence of a radiogenic disease, the claims folder should be transferred to the VA Regional Office in Jackson, MS. (Note: This is typically done by a VSR).

RVSRs should not rate or partially rate any cases that have a claim for radiation exposure with one of the radiogenic diseases listed above. These cases will be rated at the VA Regional Office in Jackson, MS. The Jackson RO will assume responsibility for processing all claims pending at the time of transfer or received following transfer. All issues will be resolved before the claims folder is returned to the regional office of jurisdiction (ROJ).

Generally, these should be transferred before an RVSR receives it; therefore, it is a best practice to review the entire claim to make sure the veteran is not claiming radiation exposure with a radiogenic disease, as these cases are only to be completed at the Jackson RO.

Note: M21-1 IV.ii.1.C.2.e states that we must have a diagnosis of a disease and the specific cell type and stage. For example, if skin cancer is claimed due to radiation exposure, the VSR should ask the claimant to provide the type of cancer diagnosed, specific site of each lesion, date it was first diagnosed or treated and the name and address of a physician or facility who made the diagnosis or first treated the disease. This information is needed prior to any claim being sent to the Jackson RO.

**38 C.F.R. 3.311 ~ Radiogenic Diseases**

In 38 CFR 3.311 radiogenic diseases are defined as a disease that may be induced by ionizing radiation and include the following conditions:

* All forms of leukemia except chronic lymphatic (lymphocytic) leukemia
* Thyroid cancer
* Breast cancer
* Lung cancer
* Bone cancer
* Liver cancer
* Skin cancer
* Esophageal cancer
* Stomach cancer
* Colon cancer
* Pancreatic cancer
* Kidney cancer
* Urinary bladder cancer
* Salivary gland cancer
* Multiple myeloma
* Posterior subcapsular cataracts
* Non-malignant thyroid nodular disease
* Ovarian cancer
* Parathyroid adenoma
* Tumors of the brain and central nervous system
* Cancer of the rectum
* Lymphomas other than Hodgkin’s disease
* Prostate cancer
* Any other cancer

**Court cases pertinent to radiation claims**

* *Hardin v. West* (1998) – The Court, citing *Combee v. Brown*, reaffirmed the principle that service connection for an unlisted condition could be pursued under the general VA compensation entitlement system. In vacating and remanding the Board’s decision that denied service connection for four conditions, none of which was subject to presumptive service connection on a radiation basis pursuant to 38 U.S.C. 1112(c) and 38 C.F.R. 3.309 (d), or deemed “radiogenic” diseases pursuant to 38 C.F.R. 3.311, the court held that claimants are still entitled to assert service connection on a direct basis under 38 C.F.R. 3.303 (d). The Court also observed that, in light of *Combee v. Brown*, VA amended 38 C.F.R. 3.311 to add subparagraph (b)(4). In addition, VA deleted 38 C.F.R. 3.311 (h), which had provided that the list of diseases at 3.311 (b)(2) was exclusive, and redefined the term “radiogenic disease” as a disease that may be induced by ionizing radiation.
* *Earle v. Brown* (1994) – The Court held that VA could not rely solely upon the DNA’s (Defense Nuclear Agency) dose estimate as to the veteran’s exposure to ionizing radiation. The Court instructed that the dose estimate of radiation exposure is only one piece of evidence that is considered.
* *Hilkert v. West* (1999) – The appellant submitted evidence that the veteran had a radiogenic disease and claimed that the veteran’s exposure to radiation in service had caused the disease. A dose estimate was performed by DNA that confirmed that the veteran had been exposed to ionizing radiation during service. The matter was then referred to the Director of Compensation and Pension, who acted on behalf of the Under Secretary for Benefits. The Director requested an advisory opinion from the Under Secretary for Health. On behalf of the Under Secretary for Health, a physician concluded that there was no reasonable possibility that the veteran’s colon cancer resulted from his exposure to ionizing radiation during service. In doing so, the physician did not specifically discuss each of the six factors listed in 38 C.F.R. 3.311. The Court held that a discussion by the Under Secretary for Benefits of all the factors listed in subparagraph (e) is not required if the Under Secretary for Benefits recommends that there is no reasonable possibility that the veteran’s disease resulted from radiation exposure during service. This holding vacated the 1998 decision of the Court in *Hilkert v. West (I).*
* *Stone v Gober* (2000) – The Court reiterated that, although the Under Secretary for Benefits was not required to explicitly consider each of the factors listed in 38 C.F.R. 3.311, the medical opinion must set forth an adequate rationale for its conclusion.
* *Ramey v. Brown* (1996) – The Court affirmed the denial of service connection for a cancer listed in 38 U.S.C. 1112 (c) on the ground that a cancer that metastasizes from a primary site that is not listed in 38 C.F.R. 3.309 (d) does not warrant consideration on the basis of presumptive service connection due to exposure to ionizing radiation.
* *Ramey v. Gober* (1997) – The veteran died as a result of colon cancer that metastasized to his liver. The appellant argued that, because colon cancer is listed as a radiogenic disease in 38 C.F.R. 3.311, and in light of the finding that the veteran was exposed to radiation during his period of active duty, service connection on a presumptive basis was warranted. The Federal Circuit held that 38 C.F.R. 3.311 did not create, expressly or implicitly, a presumption of service connection for radiation-exposed veterans who contracted one of the radiogenic diseases listed in the regulation. The Federal Circuit explained that the regulation simply outlined a framework for adjudicating, on a case-by-case basis, claims brought by radiation-exposed veterans and their survivors.
* *McGuire v. West* (1998) – The veteran asserted a claim of service connection for esophageal and stomach cancers, each of which is presumptively service connected under 38 C.F.R. 3.309 (d). The Court held, as a matter of law, that a veteran who visited Hiroshima or Nagasaki, Japan, while on leave from duty not related to the occupation of either city, did not participate in the occupation of those cities as the term is defined by statute or by regulation. Therefore, the Court affirmed the Board’s denial, on the merits, of the veteran’s claim for service connection for these cancers.
* *Rucker v. Brown* (1997) – The veteran asserted claims of service connection for four cancers on the basis that they were due to his in-service exposure to radiation. None of the cancers was subject to presumptive service connection under 38 C.F.R. 3.309 (d), but three of the four were radiogenic diseases under 38 C.F.R. 3.311 (prostate cancer, along with all other cancers, has since been added to the list of radiogenic diseases effective September 24, 1998). The Court held that, based on DNA’s response that the veteran had no risk of exposure to ionizing radiation from bombs dropped in Hiroshima or Nagasaki, Japan, his claims of service connection due to exposure to such radiation were properly denied. The Court, however, vacated and remanded the Board’s decision as to these claims of service connection due to his exposure to non-ionizing radiation. The veteran asserted that the four cancers were caused by non-ionizing radiation that emanated from naval radar equipment that he operated while on active duty. In support, the veteran submitted scientific evidence in the form of several articles that documented the uncertainty and controversy surrounding microwave (non-ionizing radiation) radiation. The Court stated that the scientific articles had been tested and subjected to peer review. The Court concluded that the articles were sufficient to well-ground the veteran’s claim under the latter theory, when taken together with the medical opinion from the veteran’s doctor indicating that non-ionizing radiation emitted from radar equipment led to the development of the four cancers. Note – since 38 C.F.R. 3.311 deals with claims based on exposure to ionizing radiation only, this claim should be considered only under 38 C.F.R. 3.303 (d).

Topic 1 Exercise

*A review is a tool used to judge the level of knowledge the group has acquired as a result of the training. It is not used for individual evaluation.*

1. Name five radiogenic diseases.
2. What did *Combee v. Brown* establish?
3. What is the definition of a radiation exposed veteran?
4. Can service connection be granted for cancers due to exposure to microwaves from radar equipment? If so, under what regulation? Where would this claim be processed?
5. List the two Manual references related to processing radiation claims.
6. List two of the three ways that a claim for exposure to ionizing radiation can be established.
7. List three court cases that have helped shape the radiation claims process.
8. Under 38 C.F.R. 3.311, what is the definition of Hiroshima and Nagasaki occupation claims?

Topic 2: Processing a Claim Based on Exposure to Radiation

**Processing of claims for service connection based on radiation exposure**

When a claim is identified as being based on radiation exposure with confirmed evidence of a radiogenic disease, the file is to be brokered to the Jackson, MS Regional Office.

When a claim is brokered to the Jackson Regional Office, this includes any additional claims not related to radiation, as well as any new claims received after the claim has been brokered. The station of origination (SOO) must leave the rating end product (EP) pending, as well as all other EPs *not* related to the radiation claim.

The Jackson RO will have jurisdiction of all non-radiation-related claims while processing the radiation issues. Once the claim is rated, the file will be brokered back to the ROJ.

Topic 2 Exercise

1. Where are claims for radiation exposure with a radiogenic disease processed? Where are claims for radiation exposure without a radiogenic disease processed?
2. What should you do if you receive a claim that is ready to rate with a verified radiogenic disease?