38 U.S. Code § 1702

Trainee Handout

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Objectives

Given the trainee handout and references, the trainee will be able to do the following with 85 percent accuracy:

* Understand 38 U.S. Code § 1702 and the required eligibility criteria for the subordinate issue
* Understand when to address 38 U.S. Code § 1702 in a rating decision

References

[Public Law (PL) 110-181, Section 1708, Service-connection and assessments for mental health conditions in Veterans](https://www.congress.gov/bill/110th-congress/house-bill/4986/text/pl)

[38 U.S.C. 1702, Presumptions: psychosis after service in World War II and following periods of war; mental illness after service in the Persian Gulf War](https://www.congress.gov/bill/110th-congress/house-bill/4986/text/pl)

[38 C.F.R. 3.384, Psychosis](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/)

[38 C.F.R. 4.127, Intellectual disability (intellectual developmental disorder) and personality disorders](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/)

[M21-1, Part III, Subpart iv, 6.B, Determining the Issues](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/portal.html?portalid=554400000001034)

[M21-1, Part IX, Subpart ii, 2.5, SC of Mental Conditions Under 38 U.S.C. 1702](https://vaww.compensation.pension.km.va.gov/system/templates/selfservice/va_ka/)

38 U.S. Code § 1702

What is 38 U.S. Code § 1702?

38 U.S. Code § 1702 (38 U.S.C. 1702) creates a presumption of SC for the purpose of eligibility for VA treatment for

* psychoses based on wartime service, or
* any mental condition based on Gulf War service.

Claims for medical or psychological treatment are normally determined by VHA without referral to VBA. However, a medical facility may require information or a determination from VBA.

In 2008, PL 110-181 extended the presumption of eligibility for medical care under 38 U.S.C. 1702 for any mental illness for Gulf War service Veterans.

38 U.S.C. 1702 is considered an unclaimed subordinate issue, which is an issue derived from the consideration or outcome of related issues. Often, the primary and subordinate issues share the same fact pattern.

**Eligibility Criteria**

38 U.S.C. 1702 provides that SC is presumed for VA treatment purposes for a Veteran of:

* any war period who develops a psychosis, or
* the Gulf War who develops any mental illness

***within***

* two years after the date of separation (under other than dishonorable conditions) from such service, *and*
* two years after the end of the war period.

***Important***: *Both* criteria must be met for the presumption to arise. The presumption that the qualifying disability was incurred in service for treatment purposes does *not* apply if

* a qualifying mental ilness develops *more* than two years after the end of the *war period*, even if the condition develops less than*,* or at, two years after *discharge*, or
* a qualifying mental illness develops more than two years after *service discharge* even if that was *during* wartime or *less than, or at*, two years thereafter.

**Note**: It is not necessary for the Veteran to have had 90 days of service to qualify.

Psychosis

Psychosis, as defind by 38 C.F.R. 3.384, includes:

* brief psychotic disorder
* delusional disorder
* psychotic disorder due to general medical condition
* psychotic disorder not otherwise specified
* schizoaffective disorder
* schizophrenia
* schizophreniform disorder
* shared psychotic disorder
* substance-induced psychotic disorder

Mental Illness

Mental illness, is defined as an Axis I diagnosis that conforms to the DSM V diagnosis. Note that personality disorders are not considered a mental illness for VA purposes (38 C.F.R. 4.127).

When VBA Must Decide the Issue of SC Under 38 U.S.C. 1702

VBA MUST decide the subordinate issue of SC for a psychosis or other mental condition under 38 U.S.C. 1702 when:

1. Requested by VHA, or
2. RVSR finds the facts support the 38 U.S.C. 1702 criteria in the course of denying service connection (SC) for compensation purposes for:
   * Psychosis based on wartime service, or
   * Any mental disorder based on Gulf War service

Requests from VHA

VHA submits requests for determination of SC by submitting a copy of a VA For 10-10EZ (Application of Health Benefits) or VA Form 10-10EZR (Health Benefits Renewal Form); and VA Form 10-10M (Medical Certificate); and any other available professional report submitted with, or developed in conjunction with, the application for hospital or outpatient treatment. Procedures for processing a request for rating activity action are followed after receipt of above items. These procedures can be found at M21-1 III.v.7.A.4.b.

1) Addressing VHA Requests for 38 U.S.C. 1702 determinations in the Rating Decisions

Requests for 38 U.S.C. 1702 determinations from VHA are issued in a rating decision:

|  |  |
| --- | --- |
| **If…** | **Then…** |
| The criteria for SC under 38 U.S.C. 1702 are met | * the decision should be a separate issue, AND * the Codesheet will show text "Active Psychosis/GW Mental - SC for Treatment Only.” |
| The criteria for SC under 38 U.S.C. 1702 are **NOT** met | * the decision should be a separate issue in the rating decision, and * the Codesheet will show the text “Active Psychosis/GW Mentla, NSC-1702.” |

**Note:** When addressing a VHA request for a 1702 determination, the issue of SC of a mental disorder for treatment purposes under the provisions of 38 U.S.C. 1702 should always be listed as a separate or stand alone issue.

2) Addressing the Subordinate Issue of 38 U.S.C. 1702 in the Rating Decision

Consider the subordinate issue of 38 C.F.R. 1702 for service connection for treatment purposes based on a denial for SC for pyschosis based on wartime service, or mental condition based on Gulf War service:

|  |  |
| --- | --- |
| **If the criteria for SC under 38 C.F.R. 1702…** | **Then…** |
| are established, | * in the rating decision address the subordinate issue as a separate decision from the decision on the mental condition, AND * ensure the rating codesheet shows "Active Psychosis/GW Mental - SC for Treatment Only" or equivalent.   EXCEPTION: If a previous decision has awarded entitlement, there is no need to address it again. |
| are not established, | do not address the matter at all in the rating decision |

**IMPORTANT:** SC for treatment purposes under 38 U.S.C. 1702 is not a subordinate issue and should not be decided in cases for which

* 38 U.S.C. 1702 determination has not been requested by VHA
* A bereavement diagnosis is the only diagnosis noted in the mental examination, as this is considered an acute and transitory condition, or
* A claim for SC for compensation purposes of a pyschosis based on any wartime service or any mental illness based on Gulf War service is denied, and under the facts of record, the 38 U.S.C. 1702 presumption would not arise.

**NOTE:** In general, address entitlement to a subordinate issueonly when entitlement can be awarded. Do not put a benefit at issue merely to deny it.