

**HERBICIDE EXPOSURE CLAIMS
TRAINEE HANDOUT**

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OBJECTIVES

The **VSR/RVSR** will be able to:

- Verify herbicide exposure
- Recognize when a formal finding is needed
- Recognize when central processing is needed
- Apply or confirm the correct effective date for an herbicide grant

REFERENCES

- [38 CFR 3.114, Change of law or Department of Veterans Affairs issue](#)
- [38 CFR 3.156\(c\)\(3\), Service Department Records](#)
- [38 CFR 3.159, Department of Veterans Affairs assistance in developing claims](#)
- [38 CFR 3.307\(a\)\(6\), Diseases associated with exposure to certain herbicide agents](#)
- [38 CFR 3.309\(e\), Disease associated with exposure to certain herbicide agents](#)
- [38 CFR 3.313, Claims based on service in Vietnam](#)
- [38 CFR 3.400, General](#)
- [38 CFR 3.816, Awards under the Nehmer Court Orders for disability or death caused by a condition presumptively associated with herbicide exposure](#)
- [M21-1, Part III, Subpart i, 3.B.3.d, FDCs and Special Issue Development](#)
- [M21-1, Part III, Subpart iv, 6.F.3.a, Rating Related Language Requirements for ADL Processing](#)
- [M21-1, Part IV, Subpart ii, 1.H, Developing Claims for Service Connection \(SC\) Based on Herbicide Exposure](#)
- [M21-1, Part IV, Subpart ii, 2.C.3.o. SC for NHL Under 38 CFR 3.313 Based on Service in the RVN During the Vietnam Era](#)
- [M21-1, Part VI, Chapter 18 Benefits](#)
- [*Haas v. Shinseki*, No. 04-0491, March 10, 2009](#)
- [*Gray v. McDonald*, No. 13-3339, April 23, 2015](#)
- [*Procopio v. Wilkie*,](#)

TOPIC 1: HERBICIDE EXPOSURE DEVELOPMENT REFRESHER

There are two parts to development for claims related to herbicide exposure:

1. Development to the Veteran for an exposure statement
2. Development to the service department for service records, to include STRs, the personnel file, and deck logs (when appropriate)

Our duty to assist for herbicide exposure claims is not satisfied by the VA Form 21-526 EZ or a standard 5103 letter if the Veteran claims a condition other than those listed in 38 CFR 3.309(e) or if herbicide exposure has not been verified. The VSR will need to send a subsequent development letter requesting that the Veteran provide us details about his exposure to Agent Orange.

Per M21-1 IV.ii.1.H.1.i, a claim is not substantially complete if a Veteran claims herbicide exposure during service but does not claim SC for a specific disability. In cases such as these inform the Veteran that they must identify a specific disability, since exposure in and of itself is not a disability. Treat it as an incomplete application and follow the steps in M21-1, Part I, 1.B.1.g and h.

This development can also be undertaken over the phone. If the Veteran is claiming a condition that is not considered presumptive to Agent Orange, further development will also be required. Remember, this development does not exclude the Veteran from the FDC program.

Development for STRs and the personnel file will be accomplished through the appropriate system based on the Veteran's service:

- PIES (STRs and the personnel file)
- email to RMC (STRs)
- DPRIS (personnel file)
- HAIMS (STRs)

Development for deck logs is accomplished through your station's JSRRC representative. If you have evidence that the Veteran served aboard a ship(s) that was/were in the waters off of the coast of Vietnam, send the file to your station's JSRRC representative and ask them to request deck logs for each ship.

Historically, verification of information relative to stressor and herbicide exposure claims was requested using the Joint Services Records Research Center (JSRRC) application owned by DoD.

Claims processors will now submit requests for stressor and herbicide exposure using VBMS.

- Authorized users will now be able to do the following actions in VBMS Core for JSRRC requests:

- Submit a records research request.
- View the status of the request which could be any of the following:
 - *Research Requested* –automatically generated when the requestor submits a records research request
 - *Research Assigned* – automatically updated when the records research task is assigned to a researcher
 - *Research in Progress* – manually updated when a researcher launches a records research task
 - *Research Extended* – automatically updated when a records research task is extended
 - *Research Response Provided* – automatically updated when a records research task is completed
- A new document type “Records Research Center Response” will be available for selection so that documents in the eFolder can be associated to the correct document type.

If at any time, exposure can be verified, cease further development and determine if an exam is needed or the claim is ready for decision.

If federal records cannot be located, a formal finding of unavailability will be needed before the RVSR can deny the claim.

If exposure to herbicides cannot be verified by the employee but enough information is located within the evidence of record (sixty-day time frame, location, unit assigned, and a brief description of the exposure event(s)) to submit the exposure event to JSRRC for further research, the claim should be forwarded to the station’s JSRRC representative.

Per M21-1, Part IV, Subpart ii, 1.H.9.c., if there is not enough information to submit the exposure event to JSRRC for further research, a formal finding will need to be completed by your station’s JSRRC representative.

Development – Other Medical Records

Request hospital reports and clinical records if the Veteran indicates pertinent treatment in a Department of Veterans Affairs (VA) facility, Vet Center, or elsewhere.

Vet Center and Private Medical Records require a VA Form 21-4142, Authorization to Disclose Information to the Department of Veterans Affairs and 4142a, General Release for Medical Provider Information to the Department of Veterans Affairs. This development would also exclude the Veteran from the FDC process.

Development – Exams

Request an examination if:

- there is credible supporting evidence that the Veteran was exposed to herbicides
- evidence indicates the Veteran is diagnosed with one of the conditions in CFR 3.309(e)
and
- medical evidence adequate for rating purposes is not already of record. Evidence (to include lay statements) indicates the Veteran currently suffers from symptoms consistent with a diagnosis of PTSD, **and**
- medical evidence adequate for rating purposes is not already of record.

TOPIC 2: VERIFICATION OF HERBICIDE EXPOSURE

Herbicide Exposure

When there is in-service evidence of herbicide exposure and current evidence of one of the conditions listed in 38 CFR 3.309(e), a presumption exists that the condition is related to herbicide exposure and the Veteran's service. This presumption removes the need for a nexus between the in-service event (in this case exposure) and the current diagnosed condition. Therefore, if the Veteran is eligible, service-connection is granted.

An herbicide agent is a harmful defoliant chemical (a very powerful weed killer), such as Agent Orange, that was used primarily in the Republic of Vietnam.

Boots on the Ground

If a Veteran served inside the land borders of the Republic of Vietnam between January 09, 1962, and May 07, 1975, he is presumed to have been exposed to herbicides. There is no time limit for the length of service inside the land borders of the Republic of Vietnam. A Veteran who got off a plane for a few hours while it was refueling, and resupplying is just as eligible as a Veteran who served in-country for two years.

Remember, although 38 CFR 3.2 classifies the Vietnam era as starting February 28, 1961, for those that served in-country, this is not the start date for herbicide presumption.

Evidence of in-country service is generally found on the DD Form 214 or in the personnel file; however, other evidentiary sources may be utilized like STRs, award citations, or personal correspondence. For a list of Vietnam APOs, please see the Vietnam APO Job Aid.

Inland Waterways and Offshore Waters

Consideration for service connection for herbicide exposure is given to Veterans who served aboard a ship or boat that navigated through the inland waterways of Vietnam as well as those who served aboard ships within the eligible offshore waters.

- The inland waterways (previously referred to as Brown Water) are noted to be all freshwater rivers within Vietnam, all streams, canals and all navigable waterways within the perimeter of land-type vegetation. This is particularly applicable to the marshes found in the Rung Sat Special Zone and other Vietnam coastal areas.
- The eligible offshore waters (noted as Blue Water) include the seas of the Republic of Vietnam, which, under international law extends 12-nautical miles seaward of a line

commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the coordinates.

Service in the eligible offshore waters of Vietnam during the time period beginning on January 9, 1962 through May 7, 1975, now qualifies a Veteran for presumption of herbicide exposure based on service in the Republic of Vietnam as defined in 38 CFR 3.313.

Note: Veterans are not required to state that they went ashore when evidence is sufficient to verify, they were aboard ships that operated on inland waterways during the specified time periods.

Evidence -Based Determinations of Eligibility

Effective January 1, 2020, upon implementation of the statutory amendments in *Public Law (PL) 116-23, the Blue Water Navy Vietnam Veterans Act of 2019*, the Department of Veterans Affairs (VA) established centralized processing teams at designated regional offices (ROs) and decision review operations centers (DROCs). The designated Regional Offices consist of St. Louis, Cleveland, Waco, St. Paul (VSC/PMC), Roanoke, St. Petersburg, Phoenix and Salt Lake City.

It is important to note Regional Office staff are no longer authorized to make the evidence-based determination regarding RVN service. Concessions of qualifying service associated with the Republic of Vietnam to include in-country, inland waterways and eligible offshore waters are the sole jurisdiction of the centralized processing teams or designated legacy appeals personnel. The evidence-based determination made by the centralized processing teams will be formally documented, uploaded to the Veteran's electronic claims folder (eFolder), and is binding on all ROs.

All ROs are responsible for the initial steps in claims based on herbicide exposure. This includes requesting all military records, to include service treatment records (STRs) and the entire official military personnel file (OMPF), as well as assigning the appropriate claim attributes, discussed in [M21-1, Part IV, Subpart ii, 1.H.1.e](#), to ensure proper routing for centralized processing.

Note: The Navy and Coast Guard Ships Associated with Service in Vietnam and Exposure to Herbicide Agents, aka "the ship list," previously used by all claims processors to concede qualifying service, is now restricted to the Records Research Team and designated legacy appeals personnel.

Depending on the initial research and analysis conducted by the centralized processing team, the claim will follow one of the paths as noted in the table below.

If ...	Then the claim will ...
the Veteran	be referred back to a RO for processing, to include all further development actions and rating and authorization activities.

If ...	Then the claim will ...
<p>had service in Thailand or Korea only, or</p> <ul style="list-style-type: none"> • had duty or visitation on land in the RVN 	<p><i>Note:</i> Once the claim is returned, the RO will be responsible for determining whether a Veteran's service in Korea or Thailand qualifies for herbicide exposure.</p>
<p>the Veteran served on a ship that was in the</p> <ul style="list-style-type: none"> • eligible offshore waters, to include visitation of a qualifying bay or harbor, or • inland waterways 	<p>remain with the centralized processing team for all rating and authorization activities.</p>
<p>none of the above is shown</p>	<ul style="list-style-type: none"> • be referred to the Records Research Team for • additional research, and • remain with the centralized processing team for all • rating and authorization activities.

(M21-1 IV.ii.1.H.1.g)

If, after all proper development has been completed, we cannot verify service within the land borders of Vietnam; send the claim to the JSRRC representative for a formal finding. A formal finding is not required if the Veteran alleges temporary duty (TDY) in Vietnam and the records do not support this assertion.

Thailand

Compensation Service has determined that special consideration should be extended to Veterans who served on U.S. Air Force or Army bases in Thailand and whose duties placed them on or near the perimeter on a regular basis during the Vietnam Era.

M21-1, Part IV, Subpart ii, 1.H.6.b has a great step-by-step guide to determine if we can concede that the Veteran was exposed to herbicides.

If the Veteran served with the Air Force on one of the Air Force bases in Thailand, we can concede exposure to herbicides when the Veteran's MOS was security policeman or security patrol dog handler, the Veteran was a member of the security police squadron, or according to credible supporting evidence, the Veteran's duties placed him on or near the perimeter on a regular basis.

If the Veteran served with the Army on one of the Air Force bases in Thailand, we can concede exposure to herbicides when the Veteran provides a statement that he was involved in perimeter

security duty and credible evidence supports his statement. Members of the Army did assist with base security at Air Force bases early in the war before these bases were fully operational.

If the Veteran served with the Army on one of the Army bases in Thailand, we can concede exposure to herbicides when the Veteran provides a statement that his duties placed him on or near the perimeter and the Veteran was a member of a military police unit, the Veteran's MOS was military police, or according to credible supporting evidence, the Veteran's duties placed him on or near the perimeter on a regular basis.

When reviewing claims involving Thailand service and herbicide exposure, the benefit of doubt rule does not apply. The employee must have credible evidence that places the Veteran on or near the perimeter on a regular basis on a direct or facts-found basis.

The perimeter of the base is the outermost perimeter and usually consisted of a double fence line. There can be multiple fence lines and perimeters within this outermost perimeter. The Veteran's duties must have placed him on or near the outermost perimeter and not on one of the interior fence lines. Generally, buildings, housing, or other structures were not near the outermost perimeter. The only structures usually on or near the outermost perimeter were guard posts or other security-related structures.

When a Veteran with service in Thailand during the Vietnam era claims SC for disability based on herbicide exposure, follow the steps listed in the table found at M21-1 IV.ii.1.H.4.b to verify exposure to herbicides

Korean DMZ

The VA has extended the presumption of exposure to herbicides to Veterans who served on the Korean DMZ from September 1, 1967 to August 31, 1971. Prior to February 24, 2011, the dates for exposure were April 1968, to July 1969. This change affects all claims, even those previously denied.

The VA and the Department of Defense have come up with a list of units that were stationed on the DMZ during this time frame. You can find this list at M21-1, Part IV, Subpart ii, 1.H.3.

For a Veteran who served in Korea to be eligible for the presumption of exposure to herbicides, he must have served in one of the units listed in the manual reference during the appropriate time frame. Pay close attention to documents in the Veteran's personnel file and the manual reference as some units on the list could be listed under the 2nd or 7th Infantry Division. If the Veteran served in one of these units, he would still be eligible for presumption no matter if his service records show he served under the 2nd or the 7th Infantry Division.

If the Veteran alleges service on the Korean DMZ during the appropriate time frame, the unit he served with is not on the list, and he provides us with enough information (namely a 2 month time frame as the Veteran would have already stated he served on the DMZ and the unit would be of record), the claim would need to be routed to your station's JSRRC representative for further research.

If the Veteran alleges service on the Korean DMZ outside of the appropriate time frame and/or the unit he served with is not on the list and he provides us with enough information (namely a 2 month time frame as the Veteran would have already stated he served on the DMZ and the unit would be of record), the claim must be routed to your station's JSRRC representative for further research.

Other Scenarios

There are three special scenarios where the VA has established the presumption of exposure to herbicides that do not fall into one of the categories above.

The first scenario is exposure to herbicides based on service on Johnston Island. Johnston Island is a coral atoll in the Pacific Ocean that was used as a storage location for drums (barrels) of herbicides from April 1972 to September 1977. During routine inspections, leakage was discovered in some of the drums. Due to the composition of the island, the herbicide did not disperse and contaminated the ground in the area. After much testing, it was determined that any risk of exposure was minimal. Also, most personnel that were involved with any activity involving the stored herbicides were military contractors. More information on herbicide exposure at Johnston Island can be found in the fact sheet located at M21-1, Part IV, Subpart ii, 1.H.5.b. Although it seems based on the information provided that exposure to herbicides would not have occurred, the VA has extended the presumption of exposure on a facts-found basis. This means if you have credible supporting evidence that directly places the Veteran in contact with the stored herbicides, presumption of exposure to herbicides can be established.

The second scenario is exposure to herbicides through contaminated C-123 aircraft. The C-123 was the aircraft used to disperse herbicides throughout Vietnam as part of Operation Ranch Hand. The VA has extended presumption of exposure to select individuals who came into contact with the aircraft used as a part of Operation Ranch Hand. If a Veteran alleges coming into contact with a contaminated C-123, the claim should be forwarded to the St. Paul Regional Office. St. Paul has exclusive jurisdiction to make service-connection determinations for these claims.

The third scenario is exposure to herbicides causing spina bifida or other birth defects in the biological children of Veterans who served in Vietnam or Korea during the Vietnam Conflict era (Chapter 18 claims). These claims are made by the children themselves. If a claim is received from a claimant alleging spina bifida or other birth defect due to their parent's herbicide exposure, the claim should be forwarded to the Denver Regional Office. Denver has exclusive jurisdiction to make determinations for these claims.

Other Locations

Occasionally, a Veteran will submit a claim alleging herbicide exposure outside of the locations and scenarios mentioned above. These locations and scenarios could range from exposure in Guam or Florida to handling the herbicide contaminated clothes of the deceased at a military mortuary facility. Anytime one of these claims is received, the steps in M21-1, Part IV, Subpart ii, 1.H.6.a should be followed.

If sufficient information has been received to perform research (sixty-day time frame, location, unit assigned, and a brief description of the exposure event(s)), an email will be sent to the Agent Orange mailbox. This address can be found in the manual reference above. If the exposure is verified by the Agent Orange mailbox, a review should be completed to determine if an exam is necessary. If after all development has been completed and not enough information has been received, the formal finding process should be started. If a negative response is received from the Agent Orange mailbox and we have enough information to submit the exposure event to JSRRC for further research, the claim should be forwarded to your station's JSRRC representative. If there is not enough information to submit the exposure event to JSRRC, the formal finding process should be started.

Formal Findings

Unfortunately, we cannot always verify the claimed herbicide exposure with the information provided by the Veteran. In the situation where enough information is not received to submit the exposure event to JSRRC for further research, a formal finding should be completed. When this situation occurs, a rating to deny any condition based on herbicide exposure should never be completed without the completed formal finding being associated with the file. This formal finding should be listed as evidence in the rating denying service-connection due to herbicide exposure. If we can submit the exposure event to JSRRC and a negative response is received, a formal finding is not required.

A template for the formal finding can be found at M21-1, Part IV, Subpart ii, 1.H.9.c.

The required elements of a formal finding are:

- a statement that the VA does not possess the information JSRRC requires to research the Veteran's herbicide event
- confirmation that the Regional Office followed all established development procedures
- description of the steps the Regional Office took to obtain the information needed
- statement that evidence of the Regional Office's attempts are contained within the file
- signature of the JSRRC coordinator and the VSCM or VSCM's designee (usually a coach)

Depending on your Regional Office, the person that prepares the formal finding may differ. It may be the VSR, RVSR, or the JSRRC coordinator. The only thing that matters is that the formal finding is reviewed and signed by the JSRRC coordinator and the VSCM or VSCM's designee.

Once the formal finding has been completed and signed, it should be associated with the Veteran's file. There is no requirement to notify the Veteran of the formal finding outside of including the formal finding as evidence on the rating decision.

TOPIC 3: EFFECTIVE DATES FOR HERBICIDE GRANTS

Effective Dates – General

In general, the effective date for a grant due to herbicide exposure is the date of claim or the date entitlement arose, whichever is later. However, there are situations unique to herbicide claims that may affect the effective date. These situations include *Nehmer* grants, liberalizing law, and diabetic complications.

When assigning an effective date, it's crucial to identify:

- the date of receipt of previous claim and/or intent to file,
- whether the claim was an original Fully Developed Claim for compensation submitted August 6, 2013 through August 5, 2015,
- the date of discharge from active duty,
- the date of diagnosis for the presumptive disability,
- the date the condition was added to 3.309(e), and
- Veteran's date of death. (when applicable)

Note: Additional information and situations related to effective dates can be found in the Effective Dates (Post-Challenge RVSR) course TMS #3950443.

Effective Dates – Federal Records

When a Veteran reopens his claim and exposure to herbicides is established based on newly received service records, the effective date must be determined using 38 CFR 3.156(c)(3). This regulation states that when VA makes a determination based on service records that existed but were not associated with the file at the time of the previously denied claim, the VA must grant benefits effective the date the VA received the previously denied claim or the date entitlement arose, whichever is later.

Effective Date Considerations

Remember intent to files did not exist prior to March 24, 2015. It is unlikely that the effective date will be day after discharge, but it depends on how long the Veteran served and when they filed the previous claim. (It is possible.)

If a condition was diagnosed prior to the addition of it to 3.309(e), and the claim was filed after it was added, 38 CFR 3.114 applies and the effective date would be the date of change in law or one year prior to date of receipt of previous claim, whichever is applicable based on date of claim and/or ITF.

Non-retroactive Effective Dates

The provisions of PL 116-23 concerning the presumption of service connection for Veterans who served offshore in the Republic of Vietnam are not liberalizing since this portion of the law serves only to clarify the interpretation of the statutory phrase “served in the Republic of Vietnam” previously found at 38 U.S.C. § 1116(a)(1).

When an initial grant of benefits is warranted based on a Veteran’s nautical service and a retroactive effective date is not available based on the provisions described above,

-do not apply 38 CFR 3.114 based on PL 116-23 to the assigned effective date, but

-do apply 38 CFR 3.400.

Note: still consider and apply all other standard effective date rules. If the Veteran was diagnosed with a 3.309(e) condition prior to its addition to 3.309(e) 38 CFR 3.114 does apply as usual.

Date entitlement arose is applicable when entitlement did not exist as of the date of claim but arose after that date. For example, if there is objective evidence that the disability was not manifested or diagnosed until after the claim was filed.

Effective Dates for Retroactive Considerations of Service Connection

A previously denied claim is considered qualifying for retroactive entitlement **only** if the reason for denial was a lack of evidence that the disease was incurred or aggravated by the service of the Veteran. A retroactive effective date may not be assigned for a claim denied for a reason other than or *in addition to* a lack of evidence that the disease was incurred or aggravated by the service of the Veteran. So, if the previous claim was correctly denied due to no diagnosis they do not qualify for a retroactive effective date.

Important: Medical evidence received alone or in connection with an unrelated claim does not constitute an explicit claim for the purposes of determining retroactive entitlement under the BWN Act. The Veteran must have previously claimed and been denied entitlement to service connection for the disability that is now the subject of the claim being considered for retroactive entitlement.

Reminder: informal claims were defined by regulations in effect prior to March 24, 2015. See historical 38 CFR 3.155, M21-1 III.ii.2.C. (Informal Claims Received Prior to March 24, 2015,

Communication of an Intent to File (ITF), and Requests for Application), and M21-1 III.iv.5.C.11 (Effective Dates Based on Historical 38 CFR 3.155).

Both the VSR promulgating and authorizing the award should be cognizant of this regulation and ensure that when an herbicide claim is granted using federal records, the appropriate effective date is applied by the RVSR.

Remember, any time that a date different from the date of claim or the day after discharge from service is used for an effective date, the RVSR must provide a reason for using that effective date in the notification letter user text field in VBMS-R (the fourth box).

PRACTICAL EXERCISE: HERBICIDE EXPOSURE SCENARIOS

Directions: For each scenario listed below, determine if the Veteran is eligible for the presumption of exposure to herbicides and detail why you made the determination.

Scenario 1

The Veteran served in the Army from February 02, 1961, to January 31, 1981. His personnel file contains a non-commissioned officer evaluation report that shows that the Veteran was deployed to Thailand and stationed at Ubon Royal Thai Air Force Base (RTAF) from June 23, 1965, to May 18, 1966. It shows that the Veteran assisted with setting up and participating in perimeter security around the airbase. The Veteran has submitted a VA Form 21-526EZ and a statement that he was exposed to herbicides due to his time patrolling the perimeter at Ubon RTAF.

Is the Veteran eligible for the concession of exposure? **YES** **NO**

Why? _____

Scenario 2

The Veteran served in the U.S. Army from April 14, 1966, to March 31, 1986. His personnel file shows that he was assigned to the 2nd Battalion, 9th Infantry Regiment, 2nd Infantry Division and deployed to Korea in May 1968. The Veteran submitted a VA Form 21-526EZ and a statement that he was exposed to herbicides while serving on the DMZ in Korea.

Is the Veteran eligible for the presumption of exposure? **YES** **NO**

Why? _____

Scenario 3

The Veteran served in the U.S. Navy from August 28, 1965, to July 31, 1985. His personnel file shows that he was assigned to the USS Markab AR-23 from March 13, 1968, to October 26, 1969. The Veteran submitted a VA Form 21-526EZ and a statement that he was exposed to herbicides while he was aboard the USS Markab in Ganh Rai Bay.

Is the Veteran eligible for the presumption of exposure? **YES** **NO**

Why? _____

