

**PL 116-23, BLUE WATER NAVY VIETNAM VETERANS ACT OF 2019:
RATING PROCESSING
FAQs**

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Claims Processing Questions

1. **So all AO claims, even not BWN claims, will be screened by one of these [St. Louis, Cleveland, Waco, St. Paul (VSC/PMC), Roanoke, St. Petersburg, Phoenix, Salt Lake City] offices?**

Claims of service connection for 3.309(e) conditions based on herbicide exposure during the Vietnam era require centralized processing. However, claims from Veterans for whom SC has already been granted by reason of conceded exposure to herbicides in-country RVN, Thailand, or Korean DMZ will remain with the RO, while service involving other concession avenues (namely, nautical service- to include inland waterways) will require centralized processing.

Note: If the claimant makes a specific allegation of eligibility under the new law, such as eligibility for the retroactive effective date, the claim must be routed for centralized processing.

2. **What is the significance of 9/25/1985?**

The historical version of 38 CFR 3.311a, which became effective on September 25, 1985, was the first VA regulation to provide guidance for the adjudication of claims based on exposure to dioxin.

3. **Are we going to construe claims, like with *Nehmer* ratings?**

No, there must be an explicit claim for the benefit received and denied between September 25, 1985 and January 1, 2020 to qualify for a retroactive effective date based on PL 116-23.

4. **For the Rating Decision effective date...should we use PL 116-23 as part of the reference in the narrative behind the effective date?**

Yes, if you are establishing a retroactive effective date this would be the appropriate citation.

5. **Are we to receive tier 1 or tier 2 credit?**

Tier 1

6. **Will there be SME or a second signature requirement on these claims as they will most likely be going back many years for effective date/staged ratings and change in laws/regulations?**

No; however, authority for single signature may vary among different regional offices (ROs). Please see M21-1 III.iv.6.D.7.d for when two signatures are required.

7. For purposes of review if SME is required, are we to be uploading a portion of this job aid (to include the pages 3 and 4) to assist with the SME review?

There is no requirement for a SME review, second signature (unless required per M21-1 III.iv.6.D.7.d or by local management), or uploading any portion of the Job Aid to VBMS.

8. Is there specialty language needed in the ratings?

No, the ratings must be completed with long form narratives, but there is no BWN specific language required. However, as always, proper selection and association of special issues in VBMS-R will generate necessary herbicide related text.

9. In the FAQ please clarify how long the narrative needs to be. With *Nehmer* cases, the narrative was very long.

There is no additional requirement for the narrative in these cases, other than they must be in long form. Follow standard long form narrative formatting per M21-1 III.iv.6.C.7. Also follow the general language standards for the rating narrative per M21-1 III.iv.6.C.5.g. Keep sentences direct, concise, and clear, and draft the rating decision using second person point of view, with active voice.

10. How detailed will have to be in regard to favorable finding?

There are no additional requirements for BWN other than the narrative must be long form and, as always, you must address all findings that are favorable to the claimant. Selecting the appropriate favorable finding glossary text and supplement it with a sentence identifying the specific evidence that supports the favorable finding documented.

11. What about cancer? Most will not have the mandatory exam after 6 months. Do we leave the 100 percent or get the exam before rating?

Yes, you will stage the rating for each case according to the evidence of record for that individual.

12. What if there is NO evidence of any specific RS criteria to assign a percentage effective from the establishment of service connection? Would we just assign a zero percent until the date of medical evidence that provides factually ascertainable findings that would enable a specific RS evaluation criteria?

Yes, you will stage the rating for each case according to the evidence of record for that individual.

13. Are we able to invite a supplemental claim for a previously denied claim for herbicide exposure based on no exposure?

Inviting the claim would not be advisable since we do not know if the service was in eligible waters so we could be inviting a claim to potentially deny.

14. Who are the Records Research Specialists? How do we refer claims to them if we are unable to concede eligible offshore waters? Will RVSRs have access to the tool that has been mentioned?

Addition of the *Special 12-mile Review* special issue will trigger assignment of the claim to the Records Research Team. As the claim moves through the process, it is crucial that the appropriate EPs, corporate flashes, and special issues are assigned at the appropriate time. These claim attributes are used to track claims for reporting purposes and to route the claim to the appropriate processing team.

15. If a condition were previously denied d/t no RVN and no diagnosis, would there be any bearing on the effective date if we received evidence to the claims file later, including with the current supplemental claim, demonstrating a diagnosis dating back to the time of the original claim?

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. The initial denial in this scenario does not qualify for a retroactive effective date based on PL 116-23, the effective date would be based on the date of receipt of the supplemental claim and apply 38 CFR 3.114 if appropriate.

16. Do you know when we will begin rating these cases? Will it be prior to 1/1/20?

Yes, these ratings will begin to be worked the week of December 16, after completion of the required BWN training.

17. Could you repeat the process for who works the legacy appeals?

AMO has designated specific personnel for legacy appeals.

18. For those of us working legacy appeals for these, will a centralized station need to complete an herbicide exposure memo prior to us working the legacy appeal?

Claims from Veterans for whom SC has already been granted by reason of conceded exposure to herbicides in-country RVN, Thailand, or Korean DMZ do not need to go to a centralized station for a memo before working the appeal. All

other herbicide related claims from Vietnam era Veterans must go for centralized processing.

19. Powerpoint states ALL herbicide claims based on Vietnam service will require centralized processing. If we conceded AO during Veteran's lifetime, say granted SC for DM, but then he dies from lung cancer, I am assuming we can just grant and do not need to send this to centralized processing as AO already was conceded?

Only if SC was granted by reason of conceded exposure to herbicides in-country RVN, Thailand, or Korean DMZ. Service involving other concession avenues (namely, nautical service-to include inland waterways) will require centralized processing.

Note: If the claimant makes a specific allegation of eligibility under the new law, such as eligibility for the retroactive effective date, the claim must be routed for centralized processing.

20. Is the St. Paul PMC only working the DIC claims and forwarding the accrued to the other centralized offices?

PMCs have jurisdiction of accrued claims and requests for substitution resulting from pension and/or survivors claims and/or appeals to include legacy appeals and AMA. VSCs have jurisdiction of accrued claims and requests for substitution resulting from compensation claims and/or appeals to include legacy appeals and AMA. However, if the Veteran's claim, request for decision review, or appeal pending at the time of death is intertwined with the cause of the Veteran's death and there is a claim for service connection (SC) for the cause of the Veteran's death pending, the PMC has jurisdiction. Therefore, pension related BWN accrued claims will be constrained to St Paul, and VSC related BWN accrued claims can route to any of the 8 BWN ROs, including St Paul. M21-1 VIII.5.17

21. Will previous AO exposure need to be sent back for review by central processing for the appropriate memos?

It depends on the nature/location of the previously conceded service. Veterans with in-country RVN, Thailand, or Korean DMZ service will remain with the RO, while service involving other concession avenues (namely, nautical service) will require centralized processing.

22. So 4138 informal claims would be pertinent?

Yes, prior to March 24, 2015 *any* communication or action that shows an intent to apply for benefits under laws administered by VA constitutes an informal claim. These claims count as an explicit claim as is required for application of PL 116-23. As of March 24, 2015 the concept of informal claim was removed from the

Department of Veterans Affairs (VA) regulations and replaced by the intent to file (ITF) and request for application regulations. M21-1 III.ii.2.C.1.a, 38 CFR 3.155

23. Are we no longer acknowledging equitable claim outcomes (presumption of exposure) to claims that were extend the presumption for Veteran's who were erroneously granted SC based on AO based on receipt of the Vietnam Service Medal, Vietnam Campaign Medal, Armed Forces Expeditionary Medal and/or the Vietnam Cross of Gallantry? Are we now saying only presumption is extended to a specific disability?

Conditions that were already established are protected, however the current guidance is **not** to concede herbicide exposure for **any newly claimed disabilities** unless evidence is presented that otherwise establishes the Veteran's exposure based on current evidentiary requirements. M21-1 IV.ii.2.C.3.p.

24. Are we sympathetically reading increases as part of our Blue Water review?

No, your BWN review should focus on the specific disability(ies) claimed on the supplemental application. However, it is important to remember and apply *historical 3.157* for increases shown in VA or uniformed services health care facility records prior to March 24, 2015. The date of outpatient or hospital examination or date of admission to a VA or uniformed services hospital will be accepted as the date of receipt of a claim if the evidence shows that an increase in evaluation is warranted on that date. If evidence after March 24, 2015 shows an increase is warranted in a condition that is not a part of the pending claim you may invite the claim for increase but you cannot grant it without a claim.

25. Is a supplemental claim necessary, or can they also use a claim form, if the previous claim is a stay? If it is just another claim for 3.309e that was denied?

Since the provisions of PL 116-23 require that an explicit claim was received and denied between September 25, 1985 and January 1, 2020 the appropriate supplemental claim form must be submitted. If the claim was previously denied and the Veteran submits a claim for the same condition on a 526EZ this is processed as a request for application. M21-1 III.ii.2.D.1.c, M21-1 III.ii.2.C.6.a.

26. It seems most of this training was about effective dates. Can you please provide a summary of what is actually different in my process as a rater? I get the rating, I see that there is a diagnosis or there isn't, I grant or deny and determine effective dates like I always have. What is different in my process for blue water navy claims, or is there no difference in the process?

An exposure verification memo must be in the file before you can grant on a 3.309(e) basis and the rating decision must be written in long form. The

entitlement to a retroactive effective date is the most significant impact of the new law.

27. What is the process for submitting legacy appeals for AO exposure determination and memo?

Legacy appeals personnel should add the *Blue Water Agent Orange* special issue to all BWN-related contentions and follow local guidance to route these appeals to the designated processing personnel at their station. If after completing all necessary development for cases with nautical service, the designated processing VSR **cannot** identify qualifying service according to the steps in the BWN Centralized Processing SOP, they will:

- add the *Special 12-Mile Review* special issue to the BWN-related contentions on the EP 335, prompting NWQ to recall the EP and route the EP 335 to the RRT for additional research and use of the Ship Locator Tool, and
- add a VACOLS diary under diary code “Other” to reflect “Ship Locator Research Required” and set the diary suspense for 15 days.

Upon receipt of an EP 335 containing the *Special 12-Mile Review* special issue, the RRT will:

- conduct research and service verification according to the RRT SOP,
- complete and upload the Exposure Verification Memo to the Veteran’s VBMS eFolder, and
- manually broker the EP 335 back to the legacy appeals team with VACOLS jurisdiction

28. Will there be more examples related to legacy appeals in the FAQ?

While the routing procedures may be different from those followed for a supplemental claim, development and rating of legacy appeals should be consistent with supplemental claims. The examples provided in the Blue Water Navy – RVSR Training are applicable to legacy appeals, as well.

29. How will the new rating criteria affect SOC / SSOC for legacy appeal?

All ratings completed based on the new law must follow the long-form rating decision format as detailed in M21-1, Part III, Subpart iv, 6.C.7, “*Long-Form Rating Narrative*,” and include a full explanation of the decision to grant or deny the benefit sought and any effective date assigned. This includes

- listing the exposure verification memo, as well as all other relevant evidence

- explaining how herbicide exposure was or was not established
- explaining the basis for assigned evaluations, including staged ratings
- justifying all assigned effective dates, citing the applicable legal authority
- addressing favorable findings, when applicable

Statements of the Case and Supplemental Statements of the Case should include the above information as required in the long-form rating decision.

Development Questions

1. Are we going to receive more concise training on development?

Development training was intended to be a prerequisite of the Rating training and is available in TMS: Blue Water Navy – Initial Training (4539988) and Blue Water Navy - Centralized Processing Development Training (VA 4539943)

2. Will there be further training about how to verify exposure/presence in the eligible waters? TMS training mentioned the Ship Locator Tool.

Members of the Records Research Team will receive necessary training. Use of the Ship Locator Tool is restricted to the centralized processing team and AMO Records Research Team.

3. Are ships deck logs available for retrieval more easily than in the past?

Members of the Records Research Team will receive necessary training. Use of the Ship Locator Tool is restricted to the centralized processing team and AMO Records Research Team.

4. Will RVSRs/RQRSs be given information on how to determine the 12 mile nautical limit of RVN in order to verify whether the concession was accurate?

Members of the Records Research Team will receive necessary training. Use of the Ship Locator Tool is restricted to the centralized processing team and AMO Records Research Team. The centralized processing teams and designated legacy appeals personnel make the evidence-based determination regarding a Veteran's service in the eligible offshore waters of the Republic of Vietnam. They will complete exposure verification memo and upload the memo to the Veteran's eFolder. This should be in the file before it is made RFD.

5. Who will prepare the "exposure verification memo"?

The centralized processing teams and designated legacy appeals personnel make the evidence-based determination regarding a Veteran's service in the eligible offshore waters of the Republic of Vietnam. They will complete exposure verification memo and upload the memo to the Veteran's eFolder using designated subject lines (Such as: *Eligible Offshore Service Confirmed.*)

- 6. How are development deficiencies handled? For example, the veteran claimed service connection for DM in 2005 and submitted a 4142 for a private physician. No development was done as the veteran served in the offshore waterways and the claim was denied due to no RVN service. There was no other medical evidence in the file at the time to verify a dx. The veteran reclaims the issue in 2019 and recent VHA records confirm a dx. Do we develop for the records identified in 2005? If they confirm a dx in 2005, do we go back?**

In order to be considered for a retroactive effective date a claim must have been received and denied between September 25, 1985 and January 1, 2020 due to lack of qualifying service. The claim in 2005 meets that criteria, therefore service connection back to the date of receipt of the previously denied claim is warranted if evidence verified diagnosis prior to that date. All standard duty to assist provisions apply.

- 7. Will we be following regular development/duty to assist procedures for claim where private medical records are identified, but not of record and/or VA-examinations are needed to appropriately evaluate the disability?**

Yes, all standard duty to assist provisions apply.

Effective Date Questions

- 1. Why would the effective date for scenario #2 [slide 20] not be based on the date the IHD was added as a recognized condition?**

For the purpose of assigning retroactive effective dates based on PL 116-23, consider the claim filed as of the date of receipt of the previously denied claim.

- 2. Can you explain the previous slide [slide 20] regarding the effective date for CAD. If *Nehmer* does not apply how were we able to grant the CAD back to 2002, instead of 8/31/10?**

The *Blue Water Navy Vietnam Veterans Act of 2019* authorizes retroactive payment of benefits based upon previously denied claims.

- 3. So if I understand this correctly, if there is a diagnosis before the condition was added, and a previously denied claim was also prior to that, we can**

grant back to the DOC of the previously denied claim regardless of when the condition was added.

Yes, that is correct.

4. So we can grant before it is a recognized presumptive condition related to AO?

Yes, that is correct. If a Veteran filed a claim for compensation before the condition was added to 3.309(e) and the evidence shows diagnosis of that condition at that time, the effective date will be date of receipt of that claim. If the claim was received after the addition of the condition to 3.309(e) consideration of 38 CFR 3.114 is appropriate if the condition was diagnosed before it was added to the list.

5. Did i just hear that we can grant a presumptive condition prior to the date it was added to the presumptive list?

Yes, that is correct.

6. What if the Veteran was denied a 3.309e condition previously due to no exposure, but on further review there was no verified diagnosis at the time of that claim either. A couple years later the evidence shows a diagnosis. Would this claimant be entitled to a potential retroactive effective date?

Not unless there was an explicit claim received after diagnosis to which the effective date could be associated. 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.

7. Does FDC Exclusion still apply (ie add'l dev needed), not all evid submitted, etc...)?

A retroactive effective date under the provisions of *Section 506 of PL 112-154* cannot be applied if the claim was excluded from the FDC program.

8. If a veteran was previously denied because there was no eligible Vietnam service AND there was no diagnosis, can a retroactive effective date be assigned if evidence received with a supplemental claim shows that the veteran had a diagnosis at the time of the previous claim? Or does the medical evidence have to be of record at the time of the previous claim?

The evidence would have to be of record at the time of the previously denied claim or associated with a date related to a subsequent denial. 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. The initial denial in this scenario does not qualify for a

retroactive effective date based on PL 116-23, however if the Veteran filed a supplemental claim for the previously denied condition between September 25, 1985 and January 1, 2020, PL 116-23 would apply to that supplemental claim.

9. There was a brief period of time in the past that Policy permitted stacking FDC with 3.114 - is this something that might apply to these cases?

We cannot stack the application of 3.114 to PL 112-154, Section 506. M21-1 III.i.3.B (*Historical - 2/19/19*) said this: **Important:** Only one effective date law can be used for each service-connected disability granted.

10. To be eligible for retroactive effective date, it notes must file supplemental claim - does this mean a claim must be submitted on 0995 or can we consider a reopened claim submitted on 4138 prior to 02/2019 as a supplemental claim?

Prior to February 2019, this would have been acceptable, however if that were the case it should have been stayed in the interim. If it was denied, they will need to file another supplemental claim on the appropriate form.

11. Scenario 8- that throws out that the supplemental claim has to be received by 1/1/2020. am I not reading correctly?

In order to be considered for a retroactive effective date a claim must have been received and denied between September 25, 1985 and January 1, 2020. A supplemental claim can be received at any time. Most claims filed within the last year were placed under the stay and are still pending processing. The stay is being lifted as of January 1, 2020. Claims that were previously denied, and are not under the stay, require a supplemental application after January 1, 2020 for processing under the new law and consideration of a potential retroactive effective date.

12. Scenario 8- how did you base the date on the reduction in this scenario?

The reduction from the 100 to 60 was based on the first of the month following three months after the myocardial infarction.

13. In reference to scenario 8, does it hypothetically matter if the Veteran is only denied on a direct basis for the IHD, and not because RVN service was not verified?

In some situations, only one reason for denial may be stated in the prior decision, though other reasons for denial were implicit in the record. For example, a stated denial reason may have been a lack of evidence that the disease was incurred or aggravated by the service of the Veteran, but the evidentiary record also lacked indication of a current disability. **Both the stated and implicit reason for denial**

are relevant to determining whether a claim may be considered an explicit claim for the presumptive disability.

- 14. With respect to previous denials... We can grant an earlier effective date from the original claim if the denial was because RVN service wasn't verified. What about if RVN service wasn't verified and there was no diagnosis? Additionally, what if RVN service wasn't ever specifically addressed because it wasn't relevant at the time? For instance, we had a claim for CAD in 2005, prior to when CAD became recognized under 3.309e. a denial was issued because CAD wasn't a recognized condition and there was never any contemplation as to whether RVN could be conceded or not**

As stated above, both the stated and implicit reason for denial are relevant to determining whether a claim may be considered an explicit claim for the presumptive disability.

- 15. Doesn't authorization have sole juris over determining effective dates for DIC?**

Authorization is responsible for DIC effective dates, however, given the complex nature of these claims, if the effective date is something other than date of claim or 1st day of the month of death it is best practice to provide the effective date to the VSR using the Special Notation box in VBMS-R.

- 16. On slide 29, it was noted that we would not be severing benefits based on pre-Haas policies. However, per the last bullet point, would we still be able to consider entitlement to an earlier effective date for service connection based on the current public law definition of RVN service, if there was a denial for the same condition of record between September 25, 1985 and January 1, 2010 (prior to the date SC has already currently established) and the reason for denial was no RVN service?**

Only if service in the eligible waterways based on the new law can be conceded.

- 17. So if the Vet filed a claim and was denied and years later he passes and the cause of death was due to one of the conditions listed under 3.309e can the widow file for retro benefits?**

In order to be entitled to the retroactive effective date for accrued benefits the widow would have had to file a claim within one year of the Veteran's death and been denied between September 25, 1985 and January 1, 2020. The widow would also have to file a supplemental claim for consideration of retroactive benefits based on PL 116-23.

- 18. In the past, if the veteran didn't meet minimum criteria for Vietnam service, we wouldn't have given an exam, therefore, no diagnosis may be shown (if private medical evidence wasn't submitted). The rating denies based on no**

exposure to AO and no diagnosis. How will we be handling the supplemental claim with no diagnosis of record for retroactive effective date purposes? The veteran may have had the diagnosis back then, we just weren't made aware of it because additional development wasn't warranted at that time.

The decision of entitlement to service connection is based on the evidence of record at the time of the previous claim. Unfortunately, if the evidence of diagnosis was not of record at the time of the previous denial retroactive effective dates for PL 116-23 do not apply. If service connection is established all medical evidence of record will be considered to appropriately stage the evaluations, regardless of the date of receipt of the evidence.

19. When the Veteran was previously denied for no diagnosis... the retroactive effective date would not/may not apply?

That is correct, 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.

20. Veteran claimed DM in 1998 and denied in 1998, No RVN no DX. You stated we are not allowed to re-adjudicate this claim. The Veteran submits a supplemental claim on 1/15/19 and medical evidence shows a diagnosis of DM II on 3/28/16. Is the effective date the date of the reopen/supplemental claim?

Correct, the effective date would be January 15, 2019.

21. Are the previous denials considered "open" claims? The examples all indicate that medical evidence was already in file throughout the history. For example, the veteran claims DM in 2010. We had medical evidence of a diagnosis and that he is on Metformin. No other evidence is received. He files an 0995 in 2019 and also supplies private treatment records showing a dx for diabetic peripheral neuropathy in 2010. Those records are received well after a year of "increase" but if the 2010 claim is considered opened, can we then apply retroactive service connection for the complication?

Once the determination is made that a grant with a retroactive effective date is warranted all evidence of record must be considered to stage the rating. Complications of diabetes are always within the scope of a claim involving diabetes and they should also be established staged as appropriate, regardless of the date of receipt of the evidence.

22. Similar example, vet claims CAD on 02/01/11. The medical evidence at the time shows a dx since 2009 with medication mgt. Claim is denied. He

submits a supplemental claim in 2019 and supplies private medical evidence from December 2013 that shows he had a heart attack. Can we stage the rating in this scenario?

Yes, since the evidence is of record at the time of your decision it must all be considered and staged based on facts found. M21-1 III.iv.5.B.2.k, M21-1 III.iv.8.D.1.e.