

TABLE THREE

Vessel	Number	Masthead lights arc of visibility; rule 21(a)	Side lights arc of visibility; rule 21(b)	Stern light arc of visibility; rule 21(c)	Side lights distance inboard of ship's sides in meters 3(b) annex 1	Stern light, distance forward of stern in meters; rule 21(c)	Forward anchor light, height above hull in meters; 2(K) annex 1	Anchor lights relationship of aft light to forward light in meters 2(K) annex 1
USS NEW MEXICO	SSN 779	206.4°	4.37	11.05	2.8	0.30 below.

* * * * *
 Approved: August 20, 2009.

M. Robb Hyde,
Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).
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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AN16

Presumption of Service Connection for Osteoporosis for Former Prisoners of War

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its adjudication regulations to establish a presumption of service connection for osteoporosis for former Prisoners of War (POWs) who were detained or interned for at least 30 days and whose osteoporosis is at least 10 percent disabling. The amendment implements a decision by the Secretary to establish such a presumption based on scientific studies.

VA is additionally amending its adjudication regulations to establish a presumption of service connection for osteoporosis for POWs who were detained or interned for any period of time, have a diagnosis of posttraumatic stress disorder (PTSD), and whose osteoporosis is at least 10 percent disabling. This amendment reflects statutory provisions of the Veterans' Benefits Improvement Act of 2008.

DATES: *Effective Dates:* September 28, 2009.

Applicability Dates: For information concerning the dates of applicability for certain provisions, see the

SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas J. Kniffen, Chief, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9725.

SUPPLEMENTARY INFORMATION: On January 14, 2009, VA published a proposal in the **Federal Register** (74 FR 2016) to amend VA's regulations at 38 CFR 3.309(c)(2) to establish a presumption of service connection for osteoporosis for POWs who were detained or interned for at least 30 days and whose osteoporosis is at least 10 percent disabling. Interested persons were invited to submit written comments on or before February 13, 2009. We received one comment based on the proposed rule.

38 CFR 3.309(c)(2)

The commenter stated that the proposed rule creating a presumption of service connection for POWs for osteoporosis does not eliminate the possibility that service connection may be denied under 38 CFR 3.307(d), Rebuttal of service incurrence or aggravation. Section 3.307(d) states that a presumption may be rebutted if the evidence is of the nature that would, in "sound medical reasoning and in consideration of all evidence of record, support a conclusion that the disease was not incurred in service." The commenter stated that, for example, if a veteran who was a POW claimed service connection for osteoporosis and also used corticosteroids, VA could deny the veteran's claim under § 3.307(d) based on medical treatises that state that osteoporosis is a common problem associated with corticosteroids. The commenter stated that the rule "seems to be another example of the Secretary offering to grant service connection knowing that he will never have to actually [sic] do so." The commenter

inquires about whether VA will "grant service connection for osteoporosis in a veteran with a history of treatment with corticosteroids."

As stated in the proposed rulemaking, VA has established a policy to grant presumptive service connection for osteoporosis that is at least 10 percent disabling for POWs detained or interned for at least 30 days. We make no change based on this comment because VA is obligated to follow Congress' directive in 38 U.S.C. 1113, which is implemented by 38 CFR 3.307(d), to deny service connection "[w]here there is affirmative evidence to the contrary, or evidence to establish that an intercurrent injury or disease which is a recognized cause of any of the diseases or disabilities within the purview of [38 U.S.C. 1112, 1116, 1117, or 1118], has been suffered between the date of separation from service and the onset of any such diseases or disabilities, or the disability is due to the veteran's own willful misconduct." Additionally, Congress has directed that "the Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary." 38 U.S.C. 5107(a). VA, therefore, may not ignore any evidence relevant to deciding a claim.

However, we are making a change to the proposed regulation text by adding language specifying the date on which the rule will be applicable to avoid confusion with the amendment to 38 CFR 3.309(c)(1) discussed *infra*, which implements section 106 of the Veterans Benefits Improvement Act of 2008, Public Law 110-389, 122 Stat. 4145, 4149. The amendment at 38 CFR 3.309(c)(2) applies to all applications for benefits that are received by VA on or after the effective date of September 28, 2009, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit

on the effective date of this rule. In accordance with 38 U.S.C. 5110(g), the effective date of benefits awarded under § 3.309(c)(2) cannot be earlier than the effective date of this rule or the date 1 year prior to the date of application, whichever is later.

Based on the rationale stated in the notice of proposed rulemaking and in this document, the proposed rule is adopted as a final rule with the change noted above.

38 CFR 3.309(c)(1)

On October 10, 2008, Public Law 110-389 was enacted. Section 106 of Public Law 110-389 amended 38 U.S.C. 1112(b)(2) by adding a new subparagraph (F) that creates a presumption of service connection for osteoporosis that becomes manifest to a degree of 10 percent for POWs if the Secretary determines that the veteran has PTSD.

Section 1112(b)(2) is implemented by VA at § 3.309(c)(1). To conform to the statutory amendment, we are adding “On or after October 10, 2008, Osteoporosis, if the Secretary determines that the veteran has posttraumatic stress disorder (PTSD)” to the list of diseases at § 3.309(c)(1).

As noted above, we are including the applicability dates in the amended regulations to avoid confusion. The amendment regarding a presumption of service connection for osteoporosis for POWs with PTSD at 38 CFR 3.309(c)(1) is mandated by section 106 of Public Law 110-389 and is therefore to be applied retroactively to all applications for benefits that are received by VA on or after October 10, 2008, the effective date of Public Law 110-389, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on the effective date of this rule. In accordance with 38 U.S.C. 5110(g), the effective date of benefits awarded under § 3.309(c)(1) cannot be earlier than the effective date of Public Law 110-389 or the date 1 year prior to the date of application, whichever is later.

Administrative Procedure Act

The substantive change to § 3.309(c)(1) made by this final rule merely reflects a statutory requirement. Accordingly, there is a basis for dispensing with prior notice and comment and a delayed effective date under the provisions of 5 U.S.C. 553. Use of those procedures would be impracticable, unnecessary, and contrary to the public interest.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this amendment to § 3.309(c) will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule does not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this rule has been examined and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that

agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are as follows: 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: June 9, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

■ For the reasons set forth in the preamble, VA is amending 38 CFR part 3 as follows:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

■ 1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

■ 2. Amend § 3.309(c) as follows:

■ a. In paragraph (c)(1), in the list of diseases, add “On or after October 10, 2008, Osteoporosis, if the Secretary determines that the veteran has posttraumatic stress disorder (PTSD),” after “Stroke and its complications.”

■ b. In paragraph (c)(2)(ii), in the list of diseases, add “On or after September 28, 2009, Osteoporosis.” after “Cirrhosis of the liver.”

■ c. Revising the authority citation.

The revision reads as follows:

§ 3.309 Disease subject to presumptive service connection.

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(c) * * *

(2) * * *

(Authority: 38 U.S.C. 501(a) and 1112(b))

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