



# Compensation & Pension Service Bulletin

DECEMBER 2008

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*The staff at C&P Service Central Office wishes everyone a safe and happy holiday season.*



## Policy (211)

### [Herbicide-Related Disability Claims from Veterans with Thailand Service](#)

The pending court case of *Haas v. Nicholson* concerns the issue of defining Vietnam service and whether the presumption of herbicide exposure will be extended to certain Vietnam-era veterans who did not serve within the country of Vietnam itself or on its inland waterways. These veterans include those with naval service on the offshore waters of Vietnam, often referred to as “blue water” veterans, and those who supported the war effort from outside Vietnam and received a Vietnam Service Medal for their support. Many of the veterans who received the Vietnam Service Medal for support efforts served in Thailand.

The Court of Appeals for Veterans Claims granted VA a stay in the *Haas* case that placed a hold on adjudicating claims that involve a presumption of herbicide exposure from blue water veterans and veterans with the Vietnam Service Medal who served in Thailand. VA Regional Office (VARO) personnel should be aware that not all veterans who served in Thailand received a Vietnam Service Medal and that there is no statutory or regulatory presumption of herbicide exposure based solely on service in Thailand. Therefore, all claims of herbicide exposure from veterans with Thailand service should be considered on a direct facts found evidentiary basis. M21-1MR, section IV.ii.2.c.10.n, instructs VARO personnel to send an inquiry in such claims to the C&P Service Agent Orange Mailbox: VAVBAWAS/CO/211/AGENTORANGE, prior to adjudication. When no factual evidence for exposure is available from the Agent Orange mailbox, then a follow-up request should be sent to the Army and Joint Services Records Research Center (JSRRC).

When these inquiries result in sufficient direct factual evidence of Thailand herbicide exposure, then the exposure should be acknowledged and the claim adjudicated. When these inquiries do not result in sufficient evidence to confirm exposure, then the claim can be adjudicated if the veteran did not receive the Vietnam Service Medal. However, when the veteran has received the Vietnam Service Medal and the claim would otherwise result in a denial of the benefit sought, then the claim falls under the *Haas* stay. These claims, as with other claims that fall under the *Haas* stay, should not be adjudicated until a final judicial decision and mandate has been issued in the *Haas* case.

### [Further Definition of Vietnam “Blue Water” Versus “Brown Water” Service for the Purpose of Determining Agent Orange Exposure](#)

Some confusion has arisen among VA Regional Office personnel regarding whether a veteran’s service as a crewmember on a deep-water naval vessel anchored temporarily in an open water port along the coast of Vietnam, such as Da Nang Harbor, is equivalent to service on the inland waterways of Vietnam.

Please be advised that Da Nang Harbor and all other harbors along the Vietnam coastline are considered by C&P Service to be part of the offshore “blue water” of Vietnam and not part of the inland waterway system or “brown water” of Vietnam.

To ensure fair and equitable treatment for all veterans, VA has extended the presumption of herbicide exposure only to those veterans who actually served within the Republic of Vietnam, or on its inland waterways, where herbicide use is well documented. The United States Court of Appeals for the Federal Circuit has upheld VA’s

determination that service in the offshore blue water does not constitute service within the country of Vietnam or on its inland waterways. VA considers open deep-water coastal harbors, such as those at Da Nang, Cam Ranh Bay, and Vung Tau to be part of the offshore blue water of Vietnam and not part of its inland waterway system. Inland brown water service in Vietnam refers to operations on rivers, estuaries, and delta areas inside the country itself.

Therefore, under current policy and procedures, the presence of a naval vessel in a Vietnam coastal port, such as Da Nang Harbor, is not sufficient to establish Agent Orange exposure based on inland brown water service for a veteran who served on that vessel.

For additional information on blue water versus brown water service, see the [September 2008 Addendum](#) to the C&P Service Bulletin.

[Impact of the \*Ellington v. Nicholson\* \(No 04-0403\) and \*Ellington v. Peake\* \(2008-7012\) decisions on inferred claims.](#)

C&P Service has received a large number of questions regarding the application of the *Ellington* decisions on inferred claims. It must be noted that the *Ellington* cases were not of great significance to our processing of claims or understanding of what should be considered a claim. The Court explained that the informal claim must be in writing, request a determination of entitlement or evidence a belief in entitlement to a benefit, and adequately identify the benefit sought.

It is important to note that the Court also held the following: “We do not hold that the submission of a document in connection with a VA examination could never constitute an informal claim.” Further, the Court stated, “Indeed, a veteran could file an informal claim by sufficiently manifesting an intent to apply for

benefits for a particular disease or injury in a VA form or questionnaire. However, those facts are clearly not presented here.”

The Court and Federal Circuit have been clear in their precedent opinions that a claim, whether informal or formal, **must be in writing**. See *Brannon, MacPhee, Rodriguez, Criswell, et. al.* This requirement is also explicitly required under 38 C.F.R. § 3.1(p).

Thus, the threshold question is, “What constitutes in writing?” We believe that, consistent with *Ellington* and related decisions, once the, “communication or action,” is transcribed in writing, such as via a [VA Form 119](#) or the transcription of the VA examination report, and the transcribed communication requests a determination of entitlement or evidences a belief in entitlement to a benefit, and adequately identifies the benefit sought, an informal claim has been raised. But it is important to note that the communication or action being transcribed, originates from the veteran.

We also believe that this approach is in accordance with our policy to sympathetically consider all pleadings. Thus, if the veteran makes a statement that meets the content requirements of a claim as described above, and the VA examiner or care provider transcribes that statement into the record, the sympathetic reading doctrine allows that to be considered an informal claim.

### [Audiology Opinions](#)

It has come to the attention of C&P Service that some VA Regional Offices are asking audiologists to provide opinions as to whether or not hearing loss or tinnitus may be presumed from the veteran’s Military Occupational Specialty (MOS). Requesting an opinion about presumption of hearing loss or tinnitus and MOS

is contrary to the findings of the Institute of Medicine's study, "Noise and Military Service: Implications for Hearing Loss and Tinnitus," that stated that the evidence was not sufficient to reach conclusions based on this relationship. Please share this information with individuals who request examinations/opinions in your offices and ensure they know not to request this type of opinion.

## **Procedures (212)**

### [Change to VA Form 4107, \*Your Rights to Appeal Our Decision\*.](#)

The June 2008 version of the VA Form 4107, *Your Rights to Appeal Our Decision*, contained an error under the section, "What Is an Appeal to the Board of Veterans' Appeals?" The Board of Veterans' Appeals has corrected the error in the form's November 2008 version. VA Regional Offices should use the new form immediately and not use prior versions. The revised VA Form 4107 may be found on the [One-VA Form Website](#). We anticipate having the new version of VA Form 4107 available via Jet Forms in PCGL with the February 2009 installation.

### [AL Amyloidosis Future Diaries](#)

As noted in the C&P Service Bulletins of [October](#) and [November](#) 2008, the process of adding Amyloid Light chain (AL) Amyloidosis to the list of presumptive diseases under [38 CFR 3.309\(e\)](#) is well underway. We have published the proposed rule in the Federal Register ([73 FR 65280](#)) and are awaiting comments. We will then respond to them and publish the final rule.

In the interim, VA Regional Offices that receive claims of compensation for AL Amyloidosis based on herbicide exposure should establish a future end product (EP) 686 maturing on April 15, 2009. In Share, also remember to select the

"Corporate Flashes" function, and assign the "NEHMER-AL AMYLOIDOSIS" flash.

Please contact Rhonda Ford of the Regulations Staff if you have any questions.

### [Returned Cost-of-Living Adjustment \(COLA\) Letters](#)

Earlier this year, we advised VA Regional Offices to collect all returned 2007 Cost-of-Living Adjustment (COLA) letters. These letters often contained only the last four digits of the claim number for compensation and Dependency and Indemnity Compensation (DIC) awards still in BDN. Attempting to identify the beneficiary with such incomplete information would be time consuming and sometimes virtually impossible. Therefore, station Records Management Officers may now destroy these 2007 COLA letters in accordance with current guidance, including *Records Control Schedule VB-1, Part I, Item number 13-052.400*.

Hines will soon be releasing the 2008 COLA letters, which will contain complete identifying information. Follow current guidance (M21-1MR Part III, Subpart iii, Chapter 1, Section B, Topic 11, Block g) regarding any returned 2008 COLA letters and all other non-essential mail.

### [C&P Establishment of Future Control for VR&E Motivational Outreach](#)

C&P and VR&E Services are considering the potential use of the End Product (EP) 810 work item to control VR&E Motivational Outreach. Until new procedures are finalized and published, all VA Regional Offices should follow the manual guidance already published. Per M21-1 MR IX.i.1.A.6, inform veterans of the availability and purpose of vocational rehabilitation when:

- a rating results in an initial evaluation

of 10 percent or greater, or increased SC combined evaluation of 20 percent or greater, other than a temporary rating under paragraph 29 or 30 of the rating schedule, or

- service connection for an additional compensable disability, regardless of whether there is a change in the combined evaluation and the combined evaluation is at least 20 percent, and a *DD Form 214, Certificate of Release From Active Duty* is received showing the veteran has been retired from the Armed Forces because of disability.

VR&E Service must meet with the veteran to determine eligibility for 38 U.S.C. Chapter 31 services.

Currently, the authorizer must establish a future date control for a 30-day period via the BDN 501 screen under EP 707, using reason code 30. For VETSNET cases, the authorizer must use the Share application to establish the 707 claim type, using the reason 30 future suspense reason.

- Use a local control in those cases in which BDN/Share control cannot be used.
- If a completed [VA Form 28-1900](#) is submitted prior to the control date, cancel the control.

VR&E, on receipt of the control document, initiates motivation activity by

- Requesting the claims folders as necessary,
- Determining whether to visit the veteran directly, or contact the veteran by telephone or letter,
- Establishing an outreach record in each case,
- Filing the original outreach record in the

claims folder, and

- Clearing the EP 707.

### Data Collection for FL 08-40

Fast Letter (FL) 08-40, *Combat-Related Special Compensation (CRSC) and Concurrent Retirement and Disability Pay (CRDP) Audit Error Worksheet (AEW) Processing Procedures Within the Veterans Service Network (VETSNET)*, released on November 14, 2008, described the process of submitting “Not Found” Audit Error Worksheets (AEWs) data to the VAVBAWAS/CO/212A mailbox.

### **The Process in FL 08-40:**

Beginning November 21, 2008, all Area Directors will submit an updated list of their area’s “Not Found” AEWs to the VBAVAWAS/CO/212A mailbox on the 3<sup>rd</sup> Friday of each month. The Compensation and Pension (C&P) Service will submit all subsequent AEWs to the Area Directors’ mailboxes for dissemination to the regional office of jurisdiction.

### **The New Process:**

Beginning December 19, 2008, VA Regional Offices (VAROs) must submit the updated list of their “Not Found” AEWs to the VBAVAWAS/CO/212A mailbox on the 3<sup>rd</sup> Friday of each month. C&P Service will provide subsequent AEWs to the Area Directors’ mailboxes for dissemination to the VARO of jurisdiction.

This change is effective immediately. Please send any questions regarding this process to the VAVBAWAS/CO/212A mailbox.

### IVM Report Due

Last month we stated that December 26, 2008, is the last day to submit the IRS Safeguard Activity Report to [VAVBAWAS/CO/212A](#). In light of the President closing Executive Departments and Agencies of the Federal Government on December 26, 2008, this report is now due on **December 29, 2008**. Any VA Regional Office or Center that has or processes Income Verification Match (IVM) files must submit the report, described in [M21-1MR, Part X, Chapter 10](#). If your office did not have any IVM files on station at the end of Calendar Year (CY) 2008 and did not destroy any IVM materials during CY 08, you may submit a negative Safeguard Activity Report. Otherwise, if your office had IVM files on station at the end of CY 2007 or destroyed IVM materials during CY 2008, you must submit the usual report.

### Requesting Transfers of PLCP Claims

C&P Service has received information that stations are requesting the claims folders of paperless claims from the Rating Activity Sites (RASs). Claims Assistants and Veteran Service Representatives should *not* request claim folders with the PLCP flash shown in COVERS. Instead, they should forward the supplemental claim to the respective RAS. Please remind employees that once a claim has been rated in the paperless environment, the RAS indefinitely retains jurisdiction of the claim. The delays caused by stations not forwarding supplemental PLCP claims to the respective RAS are adversely affecting development initiation time, control time, and average days pending.

### SSA Medical Records

The Social Security Administration (SSA) has notified us of several issues regarding medical

records. Some VA Regional Offices (VAROs) have requested that SSA cease sending medical records via Compact Disc (CD) because of various problems reading the CD. VARO staff that cannot read a CD provided by SSA should e-mail VAVBAWAS/CO/SSA. An employee having problems with the CD player in his/her Personal Computer (PC) should notify the information technology staff to inspect it for repair or replacement. Also, outbased offices (mini-Veterans Service Centers) that request SSA records should use the mailing address of the VARO as the return address. VAROs are responsible for ensuring prompt delivery of SSA medical records to their outbased offices.

### Month of Death Check for Surviving Spouse

Section 506 of Public Law 104-275 which amended section 5310 of Title 38, United States Code, states:

“Where a veteran receiving compensation or pension dies after December 31, 1996, the surviving spouse, if not entitled to death compensation, dependency and indemnity compensation, or death pension for the month of death, shall be entitled to a benefit for that month in an amount equal to the amount of compensation or pension the veteran would have received for that month but for his or her death.”

Many, if not all VA Regional Offices, have been paying the month of death check to the surviving spouse only when he or she requests it in writing or by phone. Also, the [VA Form 21-534](#), Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits, has been treated as a claim for the month of death check.

Based on this practice, there is reason to believe that many surviving spouses have not received the month of death check for which they were

eligible. Effective immediately, any First Notice of Death (FNOD) that is processed should be screened in the Triage or Post-Determination team for a potential eligible surviving spouse. For cases in which the veteran was in receipt of pension or compensation benefits at the 30% rate or higher, this should be a relatively easy task as dependency information is stored on these cases. However, for cases in which the veteran was receiving 20% compensation or lower, more research may be needed.

If the Notice of Death (NOD) came in the form of a death certificate, the existence of a surviving spouse should be noted. Also, some [VA Form 21-530s](#), Applications for Burial Benefits, [VA Form 21-2008s](#), Applications for United States Flag for Burial Purposes, phone calls and written notices will reveal that there is a surviving spouse. In cases for which there is no indication of a surviving spouse such as a death match for a veteran receiving a 20% compensation benefit, further development is required in the form of a phone call or letter.

The screener should forward all cases with a surviving spouse to the Post-Determination team to process an award for the month of death check using End Product (EP) 290 Payee 10.

C&P Service is working on clarification of VA's policy related to this statute and a means to compensate surviving spouses who may be unaware of their entitlement.

## **Training & Contract Exams (213)**

### **Centralized Challenge Training Session**

Session 2 of Centralized Challenge training will be held January 27 – February 13, 2009, with students traveling on January 26, 2009.

Stations that are sending students to Centralized Challenge training should ensure those students complete their prerequisite requirements prior to

arriving at centralized training. Prerequisite requirements are posted to the [C&P Training Website Home Page](#) a minimum of two weeks prior to the start of a session.

### **Release of New EPSS on Due Process**

A new Electronic Performance Support System (EPSS) on Due Process was released to the field on December 12, 2008. The new EPSS will be located within the [VSR Assistant](#). It includes a step-by-step guide on working due process, both pre-determination and post-determination on many issues, such as incarceration, fugitive felon and dependency. Users will be able to use flow charts, which can be found by clicking on the, "Resources," button on the top menu bar. When Resources appear, open the job aid topic and look for the flow chart. Users can print a copy of the flow chart for a static version, or it can be used interactively on-line, allowing the user to quickly click through it. Under, "Resources," we have also included two Due Process Job Aides, "Due Process Common Errors Job Aid" and "VETSNET Apportionment Job Aid". We would like to thank our field subject matter experts, Thomas Kenville from Cleveland and Dottie Scanlan from Nashville for all of their hard work. We look forward to your feedback on the new EPSS, which may be sent to the C&P Service Training mailbox at VAVBAWAS/CO/C&PTraining.

## **Business Management (215)**

### **COLA Adjustments**

We sent a reminder on December 16, 2008, that VETSNET COLA adjustments needed to be complete by COB that date in order to apply to the next benefit payment cycle. For cases not adjusted within this timeframe, please work to ensure that these are adjusted before January end-of-month processing. The cutoff for BDN

cases is December 19, 2008.

### 850 Work Items

850 series work items were installed into production in November. This new series of work items represents VETSNET cases requiring a manual COLA adjustment. We are in the process of testing these in the VETSNET Operations Reports (VOR) test environment and predict they will be available shortly in VOR production.

The 800 series [desk reference guide](#) has been updated to reflect the 850s.

## **Veterans Services (216)**

### Status of Outreach Letters

#### **Agent Orange**

On November 4, 2008, Hines mailed approximately 28,000 letters to “in-country” Vietnam veterans who received treatment for type II diabetes within the VHA health care system, but were not currently receiving compensation for the condition. Subsequently, a match was conducted of those veterans who were sent that outreach letter against C&P records to determine how many veterans had filed claims since the mailing. The match only identified those veterans who had filed a claim for an Agent Orange presumptive condition after November 4, 2008 (date of the letter) as of December 2, 2008:

Agent Orange claims pending – 497  
Number of grants – 1  
Number of denials – 0  
Letters returned as undeliverable – 522

C&P Service is working with an outside vender (Choicepoint) to obtain current addresses for a second mailing to the 522 veterans whose letters

were returned.

## **Traumatic Brain Injury (TBI)**

An outreach letter has been developed that provides information on VA’s new evaluation criteria for Traumatic Brain Injury (TBI). The letter also provides information on how to request a re-examination based on the new criteria. This mailing will target all veterans currently service-connected for diagnostic code 8045 (TBI). A data request has been submitted to PA&I to identify those veterans. Results of this search have not been received, but we should have the data soon. We will advise VAROs before a mailing occurs.

## **Radiation**

The Defense Threat Reduction Agency (DTRA) provided VA with a list of 2,182 veterans who participated in US atmospheric nuclear testing between 1945 and 1962. The list did not contain all the information needed for this outreach mailing. A radiation outreach letter has been drafted and is being reviewed. The letter provides information on the presumptive conditions specific to radiation-exposed veterans as well as radiogenic diseases associated with ionizing radiation. We will advise VAROs before a mailing occurs. Of the 2,182 records, 465 only had the first and last name and no other identifying information. The remaining 1,717 were matched against C&P records to find living veterans with award or pending claim information. The match resulted in 266 veterans who matched our search criteria and 1,451 veterans who did not match. Within the unmatched group 708 were identified as deceased and 743 as unknown. We are currently working with an outside vender (Choicepoint) to obtain current address information for the 743 veterans who are still living.