

Department of
Veterans Affairs

Memorandum

Date: June 08, 2021

From: Office of Field Operations and Compensation Service

To: Veterans Benefits Administration (VBA)

Subject: Persian Gulf War (GW) Particulate Matter Exposure Interim Claims Processing

Background

On May 24, 2021, the Secretary for the Department of Veterans Affairs (VA) issued a memorandum to initiate rulemaking to address the role that particulate matter exposure in the Gulf War plays in generating chronic respiratory conditions, such as asthma, rhinitis, and sinusitis. The rulemaking will address the establishment of presumptions of service connection, for Veterans that served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, and/or Afghanistan and Uzbekistan after September 19, 2001.

The *Southwest Asia theater of operations* refers to Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations (see generally 38 CFR 3.317).

VA is committed to implementing changes to address chronic respiratory conditions such as asthma, rhinitis, and sinusitis. As such, to ensure that affected Veterans with pending claims receive the benefits of the possible change in regulation, any rating decision(s) that would result in a denial of these conditions should be deferred until updated regulatory and procedural guidance is provided. When a Veteran has served in a covered area and is claiming asthma, rhinitis, or sinusitis (or symptoms that can be reasonably related to these conditions) claims processors should fully develop for the evidence necessary to adjudicate the claim. Please note that development can include ordering any examinations, for the claimed conditions, if the evidence of record indicates potential entitlement based on this future rulemaking. However, as discussed below, in situations where the claim can be granted on any basis, other than a presumption, claims adjudicators should not delay deciding the claim.

Purpose

This memorandum provides the following guidance to VA regional offices (to include Pension Management Centers):

- Reviewing and developing claims for asthma, rhinitis, or sinusitis based on exposure to particulate matter for Veterans with the active military service within the areas and timeframes noted above.
- Processing, to the maximum extent possible, any other issues or claims that can be resolved.
- Deferring or otherwise holding any denials for claims of asthma, rhinitis, or sinusitis, where exposure has been conceded.
- Properly establishing a special issue (SI) control to ensure that any, deferred or otherwise unprocessed claim, associated with the asthma, rhinitis, or sinusitis, is appropriately tracked for future claims processing, following updated regulatory and procedural guidance.

Claims Review

When reviewing claims that might be affected, VA claims adjudicators should apply this guidance for any claims related to the new conditions where a:

- Veteran has been deployed to the Southwest Asia theater of operations after August 2, 1990 during the Persian Gulf War and/or served in Afghanistan or Uzbekistan on or after September 19, 2001; and,
- Has filed a claim for asthma, rhinitis, or sinusitis (or symptoms that can be reasonably related to these conditions); and,
- May be eligible for a later presumption of service connection based on VA's rulemaking to address particulate matter exposure for asthma, rhinitis, or sinusitis.

For survivors, VA claims adjudicators should apply this guidance for any claims related to the new conditions where a:

- Survivor is claiming that the principal or contributory cause of the Veteran's death is, or is secondary to, asthma, rhinitis, or sinusitis; or,
- claimant has a specific allegation of eligibility under the new policy.

Important Note: As discussed above, in situations where service connection, and/or service-connected death, can be established on any basis, other than presumptive basis (e.g. direct basis), claims processors should not delay deciding the claim. If service connection, and/or service-connected death, on a presumptive basis due to particulate matter exposure is the only viable option, claims adjudicators should fully develop the claim and properly utilize SI controls to ensure that any deferred or otherwise unprocessed claim associated with asthma, rhinitis, or sinusitis is appropriately tracked for future claims processing.

Example: A Persian Gulf War Veteran, who served in the Southwest Asia theater of operations, is claiming asthma, and evidence in the file shows an in-service diagnosis of asthma. In this situation, assuming all other elements are met for VA to grant the condition on a direct basis, VA should not delay a decision on the claim; the claim should be granted.

General Claims Processing: Establishing SI Control

For claims of asthma, rhinitis, or sinusitis where exposure can be conceded, but service connection, and/or service-connected death, cannot be established on any other basis (e.g. direct), claims processors should take the following steps:

1. Apply *Gulf War Presumptive - Airborne Hazards* special issue to the contention(s) **only** if the issues remaining are related to the particulate matter (asthma, rhinitis, or sinusitis) and cannot be decided on any other basis (e.g. direct).

Note: The special issue should only be added at this stage if the claim contains only the potential particulate matter presumptive issue(s). NWQ will recall the claim prior to moving to rating once the special issue is attached. If additional issues are associated with the claim, the claims adjudicator should not add the special issue at this stage and should continue to develop and decide all other issues.

2. For claims with additional issue(s) that are ready for decision, the potential particulate matter presumptive issue(s) should be deferred on the code sheet, but the decision maker should not use the VBMS Core deferral functionality for any of the three new GW airborne-hazard, presumptive conditions:

- a. when deferring on the code sheet, the decision maker should notate in the Special Notation field: "GW particulate matter presumptive issue(s)"
- b. otherwise, for partial rating decisions and deferred issues follow the guidance contained in M21-1, Part III, Subpart iv, Chapter 6, Section A.

3. Prior to authorization, if there are no unadjudicated issues beyond those involving any of the potential particulate matter presumptive issue(s), the authorizer will apply the *Gulf War Presumptive - Airborne Hazards* special issue to the contention(s)

4. The authorizer will then continue the claim at authorization.

Note: The special issue will allow NWQ to hold the claim until VA releases additional guidance.

Service-Connected Death Claims: Processing and Establishing SI Controls

For service-connected, death claims based on the potential particulate matter presumptive conditions that cannot otherwise be granted on another basis (e.g., direct service-connection), the claims adjudicator reviewing the claim should apply the *Gulf War Presumptive - Airborne Hazards* special issue to the contention(s).

Note: The claims adjudicator reviewing the claim in this scenario will generally be a VSR responsible for gathering evidence necessary for a rating determination. If other entitlement decisions are at issue that may require a rating determination, then a partial

rating may need to be completed as indicated in the preceding section.

Higher-level Reviews (HLRs)

For any of the new potential particulate matter presumptive issue(s) that VA cannot otherwise grant on another basis (e.g. direct service-connection and/or service-connected death), claims processors should take the following steps for HLRs:

1. If VA may grant the issue(s) (asthma, rhinitis, or sinusitis) based the future regulatory presumption particulate matter (airborne hazards), then do not decide the issue(s) pending on the HLR. Complete a *VA Form 20-0999* and return the issue as a difference of opinion (DOO). Any issues on the HLR that are not related to the potential presumption of service connection, should be addressed through normal HLR procedures.
2. If the review finds further development is required for the GW presumptive issue, such as verification of deployment to a designated location or a medical examination to determine the evaluation of the disability, then return the issue as a DOO disposition for appropriate development.
3. If the review still warrants a denial based upon VA's inability to verify deployment location and/or due to the lack of diagnosis of the potential presumptive condition (asthma, rhinitis, or sinusitis), then decide the review by normal procedures.

AMA Board Grants, AMA Remands or HLR DOO Errors

Follow the guidance under the section *General Claims Processing: Establishing SI Controls* for claims implicated by the rule/regulation change.

Legacy Appeals

For any of the new potential presumptive conditions that VA cannot otherwise grant on another basis (e.g. direct service-connection and/or service-connected death), claims adjudicators should take the following steps:

1. If the appeal requires further development, such as verification of deployment to a designated location or an examination to determine the evaluation of the disability, then develop as necessary. If the appeal is ready for a decision because VA has completed all development, then follow guidance in steps 2 or 3 below.
2. If VA may grant the appeal based on airborne-hazard exposure, then do not decide the appeal at this time. VA may decide any other appeal issues if the decisions result in a grant of benefits. Otherwise, do not complete a Statement of the Case (SOC) or a Supplemental Statement of the Case (SSOC) at this time and apply the *Gulf War Presumptive - Airborne Hazards* special issue to the applicable GW issue(s).

Note: The special issue will allow NWQ to hold the claim until VA releases additional guidance

3. If VA will deny the appeal based upon VA's inability to verify deployment to a designated location exposure or the lack of diagnosis of the newly presumptive condition, then address the decision using normal procedures for airborne-hazard-related disabilities. Recertify the remand to the Board of Veterans' Appeals after expiration of the 30-day period following the SSOC.

Questions

Questions concerning this memorandum's guidance should be directed via e-mail through station leadership to Districts/OFO.