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National Veterans Affairs and Rehabilitation Commission

1608 K Street, N.W. • Washington, D.C. 20006

K. Robert Lewis, Chairman - Connecticut

Barry A. Searle, Director - Pennsylvania

25-09

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## VA to extend benefits to Veterans affected by Agent Orange

On October 13, 2009, the Secretary of the Department of Veterans Affairs (VA) announced his intent to establish presumption of service connection for three additional illnesses associated with Agent Orange exposure. Resulting from studies conducted by the Institute of Medicine (IOM), part of the National Academy of Sciences (NAS), the illnesses recognized to be added to the list of presumed illnesses are, B cell leukemia, such as hairy cell leukemia; Parkinson's disease, and Ischemic Heart Disease (IHD).

B-cell leukemia describes several different types of lymphoid leukemia which affect B cells. B-Cell Lymphoma occurs when B-Cells mutate and become cancerous. Subsequently, as the cancerous B-Cells clone themselves, the cancer proliferates.

Parkinson's disease is a neurological syndrome usually resulting from deficiency of the neurotransmitter dopamine characterized by rhythmical muscular tremors. In the United States, at least 500,000 people are believed to suffer from Parkinson's disease, and about 50,000 new cases are reported annually.

IHD, also known as coronary artery disease (CAD), is the lack of blood supply to the heart muscle caused by coronary artery disease and heart attacks. Its risk increases with age, smoking, high cholesterol, diabetes, and hypertension. IHD is the leading cause of death in the United States for both men and women.

The next step in the process is for VA to publish a proposed implementing regulation in the Federal Register. There will be a 60 day public comment period following publication of the proposed regulation. A final regulation will be published in the Federal Register once VA has considered all public comments.

38 U.S.C. § 1116(c)(1) states that the VA should adhere to the following timeline when promulgating regulations to implement presumptive service connection for agent orange-related diseases:

A. Not later than 60 days after the date on which the Secretary receives a report from the National Academy of Sciences, the Secretary shall determine whether a presumption of service connection is warranted for each disease covered by the report.

In this case, the Secretary determined that presumptive service connection was warranted for Parkinson's disease, ischemic heart disease and B cell leukemia on October 13, 2009.

B. If the Secretary determines that a presumption is warranted, the Secretary, not later than 60 days after making the determination, shall issue proposed regulations setting forth the Secretary's determination.

If VA adheres to this requirement, they must issue proposed regulations by Saturday, December 12, 2009.

C. Not later than 90 days after the date on which the Secretary issues any proposed regulations, the Secretary shall issue final regulations. Such regulations shall be effective on the date of issuance.

However, in *Liesegang v. Secretary of Veterans Affairs*, 312 F.3d 1368, 1378 (Fed. Cir. 2002), the Court indicated that there is no harmful error if the VA misses the specific deadlines under § 1116(c)(1), as long as final regulations are issued within 210 days of the date the VA receives a report from the National Academy of Sciences.

The most recent National Academies, Institute of Medicine Report, *Veterans and Agent Orange: Update 2008*, was released on July 24, 2009. Presuming that this is the date the VA "received" the report, the final regulations are required to be published no later than February 19, 2010, pursuant to *Liesegang*.

The American Legion remains concerned that the Secretary has yet to comment on another condition, hypertension, noted by the IOM in both their 2006 and 2008 reports. Hypertension is a condition which leads to other serious medical conditions. The IOM concluded two years ago that there is limited or suggestive evidence of an association between hypertension and herbicide exposure, which is the same category that ischemic heart disease and Parkinson's disease. As of this writing, it has been over two and a half years and the VA remains silent on this medical condition.

As of this time, VA has yet to make a determination as to the disposition of claims presently within the system that may be affected by this proposed regulation. It is possible that a stay may be issued on the affected claims until a final regulation affecting them is published. Service Officers can best serve their veterans by ensuring that claims still in the system that relate to

these issues are preserved in the system, and should exhaust any appeal or reconsideration measures available to them. In the case of veterans who have not filed a claim relating to these conditions, they should be advised to file now to preserve the earliest possible effective date, rather than waiting to determine the outcome of the final rule, as this could represent potentially several months of accrued benefits.

Any question about this regulation should be directed to:

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