

# Camp Lejeune

# Presumptive Conditions



Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune

# BACKGROUND

- ∞ On January 13, 2017, VA issued a final rule establishing a presumption of service connection for several diseases associated with exposure to contaminants in the water supply at the Marine Corps Base Camp Lejeune in North Carolina.
  - 82 Fed. Reg. 4173 (Jan. 13, 2017)
- ∞ The rule amends 38 C.F.R. §§ 3.307 and 3.309
- ∞ Rule becomes effective March 14, 2017

# Camp Lejeune Contamination

- ∞ Contaminants were present in the base water supply at Camp Lejeune from August 1, 1953, to December 31, 1987 (as estimated by the Agency for Toxic Substances and Diseases Registry)
- ∞ The contamination was caused by on-base industrial activities and an off-base dry cleaning facility
- ∞ Contaminants found in the water supply included the following volatile organic compounds:
  - Trichloroethylene (TCE)
  - Perchloroethylene (PCE)
  - Benzene
  - Vinyl Chloride

# Diseases Subject to Presumptive SC

VA will presume that the following conditions were caused by the contaminated water at Camp Lejeune:

1. Kidney Cancer
2. Liver Cancer
3. Non-Hodgkin's Lymphoma
4. Adult Leukemia (all types of leukemia with onset in adulthood)
5. Multiple Myeloma
6. Parkinson's Disease
7. Aplastic anemia and other myelodysplastic syndromes
8. Bladder Cancer

# Diseases Subject to Presumptive SC

- ∞ VA included diseases based on a recent review of scientific evidence, including an analysis of several hazard evaluations on the chemicals of interest conducted by multiple bodies of scientific experts
- ∞ The review was not an evaluation of the specific risks of exposure to contaminated water at Camp Lejeune

# Diseases Subject to Presumptive SC

- ☞ Under the Camp Lejeune Act, for Vet's with at least 30 days of **active duty service** at Camp Lejeune during the period 8/1/1953 – 12/31/1987, VA will assume that certain conditions are attributable to the service at Camp Lejeune, **for purposes of VA hospital care and medical services only**
- ☞ While there is some overlap of conditions covered for health care purposes and diseases subject to presumptive service connection, the lists are not identical
  - 38 U.S.C. § 1710; 38 C.F.R. § 17.400

# Diseases Subject to Presumptive SC

- ∞ The following conditions are covered for VA health care purposes, but are **not subject to presumptive SC**: 1) esophageal cancer; 2) lung cancer; 3) breast cancer; 4) neurobehavioral effects; 5) scleroderma; 6) renal toxicity; 7) hepatic steatosis; 8) female infertility; and 9) miscarriage.
- ∞ The following diseases are subject to presumptive SC, but are not included in the Camp Lejeune Act: 1) liver cancer; and 2) Parkinson's disease
- ∞ The differences are attributable to the review of additional scientific evidence that did not exist at the time the Camp Lejeune Act was passed by Congress

# Who Qualifies?

- ∞ To qualify for presumptive service connection, the Vet must meet the following requirements:
  1. Served no less than 30 days (consecutive or non-consecutive) at Camp Lejeune during the period 8/1/1953 – 12/31/1987
  2. Have a diagnosis of one of the 8 covered diseases
  3. The disease must manifest to a degree of 10% or more at any time after service



# What is “Service at Camp Lejeune”?

- ∞ Service at Camp Lejeune is defined as any service within the borders of the entirety of:
  - U.S. Marine Corps Base Camp Lejeune, or
  - U.S. Marine Corps Air Station New River
  
- ∞ Must be established by military orders or other official documents
  
- ∞ This does **NOT** include individuals who served aboard amphibious vessels docked at Camp Lejeune, *unless there is evidence in official service department records documenting official orders or assignment to serve, either in an individual capacity or as part of a larger unit, at Camp Lejeune*

# What Type of Service Qualifies?

- ∞ Individuals who were on active duty
- ∞ Former Reservists and former National Guard members
  - Qualify as a “veteran” under this rule
  - Exposure to contaminants qualifies as an “injury” for individuals serving on active duty for training or inactive duty training
  - If the person develops one of the covered diseases, VA will presume he or she became disabled during that service for purposes of establishing that the veteran had “active” service

# Presumptive SC Effective Date

- ∞ The earliest possible effective date for service connection on a presumptive basis under this rule is March 14, 2017.
- ∞ To qualify for an effective date of 3/14/2017, Vet must:
  - Have a current diagnosis of a covered disease as of 3/14/2017, AND
  - Have a pending claim for SC for the disease on 3/14/2017, OR
  - File a claim for SC for the disease before 3/14/2018

# Presumptive SC Effective Date

- ∞ Note 1: Effective date can be up to one year prior to the date of claim, but not earlier than 3/14/17, if the Vet had diagnosis on 3/14/2017
- ∞ Note 2: If Vet was previously denied, he or she must reapply because the claim will not be automatically reopened by VA

# Effective Date Under Other SC Theories

- ∞ Vet may be able to establish an effective date prior to 3/14/2017 under a different theory of SC
  - Claim must be filed prior to that date and be currently pending / on appeal
  - Must establish service connection under a different theory of service connection than the new presumptive rule:
    - Direct
    - Secondary
    - Other presumptive rule
      - Ex: Non-Hodgkin's Lymphoma, Multiple Myeloma, Parkinson's Disease due to Agent Orange exposure

# Direct SC

- ∞ To obtain SC on a direct basis, Vet **will need a medical opinion** stating that it is at least as likely as not the disease was caused by contaminants in the water at Camp Lejeune
- ∞ Doctor should provide good rationale for the opinion, cite studies/medical treatises, and discuss the Vet's medical history, family history, and the lack of stronger risk factors.
  - Simply stating that VA presumes the condition was caused by exposure to contaminated water at Camp Lejeune not enough.

# Direct SC

- ∞ Vets who had active duty service at Camp Lejeune for less than 30 days during the period 8/1/1953 – 12/31/1987 can also establish SC on a direct basis with a sufficient medical opinion linking a current disease to the Vet's exposure to water contaminants
  - Opinion would likely need to address the level of exposure, or the Vet would likely need to provide evidence estimating the exposure based on the amount of time at Camp Lejeune
- ∞ Doctors will likely be more willing to provide favorable medical nexus opinions in light of VA's acknowledgment of a presumed link

# Direct / Secondary SC

- ☞ Similarly, to obtain service connection on a secondary basis, Vet **will need a strong medical opinion** stating that it is at least as likely as not that the disease was caused or aggravated by an already service-connected condition.
- ☞ If VA grants SC on a presumptive basis and assigns 3/14/2017 effective date, despite evidence supporting direct or secondary service connection (or another theory of entitlement), appeal the decision.



# Comments to VA's Proposed Rule

- ☞ After publishing the proposed rule in Sept. 2016, VA provided a 30 day comment period
- ☞ VA received 290 comments from several veterans organizations, a member of Congress, and other interested persons
- ☞ Despite all the comments, the VA made no substantive changes to their proposed rule, making their original proposed rule final effective March 14, 2017

# Comments to VA's Proposed Rule

- ☞ Comments submitted to VA covered a variety of issues and concerns, including :
  - Changing the exposure requirement to less than 30 days
  - Expanding the definition of “service at Camp Lejeune”
  - Providing a more favorable effective date for benefits granted under the presumption
  - Extending the date range for exposure to contaminants
  - Expanding the list of covered conditions, particularly to all of those covered for VA health care purposes under the Camp Lejeune Act
- ☞ None of these comments resulted in VA substantively changing its originally proposed rule

# Questions?



# ACDUTRA AND THE PRESUMPTION OF AGGRAVATION

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# WHO IS A VETERAN?

- Elements of a VA disability compensation claim:
  1. Veteran status
  2. Current disability
  3. Link between current disability Vet's service
  4. Degree of disability
  5. Effective date of the disability

# WHO IS A VETERAN?

- To obtain “Veteran status,” a claimant must prove that he or she is a “veteran” for VA purposes.
  - A “veteran” is “a person who served in the active military, naval, or air service.”
    - 38 U.S.C. § 101(2)

# 3 WAYS TO ESTABLISH VETERAN STATUS (38 U.S.C. § 101(24))

1. Active duty service
2. Any period of active duty for training (ACDUTRA) during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in the line of duty
3. Any period of inactive duty training (INACDUTRA) during which the individual was disabled or died:
  - (i) from an injury incurred or aggravated in the line of duty; or
  - (ii) from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training

## FACTS – *HILL V. McDONALD*

- October 1980 to July 2002: Mr. Hill had several periods of Reserve duty
- June 7, 1997 - June 21, 1997: He had period of ACDUTRA
- June 14, 1997: His unit was performing field exercises when a bolt of lightning struck a nearby tree. An eyewitness stated he “fell to the ground” and immediately sought medical attention, complaining of knee and back pain.



# FACTS

- Line of Duty investigation report:
  - Knee injury was “incurred in line of duty,” and
  - Chronic low back pain classified as “in line of duty-existed prior to service-aggravation.”  
Investigator stated: “While there is evidence that the soldier had a history of low back pain, the force of being thrown to the ground may have aggravated that condition. Therefore, the presumption of service aggravation applies.”

# FACTS

- January 1998 statement from person with Master of Science degree in social work:  
“Although Mr. Hill had a preexisting condition, his psychiatric symptoms became much worse after the lightning strike.”
- Private medical reports show Mr. Hill’s physical and psychiatric symptoms increased after the lightning strike
- June 2002: Mr. Hill filed SC claims for a low back condition, a knee condition, and memory loss, all secondary to the lightning strike

# FACTS

- March 2003 Rating Decision:
  - Granted SC for right knee condition
  - Denied SC for low back and memory loss
- May 2003 VA psych exam: Mr. Hill diagnosed with major depressive disorder and PTSD, secondary to childhood abuse
  - Note: claimant now has veteran status for June 1997 period of ACDUTRA due to grant of SC for right knee
- September 2008: Mr. Hill filed to reopen low back disability claim and short term memory loss with PTSD claim

# FACTS

- ▶ June 2009 Rating Decision:
  - ▶ Denied SC for PTSD
  - ▶ Found no new and material evidence to reopen the low back claim
- ▶ June 2009: Mr. Hill submitted NOD, accompanied by private medical records, and articles regarding the effects of lightning strikes
  - ▶ The articles noted that lightning strikes can cause musculoskeletal damage

# FACTS

- March 2010 VA psych exam:
  - There is no evidence the Vet's depression was permanently aggravated beyond normal progression by the lightning strike, as there appeared to be several other factors that were occurring between the time of the lightning strike and the time he was reassessed by his mental health provider, including heavy alcohol use which was not brought to the attention of the provider.
  - Vet does report significant chronic pain as a factor in the depression and something that has limited his activity.
  - While it is this examiner's opinion that the lightning strike per se did not cause progression of the Vet's depression, it is this examiner's opinion that the chronic pain has permanently aggravated the Vet's depression.

# FACTS

- March 2010 VA psych exam (cont'd):
  - However, at this time, the Vet's chronic back pain is not service connected. This is being evaluated and is under appeal at this time.
  - In summary, if it is deemed by the specific examiner evaluating the Vet's back pain that his back pain is service connected and caused by the lightning strike, then it would be this examiner's opinion that the Vet's depression was aggravated beyond normal progression by the chronic back pain, but that his depression was less likely than not aggravated beyond normal progression specifically by the event of the lightning strike.

# FACTS

- September 2011 DRO hearing:
  - Mr. Hill stated that as a result of the lightning strike, “I was thrown 25 feet. I hit a tree and hurt my knee and I had back issues.”

# FACTS

- ▶ April 2014 BVA decision:
  - ▶ No new and material evidence submitted to reopen the low back claim
  - ▶ Denied SC for acquired psychiatric disability, to include PTSD
  - ▶ Acknowledged that the claims were based on a period of ACDUTRA and he established veteran status for these claims by virtue of his service-connected knee disability



# FACTS

- April 2014 BVA decision (cont'd):
  - ▶ Articles submitted regarding lightning strikes were not material
  - ▶ Hearing testimony that the lightning strike caused him to hit a tree was “patently incredible”
  - ▶ Relied on the March 2010 VA exam to deny the psychiatric disorder claim

# VET'S ARGUMENTS

- Vet should be entitled to the presumption of aggravation for both disabilities on appeal.
  - ▶ Since he established that he injured his right knee during a period of ACDUTRA, he has achieved veteran status for all of the claimed disabilities that he alleges he incurred during that period of ACDUTRA.
  - ▶ The “statutory presumption of aggravation applies to any period of active military service.
  - ▶ 38 U.S.C. §§ 1153 and 101(24) define ‘active military service’ to include any ACDUTRA period resulting in a disability.

# VET'S ARGUMENTS

- The Board erred in finding that his psychiatric disability did not increase in severity during service
- The Board erred in finding that his DRO hearing testimony and the lightning strike articles he submitted were not new and material evidence sufficient to reopen his low back disability claim

# CAVC ANALYSIS

- The Court held that once a claimant has achieved veteran status for a single disability incurred or aggravated during a period of ACDUTRA, that veteran status applies to ALL disabilities claimed to have been incurred or aggravated during that period of ACDUTRA
  - The Court noted that this holding also applies to claimants whose claims are based on inactive duty for training (INACDUTRA)

# CAVC ANALYSIS

- 38 U.S.C. § 1153 provides that “[a] preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease”
- “Active military, naval, or air service” is, essentially, shorthand for “veteran status”

# CAVC ANALYSIS

- The Court had previously held that where a claim is based on a period of ACDUTRA, and the claimant had not already established veteran status, the presumption of aggravation could NOT be applied.
  - *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2011).
- This case is different from *Smith*, because in this case, the claimant had already achieved veteran status by establishing service connection for his right knee disability

# CAVC ANALYSIS

- Because Mr. Hill was a “veteran,” the presumption of aggravation could apply for his other disability claims that pertain to that period of ACDUTRA

# CAVC ANALYSIS

- The Court then discussed whether the presumption of aggravation requires an entrance exam to have been performed to establish the baseline severity of a condition
- Entrance exams are usually not conducted at the beginning of periods of ACDUTRA.
  - If the Court were to find that 38 U.S.C. § 1153 required an entrance examination as a prerequisite to the application of the presumption of aggravation, it would render meaningless the Court's holding that the presumption of aggravation applied.



# CAVC ANALYSIS

- The Court referenced the distinction between the statutory language of the presumption of soundness (38 U.S.C. § 1111) and the presumption of aggravation (38 U.S.C. § 1153)
  - 38 U.S.C. § 1111 refers to an entrance exam
  - 38 U.S.C. § 1153 makes no such reference

# CAVC ANALYSIS

- The Court concluded that the presumption of aggravation can apply even if there is no entrance examination at the beginning of the period of ACDUTRA, as long as there is contemporaneous evidence of the baseline severity of the preexisting condition

# CAVC ANALYSIS

In summary:

- The presumption of aggravation will apply if the claimant submits evidence of:
  1. the baseline severity of the preexisting condition prior to the period of ACDUTRA,

AND

  2. a permanent increase in disability during the period of ACDUTRA

# CAVC ANALYSIS

- The Court also concluded that the articles the Vet submitted about lightning strikes were material to his claim
- The Board engaged in “an improper, pre-reopening weighing of the evidence” when it stated the Vet’s testimony about being thrown into a tree was “patently incredible”
  - Remember: when new evidence is submitted to reopen a claim, VA must presume the evidence is credible (unless it is inherently incredible) for purposes of determining whether new and material evidence has been submitted.
    - *Justus v. Principi*, 3 Vet. App. 510 (1992)

# CAVC ANALYSIS

- The Court said there was nothing inherently false or untrue about a statement that a person was thrown some distance into a tree by a lightning strike
- For purposes of contrast, the Court cited to an example of an “inherently false or untrue” statement:
  - A male veteran claiming that his disabilities were the result of complications from giving birth

# CAVC ANALYSIS

- Finally, the Board provided an inadequate statement of reasons or bases for relying on the March 2010 VA psych exam
  - While the examiner concluded the Vet's depression was not aggravated by the lightning strike and instead was aggravated by chronic back pain and heavy alcohol consumption, the examiner also acknowledged that the Vet reported that he started to drink heavily after the lightning strike, that he began drinking heavily due to the back pain from the lightning strike, and that he never had problems with alcohol prior to 1997

# CAVC ANALYSIS

- It is unclear why the examiner did not consider the Vet's heavy drinking as favorable evidence of aggravation related to the lightning strike
- The Court instructed the Board to either seek clarification from the examiner on this issue or obtain a new psychiatric exam that addressed this issue

# CAVC RESULT

- The Board's decision that no new and material evidence had been submitted to reopen the Vet's back disability claim was **REVERSED**
- The Vet's claims for a back disability and mental condition were remanded to the BVA
- *Hill v. McDonald*, 28 Vet. App. 243 (2016)



## LESSONS LEARNED FROM *HILL*

- Once a claimant has achieved veteran status for a single disability incurred or aggravated during a period of ACDUTRA or INACDUTRA, that status applies to all disabilities claimed to have been a result of that period of ACDUTRA or INACDUTRA.
- Once a claimant has achieved veteran status for a period of ACDUTRA or INACDUTRA, the presumption of aggravation can apply to that period of ACDUTRA or INACDUTRA.

## LESSONS LEARNED FROM *HILL*

- An entrance exam is not required for the presumption of aggravation to apply
- Instead, a veteran need only submit evidence that establishes that “there [was] an increase in disability during such service.” This includes:
  - Showing the baseline severity of the preexisting condition at the beginning of (close in time to) the period of service; and
  - Showing that the disability permanently increased in severity during the period of service

## LESSONS LEARNED FROM *HILL*

- Make sure the VA does not make credibility determinations about evidence in its evaluation of whether the evidence is new and material (unless the evidence is inherently incredible)

# QUESTIONS?

