

STATEMENT FOR THE RECORD
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THE AMERICAN LEGION
BEFORE THE
HOUSE COMMITTEE ON VETERANS AFFAIRS' SUBCOMMITTEE ON
DISABILITY ASSISTANCE & MEMORIAL AFFAIRS
ON
“ASSESSING THE PROCESS FOR DETERMINING PRESUMPTIVE CONDITIONS”

DECEMBER 9, 2020

Chairwoman Luria, Ranking Member Bost, and distinguished members of the House Subcommittee on Disability Assistance & Memorial Affairs; on behalf of our National Commander James W. "Bill" Oxford and our nearly two million dues-paying members, we thank you for inviting The American Legion to submit a Statement for the Record today and share our views on the process for determining presumptive conditions for VA purposes.

As the nation's largest wartime veterans service organization, The American Legion is a leading voice safeguarding veterans' healthcare and hard-earned benefits. We were founded back in 1919 with one primary purpose, to ensure that veterans who served their country and fought this nation's wars would be taken care of, especially those who were wounded or ill as a result of their service. This mission has been a constant struggle, particularly in determining presumptive conditions of servicemembers who have been exposed to toxins during their service. Too often it has become a vicious cycle of trying to get care for our most sick veterans only to receive the care they need too little too late.

Background

The federal government's role in providing healthcare to the nation's veterans goes back to World War I. The veterans' healthcare system was first developed in 1919 with the enactment of P.L. 65-326, which authorized the Public Health Service to provide needed care to veterans injured or sick due to military service.^{1,2} In general, a veteran will only receive care or receive compensation for injuries, illnesses, or disabilities which occurred and can be proven to be a result of their service. However, it is nearly impossible for a veteran to establish proof of service connection if the manifestation of the disability is long after their service or the relationship between the disability and service is not clear. Thus, the United States government has long relied on a presumption of service connection in order to relieve this burden of proof and take proper care of its veterans. Congress first established a presumption of service connection for tuberculosis and psychosis in 1921 for WWI veterans.³

¹ P.L. 68-242.

² CRS Report IF10555, [Introduction to Veterans Health Care](#).

³ CRS Report R41405, [Veterans Affairs: Presumptive Service Connection and Disability Compensation](#)

The Agent Orange Act of 1991 laid the basis of how VA is supposed to establish presumptive conditions today. In this process, the Institute of Medicine (IOM) provides VA with reports on findings that link toxic exposures with particular health conditions, which VA uses to make an internal decision on establishing a presumptive condition. Congress then requires VA to make a determination and report the decision to Congress.⁴

The American Legion has been involved with the presumptive condition process for decades. In 1983, the Legion sponsored an independent study by Columbia University that established the toxic effects of herbicide exposure on America's Vietnam War veterans. Since then, VA has recognized 14 presumptive conditions related to such exposure, and three more may soon be added as part of the National Defense Authorization Act for FY2021. In 2010, VA also established several presumptive conditions for our Gulf War veterans.

However, it has been nineteen years since U.S. forces began post-9/11 combat operations. Yet, VA has established no such conditions for U.S. veterans who deployed to Iraq or Afghanistan and suffered toxic exposure from burn pits and other sources. Nine years ago, the Institute of Medicine issued its report on the long-term health consequences from exposure to burn pits in Iraq and Afghanistan, and recommended longitudinal studies to determine the relationship between chronic diseases and toxic exposure.⁵

In 2016, the American Legion passed a resolution that urged VA "to expeditiously conduct peer reviews and scientific investigations through the National Academy of Sciences within the Institute of Medicine on all locations provided by the DoD" where U.S. troops may have suffered toxic exposure. The resolution also called on our federal government "to ensure that veterans are properly compensated for diseases and other disabilities scientifically associated with a particular exposure...."⁶

This health issue continues to burden our nations' servicemembers and veterans socially, financially, and physically. The American Legion supports expanding eligibility for those exposed to toxic exposures and urges that the federal government takes all necessary action, both administratively and legislatively as appropriate, to ensure veterans receive medical care for diseases and other disabilities scientifically associated with a particular exposure.⁷ It is unacceptable that we haven't yet addressed all the presumptive conditions for the Vietnam War veterans, and now we are repeating the problem with our post-9/11 veterans.

⁴ Ibid.

⁵ : IOM (Institute of Medicine). 2011. *Long-term health consequences of exposure to burn pits in Iraq and Afghanistan*. Washington, DC: The National Academies Press.

⁶ Resolution N. 118 (2016): *Environmental Exposures*

⁷ Resolution No. 118 (2016): [Environmental Exposures](#).

Legislative Action on the Presumptive Conditions Process

The American Legion believes that the Department of Veterans Affairs should be proactive – not reactive – when it comes to establishing presumptive conditions for our nation’s servicemembers and veterans. Congress should not find it necessary to legislate cooperation between VA and the National Academy of Sciences. The lack of VA initiative in the presumptive conditions process has been chronic. Congress had to pass legislation in 1991 before VA recognized any presumptive conditions for our Vietnam War veterans. For Persian Gulf War veterans, VA eventually established a few presumptive conditions based on Institute of Medicine studies – but only after Congress directed it to do so.⁸

Despite VA’s lack of initiative in the presumptive process, Congress has introduced multiple pieces of legislation that address this issue. In 2017, Secretary Shulkin considered recommending “bladder cancer, hypothyroidism and Parkinson-like symptoms” to the list of presumptive conditions linked to Agent Orange exposure as a result of an Institute of Medicine study.⁹ However, this never occurred and nearly 50 years after initial exposure some veterans are still suffering from these conditions without proper compensation. Again, Congress has been forced to legislate the issue that VA itself could have easily solved. S.3444, *the Fair Care for Vietnam Veterans Act of 2020*, which seeks to add these additional presumptive conditions for herbicide exposure, was introduced in Congress. We sincerely hope that this Congress will pass this legislation via S.3444 or in its current iteration as an amendment to the NDAA.

In September, S.4572 was introduced in the Senate to establish presumptive conditions for veterans exposed to burn pits and other toxins while serving on active duty. This legislation, the *Presumptive Benefits for War Fighters Exposed to Burn Pits and Other Toxins Act of 2020*, calls on VA to work with the National Academies of Science – just as The American Legion recommended – in the review of scientific evidence, the scientific determination of presumptive conditions, and recommendations for additional scientific studies.

Today, it has been reported that more than three million of our veterans may have suffered toxic exposure while deployed overseas. Congress has done what it can to solve the issue after the problems occur and will likely need to continue this vital work in the future. But VA has shown a consistent pattern that its presumptive condition process does not work. It took VA 20 years to recognize presumptive conditions for Vietnam War veterans and another 20 years to recognize them for Gulf War veterans. Now VA is repeating the pattern: it has had nearly two decades to develop the scientific evidence that would justify the establishment of presumptive conditions for our Post-9/11 veterans -- yet VA has failed to do so.

⁸ See H.R. 4386 (103rd): Veterans’ Persian Gulf War Benefits Act

⁹ <https://www.stripes.com/news/veterans/shulkin-will-decide-whether-to-add-more-conditions-to-agent-orange-list-by-nov-1-1.481353>

Possible Reforms to the Presumptive Condition Process at VA

The American Legion has multiple resolutions addressing the presumptive condition process and has long advocated for improvements based on them. In 2008, the Institute of Medicine issued a report on how the decision-making process for presumptive disabilities may be improved. It traced the current process back to the Agent Orange Act of 1991. Congress asked VA to contract with an independent organization to review the scientific information on Agent Orange.¹⁰

Increased Transparency

VA chose to work with the Institute of Medicine and used IOM committee reports and other information in an internal decision-making process to decide whether a presumptive condition could be established. The IOM found that the “internal processes by which the VA makes its presumptive decisions following the receipt of an IOM report have been unclear. VA should adopt transparent and consistent approaches for making these decisions.”¹¹ The American Legion agrees that VA needs far greater transparency in its decision-making process for presumptive conditions. Veterans service organizations and other stakeholders should be briefed by VA and asked for their input before a final decision is made in the presumptive process. For example, if VA plans to deny presumptive status for a certain medical condition related to toxic exposure, it should share its rationale with stakeholders beforehand and solicit their comments.

Greater Inclusion of Stakeholders

Besides encouraging VA to employ a more consistent and transparent decision-making process, the Institute of Medicine also recommended more “stakeholder inclusiveness,” identifying “a need for more active solicitation of stakeholder input, not just into decisions on specific presumptions but more generally with regard to VA’s overall process for making presumptions.... Among others, this entity should consult with: representatives of veterans service organizations; veterans; veterans’ families; medical personnel at VA who are engaged in the research, diagnosis, and treatment of conditions at issue; and personnel at the Department of Defense (DoD) who are knowledgeable about pertinent exposures and exposure data.”¹² VA should also consult with veterans service organizations and other stakeholders regarding the decision-making process. For example, VA could provide quarterly briefings on medical conditions being considered for presumptive status, and to what extent current research in the medical community supports such consideration, and how likely it is that VA will recognize a condition.

¹⁰ Institute of Medicine. 2008. *Improving the Presumptive Disability Decision-Making Process for Veterans*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/11908>.

¹¹ Ibid.

¹² Ibid.

Research on Identifying and Establishing Presumptive Conditions

We believe that VA's overriding responsibility to assist veterans and their families should compel it to identify and establish presumptive conditions in a far more aggressive manner. For example, our Blue Water Navy veterans who served off the coast of Vietnam had to wait until 2019 to become eligible for presumptive conditions – 36 years later. Although The American Legion and other VSOs supported the extension of presumptive conditions to Blue Water Navy veterans, it took a Court decision to get VA to finally take action.¹³

We also consider the presumptive conditions process for our 9/11 veterans, and wonder why VA has no such conditions in place 19 years after our troops first deployed to Afghanistan. VA has not conducted sufficient studies to determine illnesses and diseases directly related to the various types of toxic chemicals, nor have they begun to develop a list of presumptive conditions. Veterans who suffer from conditions related to toxic exposure have neither the time, resources, or evidence to make their case, nor is there adequate legislation to support toxic exposure claims. This health issue continues to burden our nations' servicemembers and veterans socially, financially, and physically.¹⁴

Lack of Cooperation

For our Gulf War veterans, VA finally granted them a few presumptive conditions in 2010 – 20 years after Operation Desert Shield had commenced. However, Congress decided that VA's research into the issue was flawed and created the Research Advisory Committee on Gulf War Veterans' Illnesses (RAC). VA's response was to replace all but one of the committee's members and declared that the RAC – a congressionally mandated committee – could not publish any of its reports without VA's approval.¹⁵

The American Legion contends that the presumptive conditions process has suffered by VA's lack of timeliness, transparency and a cooperative spirit. VA cannot justify why it has taken decades to establish presumptive conditions for our veterans, or why it takes Court decisions and public laws to jolt it into action. As the Institute of Medicine recommended 12 years ago, VA would surely benefit from more “stakeholder inclusiveness” in its decision-making process.

We all should be in the position to look upon VA as a role model for the presumptive process, and we call upon the Secretary of Veterans Affairs to move his department in that direction. Create a program for the early identification of toxic exposure to our troops deployed overseas. Produce a list of presumptive conditions, based on research conducted by the National Academies of Science. Submit a budget request to Congress to consider compensation for veterans who suffer from any presumptive conditions.

¹³ Resolution No. 246: Blue Water Navy Vietnam Veterans. Also, see *Procopio v. Wilkie*, U.S. Court of Appeals for the Federal Circuit (Jan. 29, 2019)

¹⁴ Resolution No. 118 (2016): [Environmental Exposures](#).

¹⁵ Kennedy, Kelly (14 March 2014). "Congress seeks independence for Gulf War illness board". USA Today.

Instead of Congress bringing presumptive conditions to VA's attention, let's try it the other way around. VA has the ability and expertise to take a leading role in the recognition of presumptive conditions. We strongly encourage it to do so, as an important part of its perpetual duty to assist our nation's heroes.

Conclusion

Chairwoman Luria, Ranking Member Bost, and distinguished members of the House Subcommittee on Disability Assistance & Memorial Affairs, The American Legion thanks this committee for the opportunity to express the position of nearly 2 million dues-paying veteran members of this organization. The American Legion looks forward to working with Congress and the Department of Veterans Affairs in substantially improving the process by which presumptive conditions are granted for disabilities suffered by America's veterans.

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