

**Department of  
Veterans Affairs**

# Memorandum

Date: May 3, 1999

VAOPGCPREC 4-99

From: General Counsel (022)

Subj: Requirements for a Well-Founded Claim Under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317--Undiagnosed Illness--Persian Gulf War

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

What evidence is necessary to establish a well-founded claim for compensation under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317 for disability due to an undiagnosed illness suffered by a veteran of the Persian Gulf War?

DISCUSSION:

1. Under 38 U.S.C. § 5107(a), a person who submits a claim for benefits under any statute administered by the Department of Veterans Affairs (VA) is required to submit "evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." The United States Court of Veterans Appeals (CVA) has defined a "well-founded claim" as "a plausible claim, one which is meritorious on its own or capable of substantiation." *Murphy v. Derwinski*, 1 Vet. App. 78, 81 (1990). The CVA has stated that such a claim need not be conclusive, but only possible, to satisfy the initial burden of section 5107(a). *Murphy*, 1 Vet. App. at 81. Further, the CVA has explained the types of evidence necessary to establish a well-founded claim for disability compensation under the generally-applicable provisions of 38 U.S.C. § 1110 and 38 C.F.R. § 3.303, see *Savage v. Gober*, 10 Vet. App. 488, 493, 495-96 (1997), and for purposes of presumptive service connection for disabilities associated with herbicide exposure under 38 U.S.C. § 1116(a) and 38 C.F.R. §§ 3.307(a)(6) and 3.309(e), *Brock v. Brown*, 10 Vet. App. 155, 162 (1997). However, apart from the general statement that a well-founded claim is one which is "plausible" and "capable of substantiation," the CVA has generally not addressed the requirements for establishing a well-founded claim for benefits under other statutes and regulations.

2. As an initial matter, we note that the determination as to what evidence is necessary to justify a belief in a fair and impartial mind that a claim is well grounded is not a purely legal question. Although a number of general legal principles may be discerned from the applicable statutes and the precedents of the CVA, there are no specific statutory or regulatory standards governing the type or amount of evidence necessary to establish a well-grounded claim. The statutory standard stated in section 5107(a) is sufficiently broad that there may be a range of permissible conclusions concerning the type or amount of evidence necessary to satisfy that standard, each of which may be consistent with the statute. The choice among permissible standards may be based on policy considerations and pragmatic concerns relating, for example, to the objectives of the particular benefit program concerned and may be an appropriate subject for issuance of regulations. Accordingly, our analysis will be limited to the governing legal principles, with the recognition that the Secretary of Veterans Affairs may issue rules more specifically identifying the type or amount of evidence necessary to establish a well-grounded claim for benefits under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317. In the absence of such rules, we believe that the determination as to whether a claimant has submitted evidence sufficient to establish a well-grounded claim in a particular case should be based on the nature and facts of the claim and the exercise of reasoned judgment in accordance with the general principles discussed below.

3. As used in section 5107(a) in relation to claims for VA benefits, the term "well grounded" is most reasonably viewed as referring to a claim which is well grounded in fact and law. Accordingly, as suggested by the CVA's precedents, section 5107(a) generally requires a claimant to submit evidence sufficient to justify a belief that there is a factual and legal basis for the claim of entitlement to the benefit sought. The history of section 5107(a) and the precedents of the CVA and the United States Court of Appeals for the Federal Circuit suggest that, to meet this burden, a claimant ordinarily is required to submit some evidence with respect to each element of the claim necessary to establish entitlement to the benefit sought. In a report preceding the enactment of what is now section 5107(a), the Senate Committee on Veterans' Affairs stated that, to establish a well-grounded claim, "the claimant would have the burden of adducing some evidence on each element necessary to warrant the granting of the benefit at

issue." S. Rep. No. 418, 100th Cong., 2d Sess. 32 (1988). Consistent with that view, the CVA and Federal Circuit have held that a well-grounded claim for service connection under 38 U.S.C. § 1110 generally requires submission of some evi-

dence of: (1) a current disability; (2) a disease or injury incurred or aggravated in service; and (3) a nexus between the in-service disease or injury and the current disability. See *Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997), cert. denied, 118 S. Ct. 2348 (1998); *Savage*, 10 Vet. App. at 493. The failure to submit evidence with respect to any of those elements may support a conclusion that the claim is not well grounded. See, e.g., *Wade v. West*, 11 Vet. App. 302, 305 (1998) (no evidence of nexus); *Brock*, 10 Vet. App. at 164 (no evidence of current disability).

4. The CVA's precedents further suggest that the evidence submitted by the claimant generally must be competent evidence of the matter at issue in order to establish that the claim is well grounded. The CVA has held that, for purposes of establishing a well-grounded claim, medical evidence is necessary to establish the existence of any disability which ordinarily requires medical expertise for its identification. See *Savage*, 10 Vet. App. at 495. However, lay evidence may be sufficient to establish the existence of any disability which is ordinarily capable of identification by lay observation. *Id.* Accordingly, the determination as to whether medical evidence, rather than lay evidence, is necessary to establish that a claim is well grounded depends upon the nature of the condition claimed.

5. To determine what evidence is required for a well-grounded claim under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317, it is necessary to consider the elements of proof necessary to establish entitlement to such benefits. Section 1117(a) authorizes VA to pay compensation to "any Persian Gulf veteran suffering from a chronic disability resulting from an undiagnosed illness (or combination of undiagnosed illnesses)" that either became manifest during service in the Southwest Asia theater of operations during the Persian Gulf War or became manifest to a degree of disability of 10 percent or more within any presumptive period prescribed by VA. VA's implementing regulation, 38 C.F.R. § 3.317(a)(1), provides that VA will pay compensation to a Persian Gulf veteran "who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms," provided that such disability became manifest either during service in the Southwest Asia theater of operations during the Persian Gulf War or to a degree of disability of 10 percent or more not later than December 31, 2001, and, provided further, that the disability cannot by history, physical examination, and laboratory tests be attributed to any known clinical diagnosis. Section 3.317(a)(2) states that the term "objective indications of chronic disability" includes both "signs," in the medical sense of objective evidence per-

ceptible to an examining physician, and other, non-medical indicators that are capable of independent verification. Section 3.317(a)(3) states that disabilities which have existed for 6 months or more and disabilities that exhibit intermittent episodes of improvement and worsening over a 6-month period will be considered chronic.

6. Based on the above-referenced statutory and regulatory terms, we believe that the necessary elements of a claim for benefits under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317 may be identified as follows: (1) proof of active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War; (2) proof of one or more signs or symptoms of undiagnosed illness; (3) proof of objective indications of chronic disability manifest during service or to a degree of disability of 10 percent or more during the specified presumptive period; and (4) proof that the chronic disability is the result of the undiagnosed illness. It is, of course, possible to arrive at different statements of the necessary elements of the claim, consisting of more than four elements (e.g., by treating the requirements of chronicity or incapability of diagnosis as separate elements). The above-stated description, however, provides an adequate framework for purposes of our analysis.

7. With respect to the first element, we note that VA routinely obtains verification of service from the appropriate service department, see 38 C.F.R. § 3.203(c), and, as a practical matter, claimants often may not have to submit evidence as to this element. In the event, however, that service records fail to show qualifying service, the claimant may be required to submit evidence of qualifying service in order to establish a well-grounded claim.

8. With respect to the second element, section 3.317(a)(1) refers to "illness or combination of illnesses manifested by one or more signs or symptoms such as those listed in [§ 3.317(b)]." The regulation indicates that existence of the

referenced "illness" or "illnesses" may be demonstrated by the existence of one or more signs or symptoms. Accordingly, we believe that the second element generally may be satisfied by evidence of manifestation of one or more signs or symptoms, such as those listed in 38 C.F.R. § 3.317(b). As discussed in paragraphs 13 through 15 below, however, the requirement that the signs or symptoms be attributable to an "undiagnosed" illness may be construed as affecting the claimant's burden with respect to the second element of a well-grounded claim under section 1117.

9. As noted above, the CVA's precedents indicate that, for purposes of establishing a well-grounded claim, medical evidence is necessary with respect to any issue which would ordinarily require the exercise of medical expertise. However, the second element of a well-grounded claim under section 1117 requires evidence of the veteran's signs or symptoms, rather than a medical diagnosis. The CVA has stated that lay witnesses "are perfectly competent to testify as to their firsthand observations of [a veteran's] visible symptoms." *Doran v. Brown*, 6 Vet. App. 283, 288 (1994). Many of the signs or symptoms identified in 38 C.F.R. § 3.317(b) appear to be susceptible to lay observation by the veteran or other persons, obviating the need for medical evidence. There may, however, be instances where the sign or symptom claimed by the veteran is not reasonably susceptible of observation by lay persons, and medical evidence may be necessary to establish a well-grounded claim based on such a sign or symptom.

10. With respect to the third element, section 3.317(a)(1) requires proof of "objective indications of chronic disability" during the pertinent period of service or to a degree of disability of 10 percent or more not later than December 31, 2001. The requirement of "objective indications" appears to contemplate evidence other than the veteran's own statements or testimony. In discussing the requirement for proof of disability under 38 U.S.C. § 1117, the House Committee on Veterans' Affairs stated that, "the Committee intends that there must be some objective indication or showing of the disability which is observable by a person other than the veteran, or for which medical treatment has been sought." H.R. Rep. No. 669, 103d Cong., 2d Sess. 7 (1994). Section 3.317(a)(2) provides that "objective indications" include both "'signs,' in the medical sense of objective evidence perceptible to an examining physician, and other, non-medical indicators that are capable of independent verification." In explanatory materials published in the Federal Register when section 3.317 was issued, VA explained that requirement:

Ordinarily, an objective indication is established through medical findings, i.e., "signs" in the medical sense of evidence perceptible to an examining physician. However, we also will consider non-medical indications which can be independently observed or verified, such as time lost from work, evidence that a veteran has sought medical treatment for his or her symptoms, evidence affirming changes in the veteran's appearance, physical abilities, and mental and emotional attitude, etc.

60 Fed. Reg. 6660, 6663 (1995).

11. Because objective evidence other than the veteran's own statements is required to establish entitlement to benefits, VA could, consistent with 38 U.S.C. § 5107(a) and the CVA's precedents, determine that evidence from such sources is necessary to establish a well-grounded claim. However, we believe that VA would also be justified in concluding that a veteran's own statements concerning non-medical indicators of disability may be sufficient to establish a well-grounded claim if those indicators are reasonably capable of independent verification. In this regard, we note that, in the explanatory materials accompanying the issuance of section 3.317, VA stated:

Some veterans may present with purely subjective symptoms, which, nonetheless, establish the basis for a valid claim under the provisions of this rule. We believe, however, that it is not only fair but also in keeping with Congressional intent to require some objective indication of the presence of a chronic disability attributable to an undiagnosed illness before awarding compensation.

60 Fed. Reg. at 6662-63. Those statements do not establish any binding rules or policies. However, insofar as they suggest that some claims for benefits under 38 U.S.C. § 5107(a) may be found to be well grounded based on the claimant's own statements or testimony, subject to verification of that evidence prior to an award of benefits, we believe that VA has the authority to reach such a conclusion, consistent with the requirements of 38 U.S.C. §§ 1117 and 5107(a). Lay persons are ordinarily competent to testify as to the existence of disability or indicators of disability, other than those which require medical expertise for their identification. See *Savage*, 10 Vet. App. at 495. Further, the credibility of testimony must be presumed for purposes of determining whether a claim is well grounded. See *Robinette v. Brown*, 8 Vet.

App. 69, 75-76 (1995). Accordingly, subject to the requirements that the testimony relate to matters within the scope of the veteran's competency and be capable of objective verification, VA could determine that the veteran's own testimony is sufficient to satisfy this element of a well-grounded claim. As noted above, VA may issue rules specifying the types of evidence it considers necessary to establish a well-grounded claim under section 1117. In the absence of such rules, it will be necessary to determine, based on the circumstances of each case, whether the claimant's evidence is sufficient to justify a belief in a fair and impartial mind that the claim for such benefits is well grounded.

12. With respect to the fourth element, section 1117(a) authorizes compensation for chronic disability "resulting from" an undiagnosed illness or combination of undiagnosed illnesses. Accordingly, evidence of a nexus between the chronic disability and the undiagnosed illness is an essential element of a well-grounded claim under section 1117. As a practical matter, an "undiagnosed illness" is identified and defined by its "signs or symptoms." 38 C.F.R. § 3.317(b). Accordingly, the fourth element may be satisfied by evidence of a nexus between the chronic disability and the signs or symptoms of the undiagnosed illness. Thus, for example, if a veteran's undiagnosed illness is manifested by respiratory signs or symptoms, the fourth element may be satisfied by evidence of a nexus between such respiratory signs or symptoms and the veteran's chronic disability. The CVA's precedents indicate that medical evidence is ordinarily required to establish a nexus between an illness or symptoms of illness and a current disability, but that there may be circumstances where the relationship between symptoms and a current disability is capable of proof by lay evidence alone. See *Savage*, 10 Vet. App. at 493, 497.

13. The second and fourth elements relate, respectively, to signs or symptoms of "undiagnosed illness" and to chronic disability resulting from "undiagnosed illness." Section 3.317(a)(1)(ii) indicates that an "undiagnosed illness" is one which "[b]y history, physical examination, and laboratory

tests cannot be attributed to any known clinical diagnosis." Accordingly, a showing that the illness cannot be attributed to any known diagnosis may be viewed as essential to elements two and four or may be viewed as a separate element of entitlement under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317. This requirement may appear to impose a rather onerous evidentiary burden by requiring evidence which, in effect, rules out all known potential causes of the sign, symptom, or disability. Moreover, it would appear that that requirement could be satisfied only by a medical opinion indicating that the claimant's disability cannot be attributed to any known diagnosis. For purposes of establishing a well-grounded claim, however, we believe that VA may reasonably require something less than evidence which tends to rule out all potential causes of the veteran's illness.

14. Section 5107(a) requires claimants to submit evidence "sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." Evidence that a claimant has a particular sign or symptom, such as headaches or joint pain, would not, in itself, provide a basis for believing that a claim for benefits under 38 U.S.C. § 1117(a) is well grounded, because such signs or symptoms are often associated with known diseases or injuries. On the other hand, it may be very difficult, as a practical matter, for claimants to obtain medical evidence indicating that their signs or symptoms cannot be attributed to any known diagnosis. Although physicians providing treatment for a veteran's illness may, in some cases, offer opinions on that question, it is equally possible that treating physicians will not specifically address the question. For example, a physician who is unable to conclusively attribute the veteran's illness to a known diagnosis may simply refer to possible diagnoses of the illness. Alternatively, the physician may defer diagnosis or may simply fail to render any diagnosis, without concluding that the veteran's illness is undiagnosable. In the statute which established section 1117, Congress recognized that Persian Gulf veterans have been found to exhibit "complex adverse health effects" which may "result from multiple illnesses with overlapping symptoms and causes that have yet to be defined." Pub. L. No. 103-446, § 102(3), 108 Stat. 4645, 4647 (1994). In view of Congress's recognition of the complexity of the diagnostic issues involved, as well as the practical difficulty claimants may face in obtaining evidence that their illnesses are incapable of diagnosis, we believe that a claimant may es-



establish a well-grounded claim under 38 U.S.C. § 1117 and 38 C.F.R. § 3.317 by submitting evidence that his or her illness has escaped diagnosis, rather than evidence that the disability is incapable of diagnosis.

15. Because the mere fact that a veteran has a particular sign or symptom of illness is not probative of whether the illness is incapable of diagnosis, the fact that the veteran's disability has not been diagnosed simply because he or she has not sought treatment ordinarily would not provide a basis for concluding that the claim is well grounded. However, evidence that an examining or treating physician failed to attribute the claimant's disability to any known diagnosis may be considered probative of whether the illness is capable of diagnosis, even though the physician may not have expressly indicated that the illness is incapable of diagnosis. Accordingly, for purposes of establishing a well-grounded claim, we conclude that a claimant ordinarily must submit some evidence indicating either that his or her illness is incapable of diagnosis or, at minimum, that physicians providing treatment or examination of the illness have not attributed it to a known diagnosis. We believe that VA may reasonably require the submission of medical evidence with respect to this issue, for purposes of establishing a well-grounded claim. However, we believe it would also be consistent with section 5107(a), if VA policymaking personnel consider it appropriate, to accept lay evidence that a claimant sought treatment or examination and that the illness was not diagnosed upon such treatment or examination, provided that the lay evidence is capable of substantiation by medical evidence. We note that in cases where a claimant has never sought treatment or examination for the claimed illness, VA may advise the claimant that he or she may request a Persian Gulf Registry examination, pursuant to section 703 of Pub. L. No. 102-585, 106 Stat. 4943, 4976 (1992).

HELD:

A well-grounded claim for compensation under 38 U.S.C. § 1117(a) and 38 C.F.R. § 3.317 for disability due to undiagnosed illness generally requires the submission of some evidence of: (1) active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War; (2) the manifestation of one or more signs or symptoms of undiagnosed illness; (3) objective indications of chronic disability during the relevant period of service or to a degree of disability of 10 percent or more within the specified presumptive period; and (4) a nexus between the chronic disability and the undiagnosed illness. With respect to the second and fourth elements, evidence that the illness is "undiag-

nosed" may consist of evidence that the illness cannot be attributed to any known diagnosis or, at minimum, evidence that the illness has not been attributed to a known diagnosis by physicians providing treatment or examination. The type of evidence necessary to establish a well-grounded claim as to each of those elements may depend upon the nature and circumstances of the particular claim. For purposes of the second and third elements, the manifestation of one or more signs or symptoms of undiagnosed illness or objective indications of chronic disability may be established by lay evidence if the claimed signs or symptoms, or the claimed indications, respectively, are of a type which would ordinarily be susceptible to identification by lay persons. If the claimed signs or symptoms of undiagnosed illness or the claimed indications of chronic disability are of a type which would ordinarily require the exercise of medical expertise for their identification, then medical evidence would be required to establish a well-grounded claim. With respect to the third element, a veteran's own testimony may be considered sufficient evidence of objective indications of chronic disability, for purposes of a well-grounded claim, if the testimony relates to non-medical indicators of disability within the veteran's competence and the indicators are capable of verification from objective sources. Medical evidence would ordinarily be required to satisfy the fourth element, although lay evidence may be sufficient in cases where the nexus between the chronic disability and the undiagnosed illness is capable of lay observation.

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