

# THE IMPACT OF VETERAN DISABILITY ATTORNEY REPRESENTATION: A LOOK AT THE VA CLAIMS INFLUX SINCE 9/11

*By Angelica C. Schultis*



Attorney representation of United States veterans in the Department of Veterans Affairs adjudicative system remains a relatively young legal practice area. For all practical purposes, since legislation became effective in 2007, attorneys have assisted veterans with VA claims for roughly 16 years now. In hindsight, the legislation—and, ultimately, attorney involvement—has proven valuable, if not necessary, to assist veterans with the dramatic increase in VA claims since September 11, 2001, compared to previous U.S. wars.

Since the Veterans Benefits, Health Care, and Information Technology Act of 2006 (Veterans Benefits Act) became effective, lawyers across the nation began practicing VA disability law. The VA requires all attorneys handling veterans' disability benefits be accredited by the VA. In Indiana, roughly 150 attorneys have completed the accreditation requirements, although the actual number of attorneys actively practicing VA disability law appears to be significantly less.<sup>1</sup>

## THE VETERANS BENEFITS, HEALTH CARE, AND INFORMATION TECHNOLOGY ACT OF 2006

In December 2006, Congress repealed the 1862 law<sup>2</sup> that prohibited attorneys from charging veterans more than \$10 to represent them in VA benefits claims, such as disability compensation, pension benefits, and family

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benefits. On June 20, 2007, the Veterans Benefits Act became effective. One key feature of the Veterans Benefits Act was it modified the point at which an attorney may enter an appearance to represent VA benefit claimants. It also permits lawyers to charge reasonable fees for their representation.

Prior to the Veterans Benefit Act, an attorney's zealous representation was perceived as *destroying* the benefits of an informal and nonadversarial process that is

meant to benefit veterans.<sup>3</sup> Holding that the \$10 fee limit did not violate the Due Process Clause of the Fifth Amendment, the Supreme Court wrote:

Invalidation of the fee limitation would frustrate Congress' principal goal of wanting the veteran to get the entirety of the benefits award without having to divide it with an attorney. Invalidation would also complicate a process that Congress wished to be as

informal and nonadversarial as possible.<sup>4</sup>

**VA CLAIMS INFLUX**

For some veteran service officers already overwhelmed by the increasing number of claims, the Veterans Benefit Act provided a welcome relief. At that time, the VA was beginning to recognize the influx of claims, as well as the increasing complexity in the VA claims' process. In fact, the VA's then-under secretary for benefits testified in 2000 that "[t]he Veterans Disability Compensation Program is the most complex disability claims system in the Federal government," and "[t]he process veterans must follow is complicated."<sup>5</sup> Similarly, the Veterans of Foreign Wars of the United States described the VA claims adjudication system: "Compared to the compensation program of a decade ago, the work



is much more complicated. It is now a complex thicket of court decisions and statutory requirements.”<sup>6</sup>

From 2001 through 2022, 4.9 million men and women served in the United States Armed Forces and were discharged as veterans.<sup>7</sup> While not all these veterans served in Iraq, Afghanistan, or related support operations, these post-9/11 veterans are referred to as “Gulf War 2 veterans” in some reports. According to the Bureau of Labor Statistics, as of 2022 approximately 41% of post-9/11 veterans had been granted a lifetime service-connected disability by the VA.<sup>8</sup> This number will likely increase since the VA disability compensation system is designed to accommodate growth in disability ratings. For example, a veteran with a 30% service-connected disability may apply for a higher rating as the condition worsens or apply for additional ratings caused by the primary service-connected disability (called “secondary” service connection).

Compared to previous wars, the percentages of post-9/11 veterans who have obtained medical care from the VA healthcare systems and who have filed claims for benefits are higher. The Bureau of Labor Statistics reports 27% of veterans from previous wars have a disability rating compared with 41% of post-9/11 veterans.<sup>9</sup>

So, what has caused the rapid influx of new VA claims in recent years?

The first reason is partially due to the higher survival rates among troops compared to previous wars. The Gulf War 2 era made it possible for troops to be evacuated from the battlefield more quickly, to receive state-of-the-art medical treatment more quickly, and to survive and recover from injuries and diseases.

Another reason is the higher incidence of post-traumatic stress disorder (PTSD) and other mental health conditions. Throughout the Gulf War 2 era, the VA has increased funding for mental health care. Since 2015, mental health treatment comprised about 20% of the VA medical budget.<sup>10</sup>

The term PTSD was not used, let alone treated or recognized, in previous war eras. During the American Civil War, soldiers were diagnosed with “soldier’s heart” or “exhausted heart.”<sup>11</sup> During WWI, terms used were “shell shock” and “war neurosis.” Terms used after WWII included “battle fatigue,” “traumatic neurosis,” and “combat

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**"Due to greater availability of information about symptoms, treatment, and VA claims' information online and through various veterans' service organizations, more veterans have greater access to information than ever before."**

exhaustion."<sup>12</sup> Soldiers from the Vietnam era were diagnosed with "Post-Vietnam Syndrome."<sup>13</sup> Lack of information and the social stigma attached to mental health disorders prevented veterans from receiving treatment.

Additionally, a greater number of post-9/11 veterans are willing to seek medical treatment and apply for benefits compared to

previous wars. Due to greater availability of information about symptoms, treatment, and VA claims' information online and through various veterans' service organizations, more veterans have greater access to information than ever before. Veterans are filing more claims and sooner.

Compared to previous wars, more generous medical benefits and

more presumptive conditions are available to post-9/11 veterans. For presumptive conditions, the veteran does not need to establish a link, or nexus, between the incurrence in service and the current condition. The nexus is presumed. But that does not mean that the veteran's claim is easy. Some presumptive conditions require proof the veteran served a certain number of days,



was stationed at a certain military base, or the condition manifested within one year after discharge.

Presumptive illnesses associated with Agent Orange exposure during the Vietnam era total 19.<sup>14</sup> By contrast, Gulf War presumptive diseases include 13 illnesses and diseases, as well as a variety of “unexplained symptoms” such as gastrointestinal disorders, menstrual disorders, neurological disorders, psychological disorders, skin conditions, respiratory disorders, and sleep disturbances, all of which comprise several different conditions and, ultimately, VA disability rating options.<sup>15</sup> These presumptive conditions are independent of the number of additional secondary service-connected conditions stemming from the original presumptive condition.

While some may continue to argue whether attorney representation in the VA claims process is necessary, statistics prove that lawyers *do* make a positive difference. Plus, there is a recognized difference in some contexts in the treatment of cases by VA and by the court (United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for Veterans Claims) that is based on whether a claimant is represented by counsel.<sup>16</sup> Ultimately, making a “recognized difference” is what every lawyer, regardless of practice area, aspires to accomplish. ☺

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## ENDNOTES

1. United States Department of Veterans Affairs, Office of General Counsel, *Accreditation, Discipline, & Fees Program* (March 22, 2023), <https://www.va.gov/ogc/accreditation.asp> (last accessed September 26, 2023).
2. In 1862 Congress imposed a \$5 limit on the amount of fees that agents or lawyers could charge individuals seeking veterans’ benefits. 12 Stat. 566, 568 (1862). Two years later, the limit was raised to \$10. 13 Stat. 387, 389 (1864). The \$10 limit remained in effect until the 2006 law was passed.
3. See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).
4. *Id.*
5. Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, Senate Committee on Veterans’ Affairs, 106th Cong., 2nd sess. (July 20, 2000) (testimony of the Honorable Joseph Thompson).
6. *Battling the Backlog: Challenges Facing the VA Claims Adjudication and Appeal Process*, Senate Committee on Veterans’ Affairs, 109th Cong., 1st sess. (May 26, 2005) (testimony of Mr. Quentin Kinderman).
7. Press Release, Bureau of Labor Statistics, *Employment Situation of Veterans Summary* (March 2023), <https://www.bls.gov/news.release/vet.nr0.htm>.
8. *Id.*
9. *Id.*
10. See VA Budget Fast Facts, 2014-2020.
11. F. Don Nidiffer and Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 Dev. Mental Health L., 1, 4 (Jan. 2010).
12. *Id.*
13. *Id.*
14. United States Department of Veterans Affairs, *VA Presumptive Disability Benefits Factsheet* (Oct. 2022), <https://www.benefits.va.gov/BENEFITS/factsheets/serviceconnected/presumption.pdf>.
15. *Id.*
16. See *Overturn v. Nicholson*, 20 Vet. App. 427, 438 (2006).

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