

# VA PRESUMPTIVE ILLNESSES: RESPIRATORY CONDITIONS ASTHMA, RHINITIS, SINUSITIS

(ALSO: COUGHING, SHORTNESS OF BREATH, WHEEZING)

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### 1. WHEN DID THE NEW REGULATION GO INTO EFFECT?

August 05, 2021

### 2. WHO IS ELIGIBLE?

Eligibility extends to any veteran who served on "active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War (hereafter Gulf War) [from August 02, 1990 to the present], as well as in Afghanistan, Syria, Djibouti, or Uzbekistan, on or after September 19, 2001, during the Gulf War."<sup>1</sup>

### 3. WHAT ARE PRESUMPTIVE ILLNESSES (OR PRESUMPTIVE CONDITIONS)?

The overall goal of creating lists of "presumptive illnesses" (or "presumptive conditions") is to try to ease the burden of proof and make it easier for veterans to file claims for the benefits they deserve. When a veteran files a claim with the VA and seeks to establish a "service connected" disability, normally the veteran must show three things: (1) evidence of an in-service event, (2) evidence of a current disability, and (3) evidence that the two are linked (sometimes a "nexus" letter is used to establish this link if the evidence is not readily apparent).

Sometimes it is difficult to establish the “link” between the in-service event and the current disability. For instance, Vietnam veterans had great difficulty establishing service connection for conditions they developed many years after active-duty exposure to an herbicide called “Agent Orange.” Many of these veterans began to develop many of the same sorts of conditions that science was able to link to their exposure to the herbicide. Congress and the VA eventually recognized that these conditions were at the very least very likely related to Vietnam veterans’ exposure to Agent Orange. The VA created a list of “presumptive illnesses” (or “presumptive conditions”) for Vietnam veterans who were exposed to the herbicide. These veterans did not have to go through the normal process of establishing the “link” between the in-service event and their current illness to win their VA claims. The VA conceded that the in-service event had occurred and simply “presumed” that the veterans’ conditions were service connected.

Now, Congress and the VA have recognized that many veterans stationed throughout Asia have experienced similar issues. In response, the VA has created a list of “presumptive conditions” for veterans who have served in various areas of operation. This eases the burden for the veteran in establishing service connection. As with Vietnam veterans experiencing Agent Orange exposure, the VA has conceded that in-service events have occurred in Asia.

Not every situation involving “presumptive conditions” will be identical. Criteria will be unique to each situation even within situations involving presumptive conditions in Asia. There are a few other presumptive condition lists, but the three that will apply most to those with military service since 1990 include the following (please see the other documents if those presumptive condition lists apply to you as well):

VA Presumptive Illnesses: Chronic Diseases Diagnosed After Discharge: for all service members;

VA Presumptive Illnesses: Gulf War Veterans: if you served 02 August 1990 to present: Iraq, Kuwait, Saudi Arabia, the neutral zone between Saudi Arabia and Iraq, Bahrain, Qatar, the United Arab Emirates, Oman, Gulfs of Aden and Oman; water of the Persian Gulf, Arabian Sea, and the Red Sea; and airspace above these locations; 2003—2010: OIF; 2010—11: OND.

**VA Presumptive Illnesses: Respiratory Conditions: The rest of this document is about this category.**

#### **4. WHAT ARE THE VA’S NEW RESPIRATORY PRESUMPTIVE ILLNESSES?**

The ruling establishes three new presumptive illnesses for certain veterans: asthma, rhinitis, and sinusitis, to include rhinosinusitis.

#### **5. WHAT ARE THE DEFINITIONS OF THESE RESPIRATORY ILLNESSES?**

Asthma: “Asthma is a condition in which your airways narrow and swell and may produce extra mucus. This can make breathing difficult and trigger coughing, a whistling sound (wheezing) when you breathe out and shortness of breath” (Mayo Clinic).

Rhinitis: “Nonallergic rhinitis involves chronic sneezing or a congested, drippy nose with no apparent cause. Nonallergic rhinitis symptoms are similar to those of hay fever (allergic rhinitis), but with none of the usual evidence of an allergic reaction” (Mayo Clinic).

Sinusitis: “Chronic sinusitis occurs when the spaces inside your nose and head (sinuses) are swollen and inflamed for three months or longer, despite treatment. This common condition interferes with the way mucus normally drains, and makes your nose stuffy. Breathing through your nose may be difficult, and the area around your eyes might feel swollen or tender” (Mayo Clinic).

## **6. WHAT IF I DIDN'T HAVE A DIAGNOSIS OF ASTHMA, RHINITIS, OR SINUSITIS?**

A veteran doesn't have to have been specifically diagnosed with these three particular illnesses. There is not a disability rating for every condition, therefore, the VA will often use the rating criteria for a condition that is the most similar. This is called rating a condition “analogously.” In this instance, the VA found that Gulf War veterans had high rates of “chronic persistent cough, shortness of breath (dyspnea), and wheezing.”<sup>1</sup> Since there are no VA ratings for those three conditions, the VA is “analogously” using the criteria for asthma, rhinitis, and sinusitis (to include rhinosinusitis) to rate those respiratory conditions. The following terms are associated with the respiratory presumptive illnesses (this is not an exhaustive list):

Narrow Airway	Swelling Airway	Cough	Excess Mucus Production
Wheezing	Shortness of Breath	Difficulty Breathing	Chronic Sneezing
Hoarseness	Congestion	Runny Nose	Swollen Sinuses
Inflamed Sinuses	Stuffy Nose	Reactive Airway Disease	

## **7. WHAT IS THE TIME LIMIT FOR SYMPTOMS TO MANIFEST?**

The regulation states that the condition(s) must manifest “within 10 years after separation from the last period of military service that includes a qualifying period of service.”<sup>1</sup> That period of service must include a “qualifying period of service” which is service in one of the theaters of operation listed in question #2 (Who Is Eligible?). Your symptoms must manifest within 10 years of discharge from the military, not necessarily within 10 years from your time spent in the Asian theater of operation.

## **8. HOW BAD DO THE SYMPTOMS HAVE TO BE?**

“...VA will not require that the chronic respiratory conditions of asthma, rhinitis, and sinusitis, to include rhinosinusitis, manifest to a compensable degree or more so that more Gulf War Veterans can meet the lower eligibility criteria for presumptive service connection for exposure to fine, particulate matter even at a non-compensable level...”<sup>1</sup> This means the symptoms can be at the 0% rating level.

## **9. HOW LONG MUST I HAVE BEEN DEPLOYED TO QUALIFY?**

There is no minimum time limit.

## **10. WHAT IF I HAD A CLAIM FOR ONE OF THESE CONDITIONS PENDING ON AUGUST 05, 2021?**

The new regulation will automatically apply to any claim that is pending on August 5, 2021, before the VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit.

### **11. WILL THE VA AUTOMATICALLY RECONSIDER A CLAIM I PREVIOUSLY FILED FOR ONE OF THESE CONDITIONS?**

No. If you previously filed a claim for one of these conditions and it was denied, and the claim is now in a closed, final status, you will need to file a new claim.

### **12. WHAT'S THE BIG DEAL? HOW DO THESE RATINGS HELP ME?**

At first glance, these ratings may not seem helpful at all. A 0% rating for a runny nose? A 0% sinusitis rating? If you are a Gulf War veteran, think of this as a stepping-stone to the disability ratings with which you've been having difficulty.

First, many Gulf War veterans have respiratory issues they are having trouble getting service connected. If you can get one of *these* respiratory presumptive illnesses service connected, even at 0%, it increases your chances of winning all kinds of secondary claims. For example, you can file your Obstructive Sleep Apnea (OSA) as a secondary claim to your newly-established respiratory presumptive illness.

Second, in the interim final rule, the phrase "VA is establishing a presumption of exposure to fine, particulate matter" (PM2.5) is found *numerous* times. It will be interesting to keep an eye on this and see if veterans are able to use *this* presumption for disability claims beyond the presumptive conditions of asthma, rhinitis, and sinusitis.

### **13. ARE THERE ANY PITFALLS OF WHICH I NEED TO BE AWARE?**

Keep in mind that your respiratory illness can in *no way* be caused by anything (e.g., seasonal allergies) that would *rule out* the presumption of exposure to fine, particulate matter. If a doctor concludes that your asthma or rhinitis or sinusitis is due to an allergy of some sort, you will not be service connected for your respiratory condition. The interim final rule makes this very clear.

However, it is possible to have a presumptive respiratory illness, *as well as* allergies. The VA can and should rate a veteran on this basis.

In addition, it is possible to have an asthma or reactive airway condition caused by fine, particulate matter that can also be exacerbated by allergies. The VA can and should rate a veteran on this basis as well.

### **14. WHERE CAN I READ THE INTERIM FINAL RULE?**

<https://www.federalregister.gov/documents/2021/08/05/2021-16693/presumptive-service-connection-for-respiratory-conditions-due-to-exposure-to-particulate-matter#print>

1. VA, *Presumptive Service Connection for Respiratory Conditions Due to Exposure to Particulate Matter*, 86 FR 42724

<https://www.federalregister.gov/documents/2021/08/05/2021-16693/presumptive-service-connection-for-respiratory-conditions-due-to-exposure-to-particulate-matter#print>