

**LAW REVIEW 21061**  
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## **The VA Will Begin Processing Disability Claims for Post-9/11 Burn Pit Vets**

By Second Lieutenant Lauren Walker<sup>1</sup>

11.0—Veterans' claims

### **I. INTRODUCTION**

During the Vietnam War, the United States used several herbicides to aid in the war effort--one such herbicide was Agent Orange.<sup>2</sup> During its use, Agent Orange was believed to be benign regarding its effect on human health.<sup>3</sup> Over time, that belief was determined to be false.<sup>4</sup> Service members who were exposed to Agent Orange had a much higher risk of diabetes, prostate cancer, and other diseases and conditions that often manifested decades after the exposure.<sup>5</sup> After countless veterans failed to meet their burden of proof to receive disability benefits for their health conditions, the Agent Orange Act of 1991 was enacted.<sup>6</sup> This Act created a presumption of service connection, thus eliminating the burden on the veteran to prove a link between his or her condition and military service.<sup>7</sup> This opened the door for thousands of veterans to receive deserved disability benefits.

Today, veterans who have served in Southwest Asia and other areas in recent decades face a similar issue as the veterans who served in Vietnam. Today's veterans have found it difficult to prove that their illnesses and diseases are linked to their military service. Where in the Vietnam era the toxin was Agent Orange, today it is burn pit smoke. Of the 12,582 veterans disability claims related to burn pits filed in the last 13 years, only 2,828 have been approved.<sup>8</sup> However, a new announcement by the Department of Veterans Affairs (VA) is going to enable more

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<sup>1</sup>Lauren, a member of ROA, is in her third year at Baylor Law School and is a Second Lieutenant in the Marine Corps. After she graduates from law school and passes the Texas bar exam, she will go on active duty in the Marine Corps. Military title used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. Government.

<sup>2</sup>Morgan Little & Samuel F. Wright, *Agent Orange VA Claims—Don't Forget the "Blue Water,"* Law Review 16010, 1 (February 2016).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>Leo Shane III, *Lawmakers question VA approach on burn pits, advance bill to help military toxic exposure victims,* MILITARY TIMES: VETERAN (Sept. 23, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/09/23/lawmakers-question-va-approach-on-burn-pits-advance-bill-to-help-military-toxic-exposure-victims/>.

veterans to receive their disability benefits.<sup>9</sup> Similar to the Agent Orange Act of 1991, some veterans who have been exposed to burn pits while serving overseas in Southwest Asia and other areas will get presumptive status for disability benefits.<sup>10</sup> While this is a step in the right direction, there is still a lot of work that needs to be done to ensure that all veterans who have been harmed while serving our Nation receive the benefits they deserve.

## II. BACKGROUND

Burn pits have been utilized by the armed forces for decades, going back to Operation Desert Shield/Desert Storm in 1990.<sup>11</sup> They have been continuously used in Iraq, Kuwait, Qatar, United Arab Emirates, Saudi Arabia, and Bahrain.<sup>12</sup> Further, since September 11, 2001, burn pits have been used in the operations in Afghanistan, Djibouti, and Iraq.<sup>13</sup> It is estimated that 3.5 million troops have been exposed to burn pit smoke in the last 20 years while serving in these locations.<sup>14</sup>

Military burn pits are large areas of land where the military incinerates all waste generated by the military bases, including plastics, rubber, chemicals, petroleum and lubricant products, munitions and other unexploded ordnance, wood waste, medical and human waste, and more.<sup>15</sup> The burn pits do not effectively burn all the waste, causing smoke to blow over military bases.

Exposure to burn pit smoke can and does lead to health concerns. Some of these health concerns only have short-term effects such as nausea, headaches, irritation of the eyes, respiratory tract, nose, and throat.<sup>16</sup> Once the exposure is gone, the conditions resolve.<sup>17</sup> However, there are also long-term health concerns linked to burn pit smoke exposure.<sup>18</sup> The smoke can affect the skin, respiratory system, eyes, liver, kidneys, central nervous system, cardiovascular system, peripheral nervous system, reproductive system, and gastrointestinal tract.<sup>19</sup> This can lead to health problems that require the veteran to undergo medical care for the rest of his or her life.

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<sup>9</sup>Leo Shane III, *For first time, some burn pit victims will get presumptive status for disability benefits*, MILITARY TIMES: VETERAN (Aug. 2, 2021), <https://www.militarytimes.com/veterans/2021/08/02/for-first-time-some-burn-pit-victims-will-get-presumptive-status-for-disability-benefits/>.

<sup>10</sup>*Id.*

<sup>11</sup>Issue Brief: *Burn Pit Exposure*, DAV, <https://www.dav.org/wp-content/uploads/Burn-Pit-Exposure-2020.pdf> (last visited Aug. 12, 2021).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Shane, *supra* note 9.

<sup>15</sup>Issue Brief: *Burn Pit Exposure*, *supra* note 11.

<sup>16</sup>War Related Illness & Injury Study Center, *Burn Pits (Trash and Human Waste Exposure)*, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.warrelatedillness.va.gov/education/factsheets/burn-pits.pdf> (last updated Nov. 2013).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

One such veteran who needs medical care for the rest of his life is Kevin Hensley. Hensley is a retired U.S. Air Force member who served in Iraq, Afghanistan, and Kuwait.<sup>20</sup> While deployed, he was exposed to the toxic burn pit smoke.<sup>21</sup> The exposure caused Constrictive Bronchiolitis, a disease that put him on a lung transplant list.<sup>22</sup> After several years of proving his case again and again to the VA, he received his disability benefits.<sup>23</sup>

Another veteran, Retired Army Sergeant Rigoberto Rosario, also has long-term health problems related to his service. He served in Iraq, Kuwait, Saudi Arabia, and Afghanistan.<sup>24</sup> Due to burn pit smoke exposure, he must take three different medications to help him breathe.<sup>25</sup> For over twenty years he has been on a “merry-go-round” trying to receive disability benefits from the VA.<sup>26</sup> Unlike Hensley, the VA has continuously denied him his disability benefits.<sup>27</sup>

These two individuals are only two of the 3.5 million troops who have been exposed to the harmful smoke emitted from burn pits over the last 20 years while serving overseas.<sup>28</sup> Unfortunately, up to this point, most veterans are in the same boat as Rosario. Of the 12,582 veterans who have applied for disability benefits due to burn pit exposure, only 2,828 have been approved.<sup>29</sup> This means, 78 percent of the claims have been dismissed. Thousands of veterans and their families have been left stranded upon returning home.

### **III. The burdens veterans face in receiving disability benefits**

Before to August 2, 2021, there was no presumptive service connection for diseases related to burn pit exposure.<sup>30</sup> Due to this, all veterans claiming burn pit exposure had to file claims for direct service connection for diseases and illnesses related to burn pit exposure.<sup>31</sup> To establish a direct service connection for a related illness or disease, the veteran had to show (1) medical evidence of a current disability; (2) evidence of burn pit exposure; and (3) evidence of a nexus between the burn pit exposure and the disability.<sup>32</sup>

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<sup>20</sup>Aaron Parseghian, *A Battle Back Home: Burn pits and the burden of proof*, FOX 17 WEST MICHIGAN: POLITICS, <https://www.fox17online.com/news/politics/a-battle-back-home-burn-pits-and-the-burden-of-proof> (last updated Apr. 12, 2021, 9:48 PM).

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>Desiree D'Iorio, *Veterans Are Demanding Benefits For Burn Pit Exposure. The VA Is Urging Patience*, THE AMERICAN HOMEFRONT PROJECT (July 6, 2021, 10:15 AM EDT) <https://americanhomefront.wunc.org/news/2021-07-06/veterans-are-demanding-benefits-for-burn-pit-exposure-the-va-is-urging-patience>.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>Shane, *supra* note 9.

<sup>29</sup>Shane, *supra* note 8.

<sup>30</sup>Issue Brief: *Burn Pit Exposure*, *supra* note 11.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

This burden placed on veterans can be a high hurdle for a veteran to jump over. While it is typically easy to know where the burn pits are located, it is difficult to document each veteran's exposure to a burn pit.<sup>33</sup> This is especially true during combat operations and in war zones.<sup>34</sup> Thus, providing sufficient evidence that the veteran was exposed to a burn pit and its toxic smoke can be challenging.

If the veteran was able to prove that he or she had been exposed to the toxins a burn pit emits, the veteran would then have to show a link between his or her disease or illness to the exposure while serving.<sup>35</sup> The evidence is provided by a medical opinion.<sup>36</sup> This can be difficult if medical professionals are unaware of the chemicals and toxins emitted by the burn pits, and many medical professionals do not have that information.<sup>37</sup>

Due to the challenges that veterans faced in obtaining disability benefits upon being exposed to burn pits, the VA contracted with the National Academy of Medicine to provide a study about the respiratory health effects burn pit exposure has on service members who served in the Southwest Asia theater of military operations.<sup>38</sup> The study began in January 2019 and ran for 21-months.<sup>39</sup> The study concluded that veterans who served in the Southwest Asia theater of operations beginning on August 2, 1990 to the present, or Afghanistan, Uzbekistan, Syria, or Djibouti beginning September 19, 2001 to the present were exposed to particulate matter pollution.<sup>40</sup> This particulate matter is associated with chronic asthma, rhinitis, and sinusitis.<sup>41</sup> The finding by the National Academy of Medicine resulted in a recommendation to create new presumptions of service connection for certain respiratory conditions.<sup>42</sup> The VA's review supported this conclusion as well.<sup>43</sup>

The study, along with years of lobbying from veterans' advocates and months of legislative pressure from Capitol Hill, led the Department of Veterans Affairs to announce a change in adjudicating disability benefits beginning on August 2, 2021.<sup>44</sup> The announcement stated that if the veteran's asthma, rhinitis, or sinusitis manifested within ten years of the veteran's overseas service, the veteran's disability claims will be processed on a presumptive basis based on

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<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*VA to start processing disability claims for certain conditions related to particulate matter*, VANTAGE POINT (Aug. 2, 2021) [https://blogs.va.gov/VAntage/92772/va-to-start-processing-disability-claims-for-certain-conditions-related-to-particulate-matter/?utm\\_source=VRfeature&utm\\_medium=email&utm\\_campaign=VetResources&utm\\_id=VetResources+Aug+4+2021](https://blogs.va.gov/VAntage/92772/va-to-start-processing-disability-claims-for-certain-conditions-related-to-particulate-matter/?utm_source=VRfeature&utm_medium=email&utm_campaign=VetResources&utm_id=VetResources+Aug+4+2021).

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

presumed exposure to burn pits during military service in certain areas.<sup>45</sup> The certain areas include the Southwest Asia theater of operations beginning on August 2, 1990 to the present, and Afghanistan, Uzbekistan, Syria, or Djibouti beginning on September 19, 2001 to the present.<sup>46</sup>

#### **IV. Veterans with presumptive status for disability benefits**

If the veteran's asthma, rhinitis, or sinusitis manifested within 10 years of his or her service in Southwest Asia or one of the other designated areas, then the veteran will receive presumptive disability benefits.<sup>47</sup> This allows the veteran to forgo certain paperwork and medical exams to prove his or her illnesses are directly linked to burn pit exposure.<sup>48</sup> This is a significant burden lifted off a veteran's shoulders. No longer will a veteran have to attempt to prove that he or she was in a certain area where burn pits were and then further prove with medical evidence that the illnesses are linked to the harmful toxins emitted from the burn pits.

The only step left for eligible veterans is to get the disability benefits in their hands. In June 2021, the Veterans Disability Benefits Administration began placing holds on veterans' cases who met the presumptive status qualifications.<sup>49</sup> This prevented claims from being rejected prematurely.<sup>50</sup> All veterans who have a claim pending do not need to resubmit paperwork.<sup>51</sup> However, veterans who had their claims rejected previously need to reapply.<sup>52</sup> To aid in the process, the VA will be conducting an outreach program to these veterans and survivors informing them about their eligibility and providing them with information on how to reapply.<sup>53</sup>

#### **V. Veterans without presumptive status for disability benefits**

While the change is a step in the right direction, there are still millions of veterans who do not meet the conditions for the presumption. Asthma, rhinitis, and sinusitis are just three of the dozens of diseases that appear to be linked to burn pit smoke exposure. Diseases and illnesses such as cancer, chronic bronchitis, lymphoma, and others were left off the presumptive disability benefits list. Veterans suffering any disease that is not asthma, rhinitis, or sinusitis must continue to go through the grueling process of proving the elements to the VA before they can receive their disability benefits. Again, with the uniqueness of burn pit smoke exposure, this can be very difficult to do.

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<sup>45</sup>Shane, *supra* note 9.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>Leo Shane III, *New disability benefits for burn pit victims may still take time to process*, MILITARY TIMES: VETERAN (Aug. 3, 2021), <https://www.militarytimes.com/veterans/2021/08/03/new-disability-benefits-for-burn-pit-victims-may-still-take-months-to-process/>.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>VA to start processing disability claims for certain conditions related to particulate matter, *supra* note 40.

Having one's disease left off the presumptive list is disheartening for veterans like Kate Thomas and millions of other veterans. Following Thomas' service in the Marine Corps, including being stationed at Camp Fallujah, she was diagnosed with a rare and aggressive form of breast cancer, at Stage 4, that had spread throughout her entire body.<sup>54</sup> The only other woman in her unit at Camp Fallujah was also diagnosed with the same form of rare breast cancer.<sup>55</sup> While undergoing her grueling treatments, Thomas had to fight with the U.S. Department of Veterans Affairs to receive her disability benefits.<sup>56</sup> And it was a fight. She had to go through the tedious process of proving each element before she could receive her disability benefits. After her initial claim and her two subsequent appeals were denied, the VA finally granted her full disability<sup>57</sup> While Thomas eventually won the battle and received her disability benefits, many are not so fortunate. As the numbers reveal, thousands of veterans are denied their disability benefits because they cannot meet their burden of proof.

## **VI. More illnesses and diseases may receive presumptive status**

Thomas and others in a similar position should not have had to fight while at home to receive their disability benefits, and many would agree. Advocates have criticized the VA for rejecting so many claims, insisting that more could be done.<sup>58</sup> But, the VA has consistently claimed that Congress would need to take action if more is to be done.<sup>59</sup> And that is exactly what Congress is doing. Both the House and the Senate have considered bills that would grant presumptive benefits status to veterans suffering from more than just the three illnesses for veterans who have served in Southwest Asia and certain other areas.<sup>60</sup> The final list could include up to 23 diseases and illnesses, including cancers and other respiratory illnesses.<sup>61</sup>

Senator Jon Tester, a Montana Democrat, heads the Veterans' Affairs Committee and introduced the Comprehensive and Overdue Support for Troops of War Act.<sup>62</sup> He recognizes that “[i]f we’re going to have people willing to sign up to serve this country, we’ve got to make sure we take care of them when they come back home.”<sup>63</sup> His legislation, which passed out of committee with bipartisan support in late May, expands healthcare access to veterans who were exposed to the toxins associated with burn pits.<sup>64</sup> The bill expands the current list to

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<sup>54</sup>Jodie Fleischer et. al, *Deployed Then Denied: Veterans Fight for Benefits After Toxic Exposure*, NBC WASHINGTON, <https://www.nbcwashington.com/investigations/deployed-then-denied-veterans-fight-for-benefits-after-toxic-exposure/2726807/> (last updated July 12, 2021, 6:20 PM).

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>Shane, *supra* note 9.

<sup>59</sup>*Id.*

<sup>60</sup>Fleischer, *supra* note 54.

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>Tester’s Historic Bill to Deliver Health Care & Benefits to Toxic Exposure Veterans of All Generations Clears Committee Hurdle, THE UNITED STATES SENATE COMMITTEE ON VETERANS’ AFFAIRS (Wednesday, May 26, 2021), <https://www.veterans.senate.gov/newsroom/majority-news/testers-historic-bill-to-deliver-health-care-and-benefits-to-toxic-exposure-veterans-of-all-generations-clears-committee-hurdle>.

thirteen specific conditions, giving many more veterans access to immediate and lifelong health care benefits from the VA.<sup>65</sup> The bill also lays out a new science-based and veteran-focused process to establish other presumptive conditions as more research is done.<sup>66</sup> Tester states the content of the bill is what they “felt the science backed up.”<sup>67</sup>

House Veterans’ Affair Committee Chairman Mark Takano, a California Democrat, introduced the Honoring our Promise to Address Comprehensive Toxics Act of 2021.<sup>68</sup> This bill expands the presumption of service connection to 23 respiratory illnesses and cancers related to burn pit exposure.<sup>69</sup> The intent behind the bill is to be comprehensive so that the VA could provide benefits without continued congressional intervention.<sup>70</sup> Takano stated that the comprehensive legislation needs to pass “to ensure that all veterans can access the care and benefits they’ve earned.”<sup>71</sup>

The biggest concern in passing any bill that gives veterans presumptive status is the costs. As Representative Mike Bost, R-III, the top Republican of the House VA committee, pointed out, the bill cannot be “so expensive it falls under its own weight.”<sup>72</sup> However, the expense of disability benefits is a cost of war.<sup>73</sup> Service members have been deployed to these toxic locations for over 20 years now. It seems only right that the Nation should take responsibility for the health and wellness of veterans when they return home.

With all of this in mind, Tester believes that the final list of presumptive illnesses and diseases will likely be somewhere in the middle of the Comprehensive and Overdue Support for Troops of War Act and the Honoring our Promise to Address Comprehensive Toxics Act of 2021.<sup>74</sup> The two chambers will need to come together and work through their differences to pass a final version. Lawmakers are working diligently to get a bill in front of President Joe Biden this year.<sup>75</sup> The urgency stems from the Agent Orange debate.<sup>76</sup> The lawmakers do not want veterans to

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<sup>65</sup>Fleischer, *supra* note 54.

<sup>66</sup>Tester’s Historic Bill to Deliver Health Care & Benefits to Toxic Exposure Veterans of All Generations Clears Committee Hurdle, *supra* note 64.

<sup>67</sup>Fleischer, *supra* note 54.

<sup>68</sup>Chairman Takano: “It’s time America makes good on our promise to care for all veterans exposed to toxic substances:” Honoring our PACT Act finally recognizes toxic exposure as a cost of war, THE HOUSE COMMITTEE ON VETERANS’ AFFAIRS: PRESS RELEASES (May 26, 2021), [https://veterans.house.gov/news/press-releases/\\_----chairman-takano-its-time-america-makes-good-on-our-promise-to-care-for-all-veterans-exposed-to-toxic-substances](https://veterans.house.gov/news/press-releases/_----chairman-takano-its-time-america-makes-good-on-our-promise-to-care-for-all-veterans-exposed-to-toxic-substances).

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>Shane, *supra* note 9.

<sup>72</sup>Steve Beynon, *Congress Hopes to Deliver the Biggest Veterans Health Bill Ever. But What will it Cost?*, MILITARY.COM: MILITARY NEWS (May 20, 2021), <https://www.military.com/daily-news/2021/05/20/congress-hopes-deliver-biggest-veterans-health-bill-ever-what-will-it-cost.html>.

<sup>73</sup>Chairman Takano: “It’s time America makes good on our promise to care for all veterans exposed to toxic substances:” Honoring our PACT Act finally recognizes toxic exposure as a cost of war, *supra* note 68.

<sup>74</sup>Fleischer, *supra* note 54.

<sup>75</sup>Beynon, *supra* note 72.

<sup>76</sup>*Id.*

wait decades for legislation to connect their illnesses and diseases to their military service and feel this is the year to address toxic exposure.<sup>77</sup>

## **VII. Conclusion**

In defending the nation, service members are aware of many of the dangers associated with war including bullet wounds, broken bones, and countless scrapes and bruises. However, what they are not aware of is the toxins that they are exposed to that could lead to long-term effects. The Vietnam service members were not aware that Agent Orange would put them in danger of cancer and diabetes and, similarly, the troops deployed to Southwest Asia and certain other areas were not aware that the burn pit smoke would lead to cancer and respiratory illnesses. Yet, it did, and thousands of veterans have been left suffering with no help. Of the 12,582 veterans' disability claims related to burn pits filed in the last 13 years, only 2,828 have been approved.<sup>78</sup> This is a disturbingly low number. But the announcement by the Department of Veterans Affairs will increase this number, giving more veterans access to the benefits they need and deserve. Yet, still more needs to be done, and lawmakers have recognized that. I am optimistic that the two chambers will work together to create a comprehensive bill that will ensure all veterans receive the benefits they've earned.

## **Please join or support ROA**

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<sup>77</sup>*Id.*

<sup>78</sup>Shane, *supra* note 8.

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#### **UPDATE—NOVEMBER 2021**

**Here is an update on the timing of Department of Veterans Affairs (VA) benefits for veterans who are suffering from diseases and conditions caused by exposure to “burn pit” smoke:**

**<https://www.militarytimes.com/veterans/2021/11/19/benefits-for-cancers-believed-caused-by-burn-pit-exposure-likely-wont-start-before-summer-2022/>**