

LAW REVIEW 24039

August 2024

TERA Medical Opinions for PACT Act Claims.

By Bradley W. Hennings¹ and Robert Chisholm²

11.0—Veterans' claims.

The 2022 PACT Act is a law that expands Department of Veterans Affairs (VA) health care and benefits for veterans exposed to burn pits, Agent Orange, and other toxic substances.³ On May 21, 2024, President Biden announced that VA had granted more than one million PACT Act-related claims, with over 888,000 veterans and survivors across all 50 states and U.S. territories now receiving new service-connected disability benefits.⁴

Among the changes that have improved access to toxin-related disability benefits was a new requirement that VA provide a medical examination

¹ BA 1997 George Washington University, MS 2001 Stevens Institute of Technology, JD 2006 Rutgers University School of Law. Mr. Hennings joined Chisholm Chisholm & Kilpatrick as an attorney in January 2018 and currently serves as a Partner in the firm. His practice focuses on the U.S. Department of Veterans Affairs (VA) and the U.S. Court of Appeals for Veterans Claims. Immediately prior to joining CCK, Mr. Hennings served as a Veterans Law Judge at the U.S. Department of Veterans Affairs, Board of Veterans' Appeals (BVA). Mr. Hennings' full biography may be found at cck-law.com/lawyers/bradley-w-hennings. To learn more about CCK, the largest veterans law firm in the U.S., visit cck-law.com.

² BA 1984 Boston College, JD 1988 Boston University School of Law. Mr. Chisholm is a Founding Partner of Chisholm Chisholm & Kilpatrick, the largest veterans law firm in the U.S. His law practice focuses on representing disabled veterans in the United States Court of Appeals for Veterans Claims and before the Department of Veterans Affairs. As a veterans lawyer, Mr. Chisholm has been representing disabled veterans since 1990. During his extensive career, he has successfully represented veterans before the Board of Veterans Appeals, Court of Appeals for Veterans Claims, and the United States Court of Appeals for the Federal Circuit. Mr. Chisholm is a founding member of the United States Court of Appeals for Veterans Claims Bar Association and served as President of that organization for the year 2002-2003. Mr. Chisholm served as the President of the National Organization of Veterans' Advocates from 1999 to 2004. In 2016, the United States Court of Appeals for Veterans Claims (CAVC) awarded Mr. Chisholm the Hart T. Mankin Distinguished Service Award in recognition of his 25 years of outstanding service to the Court. Mr. Chisholm has served as appellant's lead counsel in over 7,500 cases before the CAVC. His full biography may be found at cck-law.com/lawyers/robert-v-chisholm. To learn more about CCK, visit cck-law.com.

³ Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act of 2022, Pub. L. No. 117-168, 136 Stat. 1759 (2022); *see also The PACT Act and your VA benefits*, U.S. Dept. of Veterans Affairs (March 5, 2024), <https://www.va.gov/resources/the-pact-act-and-your-va-benefits/> (last visited June 25, 2024).

⁴ Statements and Releases, *Fact Sheet: President Biden to Announce 1 Million PACT Act Claims Approved, Benefits Delivered to Veterans in all 50 States and U.S. Territories* (May 21, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/21/fact-sheet-president-biden-to-announce-1-million-pact-act-claims-approved-benefits-delivered-to-veterans-in-all-50-states-and-u-s-territories/> (last visited June 25, 2024).

to determine toxic exposure even in situations where VA might have previously rejected a finding of service connection.⁵

A Toxic Exposure Risk Activity (TERA) medical opinion is a specialized medical evaluation that assesses a veteran's potential exposure to toxic substances during their military service, specifically in relation to claims under the PACT Act.⁶ These examinations can be crucial for establishing service connection for disabilities or conditions that may have resulted from such exposures.⁷

Purpose and Definition of TERA

After passage of the PACT Act, Veterans Benefits Administration (VBA) updated guidelines for claims processors reviewing PACT Act claims and appeals.

Revisions to Definitions

Included in the VBA updates for clarity are three definitions relating to toxic exposure: toxic exposure, toxic exposed veteran, and toxic exposure risk activity.⁸

- **Toxic exposure** pertains to Vietnam-era herbicide-exposed veterans, radiation-exposed veterans, TERA, and an ongoing list that “identifies substances, chemicals, and airborne hazards that are appropriate for presumptions of specific toxic exposure for members who served in certain locations.”⁹
- **Toxic exposed veteran** includes Persian Gulf veterans, Camp Lejeune veterans, veterans who participated in a toxic exposure risk activity, and chemical and biological warfare testing.¹⁰

⁵38 U.S.C. § 1168; *see generally* 38 U.S.C. § 1710(e)(4) (defining “toxic exposure risk activity”).

⁶ 38 U.S.C. § 1168.

⁷ *Id.*; *see also* U.S. DEP’T OF VETERANS AFFS., VBA LETTER 20-22-10, PROCESSING CLAIMS INVOLVING PUBLIC LAW 117-168, SERGEANT FIRST CLASS HEATH ROBINSON HONORING OUR PROMISE TO ADDRESS COMPREHENSIVE TOXICS ACT OF 2022, 3-4 (2022).

⁸ U.S. DEP’T OF VETERANS AFFS., *supra* note 7, at 3.

⁹ *Id.*; *see also* 38 U.S.C. § 101(37); 38 U.S.C. § 1119(b)(2); 38 U.S.C. § 1710(e)(4).

¹⁰ U.S. DEP’T OF VETERANS AFFS., *supra* note 7, at 3; *see also* 38 U.S.C. § 101(38); 38 U.S.C. § 1710(e)(1).

- **Toxic exposure risk activity, or TERA**, is defined as “any activity that requires a corresponding entry in an exposure tracking record system, or that VA determines qualifies for purposes of this subsection when taking into account what is reasonably prudent to protect the health of veterans.” This exposure tracking record system refers to government programs that will track how service members or veterans have been exposed to various occupational or environmental hazards.¹¹

Revisions to Claims Processing

The PACT Act claims processing guidelines include the following revisions:

- August 10, 2022, is the earliest effective date for establishing entitlement to PACT Act benefits.¹² *Note: There are some exceptions for survivors’ benefits.¹³
- **VA Form 21-526EZ**, Application for Disability Compensation and Related Compensation Benefits, now includes a toxic exposure section. This is intended to help VA identify claims related to toxic exposure.¹⁴
- VA Forms **21P-534EZ** (Application for DIC, Survivors Pension, and/or Accrued Benefits) and **21P-535** (Application for Dependency and Indemnity Compensation by Parent(s)) now include a question about choosing reevaluation of a previously denied DIC claim.¹⁵

Examples of TERAs

As mentioned, VA defines a TERA as exposure to specific hazardous substances during military service.¹⁶ Examples of these substances include:

- Herbicide Agents like 2,3,7,8-Tetrachlorodibenzodioxin (TCDD)

¹¹ U.S. DEP’T OF VETERANS AFFS., *supra* note 7, at 3; *see also* 38 U.S.C. § 1119(c)(2); 38 U.S.C. § 1710(e)(4).

¹² *See* 136 Stat. at 1759 (listing the effective date as Aug. 10, 2022); *see, e.g.*, 38 U.S.C. § 1116(a).

¹³ 38 U.S.C. § 1305.

¹⁴ U.S. DEP’T OF VETERANS AFFS., *supra* note 7, at 2; *see generally* 38 C.F.R. § 3.151(a) (2024).

¹⁵ U.S. DEP’T OF VETERANS AFFS., *supra* note 7, at 2; *see generally* 38 U.S.C. § 5101(b).

¹⁶ *See* 38 U.S.C. § 101(37)(b); 38 U.S.C. § 1710(e)(4).

- Ionizing Radiation
- Mustard Gas (Nitrogen, Sulfur Mustard, or Lewisite)
- Contaminated water at Camp Lejeune (Perchloroethylene, Trichloroethylene, Vinyl Chloride, Benzene)
- Burn Pits¹⁷

Commented [SP1]: This one covers the whole list

How VA Identifies New TERA Claims

There are multiple ways that VA claims processors may recognize a new claim as involving a TERA. Some examples include the following:

- A veteran with a qualifying service claims a condition considered presumptive by the PACT Act.
- A veteran specifically claims that a condition is due to toxic exposure.
- A veteran does not specifically attribute their condition to a toxic exposure, but the condition reasonably raises the issue of association with a toxic exposure or there is evidence in the record of participation in a TERA.¹⁸

Commented [SP2]: For all bullet points

When VA classifies a claim as being related to the PACT Act, VA's duty to assist requires it to proactively look for evidence of exposure. When determining whether to concede a TERA, claims processors must consider all available evidence, such as:

- Full ILER record
- Service treatment and personnel records
- VA and private treatment records
- Lay statements
- Expert reports or testimony
- Military occupational specialty
- Locations of known non-presumptive and presumptive exposures¹⁹

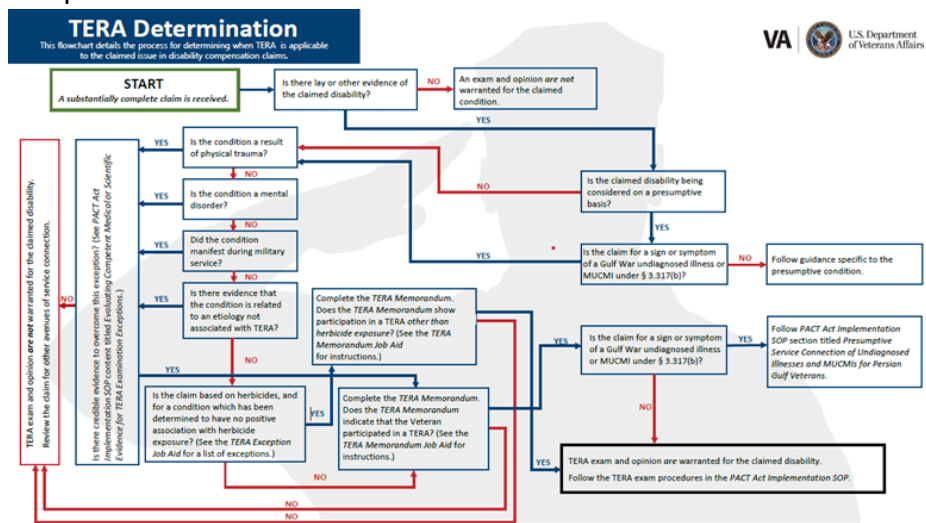
¹⁷ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 9.

¹⁸ *Id.*

¹⁹ *Id.* at 10.

VA must liberally construe the evidence when considering whether the veteran has a TERA.²⁰ Reasonable doubt must be applied in all cases.²¹

Below is a flowchart detailing the process VA claims processors must follow to determine if TERA is applicable to the condition in disability compensation claim.



Supplemental Claims and VA Outreach for Previously Denied Claimants

When VA receives a supplemental claim for a new or modified presumption, VA has a duty to review the claim based on the new law, and the claimant is not required to submit **new and relevant evidence**.²²

However, veterans must submit a **Decision Review Request:**

Supplemental Claim form to initiate the process.²³

In addition, VA must "identify all previously denied disability compensation claims that might be evaluated differently when there is an establishment of or modification to a presumption of service connection."

²⁴ It must then conduct outreach and inform identified claimants that a

²⁰ *Id.*

²¹ *Id.*; see 38 C.F.R. § 3.102 (2024).

²² U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 5; 38 C.F.R. § 3.2501(a)(1) (2024).

²³ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 5.

²⁴ *Id.* at 4; see also 38 U.S.C. § 1167(a).

supplemental claim may be submitted.²⁵ This will apply to veterans affected by the PACT Act.²⁶

VA is also required to conduct similar outreach to previously denied survivors under 38 U.S.C. § 1305. For previously denied DIC claims, VA must award effective dates “as if the establishment or modification of the presumption of service connection had been in effect on the date of the submission of the original claim.”²⁷

When VA Creates a TERA Memorandum

If VA finds evidence of potential exposure, it creates a TERA Memorandum for the veteran.²⁸ The TERA Memorandum is used to document and detail the specific types of activities and exposures a veteran experienced during their service.²⁹ The memorandum includes data from the exposure tracking record systems, detailing the veteran's participation in activities that exposed them to hazardous substances.³⁰ These substances can include chemicals, air pollutants, occupational hazards, radiation, and warfare agents.³¹

This information is crucial for the VA medical examiner to review and consider when providing a medical opinion on the veteran's disability claim.³² If a veteran seeks a private opinion, the TERA Memorandum must be provided to the medical expert.³³

TERA Medical Opinions: Triggers and Exceptions

If the evidence in the TERA Memorandum is not sufficient to establish a direct service connection, VA should order a TERA medical opinion.³⁴ In the past, VA was required to provide a Compensation & Pension (C&P)

²⁵ 38 U.S.C. § 1167(b).

²⁶ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 4.

²⁷ *Id.*; 38 U.S.C. § 1305.

²⁸ See U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 7; see also 38 U.S.C. § 1119.

²⁹ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 7.

³⁰ *Id.*; see generally 38 U.S.C. § 1119(c)(2).

³¹ 38 U.S.C. § 1710(e)(1); see also 38 U.S.C. § 1119; VBA Letter 20-22-10 at 3, 9.

³² See 38 U.S.C. § 1168.

³³ See U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 7.

³⁴ 38 U.S.C. § 1168.

examination or medical opinion for certain claims involving TERA in which the record did not contain sufficient evidence to decide the claim.³⁵ Now, under U.S.C. § 1168, a C&P examination and medical opinion must be provided in TERA cases when evidence is not sufficient to establish service connection for the condition, rather than just when a decision cannot be made.³⁶

A TERA medical opinion involves a C&P exam conducted by a specialist to evaluate the veteran's exposure and its potential link to their medical condition.³⁷ The Veterans Service Representative (VSR) and Rating Veterans Service Representative (RVSR) are responsible for preparing the necessary documentation and memoranda related to the veteran's exposure.³⁸

This will primarily apply when the claimed condition is not subject to a presumption.³⁹ However, this also applies when a veteran claims a presumptive condition and does not have qualifying service but may have other exposures show in the totality of the evidence.⁴⁰ VA may also request a disability examination to determine the severity of a presumptive condition.⁴¹

Exceptions to TERA Examination Requirements

38 U.S.C. § 1168(b) provides that TERA examination requirements do not apply if the Secretary determines there is no indication of an association between the disability claimed by the Veteran and participation in the TERA.⁴²

Exception	Scenario	Correct Action
-----------	----------	----------------

³⁵ See 38 U.S.C § 5103A(d).

³⁶ 38 U.S.C. § 1168(a).

³⁷ *Id.*; see also U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 8.

³⁸ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 8.

³⁹ *Id.*; see also 38 U.S.C. § 1168(a).

⁴⁰ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 8; see also 38 U.S.C. § 1168(a).

⁴¹ U.S. DEP'T OF VETERANS AFFS., *supra* note 7, at 8-9.

⁴² See *id.* at 8, 10-13.

Physical Trauma VBA Letter 20-22-10 pages 10-11 (2022).	The Veteran claims service connection for left knee patellofemoral pain syndrome. The Veteran submits medical evidence of a diagnosis of left knee patellofemoral pain syndrome but submits no other evidence regarding the etiology of the condition. Exposure to burn pits is conceded for this Veteran.	By definition, patellofemoral pain syndrome is a disorder of the knee caused by overuse, injury, or muscle weakness. In the absence of competent medical or scientific evidence to suggest a link between this condition and a toxic exposure risk activity, this condition is exempt from the TERA examination requirements, and the claims processor would not order a TERA examination with medical opinion.
Physical Trauma VBA Letter 20-22-10 pages 10-11 (2022).	The Veteran claims service connection for a left elbow condition. The Veteran submits private medical evidence showing a diagnosis of left elbow arthritis and submits a peer reviewed medical journal article indicating a potential link between arthritis	Follow the guidelines in <u>M21-1, Part IV, subpart i,1,B,1,c</u> to evaluate the submitted evidence. The threshold for determining whether an association may be present is low. Medical assessments that do not support a decision on the merits can still be sufficient to

	and exposure to air pollution. Exposure to burn pits is conceded for this Veteran.	establish an indication of an association for the purposes of requesting an examination. If after reviewing the evidence, it is determined to have probative value that the Veteran's arthritis could be due to burn pit exposure, then a TERA examination with medical opinion should be requested.
Mental Disorders or disabilities that Manifested During Military Service VBA Letter 20-22-10 page 11 (2022).	The Veteran claims service connection for major depressive disorder. The Veteran submits a statement on VA Form 21-4138 indicating that he started feeling depressed while on	Follow the guidance under <u>M21-1, Part V, Subpart ii, 2, A</u> and <u>M21-1, Part IV, subpart i, 1, B, 1, a-c</u> to determine whether a mental health examination should be ordered with a direct

	<p>active duty and has felt depressed ever since. The Individual Longitudinal Exposure Record (ILER) report shows participation in a TERA. Service treatment records show the Veteran visited a counselor on one occasion for depression in service. A review of VAMC records show the Veteran has a current diagnosis of depression and receives counseling on a regular basis.</p>	<p>opinion. This condition is exempt from the TERA examination requirements, as the claimed condition is a mental disorder. It is also exempt from the TERA examination as the disability manifested during military service.</p>
<p>Mental Disorders VBA Letter 20-22-10 page 11 (2022).</p>	<p>The Veteran claims service connection for a cognitive disorder. The Veteran submits a statement on VA Form 21-4138 indicating symptoms of forgetfulness and issues with processing information. An Individual Longitudinal Exposure Record (ILER) report shows participation in a TERA.</p>	<p>Follow the guidelines in <u>M21-1, Part V, Subpart ii, 1, A</u> to evaluate the credibility and competence of the submitted evidence. If after weighing the evidence, it is determined to have probative value that the Veteran's cognitive disorder could be due to the verified TERA, then a mental health</p>

	<p>The Veteran also submits a statement from his private physician who states that the Veteran's exposure to environmental hazards while on active duty resulted in severe neurobehavioral decline.</p>	<p>examination with TERA medical opinion should be requested.</p> <p>Toxic exposure can result in symptoms of neurobehavioral decline.</p>
<p>Conditions Determined to Have No Positive Association with Herbicide Exposure</p> <p>VBA Letter 20-22-10 pages 11-12 (2022).</p>	<p>The Veteran submits a claim for a stomach cancer and provides current medical evidence of a biopsy. The Veteran served in a location that exposed him to herbicides, but has no other documented TERA exposure.</p>	<p>Review the records to determine if the stomach cancer can be granted on a direct basis. The Secretary has determined that a positive association does not exist between herbicide exposure and digestive cancers, including stomach cancer. This condition is exempt from the TERA examination requirements, and the claims processor would not order a TERA examination with medical opinion.</p>

		Reference <u>Toxic Exposure Risk Activity (TERA) Exception Job Aid.</u>
Claims for Disabilities that Manifested During Military	The Veteran submits a claim for low back pain. A statement on	Follow the guidance under <u>M21-1, Part V, Subpart ii, 2, A</u>

<p>Service or With an Etiology Not Associated to Toxic Exposure</p> <p>VBA Letter 20-22-10 page 12-13 (2022).</p>	<p>VA Form 21-4138 indicates that his low back pain is due to multiple landings as a parachutist. DD form 214 shows the Veteran received a Parachutist Badge with Combat Jump Device. Service treatment records show multiple visits for back pain and stiffness.</p>	<p>and <u>M21-1, Part IV, subpart i, 1, B, 1, a-c</u> to determine whether a lumbar spine examination should be ordered. This condition is exempt from the TERA examination requirements, and the claims processor would not order a TERA examination with medical opinion.</p>
<p>Claims for Disabilities that Manifested During Military Service or With an Etiology Not Associated to Toxic Exposure</p> <p>VBA Letter 20-22-10 page 12-13 (2022).</p>	<p>The Veteran files a claim for cirrhosis. The TERA exposure memorandum documents exposure to asbestos. VAMC treatment records document a long history of treatment for cirrhosis, with several indications in the treatment records that his cirrhosis was due to 20 years of chronic alcohol abuse post-service.</p>	<p>This condition is exempt from the TERA examination requirements, as the evidence of record indicates the condition is related to an etiology that is not associated with toxic exposures (post- service alcohol use). Per <u>M21-1, Part X, Subpart iv, 1, D, 1, h</u>, service connection for secondary disabilities resulting from alcohol abuse is prohibited. No</p>

	There is no evidence that the alcohol abuse is secondary to a service-connected disability.	examination or opinion should be ordered.
--	---	---

Conclusion

The 2022 PACT Act has made significant efforts toward improving access to toxin-related disability benefits. Considering the complexities of this intersection of law and medicine, the TERA medical opinion plays an important role in achieving that access for veterans.

Please join or support ROA.

This article is one of 2,200-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).⁴³

ROA is more than a century old—on 10/2/1922, a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s eight⁴⁴ uniformed services, you are eligible for membership in ROA, and

⁴³ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

⁴⁴ Congress recently established the United States Space Force as the eighth uniformed service.

a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join online at <https://www.roa.org/page/memberoptions>.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail a contribution to:

Reserve Organization of America
1 Constitution Ave NE
Washington, DC 20002⁴⁵

⁴⁵ You can also contribute on-line at www.roa.org.