

Presumption of Soundness 38 U.S.C. § 1111

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Learning Objectives

- Learn when the presumption of soundness applies.
- Learn VA's requirements to rebut the presumption of soundness.
- Learn about claims for aggravation, when the presumption of soundness does not apply.
- Review common VA mistakes and suggested arguments.

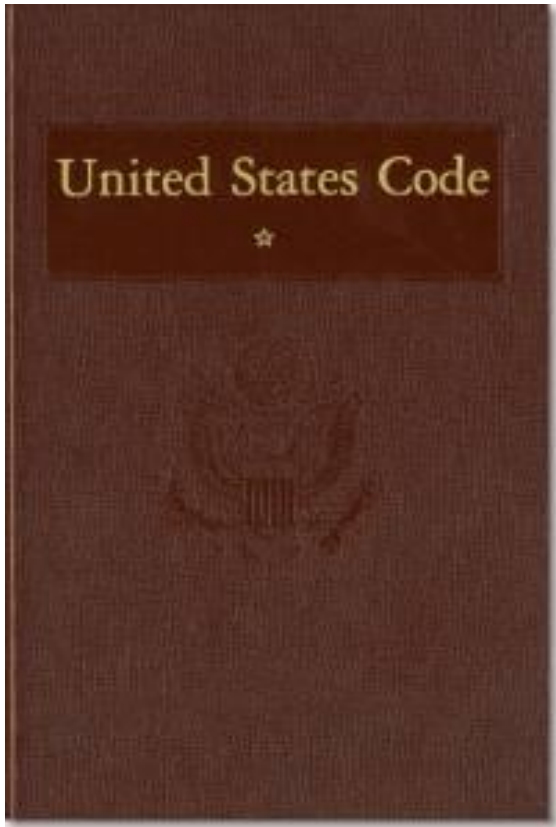
Presumption of Soundness

Presumption of Soundness

- Veterans are presumed to be “sound,” or healthy, at entrance to military service.
- This is a result of a policy choice by Congress.



38 U.S.C. § 1111



"For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service."

Must Have Veteran Status

- In order for the presumption of soundness to apply, the claimant must have status as a veteran.
 - *Smith v Shinseki*, 24 Vet. App. 40, 44 (2010)

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“Noted”

- 38 C.F.R. § 3.304(b) defines
- Only includes conditions recorded in examination reports.
- Does not include history of prior existence reported at entrance. § 3.304(b)(1).
- Veteran’s account that a condition pre-existed service is not “noted.” See *Paulson v. Brown*, 7 Vet.App. 466, 470 (1995).

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No entrance exam?

- If the Veteran was **not examined** on entrance, then the presumption of soundness does **not** attach.

- *Crowe v. Brown*, 7 Vet.App. 238, 245 (1994)

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- BUT if the Veteran was examined and the report of medical examination is lost or missing, then the Veteran is presumed to have been in sound condition.

- *See Lee v. Brown*, 10 Vet.App. 336, 339 (1997)

Presumption of Soundness Attaches



- Veterans who received an entrance examination with no notation of the condition in question **receive the benefit of the Presumption of Soundness.**
- If the Presumption of Soundness applies, then is a normal claim for service connection. The in-service manifestation meets the first element.
- Veteran must still prove the other elements of service connection, including nexus.

Rebutting the Presumption of Soundness

Rebutting Presumption of Soundness

To rebut the presumption of soundness, **VA** must prove:

1. There is **clear and unmistakable** evidence that the disorder existed before entrance into service (pre-existence)
AND
2. There is **clear and unmistakable** evidence that the injury or disease was **NOT aggravated** by such service.

38 U.S.C. § 1111; 38 C.F.R. § 3.304(b); *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004).

Burden on VA

- Veteran not required to show any increase in severity before VA has the duty to rebut the second prong **by clear and unmistakable evidence**.
- Clear and unmistakable means the evidence must be “undebatable.”
 - *Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009)
- If VA cannot prove BOTH prongs by clear and unmistakable evidence, then presumption of soundness attaches.



Aggravation Prong



- VA may show lack of aggravation by establishing (by clear and unmistakable evidence) that
 - There was no increase in disability during service **OR**
 - Any increase in disability was due to the natural progression of the pre-existing condition.

Question - Aggravation

Veteran Horn is seeking service connection for his left hip. Nothing was noted on his entrance examination. During basic training he complained of left hip pain. A physician diagnosed Legg-Calve-Perthes disease, recommended him for medical evaluation board, and marked an "X" in the box that the condition existed prior to service and was not aggravated by active duty.

Was this enough for VA to rebut the PoS?

A. Yes

B. No



Answer - Aggravation

- Answer: No
- These are from the facts of *Horn v. Shinseki*, 25 Vet.App. 231, 235 (2012).
- The Court said this “X,” with no accompanying medical explanation, “falls woefully short of clear and unmistakable evidence.”
- VA’s finding cannot rely on lack of evidence of aggravation. VA must show **affirmative evidence** to prove **no aggravation**.

Historically Rebutting PoS

- In the past, VA had regulations that suggested clear and unmistakable evidence was not required for both prongs.
 - Old 38 C.F.R. § 3.304(b) did not require clear and unmistakable evidence for the lack of aggravation.
- VA since fixed their regulation to say the same as *Wagner*.
- Old cases that used the old regulation are not CUE.

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AL90

Presumption of Sound Condition: Aggravation of a Disability by Active Service

AGENCY: Department of Veterans Affairs.

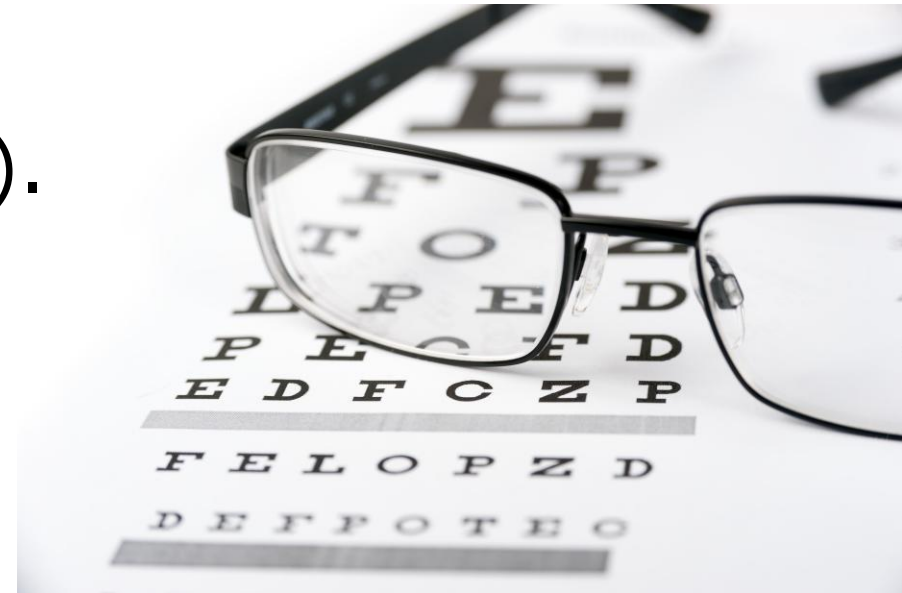
ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations regarding the presumption of soundness of a veteran by adding a requirement that, in order to rebut the presumption of soundness of a veteran on entrance into active service, VA must prove not only that the condition existed prior to entrance into active service, but also that it was not aggravated by the veteran's active service. This amendment reflects a change in VA's interpretation of the statute governing the presumption of sound condition, and is based on a recent opinion of VA's General Counsel as well as a recent decision of the United States Court of Appeals for the Federal Circuit. The intended effect of this amendment is to require that VA, not the claimant, prove that the disability preexisted entrance into military service and that the disability was not aggravated by such service before the presumption of soundness on entrance onto active duty is overcome.

DATES: *Effective Date:* May 4, 2005.

Exception: Congenital Defects/Disease

- The presumption of soundness does not apply to cases involving congenital defects because they are not “diseases or defects” for VA purposes.
 - 38 C.F.R. § 3.303(c); *Quirin v. Shinseki*, 22 Vet.App. 390, 397 (2009).
- Congenital defects include personality disorders and refractive error of the eye. 38 C.F.R. § 3.303(c).



Aggravation

If Condition is Pre-existed

- If pre-existing disability **is noted** upon entry to service, then the claim is one for entitlement to compensation based on aggravation, not a claim for service connection.
 - *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004).
- This means that 38 U.S.C. § 1153 applies.

§ 1153. Aggravation

A preexisting injury or disease will be considered to have been aggravated by active military, naval, air, or space service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

Aggravation

- 38 U.S.C. § 1153: Presumption of Aggravation
- “A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, **where there is an increase in disability during such service**, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.”
- Applies ONLY when a disorder is **NOTED** at entrance.

Compensation for Aggravation

- If a claim for aggravation is granted, Veterans are only granted a **rating for the difference between the baseline level** of pre-existing disability and the amount of aggravation due to service.
- This means VA will determine the rating warranted at the Veteran's entrance to service and subtract that from the rating currently warranted.



Aggravation is Harder to Prove



- Despite the “presumption of aggravation” it is harder to establish service connection for a disability that pre-existed service than one that started during service.
- Additionally, Veterans may receive less compensation for claims based on aggravation.
- Generally, **do not argue that a disability pre-existed service.**

Comparison: PoS vs. Aggravation

Pre-existing condition is <i>not</i> noted at entry into service.	Pre-existing condition <i>is</i> noted at entry into service.
Veteran is afforded presumption of soundness (PoS).	Veteran must bring a claim for aggravation.
VA must prove by clear and unmistakable evidence both that the condition pre-existed service and was not aggravated by service to rebut the PoS.	Veteran must show an increase in disability during service. If shown, the presumption of aggravation applies.
Veteran can be paid for full amount of disability due to condition.	Veteran can only be paid for difference between baseline level of pre-existing disability and amount of aggravation due to service.

Common VA Mistakes

Finding Report of Medical History as “Noted”

- Generally, only conditions noted at the Report of Medical Examination at entrance are “noted.”
- Suggested Argument:

The Veteran’s report of a history of [disability] on the entrance Report of Medical History does not count as “noted” under 38 U.S.C. § 1111. Therefore, the presumption of soundness should apply. 38 C.F.R. § 3.304(b)(1); *Crowe v. Brown*, 7 Vet.App. 238, 245 (1995).

Fail to Address if “Noted” Condition is Same as Claimed Condition

- VA also will fail to address if the “noted” condition is the same as the claimed condition.
- For example, entrance examination notes a pre-existing left knee meniscal injury, but the Veteran is seeking service connection for degenerative joint disease of the left knee.

- Suggested Argument:

Although a history of [noted condition] is noted on the entrance examination, the Veteran is seeking service connection for a separate [claimed condition]. Therefore, the presumption of soundness should apply. 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b).

Rely on Medical Opinions Using the Wrong Standard

- To rebut the Presumption of Soundness VA must prove by clear and unmistakable evidence that the condition did not get worse during service, or was the result of the natural progression.
 - This determination generally requires expert medical opinion.
 - VA examiners are used to the 'as likely as not standard.'
 - Carefully review the medical opinion to see that the correct standard was used.

Suggested Argument: Medical Opinion Using the Wrong Standard

- The VA examiner opined [quote from examiner using as likely as not standard]. However, to rebut the presumption of soundness VA must prove the pre-existing disability was not aggravated by service by clear and unmistakable evidence. 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b); *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004). Remand for a new examination using the correct, clear and unmistakable standard is required.

Summary

- Carefully review all claims that involve a suggestion that the claimed disability started before service.
- Unless specifically noted at the entrance medical examination, the Presumption of Soundness applies.
- VA has the burden to rebut the Presumption of Soundness by a high standard.
- VA very often makes mistakes in this analysis. Your arguments pointing out these errors can greatly help Veterans.

