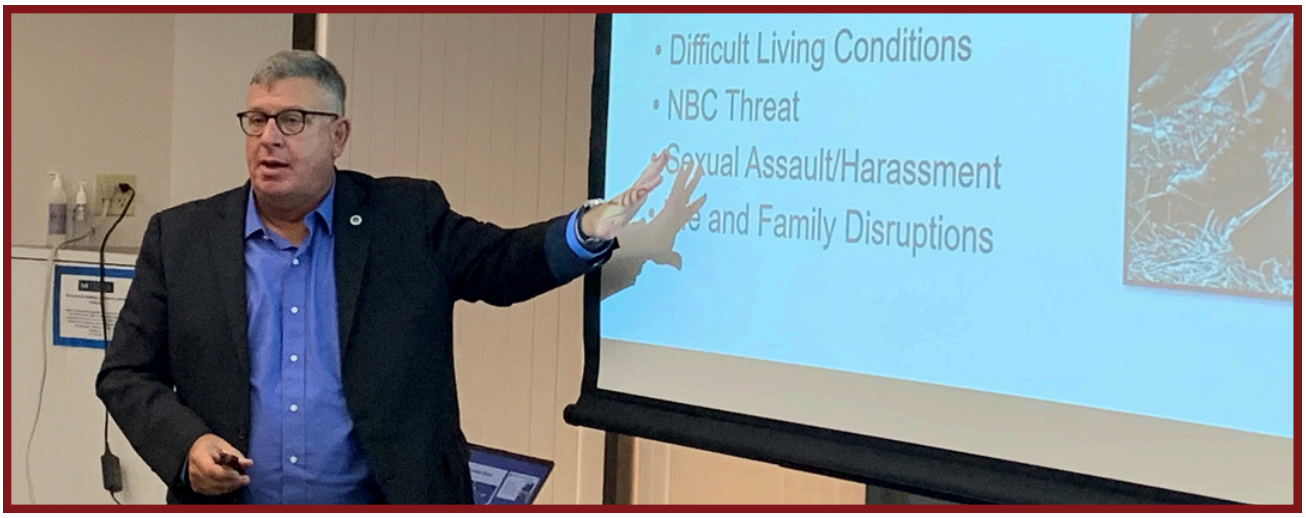
The Veterans Advocate©

A Veterans Law and Advocacy Journal



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Advocate's Corner: *Spicer v. McDonough* – Broader Definition of Causation for Service Connection Based Upon Aggravation

The 2023 decision in *Spicer v. McDonough* significantly changed how the VA evaluates secondary service connection claims, in particular, claims for service connection based upon aggravation. See *Spicer v. McDonough*, 61 F.4th 1360 (Fed. Cir. 2023). In *Spicer*, the Court of Appeals for the Federal Circuit held that 38 U.S.C. § 1110 "provides for compensation for a worsening of functionality—whether through an inability to treat or a more direct, etiological cause." 61 F.4th at 1364.

Luther Spicer served in the U.S. Air Force from May 1958 to September 1959. In April 2013, he was granted service connection for chronic myeloid leukemia, based upon his exposure to toxic fumes and other hazardous chemicals/waste products, while serving as a military Aircraft Mechanic. He sought service connection for a knee disability, as secondary to his service-connected leukemia, on the basis that he was unable to undergo necessary knee replacement surgery because medications he took to manage his leukemia lowered his red blood cell level such that it precluded surgery. Mr. Spicer was represented before VA by the Missouri Veterans Commission, and NVLSP represented him before the Court of Appeals for Veterans Claims at no charge pursuant to NVLSP's partnership with the Missouri Veterans Commission.

Luther Spicer holds up his victorious case decision. Upon receiving the decision, he said, "I'm just glad I could help some other people with this."

In its denial, the Board wrongfully explained that Mr. Spicer's inability to undergo knee replacement surgery because of the effects of service-connected leukemia was not contemplated by the applicable laws or regulations to fall within secondary service connection. Before the CAVC, Mr. Spicer argued that notwithstanding any regulation, 38 U.S.C. § 1110 established entitlement to service connection given his circumstances, that section 1110 provides compensation for veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty," and that section 1110 only required a worsening of functionality—whether through an inability to treat or a more direct, etiological cause.

The majority of a divided CAVC panel disagreed with Mr. Spicer's assertions. With the assistance of NVLSP, Mr. Spicer appealed this decision to the Federal Circuit.

The Federal Circuit reversed in Mr. Spicer's favor, vacated, and remanded the CAVC's decision, finding that the "but-for causation" standard was not limited to a single cause-effect, but rather contemplates multi-causal links, including action or inaction. The Court held that the "broad language [of section 1110] applies to the natural progression of a condition not caused by a service-connected injury or disease, but that nonetheless would have been less severe were it not for the service-connected disability." 61 F.4th at 1361- 64. In short, the Court held that secondary service connection is warranted where there is a "worsening of functionality—whether through an inability to treat or a more direct, etiological cause." 61 F.4th at 1364. Finally, the Court struck down VA's regulation governing secondary service connection via aggravation, stating "[t]o the extent that the VA also applied 38 C.F.R. § 3.310(b) to reject Mr. Spicer's theory of compensation, that regulation is unlawful as inconsistent with 38 U.S.C. § 1110." 61 F.4th at 1366. As of the date of this writing, VA has not yet revised their regulation consistent with the Court's holding in *Spicer.*

In view of the Court's decision in *Spicer,* advocates should take an expansive view of secondary service connection. Rather than looking for a strict cause-and-effect relationship between conditions, advocates should not hesitate to "think outside the box" and investigate whether a service-connected condition aggravates another condition, even if the cause-and-effect relationship is not a direct one. If a service-connected disability –or medical treatment related thereto – eliminates treatment options (such as what took place with Mr. Spicer), the advocate should apply for secondary service connection based on these broader principles of aggravation. For example, a veteran with a service-connected knee condition, who has undergone cardiac bypass surgery and is unable to engage in his full cardiac rehabilitation program due to an inability to exercise related to his service-connected knee condition, with the result that his heart condition is more severe, may be entitled to a grant of secondary service connection based upon aggravation principles, as explained in *Spicer.* Questions about how best to apply this new and consequential legal principle can be directed to the NVLSP Veterans Service Officer Liaison at louis.george@nvlsp.org.

The Missouri Veterans Commission Veterans Service Officer and Southeast Region Supervisor Mike Probst, said, "So incredibly thankful for your tireless work and for the work of everyone there at the NVLSP. You guys have my utmost respect and admiration for the work you do."

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Message from NVLSP Executive Director Paul Wright

Dear Readers,

As we continue our mission to advocate for the rights and benefits of veterans across the nation, I am pleased to address you in this issue of The Veterans Advocate. Our commitment to ensuring that veterans receive the justice they deserve remains steadfast, and we are grateful for the support and collaboration of our state partners who play a crucial role in this endeavor.

Together, we have made significant strides in tackling the challenges faced by veterans in navigating the complex VA claims process. Our collective efforts have led to meaningful changes and increased awareness, helping veterans secure the benefits they have earned through their service.

In this edition, we focus on providing the latest updates and insights that are vital for advocates working on the front lines. We aim to equip you with the tools and knowledge needed to effectively assist veterans and their families. Your dedication and expertise are invaluable, and we are here to support you every step of the way.

Thank you for your ongoing partnership and unwavering commitment to our shared mission. Let us continue to work together to ensure that all veterans receive the recognition and support they deserve.

With gratitude,

Litigation Updates

Nehmer v. U.S. Department of Veterans Affairs / OIG Report:

The *Nehmer* case, brought by NVLSP in 1986, originated with VA regulations mandating denial of benefits claims by Vietnam veterans who had diseases associated with exposure to Agent Orange. In 1989, a federal court found the regulation unlawful, and in 1991 NVLSP negotiated a favorable consent decree with the VA. The *Nehmer* consent decree requires VA, whenever it recognizes that the emerging scientific evidence shows that a positive relationship exists between Agent Orange exposure and a new disease, to (a) identify all claims based on the newly recognized disease that were previously denied; and then (b) pay disability and death benefits to these claimants, retroactive to the initial date of claim.

NVLSP has continued to represent the *Nehmer* class as the VA has recognized additional diseases associated with Agent Orange exposure, including three recognized in 2010 and another three recognized in 2021. In 2020, the federal court also ruled in favor of thousands of so-called Blue Water Navy Vietnam Veterans and their survivors, holding that the consent decree applies to them.

On June 27, 2024, VA's Office of Inspector General published a report, *VBA Did Not Identify All Vietnam Veterans Who Could Qualify for Retroactive Benefits*, detailing how VA failed to identify and readjudicate approximately 35,000 additional *Nehmer* class members under the *Nehmer* consent decree based on the three diseases added to VA's agent orange presumptive list in 2021. NVLSP is investigating this apparent violation of the consent decree and exploring with VA and DOJ how to ensure these class members receive the benefits they are owed. This may result in VA having to readjudicate tens of thousands of additional decisions, either through the parties' agreement or through litigation.

Soto v. United States:

In 2019, the U.S. District Court for the Southern District of Texas granted class certification in a lawsuit filed by NVLSP with Sidley Austin LLP as pro bono counsel on behalf of Army, Navy, Marine Corps, and Air Force veterans who were denied the full amount of retroactive Combat-Related Special Compensation (CRSC) because the military illegally imposed a 6-year ceiling on the amount it would pay in retroactive CRSC. CRSC is an extra tax-free monthly payment provided by the Department of Defense, that is available to eligible retired veterans who have injuries that are combat-related. CRSC is a payment that is in addition to any military disability retirement pay and/or VA disability compensation that the veteran may be receiving each month. This suit is limited to individuals with back awards under $10,000.

On December 16, 2021, the Court awarded final judgment in favor of the class and ruled that the United States is liable to each class member for the amount of CRSC withheld due to the retroactive application of the payment cap. The government appealed to the Federal Circuit and in February 2024, the Federal Circuit reversed the district court.

On January 17, 2025, the U.S. Supreme Court granted the petition for certiorari filed by NVLSP and co-counsel Sidley Austin. Whether the six-year statute of limitations in the Barring Act applies to CRSC claims is the issue before the Supreme Court, and oral argument is scheduled for April 28, 2025.

Program Updates

NVLSP's Burn Pits Claims Assistance Program

The National Veterans Legal Services Program (NVLSP) has been assisting veterans and their surviving spouses with their burn-pit-related claims for disability and DIC benefits since October 2021. Since its inception, NVLSP's Burn Pits Claims Assistance Program has successfully obtained benefits for dozens of veterans suffering from respiratory conditions, cancers, and other conditions related to their toxic exposures during their service.

Since the passage of the PACT Act in August 2022, the Burn Pits Claims Assistance Program has continued to represent veterans and surviving spouses seeking to obtain service connection for conditions related to veterans' exposures, with priority for (1) veterans (and their surviving spouses) who were previously denied service connection for a burn-pit-related condition that is not presumptively service-connected and (2) veterans (and their surviving spouses) whose claims for a condition that is presumptively service connected under the PACT Act and subsequent regulations were denied even after those presumptions took effect.

NVLSP's Burn Pits Claims Assistance Program has a 98% success rate for final decisions. For more information on our program and the PACT Act, and for an intake form, please visit https://www.nvlsp.org/what-we-do/burn-pits-claims-assistance-program/.

NVLSP Launches Family Caregiver Assistance Program

In late 2024, NVLSP launched its Family Caregiver Assistance Program (FCAP), a dedicated initiative aimed at assisting veterans and their families in accessing the Department of Veterans Affairs (VA)'s Program of Comprehensive Assistance for Family Caregivers (PCAFC). This new program is designed to help families obtain critical benefits offered to caregivers of veterans with serious disabilities resulting from their service – at no cost veterans or their families. The program was created with the support of the Skadden Fellowship Foundation.

Since then, we have screened or begun the screening process with over thirty veteran-caregiver pairs. In the majority of these cases, we have provided or intend to provide legal advice or representation. More information and resources can be found at https://www.nvlsp.org/what-we-do/family-caregiver-assistance-program/.

NVLSP's FCAP aims to provide legal assistance to caregivers and veterans in two key situations: (1) those who have been denied benefits after applying for PCAFC, and (2) those who have successfully enrolled in the program but have had their benefits reduced or terminated. NVLSP will offer support through direct legal representation, advice, and self-help resources to assist families in appealing adverse VA decisions.

FCAP also engages in strategic litigation and advocacy related to PCAFC. We are currently litigating a set of four cases in the Court of Appeals for Veterans Claims (CAVC). In February, after VA proposed new PCAFC regulations, we not only submitted a public comment on behalf of NVLSP but also contributed to a comment signed by a coalition of veteran and caregiver organizations.

WEBINAR: The Power of Secondary Service Connection

Presented by Alexis Ivory
April 22, 23, and 24, 2025
2:00-3:30P.M. ET

When a veteran develops a disability due to military service, the ramifications can be severe. Service-connected disabilities can affect the veteran's ability to work, perform household chores, and enjoy leisurely activities. They also often lead to the development of new disabilities and worsen already existing conditions. When this happens, the veteran can obtain service-connected disability benefits for the other condition under the theory of secondary service connection. This webinar will teach advocates how to identify conditions that may be secondary to a primary condition that is service connected. It will also provide specific strategies for obtaining service connection for conditions that are often caused or aggravated by some of the most common primary service-connected disabilities.

This webinar will cover the intricacies of secondary service connection claims, including the following and more:

- The rules for establishing secondary service connection on both a causation and aggravation basis, including when a condition cannot be treated because of a primary service-connected disability
- When VA must address secondary service connection claims that aren't expressly raised by a veteran
- Tips for obtaining service connection for cardiovascular disease, sleep apnea, and other conditions as secondary to PTSD
- Advice for obtaining service connection for mental disabilities, such as depression, as secondary to service-connected physical conditions
- How veterans may obtain service connection for disabilities cause or aggravated by medication, drug and alcohol use, and obesity associated with a primary disability

Register here.
Price: $57 per VSO (NVLSP state partners may be able to receive this webinar for free or at a further discount).

Save the Date!

WEBINAR: Recent Court Decisions Veterans Advocates Need to Know About: Nov. 2024-May 2025

Presented by Peggy Costello
May 28, 29, and 30
2:00-3:30P.M. ET

IN-PERSON & VIRTUAL EVENT:
NVLSP's Veterans Benefits Training for Advocates - Get Trained by the People Who Wrote the Book -

June 25, 2025, 9:00A.M.-5:00P.M.
Washington, D.C., and Online
Visit www.nvlsp.org for more details.

NVLSP's VSO Liaison Services

While NVLSP has always provided veterans claims and appeals assistance to our partners over the past 44 years, it was not until 2023 that we formalized a team dedicated to assisting our national, state, and county counterparts with challenging veterans law issues. We understand that veterans service officers and appeals specialists may sometimes need a second set of eyes to address technical veterans law questions or navigate appeals strategy—including under the AMA. Such questions might involve military discharge upgrade timelines, special monthly compensation eligibility, the specificity of CUE claims, how to formulate Board of Veterans' Appeals (BVA) hearing arguments, and/or questions around choosing an AMA appeal lane that is best in light of the evidence and legal issues presented. To assist our partners in representing our veterans and their families, we have created this special team of experts.

NVLSP Special Counsel and VSO Liaison Lou George speaks at a recent training

Heading the team is one of NVLSP's most experienced attorneys—Lou George. Lou began his tenure at NVLSP in 1998, serving in many roles, including as the Director of Training and Publications. He now serves as a Special Counsel and VSO Liaison. As a member of NVLSP's litigation team, he expertly represents veterans and dependents before the U.S. Court of Appeals for Veterans Claims. Lou is an expert trainer, having provided training to thousands of federal, state, and county service officers over the past 25 years. As one of our nation's leading experts in veterans law, Lou serves as an author and editor of The *Veterans Benefits Manual*. Before joining NVLSP, Lou served as an associate counsel with the Board of Veterans' Appeals, where he authored countless decisions, and as a law clerk with the Board for Correction of Military Records of the Coast Guard, where he drafted decisions regarding requests for discharge upgrades and other personnel matters. Additionally, Lou is a past President of the Court of Appeals for Veterans Claims Bar Association and served as a member of the Rules Advisory Committee of the U.S. Court of Appeals for Veterans Claims.

Needless to say, Lou brings a wealth of subject matter expertise and practical experience to NVLSP, and he and his team are available to assist your team of experts as well. Our VSO Liaison Services can be accessed by sending an email to louis.george@nvlsp.org or calling (202) 721-0186. Please make sure to include your contact information and a brief description of the assistance you are seeking. To subscribe to The Veterans Advocate, please send an email to tva@nvlsp.org.

FAAQ: Frequently Asked Advocacy Questions

If you have a general advocacy question that you would like to be included in an upcoming issue of The Veterans Advocate, please send an email to tva@nvlsp.org.

I'm trying to help a surviving spouse get DIC, but the Veteran was not service-connected for anything before he passed. Is survivor's pension the most she can get (assuming she meets the relevant criteria)?

She may still be eligible for Dependency and Indemnity Compensation (DIC) because the law allows claimants to establish that a condition that caused or contributed to death was related to service, even where that condition was not service connected prior to the veteran's death. Advocates should look very closely at conditions that impact vital organs (Examples: hypertension, heart disease, diabetes) because these conditions often contribute materially to the veteran's death even where that condition was not a direct cause of death and was not even listed on the death certificate.

It's also important to remember that survivors may be eligible for burial benefits and reimbursement of final expenses.

The biggest complaint I get from veterans is that C&P exams are very short and superficial. What can I do?

By law, whenever VA provides a Compensation and Pension (C&P) examination, it must be "adequate." This means that, at a minimum, the examiner must review all of the pertinent information, perform all the necessary tests, take into account the veteran's statements, and provide a good explanation for their conclusions. When this does not happen advocates should challenge the examination as inadequate. Advocates should also look closely at any medical articles the examiner cites for the opinion rendered. If the examiner misstated the article, if the article contradicts the examiner, or if there are contrary articles that rebut the examiner's conclusions, advocates should point that out and submit the contrasting articles into the record.

Independently, advocates should be aware of the examiner's credentials, and be mindful if the C&P examiner is not qualified to provide an opinion, particularly regarding a complex medical matter. For example, if a podiatrist renders an opinion regarding a PTSD claim, the advocate may wish to consider challenging the credentials of the examiner.

Veterans wait a long time to testify before a Veterans Law Judge. How do I make the most of the hearing?

If the issue is entitlement to service-connection, the best thing you can do is help the veteran tell their story in as much detail as possible. Because some events may have happened decades earlier, it is helpful to review the file and remind the veteran of certain events by referring to information in their service records. If you are able to take notes, you can use them to make sure all points are covered during the hearing. This can be a powerful technique not only to improve accuracy, but also to prevent the Board from finding that certain testimony is "contradicted by the record."

If the issue is an increased rating, then it helps to discuss the criteria for the next-highest rating and help the veteran testify as to their personal experiences as well as medical information they were given by their doctors. If there is any supporting evidence, such as medical treatment records, Disability Benefits Questionnaires, or statements that support the benefit sought, these should be submitted within 90 days of the hearing.

Finally, friends or family members may be able to present powerful testimony regarding the effects of a service-connected disability on the veteran's everyday life. In a claim for service connection, they may be able to testify regarding symptoms that the veteran may have experienced during, or shortly after, active service.

I have seen this a lot: A benefit is granted but the effective date is set as the date of the C&P exam, not when the claim was received by VA (which is usually months, or even years, before). Why is that and can I appeal it?

The law requires that, when service-connection is granted, ratings are assigned effective as of the date the claim is received by VA, OR the date when the evidence first shows that the criteria for that rating were met, whichever is later. Very often, VA will decide that the C&P exam is the first time that there is evidence that a claimed disability has met the criteria in the applicable Diagnostic Code (DC) and set the effective date accordingly.

There are several problems with this. First, C&P examiners usually note what symptoms the veteran has in the moment and rarely say when they started. Second, DCs don't always match the kind of information medical professionals include in treatment records (you are unlikely to find mentions of "characteristic prostrating attacks" in treatment records for migraines, for example). Third, VA sometimes does not look beyond the C&P exam to determine when symptoms started.

These issues can be addressed in a supplemental claim or notice of disagreement (evidence or hearing lane) with statements from the veteran, their family members, and treating physicians, that confirm how symptoms were present at least as early as when the claim was filed. If the evidence was there but simply overlooked by the rater, the error could be resolved through a higher-level review.