

NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

1

VA BENEFITS BASED ON NATIONAL GUARD AND RESERVE SERVICE

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AGENDA

- **Veteran Status**
 - Active service requirement
- **Special Considerations for VA Benefits**
 - Length of active service
 - Home loans
 - Presumptive service connection
 - Prohibition on concurrent pay
- **Helpful Military Records**
 - Where to request records
 - Important types of records

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Veteran Status

The "Active Service" Requirement

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VETERAN STATUS FOR VA CLAIMS

- **To be eligible for VA benefits, the claimant must meet the statutory definition of “veteran” or be the dependent or survivor of a “veteran”**
- **Not all people who served in the Reserves or National Guard are considered a “veteran” for VA benefits purposes**

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DEFINITION

- **A “veteran” is a person who**
 - **served in the active military, naval, air, or space service, and**
 - **was discharged or released under conditions other than dishonorable**
 - 38 U.S.C. 101(2)
- **Establishing “active” service is usually the biggest hurdle for obtaining VA benefits for former National Guard and Reserve members**

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ACTIVE SERVICE REQUIREMENT

- **National Guard members and Reservists may qualify as a veteran based on:**
 - Active duty
 - Active duty for training (ADT) (under certain circumstances)
 - Inactive duty training (IADT) (under certain circumstances)

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“ACTIVE DUTY”

- **Active duty is full-time active service, other than ADT, including:**
 - Federal Active Service (Title 10 Service): NG / Reserve Member called to full-time active duty, for purposes other than training, under 10 U.S.C.
 - Usually associated with a deployment
 - Results in issuance of DD Form 214
 - Activation of a Coast Guard Reservist under 14 U.S.C.

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“ACTIVE DUTY”

- For Reservists (but not NG):
 - Active Guard Reserve (AGR): Full-time service performed under 10 U.S.C. for operational support
 - Active Duty Support (ADS): Full-time, but temporary, duty
 - If for operational support, for any period of time
 - If for training purposes, for a period of 180 days or more
- 38 U.S.C. § 101(21); Manual M21-1, III.i.1.A

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SUBMITTING CLAIMS ON ACTIVE DUTY

- **Like other service members on active duty, National Guard and Reserve members can use the Benefits Delivery at Discharge (BDD) program to file VA claims**
 - May file most types of disability comp. claims
 - Must be filed during 180 to 90 day period prior to separation from a period of active duty
 - <https://www.va.gov/disability/how-to-file-claim/when-to-file/pre-discharge-claim/>

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HYPO

- **The Governor of New Mexico calls up the National Guard to quell a state prison riot**
- **2 National Guard members sustain injuries and apply to VA for SC disability benefits**
- **VA initially grants the claims, but then severs service connection, finding they did not have qualifying active service**


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POLL

Was VA's decision to sever service connection correct?

- A. Yes
- B. No
- C. Not sure



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ANSWER

YES!

- **VA's decision to sever service connection was valid**
- **The National Guard members were called up by NM's governor, not the President**
- **They were injured during state service, not federal service, so it did not qualify as "active service"**
- **Thus, they did not have "veteran" status**
 - *Allen v. Nicholson*, 21 Vet. App. 54 (2007)

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ADT

- **Active Duty for Training (ADT) Qualifies as “active service” if:**
 - Service member “was disabled or died from a disease or injury incurred or aggravated in line of duty”
 - 38 U.S.C. § 101(24); 38 C.F.R. § 3.6(a) (emphasis added)
 - In other words, former NG/Reserve members must establish that they have a current disability stemming from a disease or injury incurred in or aggravated during ADT (and thus qualify for SC disability benefits) before they will be considered a “veteran”

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ADT

- **ADT includes:**
 - Full time duty in the Armed Forces performed by Reservists for training purposes
 - Examples: Initial training; 15-day annual training
 - Exceptions:
 - ADS for 180 days or more
 - Duty performed as a temporary member of the Coast Guard Reserve

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ADT

- Full time National Guard duty under 32 U.S.C. §§ 316, 502, 503, 504, 505
 - Examples:
 - Initial military training
 - Job skills training
 - 15-day annual training
 - Full time operational/support service duty (AGR or ADS)
- Temporary duty under 10 U.S.C. for ADT
- Authorized travel directly to and from ADT
 - 38 U.S.C. § 101(22); 38 C.F.R. § 3.6(c)

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WHAT ABOUT MILITARY ACADEMY PREP SCHOOLS?

- **For Reserve and National Guard members who attend:**
 - United States Air Force Academy Preparatory School
 - United States Military Academy Preparatory School
 - United States Naval Academy Preparatory School
- **If they enter service only to attend the school:**
 - Time at school = ADT
 - Exception: If they have a commitment to serve on active duty upon disenrollment or continue on active duty after the academy, then time at school = active duty

• 38 C.F.R. § 3.6(b)(5), (c)(5); Manual M21-1 III.i.1.A.1.h

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IADT

- **Inactive duty training (IADT) qualifies as “active service” if service member was “disabled or died” from**
 - an injury incurred or aggravated in line of duty; or
 - an acute myocardial infarction, cardiac arrest, or a cerebrovascular accident occurring during such training

• 38 U.S.C. § 101(24)(C); 38 C.F.R. § 3.6(a)

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IADT

- **In other words, former NG/Reserve member must establish that they have a current disability stemming from an “injury,” heart attack, or stroke incurred in or aggravated during IADT before they will be considered a “veteran”**
 - Must show they qualify for SC benefits!
- **Not enough to show that person was diagnosed with a *disease* during IADT that caused a current disability**

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IADT

• IADT includes:

- Part-time Reserve duty, including under 37 U.S.C. § 206
 - Example: weekend drills
- Senior ROTC training
- Special additional duties authorized for and performed voluntarily by Reservists in connection with the prescribed training or maintenance activities of their units
- Part-time duty in the National Guard under 32 U.S.C. §§ 316, 502, 503, 504, and 505
 - Example: weekend drills
- Travel directly to or from IADT
 - 38 U.S.C. 101(23); 38 C.F.R. § 3.6(d), (e)

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IADT

• IADT does NOT include:

- Work performed in connection with correspondence courses
- Attendance at school in an inactive status
- Duty performed as a temporary member of the Coast Guard Reserve
 - 38 U.S.C. § 101(23)

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Is sexual assault that causes PTSD an “injury” for purposes of determining if a period of IADT was active service?

A. Yes

B. No

C. Maybe



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YES

VA General Counsel Precedent Opinion 8-2001


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POLL

Is an anthrax vaccination that results in disability an “injury” for purposes of determining whether IADT was active service?

- A. Yes
- B. No
- C. Maybe



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YES

VA General Counsel Precedent Opinion 4-2002

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MORE ON TRAVEL

- **When determining whether a person was disabled or died from an injury or disease incurred during travel directly to or from ADT or IADT, VA shall consider:**
 - the hour the individual began to proceed or return
 - the hour on which the individual was scheduled to arrive for, or on which the individual ceased to perform, such duty
 - the method of travel
 - the itinerary
 - the manner in which the travel was performed
 - the immediate cause of disability or death
- **The burden of proof is on the claimant**
 - 38 U.S.C. § 106(d)(B); 38 C.F.R. § 3.6(e)(2)

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MORE ON TRAVEL

- **There is room for advocacy related to travel!**
- **In one recent case, CAVC held that BVA provided inadequate reasons or bases for determining that person was not on authorized travel to ADT at the time her bipolar disorder manifested, since BVA ignored 38 U.S.C. § 101(22)(E) and 38 C.F.R. 3.6(c)(6), and did not explain how it determined that her advance orders required her to follow a specific itinerary; moreover, there was nothing in the advance orders that provided a route she was required to follow or destinations that were off-limits**
 - *Watkins v. McDonough*, Vet. App. No. 20-5612 (June 2, 2022)

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SERVICE AS DUAL STATUS TECHNICIAN

- **Some federal employees work as dual status technicians with the Reserves or National Guard under 5 U.S.C.**
 - This work is not reflected in military records
 - Other than periods of ADT or IADT performed by individual, this service is not qualifying active service for VA benefits purposes
 - Manual M21-1 III.i.1.A.2.c

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Special Considerations For VA Benefits

Length of Service, Home Loans
Presumptions, Concurrent Pay

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LENGTH OF ACTIVE SERVICE

- To be eligible for many VA benefits, some Vets must satisfy a "length of active service" requirement
 - Exceptions include SC disability and death benefits
- There is no length-of-service requirement for Vets who had any active service before 9/8/1980
- Requirement generally applies to:
 - Vets who enlisted after 9/7/1980, and
 - Any other person (including officers) who entered on active duty after 10/16/1981, and has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under 10 U.S.C. § 1171 (early discharge w/in 1 year of term of enlistment)
 - 38 U.S.C. § 5303A(b); 38 C.F.R. § 3.12a

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LENGTH OF ACTIVE SERVICE

- **Requirement:**
 - 24 months of continuous active duty, or
 - The full period for which such person was called or ordered to active duty
 - 38 U.S.C. § 5303A(b); 38 C.F.R. § 3.12a(a)(1)

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LENGTH OF ACTIVE SERVICE

- **Some benefits this may impact:**
 - NSC VA disability pension
 - VA health care
 - VA education benefits
- **But, there are many exceptions, including:**
 - Hardship discharge under 10 U.S.C. § 1173
 - Early discharge under 10 U.S.C. § 1173
 - Vets retired/separated due to SC disability
 - Vets with a compensable SC disability

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LENGTH OF ACTIVE SERVICE

- **Many Reservists/NG members may not satisfy this length-of-active-service requirement**
- **But, some Reservists/NG members with less than 24 months of active service will meet the requirement, because they served the full period for which they were called or ordered to active duty**
 - Ex: NG member deployed to Afghanistan for 1 year will satisfy the length-of-service requirement if ordered to active duty for only 1 year

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HOME LOANS

- **Reserve or NG service can make a person eligible for a VA home loan program**
 - Reserve and NG members who have served during the period 8/2/1990 to the present will qualify if they have at least 90-days of active duty
 - See 38 U.S.C. §§ 3701, 3702; *Eligibility requirements for VA home loan programs*, <https://www.va.gov/housing-assistance/home-loans/eligibility/>

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HOME LOANS

- **Additional eligibility based on National Guard service at any time:**
 - Individuals who performed full-time National Guard duty for **not less than 90 cumulative days**, which includes **30 consecutive days**
 - 38 U.S.C. § 3701(b)(7)
 - Full-time National Guard duty is training or other duty, other than inactive duty, performed by a member of the National Guard in the member's status as a member of the National Guard under 32 U.S.C. §§ 316, 502, 503, 504, or 505 for which the member is entitled to pay from the U.S. or for which the member has waived pay from the U.S.
 - 38 U.S.C. § 101(d)(5)

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HOME LOANS

- **Additional eligibility based on National Guard service before 8/2/1990:**
 - At least 90 days of non-training active-duty service, OR
 - At least 90 days of active-duty service, including at least 30 consecutive days (DD Form 214 must show 32 U.S.C. §§ 316, 502, 503, 504, or 505 activation), OR
 - 6 creditable years in the National Guard with an honorable discharge or placement on the retired list

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HOME LOANS

- **Eligibility based on Reserve service before 8/2/1990:**
 - At least 90 days of non-training active-duty service, OR
 - 6 creditable years in the Selected Reserve, PLUS at least one of following:
 - Honorable discharge
 - Placement on the retired list
 - Transfer to the Standby Reserve or an element of the Ready Reserve other than the Selected Reserve after service characterized as honorable
 - Current service in the Selected Reserve

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PRESUMPTION OF SOUNDNESS

- “[E]very 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.”
- 38 U.S.C. § 1111
- Makes it easier for “veterans” to establish SC for disabilities not noted on entrance exam

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PRESUMPTION OF SOUNDNESS

- **Usually presumption of soundness does NOT apply to a period of ADT or IADT**
- Exception:
 - If there is a medical exam at the beginning of a period of ADT, AND
 - The person has already established “veteran” status (based on a prior period of active service or a prior finding that a disability was incurred or aggravated during the period of ADT)
- *Smith v. Shinseki*, 24 Vet. App. 40 (2010); Manual M21-1, V.ii.2.A.2.e

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PRESUMPTION OF 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.
- 38 U.S.C. § 1153; 38 C.F.R. § 3.306
- This rule applies when a condition was noted at entry to service
- Makes it easier to establish SC if the preexisting noted condition got worse during active service

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PRESUMPTION OF AGGRAVATION


- **Usually, presumption of aggravation does NOT apply to a period of ADT or IADT**
- **Exception:**
 - If Vet is already SC for another condition stemming from the same period of ADT or IADT (i.e., it is already considered “active” service), **AND**
 - Vet had an entrance exam prior to the period of ADT or IADT, **OR**
 - Other contemporaneous evidence establishes the baseline severity of the pre-existing condition
 - *Hill v. McDonald*, 28 Vet. App. 243 (2016); Manual M21-1, III.i.1.A and V.ii.2.C

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PRESUMPTIVE SERVICE CONNECTION

- **As a general rule, individuals cannot establish SC by presumption under 38 C.F.R. § 3.307 based on periods of ADT or IADT**
- **But there are several exceptions**
- *See Manual M21-1, III.i.1.A.2.i*



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PRESUMPTIVE SERVICE CONNECTION

- **Exception #1:**
 - If Vet is already SC for another condition stemming from the same period of ADT/IADT
 - That period is then classified as active service, so Vet can establish presumptive SC under 38 C.F.R. § 3.307, 3.318, etc.
 - Vet may still need to meet other requirements for presumptive SC (e.g., 90-day period of service)
 - *Biggins v. Derwinski*, 1 Vet. App. 474 (1991)

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PRESUMPTIVE SERVICE CONNECTION

- **Exception #1 example:**
 - 2015: Vet falls and suffers a head injury during a 90-day period of ADT
 - 2017: VA awards Vet SC for residuals of TBI stemming from the head injury, so period of ADT is then considered “active” service
 - 2022: Vet diagnosed with Amyotrophic Lateral Sclerosis (ALS) and files VA claim for SC
 - Vet is entitled to presumptive SC for ALS under 38 C.F.R. § 3.318 based on at least 90-days of “active” service

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PRESUMPTIVE SERVICE CONNECTION

- **Exception #2:**
 - Diseases specific to former prisoners of war
 - 38 C.F.R §§ 3.307(a); 3.309(c)

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PRESUMPTIVE SERVICE CONNECTION

- **Exception #3:**
 - Diseases associated with contaminated water at Camp LeJeune
 - A Reservist or member of the National Guard, who had at least 30 days (consecutive or nonconsecutive) of service at Camp Lejeune during the period beginning on 8/1/1953, and ending on 12/31/1987, shall be presumed to have been exposed during such service to the contaminants in the water supply, unless there is affirmative evidence to establish that the individual was not exposed to contaminants in the water supply during that service.
 - 38 C.F.R §§ 3.307(a)(7), 3.309(f)

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PRESUMPTIVE SERVICE CONNECTION


- **Exception #4:**
 - Diseases associated with exposure to herbicides (Agent Orange)
 - 38 C.F.R. §§ 3.307(a), 3.309(e)
 - Additionally, there are special rules for members of the Air Force Reserve who were exposed to Agent Orange on the C-123 aircraft that sprayed Agent Orange in Vietnam

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C-123 AIRCRAFT

- During the Vietnam War, Agent Orange was sprayed by C-123 Provider Aircraft as part of Operation Ranch Hand
- After spraying operations ended, between 1972 and 1982, these aircraft were used for routine cargo and medical evacuation missions
- Approx. 1,500 – 2,000 Air Force Reservists trained and worked on these aircrafts during this period



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C-123 AIRCRAFT

- **1/2015: IOM released a report finding:**
 - C-123s that sprayed Agent Orange continued to have residue on their interior surfaces years after returning to the U.S.
 - Air Force Reservists would have been exposed to Agent Orange residue when working inside the aircraft, and some of them “quite likely experienced non-trivial increases in their risks of adverse health outcomes”

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C-123 AIRCRAFT

- **6/19/2015, VA updated its Agent Orange rules based on IOM’s findings**
 - VA determined that this exposure may have occurred during a longer period than initially identified by IOM – 1969 through 1986
 - VA found that some active duty Air Force personnel, in addition to Reservists, may have been exposed

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C-123 AIRCRAFT

- **VA now presumes Agent Orange exposure for anyone who:**
 - Served in the Air Force or **Air Force Reserve**, and “regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era”
 - 38 C.F.R. 3.307(a)(6)(v)

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C-123 AIRCRAFT

- **Person must have:**
 1. Been assigned to an Air Force or Air Force Reserve squadron when the squadron was permanently assigned to one of the affected aircraft, AND
 2. Had an Air Force Specialty Code (AFSC) indicating duties as a flight, ground maintenance, or medical crew member on one of these aircraft

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C-123 AIRCRAFT

- **Qualifying Reserve Units**
- **Pittsburgh International Airport, Pennsylvania, USAF Reserve Station (1972-1982)**
 - 758th Airlift Squadron
 - 911th Aeromedical Evacuation Squadron (was 33rd AES pre-1994)
 - 911th Aircraft Maintenance Squadron
- **Westover AFB (Westover Air Reserve Base) and Hanscom Field AFB, Massachusetts (1972-1982)**
 - 731st Tactical Airlift Squadron
 - 74th Aeromedical Evacuation Squadron
 - 901st Organizational Maintenance Squadron
- **Lockbourne/Rickenbacker AFB, Ohio (USAF Reserves, Rickenbacker Air National Guard Base) (1969-1986)**
 - 355th Tactical Airlift Squadron
 - 356th Tactical Airlift Squadron
 - 4413th Combat Crew Tactical Wing [Ferry Flights]

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C-123 AIRCRAFT

- **If exposure occurred during ADT or IADT, the exposure is considered an injury for purposes of establishing “veteran” status**
- **If the exposed Vet develops a disease VA recognizes as presumptively caused by AO, VA will presume the person became disabled during that period of service, which VA will consider to be “active” service**

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PRESUMPTIVE SC FOR COVID-19

- **In Jan. 2021, Congress passed a law creating 38 U.S.C. § 1164, which provides for presumptive SC for COVID-19 in certain instances**
- **Makes it easier for members of National Guard and Reserves to obtain SC**
 - Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. 116-315, § 4101 (2021)

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PRESUMPTIVE SC FOR COVID-19

- **If person has (1) a qualifying period of duty; and (2) COVID-19 symptoms that manifest during a certain time period, VA must presume:**
 - COVID-19 was incurred during the qualifying period of duty, and
 - If the person becomes disabled or dies as a result of COVID-19, that the person became disabled or died during the qualifying period of duty for purposes of establishing “active” service
 - Person will qualify as a “veteran” for VA benefits purposes, even if incurred during Reserve or National Guard duty

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PRESUMPTIVE SC FOR COVID-19

- **Qualifying duty:**
 - **Dates:**
 - During the National Emergency (3/1/2020 – TBD) and before 1/5/2024
 - **Types:**
 - Active duty
 - **Training duty under 10 U.S.C. or full-time National Guard duty under orders issued on or after 3/13/2020**

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PRESUMPTIVE SC FOR COVID-19

- **Symptom manifestation period:**
 - During a qualifying period of duty, if the duty was more than 48 consecutive hours
 - Within 14 days of completion of a qualifying period of duty

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CONCURRENT PAY PROHIBITED

- **If a claimant is granted entitlement to VA benefits while still serving in the Reserves or National Guard:**
 - He or she cannot receive drill pay and VA disability compensation or pension for the same days
 - Vet must waive one or the other
 - Usually drill pay is the greater benefit
 - 10 U.S.C. § 12316; 38 U.S.C. § 5304(c); Manual M21-1, VI.ii.3.A.1.b

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CONCURRENT PAY PROHIBITED

- **Reservists and NG members called to active duty cannot receive both active duty pay and VA disability comp for the same period**
 - Vet can elect to receive the higher benefit
 - VA comp may be resumed if Vet files claim for recommencement w/in 1 year following end of active duty
 - If no claim filed w/in 1 year of release, VA payments will resume up to 1 year prior to the date of the filing of the claim
 - If payments are not stopped while the individual is serving on active duty, VA may recoup comp for the period from the beginning to the end of active duty
 - 38 C.F.R. § 3.654(b)(2); *Buffington v. McDonough*, 7 F.4th 1361 (Fed. Cir. 2021)

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Helpful Military Records

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MILITARY RECORDS

- Complete military records of Reserve or National Guard members may be difficult to obtain, because these service members typically have multiple, non-consecutive deployments with different units and their records may exist in multiple places

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MILITARY RECORDS


- **Military records of Reservists and National Guard members are not at the National Personnel Records Center (NPRC)**
 - Located at Reserve Headquarters of service dep't
 - National Guard records located at state's Adjutant General's Office
- **Military records of Vets who separated from active duty, but retained some form of Reserve status, whether active or inactive, also are not held at NPRC**
 - Should be requested through the Reserve Headquarters of the service dep't

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IMPORTANT RECORDS

- DD Form 214
- Retirement Points Annual Summary
- NGB Form 22
- DD Form 261
- Service treatment records
- Official orders
- Pay stubs
- *New* DD Form 214-1




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DD FORM 214

Certificate of Release or Discharge from Active Duty



- **Must be issued for:**
 - Federal active duty - 10 U.S.C., "Title 10 service"
 - Period of ADT for initial military training
 - Active Guard Reserve (AGR) – full time duty for operational support of the Reserve or National Guard
 - Active duty support (ADS) (formerly called active duty special work (ADSW)) for 180 days or more (considered active duty)
- **May be issued for:**
 - ADT in excess of annual two week period
- **Sometimes, but usually not, issued for:**
 - ADS for less than 180 days
 - Manual M21-1, III.i.1.A

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NVLSP 65

RETIREMENT POINTS ANNUAL STATEMENT

- **This is a detailed report listing the dates of verified service for each year and the type of duty (although this may still require some interpretation for VA purposes)**
 - See Manual M21-1, III.i.1.A

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NVLSP 66

NGB FORM 22

Report of Separation and Record of Service

- **National Guard only**
 - Lists spans of service in the National Guard
 - Does NOT verify individual periods of ADT or IADT
 - See Manual M21-1, III.i.1.A.2.e

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NVLSP 67

DD FORM 261

Report of Investigation Line of Duty and Misconduct Status


- **May be used to verify ADT or IADT, if:**
 - Complete, and
 - Signed by “final approval authority”
- Manual M21-1, III.i.1.A.2.e

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NVLSP 68

SERVICE TREATMENT RECORDS

- **If STRs document an injury during IADT or ADT, or treatment for a disease during ADT, this will be highly relevant to a disability claim and establishing “veteran” status**



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NVLSP 69

OFFICIAL ORDERS

- **If claimant kept official order(s) telling him/her to report to ADT (or records included in personnel file), this can be used to establish a period of service**
- Manual M21-1 III.i.1.A.2.e

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NVLSP 70

PAY STUB

- **If claimant kept pay stubs from Reserve or National Guard service, this can help prove a period of service that was not documented in personnel records**
- Manual M21-1, III.i.1.A.2.e

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NVLSP 71

DD Form 214-1

- **DOD recently announced it will start issuing a new standardized discharge form for separating Reserve and National Guard members—DD Form 214-1**
- Implementation to be completed by 2025
- Congress is considering requiring issuance at additional times before retirement
- www.militarytimes.com/education-transition/2022/04/29/new-dd-214-form-created-for-guard-reserve-troops/
- H.R. 7041 – Record of Military Service for Members of the Armed Forces Act of 2022

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NVLSP 72

Questions?



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