

One commenter recommended that VA alter the wording of proposed § 3.317(a)(3) (§ 3.317(a)(4) in the final rule), which provides that VA will evaluate chronic disabilities of undiagnosed illnesses using the criteria of VA's Rating Schedule for a disease or injury in which "the functions affected, anatomical localization, and symptomatology are similar," to read "the functions affected, anatomical localization, or symptomatology."

Since we intend to allow rating specialists enough flexibility to rate as accurately and fairly as possible, we have amended the language as the commenter suggested.

This same commenter also recommended that VA develop full rating criteria specific to the undiagnosed illnesses of Persian Gulf veterans, and covering the full range of physiological and psychological disabilities being reported.

Although Persian Gulf veterans have reported that they are suffering from a variety of signs and symptoms, the scientific and medical communities have been unable to identify a single disease process and, in fact, have suggested that more than one disease category may be involved. Our purpose in this rule making is to authorize compensation for the *disabilities* resulting from the undiagnosed illnesses, and, in our judgment, the criteria in the Rating Schedule are adequate to evaluate any disabilities which may arise.

One commenter recommended that VA revise § 3.317 to specify that service connection may be recognized for aggravation of a preexisting undiagnosed illness during service in the Southwest Asia theater of operations or during the presumptive period.

VA does not agree. In enacting Public Law 103-446, Congress authorized VA to compensate Persian Gulf veterans who suffer chronic disabilities resulting from undiagnosed illnesses that became manifest during active service in the Southwest Asia theater of operations or within a presumptive period thereafter, as determined by the Secretary. It would exceed the Secretary's statutory authority to compensate for aggravation of disabilities resulting from preexisting undiagnosed illnesses. Furthermore, since the course of an undiagnosed illness cannot be predicted, it would be impossible to determine whether an increase in disability was due to the natural progress of the illness or to aggravation during service.

The proposed regulation contained provisions prohibiting payment of compensation where affirmative evidence establishes that an

undiagnosed illness was not incurred during active service in the Persian Gulf (§ 3.317(c)(1)), and where affirmative evidence establishes that an undiagnosed illness is the result of a supervening condition or event that occurred following the veteran's most recent departure from the Southwest Asia theater of operations and the onset of the illness (§ 3.317(c)(2)). One commenter stated that § 3.317(c)(1) was redundant and unnecessary in light of § 3.317(c)(2).

VA does not agree. The prohibition contained in § 3.317(c)(2) applies whether the illness was alleged to have occurred during service in the Southwest Asia theater of operations or during the presumptive period thereafter. However, since Public Law 103-446 did not contemplate eligibility by reason of aggravation of a pre-existing undiagnosed illness, the provisions of § 3.317(c)(1) are necessary to ensure that entitlement to compensation is properly established.

One commenter stated that the "affirmative evidence" standard for determining that an undiagnosed illness was the result of a supervening condition or event does not equate to any standard known in law but is rather an arbitrary standard established by VA. The commenter suggested substituting the recognized legal standard of "clear and convincing evidence."

VA does not agree. In fact, the standard of "affirmative evidence" is long established in the statutes and regulations governing VA benefits. It is used in 38 U.S.C. 1113 to define the type of evidence sufficient to rebut a presumption of service connection. Congress again adopted the term at 38 U.S.C. 1116(a)(3), which provides that a veteran who served in the Republic of Vietnam during the Vietnam era and has one of the presumptive diseases related to herbicide exposure will be presumed to have been exposed to herbicides "unless there is affirmative evidence" to the contrary. Under 38 CFR 3.307(d), affirmative evidence accepted to rebut a presumption of service connection, although not requiring a conclusive showing, must, nonetheless, be competent to indicate the time of existence or inception of a disease and must support a conclusion that a disease was not incurred in service. We believe that this standard is both reasonable for determining whether a claimed undiagnosed illness is the result of a supervening condition and consistent with standards that VA applies to presumption for diagnosed conditions.

One commenter recommended that the regulation define the term "known clinical diagnosis" in order to specify

the criteria to be applied in determining whether a condition qualifies as an undiagnosed illness.

VA does not agree. The concept of what constitutes a "known clinical diagnosis" is not such a matter of uncertainty within the medical community as the commenter has implied. Examining physicians routinely determine whether or not an illness is part of a disease process that follows a particular clinical course which can be generally predicted. If the physician is unable to attribute a disability to such a known clinical diagnosis, he or she would routinely include a statement to that effect on the examination report. In the event of conflicting findings, it would be incumbent upon VA to resolve the issue on the basis of all medical evidence of record.

Another commenter believed that the requirement for a finding of undiagnosed illness is outside currently accepted standards of medical practice and that physicians should not be required to make a diagnosis of an "undefined non-disease."

The regulation does not require that physicians make such a diagnosis. Physicians should simply record all noted signs and reported symptoms, document all clinical findings, and provide a diagnosis where possible. If the signs and symptoms are not characteristic of a known clinical diagnosis, the physician should so indicate. This conforms with the usual standards of medical practice.

The proposed regulation provided that VA shall pay compensation to a Persian Gulf veteran who exhibits objective indications of chronic disability resulting from an undiagnosed illness or combination of illnesses as manifested by one of the 13 signs and symptoms listed at § 3.317(b). One commenter stated that objective verification of symptoms by an examining physician would be impossible, since most of the 13 signs and symptoms are subjective. He predicted that many veterans would not present with objective signs perceptible to examining physicians and that, therefore, examinations would be judged inadequate or claims would be denied for a lack of objective evidence. Another commenter recommended that VA omit the word "objective."

VA does not agree. Some veterans may present with purely subjective symptoms, which, nonetheless, establish the basis for a valid claim under the provisions of this rule. We believe, however, that it is not only fair but also in keeping with Congressional intent to require some objective