In the
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

APPELLANT'S BRIEF

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13 - 3339

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ROBERT H. GRAY,

Appellant,

v.

SLOAN D. GIBSON,
Acting Secretary of Veterans Affairs,

Appellee.

Submitted by:

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July 22, 2014

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Issues Presented on Appeal

1. Whether the November 6, 2013 decision of the Board of Veterans' Appeals (Board) to deny the appellant Robert H. Gray entitlement to compensation benefits for his dioxin-related disabilities on a presumptive basis pursuant to 38 U.S.C. § 1116 based on the determination that Da Nang Harbor is not an inland waterway of Vietnam must be reversed as arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, given that there is no legal authority or reasoned rationale to support this policy position espoused by the Secretary's Compensation and Pension Service?;

2. Whether the Board's decision also must be reversed because its determination that Da Nang Harbor is not an inland waterway of Vietnam despite acknowledging in another veteran's case that it was such an inland waterway violates Mr. Gray's right to equal protection of the law as provided by the 5th Amendment to the U.S. Constitution?;

And,

3. Whether, in the alternative to reversal, the Board's decision still must be set aside and Mr. Gray's claim remanded for re-adjudication because the Board's statement of its reasons or bases for finding that Da Nang Harbor does not constitute an inland water way in Vietnam is inadequate in light of the Board's failure to provide any meaningful response, including citation to any legal authority, to rebut Mr. Gray's arguments that challenged the Compensation and Pension ("C&P") Service's policy position that Da Nang Harbor did not meet the definition of an inland waterway of

Vietnam for purposes of establishing his entitlement to disability compensation pursuant to 38 U.S.C. § 1116?

Statement of the Case

Nature of the Case

The appellant, Robert H. Gray, served aboard the *U.S.S. Roark* (DE-1053) during the Vietnam War, including periods of time when the ship not only operated in waters contiguous to Vietnam, but actually berthed in Da Nang Harbor, including docking itself alongside piers. He now suffers from numerous dioxin-related disabilities, including diabetes mellitus II, neuropathy, and ischemic heart disease, for which he seeks the benefit of the presumptive service-connection rules for veterans of the Vietnam War who served in Vietnam, including the inland waterways thereof, pursuant to 38 U.S.C. § 1116. The Board denied his claims for these benefits based on its finding that the *U.S.S. Roark*'s indisputable presence in Da Nang Harbor on repeated occasions did not constitute the ship having been operated in the "inland waters" of Vietnam. The Board made this finding despite its failure to cite to any legal authority that would support it other than that it was the "policy position" of the Secretary's C&P Service. The Board merely asserted that this was VA's "official position on this matter" and referenced VA "bulletins" and "training letters." *See* Record Before the Agency at 16-17 (hereinafter "R-xx.").

In contrast, in support of his view of the status of Da Nang Harbor, Mr. Gray cites to scholarly definitions of inland water ways and harbors and United States Supreme

Court case law addressing the definition of harbors and inland water ways based on the Supreme Court's review of United Nations Conventions. In such circumstances the Board's simple declaration that VA "policy" trumps accepted international conventions, as considered and affirmed by the U.S. Supreme Court, about whether a harbor such as Da Nang is an "inland water way" is arbitrary and capricious, an abuse of discretion, and otherwise not in accord with law, and must be reversed. As well, the Board's determination that Da Nang Harbor is not an inland water way for purposes of establishing Mr. Gray's entitlement to compensation pursuant to § 1116 also must be reversed because it has denied him the equal protection of the law guaranteed him by the 5th Amendment to the U.S. Constitution. This is so because in another veteran's case, consistent with Mr. Gray's arguments here, the Board expressly held that Da Nang Harbor was such an inland water way in Vietnam and did award that impacted veteran benefits pursuant to the operation of § 1116.

Statement of Facts

The appellant Mr. Gray served on active duty with the United States Navy from September 1971 until he was discharged under honorable conditions in February 1975. R-547. His service medical records document several instances of medical treatment for various conditions however none are relevant to his currently diagnosed dioxin-related disabilities. R-1006-1028.

After boot camp essentially all of Mr. Gray's naval service was aboard the

destroyer escort *U.S.S. Roark* (DE-1053). R-994. From February to August 1972 the *Roark* served in the Western Pacific in support of United States military operations in Vietnam.[1] In April 1972 Mr. Gray earned the Combat Action Ribbon when the *Roark* came under fire from enemy guns firing from shore near the Cua Viet River, Vietnam, a location just north of Da Nang Harbor. R-981. Deck Logs for the *Roark* dated in April 1972 show that the ship regularly entered Da Nang Harbor and either set her anchor in the harbor or moored alongside the destroyer repair ship *U.S.S. Samuel Gompers* (AD 37).[2] R-611-617. When *Roark* moored itself to the *Samuel Gompers* on these occasions in April 1972 the latter was docked at one of the piers in Da Nang Harbor.[3]

In June 2007 Mr. Gray submitted his claim to the Dallas VA regional office ("RO") for disability compensation, including for several dioxin-related conditions, diabetes mellitus and neuropathy of the bilateral lower limbs. R-942. His VA medical records dating from this time show that he receives treatment for these conditions. R-762-779.

In March 2008 the RO issued a rating decision deferring final adjudication of Mr. Gray's dioxin-related diabetes claim pending the outcome of the Secretary's appeal in the

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[1] *See* http://www.history.navy.mil/danfs/r7/roark.htm (last visited July 22, 2014).

[2] *See* http://www.history.navy.mil/danfs/s4/samuel_gompers.htm (last visited July 22, 2014).

[3] *See* http://www.publichealth.va.gov/exposures/agentorange/shiplist/list.asp#S (last visited July 22, 2014) ("Samuel Gompers (AD-37)--Multiple dockings to piers at Da Nang during April 1972").

case of *Haas v. Nicholson*. *See* R-632-634 (deferred rating decision and notice letter). All of his other claims were denied by the RO in a rating decision issued in May 2008. R-622-627. In response Mr. Gray submitted his statement disagreeing with the rating May 2008 rating decision and requesting that his diabetes claim be decided "on the merits." R-596.

In a February 2009 rating decision the RO denied Mr. Gray's dioxin-related diabetes and other claims based on the assertion that his Vietnam service did not include being "on the ground" in Vietnam.[4] R-412-417. He submitted his notice of disagreement with this denial shortly thereafter. R-408. The RO's statement of the case was issued in September 2009 (R-340-357), which was followed soon thereafter by Mr. Gray's

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[4] In Mr. Gray's claims file is a copy of "Addendum - Compensation & Pension Service Bulletin", dated March 4, 2009, which addresses "Evidence for Ship Docking on Shore" to establish a Navy veteran's exposure to dioxin in Vietnam. R-358-361. The copy of the bulletin contains handwritten annotations by RO personnel pertinent to Mr. Gray's specific case. *See* R-358-359. The annotations appear to concede that his "ship docked in Danang Bay", but that "the veteran has never contended that he got off the ship." R-358. The fact that Mr. Gray "never got off the ship" was pertinent to the RO's denial of his claim because the Bulletin

> . . . explained that service aboard a blue water naval ship that entered a deep-water harbor along the coast of Vietnam, such as Da Nang . . . , did not constitute brown water service for the purpose of presumptive herbicide exposure. These deep-water harbors are considered part of the offshore blue waters, not part of the inland brown waters. However, if the blue water veteran's claimed herbicide exposure is based on leaving the ship and going ashore, then the issue shifts from a determination of brown water status to a determination of whether the veteran set foot on the ground in Vietnam.

R-358-359.

substantive appeal. R-336.

In January 2010 Mr. Gray submitted a copy of a November 2009 Board decision that granted the veteran service-connected compensation for diabetes on a presumptive basis pursuant to 38 U.S.C. § 1116. R-312-320. The veteran in that case served aboard a U.S. Navy ship that anchored in Da Nang Harbor during the Vietnam war. In the course of granting the veteran's claim, the Board member determined, and provided its reasons or bases for the determination, that Da Nang Harbor was an "inland waterway" of Vietnam:

> . . . the Veteran's service was conducted on a ship that frequently anchored within the territorial borders of Vietnam. The evidence of record clearly shows that Da Nang Harbor is well sheltered and surrounded on three sides by the shoreline of Vietnam. The harbor is nearly totally surrounded by land and that the entire harbor is located within the territorial boundaries of Vietnam. As such, given the location of the harbor as being surrounded by the land on three sides and the evidence that the harbor is within the territory of Vietnam, and resolving all reasonable doubt in the Veteran's favor, the Board finds that Da Nang Harbor is an inland waterway for purposes of the regulation.

R-320.

Also in January 2010 Mr. Gray submitted a claim for compensation for his ischemic heart disease based on presumptive exposure to dioxin in Vietnam. R-300; *see also* R-292-299 (VCAA notice letter). In June 2010 Mr. Gray underwent a rating examination of his diabetes, ischemic heart, and hypertension disabilities at the Dallas VA medical center ("VAMC"). R-264-269. In the course of the examination he informed the examiner that his ship, the *Roark*, entered and stayed in Da Nang Harbor a

number of times but that "he was never on land." R-264.

The RO issued a rating decision in May 2011 denying Mr. Gray's ischemic heart disease claim. R-196-201. The basis for the denial was that the deck logs for the *Roark* "do not confirm you stepped foot on the ground in the Republic of Vietnam or the USS Roark docked or transited the inner waterways of Vietnam." R-200. Based on this finding the RO stated that "VA has confirmed that you did not have service in the Republic of Vietnam as defined by law." R-200. Mr. Gray's authorized representative before the VA submitted his notice of disagreement with this decision in July 2011. R-813.

In January 2012, Mr. Gray, through his authorized representative, submitted substantive argument in support of his claim for compensation for his dioxin-related disabilities on a presumptive basis pursuant to 38 U.S.C. § 1116. R-152-156. He argued that, contrary to the RO's reasoning thus far, Da Nang Harbor is part of the "inland waters" of Vietnam, and thus his service aboard the *Roark*, which entered Da Nang Harbor on a number of occasions, establishes his requisite "Vietnam service" pursuant to § 1116. R-153. To establish that Da Nang Harbor qualifies as being part of Vietnam's "inland waters", Mr. Gray's argument was two-fold.

First, Mr. Gray cited to the definition of such waters found in international law, as well as to U.S. Supreme Court case law. R-153-154. He pointed out where the Supreme Court held that, under United Nations Convention, bays and harbors "are traditionally

considered inland waters." R-154. Second, Mr. Gray argued that the Secretary, through the Board of Veterans' Appeals, had already determined Da Nang Harbor was part of the "inland waters" of Vietnam for purposes of establishing a veteran's presumptive entitlement to § 1116 compensation benefits. *See* R-155-156 (citing to, and quoting BVA decision Docket No. 04-00250, at 5 (Nov. 2, 2009)). In light of this Board finding establishing the status of Da Nang Harbor as part of Vietnam's "inland waters", Mr. Gray argued further that the Secretary's decision to deny him the benefit of the same finding denied him the equal protection of the law in violation of the 5th Amendment of the U.S. Constitution. R-155-156.

The RO issued a supplemental statement of the case in July 2012 that re-affirmed the denial of Mr. Gray's § 1116 claims on grounds that he did not have the required physical presence in the "inland waters" of Vietnam. R-126-129. His claims on appeal were certified to the Board in May 2013. R-86.

In September 2013, again through his authorized representative, Mr. Gray submitted his final arguments in support of his claims directly to the Board. R-65-71. He reiterated that he was entitled to § 1116 benefits because the law and facts established he was present in the inland waters of Vietnam in 1972. R-65-78. Again, these were that a) international law and convention, as upheld by the U.S. Supreme Court, established that Da Nang Harbor is part of Vietnam's inland waters, and b) the Board itself had already determined that Da Nang Harbor was part of Vietnam's inland waters, and Mr. Gray was entitled to the benefit of this determination by operation of the Equal Protection Clause of

the 5th Amendment of the U.S. Constitution. R-66-71.

The Board issued its final adverse decision on November 6, 2013. R-3-21. As its essential finding of fact the Board determined, "The record reflects that [Mr. Gray] had no in-country service or documented visitation in the Republic of Vietnam, or exposure to herbicides, including Agent Orange." R-4. The Board correctly noted Mr. Gray's dispute with the denial of his claim centered on what "constitutes an inland waterway of the Republic of Vietnam." R-15. The Board further correctly noted that Mr. Gray "contends that Da Nang Harbor constitutes" such an inland waterway "and that he is entitled to presumptive herbicide exposure pursuant to 38 U.S.C.A. § 1116 on that basis." R-15.

The Board addressed and rejected each of Mr. Gray's arguments that the law and facts supported his assertion that Da Nang Harbor was part of the "inland waters" of Vietnam. R-15-17. Mr. Gray's argument citing to international law, the accepted nautical definition of "inland waters", and the decision of the U.S. Supreme Court affirming the United Nations Convention that defined "harbor" as part of a nation's inland waters was rejected by the Board because this position "is contrary to VA's official position on this matter." R-16. The Board explained that the "rationale for concluding Da Nang Harbor was an open waterway, as opposed to inland waters of Vietnam, is discussed in the December 2008 C&P Bulletin, September 2010 Training Letter, and M21-1MR provisions." R-17. However, the Board stated further, "For the sake of brevity, this rationale will not be reiterated in this decision." R-17.

Mr. Gray's equal protection argument also was rejected by the Board. R-16. To

explain its reasoning to reject this argument the Board stated, "Simply put, the prior November 2009 Board decision has no precedential value in the present Veteran's case." *See* R-16 (citing 38 C.F.R. § 20.1303).

Subsequently, Mr. Gray timely filed his appeal of the Board's adverse decision to this Court.

Summary of the Argument

The Board's error in this case is at least three-fold. First, the Board's position that Da Nang Harbor in Vietnam is not part of that country's "inland waters" is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. This is so because the Board cites to no legal authority for the C&P Service's "policy position" that Da Nang Harbor is not an inland waterway other than this policy position itself. There is no explanation, rationale, rule making, or regulation the Board cites to support this policy position. In contrast, Mr. Gray has cited to provisions of international law and convention, as well as U.S. Supreme Court case law, as well as to geographical facts, to establish that Da Nang Harbor is an inland waterway of Vietnam. The Board's rejection of this legal authority in support of Mr. Gray's case, while citing to none to support its adverse determination, renders the Board's decision legally untenable. The Court should reverse it accordingly and direct that Mr. Gray be awarded the § 1116 benefits he seeks.

Second, with respect to Mr. Gray's argument that the Equal Protection Clause of the 5th Amendment to the U.S. Constitution requires that he be treated the same as the veteran in another case in which the Board did find that Da Nang Harbor was an inland

waterway in Vietnam for purposes of awarding § 1116 benefits, the Board rejected it out of hand. Again, the Board cites to no substantive legal authority to justify the disparate treatment Mr. Gray has received with respect to the Board's determination that Da Nang Harbor is not an inland waterway of Vietnam. The Board's simple reference to the regulation at 38 C.F.R. § 20.1303 that Board decisions are not precedential, is insufficient to rebut the serious charge that Mr. Gray's constitutional rights have been violated. The Court should reverse the Board's decision on this basis as well and direct the Secretary to award him the § 1116 benefits he seeks.

Third, if the Court determines that it will not reverse the Board's position that Da Nang Harbor is not an inland waterway of Vietnam for purposes of providing Mr. Gray with § 1116 benefits, the Board's decision still must be set aside and the matter remanded for re-adjudication. This is so because the Board's statement of its reasons or bases is inadequate for finding that the legal and factual authority presented by Mr. Gray is not sufficient to support his claim that Da Nang Harbor is an inland waterway of Vietnam. Given the substantive law cited by Mr. Gray in support of his claim, the Board failed to provide any meaningful explanation for why the C&P Service's "policy position" about Da Nang Harbor carried more weight than this substantive legal authority.

Argument

I. THE COURT'S JURISDICTION AND STANDARDS OF REVIEW

This Court has jurisdiction to review the Board's adverse November 6, 2013, decision pursuant to 38 U.S.C. § 7252(a), which invests the Court with the "power to

affirm, modify, or reverse [the Board's] decision, or to remand the matter as appropriate."

The Court's power extends to reviewing a decision of the Board to ensure that all relevant provisions of law have been properly applied. *Horowitz v. Brown*, 5 Vet.App. 217, 223 (1993); *Gardner v. Derwinski*, 1 Vet.App. 584, 586 (1991), *aff'd sub nom. Gardner v. Brown*, 5 F.3d 1456 (Fed.Cir. 1993), *aff'd* 513 U.S. 115 (1994). The Court conducts its review of issues of law without deference to the Board's reasoning. Among other things, the Court will "hold unlawful and set aside decisions, . . . , rules, and regulations issued or adopted by the Secretary, Board of Veterans' Appeals, or the Chairman of the Board found to be--- . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[, or] contrary to constitutional right . . . ." 38 U.S.C. § 7261(a)(3)(A)-(B) (2000). *See also Horowitz*, 5 Vet.App. at 223; *Gardner*, 1 Vet.App. at 586.

II. THE BOARD'S DETERMINATION THAT MR. GRAY'S SERVICE ABOARD THE *U.S.S. ROARK* IN APRIL 1972 DID NOT AMOUNT TO SERVICE IN THE INLAND WATERS OF VIETNAM FOR THE PURPOSE OF ESTABLISHING HIS ENTITLEMENT TO DIOXIN-RELATED DISABILITY COMPENSATION ON A PRESUMPTIVE BASIS MUST BE REVERSED

Mr. Gray, a veteran of the Vietnam war, seeks the benefit of the provisions of 38 U.S.C. § 1116 to establish his entitlement to service-connected compensation for his dioxin-related disabilities. Section 1116 provides for a presumption that certain disabilities associated with exposure to herbicides during the Vietnam war era were incurred in service for any veteran who "served in the Republic of Vietnam" during the specified period of the war. 38 U.S.C. § 1116 (a)(1)(A), (f) (2000 & Supp). Among

others, Mr. Gray's diabetes mellitus (Type 2) and ischemic heart disease are specified in § 1116 as such disabilities to be presumed to have been incurred in service. *Id*. at § 1116(a). Upon applying the § 1116 provisions to his case, the Board denied Mr. Gray's claims based on its finding that he did not have the requisite service "in the Republic of Vietnam." *See* R-4; *see also* R-17 (citing C&P Bulletin, Training Letter and M21-1MR provisions). However, as discussed in greater detail below, the Board's finding that Mr. Gray did not have the requisite "service in the Republic of Vietnam" despite the Board's acknowledgment that his ship was present in Da Nang Harbor on multiple occasions is arbitrary and capricious, an abuse of discretion, otherwise contrary to law, and contrary to constitutional right, and must be reversed.

A. The Secretary's Exclusion Of Da Nang Harbor From The Category Of Water Ways That Constitute Vietnam's "Inland Waters" Has No Support In Law Or Fact, Rendering Its Decision To Deny Mr. Gray Benefits On This Basis Arbitrary, Capricious, An Abuse Of Discretion, And Otherwise Not In Accordance With Law

The legal authority the Secretary relies upon to require a veteran's presence on the "inland waters" of Vietnam for that veteran to benefit from the § 1116 presumption of service connection for dioxin-related disabilities is clear. The Secretary's requirement that an affected veteran must have been present on the landmass or "inland waters" of Vietnam has survived judicial review. *See Haas v. Peake*, 525 F.3d 1168, 1181-82, 1196 (Fed. Cir. 2008), *cert. denied*, 129 S.Ct. 1002 (2009). Generally, the requirement that a veteran must have stepped on the landmass of Vietnam is clear, and uncontroversially satisfies the "served in the Republic of Vietnam" requirement. Moreover, the Secretary's

position that "it is 'commonly recognized' that the statutory term 'in the Republic of Vietnam' includes the inland waterways" of Vietnam also is uncontroversial in that expands the class of affected veterans and is supported by legal authority. *See Haas* at 1181 (citing 66 Fed.Reg. at 23,116); *see also* M21-1 MR at Part IV, Subpart ii, Chapter 2, Section C.10.b ("service in the Republic of Vietnam means . . . service in the RVN or its inland waterways.").

However, beyond using the basic term, VA has not promulgated ***any*** legal authority that addresses the definition and scope of the term "inland waterways." As a consequence, the Board in Mr. Gray's case does not cite to any such authority when it deemed Da Nang Harbor was excluded from that category of water way. The best the Board could do was refer to "VA's official position on this matter", which the Board said was articulated in a C&P Service Bulletin and a C&P Service Training Letter. R-16-17. *See also* Appendix to Appellant's Brief (providing copies of these documents). The Board stated that the "rationale for concluding Da Nang Harbor was an open waterway, as opposed to inland waters of Vietnam" was "discussed" in these documents. R-17. Yet, the Board stated further that it would not address "this rationale" in its decision "for the sake of brevity." R-17.

It is more likely, however, that the actual reason the Board did not discuss the content of these documents was that they contained no "rationale" at all that would provide ***legal*** or ***historical*** support for the Board's adverse decision. Rather, these documents essentially amount to, literally, someone's personal opinion about the nature

and extent of U.S. naval operations in Vietnam. *See* Appendix to Brief. The discussions found there contain no citation to historical or legal authority. This so called "rationale" touted by the Board merely is a bald statement of someone's personal opinion that a harbor such as Da Nang in Vietnam is part of the open blue waters of the ocean. *See* Appendix to Brief. On its face it cannot be relied upon as legal authority that would establish a hard and fast rule that would operate to deny veterans such as Mr. Gray benefits pursuant to 38 U.S.C. § 1116. Indeed, the potential effect of such an unsupported "rule" remaining in effect would be to exclude thousands of U.S. Navy Vietnam veterans from the presumptive service-connection benefits Congress generously provided by enacting § 1116.

In stark contrast to the paucity of legal and factual weight underpinning the C&P Service's Bulletin and Training letter is the legal and factual authority that Mr. Gray submitted in support of his argument that Da Nang Harbor is part of Vietnam's inland waterways. R-65-77. This included the definition of "inland waters" contained in a treatise on international maritime law. *See* R-67 (internal citation omitted). This definition clearly states that inland waters consist of "***all bodies of water within the land territory***, such as rivers and lakes, as well as bodies of water ***which open on the coast and fall within the category of 'true' bays***." *See* R-67 (internal citation omitted) (emphasis added). Mr. Gray provided further legal authority for his position that Da Nang Harbor is an inland waterway in Vietnam by citing to *United States v. Louisiana*, 394 U.S. 11, 22-23 (1968). R-67. Mr. Gray quotes the Court in the *Louisiana* case where

it provides an almost dispositive definition of a harbor such as Da Nang as qualifying as an "inland waterway":

> Whether particular waters are inland depended on historical as well as geographical factors. ***Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland***.

See R-67 (emphasis added). Finally, Mr. Gray also cites to the 1967 law of the sea conventions brokered by the United Nations, which holds that the boundary line of a nation's inland water at the location of a harbor is the line between the natural entry points as long as the entry points are not more than "24 miles" apart. *See* R-68 (internal citations omitted). Mr. Gray concluded his discussion of this legal authority establishing that Da Nang Harbor is an inland waterway by pointing out that its opening to the sea is just "4.24 miles wide." R-68.

This Court's review of the Board decision in this case is subject to the "arbitrary [or] capricious" standard of review. 38 U.S.C. § 7261(a)(3)(A). The scope of review under the "arbitrary [or] capricious" standard is narrow; the court is prohibited from substituting its judgment for that of the agency. *See Baldwin v. West*, 13 Vet.App. 1, 5 (1999); *Ternus v. Brown*, 6 Vet.App. 370, 375 (1994). Rather, under this standard, the Court must analyze the Board's explanation for its decision and consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Marlow v. Brown*, 5 Vet.App. 146, 151 (1993) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Smith v. Derwinski*, 1 Vet.App. 267, 279-280 (1991) (quoting *Motor Vehicles*

Mfrs. Ass'n). The Court is to determine whether the agency "articulate[d] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made'." *Motor Vehicle Mfrs, supra*. A Board's decision is arbitrary if the Board "entirely failed to consider an important aspect of the problem, . . . or [if the decision] is so implausible that it could not be ascribed to a difference in view . . . ." *Marlow, supra*.

Upon application of ***any*** of the foregoing tests, the Board's adverse determination regarding Mr. Gray's service in Vietnam must be found arbitrary and capricious. By failing dismissing the weight of the legal and factual authority submitted by Mr. Gray and instead giving credit to the C&P Service's purported "policy" and "rationale" to exclude Da Nang Harbor from Vietnam's "inland waterways", the Board clearly did not consider all of "the relevant factors" in Mr. Gray's case. *Marlow, supra*. Accordingly, it was not possible for the Board to provide a "satisfactory explanation for its action." *Motor Vehicle Mfrs, supra*. As well, because of the clear disparity in the weight of the relative legal authority cited by Mr. Gray versus that cited by the Board, neither has the Board provided a "rational connection between the facts found" and "the choice made" to deny Mr. Gray's claim that he had the requisite § 1116 presence in Vietnam. *Id.* By failing to give proper credit to the weight of the evidence he submitted in support of his claim, the Board also "entirely failed to consider an important aspect of the problem." *Marlow, supra*. Ultimately, given the disparity in the relative weight of the evidence relied upon by the Board versus Mr. Gray's arguments and citations to legal authority, the Board's

determination to deny his claim is "so implausible that it could not be ascribed to a difference in view . . . ." *Id.* Accordingly, the Court should find that the Board's decision should be reversed because it is arbitrary, capricious, an abuse of discretion, and otherwise not in accord with law.

B. The Board's Determination In Mr. Gray's Case That Da Nang Harbor Is Not Part Of The Inland Waters Of Vietnam, Despite Acknowledging The Board's Prior Determination In Another Veteran's Case That Da Nang Harbor Is Such An Inland Water Way, Deprived Him Of His Right To The Equal Protection Of The Law As Guaranteed By The 5th Amendment Of The U.S. Constitution

Mr. Gray also argued to the Board that he should not be treated differently from another veteran whose ship also was present in Da Nang Harbor during the Vietnam war, and in which case the Board found that Da Nang Harbor did satisfy the definition of being an "inland waterway" pursuant to 38 U.S.C. § 1116. *See* R-70 (citing to BVA decision Docket No. 04-00250, at 5 (Nov. 2, 2009)) (internal quotation omitted). In pertinent part the prior Board decision provided a reasoned explanation for why Da Nang Harbor constituted an "inland waterway." The Board said,

> The evidence of record clearly shows that Da Nang Harbor is well sheltered and surrounded on three sides by the shoreline of Vietnam. The harbor is nearly totally surrounded by land and that the entire harbor is located within the territorial boundaries of Vietnam. As such, given the location of the harbor as being surrounded by the land on three sides and the evidence that the harbor is within the territory of Vietnam, and resolving all doubt in the Veteran's favor, the Board finds that Da Nang Harbor is an inland waterway for the purposes of [38 C.F.R. § 3.307(a)(6)(iii)].

R-70. In light of this finding by the Board, Mr. Gray specifically argued that his case

should not be treated differently. That is, he asserted that the finding by the Board in its prior decision that Da Nang Harbor was an inland waterway for purposes of awarding benefits pursuant to § 1116 was binding on the Board in his case. R-70.

The Board's rules of practice do provide that its decisions are "nonprecedential in nature" except with respect to the "specific case decided." 38 C.F.R. § 20.1303. Nevertheless, the Board asserts that it "strives for consistency in issuing its decisions." *Id*. To this end, the Board's rules provide that "[p]rior decisions in other appeals ***may*** be considered in a case to the extent that they reasonably relate to the case." *See id.* (emphasis added). In the end, however, "each case presented to the Board will be decided on the basis of the individual facts of the case." *Id*. The genesis of this rule is that the "majority of decisions by the BVA turn on unique fact situations." *See* 57 Fed.Reg. 4103, W.L. 15299 (F.R.) (February 3, 1992). Despite the Board's purported policy of striving for consistency, and Mr. Gray's assertion of his right to the equal protection of the law, the Board rejected his equal protection argument out of hand. Without addressing the substance of his equal protection argument, or the Board's alleged desire to "strive for consistency", the Board simply explained, "Simply but, the prior November 2009 Board decision has no precedential value in the present Veteran's case", and cited the Board's regulation at 38 C.F.R. § 20.1303.

This reasoning by the Board to reject Mr. Gray's right to the equal protection of the law not only is arbitrary and capricious (*see* Argument II. A, *supra*), but bears the additional onus of being "contrary to [his] constitutional right." 38 U.S.C. § 7162(a)

(3)(B). Unlike in most cases where each turns on a unique fact situation, in Mr. Gray's case his § 1116 claims turn on the ***identical*** essential fact as existed in BVA Docket No. 04-00250, i.e., whether Da Nang Harbor qualified as an inland waterway. Accordingly, the Board's rule at § 20.1303 cannot be applied by the Secretary in this case to support the denial of his claim. In other words, this rule does not authorize the Board to deny the fact that the Board has already determined that, in the case of another Navy ship, its presence in Da Nang Harbor qualified as being present in the inland waterways of Vietnam. Because Mr. Gray's herbicide exposure claims involve ***the*** identical essential fact as in the prior Board case (BVA Docket No. 04-00250)—the essential fact that is outcome determinative in each case—the Board must concede this finding in Mr. Gray's case. Any other outcome would deny him the equal protection of the law.

Mr. Gray is entitled to equal treatment under the laws of the United States based on the U. S. Constitution's Fifth Amendment, including equal treatment from the Department of Veterans' Affairs. *See, e.g., Saunders v. Brown*, 4 Vet.App. 320, 325 (1993) (citing *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954)). To the extent that the Board has determined that the key fact regarding De Nang Harbor in BVA Docket No. 04-00250 did not bind the Board in Mr. Gray's case because of the operation of § 20.1303, the Board's application of this regulation should be reversed because it clearly violates Mr. Gray's right to equal protection of the law. The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *See Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432, 439 (1985). Two sailors present

in the same location, that location being the critical factor in the Board's award of § 1116 benefits to one of the sailors, unquestionably causes both to be similarly situated. Therefore, under the principle of equal protection they "should be treated alike." *Cleburne, supra*. Because Da Nang Harbor in BVA Docket No. 04-00250 was found to constitute an inland waterway of Vietnam for purposes of establishing the veteran's entitlement to benefits under § 1116, the same must also be found in Mr. Gray's case.

Only if the Secretary can show a "rational basis" for its disparate treatment of Mr. Gray's case and the case of the veteran in BVA Docket No. 04-00250 can the Board's decision in this case be upheld. *See, e.g., United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 (1980) (rational basis standard applied when social welfare legislation involved); *Raugust v. Shinseki*, 23 Vet.App. 475, 479 (2010). "Under the rational basis standard of review, the Court will uphold a statute unless it is 'patently arbitrary and irrational.'" *See Raugust v. Shinseki* at 479 (quoting *Saunders*, 4 Vet.App. at 325 and *Fritz*, 449 U.S. at 177). In light of the pertinent factual finding about Da Nang Harbor made by the Board in BVA Docket No. 04-00250, it is hard to imagine a more arbitrary and irrational determination about the same Da Nang Harbor than the one the Board made in Mr. Gray's case. It literally required the Board to ignore established facts so as to treat one sailor disparately from another despite both cases involving the exact same physical location. Such an outcome is the epitome of "patently arbitrary and irrational." *Raugust, supra*. This disparate outcome requires that the Board's decision in Mr. Gray's case be reversed. *Raugust, supra*.

Indeed, Congressional intent behind the creation of § 1116 was to "ensure that 'veterans have their exposure claims adjudicated under ***uniform and consistent regulations that incorporate rational scientific judgments***, ...'" *See Haas v. Nicholson*, 20 Vet.App. at 267 (citing statement of Senator Simpson, 130 Cong. Rec. S13591 (daily ed. Oct. 4, 1984)) (emphasis added), *reversed on other grounds*, *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), cert. denied, 129 S. Ct. 1002 (2009). Having found in one case that a ship's presence in Da Nang Harbor constituted its presence in the inland waterways of Vietnam, that Mr. Gray's ship also was present in the same location should serve to satisfy the § 1116 requirement that he was exposed to dioxin there. The Board and the Secretary simply cannot apply this benefit in an inconsistent manner with respect to Mr. Gray. Such an outcome is explicitly at odds with the terms for how the benefit was to be administered as expressed by Congress. *Haas, supra.* To the contrary, the application of the various terms of the statute must be consistent throughout. *See, e.g., Ramsey v. Nicholson*, 20 Vet.App. 16, 27 (2006) (holding that, "[t]he Secretary also possesses the authority to promulgate rules and regulations. 'Section 501(a) provides: The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are ***consistent with those laws, including . . . the manner and form of adjudications and awards***.'") (emphasis added).

For all the reasons discussed above, the Board's decision in Mr. Gray's case regarding whether he was exposed to herbicides in Vietnam must be reversed despite any

potential application of the regulation at 38 C.F.R. § 20.1303. Any other outcome would impermissibly violate his right to the equal protection of the law.

III. IN THE ALTERNATIVE TO REVERSAL, THE BOARD'S DECISION MUST BE SET ASIDE AND REMANDED FOR RE-ADJUDICATION BECAUSE ITS STATEMENT OF REASONS OR BASES FOR FINDING THAT DA NANG HARBOR WAS NOT AN INLAND WATER WAY IS INADEQUATE

A Board decision is required by statute to provide a "written statement of the reasons or bases for its findings and conclusions on all issues of fact and law presented on the record." *See Johnston v. Brown*, 10 Vet.App. 80, 86 (1997) (citing 38 U.S.C.§ 7104 (d)(1)). *See also Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Hensley v. Brown,* 5 Vet.App. 155, 161 (1993); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1991). As well, the "Board's statement must be adequate to inform the appellant of the basis for the d[ecision] and to permit effective judicial review." *Brambley v. Principi*, 17 Vet.App. 20, 23 (2003). For instance, the Board's statement of its reasons and bases must provide "a clear analysis of the evidence that it finds persuasive or unpersuasive with respect to that issue, and to provide the reasons for its rejection of any material evidence favorable to the veteran." *Cohen v. Brown*, 10 Vet.App. 128, 143 (1997); *Smallwood v. Brown*, 10 Vet.App. 93, 99 (1997) (quoting *Gilbert*, 1 Vet.App. At 57); *Johnston*, 10 Vet.App. at 86.

Moreover, the Board is required by statute to base its decisions "on the ***entire*** record in the proceedings and upon consideration of ***all*** evidence and material of record and applicable provisions of law and regulation." *See* 38 U.S.C. § 7104(a) (emphasis added). In pertinent part, this means that, "[b]efore deciding a claim," the Board must

demonstrate that it has considered "***all*** relevant evidence of record." *See Washington v. Nicholson*, 19 Vet.App. 362, 366 (2005) (emphasis added). When the Board's statement of reasons and bases fails to adhere to the foregoing requirements, its decision denying a claim is erroneous, and "the case must be remanded for further adjudication." *See Smallwood*, 10 Vet.App. at 99 (citing *Gilbert, ibid*.). *See also Martin v. Principi*, 17 Vet.App. 324, 328-29 (2003); *Brambley*, 17 Vet.App. at 23.

In the event that the Court does not reverse the Board's decision on grounds that it is arbitrary and capricious, and violates Mr. Gray's constitutional rights, it still must be set aside and the case remanded for re-adjudication. Minimally, the Board's decision lacks an adequate statement of reasons or bases for its findings and conclusions. For instance, the Board did not adequately address the merits of Mr. Gray's arguments that Da Nang Harbor, pursuant to the law and facts presented in those arguments, constituted an inland waterway in Vietnam. *See* Argument II.A, *supra*. The Board's simple explanation that it was bound by VA's "policy position" as set forth in the C&P Bulletins and Training Letters is an insufficient basis to adequately inform Mr. Gray of the reasons his claim was denied considering the substantive nature of his own arguments in support of his claims.

As well, the Board's plain assertion that it was bound by the regulation at § 20.1303 to ignore the Board's prior finding that Da Nang Harbor was an inland waterway in Vietnam (*see* Argument II.B, *supra*) is inadequate in light of Mr. Gray's arguments that the Equal Protection Clause of the 5th Amendment to the U.S. Constitution should trump this regulation. This, and the other inadequacies in the Board's statement of reasons or

bases for denying Mr. Gray's claims, require that the Board's decision be set aside and the matter remanded for re-adjudicated in the event the Board's decision is not reversed. *Cohen, supra.; Smallwood, supra*.

Conclusion

For the reasons stated above, the Court should reverse the Board's decision that denied Mr. Gray compensation for his dioxin-related disabilities on a presumptive basis because the Board's decision was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, and also in violation of his constitutional rights. 38 U.S.C. § 7261(a)(3)(A)-(B). In the alternative to reversal, the Court still should set the Board's decision aside because its statement of reasons or bases for its decision is inadequate, and remand the matter for re-adjudication.

Respectfully submitted,

//s// Michael E. Wildhaber

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July 22, 2014

Counsel for Appellant

In the
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT H. GRAY, Appellant,	)	
v.	)	No. 13 - 3339
SLOAN D. GIBSON, Acting Secretary of Veterans Affairs, Appellee.	)	

Appendix to Opening Brief

Compensation & Pension Service Bulletin

DECEMBER 2008

Inside This Issue

The staff at C&P Service Central Office wishes everyone a safe and happy holiday season.

Policy (211)

Herbicide-Related Disability Claims from Veterans with Thailand Service

The pending court case of *Haas v. Nicholson* concerns the issue of defining Vietnam service and whether the presumption of herbicide exposure will be extended to certain Vietnam-era veterans who did not serve within the country of Vietnam itself or on its inland waterways. These veterans include those with naval service on the offshore waters of Vietnam, often referred to as "blue water" veterans, and those who supported the war effort from outside Vietnam and received a Vietnam Service Medal for their support. Many of the veterans who received the Vietnam Service Medal for support efforts served in Thailand.

The Court of Appeals for Veterans Claims granted VA a stay in the *Haas* case that placed a hold on adjudicating claims that involve a presumption of herbicide exposure from blue water veterans and veterans with the Vietnam Service Medal who served in Thailand. VA Regional Office (VARO) personnel should be aware that not all veterans who served in Thailand received a Vietnam Service Medal and that there is no statutory or regulatory presumption of herbicide exposure based solely on service in Thailand. Therefore, all claims of herbicide exposure from veterans with Thailand service should be considered on a direct facts found evidentiary basis. M21-1MR, section IV.ii.2.c.10.n, instructs VARO personnel to send an inquiry in such claims to the C&P Service Agent Orange Mailbox: VAVBAWAS/CO/211/AGENTORANGE, prior to adjudication. When no factual evidence for exposure is available from the Agent Orange mailbox, then a follow-up request should be sent to the Army and Joint Services Records Research Center (JSRRC).

When these inquiries result in sufficient direct factual evidence of Thailand herbicide exposure, then the exposure should be acknowledged and the claim adjudicated. When these inquiries do not result in sufficient evidence to confirm exposure, then the claim can be adjudicated if the veteran did not receive the Vietnam Service Medal. However, when the veteran has received the Vietnam Service Medal and the claim would otherwise result in a denial of the benefit sought, then the claim falls under the *Haas* stay. These claims, as with other claims that fall under the *Haas* stay, should not be adjudicated until a final judicial decision and mandate has been issued in the *Haas* case.

Further Definition of Vietnam "Blue Water" Versus "Brown Water" Service for the Purpose of Determining Agent Orange Exposure

Some confusion has arisen among VA Regional Office personnel regarding whether a veteran's service as a crewmember on a deep-water naval vessel anchored temporarily in an open water port along the coast of Vietnam, such as Da Nang Harbor, is equivalent to service on the inland waterways of Vietnam.

Please be advised that Da Nang Harbor and all other harbors along the Vietnam coastline are considered by C&P Service to be part of the offshore "blue water" of Vietnam and not part of the inland waterway system or "brown water" of Vietnam.

To ensure fair and equitable treatment for all veterans, VA has extended the presumption of herbicide exposure only to those veterans who actually served within the Republic of Vietnam, or on its inland waterways, where herbicide use is well documented. The United States Court of Appeals for the Federal Circuit has upheld VA's

determination that service in the offshore blue water does not constitute service within the country of Vietnam or on its inland waterways. VA considers open deep-water coastal harbors, such as those at Da Nang, Cam Ranh Bay, and Vung Tau to be part of the offshore blue water of Vietnam and not part of its inland waterway system. Inland brown water service in Vietnam refers to operations on rivers, estuaries, and delta areas inside the country itself.

Therefore, under current policy and procedures, the presence of a naval vessel in a Vietnam coastal port, such as Da Nang Harbor, is not sufficient to establish Agent Orange exposure based on inland brown water service for a veteran who served on that vessel.

For additional information on blue water versus brown water service, see the September 2008 Addendum to the C&P Service Bulletin.

Impact of the *Ellington v. Nicholson* (No 04-0403) and *Ellington v. Peake* (2008-7012) decisions on inferred claims.

C&P Service has received a large number of questions regarding the application of the *Ellington* decisions on inferred claims. It must be noted that the *Ellington* cases were not of great significance to our processing of claims or understanding of what should be considered a claim. The Court explained that the informal claim must be in writing, request a determination of entitlement or evidence a belief in entitlement to a benefit, and adequately identify the benefit sought.

It is important to note that the Court also held the following: "We do not hold that the submission of a document in connection with a VA examination could never constitute an informal claim." Further, the Court stated, "Indeed, a veteran could file an informal claim by sufficiently manifesting an intent to apply for benefits for a particular disease or injury in a VA form or questionnaire. However, those facts are clearly not presented here."

The Court and Federal Circuit have been clear in their precedent opinions that a claim, whether informal or formal, **must be in writing**. *See Brannon, MacPhee, Rodriguez, Criswell, et. al.* This requirement is also explicitly required under 38 C.F.R. § 3.1(p).

Thus, the threshold question is, "What constitutes in writing?" We believe that, consistent with *Ellington* and related decisions, once the, "communication or action," is transcribed in writing, such as via a VA Form 119 or the transcription of the VA examination report, and the transcribed communication requests a determination of entitlement or evidences a belief in entitlement to a benefit, and adequately identifies the benefit sought, an informal claim has been raised. But it is important to note that the communication or action being transcribed, originates from the veteran.

We also believe that this approach is in accordance with our policy to sympathetically consider all pleadings. Thus, if the veteran makes a statement that meets the content requirements of a claim as described above, and the VA examiner or care provider transcribes that statement into the record, the sympathetic reading doctrine allows that to be considered an informal claim.

Audiology Opinions

It has come to the attention of C&P Service that some VA Regional Offices are asking audiologists to provide opinions as to whether or not hearing loss or tinnitus may be presumed from the veteran's Military Occupational Specialty (MOS). Requesting an opinion about presumption of hearing loss or tinnitus and MOS

is contrary to the findings of the Institute of Medicine's study, "Noise and Military Service: Implications for Hearing Loss and Tinnitus," that stated that the evidence was not sufficient to reach conclusions based on this relationship. Please share this information with individuals who request examinations/opinions in your offices and ensure they know not to request this type of opinion.

Procedures (212)

Change to VA Form 4107, *Your Rights to Appeal Our Decision*.

The June 2008 version of the VA Form 4107, *Your Rights to Appeal Our Decision,* contained an error under the section, "What Is an Appeal to the Board of Veterans' Appeals?" The Board of Veterans' Appeals has corrected the error in the form's November 2008 version. VA Regional Offices should use the new form immediately and not use prior versions. The revised VA Form 4107 may be found on the One-VA Form Website. We anticipate having the new version of VA Form 4107 available via Jet Forms in PCGL with the February 2009 installation.

AL Amyloidosis Future Diaries

As noted in the C&P Service Bulletins of October and November 2008, the process of adding Amyloid Light chain (AL) Amyloidosis to the list of presumptive diseases under 38 CFR 3.309(e) is well underway. We have published the proposed rule in the Federal Register (73 FR 65280) and are awaiting comments. We will then respond to them and publish the final rule.

In the interim, VA Regional Offices that receive claims of compensation for AL Amyloidosis based on herbicide exposure should establish a future end product (EP) 686 maturing on April 15, 2009. In Share, also remember to select the "Corporate Flashes" function, and assign the "NEHMER-AL AMYLOIDOSIS" flash.

Please contact Rhonda Ford of the Regulations Staff if you have any questions.

Returned Cost-of-Living Adjustment (COLA) Letters

Earlier this year, we advised VA Regional Offices to collect all returned 2007 Cost-of-Living Adjustment (COLA) letters. These letters often contained only the last four digits of the claim number for compensation and Dependency and Indemnity Compensation (DIC) awards still in BDN. Attempting to identify the beneficiary with such incomplete information would be time consuming and sometimes virtually impossible. Therefore, station Records Management Officers may now destroy these 2007 COLA letters in accordance with current guidance, including *Records Control Schedule VB-1, Part I, Item number 13-052.400.*

Hines will soon be releasing the 2008 COLA letters, which will contain complete identifying information. Follow current guidance (M21-1MR Part III, Subpart iii, Chapter 1, Section B, Topic 11, Block g) regarding any returned 2008 COLA letters and all other non-essential mail.

C&P Establishment of Future Control for VR&E Motivational Outreach

C&P and VR&E Services are considering the potential use of the End Product (EP) 810 work item to control VR&E Motivational Outreach. Until new procedures are finalized and published, all VA Regional Offices should follow the manual guidance already published. Per M21-1 MR IX.i.1.A.6, inform veterans of the availability and purpose of vocational rehabilitation when:

- a rating results in an initial evaluation

of 10 percent or greater, or increased SC combined evaluation of 20 percent or greater, other than a temporary rating under paragraph 29 or 30 of the rating schedule, or

- service connection for an additional compensable disability, regardless of whether there is a change in the combined evaluation and the combined evaluation is at least 20 percent, and a *DD Form 214*, *Certificate of Release From Active Duty* is received showing the veteran has been retired from the Armed Forces because of disability.

VR&E Service must meet with the veteran to determine eligibility for 38 U.S.C. Chapter 31 services.

Currently, the authorizer must establish a future date control for a 30-day period via the BDN 501 screen under EP 707, using reason code 30. For VETSNET cases, the authorizer must use the Share application to establish the 707 claim type, using the reason 30 future suspense reason.

- Use a local control in those cases in which BDN/Share control cannot be used.
- If a completed *VA Form 28-1900* is submitted prior to the control date, cancel the control.

VR&E, on receipt of the control document, initiates motivation activity by

- Requesting the claims folders as necessary,
- Determining whether to visit the veteran directly, or contact the veteran by telephone or letter,
- Establishing an outreach record in each case,
- Filing the original outreach record in the claims folder, and
- Clearing the EP 707.

Data Collection for FL 08-40

Fast Letter (FL) 08-40, *Combat-Related Special Compensation (CRSC) and Concurrent Retirement and Disability Pay (CRDP) Audit Error Worksheet (AEW) Processing Procedures Within the Veterans Service Network (VETSNET)*, released on November 14, 2008, described the process of submitting "Not Found" Audit Error Worksheets (AEWs) data to the VAVBAWAS/CO/212A mailbox.

The Process in FL 08-40:

Beginning November 21, 2008, all Area Directors will submit an updated list of their area's "Not Found" AEWs to the VBAVAWAS/CO/212A mailbox on the 3rd Friday of each month. The Compensation and Pension (C&P) Service will submit all subsequent AEWs to the Area Directors' mailboxes for dissemination to the regional office of jurisdiction.

The New Process:

Beginning December 19, 2008, VA Regional Offices (VAROs) must submit the updated list of their "Not Found" AEWs to the VBAVAWAS/CO/212A mailbox on the 3rd Friday of each month. C&P Service will provide subsequent AEWs to the Area Directors' mailboxes for dissemination to the VARO of jurisdiction.

This change is effective immediately. Please send any questions regarding this process to the VAVBAWAS/CO/212A mailbox.

IVM Report Due

Last month we stated that December 26, 2008**,** is the last day to submit the IRS Safeguard Activity Report to VAVBAWAS\CO\212A. In light of the President closing Executive Departments and Agencies of the Federal Government on December 26, 2008, this report is now due on **December 29, 2008**. Any VA Regional Office or Center that has or processes Income Verification Match (IVM) files must submit the report, described in M21-1MR, Part X, Chapter 10. If your office did not have any IVM files on station at the end of Calendar Year (CY) 2008 and did not destroy any IVM materials during CY 08, you may submit a negative Safeguard Activity Report. Otherwise, if your office had IVM files on station at the end of CY 2007 or destroyed IVM materials during CY 2008, you must submit the usual report.

Requesting Transfers of PLCP Claims

C&P Service has received information that stations are requesting the claims folders of paperless claims from the Rating Activity Sites (RASs). Claims Assistants and Veteran Service Representatives should *not* request claim folders with the PLCP flash shown in COVERS. Instead, they should forward the supplemental claim to the respective RAS. Please remind employees that once a claim has been rated in the paperless environment, the RAS indefinitely retains jurisdiction of the claim. The delays caused by stations not forwarding supplemental PLCP claims to the respective RAS are adversely affecting development initiation time, control time, and average days pending.

SSA Medical Records

The Social Security Administration (SSA) has notified us of several issues regarding medical records. Some VA Regional Offices (VAROs) have requested that SSA cease sending medical records via Compact Disc (CD) because of various problems reading the CD. VARO staff that cannot read a CD provided by SSA should e-mail VAVBAWAS/CO/SSA. An employee having problems with the CD player in his/her Personal Computer (PC) should notify the information technology staff to inspect it for repair or replacement. Also, outbased offices (mini-Veterans Service Centers) that request SSA records should use the mailing address of the VARO as the return address. VAROs are responsible for ensuring prompt delivery of SSA medical records to their outbased offices.

Month of Death Check for Surviving Spouse

Section 506 of Public Law 104-275 which amended section 5310 of Title 38, United States Code, states:

"Where a veteran receiving compensation or pension dies after December 31, 1996, the surviving spouse, if not entitled to death compensation, dependency and indemnity compensation, or death pension for the month of death, shall be entitled to a benefit for that month in an amount equal to the amount of compensation or pension the veteran would have received for that month but for his or her death."

Many, if not all VA Regional Offices, have been paying the month of death check to the surviving spouse only when he or she requests it in writing or by phone. Also, the VA Form 21-534, Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits, has been treated as a claim for the month of death check.

Based on this practice, there is reason to believe that many surviving spouses have not received the month of death check for which they were

eligible. Effective immediately, any First Notice of Death (FNOD) that is processed should be screened in the Triage or Post-Determination team for a potential eligible surviving spouse. For cases in which the veteran was in receipt of pension or compensation benefits at the 30% rate or higher, this should be a relatively easy task as dependency information is stored on these cases. However, for cases in which the veteran was receiving 20% compensation or lower, more research may be needed.

If the Notice of Death (NOD) came in the form of a death certificate, the existence of a surviving spouse should be noted. Also, some VA Form 21-530s, Applications for Burial Benefits, VA Form 21-2008s, Applications for United States Flag for Burial Purposes, phone calls and written notices will reveal that there is a surviving spouse. In cases for which there is no indication of a surviving spouse such as a death match for a veteran receiving a 20% compensation benefit, further development is required in the form of a phone call or letter.

The screener should forward all cases with a surviving spouse to the Post-Determination team to process an award for the month of death check using End Product (EP) 290 Payee 10.

C&P Service is working on clarification of VA's policy related to this statute and a means to compensate surviving spouses who may be unaware of their entitlement.

Training & Contract Exams (213)

Centralized Challenge Training Session

Session 2 of Centralized Challenge training will be held January 27 – February 13, 2009, with students traveling on January 26, 2009.

Stations that are sending students to Centralized Challenge training should ensure those students complete their prerequisite requirements prior to arriving at centralized training. Prerequisite requirements are posted to the C&P Training Website Home Page a minimum of two weeks prior to the start of a session.

Release of New EPSS on Due Process

A new Electronic Performance Support System (EPSS) on Due Process was released to the field on December 12, 2008. The new EPSS will be located within the VSR Assistant. It includes a step-by-step guide on working due process, both pre-determination and post-determination on many issues, such as incarceration, fugitive felon and dependency. Users will be able to use flow charts, which can be found by clicking on the, "Resources," button on the top menu bar. When Resources appear, open the job aid topic and look for the flow chart. Users can print a copy of the flow chart for a static version, or it can be used interactively on-line, allowing the user to quickly click through it. Under, "Resources," we have also included two Due Process Job Aides, "Due Process Common Errors Job Aid" and "VETSNET Apportionment Job Aid". We would like to thank our field subject matter experts, Thomas Kenville from Cleveland and Dottie Scanlan from Nashville for all of their hard work. We look forward to your feedback on the new EPSS, which may be sent to the C&P Service Training mailbox at VAVBAWAS/CO/C&PTraining.

Business Management (215)

COLA Adjustments

We sent a reminder on December 16, 2008, that VETSNET COLA adjustments needed to be complete by COB that date in order to apply to the next benefit payment cycle. For cases not adjusted within this timeframe, please work to ensure that these are adjusted before January end-of-month processing. The cutoff for BDN

cases is December 19, 2008.

850 Work Items

850 series work items were installed into production in November. This new series of work items represents VETSNET cases requiring a manual COLA adjustment. We are in the process of testing these in the VETSNET Operations Reports (VOR) test environment and predict they will be available shortly in VOR production.

The 800 series desk reference guide has been updated to reflect the 850s.

Veterans Services (216)

Status of Outreach Letters

Agent Orange

On November 4, 2008, Hines mailed approximately 28,000 letters to "in-country" Vietnam veterans who received treatment for type II diabetes within the VHA health care system, but were not currently receiving compensation for the condition. Subsequently, a match was conducted of those veterans who were sent that outreach letter against C&P records to determine how many veterans had filed claims since the mailing. The match only identified those veterans who had filed a claim for an Agent Orange presumptive condition after November 4, 2008 (date of the letter) as of December 2, 2008:

Agent Orange claims pending – 497
Number of grants – 1
Number of denials – 0
Letters returned as undeliverable – 522

C&P Service is working with an outside vender (Choicepoint) to obtain current addresses for a second mailing to the 522 veterans whose letters were returned.

Traumatic Brain Injury (TBI)

An outreach letter has been developed that provides information on VA's new evaluation criteria for Traumatic Brain Injury (TBI). The letter also provides information on how to request a re-examination based on the new criteria. This mailing will target all veterans currently service-connected for diagnostic code 8045 (TBI). A data request has been submitted to PA&I to identify those veterans. Results of this search have not been received, but we should have the data soon. We will advise VAROs before a mailing occurs.

Radiation

The Defense Threat Reduction Agency (DTRA) provided VA with a list of 2,182 veterans who participated in US atmospheric nuclear testing between 1945 and 1962. The list did not contain all the information needed for this outreach mailing. A radiation outreach letter has been drafted and is being reviewed. The letter provides information on the presumptive conditions specific to radiation-exposed veterans as well as radiogenic diseases associated with ionizing radiation. We will advise VAROs before a mailing occurs. Of the 2,182 records, 465 only had the first and last name and no other identifying information. The remaining 1,717 were matched against C&P records to find living veterans with award or pending claim information. The match resulted in 266 veterans who matched our search criteria and 1,451 veterans who did not match. Within the unmatched group 708 were identified as deceased and 743 as unknown. We are currently working with an outside vender (Choicepoint) to obtain current address information for the 743 veterans who are still living.

TRAINING LETTER 10-06
Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era

Department of Veterans Affairs
Veterans Benefits Administration
Washington, D.C. 20420

All VA Regional Offices
Training Letter 10-06

SUBJ: Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era

Purpose

The Compensation and Pension (C&P) Service is providing the following information and guidelines in order to promote regional office awareness, consistency, and fairness in the processing of disability claims based on herbicide exposure from Veterans with service in the U.S. Navy and Coast Guard during the Vietnam era.

Background

Department of Veterans Affairs (VA) regulations provide Veterans who served in the Republic of Vietnam with the presumption of herbicide exposure due to widespread use of Agent Orange and other herbicides during U.S. military operations within the country. This allows for service connection on a presumptive basis for certain diseases that are associated with such exposure. VA limits the presumption of exposure to Veterans who served on the ground or on the inland waterways of Vietnam and excludes Veterans who served aboard ships operating on Vietnam's offshore waters. This limitation has been legally upheld by the court system. However, VA has become increasingly aware of evidence showing that some offshore U.S. Navy and Coast Guard ships also operated temporarily on Vietnam's inland waterways or docked to the shore. Additionally, VA has recently acquired evidence showing that certain ships operated primarily on the inland waterways rather than offshore. Veterans who served aboard these ships qualify for the presumption of herbicide exposure. Assisting Veterans who served aboard these ships requires special claims processing steps that are explained in this training letter.

Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era

I. Introduction

Legal Background

The Department of Veterans Affairs (VA) acknowledges the widespread use of tactical herbicides, such as Agent Orange, by the United States military during the Vietnam War and has extended a presumption of herbicide exposure to any Veteran who served on the ground or on the inland waterways of the Republic of Vietnam between January 9, 1962, and May 7, 1975. This policy represents VA's interpretation of the statutory phrase "served in the Republic of Vietnam" found at 38 U.S.C.§ 1116(a)(1). The regulation implementing this interpretation at 38 C.F.R. § 3.307(a)(6)(iii) makes it clear that "duty or visitation in the Republic of Vietnam" is required to qualify for the presumption. This policy is grounded in the fact that aerial herbicide spraying was used within the land boundaries of Vietnam to destroy enemy crops, defoliate areas of enemy activity, and create open security zones around U.S. military bases.

A legal challenge to VA's interpretation was brought before the United States Court of Appeals for Veterans Claims (CAVC) in *Haas v. Nicholson* (2006). The case sought to further extend the presumption of exposure to U.S. Navy Veterans who served aboard ships operating on Vietnam's offshore waters. CAVC held that the presumption of exposure should be extended to U.S. Navy Veterans. VA filed an appeal on that decision and implemented a stay on adjudicating the numerous new claims resulting from it. The United States Court of Appeals for the Federal Circuit, in *Haas v. Peake* (2008), reversed the CAVC decision and held that VA's policy of extending the presumption only to those Veterans who served on the ground or on the inland waterways of Vietnam was a reasonable and valid statutory interpretation.

The *Haas* court cases and the resulting claims have sensitized Compensation and Pension (C&P) Service to the issues related to herbicide exposure claims from U.S. Navy Veterans. As a result, there is a need to clarify current claims processing policies and procedures in order to assist this group of Veterans in an equitable and consistent manner.

U.S. Navy in Vietnam

The following summary of U.S. Navy and Coast Guard activities in Vietnam is intended to give regional office personnel background information on the service provided to our nation by these Veterans and to assist with understanding development procedures when processing their claims.

U.S. Navy and Coast Guard operations in the waters of Vietnam were primarily focused on providing gunfire support for ground troops and conducting interdiction patrols designed to disrupt the movement of enemy troops and supplies from North Vietnam into South Vietnam. Shipboard gunfire was directed at inland targets primarily by destroyers (designated by DD hull numbers) operating at varying distances off the Vietnam coast. It was used to protect U.S. Army and Marine ground forces and destroy enemy positions within gun range. The destroyers operated along the offshore “gun line” on a rotating basis for several days or weeks at a time and then returned to escorting larger ships at sea or to a safe port, such as Subic Bay in the Philippines, for replenishment. Support missions for ground troops and attacks on enemy positions were also conducted by U.S. Navy aircraft launched from aircraft carriers (designated by CV or CVA hull numbers) stationed at sea, generally from 30 to 100 miles off the Vietnam coast. The gun line ships and aircraft carriers, as well as their supply and support ships, are collectively referred to as the “Blue Water” Navy because they operated on the blue-colored waters of the open ocean.

Although some Blue Water Navy destroyers were involved with enemy interdiction, the majority of these operations were conducted by smaller vessels based along the coast or within the river systems of South Vietnam. These vessels are collectively referred to as the “Brown Water” Navy because they operated on the muddy, brown-colored inland waterways of Vietnam. In general, patrolling of close coastal waters and the larger rivers was conducted by 50-foot swift boats (designated by PCF hull numbers) while patrolling of smaller rivers and waterways was carried out by 30-foot river patrol boats (designated by PBR hull numbers). Swift boat units were stationed at coastal locations where major rivers flowed into the South China Sea, from the Cua Viet River near the demilitarized zone (DMZ), which divided North from South Vietnam, to the large Mekong River Delta system that dominated the southern landscape of South Vietnam. Swift boats and some larger vessels sought to prevent enemy movement and activity along the close coastal waters and major river arteries. The code name for this interdiction effort was “Operation Market Time.” The U.S. Navy was assisted in this mission by two types of U.S. Coast Guard Cutters. They included “patrol boat” cutters (designated by WPB hull numbers), which were 80-foot vessels that operated like Navy swift boats, and “high efficiency” cutters (designated by WHEC hull numbers), which were 300- foot vessels that

could interdict enemy craft farther offshore. These patrol and high efficiency cutters operated from land-based units within Vietnam and did not rotate in and out of Vietnamese waters like the larger Blue Water Navy vessels did.

The smaller Navy river patrol boats generally operated within the Mekong River Delta region and were attached to the Mobile Riverine Force, which was a joint force comprised of Brown Water Navy vessels and the U.S. Army 9th Infantry Division. This area of operation was strategically important because it was located just south of Saigon, the capital of South Vietnam, and bordered Cambodia. During the war, the overthrow of the Saigon government was a major enemy objective. As a result, troops and materials from North Vietnam moved south along a hidden supply line within Cambodia, known as the Ho Chi Minh Trail, and then into the Mekong River Delta region of South Vietnam to mount attacks. An especially dangerous area of enemy activity within the delta was referred to as the Rung Sat Special Zone. The Mobile Riverine Force mission was to protect Saigon from enemy infiltration through this difficult delta terrain. The code name for this interdiction effort was “Operation Game Warden.” Numerous support ships were also involved in the delta interdiction activities, including supply landing craft vessels (designated by LST hull numbers); mobile barracks vessels (designated by APL hull numbers); and auxiliary repair craft vessels (designated by ARL hull numbers).

Although operations on the inland waterways of Vietnam were primarily conducted by Brown Water Navy and Coast Guard vessels, some larger Blue Water Navy vessels periodically entered inland waterways to provide gunfire support or deliver troops or supplies. Gunfire support for land-based or riverine operations was provided by destroyers that entered a river, such as the Saigon River in the southern delta area, as a means to get closer to enemy targets. Following these temporary inland waterway operations, destroyers would return to patrolling the offshore gun line or travel farther out to sea for aircraft carrier escort duty. A number of Blue Water Navy amphibious assault and supply vessels also periodically entered inland waterways to deliver troops for a combat mission or supplies for units stationed on the rivers.

II. Processing Guidelines for Regional Offices

Evidentiary Development

U.S. Navy and Coast Guard Veterans of Vietnam who file disability claims will generally fall into one of three categories: (1) those who served at land based naval support facilities, such as the U.S. Naval Support Activities at Da Nang, near the DMZ, or Vung Tau, near the Mekong River Delta, or with land-based Navy Seabee construction units at various locations throughout South Vietnam;

(2) those who served with the Brown Water Navy aboard patrol and support vessels operating on the inland rivers, canals, estuaries, and close coastal waters of South Vietnam; or (3) those who served with the Blue Water Navy aboard large ships operating on the open offshore waters of South and North Vietnam.

Veterans who served on land at a naval support facility or with the Brown Water Navy qualify for the presumption of herbicide exposure and development should proceed to establish their land-based or inland waterway service. Keep in mind that Veterans who served aboard the larger patrol vessels conducting interdiction missions along the close coastal waters operated out of land bases. So, despite the coastal off-shore activities, the crew was land based. This was not the case with Blue Water Navy crews who lived aboard their ships.

In order for the presumption of exposure to be extended to a Blue Water Navy Veteran, development must provide evidence that the Veteran's ship operated temporarily on the inland waterways of Vietnam or that the Veteran's ship docked to the shore or a pier. In claims based on docking, a lay statement that the Veteran personally went ashore must be provided. Since there is no way to verify which crewmembers of a docked ship may have gone ashore, C&P Service has determined that the Veteran's lay statement is sufficient. This is in keeping with 38 U.S.C. § 1154, which states that consideration shall be given to the places, types, and circumstances of a Veteran's service, and with 38 C.F.R. § 3.159(a)(2), which states that lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person. In claims based on docking, the circumstances of service have placed the Veteran in a position where going ashore was a possibility and the Veteran, by virtue of being there, is competent to describe leaving the ship and going ashore. The circumstances also establish credibility unless there is evidence to the contrary.

Although evidence that the Veteran's ship docked, along with a statement of going ashore, is sufficient for the presumption of herbicide exposure, service aboard a ship that anchored temporarily in an open deep water harbor or port is not sufficient. C&P Service considers open water ports such as Da Nang, Cam Ranh Bay, and Vung Tau as extensions of ocean waters and not inland waterways. They are not similar to the rivers, canals, and estuaries that make up the inland waterway system. This is illustrated by a quote from the 1967 ship's history of the USS Cleveland (LPD-7), which states: "Da Nang Harbor is easy to enter due to being open to the sea." Blue Water Navy ships occasionally entered these open water harbors and anchored temporarily without docking to take on fuel from harbor barges. Sometimes ships would briefly anchor so that ranking officers could attend strategy meetings ashore. In such cases, a small

boat manned by a crewmember referred to as a “coxswain” would usually ferry the officers ashore. Deck logs and ship’s histories will generally not provide names of personnel going ashore from anchorage. However, evidence that a claimant served as a coxswain aboard a ship at anchorage, along with a statement from the Veteran of going ashore, may be sufficient to extend the presumption of exposure.

Claims based on statements that exposure occurred because herbicides were stored or transported on the Veteran’s ship, or that the Veteran was exposed by being near aircraft that flew over Vietnam or equipment used in Vietnam, do not qualify for the presumption of exposure. These claims can be processed without further development by placing a memorandum for the record from the Army and Joint Services Records Research Center (JSRRC) in the claims file. This memorandum is located in M21-1MR at IV.ii.2.C.10.l and states that JSRRC research efforts have been unable to provide evidence supporting such claims of shipboard herbicide exposure.

When a U.S. Navy Veteran claims herbicide exposure based on inland waterway service or shore docking, development begins with a PIES O19 request for military records and a PIES O34 request for dates of service in Vietnam, both sent to the National Personnel Records Center. Information from these requests should provide the name of the Veteran’s ship, dates of service aboard it, and dates the ship operated on the offshore waters of Vietnam. This information may be sufficient to establish exposure without extensive development.

The first reference to check is the new *Vietnam Era Navy Ship Agent Orange Exposure Development Site* located on the C&P Service Intranet site located under Rating Job Aids. The site contains several links. The *Ships operating on the inland waterways or docking in Vietnam* link identifies: (1) Brown Water Navy individual vessels, and types of vessels, that operated primarily or exclusively on the inland waterways, and (2) Blue Water Navy individual vessels that temporarily operated on inland waterways or docked, with dates. The activity of all these ships has been verified through official documents or websites. If the Veteran served aboard one of the listed Brown Water Navy vessels at any time during its Vietnam tour, the presumption of exposure applies. For Veterans serving aboard one of the listed Blue Water Navy vessels, the presumption will apply only if the Veteran was aboard during the specified dates. The ships are arranged by vessel type and hull number and can be searched by name through use of the “Find” tool under the “Edit” function on your personal computer tool bar. Another link is to the official U.S. Navy *Dictionary of American Naval Fighting Ships* (DANFS) website. This site provides ship histories for most naval vessels. Ships are listed alphabetically by name. The histories vary in completeness but some provide detailed descriptions of service on Vietnam’s

inland waterways, whether operating as part of the permanent Mobile Riverine Force or operating temporarily on gunfire support or supply missions. Since DANFS is an official U.S. Navy site, evidence from it supporting the claim will generally be sufficient to establish the presumption of herbicide exposure. A third link is to *U.S. Naval Bases & Support Activities Vietnam*. This site provides a description of all land-based locations that supported U.S. Navy operations in Vietnam. It is not an official government site but can serve as a valuable starting point for research if the name of one of these bases, or units located there, appears in the claims file or is identified by the Veteran.

An additional location to check is the *Stressor Verification Site,* which is also on the C&P Service Intranet under Rating Job Aids. This site has a section with official declassified documents on Navy operations in Vietnam and may provide information on inland waterway activity or docking for specific vessels. It also contains information on Brown Water Navy and Seabee construction operations.

If these sources do not provide evidence to support the claimed exposure, development should proceed with a DPRIS O43 request to JSRRC for information on the Veteran's ship. JSRRC has recently agreed to expand its research on the ship's history to include deck log research. It will no longer be necessary to request deck logs from the National Archives and Records Administration. JSRRC will review the ship's official history for a record of inland water operations or docking and, if this does not provide supporting evidence, will then review deck logs for the time frame identified by the Veteran. The time frame must be limited to 60 days but can include different date ranges, as long as the cumulative time frame does not exceed 60 days. The DPRIS request screen will accept two date ranges for a single ship under "Dates Ship was in RVN Territorial Waters." If additional date ranges are required for the same ship, type them into the large space for "Circumstances Surrounding Exposure to Agent Orange." In that space, also describe the Veteran's statement as to how exposure occurred. JSRRC will provide a summary of its findings for the time frames requested.

When the JSRRC response is received, evaluate it carefully for evidence of the vessel's entry into the inland waterways or docking. Although JSRRC does not provide copies of all original document reviewed, relevant excerpts are generally included with the summary. When evaluating deck log information, look for statements like "maneuvering at various speeds into…" and references to such locations as "Cua Viet River," "Saigon River," "Mekong River Delta," and "Ganh Rai Bay" or "Rung Sat Special Zone" (both are up river from Vung Tau Harbor). Keep in mind that anchoring in one of these locations is not the same as anchoring in an open deep-water port; these are inland waterways and the presumption of exposure applies to any anchorage associated with them. When

deck logs refer to entering or anchoring in the “mouth” of one of these locations, or any other identifiable river location, C&P Service has determined that this is sufficient to establish service on the inland waterways. It is not practical to establish a bright dividing line between a river entrance and the South China Sea. Therefore, the benefit-of-the-doubt doctrine is applicable and evidence of the vessel’s presence in a river’s mouth is sufficient to establish the presumption of exposure for Veterans aboard that ship.

Ratings Procedures

When development is complete, a rating decision can be produced. Service connection will depend on whether the evidence confirms that the Veteran served at a land-based Navy facility within Vietnam, with the Brown Water Navy on the inland waterways of Vietnam, or aboard a Blue Water Navy ship that operated temporarily on the inland waterways or docked to the shore. If service connection is granted, a disability percentage determination may be possible based on medical evidence already in the claims file from a private physician or a treating VA medical facility. If the available medical evidence is insufficient to determine the level of disability, a VA examination is necessary.

The next issue for consideration is the effective date for compensation purposes. For an original claim, the effective date will be the date VA receives the claim or the date entitlement arose, whichever is later, as stated in 38 C.F.R. § 3.400. Since all the presumptive diseases associated with herbicide exposure represent liberalizing regulations, 38 C.F.R. § 3.114 will also apply. This means that the effective date for compensation may go back one year prior to the date of claim, if evidence shows that the disease was present at that time. However, the effective date may not go back earlier than the date that the disease itself was added by regulation to the list of herbicide exposure-related diseases.

Due to the *Haas* decision, the majority of Navy Veterans’ cases will likely involve a previous denial and either a claim to reopen received from the Veteran or a review initiated by VA. In these cases, reopening the claim may be based on new and material evidence showing inland waterway service or docking found in deck logs, ship histories, or some other acceptable documentation. If service connection is granted, the effective date will generally be governed by 38 C.F.R. § 3.156(c) because the newly acquired evidence falls under “service department records” and meets the regulatory requirements of: (1) official service department records, (2) existing at the time VA decided the claim, and (3) not associated with the claims file at that time. In cases where these records have now become available and are associated with the claims file, the regulation provides for a reconsideration of the claim.

If the evidence justifies service connection, the effective date will be the *date entitlement arose or the date VA received the previously decided claim*, *whichever is later*, as stated in section 3.156(c)(3). This is the general rule, but there are several factors to consider. The date entitlement arose may be either the date that the claimed disease was diagnosed (or symptoms became manifest according to medical evidence) or the date that the claimed presumptive disease was finalized as part of the presumptive list of herbicide exposure-related diseases at 38 C.F.R. 3.309(e). The date entitlement arose cannot precede the date a presumptive disease was added to the regulations.

Consideration must be given to the date of receipt of the original denied claim in relationship to the date that the claimed disease was finalized as part of the herbicide exposure presumptive list. If the original denied claim was received prior to addition of the claimed disease to the presumptive list and the evidence now warrants service connection, the effective date will be the date the disease was added to the presumptive list. If the original denied claim was received after the claimed disease was added to the presumptive list and the evidence now warrants service connection, the effective date will be the date the original denied claim was received or the date that medical evidence shows the Veteran first contracted the claimed disease, whichever is later, in accordance with section 3.156(c)(3). However, in such cases, section 3.114 will also apply because the additions of new presumptive diseases are regulatory liberalizations. Therefore, if the original denied claim was received within one year of the date the claimed disease was added to the presumptive list, and the claimed disease was present at that time, the effective date will be the date of that addition. If the claim was received more than one year after the claimed disease's addition, the effective date will be one year prior to the date it was received, if the claimed disease was present at that time.

If, for example, an original denied claim for diabetes mellitus (DM) type 2 was received before May 8, 2001, the date that DM type 2 was added to the list of diseases associated with herbicide exposure, the effective date for compensation could be no earlier than May 8, 2001. If the original denied claim for DM type 2 was received any time within the one-year period following May 8, 2001, the effective date for compensation would go back to May 8, 2001. If, on the other hand, the original denied claim was received more than one year after May 8, 2001, the effective date for compensation would go back one year from the date of claim. Another situation may arise where the Veteran has filed two claims for DM type 2, one before May 8, 2001, and the other more than one year after, both of which were denied. If readjudication evidence now shows that herbicide exposure can be presumed, the earlier denied claim should be used to determine the effective date for compensation, which would be the date that DM type 2 was

added to the presumptive list. This effective date scheme assumes in all cases that the Veteran's disease was present on the date of claim, as required by section 3.114. The date that each presumptive disease associated with herbicide exposure was added to section 3.309(e) can be found in M21-1MR at IV.ii.2.C. 10.i.

Regulations concerning awards and effective dates related to the *Nehmer* court case are found at 38 C.F.R. § 3.816. These will apply to the latest proposed diseases to be associated with herbicide exposure: ischemic heart disease, Parkinson's disease, and chronic B-cell leukemias, as explained in C&P Service Training Letter 10-04.

Herbicide-related disability claims from Navy Veterans of the Vietnam era were generally denied because the evidence available did not verify their service on the ground in Vietnam or on its inland waterways at the time of the decision. Therefore, section 3.156(c) governs effective date issues when the records of inland waterway service or shore docking have become available.

Additional Considerations

Regional office personnel should keep in mind that when a Blue Water Navy Veteran claims non-Hodgkin's lymphoma as a disability, service connection may be granted without the need to show inland waterway service or docking. Although this disease is on the herbicide exposure-related list at section 3.309 (e), it is also specified as a presumptive disease at 38 C.F.R. 3.313, based solely on "service in Vietnam " without reference to herbicide exposure. Therefore, any Veteran who served in the offshore waters of Vietnam will qualify for this presumption when this disease manifests itself subsequent to service.

Regional office personnel should also be aware that it is not proper to propose severing service connection for Blue Water Navy Veterans who were granted a presumption of herbicide exposure under former policies. Before the *Haas* case entered the court system, there was a short period of time when a Blue Water Navy Veteran's receipt of the Vietnam Service Medal was considered sufficient to establish a presumption of herbicide exposure. That broad policy was subsequently narrowed so that service on the ground in Vietnam or on its inland waterways was required to receive a presumption of exposure. The *Haas* case was initiated as a challenge to the revised policy. Although the final judicial decision in *Haas* supported VA's revised policy, that decision cannot be applied retroactively to Veterans who were evaluated under the original broad policy. In the CAVC case of *Berger v. Brown* (1997), the court stated that its holdings, which formulate new interpretations of the law subsequent to regional office

decisions, cannot be used as the basis for a clear and unmistakable error (CUE) action. Additionally, the Federal Circuit, in *Jordan v. Nicholson* (2005), held that if VA correctly applied a regulation (or policy) in a prior final decision, the fact that the regulation (or policy) was later found to be invalid does not establish that the prior final decision contained CUE warranting retroactive correction. Therefore, if a Blue Water Navy Veteran was previously awarded presumptive service connection based on herbicide exposure when the broad standard was in effect, that service connection cannot now be severed.