



**DEPARTMENT OF VETERANS AFFAIRS**  
**Veterans Benefits Administration**  
**Washington, D.C. 20420**

December 11, 2006

Director (00/21)  
All VA Regional Offices and Centers

In Reply Refer To: 211A  
Fast Letter 06-26

SUBJ: *Haas v. Nicholson*

This letter provides interim procedures for controlling claims affected by the U.S. Court of Appeals for Veterans Claims (CAVC or Court) decision in *Haas v. Nicholson*. The enclosure provides general answers to typical questions employees may receive during interviews or when answering telephones.

## **Background**

On August 16, 2006, the Court determined that Vietnam veterans who served in the waters off Vietnam and did not set foot in Vietnam are entitled to a presumption of exposure to herbicide agents, to include Agent Orange. This class of veterans is generally known as “blue water” Navy veterans; but any claim, regardless of branch of service, may be a *Haas* case. Prior to this decision, VA’s interpretation of 38 CFR 3.307(a)(6)(iii) was that a service member had to have actually set foot on Vietnamese soil or served on a craft in its rivers (also known as “brown water”) in order to be entitled to the presumption of exposure to herbicides.

Specifically, the Court held the following:

- The reference to service in “Vietnam” as used in the statute was ambiguous because there are many definitions of the territory of a nation.
- VA’s regulation defining Vietnam service for purposes of granting the presumption of exposure to herbicides, 38 CFR 3.307(a)(6)(iii), is ambiguous when viewed together with 38 CFR 3.313, which also defines service in Vietnam. The Court pointed to the use of different conjunctions, “and” in § 3.307 and “or” in § 3.313, as well as the differing placement of a comma in each regulation to prove the ambiguity and observed that VA had merely “replac[ed] legislative ambiguity with regulatory ambiguity.”
- Because of its determination that ambiguity was present, the Court looked to a procedural manual (M21-1) provision from 1991 that stated that possession of

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a Vietnam Service Medal (VSM) would be conceded as proof of Vietnam service in the absence of “contradictory evidence.” The Court held this to be a substantive rule establishing entitlement to the presumption of exposure to herbicides. It held that VA’s “attempted rescissions” of that M21-1 provision were void because they failed to comply with the notice and comment requirements of the Administrative Procedures Act (APA). The Court also held that within the meaning of VA’s manual provisions: 1) proof that a veteran had blue water service without setting foot on mainland Vietnam would not necessarily be “contradictory evidence,” but 2) proof that a veteran served in a location “that reasonably precluded exposure to Agent Orange” could be considered “contradictory evidence.”

## **Current Status**

VA has appealed the *Haas* decision to the U.S. Court of Appeals for the Federal Circuit. *Haas* issues will not be adjudicated until this litigation is resolved. When claims with *Haas* issues are received, they will be acknowledged with specific language approved by the Office of General Counsel and controlled as indicated in this letter.

## **Language Approved by General Counsel**

The following language will be used to acknowledge receipt of a claim for service connection that includes *Haas* issues:

“We have received your claim for (insert the disability(ies)) based upon claimed herbicide exposure. Your claim may be affected by recent judicial action by the Court of Appeals for Veterans Claims in *Haas v. Nicholson*. VA has appealed that action to the Federal Circuit. We must await the outcome of that appeal and receive guidance from the Department of Veterans Affairs General Counsel prior to taking further action on your claim. We will advise you further when we receive guidance.”

## **Haas Claims**

Claims affected by *Haas* include those based on herbicide exposure for which the only evidence of exposure is receipt of the Vietnam Service Medal or service on a vessel off the shore of Vietnam.

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Claims not affected by the *Haas* decision include those claims based on herbicide exposure in which it is established by record that the veteran did set foot in the Republic of Vietnam, or claims based on herbicide exposure in which the veteran did not set foot in Vietnam, did not receive the Vietnam Service Medal, and did not serve off the shore of Vietnam. These claims should continue to be processed in the usual manner.

## **Controlling Claims Affected by *Haas***

Pending a final decision by the courts in *Haas*, regional offices must control claims from “blue water” Vietnam veterans (or veterans from another branch of service, as explained above) seeking presumptive service connection with end product 335 as explained below.

The following procedures are required when a veteran seeks either to establish entitlement to service connection for a herbicide-related disease for the first time in a new or original claim or to reopen a previously denied exposure-related claim. These procedures are also applicable in cases where a veteran claims service connection for both an exposure-related disability and one not related to herbicide exposure. These procedures are intended to avoid delays in the adjudication of other claims and the unnecessary expenditure of resources in handling claims that may ultimately be overturned on appeal.

### **Original (or new) claims involving only *Haas* 3.307 presumptions**

- If a veteran’s claim for service connection for a disease associated with herbicide exposure is new, involves no other issues, and there is no basis to establish entitlement except under *Haas*, control the claim using end product 335, DISP to *OCHAA* (original claim, *Haas*), and defer adjudication.
- Send a letter to the claimant with the approved General Counsel language.
- Do not send a VCAA notice at this time.

### **Claims involving only *Haas* 3.307 presumptions (claims based on herbicide exposure which have previously been denied)**

- If a veteran’s claim for service connection for a disease associated with herbicide exposure has previously been denied (both on a direct and presumptive basis) and there is no basis to establish entitlement except under *Haas*, control the claim using end product 335, DISP to *OPHAA* (pre-*Haas* denial), and defer adjudication.

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- Send a letter to the claimant with the approved General Counsel language.
- Do not send a VCAA notice at this time.

**Claims involving *Haas* 3.307 presumptions (claims related to herbicide exposure which are raised for the first time) and non-*Haas* issues**

- If a veteran is claiming service connection for a disability not related to herbicide exposure and also claiming service connection based on *Haas*-related herbicide exposure for the first time, establish the appropriate end product (010, 110, 020) on the non-*Haas* issue(s) and control the *Haas* issues with end product 335.
- Send a VCAA notice on all issue(s). Until further notice, send only the standard MAP-D development letter. Do not send any attachments requesting development of claims for exposure to Agent Orange or other herbicidal agents.
- Develop and rate all non-*Haas* issue(s).
- Develop and rate all herbicide exposure issues to be decided on a direct or presumptive basis, without resort to *Haas* presumptions.
- If the criteria for presumptive service connection can be established under a basis other than *Haas*, the claim should still be rated. Specifically, service connection can be granted (1) on a direct basis, (2) if herbicide exposure is shown by a non-*Haas* means, i.e., other than by receipt of the VSM/service in offshore waters, or (3) under a presumption other than the herbicide presumption. An example of (3) would be a claim involving a Navy veteran awarded a VSM, who was also an atmospheric nuclear test participant, and who claims service connection for lung cancer. If the claim meets the presumptive criteria of section 3.309(d), it is not considered a *Haas*-related issue and should be granted.
- If stations are unable to grant *Haas*-related issue(s) on a direct basis or on a presumptive basis other than under *Haas*, continue the end product 335 control for the *Haas* issue and DISP to *ONHAA* (new *Haas* claim, received after Court's decision).
- Send a decision notice letter to the claimant on non-*Haas* issue(s), include the approved General Counsel language on the *Haas* issues, and clear the controlling end product (010, 110, 020).
- If, however, there are any deferred issues other than those related to *Haas*, you must continue the controlling end product.

**Appeals involving *Haas* issues**

- If a veteran files an appeal on the denial of service connection for a herbicide presumptive disability because there is no evidence of in-country Vietnam service, control the appeal under end product 335 for the *Haas* issue and DISP to *APHA* (appeal of a *Haas* issue).

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- Send a letter to the claimant with the approved General Counsel language.
- Do not enter the appeal into VACOLS at this time.
- If a veteran files an appeal on a *Haas* issue together with an appeal of non-*Haas* issues, control the *Haas* issue as explained above. Establish a VACOLS record for the non-*Haas* issues and process those issues in the standard manner.

## **Actions by the Board of Veterans' Appeals (BVA)**

On September 21, 2006, the Secretary issued a memorandum directing BVA to stay action and refrain from remanding all claims for service connection based on exposure to herbicides in which the only evidence of exposure is the receipt of the Vietnam Service Medal or service on a vessel off the shore of Vietnam. Because the Secretary's direction indicates his view that these claims should not be decided until the litigation runs its course, BVA has suspended action on *Haas* claims.

For cases in which the only issue on appeal is a claim affected by the stay, BVA will retain and store the claims folder during the period of the stay. Once a final decision is reached on appeal in the *Haas* case, the adjudication of any cases that have been stayed will be resumed. In multiple-issue cases, the Board will adjudicate all issues that are not subject to the stay in accordance with normal procedures, and place appropriate controls on the issue(s) affected by the stay.

If a regional office receives a decision from BVA that grants presumptive service connection under *Haas v. Nicholson* to a veteran who was not in-country in Vietnam, please send the folder to the C&P Policy Staff (211) prior to implementing the decision. The point of contact is Michele Katina.

## **Questions**

Questions concerning this fast letter and other issues related to *Haas* should be submitted to the VAVBAWAS/CO/21Q&A mailbox.

/s/  
Bradley G. Mayes  
Acting Director  
Compensation & Pension Service

Enclosure