2007-7037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JONATHAN L. HAAS,
Claimant-Appellee,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellant.

Appeal From The United States Court of Appeals For Veterans Claims
In 04-4091, Judge William A. Moorman

CORRECTED REPLY BRIEF FOR RESPONDENT-APPELLANT

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INTRODUCTION

There is no dispute that Mr. Haas honorably served our Country under difficult conditions during the Vietnam War. However, this appeal is not about his honorable service. It presents the narrow legal question of whether the Secretary's reasonable interpretation of the statutory and regulatory basis for the presumption of herbicide exposure is entitled to deference. Because the United States Court of Appeals for Veterans Claims erred in refusing to defer to the Secretary's reasonable view that only veterans who served on land were entitled to the presumption, its decision must be reversed.

As we established in our opening brief, the Veterans Court principally erred by concluding that the Secretary's regulatory interpretation of the presumption of herbicide exposure, 38 C.F.R. § 3.307(a)(6)(iii), must be construed to presume herbicide exposure in veterans who served in ships off the coast of the Republic of Vietnam. The court erred both in its interpretation of the regulation and its failure to defer to the agency's reasonable interpretation of its own regulation. Mr. Haas fails to respond directly to our principal argument or attempt to defend the Veterans Court's interpretation of section 3.307(a)(6)(iii). Accordingly, he should be considered to have waived any challenge to our principal argument on appeal.

Rather than defending the Veterans Court's decision, Mr. Haas argues that the Court erred by finding ambiguity in 38 U.S.C. § 1116(a)(1)(A), and he asserts

that Congress unambiguously defined service "in the Republic of Vietnam" in § 1116(a)(1)(A) to include service in offshore waters. He further argues that, assuming the statute is ambiguous, the VA's interpretation is not entitled to deference, because it has been inconsistent and it impermissibly relies on the potential for herbicide exposure as a relevant factor in interpreting the statute. As explained below, these arguments are without merit.

I. Statutory And Regulatory History

Mr. Haas' brief casts unnecessary confusion over the history of the relevant statues and regulations in a futile attempt to support his argument that the Agent Orange Act of 1991 ("AOA"), Pub. L. No. 102-4, 105 Stat. 11, and the particular provision at issue here, 38 U.S.C. § 1116(a)(1)(A), have little, if anything, to do with Agent Orange exposure. For the purpose of addressing his arguments, we begin by describing the complex history of the laws applicable to this case, which establish that the AOA was predicated entirely upon herbicide exposure. In particular, we demonstrate that Mr. Haas' arguments rests upon the flawed premise that the current regulatory interpretation of "service in the Republic of Vietnam" is drawn from a previous regulatory interpretation that included offshore service when, in fact, the current regulatory interpretation, as defined by 38 C.F.R. 3.307(a)(6)(iii), is based upon the previous regulation, 38 C.F.R. §3.11a, which was limited to service on shore.

In 1984, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725, 2728 (Oct. 24, 1984)("1984 Dioxin Act"), which directed the VA to address claims for service connection based on exposure to the herbicide dioxin (a contaminant of Agent Orange) by issuing rules grounded in "sound scientific and medical evidence." Id. In enacting the 1984 Dioxin Act, Congress recognized that, at the time, there was little scientific evidence of a connection between dioxin exposure and any disease other than chloracne, porphyria cutanea tarda, and soft tissue sarcoma ("STS"). Id.

In 1985, the VA promulgated 38 C.F.R. § 3.311a to implement the 1984 Dioxin Act. The rule making for § 3.311a noted that herbicides "were used during the Vietnam conflict to defoliate trees, remove ground cover, and destroy crops," and many veterans" were deployed in or near locations where Agent Orange was sprayed." 50 Fed. Reg. 15,848, 15,849 (1985). Under 38 C.F.R. § 3.311a(b) (1986), the VA presumed that veterans who served in Vietnam during the Vietnam era were exposed to dioxin, eliminating the need to establish exposure by evidence. The presumption of exposure extended to "service in the waters offshore and service in other locations, *if the conditions of service involved duty or visitation in the Republic of Vietnam."* 38 C.F.R. § 3.311a(b) (1986) (emphasis added).

In 1989, a Federal court invalidated the portion of § 3.311a providing that no disease other than chloracne was associated with dioxin exposure. See Nehmer v. United States Veterans Administration,712 F. Supp. 1404, 1420 (N.D. Cal. 1989).[1] Nehmer did not address the geographical basis for application of the presumption.

In March 1990, a Centers for Disease Control (CDC) study found a statistically significant association between non-Hodgkin's lymphoma ("NHL"). and service in Vietnam. See 55 Fed. Reg. 43,123 (Oct. 26, 1990). In October 1990, the VA promulgated 38 C.F.R. § 3.313, providing service connection for NHL based not on herbicide exposure, but on service in Vietnam, and specifically including offshore service because "the CDC study on which [§ 3.313] was based noted an increased risk of developing NHL based on service in Vietnam during the Vietnam Era, rather than exposure to herbicides containing dioxin." 55 Fed. Reg. at 43,124. Thus, unlike the presumption for herbicide exposure for dioxin in section 3.11a discussed above, 3.313 was not based upon exposure nor did it contain a limitation requiring service to be on land in Vietnam.

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[1] Counsel for Mr. Haas also represented the Nehmer plaintiffs, and is thus familiar with former § 3.311a, not withstanding his professed confusion over VA's statement that the presumption of exposure currently codified in § 3.307 (a) (6) (iii) existed prior to the AOA's enactment. See App. Br. At 26, 29, 31.

In reaction to Nehmer, the Secretary of Veterans Affairs proposed to amend the presumption of herbicide exposure (dioxin) in section 3.11a to include a presumption of service connection for Soft Tissue Sarcoma ("STS"). See 56 Fed. Reg. 7632 (Feb. 25, 1991) (proposed rule approved by Secretary on January 11, 1991); 55 Fed. Reg. 31,687 (Aug. 3, 1990) (notice of advisory committee meeting to review proposed STS presumption). The proposed rule was announced because the Secretary was convinced that the medical and scientific evidence established there was a significant statistical link between dioxin exposure and STS. Because STS was based upon the presumption of dioxin exposure contained in section 3.11a, it required the same proof that the veteran served on land in Vietnam.

In February 1991, Congress enacted the Agent Orange Act ("AOA"), Pub. L. No. 102-4, § 2, 105 Stat. 11, which established 38 U.S.C. § 1116, the statutory provision at issue in this appeal. The AOA established presumptions of service connection for Vietnam veterans who served "in the Republic of Vietnam" and were diagnosed with NHL (recognized by the VA as a presumptive disease under 38 C.F.R. § 3.313), chloracne (recognized by the VA as a presumptive disease under 38 C.F.R. § 3.311a), or STS (which the VA had announced would be recognized as a presumptive disease under 38 C.F.R. § 3.311a). The AOA was understood as codifying the VA's existing and announced regulatory

presumptions. See 137 Cong. Rec. H719, H726 (Jan. 3, 1991) (joint explanatory statement noting that the AOA would codify the VA's existing regulatory presumption for chloracne and VA's announced regulatory presumptions for NHL and STS); 1991 U.S.C.C.A.N. 11, statement by President George Bush upon signing H.R. 556 (Feb. 6, 1991) (stating that the AOA will "codify decisions previously made by my administration with respect to presumptions of service connection").

In September 1993, the VA proposed to delete § 3.311a and move its regulatory definitions to section 3.307(a)(6), so that all Agent Orange rules could be located in one section. In particular, VA proposed the amendment "so that it . . . incorporates the definition of the term 'service in the Republic of Vietnam'' from 38 C.F.R. § 3.311a." 58 Fed. Reg. 50,528, 50,529 (Sept. 28, 1993). The fact that § 3.307(a)(6)(iii), the presumption at issue in this case, explicitly adopted the § 3.311a definition of service in Vietnam repudiates Mr. Haas' suggestion that the § 3.307(a)(6)(iii) "definition bears a strong resemblance to the definition . . . in 38 C.F.R. § 3.313," and should thus be interpreted consistent with section 3.313 rather than section 3.311a. App. Br. at 31. In the September 1993 rule making, the VA also concluded that there was a positive association between herbicide exposure and the development of NHL. 58 Fed. Reg. at 50,528.

In 1994, Congress amended 38 U.S.C. § 1116(a)(2) to establish presumptions of service connection for four additional diseases (Hodgkin's disease, porphyria cutanea tarda, respiratory cancers, and multiple myeloma). Pub. L. No. 103-446, § 505, 108 Stat. 4664, 4685 (1994). The stated purpose of that change was to codify presumptions of service connection based on herbicide exposure that the VA had previously established pursuant to the AOA. Id.; 140 Cong. Rec. S15005, S15016 (Sept. 12, 1994) (joint explanatory statement).

In 1996, based on evidence concerning the deployment of troops and the use of herbicides, Congress amended the statutory definitions of the Vietnam era. See Veterans' Benefits Improvement Act, Pub. L. No. 104-275, 110 Stat. 3322, 3342. In 38 U.S.C. § 101(29), for general purposes, the definition was broadened to cover the period from February 28, 1961, to May 7, 1975. But Congress recognized that "[h]erbicides and defoliants were not in use throughout the `Vietnam era' as that term would be newly defined" and "such materials were not introduced into the Republic of Vietnam until January 9, 1962." Therefore, ... *for purposes of sections 1116* and 1710 of title 38, United States Code, provisions of law *which specify benefits based on presumptive exposure to herbicides and defoliants,* the term `Vietnam era' [was] limited to the period between January 9, 1962, and May 7, 1975." S. Rep. No. 104371, at 21 (1996) (emphasis added).

Thus, Congress found the deployment of herbicides relevant to the uses of the term "service in the Republic of Vietnam" in § 1116.

n January 2001, citing scientific evidence regarding dioxin exposure, the VA proposed to add type 2 diabetes to the list of diseases presumptively service connected based on herbicide exposure. 66 Fed. Reg. 2376, 2377-78 (2001). In the notice of final rule making, the VA stated that the rule covered only veterans who served on land because § 3.307(a)(6)(iii), which defined Vietnam service, covered only those veterans. 66 Fed. Reg. 23,166, 23,166 (May 8, 2001). In December 2001, Congress codified that presumption in 38 U.S.C. § 1116(a)(2). Pub. L. No. 103-107 § 201(b), 115 Stat. 976, 988 (2001).

II. Congress Did Not Speak To The Precise Question At Issue In This Case

The Veterans Court properly concluded that Congress did not precisely define what constituted "service in the Republic of Vietnam." We agree and, as we demonstrated in our opening brief, the Veterans Court should have deferred to the Secretary's reasonable interpretation of that term. Mr. Haas' main argument on appeal is not that the VA's interpretation is unreasonable, but that the statute itself is plain and that the presumption of service connection for the diseases covered by § 1116(a) includes offshore service. This argument fails for several reasons.

First, and most significantly, there is no definition of "service in the Republic of Vietnam" in § 1116(a), much less a definition that would include offshore service. Given that the statute does not contain any definition of what constitutes such service, let alone specify any geographic boundaries regarding that service, Mr. Haas' plain language argument fails at the start. Further, his argument that the Veterans Court erred by focusing upon the definition of "service" in § 1116(f), as opposed to § 1116(a), is irrelevant. Section 1116(a) is no more plain than section 1116(f) as to what constitutes service in the Republic of Vietnam.

Second, to the extent that Mr. Haas' argument is based upon the legislative history of the statute, the legislative history is likewise ambiguous. At best, the legislative history can be read to incorporate presumptions regarding two diseases that did require service on land in Vietnam, and one which did not, rendering which definition it intended to be applied ambiguous. Thus, the Veterans Court was correct to conclude that the statute was ambiguous, even if it ultimately erred in not deferring to the Secretary's reasonable interpretation.

The real problem with Mr. Haas' plain language argument is that it is not directed to the term "service in the Republic of Vietnam" at all, but to whether the statute requires proof of herbicide exposure for certain diseases. For instance, he

argues that Congress clearly provided in 38 U.S.C. § 1116(a)(1)(A) that a veteran who has a disease listed in § 1116(a)(2) "does not need to establish exposure to an herbicide agent," because section (a)(2) does not refer to such exposure. App. Br. at 10; App. Br. at 7-19. That may be true (and indeed, is because that is the underlying purpose of the presumption) but it has no relevance to the definition of "service in the Republic of Vietnam."

Mr. Haas suggests that, because § 1116(a)(1)(A) does not expressly refer to herbicide exposure as a requirement for service connection of a disease listed in § 1116(a)(2), Congress has clearly indicated that those provisions are not based upon herbicide exposure and thus must apply to all service on shore and off. But the premise does not lead inexorably to that conclusion. Even if the provisions were not based upon herbicide exposure — a premise which we dispute in large part— that fact says nothing about what constitutes service and there could be any number of reasons to limit service to those who served on shore.[2]

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[2] To the extent Mr. Haas suggests that, because the statute does not require herbicide exposure, it was improper for the Secretary to consider the likelihood of such exposure in defining "service," that argument is not a "step one," plain language Chevron argument, but a "step two" argument regarding the reasonableness of the Secretary's interpretation, an argument addressed below in Part III.

The strongest support for Mr. Haas' argument is largely based on the following syllogism: (1) the AOA codified the NHL presumption from 38 C.F.R. § 3.313, which applied to offshore service without regard to the potential for herbicide exposure; (2) therefore, Congress intended the NHL presumption in 38 U.S.C. § 1116 to apply in the same fashion as § 3.313; and (3) it must be assumed that Congress intend all presumptions under 38 U.S.C. § 1116(a)(1)(A) and (a)(2) to apply to offshore service without regard to herbicide exposure. That assertion does not establish a clear intent by Congress.

To the contrary, two of the three presumptions codified in the AOA (STS and chloracne) were based on herbicide exposure and did not apply to persons who served solely offshore, where herbicides were not used. To the extent any congressional intent can be inferred from the fact that Congress codified existing VA presumptions, it is at least as likely that Congress intended that the presumptions would be based on herbicide exposure and would be applicable only to persons who served in areas where herbicides were used. Further, as discussed below in section III, the legislative history reflects an intent that all three disease presumptions, including the NHL presumption, be based on herbicide exposure.

Moreover, the assertion that § 1116(f), which contains the statutory language referencing herbicide exposure, is inapplicable to his claim lacks merit

and, even if true, provides no evidence that Congress intended the phrase "serv[ice] in the Republic of Vietnam" in § 1116(a)(1)(A) to include offshore service; subsection (a) simply does not address the question at all. In any event, his assertion is incorrect. Mr. Haas seeks service connection for a disability based on a presumption. Subsection (f) specifically applies "[f]or purposes of establishing service connection for a disability or death resulting from exposure to an herbicide agent, *including a presumption of service connection under this section."* 38 U.S.C. § 1116(f) (emphasis added).

Nothing in the plain language of 1116(a), or its legislative history, compels the conclusion that Congress intended offshore service to be included in the term "service in the Republic of Vietnam." Accordingly, Mr. Haas' plain language argument offered as an alternative basis to support the Veterans Court's decision must be rejected.

III. VA's Interpretation Is Reasonable And Entitled To Deference

Because section 1116(a)(1)(A) is facially ambiguous as to whether offshore service constitutes service "in the Republic of Vietnam," the central issue in this case is whether the VA reasonably interpreted that statutory phrase to require service within the land-based borders of the Republic of Vietnam, where herbicides were used. In an attempt to show that the VA's interpretation is not

entitled to deference, Mr. Haas argues that the potential for herbicide exposure is irrelevant to the interpretation and operation of § 1116(a)(1)(A). That argument defies reason and all relevant evidence of congressional intent.

There is ample evidence that Congress intended that all presumptions in 38 U.S.C. § 1116(a) would be based on herbicide exposure and that herbicide exposure would thus be relevant to the interpretation of that statute. The title of the enacting legislation ("The Agent Orange Act"), the title of the codified section ("Presumptions of service connection for diseases associated with exposure to certain herbicide agent, presumption of exposure for veterans who served in the Republic of Vietnam"), and every piece of legislative history all are clearly concerned with herbicide exposure. Indeed, floor statements in support of the AOA consistently reflect the intent that all three disease presumptions in that statute be based on herbicide exposure. See, e.g.,137 Cong. Rec. S 1262, S 1276 (Jan. 3, 1991) (statement of Sen. Biden) ("For the first time, it will be the law of the land that those who were exposed to agent orange and who suffer from three types of cancer -- chloracne, non-Hodgkin's lymphoma, and soft-tissue sarcoma -- are eligible for compensation"); at S 1277 (statement of Sen. McCain) ("it will establish, by law, a permanent presumption of service connection for soft-tissue sarcoma, non-Hodgkin's lymphoma, and chloracne that manifests itself within 1

year of service. These diseases have a direct linkage to agent orange from all that we know."); at S 1278 (statement of Sen. Bradley) ("The act establishes a permanent presumption of service connection for the diseases that are frequently associated with exposure to agent orange, soft-tissue sarcoma and non-Hodgkin's lymphoma").[3] There is simply no reason to think that the diseases in subsection (a)(2) were selected without regard to their relationship to exposure.

Mr. Haas finds significant the fact that diseases specifically included in § 1116(a)(2) are service connectable under § 1116(a)(1)(A), whereas presumptive diseases added by the VA in regulations are service connectable under § 1116(a)(1)(B). He argues that because the word "exposure" appears in § 1116(a)(1)(B), but not in § 1116(a)(1)(A), the fact of exposure is irrelevant to the interpretation and application of § 1116(a)(1)(A).

Contrary to Mr. Haas' argument, the presumptions in both (a)(1)(A) and (a)(1)(B) are clearly based on herbicide exposure. In (a)(1)(A), Congress has determined that service in Vietnam at a time when herbicides were used is sufficient to presume exposure to dioxin, the herbicide associated with the diseases listed in § 1116(a)(2), and there was thus no need to refer expressly to an

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[3] As noted above, analysis by the National Academy of Sciences pursuant to the AOA supported Congress' understanding that the three diseases, including NHL, were associated with herbicide exposure. See 58 Fed. Reg. at 50,528.

"exposure" requirement if those service requirements were met. For purposes of §1116(a)(1)(B), Congress has similarly determined that proof of service in Vietnam at a time when herbicides were used is sufficient to presume exposure to dioxin and one other herbicide agent (2,4-dichlorophenoxyacetic acid (2,4-D)) and may permit a presumption of exposure to other herbicide agents that the VA finds to be associated with disease. See 38 U.S.C. § 1116(f). The only practical difference between (a)(1)(A) and (a)(1)(B) is that the former always presumes exposure, while the latter permits VA, if it finds a disease to be associated with an herbicide agent other than dioxin and 2,4-D, to require proof of exposure to that agent rather than presuming exposure.

Moreover, as noted above, Congress in 1996 narrowly limited "serv[ice] in the Republic of Vietnam" in § 1116(a)(1)(A) to encompass only those veterans potentially exposed to Agent Orange based on their dates and locations of service. If § 1116(a)(1)(A) was not concerned with exposure, Congress would not have amended the applicable period to match the dates of potential exposure.[4] Mr. Haas' contention is further refuted by the fact that the diseases in § 1116(a)(2)

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[4] Mr. Haas ignores the fact that § 1116(a)(1)(A) refers expressly to the dates of herbicide use in Vietnam, and instead asserts, incorrectly, that § 1116(a)(1)(A) applies to any veteran who served in Vietnam during the "Vietnam era." App. Br. at 9-10.

were codified in that section precisely because of their relationship to herbicide exposure.

Mr. Haas suggests that, because § 1116(a)(1)(A) does not expressly refer to a presumption of exposure, one who otherwise meets the requirements of that statute is still entitled to service connection even if evidence affirmatively established that he or she was not exposed to herbicides. Although that argument would appear flatly contrary to the statutory scheme, it is not relevant to this case, which turns upon the predicate question of whether offshore service satisfies the requirement in § 1116(a)(1)(A) of service "in the Republic of Vietnam." Congress' clear intent to establish presumptions for diseases linked to herbicide exposure, for the benefit of those who served at times and in locations where herbicides were in use, is undeniably a relevant factor for consideration in interpreting the statutory reference to service "in the Republic of Vietnam." The assertion that the presumptions, once they attach, cannot be rebutted by proof of nonexposure, does not undermine the VA's reliance on Congress' intent in determining when the presumptions attach.

Mr. Haas misleadingly suggests that § 1116(a)(1)(A) must be interpreted consistent with 38 C.F.R. § 3.313 rather than with 38 C.F.R. § 3.307(a)(6)(iii), because only the former existed when the AOA was enacted. App. Br. at 26, 29,

31-34. As explained in our brief, however, the AOA codified provisions in 38 C.F.R. § 3.311a, which included the presumption of herbicide exposure now contained in § 3.307(a)(6)(iii). Indeed, other portions of Mr. Haas' brief concede that the AOA codified *both §§* 3.311a and 3.313. See, e.g. ,App. Br. at 15, 17. And in yet other portions of his brief, Mr. Haas concedes the existence of § 3.311a, but argues that "there is no indication in the AOA that Congress intended to codify the 1985 regulation." App. Br. at 25.

Although Mr. Haas' position changes throughout his brief, the legislative history is consistent: Congress intended to codify the diseases service connected in VA regulations. There is no reason to believe that "[i]n defining the universe of veterans to whom the STS and chloracne presumptions would apply, Congress decided the universe should be exactly the same as for NHL" under § 3.313. App. Br. at 15-16. Congress did not exclusively codify § 3.313; if it had, only NHL would have appeared in § 1116(a)(2). Congress also codified § 3.311a, which clearly required service on land and was not promulgated based on scientific evidence of disease in veterans who solely served on ships.

Moreover, when the AOA was enacted neither §§ 3.311a nor 3.313 included diabetes. Diabetes was added later, both to the VA's herbicide regulations and § 1116(a)(2), based on evidence of a connection to exposure to herbicides used on

land and not on evidence like the 1990 CDC report finding a link to offshore service. The VA's rule making regarding diabetes was explicit: VA did not consider offshore service to warrant application of the presumption. See 58 Fed. Reg. at 50,529 (discussed supra).

IV. VA Has Not Been Inconsistent In Requiring Service On Land

The VA has never interpreted service in Vietnam to encompass service in the waters offshore for purposes of the Agent Orange presumption. Mr. Haas relies on distortions of the VA's argument, of law, and of fact, to conclude that "the Secretary's version of history" is "simply untrue." App. Br. at 25. Mr. Haas accuses the VA, for reasons that "lie beyond [his] comprehension," of claiming that § 3.307(a)(6)(iii) existed in 1991. App. Br. at 26 (citing Appellant's Br. at 41). Although our brief may have been less than precise in referring to pre-1991 "rule making proceedings relevant to section 3.307(a)(6)(iii)," we clearly established that section 3.311a in 1991 contained the provisions now located in (and thus relevant to) § 3.307(a)(6)(iii), and Mr. Haas' incredulity is belied by his own acknowledgement of this fact. App. Br. at 32. His suggestion that VA misled the Court is unsupported. Nonetheless, we reiterate for clarity that both § 3.311a, which Mr. Haas concedes existed in 1991, and § 3.307(a)(6)(iii), which incorporated § 3.311 a's provisions, reflect VA's consistent position that "serv[ice]

... in the Republic of Vietnam" includes offshore service only if the veteran had duty or visitation in the Republic of Vietnam. Mr. Haas does not respond to or attempt to refute those facts, but chooses instead to alternately ignore § 3.311a or argue that it had lapsed into irrelevance at some point prior to 1991.

Regarding Mr. Haas' assertion that VA manuals are "instructions of the Secretary," App. Br. at 27, we believe that our initial brief adequately addresses the authority of a Manual M21-1 provision. We add only that the term "instructions of the Secretary" (originally "instructions of the Administrator") is not a generic term referring to all direction from the Secretary, but refers to a specific class of documents formerly issued by the Administrator of Veterans Affairs providing instructions for implementation of newly enacted legislation prior to the issuance of regulations. See VAOPGCPREC 7-92 (1992 VAOPGCPREC LEXIS 438), para. 3 (Mar. 17, 1992). The Administrator of Veterans Affairs issued many such documents, expressly designated as "instructions," between 1934 and 1967. However, the practice of issuing such instructions has long since been discontinued. See 54 Fed. Reg. 5610, 5611 (1989). Notwithstanding that certain court decisions have found certain Manual M21-1 provisions to be substantive, they plainly are not "instructions of the Secretary" and generally are not binding substantive rules. They are guidance to

the VA's field offices as to how to apply the VA's binding regulations in particular cases. See Carter v. Cleland, 643 F.2d 1, 6 (D.C. Cir. 1980) ("[t]he Board is not bound by Department manuals, circulars, or similar administrativeissues").[5]

Finally, Mr. Haas alleges inconsistency based on a handful of regional office and Board of Veterans' Appeals (Board) decisions that incorrectly applied VA regulations. While such aberrant decisions are not surprising in view of the high volume of VA adjudications and some ambiguity in the VA's regulations, the public record is replete with Board decisions correctly applying the VA's interpretation, and representative decisions are cited on a page appended to this reply.

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[5] For these reasons, Mr. Haas' suggestion that our position is at odds with a position taken by the Solicitor General in Traynor v. Turnage 485 U.S. 535 (1988) is misplaced. As noted, the term "instructions of the administrator," refers to a specific designated set of "instructions" that the Administrator had determined to be precedential, a practice which no longer exists. Moreover, Traynor itself has nothing to do with whether the VA Adjudication Manual can be amended without notice and comment procedures. Rather, Traynor is a pre-Veterans Judicial Review Act case which involved a question of whether any judicial review existed for a claim that a VA regulation violated the Rehabilitation Act. Given the complete prohibition on judicial review at the time, the reference to "instructions of the administrator," was to suggest the potential broad-reaching effect that an exception to the ban on judicial review would have if the position advanced by the veteran in Traynor was approved. We have never disputed that the VA manual states the policies of the Secretary, but simply that its provisions, which are not promulgated pursuant to notice and comment procedures, do not require notice and comment procedures prior to amendment.

More importantly, there is no legal support for the position that, when an agency that decides hundreds of thousands of cases every year occasionally misapplies a regulation, that error establishes inconsistent regulatory interpretation. In fact, it is precisely because of such erroneous applications of law that the VA attempts to manage its adjudicators using the Manual M21-1. It is also why we revised the manual in 2002, and why we need to be free to revise it again, as VA discovers particular instances or patterns of the misapplication of regulations. Under the Veterans Court's Haas decision, however, our efforts to do so will be crippled and VA will be deprived of an essential case management tool.

V. The Amicus Brief Provides No Support For The Veterans Court's Erroneous Conclusion

In its brief, the amicus provides two additional reasons to support the Veterans Court's conclusions, neither of which possess any merit.[6]

First, the amicus contends that, because international law includes territorial waters in a country's sovereign territory, Mr. Haas must be presumed to have served in the Republic of Vietnam. There is no support for this argument. The definition of "service in the Republic of Vietnam," in the relevant statute does not

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[6] The amicus also notes Mr. Haas' testimony that his ship was enveloped by a cloud of Agent Orange during his service in Vietnam. That testimony is irrelevant to the question of whether a presumption applies but, as we noted in our opening brief, could provide direct evidence of herbicide exposure.

address territorial waters, not does it in any way suggest that Congress intended the definition of the Republic of Vietnam in §1116(f) to be defined by a particular meaning under international law. Indeed, the Veterans Court considered this argument and properly rejected it. Haas v. Nicholson, 20 Vet. App. 257, 263-65 (2006).

Second, the amicus suggests that a report regarding the service of the Australian Navy provides evidence that service on ships offshore resulted in exposure to Agent Orange. This argument must be rejected for several reasons. The study referred to is not part of the record, was not relied upon by the Court below, and, indeed, was not relied upon by the Secretary in promulgating its regulations or its official interpretation of those regulations. Such late proffered evidence cannot be considered by this Court for the first time on appeal. This Court has consistently confirmed the principle that appellate courts generally will not review evidence that was not presented to the trial court or board. See, e.g., Ballard Medical Products v. Wright, 821 F.2d 642, 643 (Fed. Cir. 1987) ("appellate court may consider only the record as it was made before the [trial] court"), citing Thomas & Betts Corp. v. Litton Systems, Inc., 720 F.2d 1572, 1581 n.6 (Fed. Cir.1984); see also Groner v. Golden Gate Gardens Apartments, 250 F.3d 1039, 1047 (6th Cir. 2001) (refusing to consider evidence not entered into

record or presented to trial court).

Moreover, because this report was not part of the record nor considered by the Secretary, there is no evidence of its reliability or its similarity to the service of American service members. These detailed scientific questions must be left to the expertise of the Secretary. The unsupported lay assertions of amicus' counsel cannot provide any basis for this Court to overturn the Secretary's reasonable interpretations in this case. If the Secretary determines to revisit this question, it is the Secretary that must determine the credibility of this study and whether to alter its existing reasonable interpretation.

CONCLUSION

For these reasons, and the reasons set forth in our opening brief, the decision of the Veterans Court should be reversed.

Respectfully submitted,

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Addendum

Appendix to Appellant's Reply in Haas v. Nicholson, 07-7037

Examples of Board of Veterans' Appeals decisions that correctly apply 38 C.F.R. § 3.307(a)(6)(iii)

Decision Date: 09/17/1998
Docket No.: 97-28 106
http://www.va.gov/vetapp98/files3/9827828.txt

Decision Date: 09/24/2001
Docket No.: 98-10 544A
http://www.va.gov/vetapp01/files03/0123117.txt

Decision Date: 12/04/2002
Docket No.: 02-07 959
http://www.va.gov/vetapp02/files04/0217518.txt

Decision Date: 10/10/03
Docket No.: 02-08 899
http://www.va.gov/vetapp03/files/0327247.txt

Decision Date: 10/14/2003
Docket No.: 02-03 250A
http://www.va.gov/vetapp03/files/0327385.txt

Decision Date: 12/20/03
Docket No.: 03-03 499
http://www.va.gov/vetapp03/files/0336607.txt

Decision Date: 12/15/03
Docket No.: 02-06 895A
http://www.va.gov/vetapp03/files/0333854.txt

Decision Date: 12/10/2003
Docket No.: 02-18 104
http://www.va.gov/vetapp03/files/0334456.txt

Decision Date: 01/05/2004
Docket No.: 03-03 688
http://www.va.gov/vetapp04/files/0400084.txt

Decision Date: 11/14/2005
Docket No.: 04-19 215
http://www.va.gov/vetapp05/files5/0530400.txt

Decision Date: 11/21/2005
Docket No.: 03-10 789
http://www.va.gov/vetapp05/files5/0531350.txt

Decision Date: 12/22/2005
Docket No.: 04-03 090
http://www.va.gov/vetapp05/files5/0534528.txt

CERTIFICATE OF SERVICE

I certify that on this 23RD day of JULY 2007, I caused to be served by United States mail (first class mail, postage prepaid) copies of "CORRECTED REPLY BRIEF FOR RESPONDENT-APPELLANT" addressed as follows:

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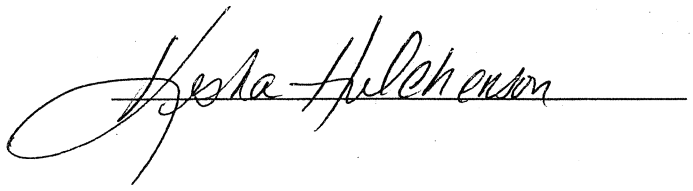

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)(B)

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent-appellant's counsel certifies that this brief complies with the Court's type-volume limitation rules. According to the word-count calculated by the word processing system with which this brief was prepared, the brief contains a total of 5,864 words.