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

BRIEF FOR RESPONDENT-APPELLANT

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellant's counsel states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Respondent–appellant's counsel is unaware of any other case pending in the Supreme Court, this Court, or any other circuit court of appeals that will be directly affected by this appeal. However, this appeal may potentially affect a significant number of cases pending before the Court of Appeals for Veterans Claims.

STATEMENT OF JURISDICTION

This Court possesses jurisdiction to review a decision of the United States Court of Veterans Appeals ("Veterans Court") "with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [CAVC] in making the decision." 38 U.S.C. § 7292(a). This Court may decide all questions of law relevant to a case within its jurisdiction. 38 U.S.C. § 7292(d)(1).

This case is an appeal from a judgment of the Veterans Court remanding the case to the VA. However, the Veterans Court's order remanding the case to VA does not deprive this Court of jurisdiction to consider this appeal as the appeal satisfies the requirements established in Williams v. Principi, 275 F.3d 1361, 1364 (Fed. Cir. 2002). The judgment of the Veterans Court was issued on September 8, 2006, with the notice of appeal to this Court filed on October 25, 2006.

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07-7037

JONATHAN L. HAAS,
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v.

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

STATEMENT OF THE ISSUES

1. Did the United States Court of Appeals for Veterans Claims ("Veterans Court") err in holding that 38 C.F.R. § 3.307(a)(6)(iii) must be construed to accord a presumption of herbicide exposure to veterans who served in ships off the coast of the Republic of Vietnam and did not serve on land or the inland waterways of that country?

2. Did the Veterans Court err by concluding that VA's Adjudication Procedure Manual M21-1 ("M21-1") required a presumption of herbicide exposure that could not be rebutted by evidence that the veteran served solely on a ship off the coast of the Republic of Vietnam without service on the land or inland

waterways of that country?

3. Did the Veterans Court exceed its authority by holding that Mr. Haas was entitled to a presumption of herbicide exposure, where that holding rests on a factual premise that would require additional fact-finding not yet made by VA?

STATEMENT OF THE CASE

I. Nature Of The Case

The respondent-appellant, R. James Nicholson, appeals the judgment of the Veterans Court in Jonathan L. Haas v. R. James Nicholson, Secretary of Veterans Affairs, 20 Vet. App. 257 (2006). The court set aside VA's interpretation of the statutory presumption of herbicide exposure and its implementing regulation, 38 C.F.R. § 3.307(a)(6)(iii), and VA's revision of its adjudication manual provision M21-1; reversed a February 20, 2004 Board decision to the extent that it denied Mr. Haas a presumption of exposure to herbicides; and remanded Mr. Haas' claim for service connection.

II. Statement Of Facts And Course Of Proceedings Below

Mr. Haas served from August 1967 to April 1969 in the United States Navy aboard the U.S.S. Mount Katmai ("Mount Katmai"), which was a ship responsible for resupplying smaller boats and ships with ammunition. JA 41.[1] Mr. Haas

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[1] "JA_" refers to the Joint Appendix.

received the Vietnam Service Medal (VSM).[2] JA 42.

In May 2002, a VA regional office denied Mr. Haas' claim for VA disability compensation based upon Type II diabetes with peripheral neuropathy, nephropathy (kidney disease), and retinopathy (loss of eyesight), which he claimed was caused by exposure to herbicides during service. JA 37, 38. Although Mr. Haas conceded that his ship never moored in a Vietnamese port and that he never set foot on shore, he alleged that the Mount Katmai had traveled within 100 feet of the coast of Vietnam, that an aircraft sprayed defoliant over coastal jungle areas and that clouds of the defoliant blew out to sea and enveloped the ship. JA 41. He alternatively contended that his service off the shore of Vietnam was service "in the Republic of Vietnam" for purposes of the presumption of exposure provided by 38 C.F.R. §3.307(a)(6)(iii).

On February 20, 2004, the Board concluded that service in Vietnam to invoke the presumption of herbicide exposure set forth in section 3.307(a)(6)(iii) required actual duty or visitation in Vietnam. JA 43. Further, the Board stated that

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[2] The VSM was established by Executive Order 11231. 30 Fed. Reg. 8665 (July 8, 1965). It was awarded to all members of the Armed Forces who served between July 3, 1965, and March 28, 1973, either (1) in Vietnam and contiguous waters and airspace thereover; or (2) in Thailand, Laos, or Cambodia, or airspace thereover, in direct support of operations in Vietnam. Generally, one day of regular service was sufficient to qualify for the VSM. See Army Reg. 600-8-22, para. 2-13.

"it is axiomatic that [herbicides], which destroyed vegetation, were not used at sea." JA 42. It found the allegation that the Mount Katmai was "enveloped by clouds of herbicide agent while operating within 100 feet off the coast of Vietnam . .. unsupported by any evidence demonstrating that this ship was located in waters sprayed by herbicides." JA 43. The Board then denied Mr. Haas' claim. JA 47.

On appeal, the Veterans Court concluded that 38 U.S.C. §1116(f), which provides a presumption of herbicide exposure to veterans who "served in the Republic of Vietnam," was ambiguous as to whether it applied only to service on land or could encompass service in waters off the coast of Vietnam. Haas, 20 Vet. App. at 263-68. The court held that VA's regulation, 38 C.F.R. §3.307(a)(6)(iii), was similarly ambiguous and did not defer to it pursuant to Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). Id. at 269-70. The court rejected VA's interpretation of section 3.307(a)(6)(iii) as "inconsistent with prior, consistently held agency views, plainly erroneous in light of its interpretation of legislative history, and unreasonable as an interpretation of VA's own regulations." Id. at 270. The court held that "[section] 3.307(a)(6)(iii) must be read to include at least service of the nature described by [Mr.Haas], that is, service in the waters near the shore of Vietnam, without regard to actual visitation or duty on land in the Republic of Vietnam." Id. at 273.

The court further held that a 1991 VA Adjudication Manual M21-1 provision required VA to concede that Mr. Haas had served in Vietnam because he had received the Vietnam Service Medal ("VSM"). Id. at 270-72 (quoting in full and discussing VA Adjudication Procedures Manual, M21-1, part III, para. 4.08(k)(1)-(2) (1991)). The court concluded that the M21-1 provision was substantive and thus a 2002 revision of it was invalid because VA did not follow the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. §553(a). Id. at 275-78.

Finally, the court recognized that VA had urged a remand of this case because the Board had not adequately addressed Mr.Haas' eligibility for direct service connection based upon the incident that he described on the Mount Katmai. Id. at 278. The court said that Mr.Haas was "free to argue this issue" on remand, but noted that "because of the Court's reversal as to the Board's determination that [Mr. Haas] was not entitled to the presumption of exposure to herbicides, such consideration is not necessary upon remand." Id. at 278-79.

SUMMARY OF THE ARGUMENT

The Veterans Court erred in holding that 38 C.F.R. §3.307(a)(6)(iii) must be construed to accord a presumption of herbicide exposure to veterans who did not serve on land or the inland waterways of the Republic of Vietnam. The court's

conclusion that this is the only permissible construction of the regulation rests upon the flawed view that there was no reasonable basis for VA to conclude that herbicide exposure was more likely to have occurred on land or inland waterways than in offshore waters and to establish a presumption of exposure based upon that general classification.

The Veterans Court erred in failing to defer to VA's reasonable interpretation of its own regulation, 38 C.F.R. § 3.307(a)(6)(iii), as providing a presumption of herbicide exposure to persons who served on land or the inland waterways of the Republic of Vietnam but not to persons who served solely in offshore waters or other locations. The court's refusal to defer was based upon the court's incorrect conclusion that VA's interpretation of its regulation is plainly erroneous and unreasonable, and is inconsistent with prior, consistently held views of the regulation. Because VA's interpretation was neither plainly erroneous nor inconsistent with the language of the regulation, it was entitled to deference.

The Veterans Court erred in concluding that the M21-1 provision extant in 1991 established a presumption of herbicide exposure that could not be rebutted by evidence that the veteran never served on land or the inland waterways of the Republic of Vietnam. The M21-1 provision does not limit the type of evidence that may be found sufficient to rebut a presumption of herbicide exposure. When

the M21-1 provision is properly viewed in the context of VA's established interpretation of 38 C.F.R. §3.307(a)(6)(iii), it is clear that evidence concerning the absence of service on land or inland waterways may rebut a presumption of herbicide exposure. The Veterans Court's interpretation of the M21-1 provision would illogically construe that provision to state an interpretation of section 3.307(a)(6)(iii) that conflicts with every other VA interpretation of the same regulation.

The Veterans Court erred in concluding that the 1991 M21-1 provision was a substantive rule and that a 2002 revision of that provision was invalid because VA did not employ notice-and-comment rulemaking procedures. The M21-1 provision merely explained the provisions of VA's regulation and advised first-line VA adjudicators how the regulatory standard would apply to a particular type of evidence. Accordingly, the M21-1 provision is properly viewed either as internal staff instructions or an interpretative rule, neither of which is subject to notice-and-comment rulemaking requirements.

Finally, the Veterans Court exceeded its jurisdiction in finding that Mr. Haas is entitled to a presumption of herbicide exposure on the ground that he served on a ship "near" the coast of the Republic of Vietnam. That conclusion rests upon a factual determination regarding the location of Mr. Haas' ship and its proximity to

shore, and the Veterans Court is not authorized to make such a factual determination in the first instance.

ARGUMENT

I. Jurisdiction And Standard Of Review

Pursuant to 38 U.S.C. § 7292(a), this Court has jurisdiction to review the validity of a Veterans Court interpretation of a statute or regulation, or its decision on a rule of law or the validity or interpretation of any statute or regulation relied upon by that court in making a decision. This Court reviews legal determinations of the Veterans Court under a de novo standard. Prenzler v. Derwinski, 928 F.2d 392, 393 (Fed. Cir. 1991). Upon such review, the Court may "affirm or, if the decision of the [Veterans Court] is not in accordance with law, . . . modify or reverse the decision of the [Veterans Court] or . . . remand the matter, as appropriate." 38 U.S.C. § 7292(e)(1). Thus, this Court has jurisdiction to review the Veterans Court's interpretations of 38 U.S.C. § 1116(f) and 38 C.F.R. § 3.307(a)(6)(iii); that court's interpretation of VA's M21-1 provision and its holding that the provision was substantive and had not been properly amended; and whether that court exceeded its jurisdiction by engaging in fact finding. All of these questions are pure questions of law.

The fact that the Veterans Court's order remanded Mr. Haas' claims for

further action is not an obstacle to this Court's jurisdiction. This Court generally will not exercise jurisdiction over Veterans Court remands because they are not final judgments, see, e.g., Adams v. Principi, 256 F.3d 1318, 1320 (Fed. Cir. 2001). However, in Williams v. Principi, this Court held that it would review a Veterans Court remand if three conditions are met:

> (1) there must have been a clear and final decision of a legal issue that (a) is separate from the remand proceedings, (b) will directly govern the remand proceedings or, if reversed by this court, would render the remand proceedings unnecessary; (2) the resolution of the legal issues must adversely affect the party seeking review; and (3) there must be a substantial risk that the decision would not survive remand, i.e., that the remand proceeding may moot the issue.

Williams, 275 F.3d 1361, 1364 (Fed. Cir. 2002) (footnotes omitted); see also Myore v. Principi, 323 F.3d 1347, 1351 (Fed. Cir. 2003). The Veterans Court's judgment meets all three criteria.

First, the judgment contains a clear and final legal decision that will directly govern the remand proceedings. Indeed, the court held that Mr. Haas is entitled to a presumption of exposure and that it was not necessary for VA to consider other theories of service connection. Haas, 20 Vet. App. at 279. Second, the resolution of the legal issue adversely affects VA because it requires VA to apply its regulations in a manner contrary to VA's intent in issuing those regulations and

contrary to Congress' intent in establishing a presumption of exposure for veterans who served in areas likely to have been sprayed with defoliant. Third, VA will be unable to appeal the Board's decision issued on remand in the present case because it mandates a presumption of exposure for Mr. Haas. See 38 U.S.C. § 7252(a) (VA "may not seek review of any" Board decision). Thus, this significant issue will clearly evade review following remand in this case. Consequently, this Court should review the Veterans Court's decision. See Williams, 275 F.3d at 1364.

II. The Veterans Court Erred in Holding That 38 U.S.C. § 1116(f) and 38 C.F.R. § 3.307(a)(6)(iii) Provide A Presumption of Herbicide Exposure For Off Shore Service

A. VA's Regulation Properly Applies The Presumption Only To Veterans Who Served On Land Or In Inland Waters

Mr. Haas claimed that his disabilities were caused by exposure to herbicides. Absent direct proof of exposure to herbicides during service, VA presumes exposure in accordance with 38 U.S.C. § 1116(f), which reads as follows:

> For purposes of establishing service connection for a disability or death resulting from exposure to a herbicide agent, including a presumption of service-connection under this section, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent containing dioxin or 2,4-dichlorophenoxyacetic acid, and may be presumed to have been exposed during such service to any other chemical compound in an herbicide

> agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

38 U.S.C. § 1116(f) (emphasis added).

The Veterans Court found 38 U.S.C. § 1116(f) ambiguous because the reference to "the Republic of Vietnam" conceivably could be limited to the nation's land mass or could include its territorial seas. Haas, 20 Vet. App. at 263-68. The Veterans Court correctly noted that where there is a gap because a "statute is silent as to the matter at issue, VA's attempt at filling that gap 'will generally be sustained as long as it reflects a permissible construction of the statute.'" Id. at 263 (quoting NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987), and citing Chevron, 467 U.S. at 842-43).

VA's gap-filling regulation is 38 C.F.R. § 3.307(a)(6)(iii), which states: "'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." VA's regulation is most reasonably construed to provide that persons who served in the waters offshore or in other locations will be considered to have served in the Republic of Vietnam only if their service involved duty or visitation in Vietnam. The plain language of the regulation favors that result.

Although the Veterans Court acknowledged that this was VA's interpretation of the statute and regulation (or at least VA's "current interpretation," in the court's view), it declined to defer to that interpretation, in part because it found that interpretation to be a "plainly erroneous" construction of the statute and regulation. Instead, the court held that "[section] 3.307(a)(6)(iii) must be read to include at least . . . service in the waters near the shore of Vietnam without regard to actual visitation or duty on land in Vietnam." Haas, 20 Vet. App. at 273. The court cited no basis for its conclusion that this was the only permissible interpretation of VA's regulation. In fact, the Court specifically found that this interpretation was not compelled by anything in the language of either 38 U.S.C. § 1116(f) or 38 C.F.R. § 3.307(a)(6)(iii) or in the relevant legislative history. Id. at 263-69 (finding statutory and regulatory language and legislative history ambiguous as to whether offshore service is considered service in the Republic of Vietnam).

In light of its finding that the statutory and regulatory language was reasonably susceptible to an interpretation limited to service on land in Vietnam, the court's subsequent pronouncement that the regulation must be interpreted to encompass some forms of offshore service is contrary to precedent. The basis for this significant leap from ambiguity to certitude is not clear from the Veterans

Court's opinion. What is clear, however, is that the Veterans Court itself believed that its "interpretation" was not compelled by the language of the statute or regulation or by any clear expression of Congressional intent.

Fairly read, the Veterans Court's opinion offers only a single rationale for its conclusion that § 3.307(a)(6)(iii) must be interpreted to include some forms of offshore service. The court explained:

> given the spraying of Agent Orange along the coastline and the wind borne effects of such spraying, it appears that these veterans serving on vessels in close proximity to land would have the same risk of exposure to the herbicide Agent Orange as veterans serving on adjacent land, or an even greater risk than that borne by those veterans who may have visited and set foot on the land of the Republic of Vietnam only briefly. This type of service may reasonably be equated to that of the veteran serving on a vessel operating in the inland waterways of the Republic of Vietnam without having set foot on land . . . . The Secretary has provided no rational distinction between these types of service and the Court can divine none. . . . Thus, in light of the lack of clear legislative history and the VA's own plainly erroneous and underinclusive interpretation, the Court concludes that § 3.307(a)(6)(iii) must be read to include at least . . . service in the waters near the shore of Vietnam, without regard to actual visitation or duty on land in the Republic of Vietnam.

Id. at 273 (citations omitted).[3]

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[3] The court also noted that its interpretation was "supported by" a provision of an internal VA manual. As explained in section IIIA. of this brief, that conclusion

Although not stated by the Veterans Court, this analysis applies equally to interpretation of 38 U.S.C. § 1116(f). In view of the statutory ambiguity, if it is at least conceivable that Congress intended to provide a presumption of herbicide exposure to persons who served on land but not to persons who served solely in offshore waters, VA's interpretation of both the statute and the regulation would be a permissible one. The Veterans Court's conclusion is necessarily a conclusion that the distinction between those classes of veterans is so irrational that it is not a permissible interpretation of 38 U.S.C. § 1116(f). That cannot be correct.

The classification embodied in VA's regulation, as VA has consistently interpreted it, distinguishes between veterans who were present within the geographic land boundaries of Vietnam and veterans who were not present within those land boundaries. The basis for that distinction, as explained by VA on several occasions,[4] is readily apparent. Because herbicides were used as defoliants, it can reasonably be concluded that they were dispersed overwhelmingly, if not exclusively, over land, and seldom, if at all, over areas off

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rests upon a mischaracterization of the referenced manual provision and, moreover, simply ignores the substantial evidence of VA's actual interpretation of § 3.307 (demonstrated in section II.B.1 of this brief).

[4] VA's numerous explanations of its interpretation are discussed in section II.B.1 of this brief.

the coast of Vietnam. Consequently, herbicide exposure is far more likely to have occurred within the geographic land boundaries of Vietnam than in areas off the coast of Vietnam, and it is certainly conceivable that Congress intended to provide a presumption of exposure only to persons who served in the area where herbicide exposure was likely to have occurred.

The Veterans Court appears to have recognized the validity of this distinction by limiting its analysis to individuals at the margin of the two classes delineated under VA's regulation. Specifically, the court referred to veterans who served on land "only briefly" and those who served offshore, but in "close proximity" to land areas where herbicides were applied. Haas, 20 Vet. App. at 273.[5] This analysis, however, rests upon the patently incorrect assumption that the mere possibility of similarities between some persons who are subject to the presumption and some who are not renders the classification so arbitrary that Congress and VA could not have intended it. That is not the law.

As the Supreme Court has noted, "[t]he 'task of classifying persons for . . .

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[5] We do not dispute that some persons who served only on vessels off the coast of Vietnam may have been exposed to herbicides, or that some persons who served on land in Vietnam may not have been so exposed. In the former case, the veteran may submit lay or other evidence of herbicide exposure in service, obtained with VA's assistance, and thereby obtain presumptive service connection for any disease associated with such exposure. In the latter case, VA may find that the presumption of herbicide exposure is rebutted. See 38 U.S.C. § 1116(f).

benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Mathews v. Diaz, 426 U.S. 67, 83-84 (1976)). Provided there is a legitimate basis for the general classification established by Congress or the agency, it is not arbitrary or capricious simply because it may be overinclusive or underinclusive on some applications. See Weinberger v. Salfi, 422 U.S. 749, 776 (1975) ("[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases"). Because there is unquestionably a legitimate basis for Congress and VA to limit the presumption of herbicide exposure to persons who served within the geographic land boundaries of Vietnam, the Veterans Court erred in concluding that § 3.307(a)(6)(iii) must be interpreted to apply to at least some veterans who served only in the waters off the coast of Vietnam.

B. The Veterans Court Should Have Deferred To VA's Reasonable Interpretation Of The Presumption

Even if the both the statute and regulation are ambiguous, the Veterans Court should nevertheless have deferred to VA's reasonable interpretation of its own regulation. The Veterans Court's substitution of its own favored

interpretation is contrary to well-established precedent and should be reversed.

It is well established that an agency's interpretation of its own regulation is due even greater deference than that provided by Chevron to agency constructions of statutes. "The administrative construction [of the agency's own regulation] becomes 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Smith v. Nicholson, 451 F.3d 1344, 1350 (Fed. Cir. 2006) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see also American Express Co. v. United States, 262 F.3d 1376, 1382 (Fed. Cir. 2001); Ramey v. Gober, 120 F.3d 1239, 1246 (Fed. Cir. 1997). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Udall v. Tallman, 380 U.S. 1, 16 (1965). "Deference to an agency's interpretation of its own regulations is broader than deference to an agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own." Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005).

VA's interpretation of section 3.307(a)(6)(iii) is undeniably consistent with the text of the regulation and is reasonable. Section 3.307(a)(6)(iii) defines Vietnam service as "includ[ing] 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. § 3.307(a)(6)(iii). The structure and grammar of section 3.307(a)(6)(iii) are consistent with VA's interpretation that the modifying phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" applies to both "service in the waters offshore" and "service in other locations." See Demko v. United States, 216 F.3d 1049, 1052 (Fed. Cir. 2000) (concluding that a statute with similar syntax was unambiguous in indicating that the modifying phrase applied to both preceding phrases). Had VA intended the modifying phrase to apply only to "service in other locations," it could have indicated such intent by inserting a comma after the phrase "service in the waters offshore" and by using the disjunctive term "or" rather than the conjunctive term "and". Compare 38 C.F.R. § 3.313 (using comma and the disjunctive term "or" to intentionally create a different result, as discussed further below).

The Veterans Court declined to defer to VA's interpretation of its regulation because it found VA's interpretation to be contrary to prior VA interpretations, plainly erroneous, and unreasonable. Haas, 20 Vet. App. at 270. The court was wrong on all three counts.

1. VA's Interpretation Has Been Consistent

Contrary to the Veterans Court's decision, VA has consistently interpreted

section 3.307(a)(6)(iii).

VA's historical exclusion of service in the waters offshore is well-documented. In promulgating the prior iteration of the rule currently codified at section 3.307(a)(6)(iii) (formerly 38 C.F.R. § 3.311a), VA stated that service in Vietnam "encompass[ed] service elsewhere if the person concerned actually was in the Republic of Vietnam, however briefly." 50 Fed. Reg. 15,848, 15,849 (Apr. 22, 1985).

Subsequent rulemakings stated with even greater clarity that a veteran who served offshore is not entitled to the presumption of exposure. In a September 1997 rulemaking, VA explained its interpretation of section 3.307(a)(6)(iii) when it adopted a new rule (38 C.F.R. § 3.814(c)(1)) incorporating the same definition of "serv[ice] in the Republic of Vietnam" for purposes of the monetary allowance for individuals suffering from spina bifida whose biological mother or father was a Vietnam veteran.

> VA defines the term service in the Republic of Vietnam, for the purposes of presuming herbicide exposure, to include service in the waters offshore and service in other locations "if the conditions of service involved duty or visitation in the Republic of Vietnam" (see 38 CFR 3.307(a)(6)(iii)). Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of

> exposure to persons who may have been in areas where herbicides could have been encountered.

62 Fed. Reg. 51,274 (1997).

A May 2001 rulemaking explained that section 3.307(a)(6)(iii) "include[d] the inland waterways," but at the same time stressed that, "[w]ith respect to offshore service, 38 C.F.R. § 3.307(a)(6)(iii) provides that 'Service in the Republic of Vietnam' includes service in offshore waters or other locations only if the conditions of service involved duty or visitation within the Republic of Vietnam." 66 Fed. Reg. 23,166, 23,166 (May 8, 2001). The rulemaking specifically described VA's position as having consistently been that section 3.307(a)(6)(iii) does not apply to veterans who served only in deep waters and stated that subsequent legislation offered "no basis to conclude that Congress intended to broaden that definition to include deep-water service." Id. See also 69 Fed. Reg. 44,614, 44,620 (July 27, 2004) (indicating that presumption did not extend to service in offshore waters).

In addition, the record before the Veterans Court contained a September 13, 1996 Memorandum from VA's Assistant General Counsel to the Acting Director of VA's Compensation and Pension Service. ROA at 310-11. The memorandum specifically concluded that the language of § 3.307(a)(6)(iii) reflected an intent to exclude offshore service. Id. The memorandum justified this exclusion because

"application of herbicides would not have occurred in the waters off the shore of Vietnam, [thus] limiting the scope of the term '[s]ervice in the Republic of Vietnam' to persons whose service involved duty or visitation in the Republic of Vietnam." Id.

Although the Veterans Court found that a provision formerly in the M21-1 reflected a different interpretation of § 3.307(a)(6)(iii), the court's analysis of that provision is also incorrect, as explained in section IV.A. of this brief. Accordingly, the court erred in finding inconsistency in VA's interpretation of its regulation and in denying deference on that basis.

2. VA's Interpretation Is Not Plainly Erroneous

The Veterans Court found VA's interpretation "plainly erroneous" on two grounds. First, the court stated that it could divine no rational basis for distinguishing veterans who served for long periods in close proximity to shore from veterans who served in inland waterways or who set foot only briefly in Vietnam. Haas, 20 Vet. App. at 272-73. Second, it found that VA's interpretation was "based on a misguided and plainly erroneous review of the legislative history of 38 U.S.C. § 101(29)." Id. at 272.

With respect to the first ground, as demonstrated in section II.A of this brief, there is a clear rational basis for the classification embodied in VA's interpretation

and the fact that it may appear overinclusive or underinclusive as applied to persons near either side of the line does not make it unreasonable. See United States R.R. Retirement Bd., 449 U.S. at 179.

With respect to the second ground, the Veterans Court cited VAOPGCPREC 27-97, a precedent opinion of VA's General Counsel, to conclude that VA's interpretation of section 3.307 was based on a mistaken reading of the legislative history relating to 38 U.S.C. § 101(29), which, the court found, did not support the VA's interpretation of the presumption. Haas, 20 Vet. App. at 272. However, VA did not rely upon the legislative history of section 101(29) for support of its regulatory interpretation of the presumption of herbicide exposure. Section 101(29) states the definition for the specific term "Vietnam era" (by referencing specific dates) when that term is used in title 38, United States Code. It does not concern the presumption of herbicide exposure as specifically noted in the precedent opinion. Indeed, the precedent opinion notes the differences between the two statutory provisions.

VAOPGCPREC 27-97 compared and contrasted section 101(29) with section 1116(f) and concluded that although both statutes refer to service "in the Republic of Vietnam," "the references may reasonably be interpreted as having different meanings in the context of the particular statutes in which they appear."

VAOPGCPREC 27-97, para. 8. The opinion then stated that, "[i]n any event, the regulatory definition in 38 C.F.R. § 3.307(a)(6)(iii) . . . requires that an individual actually have been present within the boundaries of the Republic to be considered to have served there, through inclusion of the requirement for duty or visitation in the Republic." Id. Because the statute authorizing benefits based upon exposure to herbicides does not rely upon 38 U.S.C. § 101(29), and because VA has never adopted the section 101(29) definition as applicable to § 3.307(a)(6)(iii), VA's "definition of '[s]ervice in the Republic of Vietnam' in section 3.307(a)(6)(iii) is not inconsistent with our interpretation of the reference to service in the Republic of Vietnam in section 101(29)(A)." Id. Thus, although VA concluded that § 101(29) and § 1116(f) are similar in excluding offshore service, it clearly did not suggest that the legislative history of § 101(29) informed VA's interpretation of § 1116(f). The court's holding based upon VAOPGCPREC 27-97 is simply incorrect.

3. VA's Interpretation Is Not Unreasonable

The Veterans Court held that VA's interpretation of 38 C.F.R. § 3.307(a)(6)(iii) was unreasonable because VA "has not presented valid or thorough reasoning for either its present interpretation of what constitutes 'service in the Republic of Vietnam,' or the difference in construction of the definition among the various regulations incorporating the definition." Haas, 20 Vet. App. at

273-74. Again, the court's decision is incorrect. As explained above, the basis for presuming herbicide exposure for veterans who served on land but not those who served only in offshore waters is readily apparent, as the presumption corresponds to the areas where herbicides were known or likely to have been applied. Further, VA has adequately explained this basis for its interpretation.

In issuing the predecessor to current section 3.307(a)(6)(iii) (i.e., former 38 C.F.R. § 3.311a), VA in 1985 explained that herbicides "were used during the Vietnam conflict to defoliate trees, remove ground cover, and destroy crops," and that many veterans "were deployed in or near locations where Agent Orange was sprayed," but that the "absence of on-site measurement of dioxin contamination and other factors" hampered determinations as to which such veterans were actually exposed to herbicides. See 50 Fed. Reg. 15,848, 15,849 (Apr. 22, 1985). These statements reflect the premise that herbicide exposure was most likely to have occurred on land, where the herbicides were applied, implicitly (and rationally) distinguishing such service from service on open water, where herbicide exposure was less likely.

VA further explained in a September 1997 rulemaking, that, "[b]ecause herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty

or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered." 62 Fed. Reg. 51,274 (1997). In a July 2004 Rulemaking, VA explained that it was "not aware of any valid scientific evidence showing that individuals who served in the waters offshore of the Republic of Vietnam or in other locations were subject to the same risk of herbicide exposure as those who served within the geographic land boundaries of the Republic of Vietnam." 69 Fed. Reg. 44,614, 44,620 (July 27, 2004). Accordingly, the Veterans Court's finding that VA has not explained the basis for its interpretation is simply incorrect and cannot justify the court's refusal to defer to VA's interpretation.

Likewise, the VA's differing construction of the term "service in the Republic of Vietnam," in different regulations is premised upon the significantly different bases and purposes of those provisions as well as significant differences in syntax. The Veterans Court's conclusion that VA has not explained the differing definitions of "serv[ice] in the Republic of Vietnam" in § 3.307(a)(6)(iii) and 38 C.F.R. § 3.313 reflects a basic misunderstanding of those provisions. Haas, 20 Vet. App. at 269, 274 (discussing grammatical differences between §§ 3.307 and 3.313(a)).

Section 3.313 provides a presumption of service connection for non-

Hodgkin's lymphoma.

> 3.313 Claims based on service in Vietnam.
>
> > (a) *Service in Vietnam. Service in Vietnam* includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.
> > (b) *Service connection based on service in Vietnam.* Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease. (Authority: 38 U.S.C. 501(a))
>
> 38 C.F.R. § 3.313.

Section 3.307(a)(6)(iii), which provides the presumption of herbicide exposure, provides as follows:

> 'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in Vietnam." 38 C.F.R. § 3.307(a)(6)(iii).

Although the definitions are similar, there are real differences in syntax that support different interpretations. In section 3.313(a), the phrases "service in the waters offshore" and "service in other locations" are separated by a comma and the disjunctive term "or", suggesting that the qualifying language ("if the conditions of service involved duty or visitation to Vietnam") applies only to the latter phrase. In contrast, in section 3.307(a)(6)(iii), those phrases are joined by the conjunctive term "and", with no comma, thus suggesting that the modifying language applies to

both preceding phrases.

Despite these differences, the court conflated the two regulations, assuming that their respective definitions of "service in the Republic of Vietnam" were intended to describe identical service. The regulations are not coextensive and the differing punctuation effects VA's intent to have two differing definitions of service apply depending upon whether the veteran's claim was based upon non-Hodgkin's lymphoma or herbicide exposure.

Section 3.313 was promulgated on October 26, 1990. See 55 Fed. Reg. 43,123 (Oct. 26, 1990). The notice of final rulemaking specifically cited to and relied on a Centers for Disease Control ("CDC") study that "noted an increased risk of developing [non-Hodgkins Lymphoma ("NHL")] based on service in Vietnam during the Vietnam era rather than exposure to herbicides containing dioxin." Id. at 43,124 (emphasis added). The notice of proposed rulemaking had similarly linked service during the Vietnam era and NHL, without regard to herbicide exposure. See 55 Fed. Reg. 25,339, 25,339 (June 21, 1990) ("The Secretary has determined that there is a relationship between Vietnam service and NHL."). Likewise, the 1996 memorandum from the Assistant General Counsel, discussed above, "note[d] that similar language to that of the last sentence of section 3.307(a)(6)(iii) is included in 38 C.F.R. § 3.313 . . . suggesting the possibility of a broader application with regard

to the NHL regulation," i.e., § 3.313.[6] ROA at 311. In short, section 3.313 provides a presumption of service connection for NHL based upon service during the Vietnam era, irrespective of herbicide exposure.

The Veterans Court seems not to have understood that service in Vietnam has more than one statutory meaning, as VA explained in VAOPGCPREC 27-97. To establish wartime service for other statutory purposes, 38 U.S.C. § 101(29)(A) has its own definition of "[t]he term 'Vietnam era.'" But for purposes of presuming exposure to herbicides, section 1116(f) requires that a veteran have "served in the Republic of Vietnam" during specified time periods when it was known that herbicides were used. See, e.g., S. Rep. No. 104-371, at 21 (1996) ("Herbicides and defoliants were not in use throughout the 'Vietnam era' . . . . Rather, such materials were not introduced into the Republic of Vietnam until January 9, 1962."). The statute does not refer to or rely upon the time period established in 38 U.S.C. § 101(29) and referred to therein as the Vietnam Era.

Accordingly, because section 3.313(b) provides benefits only to veterans with "[s]ervice in Vietnam during the Vietnam era," 38 C.F.R. § 3.313(b) (emphasis

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[6] The General Counsel cited an earlier opinion, VAOPGCPREC 7-93, noting that the CDC study included veterans who served on boats off the coast of Vietnam. As noted in the 1996 memo, the CDC finding, which is not based on herbicide exposure and which included offshore service, suggests a reasonable basis for the different standards in section 3.307(a)(6)(iii) and section 3.313.

added), the regulation cannot possibly be referring to the benefits provided under 38 U.S.C. § 1116(f), which refers to a subset of the Vietnam era during which herbicide exposure was possible, and must be viewed as reflecting 38 U.S.C. § 101(29), which uses—and in fact defines—the term, "Vietnam era." The regulations clearly apply to different groups of veterans. The court's comparison of the two regulations is flawed because the two regulations are intended to serve different purposes, and the different language and punctuation is thus intentional.

The Veterans Court did not discuss this regulatory history. The court's explanation for conflating these two regulations was solely that "[i]n defining 'service in the Republic of Vietnam' before the Court, the Secretary has used interchangeably the definitions in 38 C.F.R. § 3.307(a)(6)(iii) and § 3.313(a), thus implying that there is no difference in the meaning of this definition as it appears in the separate regulations." Haas, 20 Vet. App. at 269. VA's opening brief to the Veterans Court did in one instance cite and quote § 3.313 where reference to § 3.307(a)(6)(iii) would have been proper. However, this single error does not establish that VA views the different definitions of sections 3.307(a)(6)(iii) and 3.313 as interchangeable. Mr. Haas did not apply for benefits based on NHL. The ultimate conclusions in the Secretary's brief and supplemental brief pertained to section 3.307(a)(6)(iii), the regulation actually applicable in this case.

Section 3.313 clearly was not intended to implement 38 U.S.C. § 1116(f), and the Veterans Court erred in finding VA's interpretation of § 3.307(a)(6)(iii) unreasonable simply because it differs from the distinct standards in § 3.313.

C. A Change in VA's Interpretation of Its Own Regulation Is Not a Reason to Deny Deference

Even assuming for the sake of argument that VA did change its interpretation of section 3.307(a)(6)(iii), an agency's interpretation or application of a statute may need to change, such that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-64. "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." American Trucking Assoc. v. Atchison, T. & S. F. R. Co., 387 U.S. 397, 416 (1967). Thus, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal." Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (citations omitted).

Similarly, this Court has concluded that where an earlier decision construes a statute based upon deference to an agency interpretation of that statute, a later panel

of that court "is free to consider whether a new agency interpretation is reasonable without en banc reconsideration of the earlier panel decision." Tunik v. MSPB, 407 F.3d 1326, 1338-1339 (Fed. Cir. 2005). In Tunik, the Federal Circuit went so far as to hold that even a "'sharp break with prior interpretations' of the statute in question" is entitled to deference. Tunik, 407 F.3d at 1338 (quoting Rust v. Sullivan, 500 U.S. 173, 186 (1991) (quoting Chevron, 467 U.S. at 862)). If prior precedent does not bind VA to prior regulatory interpretations, then prior VA manual interpretations should not so bind VA.

As explained above, VA's interpretation has indeed been consistent and, moreover, the supposed inconsistency alleged by the Veterans Court was not a proper basis on which to deny deference.

III. The Veterans Court Misinterpreted The M21-1 Provision And Erred In Concluding That The Provision Is Substantive

In 2002, to eliminate any potential ambiguity regarding offshore service, VA issued an M21-1 provision that made it clear that veterans who served only on ships offshore and did not serve on land are not entitled to the presumption of herbicide exposure. Specifically, the provision provided:

> e. Verifying Vietnam Service for Claims Involving Exposure to Herbicide Agents
>
> (1) It may be necessary to determine if a veteran had "service in Vietnam" in connection with claims based on

> exposure to herbicide agents. A veteran must have actually served on land within the Republic of Vietnam (RVN) to qualify for the presumption of exposure to herbicides. 38 CFR Sec. 3.307(a)(6). The fact that a veteran has been awarded the Vietnam Service Medal does not prove that he or she was "in country." Service members who were stationed on ships off shore, or who flew missions over Vietnam, but never set foot in-country, were sometimes awarded the Vietnam Service Medal. To verify service in RVN, you should review the veteran's DD-214 to determine if it shows such service (e.g., "Foreign Service: Republic of Vietnam"). If not, you may need to obtain and review the veteran's other personnel records (e.g., Department of the Army Form 20 or equivalent). (VAOPGCPREC 7-93.)
>
> (2) If a veteran claims service connection for exposure to herbicide agents, and alleges service on a ship in the waters offshore of Vietnam, review the record for evidence that the ship was in the waters off Vietnam and that the veteran's service involved duty or visitation on land. If the veteran cannot produce evidence of this, request verification from the Navy [address deleted]. Furnish the name and number of the ship (e.g., USS Galveston (CLG 3)), and the dates that it is alleged to have been in the waters offshore of Vietnam.

M21-1, pt. III, para. 4.24(e)(1)-(2), change 88 (Feb. 27, 2002).

Rather than consider that M21-1 provision, the Veterans Court relied upon a November 1991 M21-1 provision, which provided:

> (1) It may be necessary to determine if a veteran had "service in Vietnam" in connection with claims for service connection for non-Hodgkin's lymphoma, soft-tissue sarcoma and chloracne. . . . In the absence of contradictory evidence, "service in Vietnam" will be

> conceded if the records shows [sic] that the veteran received the Vietnam Service Medal.
>
> (2) If a veteran who did not receive the Vietnam Service Medal claims service connection for non-Hodgkin's lymphoma, soft-tissue sarcoma or chloracne and alleges service on a ship in the waters offshore Vietnam, review the record for evidence that the ship was in the vicinity of Vietnam for some significant period of time (i.e., more than just in transit through the area). If the veteran cannot produce evidence that the ship was in the waters offshore Vietnam, contact the Compensation and Pension Service Projects Staff. Be prepared to furnish the name of the ship, the number of the ship, and the dates that it is alleged to have been in the waters offshore Vietnam. Central Office will attempt to obtain confirmation from the Department of Defense.

M21-1, part III, paragraph 4.08(k)(1)-(2). The Veterans Court incorrectly concluded that this provision both required a presumption of herbicide exposure for all veterans who received the Vietnam Service Medal and that it created a substantive right. Both of these conclusions are incorrect.

A. The Veterans Court Misinterpreted The Purpose Of The M21-1 Provision

The Veterans Court concluded that the 1991 M21-1 provision "concedes the application of the presumption [in § 3.307(a)(6)(iii)] based upon the mere receipt of the VSM." Haas, 20 Vet. App. at 271. But the M21-1 provision did no such thing. Paragraph 4.08(k)(1) conceded the applicability of section 3.307(a)(6)(iii) based upon the VSM only "[i]n the absence of contradictory evidence." The concession

in no way precluded the operation of the actual text of the rebuttable presumption set forth in section 3.307(a)(6)(iii), which specifically requires that "'service in the Republic of Vietnam' include[ ] . . . duty or visitation in the Republic of Vietnam." Paragraph (k)(1) merely instructed adjudicators to accept the VSM as prima facie evidence that the veteran's service met the requirements of § 3.307(a)(6)(iii) absent contradictory evidence. The court either overstated or misunderstood the effect of both paragraph 4.08(k)(1) and the § 3.307(a)(6)(iii) presumption of exposure.

The court believed that "evidence to the contrary" could not possibly refer to "evidence that the [VSM] recipient never set foot on Vietnamese soil" because, "[w]ere this the case, there would be no need for the provision of subparagraph (2), which requires analysis of a ship's operating environment for those who served offshore and did not receive the VSM." Haas, 20 Vet. App. at 276. Contrary to the court's conclusory assertion, there are numerous reasons why assessment of the ship's operating environment could be relevant to a veteran's claim, even though offshore service alone would not warrant a presumption of herbicide exposure under section 3.307(a)(6)(iii). For example, if offshore service were verified and the veteran suffered from NHL, VA could grant service connection under section 3.313 irrespective of whether the veteran was entitled to a presumption of herbicide exposure. Further, development of evidence as to the location and

duration of offshore service might lead to the discovery of other evidence establishing visitation in Vietnam, for example as part of military duties or service on a launch boat that traveled inland waters. Additionally, evidence of dates and locations of service on ships off the coast of Vietnam may also help identify direct evidence of herbicide exposure, such as where a vessel was known to have operated in areas proximate to herbicide spraying, as was alleged by Mr. Haas in this very case. Thus, the Veterans Court erred when it found such information "irrelevant" unless service in Vietnam included service in the waters offshore and erred in holding that VA's prior manual provision conflicts with VA's interpretation of section 3.307(a)(6)(iii) set forth in numerous other documents. Haas, 20 Vet. App. at 271.

The Veterans Court made no effort to reconcile the M21-1 provision with VA's numerous stated interpretations of 3.307(a)(6)(iii), even though that provision clearly can be construed in a manner harmonious with VA's regulatory interpretation. See Rice v. Martin Marietta Corp., 13 F.3d 1563, 1568 (Fed. Cir. 1993) (the canon of construction that statutes dealing with similar subjects should be construed harmoniously applies equally to regulations). Accordingly, the court implausibly concluded that the M21-1 provision interprets § 3.307(a)(6)(iii) in a manner that conflicts with every one of VA's publicly-stated interpretations of that

regulation.

B. The M21-1 Provision Was Not Substantive

Based upon its erroneous reading of the former M21-1 provision, the Veterans Court further erred in holding that the provision was a substantive rule that could be revised only through notice-and-comment rulemaking. Haas, 20 Vet. App. at 275-77. The Veterans Court held that the M21-1 provision was a substantive rule because it "instructs adjudicators to apply the presumption in cases in which the veteran received the VSM" and concluded that presumption, "when applied, dictate[s] the award of service connection."[7] Haas, 20 Vet. App. at 276.

Because, as shown above, the M21-1 provision is consistent with VA's well-documented and consistent interpretation of § 3.307(a)(6)(iii), it is not a substantive rule. The M21-1 provision directed adjudicators to concede service in Vietnam based upon receipt of the VSM, "[i]n the absence of contradictory evidence." M21-1, part III, para. 4.08(k)(1). As explained above, "evidence to the contrary" would necessarily include evidence showing that the veteran did not meet the requirements of the applicable regulation, section 3.307(a)(6)(iii), such as evidence that the veteran never had duty or visitation in the Republic of Vietnam. Fairly viewed, the

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[7] The court incorrectly suggested that the presumption of herbicide exposure would "dictate the award of service connection." Herbicide exposure is only one of the factors necessary to support an award.

M21-1 provision thus instructs VA first-line adjudicators to treat the VSM as prima facie evidence of service in the Republic of Vietnam provided that there is no contrary evidence of record showing that the veteran did not meet the requirements of § 3.307(a)(6). In other words, the M21-1 provision merely explained how to evaluate a particular type of evidence (receipt of the VSM) in relation to existing statutory and regulatory requirements.

As such, the M21-1 provision is properly viewed as an interpretative rule. See Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99 (1995) (explanation of application of statutory and regulatory standards to specific circumstance is a "prototypical" example of an interpretative rule). The M21-1 provision did not "effect[ ] a change in existing law or policy which affects individual rights and obligations," Animal Legal Defense Fund v. Quigg, 932 F.2d 920, 927 (Fed. Cir. 1991) (quotation omitted), but merely explained the application of section 3.307(a)(6)(iii) with respect to a specific type of evidence.

The Veterans Court distinguished the M21-1 provision at issue in Mr. Haas' case from those relating to developing evidence of asbestos exposure, reviewed by the Federal Circuit in Dyment v. Principi, 287 F.3d 1377 (Fed. Cir. 2002). Haas, 20 Vet. App. at 276. In Dyment, the court found M21-1 provisions not to create a presumption of asbestos exposure, as they indicated that exposure was a fact to be

determined from the evidence. Dyment, 287 F.3d at 1384. The Veterans Court found this case dissimilar because the M21-1 provision before it in Haas "instructs adjudicators to apply the presumption in cases in which the veteran received the VSM" and the application of the presumption "dictate[s] the award of service connection." Haas, at 276. Again, this is an incorrect description of the M21-1 provision, because it conceded exposure only in the absence of contradictory evidence and, in turn, because the presumption of exposure alone cannot establish service connection. In fact, this case is exactly like Dyment because both cases involve M21-1 provisions that assist adjudicators in making necessary findings of fact to determine whether a claimant enjoys the benefit of a presumption.

The Veterans Court's conclusion that the M21-1 provision was substantive seems to have been based as well on the court's belief that the application of the M21-1 provision could have affected the outcome of a claim. Yet, this Court has held that "a rule that does no more than clarify the interpretation of a statute is necessarily interpretive in character, even if that interpretation has consequences for the rights of the parties." National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1376 (Fed. Cir. 2001).

In Routen v. West, this Court considered whether a change in the standard of proof to rebut a presumption was a substantive or procedural change in the law.

Routen, 142 F.3d 1434 (Fed. Cir. 1998). After noting that an evidentiary presumption merely affects the burden of proof, not the burden of persuasion, id. at 1440, the Court specifically determined that a change in the "evidentiary standard" relating to a presumption "does not effect a substantive change in the law . . . since no new entitlement is created," id. at 1442. This was true despite the fact that "had the new presumption standard been in effect and applied at the time Mr. Routen's claim was first considered, the outcome in his case might have been different." Id.

Based on Routen, the Veterans Court erred even if the M21-1 provision operated the way that the court believed that it did, i.e., if it required VA to presume herbicide exposure for any veteran who received the VSM, including a veteran who served only in areas that were not near foliage. At most, the M21-1 provision lightened the evidentiary burden to establish exposure via the presumption.

Similarly, the D.C. Circuit has stated that "[t]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals." American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 560 (D.C. Cir. 1983). Accord Metropolitan School Dist. v. Davila, 969 F.2d 485, 493 (7th Cir. 1992); White v. Shalala, 7 F.3d 296, 303 (2nd Cir. 1993); Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984); cf. Carter v. Cleland, 643 F.2d 1, 5-9 (D.C. Cir. 1980) (VA M21-1

provision creating an "evidentiary presumption ... at the first levels of decisionmaking" was not substantive because the appellate decisionmaker was not bound by the provision). Again, the mere fact that Mr. Haas might have benefitted from the application of the M21-1 (and we do not concede that Mr. Haas would in fact have benefitted from it) does not support the court's position that the M21-1 provision was substantive.

Further, the M21-1 provision does not even establish an evidentiary presumption. It merely explains how to evaluate a specific item of evidence while still requiring VA to consider "contradictory evidence." As such, the rule is at best guidance for VA adjudicators as to how to interpret, or apply, the presumption of exposure in cases involving recipients of the VSM. The adjudicators remain free to exercise judgment based upon all available evidence. See Carter, 643 F.2d at 8-9 (concerning M21-1 provision); see also Panhandle Producers and Royalty Owners Assoc. v. Economic Regulatory Admin., 822 F.2d 1105, 1110 (D.C. Cir. 1987); Ryder Truck Lines v. United States, 716 F.2d 1369, 1377-78 (11th Cir. 1983).

In contrast to an interpretive rule, a legislative rule exercises power delegated to the agency by Congress to fill a gap in the law. See White v. Shalala, 7 F.3d at 303-04. A legislative rule "creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself." La Casa Del

Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1st Cir. 1992). Legislative rules generally are based on some degree of policy analysis, "such as weighing the pro's and con's of one course of action versus another," rather than on traditional tools of statutory interpretation. Splane v. West, 216 F.3d 1058, 1063 (Fed. Cir. 2000). The M21-1 provision does not attempt to qualify or distinguish itself from the "duty or visitation" requirement. In fact, it specifically helps adjudicators identify information to determine whether a veteran's service constituted "duty or visitation." Likewise, the M21-1 provision does not address policy concerns about whether a veteran should or should not be presumed to have been exposed to herbicide or should be considered to have served in Vietnam. Such considerations were made by VA earlier, in the Federal Register rulemaking proceedings relevant to section 3.307(a)(6)(iii) and 3.313, which are discussed above.

Courts have also recognized that "[i]n determining whether an agency statement is a substantive rule, which requires notice and comment, . . . the ultimate issue is 'the agency's intent to be bound'." Public Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n, 940 F.2d 679, 681-82 (D.C. Cir. 1991) (quoting Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528, 538 (D.C. Cir. 1988)); see also Splane, 216 F.3d at 1063 ("'an agency's characterization of its own action, while not decisive, is a factor [to] consider'" (quoting American Hosp. Ass'n v.

Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1987)). As noted earlier, VA's intended interpretation of section 3.307(a)(6)(iii) was expressed on several occasions in the Federal Register, the appropriate forum for such expression. Moreover, the placement of the provision in the M21-1, which is not promulgated by the Secretary but rather is written (and frequently revised) by the Director of VA's Compensation and Pension Service, further suggests that VA did not intend to be bound by the provision. For example, the Board is not bound by the M21-1. See 38 U.S.C. § 7104 ("The Board shall be bound in its decision by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department"). Had VA intended the provision to carry substantive weight, VA would have bound the entire agency to the provision. Finally, if the M21-1 provision at issue here were intended to establish the rule inferred by the Veterans Court, it would be wholly illogical for the Federal Register documents discussing § 3.307(a)(6)(iii) to state a completely contrary interpretation.

As the Court of Appeals for the Ninth Circuit has noted, courts must exercise caution in inferring substantive rules from internal agency directives intended to convey guidance to agency personnel, because "[t]o hold such a [directive] binding on the VA would 'hamper seriously the ability of departmental administrators to communicate freely and flexibly with the employees of their departments by means

of written directives.'" Rank v. Nimmo, 677 F.2d 692, 698 (9th Cir. 1982) (Citation omitted). In this instance, the magnitude of the court's error goes well beyond mere interference with internal agency communications. As a result of its misguided reading of the 1991 M21-1 provision, the Veterans Court not only invalidated VA's 2002 revision to that manual, but also effectively invalidated VA's long-standing interpretation of 38 U.S.C. § 1116(f) and 38 C.F.R. § 3.307(a)(6)(iii). The plain effect of the court's construction of the manual provision is to preclude VA from giving effect to its publicly stated interpretation of the statute and regulation.

For the foregoing reasons, this Court should reverse the Veterans Court's decision invalidating VA's 2002 manual revision.

IV. The Veterans Court Exceeded Its Authority by Holding That Mr. Haas Was Entitled To a Presumption of Herbicide Exposure Because

The Veterans Court reversed the Board's determination that Mr. Haas is not entitled to the benefit of the presumption of exposure. Haas, 20 Vet. App. at 279. As discussed above, both the M21-1 provision applied by the court and the section 3.307(a)(6)(iii) presumption of exposure are rebuttable. Although the Veterans Court determined that evidence that a veteran did not set foot on Vietnamese soil is insufficient to rebut the presumption of exposure, it did not rule out the possibility

that other evidence could rebut the presumption. Id. at 276. Further, although the court held that section 3.307(a)(6)(iii) must be read to encompass service "near the shore of Vietnam," it offered no guidance as to the parameters of that ill-defined standard. Nonetheless, citing Mr. Haas' "uncontradicted," although implausible, testimony that his ship had ventured within 100 feet of the shoreline, and what appear to have been the court's own assumptions about the "wind borne effects" of the "spraying of Agent Orange along the coastline," Id. at 273, the court concluded that Mr. Haas' service fell within the scope of the presumption of exposure. Id.. These determinations require factual findings that were not made by VA, and the Veterans Court had no authority to usurp VA's fact-finding function. See 38 U.S.C. § 7261, Hensley v. West, 212 F.3d 1255, 1263 (Fed. Cir. 2000). Accordingly, this Court should vacate the Veterans Court's holding that Mr. Haas is entitled to a presumption of herbicide exposure.

CONCLUSION

For these reasons, this Court should vacate the Veterans Court's decision and remand Mr. Haas' claim with instructions for that court to apply VA's interpretation of the statutory and regulatory presumption of herbicide exposure.

Respectfully submitted,

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