The American Legion

For God and Country

bulletin

National Veterans Affairs and Rehabilitation Commission
1608 K Street, N.W. • Washington, D.C. 20006
K. Robert Lewis, Chairman - Connecticut
Peter S. Gaytan, Director - Maryland

20-06 **August 22, 2006**

RE: "Blue Water" Navy Veterans Entitled to the Presumption of Exposure to Agent Orange

On August 16, 2006, the United States Court of Appeals for Veterans Claims (CAVC or Court) held that Vietnam veterans who served in the waters off Vietnam (these class of veterans are known as "Blue Water" Navy veterans) are entitled to disability benefits for diseases related to exposure to Agent Orange. This decision reverses the Department of Veterans Affairs (VA) policy that veterans had to step foot on Vietnamese soil in order to be entitled to the presumption of exposure to Agent Orange, and hence, presumptive disability benefits related to this exposure. The veteran in this case, a retired Navy commander who served in the waters offshore of Vietnam and received the Vietnam Service Medal, claimed that his diabetes mellitus and complications were related to his exposure to Agent Orange that drifted from the shore. The National Veterans Legal Services Program (NVLSP) represented the veteran before the CAVC.

The Board of Veterans' Appeals (Board or BVA) denied the veteran's claim for service-connected disability compensation based on exposure to Agent Orange, holding that although he served in the official waters of Vietnam, he did not step foot on shore in Vietnam; therefore, service connection for his diabetes and residuals was not warranted. The veteran appealed to the CAVC.

In its decision, the CAVC reversed the Board's determination that the veteran was not entitled to the presumption of exposure to herbicides and remanded the matter for readjudication consistent with this decision. The Court held:

(1) 38 U.S.C. §1116(f) is not clear on its face concerning the meaning of the phrase "service in the Republic of Vietnam." Accordingly, the Court held that the statute is ambiguous, and the Secretary may promulgate regulations to resolve that ambiguity so long as the regulations reasonably interpret both the language of the statute and the intent of Congress in enacting the legislation.

(2) 38 U.S.C. § 1116(f) does not by its terms limit application of the presumption of service connection for herbicide exposure to those who set foot on the soil of the Republic of Vietnam.

(3) The Secretary's regulations, while a permissible exercise of his rulemaking authority, do not clearly preclude application of the presumption to a member of the Armed Forces who served aboard a ship in proximity to the land mass of the Republic of Vietnam.

(4) The provisions of the VA Adjudication Procedure Manual in effect at the time the appellant filed his claim in 2001 entitled him to a presumption of service connection based upon his receipt of the Vietnam Service Medal (VSM).

(5) VA's attempt to rescind that version of the M21-1 provision more favorable to the appellant was ineffective because VA did not comply with the notice and comment requirements of the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A).

(6) If service connection for diabetes mellitus is granted upon remand, secondary service connection must be considered for the veteran's claims of peripheral neuropathy, nephropathy, and retinopathy.

Guidance for Accredited American Legion Representatives

It is unclear at this time whether the VA will appeal the Court's decision in *Haas.* Also, the VA may amend their regulations in a way that is adverse to veterans who otherwise would have benefited from the Court's decision in *Haas.* It is clear however, that the negative change to the M21-1 has no force and effect because it was promulgated unlawfully. As of this writing, *Haas* is the "law of the land" and therefore VA must abide by it.

Prompt action by representatives is essential. Because the VA may issue a negative regulation, claims based on presumptive exposure to Agent Orange needed to be filed before the VA can finalize a negative regulation. Veterans and representatives seeking service connection for diseases as a result of Agent Orange exposure (as well as those seeking to have their benefits restored) are encouraged to take the following steps:

For new claims: If the veteran received the Vietnam Service Medal (or its predecessor award, the Armed Forces Expeditionary Medal (AFEM) (Vietnam)), for service offshore of the Republic of Vietnam between January 9, 1962, and May 7, 1975, that was not just overflight duty, the advocate should argue that service connection should be granted under the M21-1 provision and *Haas*.

Even if the veteran received the Vietnam Service Medal for service in a location other than Vietnam (such as Thailand), their representatives should still apply for service connection, since the M21-1 provision does not outright prohibit application of the Agent Orange presumption in such case. This type of claim may be difficult to win but should be filed.

Finally, even if the veteran did not receive the Vietnam Service Medal or the AFEM, the advocate should apply for service connection if the veteran had offshore Naval service during the above

periods. This is because the M21-1 provision does not preclude service connection as long as it is verified that the veteran had service offshore of Vietnam.

For denied claims still pending before the VA or before the CAVC: If the veteran received the Vietnam Service Medal (or the Armed Forces Expeditionary Medal (Vietnam)), for service offshore of the Republic of Vietnam (that was not just overflight duty), the advocate should appeal any denials of service connection (and severances of service connection) and argue before the VA (or the Court) that service connection should be granted under the M21-1 provision and *Haas*. Even if the veteran received the Vietnam Service Medal for service in a location other than Vietnam (such as Thailand), he/she should still appeal.

If the veteran did not receive the Vietnam Service Medal or predecessor award, the veteran should appeal the denial of service connection or severance action if he or she had offshore Naval service during the above periods.

For claims previously denied and that are now final: For claims that were previously denied and that are now final, the veteran should file a reopened claim in order to get benefits started (or restored) as soon as possible. The representative should cite the M21-1 provision and *Haas* in the claim.

We suggest that the representative **not** raise the issue of an earlier effective date, or claim clear and unmistakable error (CUE) in the decision that denied or severed benefits, until benefits are actually granted and restored. Once benefits have been granted or restored, the representative should consider challenging the effective date by filing a Notice of Disagreement with the effective date and/or a motion to revise the prior VA (or Board) decision that denied the claim (or that severed service connection) on the basis of CUE. Unrepresented veterans should seek the assistance of a representative prior to taking such action.

If you have any questions or concerns, please contact Steve Smithson, Deputy Director for Claims Service, VA&R, at (202) 263-2985 or ssmithson@legion.org.

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National Veterans Affairs and
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