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Date: January 22, 2009

MEMORANDUM

NO. 01-09-03

SUBJ: STAY LIFTED ON PROCESSING OF CLAIMS FOR COMPENSATION BASED ON EXPOSURE TO HERBICIDES AFFECTED BY *HAAS v. NICHOLSON*

1. REFERENCES

- a. *Haas v. Nicholson*, 20 Vet. App. 257 (2006), *rev'd sub nom. Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), *cert. denied*, 77 U.S.L.W. 3267 (Jan. 21, 2009) (No. 08-525).
- b. 38 U.S.C. § 1116; 38 C.F.R. §§ 3.307, 3.309, 3.313.
- c. VA Adjudication Procedure Manual M21-1, Part III, ¶ 4.08(k)(1)-(2) (Nov. 1991).
- d. *Ribaudo v. Nicholson*, 20 Vet. App. 552 (2007) (en banc).
- e. *Ribaudo v. Nicholson*, 21 Vet. App. 16 (2007) (per curiam order).
- f. *Ribaudo v. Nicholson*, 21 Vet. App. 137 (2007) (per curiam order).
- g. *Ribaudo v. Peake*, No. 06-2762, 2008 WL 5082129 (U.S. Vet. App. Nov. 17, 2008) (per curiam order).
- h. SUP. CT. R. 45; FED. R. APP. P. 41; FED. CIR. R. 41.

2. PURPOSE OF THIS MEMORANDUM

The purpose of this memorandum is to lift a stay that was implemented at the Board of Veterans' Appeals (BVA or Board), by direction of the Secretary, on the adjudication of cases affected by the decision issued by the U.S. Court of Appeals for Veterans Claims (Veterans Court) in *Haas v. Nicholson*, 20 Vet. App. 257 (2006). The procedures for handling cases affected by that stay were set forth in Chairman's Memorandum No. 01-06-24, "Processing of Claims for Compensation Based on Exposure to Herbicides Affected by *Haas v. Nicholson* – Imposition of Stay." This memorandum rescinds Chairman's Memorandum No. 01-06-24, and sets forth new procedures for handling cases previously affected by the stay.

3. BACKGROUND

a. In its decision in *Haas*, the Veterans Court reversed a Board decision, which denied service connection for diabetes mellitus, with peripheral neuropathy, nephropathy, and retinopathy as a result of exposure to herbicides. The Board determined that, although the appellant had served in the waters off the shore of the Republic of Vietnam, such service did not warrant application of the presumption of herbicide exposure because the appellant never set foot on land in that country.

b. In reversing the Board's decision, the Veterans Court held that a VA manual provision, VA Adjudication Procedure Manual M21-1, Part III, ¶ 4.08(k)(1)-(2) (Nov. 1991), created a presumption of herbicide exposure based on receipt of the Vietnam Service Medal for purposes of service

connection for diseases associated with herbicide exposure. In so holding, the Veterans Court found the manual provision to be a substantive rule and invalidated a subsequent amendment to that provision. The Veterans Court also found that neither the statute nor the regulation governing herbicide exposure claims precludes application of the presumption of herbicide exposure to persons who served aboard ship in close proximity to the Republic of Vietnam. Accordingly, the Veterans Court held that, for the purpose of applying the presumption of exposure to herbicides under 38 C.F.R. § 3.307(a)(6)(iii), “service in the Republic of Vietnam” will, in the absence of contradictory evidence, be presumed based upon the veteran’s receipt of a Vietnam Service Medal, without any additional proof required that a veteran who served in waters offshore of the Republic of Vietnam actually set foot on land.

c. The Department of Veterans Affairs (VA), through the VA Office of the General Counsel (OGC), immediately prepared a recommendation that the Department of Justice (DOJ) appeal *Haas* to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).

d. On September 21, 2006, in order to avoid burdens on the adjudication system, delays in the adjudication of other claims, and unnecessary expenditure of resources through remand or final adjudication of claims based on court precedent that may ultimately be overturned on appeal, the Secretary of Veterans Affairs (Secretary) issued a memorandum directing the Board to stay action on and refrain from remanding all claims for service connection based on exposure to herbicides in which the only evidence of exposure is the receipt of the Vietnam Service Medal or service on a vessel off the shore of Vietnam. Chairman’s Memorandum No. 01-06-24 implemented this stay.

e. Shortly thereafter, a separate veteran-claimant filed a petition for extraordinary relief in the nature of a writ of mandamus that would direct the Secretary to rescind VA’s stay of proceedings embodied in Chairman’s Memorandum No. 01-06-24. On January 9, 2007, the Veterans Court issued its decision in *Ribaudo v. Nicholson*, 20 Vet. App. 552 (2007) (en banc), wherein it held that the Secretary “possesses no authority, inherent or otherwise, to stay, arbitrarily and unilaterally, the processing of appeals merely because he disagrees with a decision of [the Veterans Court] in a proceeding to which he is a party.” *Ribaudo v. Nicholson*, 20 Vet. App. at 560. The Veterans Court noted that if the Secretary wished to stay the effect of any decision issued by it during the pendency of an appeal, he must file a proper motion to stay with either the Veterans Court or the Federal Circuit.

f. On January 16, 2007, the Secretary filed such a motion, asking the Veterans Court to stay the precedential effect of *Haas* and to delay entering judgment in *Ribaudo* until it had ruled upon the motion to stay. On January 26, 2007, the Veterans Court issued a temporary stay on adjudication of cases at VA that are potentially affected by *Haas*. *Ribaudo v. Nicholson*, 21 Vet. App. 16 (2007) (per curiam order). On April 13, 2007, the full court panel issued an order in *Ribaudo v. Nicholson*, 21 Vet. App. 137 (2007) (per curiam order), which dissolved the January 26, 2007, temporary stay, and stayed VA’s adjudication of all cases potentially impacted by *Haas* until such time as the Federal Circuit issued mandate in the pending appeal of the *Haas* decision. The Veterans Court also ordered that the Secretary may, upon motion of the appellant, advance for consideration compelling cases on the Board’s docket to which *Haas* applied.

g. On May 8, 2008, the Federal Circuit issued its decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) where it reversed the Veterans Court, holding that the Veterans Court had erred in rejecting VA’s interpretation of § 3.307(a)(6)(iii) as requiring a servicemember’s presence at some point on the landmass or inland waters of Vietnam in order to benefit from the regulation’s

presumption. The Federal Circuit issued mandate in *Haas* effective October 16, 2008. See FED. R. APP. P. 41 (setting forth federal rules of appellate procedure with respect to issuance of mandate and staying of mandate pending petition for certiorari); FED. CIR. R. 41 (outlining Federal Circuit's rule with respect to mandate and effective date thereof).

h. That same day, the appellant in *Ribaudo* filed a motion for leave to file a motion to modify the Veterans Court's April 13, 2007 per curiam order to state that the stay effectuated in *Ribaudo* would expire either when the United States Supreme Court (Supreme Court) denied the petition for a writ of certiorari in *Haas* or decided *Haas* on the merits, rather than expiring on the date that the Veterans Court issued the mandate in that case. The Veterans Court denied the motion on November 17, 2008, noting that the April 13, 2007 *Ribaudo* order, which merely stayed the implementation of its own *Haas* decision, had become final upon issuance of the mandate on May 17, 2007.

i. The appellant in *Haas* filed a petition for a writ of certiorari to the Supreme Court, which was denied on January 21, 2009. See *Haas v. Peake*, 77 U.S.L.W. 3267 (Jan. 21, 2009) (No. 08-525). As the *Ribaudo* stay of *Haas*-related cases is no longer in effect, and in light of the Supreme Court's denial of certiorari, VA's OGC has advised that the Board may resume adjudication of the previously stayed cases. See FED. R. APP. P. 41; see also SUP. CT. R. 45 (setting forth Supreme Court rule as to process and mandates).

4. LIFTING OF STAY PROCEDURES

a. **Case Distribution.** All cases with appeals pending before the Board that involve issues that were previously stayed by the Board pursuant to *Haas* will be distributed in a manner prescribed by the Chairman or his designee. Case distribution will be consistent with the Board's statutory requirement under 38 U.S.C. §§ 7107 and 7112 regarding consideration of appeals in docket order, with certain exceptions. To the extent possible, cases will be redistributed to the Veterans Law Judge to whom they were previously assigned.

b. **Recall of Claims Folders.** All claims folders containing issues that were previously stayed by the Board pursuant to *Haas* will be promptly recalled from the agency of original jurisdiction by appropriate Management and Administration (M&A) staff if the claims folder is not presently located at the Board.

5. RESCISSION

a. Chairman's Memorandum No. 01-06-24 (September 21, 2006), "Processing of Claims for Compensation Based on Exposure to Herbicides Affected by *Haas v. Nicholson* – Imposition of Stay," is hereby rescinded in its entirety.

b. This memorandum is effective until expressly rescinded, modified, or superseded.

James P. Terry

Chairman

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Director, Compensation and Pension Service (21)