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Office of the Chairman
Board of Veterans' Appeals
Washington, D.C. 20420

Date: April 1, 2019

MEMORANDUM
NO. 01-19-02

**SUBJ: STAY LIFTED ON ADJUDICATION OF APPEALS FOR COMPENSATION
BASED ON ALLEGED EXPOSURE TO HERBICIDE AGENTS IN THE
OFFSHORE WATERWAYS OF THE REPUBLIC OF VIETNAM**

1. REFERENCES

- a. 38 U.S.C. § 1116;
- b. 38 C.F.R. § 3.307(a)(6);
- c. *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008)
- d. *Procopio v. Wilkie*, No. 17-1821 (U.S. Fed. Cir. Jan. 29, 2019);
- e. Chairman's Memorandum 01-18-15, "Stay of Adjudication of Appeals for Compensation Based on Alleged Exposure to Herbicide Agents in the Offshore Waterways of the Republic of Vietnam" (Oct. 22, 2018).

2. PURPOSE OF THIS MEMORANDUM

The purpose of this memorandum is to rescind a stay on the adjudication of appeals which may be affected by the ruling of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Procopio v. Wilkie*, No. 17-1821 (U.S. Fed. Cir.) imposed by Chairman's Memorandum 01-18-15, as well as to set forth procedures for the resumption of processing of cases affected by the stay.

3. BACKGROUND

a. Congress has established a presumption of exposure to herbicide agents for those veterans who, during active military, naval, or air service, "served in the Republic of Vietnam" during a period beginning on January 9 1962, and ending on May 7, 1975. 38 U.S.C. § 1116 (a)(1)(A). The Secretary of Veterans Affairs issued a regulation defining "service in the Republic of Vietnam" to include the "waters offshore" if the conditions of service involved duty or visitation in the Republic of Vietnam. 38 C.F.R. § 3.307 (a)(6)(iii). Both the statutory phrase "served in the Republic of Vietnam" and the implementing regulation were found ambiguous as applied to service in the waters adjoining the landmass of Vietnam. *Haas v. Peake*, 525 F.3d

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1168, 1184-85 (Fed. Cir. 2008). VA interpreted both the statute and regulation to require service on the actual landmass or on the inland waterways of the Republic of Vietnam, which the Federal Circuit found reasonable. *Id.* at 1189-93.

b. On January 29, 2019, the Federal Circuit issued an en banc decision in *Procopio v. Wilkie*, reversing its prior determination that VA's interpretation of the statute and regulation was reasonable. Instead, the Court held that the statutory phrase "the Republic of Vietnam" included the 12 nautical mile territorial sea of that nation. *Procopio*, slip op. at 10. By extension, the presumption of herbicide agent exposure extends to those veterans with service in the territorial seas of the Republic of Vietnam. On March 21, 2019, the Federal Circuit denied the Secretary's motion to stay the entry of mandate. Mandate was issued on March 22, 2019.

4. LIFTING OF STAY PROCEDURES

a. All cases with appeals pending before the Board that involve issues that were previously stayed by the Board pursuant to Chairman's Memorandum No. 01-18-15 will be distributed in a manner prescribed by the Chairman or her designee. Case distribution will be consistent with the Board's statutory requirements 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.

5. RESCISSIONS

a. Chairman's Memorandum No. 01-18-15 (Oct. 22, 2018) entitled "Stay of Adjudication of Appeals for Compensation Based on Alleged Exposure to Herbicide Agents in the Offshore Waterways of the Republic of Vietnam," is hereby rescinded in its entirety.

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



Cheryl L. Mason
Chairman