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VA TRAINING LETTER 10-06

Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era Department of Veterans Affairs - Veterans Benefits Administration Washington, D.C. 20420 All VA Regional Offices - Training Letter 10-06

SUBJ: Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era

Purpose

The Compensation and Pension (C&P) Service is providing the following information and guidelines in order to promote regional office awareness, consistency, and fairness in the processing of disability claims based on herbicide exposure from Veterans with service in the U.S. Navy and Coast Guard during the Vietnam era.

Background

Department of Veterans Affairs (VA) regulations provide Veterans who served in the Republic of Vietnam with the presumption of herbicide exposure due to widespread use of Agent Orange and other herbicides during U.S. military operations within the country. This allows for service connection on a presumptive basis for certain diseases that are associated with such exposure.

VA limits the presumption of exposure to Veterans who served on the ground or on the inland waterways of Vietnam and excludes Veterans who served aboard ships operating on Vietnam's offshore waters. This limitation has been legally upheld by the court system. However, VA has become increasingly aware of evidence showing that some offshore U.S. Navy and Coast Guard ships also operated temporarily on Vietnam's inland waterways or docked to the shore.

Additionally, VA has recently acquired evidence showing that certain ships operated primarily on the inland waterways rather than offshore. Veterans who served aboard these ships qualify for the presumption of herbicide exposure. Assisting Veterans who served aboard these ships requires special claims processing steps that are explained in this training letter.

Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era

I. Introduction

Legal Background

The Department of Veterans Affairs (VA) acknowledges the widespread use of tactical herbicides, such as Agent Orange, by the United States military during the Vietnam War and has extended a presumption of herbicide exposure to any Veteran who served on the ground or on the inland waterways of the Republic of Vietnam between January 9, 1962, and May 7, 1975. This policy represents VA's interpretation of the statutory phrase "served in the Republic of Vietnam" found at 38 U.S.C. § 1116(a)(1). The regulation implementing this interpretation at 38 C.F.R. § 3.307(a)(6)(iii) makes it clear that "duty or visitation in the Republic of Vietnam" is required to qualify for the presumption. This policy is grounded in the fact that aerial herbicide spraying was used within the land boundaries of Vietnam to destroy enemy crops, defoliate areas of enemy activity, and create open security zones around U.S. military bases.

A legal challenge to VA's interpretation was brought before the United States Court of Appeals for Veterans Claims (CAVC) in *Haas v. Nicholson* (2006). The case sought to further extend the presumption of exposure to U.S. Navy Veterans who served aboard ships operating on Vietnam's offshore waters.

CAVC held that the presumption of exposure should be extended to U.S. Navy Veterans. VA filed an appeal on that decision and implemented a stay on adjudicating the numerous new claims resulting from it. The United States Court of Appeals for the Federal Circuit, in *Haas v. Peake* (2008), reversed the CAVC decision and held that VA's policy of extending the presumption only to those Veterans who served on the ground or on the inland waterways of Vietnam was a reasonable and valid statutory interpretation.

The *Haas* court cases and the resulting claims have sensitized Compensation and Pension (C&P) Service to the issues related to herbicide exposure claims from U.S. Navy Veterans. As a result, there is a need to clarify current claims processing policies and procedures in order to assist this group of Veterans in an equitable and consistent manner.

U.S. Navy in Vietnam

The following summary of U.S. Navy and Coast Guard activities in Vietnam is intended to give regional office personnel background information on the service provided to our nation by these Veterans and to assist with understanding development procedures when processing their claims.

U.S. Navy and Coast Guard operations in the waters of Vietnam were primarily focused on providing gunfire support for ground troops and conducting interdiction patrols designed to disrupt the movement of enemy troops and supplies from North Vietnam into South Vietnam. Shipboard gunfire was directed at inland targets primarily by destroyers (designated by DD hull numbers) operating at varying distances off the Vietnam coast. It was used to protect U.S. Army and Marine ground forces and destroy enemy positions within gun range. The destroyers operated along the offshore "gun line" on a rotating basis for several days or weeks at a time and then returned to escorting larger ships at

sea or to a safe port, such as Subic Bay in the Philippines, for replenishment. Support missions for ground troops and attacks on enemy positions were also conducted by U.S. Navy aircraft launched from aircraft carriers (designated by CV or CVA hull numbers) stationed at sea, generally from 30 to 100 miles off the Vietnam coast. The gun line ships and aircraft carriers, as well as their supply and support ships, are collectively referred to as the “Blue Water” Navy because they operated on the blue-colored waters of the open ocean.

Although some Blue Water Navy destroyers were involved with enemy interdiction, the majority of these operations were conducted by smaller vessels based along the coast or within the river systems of South Vietnam. These vessels are collectively referred to as the “Brown Water” Navy because they operated on the muddy, brown-colored inland waterways of Vietnam. In general, patrolling of close coastal waters and the larger rivers was conducted by 50-foot swift boats (designated by PCF hull numbers) while patrolling of smaller rivers and waterways was carried out by 30-foot river patrol boats (designated by PBR hull numbers). Swift boat units were stationed at coastal locations where major rivers flowed into the South China Sea, from the Cua Viet River near the demilitarized zone (DMZ), which divided North from South Vietnam, to the large Mekong River Delta system that dominated the southern landscape of South Vietnam. Swift boats and some larger vessels sought to prevent enemy movement and activity along the close coastal waters and major river arteries.

The code name for this interdiction effort was “Operation Market Time.” The U.S. Navy was assisted in this mission by two types of U.S. Coast Guard Cutters. They included “patrol boat” cutters (designated by WPB hull numbers), which were 80-foot vessels that operated like Navy swift boats, and “high efficiency” cutters (designated by WHEC hull numbers), which were 300-foot vessels that could interdict enemy craft farther offshore. These patrol and high efficiency cutters operated from land-based units within Vietnam and did not rotate in and out of Vietnamese waters like the larger Blue Water Navy vessels did.

The smaller Navy river patrol boats generally operated within the Mekong River Delta region and were attached to the Mobile Riverine Force, which was a joint force comprised of Brown Water Navy vessels and the U.S. Army 9th Infantry Division. This area of operation was strategically important because it was located just south of Saigon, the capital of South Vietnam, and bordered Cambodia. During the war, the overthrow of the Saigon government was a major enemy objective. As a result, troops and materials from North Vietnam moved south along a hidden supply line within Cambodia, known as the Ho Chi Minh Trail, and then into the Mekong River Delta region of South Vietnam to mount attacks. An especially dangerous area of enemy activity within the delta was referred to as the Rung Sat Special Zone. The Mobile Riverine Force mission was to protect Saigon from enemy infiltration through this difficult delta terrain. The code name for this interdiction effort was “Operation Game Warden.”

Numerous support ships were also involved in the delta interdiction activities, including supply landing craft vessels (designated by LST hull numbers); mobile barracks vessels (designated by APL hull numbers); and auxiliary repair craft vessels (designated by ARL hull numbers).

Although operations on the inland waterways of Vietnam were primarily conducted by Brown Water Navy and Coast Guard vessels, some larger Blue Water Navy vessels periodically entered inland waterways to provide gunfire support or deliver troops or supplies. Gunfire support for land-based or riverine operations was provided by destroyers that entered a river, such as the Saigon River in the southern delta area, as a means to get closer to enemy targets.

Following these temporary inland waterway operations, destroyers would return to patrolling the offshore gun line or travel farther out to sea for aircraft carrier escort duty. A number of Blue Water Navy amphibious assault and supply vessels also periodically entered inland waterways to deliver troops for a combat mission or supplies for units stationed on the rivers.

II. Processing Guidelines for Regional Offices

Evidentiary Development

U.S. Navy and Coast Guard Veterans of Vietnam who file disability claims will generally fall into one of three categories:

(1) those who served at land based naval support facilities, such as the U.S. Naval Support Activities at Da Nang, near the DMZ, or Vung Tau, near the Mekong River Delta, or with land-based Navy Seabee construction units at various locations throughout South Vietnam;

(2) those who served with the Brown Water Navy aboard patrol and support vessels operating on the inland rivers, canals, estuaries, and close coastal waters of South Vietnam; or

(3) those who served with the Blue Water Navy aboard large ships operating on the open offshore waters of South and North Vietnam.

Veterans who served on land at a naval support facility or with the Brown Water Navy qualify for the presumption of herbicide exposure and development should proceed to establish their land-based or inland waterway service. Keep in mind that Veterans who served aboard the larger patrol vessels conducting interdiction missions along the close coastal waters operated out of land bases. So, despite the coastal off-shore activities, the crew was land based. This was not the case with Blue Water Navy crews who lived aboard their ships.

In order for the presumption of exposure to be extended to a Blue Water Navy Veteran, development must provide evidence that the Veteran's ship operated temporarily on the inland waterways of Vietnam or that the Veteran's ship docked to the shore or a pier. In claims based on docking, a lay statement that the Veteran personally went ashore must be provided. Since there is no way to verify which crewmembers of a docked ship may have gone ashore, C&P Service has determined that the Veteran's lay statement is sufficient. This is in keeping with 38 U.S.C. § 1154, which states that consideration shall be given to the places, types, and circumstances of a Veteran's service, and with 38

C.F.R. §3.159(a)(2), which states that lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person. In claims based on docking, the circumstances of service have placed the Veteran in a position where going ashore was a possibility and the Veteran, by virtue of being there, is competent to describe leaving the ship and going ashore. The circumstances also establish credibility unless there is evidence to the contrary.

Although evidence that the Veteran's ship docked, along with a statement of going ashore, is sufficient for the presumption of herbicide exposure, service aboard a ship that anchored temporarily in an open deep water harbor or port is not sufficient. C&P Service considers open water ports such as Da Nang, Cam Ranh Bay, and Vung Tau as extensions of ocean waters and not inland waterways. They are not similar to the rivers, canals, and estuaries that make up the inland waterway system. This is illustrated by a quote from the 1967 ship's history of the USS Cleveland (LPD-7), which states: "Da Nang Harbor is easy to enter due to being open to the sea." Blue Water Navy ships occasionally entered these open water harbors and anchored temporarily without docking to take on fuel from harbor barges. Sometimes ships would briefly anchor so that ranking officers could attend strategy meetings ashore. In such cases, a small boat manned by a crewmember referred to as a "coxswain" would usually ferry the officers ashore. Deck logs and ship's histories will generally not provide names of personnel going ashore from anchorage. However, evidence that a claimant served as a coxswain aboard a ship at anchorage, along with a statement from the Veteran of going ashore, may be sufficient to extend the presumption of exposure.

Claims based on statements that exposure occurred because herbicides were stored or transported on the Veteran's ship, or that the Veteran was exposed by being near aircraft that flew over Vietnam or equipment used in Vietnam, do not qualify for the presumption of exposure. These claims can be processed without further development by placing a memorandum for the record from the Army and Joint Services Records Research Center (JSRRC) in the claims file. This memorandum is located in M21-1MR at IV.ii.2.C.10.I and states that JSRRC research efforts have been unable to provide evidence supporting such claims of shipboard herbicide exposure.

When a U.S. Navy Veteran claims herbicide exposure based on inland waterway service or shore docking, development begins with a PIES O19 request for military records and a PIES O34 request for dates of service in Vietnam, both sent to the National Personnel Records Center. Information from these requests should provide the name of the Veteran's ship, dates of service aboard it, and dates the ship operated on the offshore waters of Vietnam. This information may be sufficient to establish exposure without extensive development.

The first reference to check is the new *Vietnam Era Navy Ship Agent Orange Exposure Development Site* located on the C&P Service Intranet site located under Rating Job Aids. The site contains several links. The *Ships operating on the inland waterways or docking in Vietnam* link identifies: (1) Brown Water Navy individual vessels, and types of vessels, that operated primarily or exclusively on the inland waterways, and (2) Blue Water Navy individual vessels that temporarily operated on inland waterways or docked,

with dates. The activity of all these ships has been verified through official documents or websites. If the Veteran served aboard one of the listed Brown Water Navy vessels at any time during its Vietnam tour, the presumption of exposure applies. For Veterans serving aboard one of the listed Blue Water Navy vessels, the presumption will apply only if the Veteran was aboard during the specified dates. The ships are arranged by vessel type and hull number and can be searched by name through use of the “Find” tool under the “Edit” function on your personal computer tool bar. Another link is to the official U.S. Navy *Dictionary of American Naval Fighting Ships* (DANFS) website. This site provides ship histories for most naval vessels. Ships are listed alphabetically by name. The histories vary in completeness but some provide detailed descriptions of service on Vietnam’s inland waterways, whether operating as part of the permanent Mobile Riverine Force or operating temporarily on gunfire support or supply missions. Since DANFS is an official U.S. Navy site, evidence from it supporting the claim will generally be sufficient to establish the presumption of herbicide exposure. A third link is to *U.S. Naval Bases & Support Activities Vietnam*. This site provides a description of all land-based locations that supported U.S. Navy operations in Vietnam. It is not an official government site but can serve as a valuable starting point for research if the name of one of these bases, or units located there, appears in the claims file or is identified by the Veteran.

An additional location to check is the *Stressor Verification Site*, which is also on the C&P Service Intranet under Rating Job Aids. This site has a section with official declassified documents on Navy operations in Vietnam and may provide information on inland waterway activity or docking for specific vessels. It also contains information on Brown Water Navy and Seabee construction operations. If these sources do not provide evidence to support the claimed exposure, development should proceed with a DPRIS O43 request to JSRRC for information on the Veteran’s ship. JSRRC has recently agreed to expand its research on the ship’s history to include deck log research. It will no longer be necessary to request deck logs from the National Archives and Records Administration. JSRRC will review the ship’s official history for a record of inland water operations or docking and, if this does not provide supporting evidence, will then review deck logs for the time frame identified by the Veteran. The time frame must be limited to 60 days but can include different date ranges, as long as the cumulative time frame does not exceed 60 days. The DPRIS request screen will accept two date ranges for a single ship under “Dates Ship was in RVN Territorial Waters.” If additional date ranges are required for the same ship, type them into the large space for “Circumstances Surrounding Exposure to Agent Orange.” In that space, also describe the Veteran’s statement as to how exposure occurred. JSRRC will provide a summary of its findings for the time frames requested.

When the JSRRC response is received, evaluate it carefully for evidence of the vessel’s entry into the inland waterways or docking. Although JSRRC does not provide copies of all original document reviewed, relevant excerpts are generally included with the summary. When evaluating deck log information, look for statements like “maneuvering at various speeds into...” and references to such locations as “Cua Viet River,” “Saigon River,” “Mekong River Delta,” and “Ganh Rai Bay” or “Rung Sat Special Zone” (both are up river from Vung Tau Harbor).

Keep in mind that anchoring in one of these locations is not the same as anchoring in an open deep-water port; these are inland waterways and the presumption of exposure applies to any anchorage associated with them. When deck logs refer to entering or anchoring in the “mouth” of one of these locations, or any other identifiable river location, C&P Service has determined that this is sufficient to establish service on the inland waterways. It is not practical to establish a bright dividing line between a river entrance and the South China Sea. Therefore, the benefit-of-the-doubt doctrine is applicable and evidence of the vessel’s presence in a river’s mouth is sufficient to establish the presumption of exposure for Veterans aboard that ship.

Ratings Procedures

When development is complete, a rating decision can be produced. Service connection will depend on whether the evidence confirms that the Veteran served at a land-based Navy facility within Vietnam, with the Brown Water Navy on the inland waterways of Vietnam, or aboard a Blue Water Navy ship that operated temporarily on the inland waterways or docked to the shore. If service connection is granted, a disability percentage determination may be possible based on medical evidence already in the claims file from a private physician or a treating VA medical facility. If the available medical evidence is insufficient to determine the level of disability, a VA examination is necessary.

The next issue for consideration is the effective date for compensation purposes. For an original claim, the effective date will be the date VA receives the claim or the date entitlement arose, whichever is later, as stated in 38 C.F.R. § 3.400. Since all the presumptive diseases associated with herbicide exposure represent liberalizing regulations, 38 C.F.R. § 3.114 will also apply. This means that the effective date for compensation may go back one year prior to the date of claim, if evidence shows that the disease was present at that time. However, the effective date may not go back earlier than the date that the disease itself was added by regulation to the list of herbicide exposure-related diseases.

Due to the *Haas* decision, the majority of Navy Veterans’ cases will likely involve a previous denial and either a claim to reopen received from the Veteran or a review initiated by VA. In these cases, reopening the claim may be based on new and material evidence showing inland waterway service or docking found in deck logs, ship histories, or some other acceptable documentation. If service connection is granted, the effective date will generally be governed by 38 C.F.R. § 3.156(c) because the newly acquired evidence falls under “service department records” and meets the regulatory requirements of: (1) official service department records, (2) existing at the time VA decided the claim, and (3) not associated with the claims file at that time. In cases where these records have now become available and are associated with the claims file, the regulation provides for a reconsideration of the claim.

If the evidence justifies service connection, the effective date will be the *date entitlement arose or the date VA received the previously decided claim, whichever is later*, as stated in section 3.156(c)(3). This is the general rule, but there are several factors to consider. The date entitlement arose may be either the date that the claimed disease was diagnosed (or symptoms became manifest according to medical evidence) or the date

that the claimed presumptive disease was finalized as part of the presumptive list of herbicide exposure-related diseases at 38 C.F.R. 3.309(e). The date entitlement arose cannot precede the date a presumptive disease was added to the regulations.

Consideration must be given to the date of receipt of the original denied claim in relationship to the date that the claimed disease was finalized as part of the herbicide exposure presumptive list. If the original denied claim was received prior to addition of the claimed disease to the presumptive list and the evidence now warrants service connection, the effective date will be the date the disease was added to the presumptive list. If the original denied claim was received after the claimed disease was added to the presumptive list and the evidence now warrants service connection, the effective date will be the date the original denied claim was received or the date that medical evidence shows the Veteran first contracted the claimed disease, whichever is later, in accordance with section 3.156(c)(3). However, in such cases, section 3.114 will also apply because the additions of new presumptive diseases are regulatory liberalizations. Therefore, if the original denied claim was received within one year of the date the claimed disease was added to the presumptive list, and the claimed disease was present at that time, the effective date will be the date of that addition. If the claim was received more than one year after the claimed disease's addition, the effective date will be one year prior to the date it was received, if the claimed disease was present at that time.

If, for example, an original denied claim for diabetes mellitus (DM) type 2 was received before May 8, 2001, the date that DM type 2 was added to the list of diseases associated with herbicide exposure, the effective date for compensation could be no earlier than May 8, 2001. If the original denied claim for DM type 2 was received any time within the one-year period following May 8, 2001, the effective date for compensation would go back to May 8, 2001. If, on the other hand, the original denied claim was received more than one year after May 8, 2001, the effective date for compensation would go back one year from the date of claim. Another situation may arise where the Veteran has filed two claims for DM type 2, one before May 8, 2001, and the other more than one year after, both of which were denied. If readjudication evidence now shows that herbicide exposure can be presumed, the earlier denied claim should be used to determine the effective date for compensation, which would be the date that DM type 2 was added to the presumptive list. This effective date scheme assumes in all cases that the Veteran's disease was present on the date of claim, as required by section 3.114. The date that each presumptive disease associated with herbicide exposure was added to section 3.309(e) can be found in M21-1MR at IV.ii.2.C.10.i.

Regulations concerning awards and effective dates related to the *Nehmer* court case are found at 38 C.F.R. § 3.816. These will apply to the latest proposed diseases to be associated with herbicide exposure: ischemic heart disease, Parkinson's disease, and chronic B-cell leukemias, as explained in C&P Service Training Letter 10-04.

Herbicide-related disability claims from Navy Veterans of the Vietnam era were generally denied because the evidence available did not verify their service on the ground in Vietnam or on its inland waterways at the time of the decision. Therefore, section 3.156(c) governs effective date issues when the records of inland waterway service or shore docking have become available.

Additional Considerations

Regional office personnel should keep in mind that when a Blue Water Navy Veteran claims non-Hodgkin's lymphoma as a disability, service connection may be granted without the need to show inland waterway service or docking. Although this disease is on the herbicide exposure-related list at section 3.309 (e), it is also specified as a presumptive disease at 38 C.F.R. 3.313, based solely on "service in Vietnam " without reference to herbicide exposure. Therefore, any Veteran who served in the offshore waters of Vietnam will qualify for this presumption when this disease manifests itself subsequent to service.

Regional office personnel should also be aware that it is not proper to propose severing service connection for Blue Water Navy Veterans who were granted a presumption of herbicide exposure under former policies. Before the *Haas* case entered the court system, there was a short period of time when a Blue Water Navy Veteran's receipt of the Vietnam Service Medal was considered sufficient to establish a presumption of herbicide exposure. That broad policy was subsequently narrowed so that service on the ground in Vietnam or on its inland waterways was required to receive a presumption of exposure. The *Haas* case was initiated as a challenge to the revised policy. Although the final judicial decision in *Haas* supported VA's revised policy, that decision cannot be applied retroactively to Veterans who were evaluated under the original broad policy. In the CAVC case of *Berger v. Brown* (1997), the court stated that its holdings, which formulate new interpretations of the law subsequent to regional office decisions, cannot be used as the basis for a clear and unmistakable error (CUE) action. Additionally, the Federal Circuit, in *Jordan v. Nicholson* (2005), held that if VA correctly applied a regulation (or policy) in a prior final decision, the fact that the regulation (or policy) was later found to be invalid does not establish that the prior final decision contained CUE warranting retroactive correction. Therefore, if a Blue Water Navy Veteran was previously awarded presumptive service connection based on herbicide exposure when the broad standard was in effect, that service connection cannot now be severed.