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NVLSP Attorneys Win Haas v. Nicholson –

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

In an August 16, 2006 decision, the United States Court of Appeals for Veterans Claims (CAVC) 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. Prior to this decision, the VA had taken the position that veterans had to step foot on Vietnamese soil in order to be entitled to the presumption of exposure to Agent Orange. The veteran in this case, Jonathan L. Haas, Commander, USNR (Retired), served in the waters offshore Vietnam and received the Vietnam Service Medal. The veteran claimed that his diabetes mellitus and complications were related to his exposure to Agent Orange that drifted from the shore. Attorneys Louis J. George and Barton F. Stichman of National Veterans Legal Services Program (NVLSP) represented Commander Haas.

Background: The Agent Orange Act of 1991 provides that veterans who served "in the Republic of Vietnam" from January 9, 1962, to May 7, 1975, are presumed to have been exposed to Agent Orange, meaning that these veterans are entitled to disability benefits (medical benefits as well as service-connected disability compensation) for diseases related to Agent Orange (such as type II diabetes mellitus, prostate cancer, and lung cancer, among other illnesses).

A long-standing provision of the VA Adjudication Procedure Manual M21-1 (called the M21-1 manual), which is the "Bible" for those VA workers who adjudicate claims at the 57 VA Regional Offices, provided that "service in Vietnam" will be conceded, in the absence of contradictory evidence, if the veteran received Vietnam Service Medal, and as long as that service did not consist exclusively of "fly-over" duty. VA ADJUDICATION PROCEDURE MANUAL M21-1, Part III, para. 4.24g. (Change 76, June 1, 1999). The M21-1 Manual went on to state that even if the veteran did not receive the Vietnam Service Medal, the VA Regional Office was required to research the ship's activities to determine whether "the ship was in the waters offshore Vietnam" in order to apply the favorable presumption. Similar M2-1 manual provisions existed as early as November 1991.

The 2002 Revisions to the M21-1: Without public notice and comment, in February 2002 the VA withdrew the M21-1 Manual provision. The VA replaced it with a provision stating that service in Vietnam would not be conceded unless the evidence showed that the veteran actually stepped foot on land in Vietnam. Because veteran Haas filed his claim for service connection for diabetes mellitus in 2001, the favorable Manual M21-1 provision applied to his claim for service connection

Since the February 2002 revision (and in some cases even earlier) the VA has taken the position that in order for a Vietnam veteran to be presumed to have been exposed to Agent Orange, the veteran must demonstrate that he or she actually set foot in Vietnam. This is often very difficult for Navy and Air Force veterans, as they may have actually had duty or visitation in Vietnam, but they cannot prove it. Records verifying their claims, such as in-country medical records, may have been destroyed. The VA, to adjudicate this type of claim, has been doing two things adverse to veterans. First, the VA regional offices have been denying service connection for initial claims. Second, the VA regional offices have been reviewing claims that were previously granted and, if the VA determined that the veteran did not step foot in the Republic of Vietnam, service connection for the disability based on exposure to Agent Orange would be severed (taken away).

The Haas Decision: The Board of Veterans' Appeals (BVA or Board) denied Mr. Haas' claim for service-connected disability compensation based on exposure to Agent Orange. The Board held that although the veteran served in Vietnamese waters, since he did not step foot on shore in Vietnam, service connection for his diabetes and residuals was not warranted.

In 2003, NVLSP, in a case similar to that of Mr. Haas, represented a Navy widow before the CAVC and won her benefits when the VA settled her case. Commander Haas retained NVLSP in 2005 to represent him before the CAVC.

In its decision, the Court reversed the Board's determination that the veteran was not entitled to the presumption of exposure to Agent Orange and remanded the matter to the BVA for readjudication of the veteran's claim. 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 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 Agent Orange 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 close 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 veteran filed his claim in 2001 entitled him to a presumption of service connection based upon his receipt of the Vietnam Service Medal.

(5) The VA's attempt to rescind that version of the M21-1 provision more favorable to the veteran was ineffective because the 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 to the Board, secondary service connection must be considered for the veteran's claims of peripheral neuropathy, nephropathy, and retinopathy.

Advocacy Advice: It is unclear whether the VA will appeal the Court's decision in Haas, and the VA may amend their regulations in the future in a way that is adverse to veterans who otherwise would have benefited from the Court's decision in Haas. It is clear 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 it must be followed by the VA.

Quick action by advocates is essential. Because the VA may issue a negative regulation, claims based on presumptive exposure to Agent Orange need to be filed before the VA can finalize a negative regulation. Veterans and advocates 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 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), those who represent veterans (and their survivors) should still apply for service connection, since the M21-1 provision does not outright prohibit application of the Agent Orange presumption in such cases. 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, advocates should submit applications for service connection if the veteran had offshore Naval service during the above period. This is because the M21-1 provision does not preclude service connection as long as it is verified that the veteran had service offshore Vietnam.

For denied claims still pending before the VA or before the Court of Appeals for Veterans Claims: If the veteran received the Vietnam Service Medal (or the Armed Forces Expeditionary Medal (Vietnam)), for service offshore 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 or 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 between January 9, 1962, and May 7, 1975.

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 advocate should cite the M21-1 provision and Haas in the claim.

We suggest that the advocate 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 or restored. Once benefits have been granted or restored, the advocate 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 are urged to seek the assistance of an advocate prior to taking such action.