



THE UNDER SECRETARY OF VETERANS AFFAIRS FOR BENEFITS

WASHINGTON, D.C. 20420

SENATOR DANIEL K. AKAKA
WASHINGTON, D.C.

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The Honorable Daniel K. Akaka
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am responding to the letter you sent on behalf of Vietnam-era Navy Veterans who are concerned about how the Department of Veterans Affairs (VA) handles claims for service-connected disability benefits based on herbicide exposure.

The Agent Orange Act of 1991 authorized the presumption of exposure to herbicides for Veterans who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975. VA believes that Congress did not intend for this presumption to apply to offshore "blue water" Veterans, since the available evidence does not show herbicides were sprayed over offshore coastal waters. VA considers open coastal harbors, such as the one at Da Nang, to be part of the offshore waters of Vietnam and not part of its "brown water" inland waterway system (i.e., rivers, canals, estuaries, and delta areas). Inland waterways were subjected to the same well-documented aerial herbicide spraying as the land areas surrounding them. Therefore, the presumption of herbicide exposure is extended to all Veterans who served on inland waterways, but not to those serving solely aboard a vessel anchored temporarily in Da Nang Harbor or any other harbor along the coast of Vietnam.

In *Haas v. Nicholson*, the United States Court of Appeals for Veterans Claims (CAVC) determined that Veterans who served aboard Naval vessels off the coast of Vietnam should be given the same presumption of herbicide exposure as Veterans who served on the ground in Vietnam or on its inland waterways. VA appealed the case to the United States Court of Appeals for the Federal Circuit, and a court-approved stay on processing "blue water" claims went into effect pending a final judicial decision. The Federal Circuit reversed the CAVC decision and determined that VA's interpretation of the statute was reasonable and valid. Recently, the United States Supreme Court declined to hear the *Haas* case appeal; the Federal Circuit decision is now final. VA is beginning to adjudicate herbicide-related claims that were affected by the stay.

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VA has procedures in place for developing and adjudicating disability compensation claims from Vietnam-era Navy and Coast Guard Veterans. These procedures have been communicated to the regional offices. Every claimant for service-connected disability compensation is sent a notification letter describing the specific evidence needed to support his or her claim. If the claimed disability is related to herbicide exposure, the Veteran is requested to provide details of such exposure. If the claim is based on the Veteran disembarking a vessel and going ashore for leave or work duties, VA will request all military records and ships' deck logs that may show the Veteran set foot on land. Before an adverse decision is made, VA requests information about the Veteran's ship from the Army and Joint Services Records Research Center, which is a Department of Defense-affiliated research facility.

To determine whether a Veteran who served aboard an open water vessel should receive the presumption of herbicide exposure, VA reviews official Navy and Coast Guard ships' deck logs held by the National Archives and Records Administration. These logs may show that a ship was anchored off the coast of Vietnam, but rarely do they contain the names of individual crewmembers who possibly went ashore for leave or work details. However, VA will continue to research ships' deck logs to help verify a Veteran's inland waterway service or visitation to the mainland of Vietnam.

In some cases, ships' deck logs will confirm that an open water vessel entered the inland waterways of Vietnam to conduct operations. Such was the case of the USS Ingersoll, a destroyer that traveled seven miles up the Saigon River to conduct a fire support mission in October 1965. Deck logs showed this inland waterway service, and the Veterans who served aboard were given the presumption of herbicide exposure. Fast Letter 07-27 was released on December 27, 2007, to provide guidance to all regional offices on processing compensation claims from Veterans who served aboard the USS Ingersoll.

The Board of Veterans' Appeals previously reviewed its decisions on herbicide exposure claims from Navy Veterans who served aboard vessels anchored in Da Nang harbor. A small number of decisions were identified (the most recent of which was in July 2004) that found Da Nang harbor to fall within the inland waters of Vietnam. However, the overwhelming majority of the decisions reviewed held otherwise. Hence, the Board concluded that these allowances, while not necessarily erroneous in the absence of clear regulatory guidance, are really aberrant from the mainstream and that it would therefore be inaccurate to claim that they were indicative of the Board's approach to the issue. Rather, these few allowances were the decisions of individual Veterans Law Judges that preceded the Federal Circuit's clear holding to the contrary in *Haas*, and are not reflective of any established position that service solely on

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board a vessel anchored in Da Nang harbor is sufficient to establish herbicide exposure.

VA is committed to providing a consistent and equitable evaluation process for all herbicide-related claims from Navy Veterans of the Vietnam era. Therefore, we will provide additional nationwide guidance to regional offices on the procedures to be followed when developing for evidence that a Navy Veteran served on the inland waterways of Vietnam or disembarked a ship and set foot on land. I will also direct our Quality Assurance Staff to conduct a focused review of these claims to ensure proper application of these procedures.

Thank you for your letter.

Sincerely yours,

A handwritten signature in cursive script that reads "P. W. Dunne". The signature is written in black ink and is positioned above the printed name.

P. W. Dunne