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Sailors' victory reversed in Agent Orange-related cases

BY TOM PHILPOTT

A federal appeals court has delivered a stinging defeat to "blue-water" sailors and Coast Guard veterans of the Vietnam War who've been fighting for disability compensation from illnesses that they say resulted from shipboard exposure to deadly herbicides, including Agent Orange.

A three-judge panel in the U.S. Court of Appeals for the Federal Circuit ruled 2-1 on May 8 that the Department of Veterans Affairs acted lawfully and reasonably in 2002. That's when it cut off Agent Orange-related disability payments and began to deny new claims from vets who served on ships off Vietnam but never actually "set foot" in the country.

The decision reversed a 2006 ruling by the U.S. Court of Appeals for Veterans Claims in the case of Haas v. Nicholson. The three-judge panel there unanimously rejected as "unduly restrictive" VA's interpretation, by revised regulation, of qualifying "service" in Vietnam under the Agent Orange Act.

The U.S. military sprayed herbicides over Vietnam from 1962 through 1971 to strip away foliage under which enemy forces could hide. It was also intended to destroy crops and clear vegetation from around military sites and fire bases.

Over the past two decades, Congress and VA expanded the list of illnesses linked to Agent Orange exposure and for which vets can receive disability compensation. The list of ailments includes prostate cancer, type-2 diabetes, non-Hodgkin's lymphoma, certain soft-tissue sarcomas, chloracne and skin conditions, Hodgkin's disease, various respiratory cancers, leukemia and multiple myeloma.

VA officials worried that if the 2006 Haas decision survived a government appeal, the pool of vets eligible for disability pay — if they contract illnesses tied to Agent Orange — would jump by 830,000, and VA benefit costs would rise \$3.3 billion over 10 years.

But from 1991 until early 2002, VA was paying Agent Orange-related claims filed by sailors who served only off Vietnam, said Barton F. Stichman, an attorney with the National Veterans Legal Services Program. The program's lawyers have represented the claimant in this case, Jonathan L. Haas, a retired Navy Reserve commander.

Stichman said that for a decade, sea service vets won, with relative ease, claims based on ailments linked to Agent Orange. A manual used by VA claim adjudicators advised them to make awards based on a presumptive service connection of certain diseases if sea service veterans received the Vietnam Service Medal.

The VSM had been awarded to all military members who served from July 3, 1965, through March 28, 1973, in Vietnam, its contiguous waters or airspace.

Haas served on an ammunition supply ship, the USS Mount Katmai, from August 1967 to April 1969. The ship operated off Vietnam but didn't dock there, and Haas never went ashore. By 2001, Haas had developed type-2 diabetes, peripheral neuropathy and loss of eyesight, which he said were caused by herbicide exposure off Vietnam.

His regional VA office denied the claim, saying service connection couldn't be established because Haas hadn't gone ashore. The Board of Veterans Appeals agreed.

It turned out that VA had reinterpreted the Agent Orange Act of 1991 regarding the phrase "service in the Republic of Vietnam," requiring at least a brief visit on land to be considered exposed to Agent Orange and eligible for disability pay for herbicide-related ailments.

The veterans' claims court reviewed Haas' appeal with a three-judge panel, so the decision would affect all claims filed by blue-water vets. It found that the VA was being too restrictive, in part because ships along the coast might have been exposed to at least as much toxin from wind-borne coastal-area spraying as service members deemed exposed from brief visits ashore.

But the U.S. Court of Appeals for the Federal District, in a 51-page opinion, has reversed the decision for Haas and fellow sailors, finding VA's stricter interpretation of service in Vietnam permissible.

The court acknowledged that in a 1990 regulation, VA had defined service in Vietnam to include vets offshore. It also noted that even today, a VA regulation — informed by a [Centers for Disease Control and Prevention](#) study — allowed presumption of service-connected Agent Orange exposure for sailors who served only offshore in Vietnam but suffered from non-Hodgkin's lymphoma.

The two-judge majority said that Congress left ambiguous the meaning of having "served in the Republic of Vietnam" under the Agent Orange Act and that Haas pointed to no single clarifying statement in the legislative record. But Congress did give to the VA authority to interpret such ambiguities, and those interpretations are "entitled to substantial deference," the court said.

The appeals court rejected the 2006 veteran claims court findings that the VA applied its regulations inconsistently and that its tighter interpretation of law and regulation was erroneous and unreasonable.

But the third appeals court judge, Jeremy Fogel, dissented. He said judicial deference to administrative agencies was important. But, he said, the appeals court should note that the intent of Congress had been to make it easier — not more difficult — for vets to assert claims for exposure to Agent Orange.

"I agree with the Veterans Court," Fogel wrote, "that in the absence of any scientific evidence in the records that support a 'foot on land' requirement, the VA's position is unreasonable."

Stichman said Haas would seek a fresh review of the case from a full panel of seven appeals court judges. Such reviews are granted only sparingly.

If that fails, an appeal to the Supreme Court will be weighed.