



Uploaded to VFC Website ~ October 2012 ~

This Document has been provided to you courtesy of Veterans-For-Change!

Feel free to pass to any veteran who might be able to use this information!

For thousands more files like this and hundreds of links to useful information, and hundreds of "Frequently Asked Questions, please go to:

[Veterans-For-Change](#)

*Veterans-For-Change is a 501(c)(3) Non-Profit Corporation
Tax ID #27-3820181*

If Veteran's don't help Veteran's, who will?

We appreciate all donations to continue to provide information and services to Veterans and their families.

https://www.paypal.com/cgi-bin/webscr?cmd=_s-xclick&hosted_button_id=WGT2M5UTB9A78

Note:

VFC is not liable for source information in this document, it is merely provided as a courtesy to our members.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 09-2585

DOUGLAS L. KELLEY, APPELLANT,
v.
ERIC K. SHINSEKI,

SECRETARY OF VETERANS AFFAIRS, APPELLEE

Before SCOELEN, *Judge*.

MEMORANDUM DECISION

Excerpts Page 3

In its February 12, 2009, response, the C&P Service informed the AMC that the list [of herbicide use and test sites outside Vietnam] does not contain any references to routine base maintenance activities such as range management, brush clearing, weed killing, etc. We have been advised by DoD that such small scale nontactical herbicide applications have not been compiled into a list and records of such activity have not been kept.

.....

Herbicides and spray equipment were stored on Guam during the Korean War (1951-53) but never used. Following the armistice, all herbicides and equipment [were] shipped back to Fort Detrick, Maryland. Since that time[,] there is no DoD record of any use, testing, or storage of tactical herbicides, such as Agent Orange, at any location on Guam.

Excerpts Page 6

In addition, the Court notes that the C&P Service report states that the list of test sites outside Vietnam "does not contain any references to routine base maintenance activities such as range management, brush clearing, weed killing, etc." and that "such small scale non-tactical herbicide applications have not been compiled into a list and records of such activity have not been kept." R. at 172. This is precisely the sort of activity the appellant alleges resulted in his direct exposure to herbicides. R. at 556, 559, 566, 568 (letters from the appellant and fellow servicemen stating that defoliants were used to maintain the base perimeter, air strips, and area around the barracks). The Board stated that "the [C&P] report correctly points out that "[n]on-tactical herbicides with unknown chemical content are not covered by 38 [C.F.R. § 3.307(a)(6)(i).]" R. at 13. However, this regulation pertains to establishing presumptive service connection, whereas the appellant here is required to establish entitlement to direct service connection through a showing of actual exposure to herbicides. It appears that the Board impermissibly relied on a finding that the appellant would not be entitled

to presumptive service connection to support its denial of service connection on a direct basis. *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994) ("[T]he presumptive service connection procedure . . . **does not foreclose proof of direct service connection.**").