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Supreme Court Refuses to Review NVLSP's Lawsuit on Behalf of Blue Water Vietnam Veterans

The General VA Rules on Agent Orange

VA rules now provide that many diseases are associated with exposure to the herbicide that was widely used during the Vietnam War and commonly known as Agent Orange. These diseases include prostate cancer, lung cancer, larynx cancer, trachea cancer, bronchus cancer, multiple myeloma, Hodgkin's disease, Non-Hodgkin's lymphoma, soft tissue sarcoma, chronic lymphocytic leukemia, and type 2 diabetes.

VA rules also state that most Vietnam veterans who apply for VA benefits do not need to prove that they were exposed to Agent Orange. The VA will simply presume that a veteran was exposed to Agent Orange if the veteran "served in the Republic of Vietnam" during the Vietnam War – even if that service was less than one day.

What this means is that a veteran or a qualifying survivor is entitled to VA disability or death benefits if the claimant can show two things: (1) service "in the Republic of Vietnam" for any period of time during the Vietnam War and (2) development of or death from one of the diseases listed above – no matter how many years after the veteran left Vietnam the disease first occurred.

What Does "Service in the Republic of Vietnam" Mean?

Many veterans who served in the waters near Vietnam (known as "Blue Water" Navy veterans) currently suffer or have died from one of the diseases that the VA currently recognizes as related to Agent Orange exposure. From 1991 to 2002, it was relatively easy for Blue Water Navy veterans to win a claim based on a disease associated with Agent Orange exposure. During these 11 years, the VA Adjudication Procedures Manual M21-1 (called the M21-1 Manual) -- which is the "Bible" for those VA workers who decide claims at the 57 VA regional offices -- provided that a veteran qualifies as having "served in the Republic of Vietnam" if the veteran received Vietnam Service Medal, and either stepped foot on land or served on a "ship [that] was in the waters offshore Vietnam." VA ADJUDICATION PROCEDURES MANUAL M21-1, Part III, para. 4.24g. (Change 76, June 1, 1999).

The VA Does an About Face in 2002

In February 2002, however, the VA did an about face. The VA amended the M21-1 Manual so that Blue Water Navy veterans could not win their claims unless they actually stepped foot on land in Vietnam. Although the law requires the VA to give the public advance notice and an opportunity to comment before it changes its rules, the VA changed the M21-1 Manual without any input from the public.

As a result of the change in rules, the 57 VA regional offices denied benefits to Blue Water Navy veterans whose claims were pending as of, or filed after February 2002 -- unless the veteran could prove to the VA's satisfaction that he stepped foot on land in Vietnam. To make matters worse, in many cases in which a Blue Water Navy veteran had already won disability benefits under the pre-2002 rules, the VA initiated proceedings to overturn the previous grant of benefits so that these veterans would not receive additional benefits in the future.

NVLSP Takes VA to Court and Wins

Many Blue Water Navy veterans whose claims were denied by a VA regional office due to the 2002 change in the VA's rules appealed their cases to the Board of Veterans' Appeals (the BVA). The BVA usually denied their claims as well. NVLSP agreed to help some of these veterans by appealing their case to the U.S. Court of Appeals for Veterans Claims.

In one of these cases, NVLSP represents Jonathan L. Haas, Commander, USNR (Retired), who served in the waters near Vietnam and received the Vietnam Service Medal. The BVA had denied Mr. Haas' disability benefits claim for type 2 diabetes and its residuals, ruling that he did not serve in the Republic of Vietnam because he did not step foot on land in Vietnam. The Veterans Court agreed to decide Mr. Haas' appeal by a panel of three judges – so that the Court's decision would control all of the claims filed by all Blue Water Navy veterans.

On August 16, 2006, the panel of the Veterans Court unanimously invalidated the VA's 2002 set-foot-on-land requirement. The Court ruled that service on a ship in the waters offshore Vietnam qualifies as service in the Republic of Vietnam. As a result, the

Court reversed the Board's decision denying benefits, and ordered the VA to award Mr. Haas disability benefits for diabetes and its residuals. [You can view this decision by clicking here.](#)

The VA Refuses to Follow the Veterans Court's Decision

Several weeks later, the VA appealed the Veterans Court's decision to the U.S. Court of Appeals for the Federal Circuit. In addition, VA Secretary R. James Nicholson took steps last fall to make sure that no Blue Water Navy veteran would receive any VA benefits while VA's appeal remained pending before the Federal Circuit. He ordered all VA regional offices and the BVA not to decide any claims filed by Blue Water Navy veterans while VA's appeal remained pending, unless the veteran proved that he set foot on land in Vietnam.

One problem with Secretary Nicholson's decision to impose a moratorium on VA decision-making is that the law does not allow the VA Secretary to impose a moratorium unless he first requests and obtains permission from the Court of Appeals for Veterans Claims to do so. Secretary Nicholson ignored this law by unilaterally imposing a moratorium without even asking for Court approval.

NVLSP Returns to the Veterans Court to Sue Secretary Nicholson

Shortly after Secretary Nicholson imposed a moratorium on deciding the claims of Blue Water Navy veterans, NVLSP filed a lawsuit with the Veterans Court on behalf of The American Legion and Nicholas Ribaud, a Blue Water Navy veteran whose claim was pending at the BVA. NVLSP asked the Veterans Court to order Secretary Nicholson to withdraw his moratorium on decision-making because he did not have the legal right to do this unless he first asked the Veterans Court for permission to impose a moratorium and convinced the Veterans Court that a moratorium was appropriate in this particular situation – actions that Secretary Nicholson never took.

On January 9, 2007, the Veterans Court granted NVLSP's request. The Court rescinded Secretary Nicholson's moratorium, and ordered the BVA to decide appeals from Blue Water Navy veterans according to first-in, first-out docket order, and, when deciding these cases, to apply the Veterans Court's precedential decision in Mr. Haas' case even though the VA had appealed that decision to a higher court. [You can view this decision by clicking here.](#)

But the January 9th Veterans Court decision was not a total victory for Blue Water Navy veterans. The Court also gave Secretary Nicholson another chance. The Court stated that if he filed a request with the Veterans Court in the future for permission to impose a moratorium, the Court would consider whether a moratorium on VA decision-making was appropriate, after giving NVLSP a chance to explain in writing why there should be no moratorium. One week later, Secretary Nicholson did exactly that – he filed a request with the Veterans Court for permission to impose a moratorium on VA regional office and BVA decision-making on claims filed by Blue Water Navy veterans while the VA's appeal of the decision in Mr. Haas' case remained pending before the Federal Circuit.

Ten days later – and before the deadline for NVLSP to file its written response to Secretary Nicholson's request – the Veterans Court issued an Order stating that it intended to decide the Secretary's request for a moratorium quickly, after receiving NVLSP's written response. But meanwhile, the Court stated, it ordered a moratorium on regional office and BVA decision-making on Blue Water claims on a temporary basis, until the Court decides whether it is appropriate to order a moratorium for the entire period while VA's appeal remained pending before the Federal Circuit. [You can view this Order by clicking here.](#) On February 2, 2007, NVLSP filed legal documents opposing Secretary Nicholson's request for a moratorium.

Unfortunately, on April 13, 2007, the Veterans Court granted the VA's request for a moratorium on regional office and BVA decision-making on all Blue Water Navy veteran claims while the VA's *Haas* appeal remains pending at the Federal Circuit. [Click here to view of a copy of the Court's April 13, 2007 Order.](#) Please note that only pages 1-10 represent the binding authority of the Court, while pages 11-29 are the concurring and dissenting opinions of some judges.

Summary of the Current Status

The VA's appeal of the Veterans Court's Haas decision to the U.S. Court of Appeals for the Federal Circuit: the VA filed its initial brief in the Federal Circuit on March 7, 2007. You can view the VA's brief, without its addendum (the Veterans Court's Haas decision and judgment), by [clicking here](#). NVLSP filed their brief on behalf of Mr. Haas on June 4, 2007. You can [view the brief here](#).

The VA filed its reply brief on July 20, 2007. You can [view the brief here](#). The VA also filed a Joint Appendix, which contains the underlying Veterans Court decision and other documents referenced in the briefs, on July 26, 2007. Oral argument was held on November 7, 2007. You can [listen to a recording of the oral argument](#) here. Type "HAAS v DVA" into the "Caption" field.

On May 8, 2008, the Federal Circuit issued a decision reversing the Veterans Court's decision that was in favor of Commander Haas. [You can view a copy of that decision here](#). On June 23, 2008, the attorneys for Commander Haas filed a Combined Petition for Panel Rehearing or Rehearing En Banc. You can view a [copy of that motion here](#).

On June 30, 2008, The American Legion, Military Order of the Purple Heart, and United Spinal Association file an Amici Curiae Brief in support of Commander Haas' petition for rehearing ([view brief here](#).) The VA filed its opposition to the petition for rehearing on September 12, 2008. ([view opposition here](#).) Unfortunately, on October 9, 2008, the Federal Circuit denied the petition for rehearing. You can [read the decision here](#).

On October 17, 2008, NVLSP filed a Petition for a Writ of Certiorari in the U.S. Supreme Court, asking the Court to overturn the Federal Circuit's decision in *Haas* that denied Agent Orange-related VA benefits to Blue Water Vietnam Veterans. ([view petition here](#)). The American Legion, Military Order of the Purple Heart, and United Spinal Association filed, as amici curiae, a brief in support the petition on November 21, 2008. ([view brief here](#).)

On December 18, 2008, the VA filed a brief in opposition to our Petition for a Writ of Certiorari. ([View VA Brief here](#)). NVLSP filed a reply brief on December 29, 2008. ([View Reply Brief here](#)).

Unfortunately, on January 21, 2009, the Supreme Court denied NVLSP's Petition for a Writ of Certiorari. This means that, pursuant to the Federal Circuit's decision, veterans who served in the waters offshore of Vietnam and never set foot on the landmass of Vietnam or served on its inland waterways are not entitled to the presumption of Agent Orange exposure under current VA regulations. Now, the VA will likely begin adjudicating claims that were on hold while the *Haas* appeal was pending

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