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The Case Against Mary Lou Keener

By Chuck Graham

Chuck Graham sends this piece of information and analysis, and we think it worthy of your time and interest. There are things in here that you likely won't find elsewhere. It may serve to explain some of the workings of the VA, and the people who make the decisions. -VNVets

VAOPGCPREC 7-93, and VAOPGCPREC 27-97 are both authored by the same person, that being Mary Lou Keener, who was the General Counsel with the Department of Veterans Affairs at the time both opinions were handed down. It will be my intention to examine both opinions and offer my own opinion as to why these decisions were made and possible motive as to why the latter [27-97] was made.

[VAOPGCPREC 7-93]

Lets look at 7-93. It deals with the question from the Board of Veterans Appeals in reference to a veteran who flew high altitude flights over Vietnam but never actually landed in Vietnam. The veteran was applying for presumption of service connection under 38 C.F.R. 3.313 for lymphocytic lymphoma on the basis of service in Vietnam as that term is used in 38 C.F.R. 3.313. 38 C.F.R. 3.313 basically deals with non-Hodgkin's Lymphoma [NHL]and establishment of service connection based on "service in Vietnam" during the Vietnam era.

Sec.3.313[b] defines service in Vietnam as including service in the waters offshore, OR service in other locations if the conditions of service involved duty or visitation in Vietnam. The Secretary of Veterans Affairs decision was based on a study released on March 29,1990, commonly know to all as the Selected Cancers Study, by the Centers for Disease Control [CDC]. A case controlled study begun in 1983, "to examine the association between several rare cancers, Agent Orange exposure, and military service in Vietnam." Results of this study strongly suggest that Vietnam veterans have a roughly 50% increased risk of developing NHL about 15-25 years after military service in Vietnam. The results do not show a similar increased risk in vets who served in other locations during the Vietnam era. Thus the reason for denying the applying veteran.

The Selected Cancers Study focused on vets who were stationed in Vietnam. That phrase was defined as including those vets who were stationed in Vietnam OR off the coast of Vietnam. For the study, vets who reported that they served in Vietnam were categorized by military regions in which they served or by naval assignments, i.e., Blue Water [ocean going vessels], Brown Water [smaller vessels patrolling near shore or along rivers],and On Shore.

The preamble to the final regulation did state that the Secretary in making his decision, and the Selected Cancers Study, both noted an increased risk of NHL based on service in Vietnam, rather than exposure to herbicides containing dioxin. It's funny that NHL is now on the list of presumptive diseases for AO exposure, and has been for some time.

Maybe Mrs. Keener should have read further into the Selected Cancers Study where she would have found that NHL was higher among men in the sea-based Navy than among other veterans. [WHY ?]

The study on risk of testicular cancer associated with AO exposure among Vietnam veterans on the AO registry found that only US Navy veterans had a statistically increased risk of testicular cancer and that there was no significantly increased risk for ground troops. Again I ask [Why ?]

I believe that the CDC found that if they went any further in their study it would have shown that U.S Navy personnel were among the highest exposed to AO [dioxin] in the Vietnam theater, and therefore, they concluded their study and didn't send it on to Washington for various reasons, monetary most likely.

To date, to my knowledge, the VA nor the Institute of Medicine [IOM] have conducted or asked for a study to evaluate the possible exposure of U.S. Navy personnel to herbicides [or dioxin] that were used in Vietnam during the Vietnam era. Only the Australian Department of Veterans Affairs has seen fit to carry on such a study. [WHY NOT OUR GOVT. ?]

Ok, so now we know that VAOPGCPREC 7-93 deals with high altitude flights over Vietnam and NHL, but as late as July 1,2004 the VA is still referring to VAOPGCPREC 7-93 in the M21-1 Part III Change 122, and I quote paragraph e:

Verifying Vietnam Service for Claims Involving Exposure to Herbicide Agents. [1] It may be necessary to determine if a veteran had service in Vietnam in connection with claims based on exposure to herbicide agents. A veteran must have actually served on land within the Republic of Vietnam [RVN] to qualify for the presumption of exposure to herbicides. 38 CFR Sec.3.307[a][6]. The fact that a veteran has been awarded the Vietnam Service Medal does not prove that he or she was "in country." Service members who were stationed on ships off shore, or who flew missions over Vietnam, but never set foot in- country, were sometimes awarded the Vietnam Service Medal. To verify service in RVN, you should review the veteran's DD-214 to determine if it shows such service [e.g., Foreign Service: Republic of Vietnam]. If not, you may need to obtain and review the veteran's other personnel records [e.g., Department of the Army Form 20 or equivalent].

Ok where in 7-93 does it mention Vietnam Service Medal and what happened to 7-93's definition of Stationed in Vietnam, which included service off the coast of Vietnam. One further comment on 7-93 Mrs. Keener defines Duty as service under orders. I believe all of us veterans were Under Orders or we would not have been there !

VAOPGCPREC 27-97

In this opinion Mrs. Keener was asked to advise the Director of Compensation and Pension Service whether service on a naval vessel in the waters off shore of Vietnam constitutes service in the Republic of Vietnam for purposes of 38 U.S.C. sec. 101 [29] [A], which defines the Vietnam era as the period beginning on February 28, 1961 and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period. The question in the claim was if a veteran serving on an aircraft carrier during the period of November 1961 through June 1962 and the carrier spent some of that time off the coast of the Republic of Vietnam, whether such service may be considered wartime service for purposes of determining eligibility for IMPROVED PENSION!! [NOTE: to qualify for a improved pension you must have served at least 90 days of active military service and at least one of those days was during a war time period.]

This was not a question about eligibility of presumptive herbicide exposure but a question dealing with wartime service for pension. Mrs. Keener's opinion 27-97 was dated July 23, 1997 but section 505 of the Veterans' Benefits Improvements Act was amended in 1996 [Pub. Law No. 104-275] to change the definition of Vietnam era in section 101 [29] of title 38, to the period beginning February 28, 1961 and ending on May 7, 1975, for vets who served in the RVN during that period, and August 5, 1964 through May 7, 1975 for all other cases, the later period is used on AO claims. I believe that Mrs. Keener could have answered the question in the pending claim at this point as yes this was a War Time Period, and that the veteran had at least 1 day of active military service during a war time period. I believe that Mrs. Keener is confusing the term used by Senate Committee on Veterans' Affairs Chairman Alan K. Simpson when he referenced the fact that "U.S. troops were subjected to the real perils of ground combat as early as February 28, 1961." When reading the early history of the Vietnam conflict we see where the U.S. Navy as early as 1959, had troops on the ground and were training and accompanying their Vietnamese counterparts in building the Vietnamese Navy and were in fact fired on by Viet Cong units using small arms as well as larger weapons. The carrier task force was flying air cover for U.S. forces and Vietnamese forces. I believe Sen. Simpson was including all military forces [even Navy] when he made this statement. Mrs. Keener continues on in her Opinion using phrases such as does not conclusively resolve, "We will examine: the statute's Legislative history, [and] the Intent of Congress."

Again, this has nothing to do with determining herbicide exposure for AO claims just wartime service for improved pension, but it has been used to DENY countless AO claims made by U.S. Navy veterans since 2002.

Since Mrs. Keener seems so fixated with Legislative History and Congressional Intent, I reviewed some of the 102d Congressional bills offered by members of Congress and Senate to see what their intent was, if it could be determined by a layman such as myself. For example, Congressman Kanjorski introduced H.R. 121 which also was dealing with changing the Vietnam era dates to March 1, 1961 through August 4, 1964 and his language was as follows: “in the case of a veteran who served on active duty in the Armed Forces in Cambodia, Laos, Thailand , the former Democratic Republic of Vietnam [north Vietnam] the Republic of Vietnam [South Vietnam] or the WATERS adjacent to the countries.” Senate bill 127 introduced by Senator Alan Cranston with 15 co-sponsors, has language such as, “in the case of a Vietnam veteran who, during Vietnam service, was exposed to an herbicide agent containing dioxin etc., and under definitions – “[1] The term Vietnam veteran means a veteran who performed Vietnam service, and “[2] The term Vietnam service means active military, naval, or air service in Vietnam during the Vietnam era. H.R. bill 321 introduced by Cong. Lane Evans with at least 86 co-sponsors and went on to become The Agent Orange Act 1991 uses the same language and definitions as Senate bill 127 [as above].

I believe Active Naval service could be safely defined as following orders and responding to what ever and where ever you’re needed whether that might be on shore, up rivers or off the coast and if we [the Navy] were not in the Republic of Vietnam, just who was shooting at us, the Canadians!?!?

Since there have been no published U.S. or VA studies on the health effects of herbicide exposure to naval personnel in Vietnam how can Mrs. Keener or the VA say conclusively that we were not exposed?

TO RECUSE OR NOT TO RECUSE

Mrs. Keener started working for VA in April 1993 and was appointed General Counsel in May 1993. Mrs. Keener is also a veteran navy nurse with service on the hospital ship USS Repose while stationed off Vietnam. While at VA, Keener also worked with Hershel W. Gober who was appointed Deputy Secretary of Veterans Affairs on Feb 4, 1993 by President Bill Clinton. Gober became acting Sec. of VA during 1997 through 1998. Gober was nominated by Clinton to be the Secretary of Veterans Affairs in 1997 but Clinton withdrew his nomination when the Senate confirmation committee intended to look into Gober’s exoneration on a 1993 charge of sexual misconduct. According to an article in The New York Times Mrs. Keener, department

counsel, referred the complaint to a staff lawyer who found the charge meritless. Mrs. Keener later married Gober in January 1996.

In a House of Representatives Sub-Committee on Oversight and Investigations Committee on Veterans Affairs hearing in 1997 [on sexual harassment in the VA] Congressman Steve Buyer stated “what I have today is to announce something that I’m not very pleased to announce, and that is I’m going to send a letter over to Arlen Specter, and what I’m going to ask the chairman is that I have very serious reservations over the nomination of Hershel Gober as the position of Secretary of the Veterans Affairs, and I’m going to send him over my reservations that he should not be named as Secretary of the VA. Mr. Gober, as the former Deputy Secretary of the VA presided as second in command over a structure whose mismanagement is only now coming fully into scope. His complacency as Deputy Secretary, and more importantly, the failure to bring these mismanagement issues to light, leaves me limited room for confidence in his fitness for Secretary of Veterans Affairs. Second, the gross mismanagement of the Secretariat is about to be eclipsed by all these recent revelations on sexual harassment that have shown signs of permeating the VA management structure to include the culture. It’s a cancer that seems to be eating away at the infrastructure of the country’s second-largest agency. Finally, to exacerbate these conditions, it is truly very concerning to me, and that is that the most influential oversight medium available to the agency, was the Office of the General Counsel, that was headed then by the Acting Secretary’s Spouse, [Mrs. Keener]. It has been very disturbing to me that many of the allegations of sexual misconduct, that it was the agency themselves that took the victims of sexual harassment and further victimized them. And so when you had the Office of General Counsel there that should have stepped forward, instead of protecting the victims who are subject to the hostile working environment, they, in turn, became victimized because she sought to protect the agency herself, and that being her husband and the former Secretariat.”

I find it not too hard to believe, and again this is just my opinion, that Mrs. Keener could have been looking for ways to make her husband look good so that he may possibly be appointed Secretary of Veterans Affairs, by saving money in the VA’s budget by issuing VAOPGCPREC 27-97 which, in effect, would deny compensation claims to US Navy Vietnam veterans. Mrs. Keener’s father was a WWII navy vet and suffered from asbestos related mesothelioma and died as a result in 2001.

In quoting Mrs. Keener from a statement she gave to the Senate Committee on the Judiciary in the Fairness in Asbestos Injury Resolution Act, January 11, 2005, she stated, “My dad was lucky to have a daughter who is a nurse, a lawyer, and a veteran to help him and my mom navigate all the health, regulatory, and legal systems we had to deal with. After his death, I

was able to help my mom receive Dependent Indemnity Compensation from the Department of Veterans Affairs for a service connected death.”

With all due to respect to Mrs. Keener’s father, a veteran, I wonder just how hard it was for her to get the DIC from VA with her past employment with VA and the fact that her husband Hershel Gober was again Acting Secretary of VA [July 25, 2000 through January 2002.]

YOU BE THE JUDGE !! It is for the above reasons that I feel that Mrs. Keener should have recused herself from making the 27-97 decision.

Sincerely,
Chuck Graham