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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4082

ALFRED PROCOPIO, JR., APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

PIETSCH, *Judge*: In October 2015, the appellant, Alfred Procopio, Jr., appealed through counsel a July 9, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for prostate cancer and diabetes mellitus, type II (DM), including as due to exposure to herbicides. Record (R.) at 2-23.

Under 38 U.S.C. § 1116(a) a veteran who "served in the Republic of Vietnam" between January 6, 1962, and May 7, 1975, is presumed service connected for certain conditions likely caused by exposure to Agent Orange, including DM and prostate cancer, even if he or she cannot prove direct exposure to a qualifying herbicide. 38 U.S.C. § 1116(a); 38 C.F.R. § 3.309(e) (2019). In *Haas v. Peake*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) adopted VA's interpretation of the statutory phrase "served in the Republic of Vietnam" to mean that, for a veteran to be entitled to the presumption of exposure to herbicides, he or she must have been present on the landmass or inland waters of Vietnam. 525 F.3d 1168, 1182-83 (Fed. Cir. 2008). VA defined veterans who served in "inland waters" by distinguishing between the "brown water" Navy, considered to have traversed inland waters and which consisted of usually smaller vessels that "operated on the muddy, brown colored inland waterways of Vietnam," and the "blue water" Navy, not considered to have traversed inland waters and which consisted of larger "gun line ships

and aircraft carriers. . .operat[ing] on the blue colored waters of the open ocean." VA Training Letter 10-06, at 4 (Sept. 9, 2010).

In *Gray v. McDonald*, this Court held that, although the Federal Circuit in *Haas* upheld VA's distinction between blue open water and the brown inland waterways, VA's exclusion of Da Nang Harbor, where Mr. Gray served, from the definition of inland waterways was not entitled to deference, was inconsistent with the regulation, and was arbitrary and irrational. 27 Vet.App. 313, 319, 326 (2015). Accordingly, the Court remanded the matter "for VA to reevaluate its definition of inland waterways—particularly as it applies to Da Nang Harbor—and exercise its fair and considered judgment to define inland waterways in a manner consistent with [§ 3.307(a)(6)(iii)'s] emphasis on the probability of exposure." *Id.* at 326-27.

In the appellant's case, the Board determined that this Court's holding in *Gray* was not applicable to his claim because the "the record reflects that the [appellant's] presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam" and because the appellant "has not specifically alleged that his ship anchored in a deep water harbor such as Cam Ranh Bay," Da Nang Harbor, Quy Nhon Bay, Ganh Rai Bay, or any other bay or harbor in Vietnam. R. at 14.

In November 2016, the Court affirmed the Board's decision. The Court noted that the appellant had not provided any evidence demonstrating that his ship anchored in a deep water harbor, as was the case in *Gray*, and that, in *Gray*, the Court noted that the holding of *Haas* applies where a veteran, such as the appellant, "never entered a harbor or port" and "served exclusively on the open ocean," 27 Vet.App. at 320 n.6. The Court therefore held that *Gray's* holding was not applicable to the appellant's claim.

On January 29, 2019, the Federal Circuit overruled their prior decision *Haas* and held that Congress has spoken directly to the question of whether those who served in the 12 nautical mile territorial sea of the "Republic of Vietnam" are entitled to [section] 1116's presumption if they meet the section's other requirements. They are. Because "the intent of Congress is clear, that is the end of the matter." Mr. Procopio is entitled to a presumption of service connection for his prostate cancer and diabetes mellitus. Accordingly, we reverse.

Procopio v. Wilkie, 913 F.3d 1371, 1380-81 (Fed. Cir. 2019) (citations omitted).

On March 26, 2019, the appellant filed an unopposed motion to remand the case, pursuant to the Federal Circuit's reversal of *Haas* and holding that he is entitled to a presumption of service connection for his prostate cancer and diabetes mellitus. *See id.*

Consequently, the appellant's motion is granted, and the Board's July 9, 2015, decision denying entitlement to service connection for prostate cancer and DM, including as due to exposure to herbicides, is VACATED and those matters are REMANDED for further proceedings consistent with the Federal Circuit's decision.

DATED: July 9, 2019

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