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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-4717

JACKIE L. JOHNSON, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Self-represented appellant Jackie Johnson served the Nation honorably in the United States Navy. In this appeal, which is timely and over which the Court has jurisdiction,¹ he contests an August 22, 2018, decision of the Board of Veterans' Appeals that denied him service connection for ischemic heart disease (IHD), including as due to exposure to Agent Orange.² Because the Board based its decision on an incorrect legal standard, we will set it aside and remand for further readjudication.

I. ANALYSIS

Resolution of this appeal is straightforward. To begin, there is no dispute that appellant has a current diagnosis of IHD.³ And it is equally beyond dispute that IHD is on the list of diseases VA rebuttably presumes are caused by exposure to Agent Orange.⁴ Thus, if he could demonstrate that he was exposed to Agent Orange in service, appellant would likely be able to obtain service

¹ See 38 U.S.C. §§ 7252(a), 7266(a).

² Record (R.) at 3-15.

³ R. at 9.

⁴ See 38 C.F.R. § 3.309(e) (2019).

connection for his IHD. In the decision on appeal, the Board concluded that he could not demonstrate exposure to Agent Orange and, therefore, denied service connection.⁵

Some veterans are entitled to a presumption of Agent Orange exposure. For example, if a person served "in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975," he or she is presumed to have been exposed to this herbicide.⁶ Appellant served aboard the U.S.S. *Robinson* from June 1967 to March 1971.⁷ While he was aboard, the *Robinson* conducted operations near Vietnam as part of that conflict.⁸ But that did not assist him in securing the benefits of this presumption before the Board because, at the time it rendered its decision, one was only "in" Vietnam if you stepped on land in that country or served on its so-called "brown water" – inland waterways.⁹ A "blue water" Navy veteran (that is one who served only on the high seas) was not entitled to the presumption.¹⁰ The Board relied on this state of the law to deny appellant's claim.¹¹

The Secretary concedes that remand is required because the legal basis for the Board's decision has been undermined.¹² The Court agrees. First, as the Secretary notes,¹³ the en banc Federal Circuit recently held that the phrase "in the Republic of Vietnam" in 38 U.S.C. § 1116 includes that Nation's 12-mile territorial sea.¹⁴ Therefore, blue water veterans are no longer categorically excluded from the benefits of the presumption under section 1116. That change alone undermines the Board's reasoning, requiring remand.

Second, in late June 2019, the President of the United States signed into law the Blue Water Navy Vietnam Veterans Act of 2019. That statute has at least potential applicability with respect to appellant's claim. The Board must consider it as appropriate on remand.

⁵ R. at 8-13.

⁶ 38 U.S.C. § 1116(a)(1)(A).

⁷ R. at 331, 384, 428.

⁸ *See, e.g.*, R. at 296.

⁹ *See Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008), *overruled by Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc).

¹⁰ *Id.*

¹¹ *See, e.g.*, R. at 8-10.

¹² *See* Secretary's Brief at 6-7.

¹³ *See id.*

¹⁴ *See Procopio*, 913 F.3d at 1380.

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.¹⁵ On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's post-remand notice.¹⁶ The Board must consider any such additional evidence or argument submitted.¹⁷ The Board must also proceed expeditiously.¹⁸

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and a review of the record, the Court SETS ASIDE the August 22, 2018, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: July 11, 2019

Copies to:

Jackie L. Johnson

VA General Counsel (027)

¹⁵ *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

¹⁶ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); *see also Clark v. O'Rourke*, 30 Vet.App. 92 (2018).

¹⁷ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

¹⁸ 38 U.S.C. §§ 5109B, 7112.