Vet. App. No. 21-0226

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT E. CREWS,
Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

SUPPLEMENTAL MEMORANDUM OF LAW OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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I. Introduction

On May 16, 2022, the Court ordered the parties to prepare supplemental memoranda of law to assist the Court in deciding this case. The Secretary respectfully submits this response to assist the Court in interpreting the special effective date exception that Congress added to the Agent Orange presumption statutory scheme to provide retroactive benefits to Blue Water Navy Veterans. *See* 38 U.S.C. § 1116A(c)(2). Moreover, the Secretary submits that Appellant is not eligible for the special effective date exception for two reasons: (1) he did not establish a current disability in a

prior claim for service connection, and (2) he had "brown water" service in the Republic of Vietnam, which would have already entitled him to the Agent Orange presumption at the time of the prior claim if he had been able to establish a current disability at that time. Therefore, VA correctly assigned an effective date based on the general effective date rules. *See* 38 U.S.C. § 5110.

II. Relevant Legal Background

Establishing service connection generally requires three elements: "'(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service' - the so-called 'nexus' requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). "Except as otherwise provided by law, a claimant has the responsibility to present and support" his or her claim for service connection. 38 U.S.C. § 5107(a).

In several instances, however, Congress has enacted presumptive service connection when Veterans faced exposure to toxins during service, but where establishing the "nexus" requirement would be difficult or impossible. In 1991, Congress passed the Agent Orange Act (AOA), Pub. L. No. 102-4, 105 Stat. 11 (1991), codified as amended at 38 U.S.C. § 1116, and implemented via regulations at 38 C.F.R. §§ 3.307(a)(6), 3.309(e). In

recognition of the use of herbicide agents over the Republic of Vietnam, the AOA established a framework for adjudicating disability compensation claims from certain Vietnam War veterans with diseases medically linked to herbicide exposure. The AOA provides that any Veteran who "served in the Republic of Vietnam during [the Vietnam era]" and who suffers from any of certain designated diseases "shall be presumed to have been exposed during such service" to herbicides "unless there is affirmative evidence to establish that the veteran was not exposed[.]" 38 U.S.C. § 1116(f).

Pursuant to the AOA, VA issued regulations establishing presumptive service connection for diseases associated with exposure to herbicides in Vietnam. 58 Fed. Reg. 29,107 (May 19, 1993). VA's implementing regulation conditioned application of the presumption on the claimant having "served in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(1993); *see* 58 Fed. Reg. 29,107 (May 19, 1993). In 2002, VA amended its internal adjudication manual to require evidence of service within the land borders of Vietnam for claimants to qualify for a presumption of service connection based upon exposure to herbicides under the AOA. M21-1, part III, paragraph 4.24(e)(1) (Feb. 27, 2002).

In 2008, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) upheld VA's Agent Orange presumption regulation "as requiring the servicemember's presence at some point on the landmass or the inland waters of Vietnam." *Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008)

(reversing this Court's rejection of VA's interpretation); *see* 38 C.F.R. § 3.307(a)(6)(iii). The inland waterways that were eligible for the presumption were often called "brown water" and the offshore waters that were outside the scope of the presumption were called "blue water." *See, e.g., Gray v. McDonald*, 27 Vet.App. 313, 320-21 (2015) (examining the brown/blue water distinction). Thus, from 2002 to 2019, VA denied presumptive exposure claims from Vietnam War veterans who did not have qualifying service on land in the Republic of Vietnam.

On January 29, 2019, the Federal Circuit, sitting *en banc*, overruled *Haas*. *Procopio v. Wilkie*, 913 F.3d 1371, 1380 (Fed. Cir. 2009). The Federal Circuit held that by using the phrase "Republic of Vietnam" in the AOA, Congress unambiguously intended to grant the presumption of herbicide exposure to veterans who served on land and within the 12-nautical mile territorial sea of the Republic of Vietnam. *Id.* at 1376.

Before VA was able to complete its implementation of the *Procopio* decision, Congress codified the presumption of exposure for Veterans with service offshore of Vietnam by enacting the Blue Water Navy Vietnam Veterans Act of 2019 (BWN Act), Pub. L. No. 116-23 (June 25, 2019) (codified, in relevant part, at 38 U.S.C. § 1116A). The new section 1116A applies only to "disease[s] covered by section 1116 of this title." 38 U.S.C. § 1116A(a). Besides defining the 12 nautical miles that would define service "offshore" of the Republic of Vietnam in section 1116A(d), the BWN Act also

codified an exception to the general statutory rules for effective dates of awards of VA compensation. 38 U.S.C. § 1116A(c)(1) (referencing 38 U.S.C. § 5110). This Court is now tasked with interpreting this statutory effective date exception.

III. Secretary's Response to Issues Presented

A. The Secretary Shall Determine the Effective Date of an Award Under the BWN Act Based on a Prior Denied Claim Only If the Current Disability Had Been Established.

The Court should interpret the special effective date exception in the BWN Act in light of Congress's general purpose in enacting the legislation and its specific purpose in including the special effective date rule. *See* 38 U.S.C. § 1116A(c). As the Secretary stated in his principal brief, the purpose of the BWN Act was to extend the Agent Orange presumption to Blue Water Navy Veterans who were previously denied based on their service offshore of the Republic of Vietnam. Sec'y Br. at 13 (citing H.R. REP NO. 116-58 at 9-10, 12).[1] There is no evidence or any suggestion at all that Congress enacted the law to assist Veterans whose claims were previously

[1] The House committee report acknowledged that the Federal Circuit's *Procopio* decision already held that BWN Veterans were eligible for the Agent Orange presumption but explained that the "bill [was] necessary to codify the Court's decision and mitigate concerns that VA may narrowly interpret the decision, thereby excluding some BWN [V]eterans." H.R. REP NO. 116-58 at 11; *see Procopio*, 913 F.3d 1371. Moreover, the *Procopio* holding would not have provided authority to assign effective dates based on previously denied final VA decisions. VA has nevertheless interpreted the BWN Act's special effective date exception to apply to claims granted under *Procopio* prior to the BWN Act's statutory change. *See* VAOPGCPREC 3-2019, at ¶ 47.

denied for not establishing diagnosis of a current disability. Congress wanted to provide retroactive awards of benefits to previously denied claims of BWN Veterans to "ensure[] *parity* for BWN [V]eterans and their survivors." H.R. REP NO. 116-58 at 12 (emphasis added). The word "parity" is significant. The legislative history makes clear that Congress wanted BWN Veterans whose claims were previously denied to be entitled to benefits from the date they would have been entitled if their offshore service had allowed them to use the Agent Orange presumption that was available to their fellow Vietnam Veterans who happened to serve on the landmass of Vietnam or its inland waterways. There is no reason to believe Congress intended for Veterans who could not establish a diagnosed disability at the time of a prior claim to be granted retroactive benefits back to the date of that claim. Parity would require those Veterans to receive effective dates based on the same rules that apply to all other Veterans who file supplemental claims with new and relevant evidence after failing to establish a diagnosed disability on prior claims. *See* 38 U.S.C. §§ 5108, 5110.

In addition to considering Congress's purpose, the Court should also consider the text and structure of the special effective date exception to understand how it works within the overall statutory scheme of the Agent Orange presumption. As discussed below, Appellant has interpreted the text in isolation, which led him to the erroneous conclusion that the

Secretary's interpretation would lead to absurd results. On the contrary, the Secretary's interpretation is the only interpretation where the text, structure, and Congress's purpose cohere.

Although there are three elements generally required to establish service connection, *see Shedden*, 381 F.3d at 1166-67, the second and third elements are satisfied together when establishing a claim based on presumed Agent Orange exposure under 38 U.S.C. § 1116. The first element is the same in both the general service connection and Agent Orange presumption contexts – the claimant must establish a current disability. *See* Sec'y Br. at 8-9, 16 (discussing *Brammer v. Derwinski*, 3 Vet.App. 223, 225 (1992)); *see also Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009) (discussing "the [V]eteran's general evidentiary burden to establish all elements of his claim") (internal quotation marks omitted)).

To benefit from the Agent Orange presumption, the claimant must establish a current disability that has been specifically listed in the statute or in the regulation. 38 U.S.C. § 1116(a)(1); *see* 38 U.S.C § 1116(a)(2); 38 C.F.R. § 3.309(e). "The disease" in section 1116A(c)(2)(B)(i) refers to one of the diseases on the list at section 1116(a)(2) or in 38 C.F.R. § 3.309(e).

The second *Shedden* element of "in-service incurrence or aggravation of a disease or injury" and the third element of "a causal relationship between the present disability and the disease or injury incurred or

aggravated during service" are satisfied together, by operation of law, when the Agent Orange presumption is for application. That is how the presumption mechanism works.[2] When a Veteran has "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975," the established listed current disability "shall be considered to have been incurred in or aggravated by such service." 38 U.S.C. § 1116(a)(1). In other words, "[s]ervice connection is available for these conditions without a claimant's showing a nexus between service and the condition." *Stefl v. Nicholson*, 21 Vet.App. 120, 122 (2007). That is a second purpose of the Agent Orange presumption under section 1116, along with the first purpose of relieving the Veteran's burden of showing that he was actually exposed to herbicides. *See* Sec'y Br. at 11.

When section 38 U.S.C. § 1116A(c)(2)(B)(i) refers to the prior claim being denied because it did not establish that the disease "was incurred or aggravated by the service of the veteran," it mirrors the language defining the Agent Orange presumption – that the listed disease "shall be considered to have been incurred in or aggravated by such service." *See* 38 U.S.C. § 1116(a)(1). The presumption is triggered when the Veteran establishes

[2] The Secretary acknowledges that the presumption is rebuttable. *See* 38 U.S.C. §§ 1113, 1116(f). However, in any case where there is "affirmative evidence" to overcome the presumption, that same evidence would defeat the Agent Orange presumption in both an initial and subsequent VA decisions. *See id.* In the instant context where there is a grant after a prior denial, the rebuttable nature of the presumption would have played no role.

he had service in the Republic of Vietnam that fits the statute's parameters as interpreted either by *Haas* prior to 2019, or *Procopio* and/or the BWN Act from 2019 to the present. The other obvious sign that the special effective date exception is part of the Agent Orange statutory scheme is that the first sentence of section 1116A cross references section 1116. *See* 38 U.S.C. § 1116A(a).

Thus, within the statutory scheme of the Agent Orange presumption, there are only two independent elements of service connection, not three. A claim must establish (1) diagnosis of one of the diseases on the statutory or regulatory list and (2) service in the Republic of Vietnam that meets the given parameters. When viewed through this lens, the Secretary's argument applying the canon of *expressio unius est exclusion atlerius* becomes clearer. *See* Sec'y Br. at 11-12.

The "submitted a claim" language in 38 U.S.C. § 1116A(c)(2)(B)(i), when read in the context of the entire clause and the following clause, requires that "the first element of service connection must have been satisfied previously," not "only that the prior claim must have been premised on a covered condition." *See* Order at ¶ 1(b) (May 16, 2022). Clause (i) requires that the prior claim "was denied by reason of the claim not establishing that the disease was incurred or aggravated by the service of the veteran." As explained above, this element of an Agent Orange presumption claim is satisfied by showing the required type of service in

Vietnam, and it is the second of two elements to establish service connection, with current disability being the first. Under *expressio unius est exclusion alterius*, that the statute states "the claim was denied by reason of" the second element means that it was not denied by reason of the first element.

If Congress had intended any prior claim to be eligible, regardless of whether a current disability was established, clause (i) would have ended before the "and." Clause (ii) ensures that the later claim was approved based on qualifying offshore service because it must be "approved pursuant to this section," meaning pursuant to section 1116A, which is solely about service offshore of the Republic of Vietnam. The Court should "avoid an interpretation that results in portions of text being read as meaningless." *See Ray v. Wilkie*, 31 Vet.App. 58, 64-65 (2019) (citing *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009)). To avoid rendering the language after the "and" in clause (i) as mere surplusage, the Court should recognize how the two clauses are meant to work together. The clauses dictate that there must be one thing different about the prior denied claim and the subsequent approved claim – that is "this section," *i.e.*, the BWN Act, exists to approve of Blue Water Navy service as qualifying service for the Agent Orange presumption. That difference in the law is what turns a denial into an approved claim and the situation for which Congress intends to bestow retroactive benefits.

The absurd result posited by Appellant in his reply brief could not occur under this statutory scheme because a claim cannot be denied based on lack of nexus when the Agent Orange presumption operates. *See* App. Reply Br. at 8; Order at ¶ 1(e). If VA did deny based on lack of nexus in a prior claim, it was because the disease that is now on the Agent Orange list was not on the list at the time of the denial. In that scenario, the claimant would be a *Nehmer* class member and could be granted an earlier effective date based on that status. *See* Order, *Nehmer v. U.S. Dep't of Veterans Affairs*, No. C 86-06160 (N.D. Cal.) (Nov. 5, 2020) (ordering readjudications of BWN cases under the *Nehmer* stipulation); *see also Constantine v. McDonough*, 35 Vet.App. 81, 82-83 (2022) (this Court declines to exercise jurisdiction to review the scope of the *Nehmer* litigation). In either scenario, a Veteran or survivor would not be denied an effective date based on the earlier claim for not establishing nexus in the earlier claim. That Appellant's posited absurd result could not happen supports the Secretary's interpretation of the statute. Moreover, it is Appellant's interpretation that would cause absurd results – Congress could not have intended for a Veteran or survivor to be paid retroactive benefits to cover a period when a disability had not been established, *i.e.*, when the Veteran had no disability.

B. The Board Did Not Err.

The Board was both legally and factually correct when it found that "the exception to the general effective date rules provided by the [BWN] Act

do not apply" because the "July 2014 denial was not based on a prior more restrictive definition of service in the Republic of Vietnam." *See* [R. at 8-9 (5-14)]. As the Board explained, "the Veteran's original September 2013 service connection claim for ischemic heart disease was denied in a July 2014 [agency of original jurisdiction] rating decision not on the basis that he did not have confirmed service in Vietnam, but on the basis that the evidence of record did not show that he had a current disability." [R. at 8-9 (5-14)]; *see* [R. at 2348-49 (2346-51)]. The July 2014 rating decision explained that the evidence did "not show a current diagnosed disability," and then discussed the Agent Orange presumption, listing all the diseases for which it would apply, including ischemic heart disease, old myocardial infarction, and coronary artery disease. [R. at 2348 (2346-51)]. The rating decision then reiterated that "the evidence does not show a diagnosis of a condition for which VA has found a positive association to herbicide exposure." [R. at 2349 (2346-51)]. There was no discussion of whether Appellant's service in Vietnam did or did not fit within the definition under case law interpreting 38 U.S.C. § 1116(a)(1)(A).

In March 2020, VA issued a memorandum conceding herbicide exposure "based on [Appellant's] duty on the Republic of Vietnam's inland waterways" and "based on [Appellant's] nautical service in the offshore eligible waters as defined in" the BWN Act. [R. at 964]. In other words,

Appellant had both blue water and brown water service.[3] Appellant's brown water service on the inland waters of Vietnam would have entitled him to the Agent Orange presumption under the *Haas* interpretation of 38 U.S.C. § 1116 and 38 C.F.R. § 3.307(a)(6)(iii), if he had established a current disability at the time of the prior rating decision. *See Haas*, 525 F.3d at 1197.

Because Appellant was entitled to the Agent Orange presumption under the old interpretation of service in the Republic of Vietnam, Appellant not only fails to meet the special effective date requirement about the prior denial, but he also fails to meet the requirement that the new "claim is approved pursuant to this section." *See* 38 U.S.C. § 1116A(c)(2)(B)(ii). Under the canon of *expressio unis est exclusion alterius*, as discussed above, this language means that the claim must be "approved pursuant to this section" and not the section that already existed before. In other words, the special effective date is only available when, but for Congress's enactment of the BWN Act, the claim would not have been approved. Here,

[3] The Secretary regrets that neither party brought this fact to the Court's attention during principal briefing. It is critical that the Court consider this significant fact and the associated argument presented in this supplemental brief because the Court risks issuing an advisory opinion if the Court does not consider the multiple factual bases for Appellant's ineligibility under the statute at issue. *See Norvell v. Peak*, 22 Vet.App. 194, 200 (2008) ("federal courts are to decide only actual controversies by judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it") (internal quotation marks omitted).

however, where the claim was allowable under *Haas*-era section 1116 but was denied because Appellant did not establish a current diagnosis at that time, Appellant's case presents no principled reason for Congress or this Court to depart from the general effective date scheme of 38 U.S.C. § 5110.

C. If the Court Finds Board Error, There Was No Prejudice Because It is Undisputed That the July 2014 Final VA Rating Decision Found No Current Diagnosis.

The Secretary reiterates that the Board did not err and also maintains the position taken in his principal brief that if the Court finds error in the Board's decision, it is not prejudicial because the July 2014 rating decision found that no current disability had been established. *See* Sec'y Br. at 16-19. Appellant concedes that the July 2014 rating decision found a "lack of evidence showing a current disability." App. Br. at 10; App. Reply Br. at 3. The fact that no current disability was established in the July 2014 decision is the only fact necessary to rule out application of the BWN Act special effective date exception and is a sufficient basis to deny Appellant's appeal. Therefore, even if the Court finds that the Board applied an improper standard or its analysis lacked clarity, there is no prejudicial error because Appellant cannot show entitlement to an earlier effective date under the law. *See Sabonis v. Brown*, 6 Vet.App. 426, 430 (1994) (advising that where the law is dispositive, a claim should be denied because of a lack of entitlement under the law).

To decide this case, the Court need not consider the Secretary's legal argument that the BWN Act's special effective date exception "is only triggered where the sole basis for the prior denial was lack of in-service incurrence." *See* Order at ¶ 3(a).[4] The Court can, and should, deny the appeal on the basis that Appellant had brown water service so he would have been entitled to the Agent Orange presumption at the time of the prior decision if he had gotten over the initial hurdle of establishing a current disability. Because he did not, the effective date of his award is properly based on when he presented new and relevant evidence of the current disability. *See* 38 U.S.C. §§ 5108, 5110.

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[4] As clarified above, "in-service incurrence" in the Agent Orange presumption context precludes the need to establish nexus.