UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

PATRICK M OVERTON,	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 17-0125
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLANT PATRICK M. OVERTON'S MEMORANDUM
IN OPPOSITION TO MOTION FOR RECONSIDERATION

The Secretary had moved for reconsideration based on an erroneous claim that the Court's dictum stating that the VA waived its deference argument was somehow central to the Court's decision. Mr. Overton suggests that the deference argument was not central to the holding in the case and, therefore, there should be no reconsideration. Secondly, Mr. Overton suggests that, in fact, the VA waived its deference argument in so far as it might have applied to its Manual Provision M21-1.

The deference waiver dictum was not central to and determinative of the Court's holding. The Court stated on page 10 of the Opinion:

> "Third, even if the *Auer* argument had not been waived, it would be misplaced here. We are not reviewing the position set forth in the M21-1. After all, the M21-1 provision is not a substantive rule of law. Rather, we are reviewing the final Board decision on the appellant's claims. As we explained, the Board's decision is deficient because the Board did not explain why it relied on the M21-1 and its conclusions concerning the brown water/blue water distinctions for Vietnamese harbors and bays. Thus, we are not called on to express any view about what the M21-1 says, and we don't. In essence, there is nothing to defer to here because in terms of the Board's rationale for adopting the M21-1's position, the Board's decision is deficient as a matter of law."

The Court explained that the Board erred because when relying on the M21-1 provision it must independently review the matter the M21-1 addresses and must provide adequate reasons or bases for so relying. The Board simply did not do that and, therefore, committed error.

In addition, the Board failed to provide an analysis of the likelihood of exposure of Agent Orange to Da Nang Harbor which was, as the Court stated in *Gray v. McDonald*, 27 Vet.App. 313 (2015) a necessary analysis to determine whether Da Nang Harbor was brown water and, therefore, subject to the Agent Orange presumption. This presumably is the analysis that the Court requires with respect to any reliance on M21-1.

In addition, the VA mischaracterizes the import of its argument. It cites *Haas v. Peake*, 525 F.3d 168 (Fed.Cir. 2008) holding that deference had to be given to 38 C.F.R. 3.307(a)(6) which provides, among other things, that veterans who served on ships or boats on Vietnam's brown water were in fact subject to the Agent Orange presumption. The VA in its brief argued that deference should be given to this regulation but did not make the specific argument that deference should be given to its manual instruction in M21-1. Instead it cited it as some kind of authority.[1]

The Court made clear in citing *Gray v. Sec.'y of Veterans Affairs*, 875 F.3d 1102, 1108 (Fed. Cir. 2017) that the Board of Veterans' Appeals was not bound by M21-1 because it did not carry the weight and authority of a regulation which, in contrast, is published before it is passed and for which comments are solicited. The VA never argued in its brief why a manual provision like M21-1 should be subject to deference in

[1] See Appellant's Memorandum In Opposition To Appellee's Motion For Leave To File Notice Of Correction and Appellant's Memorandum In Opposition To Appellee's Second Opposed Motion For Leave To File Notice Of Correction filed in this case.

the same manner to which a pre-published well vetted regulation was entitled. As a result, the VA did, in fact, waive the so-called *Auer* deference argument specifically with respect to M21-1.[2]

For the above stated reasons, the Secretary's complaint about the deference issue is simply beside the point. The point the Court made and its holding in this case was that a proper analysis of whether to apply M21-1 to Da Nang Harbor was not made by the Board of Veterans Appeals and, therefore, it was error. In addition, Mr. Overton demonstrated that the deference argument with respect to M21-1 was never made and, therefore, waived.

For the above stated reasons, it is respectfully submitted that the Motion For Reconsideration should be denied.

Dated: October 12, 2018.

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[2] The VA cites *Procopio v. Wilkie*, No. 17-1821, (U.S. Fed. Cir.), as having a possible effect on the holding in this case. *Procopio* is a territorial seas case, the ship in question never went near a harbor and, therefore, it is not factually the same as this case. The issue in the *Blue Water Navy Vietnam Veterans Association, Inc. v. Peter O'Rourke*, No. 17-1693 and *Gray v. Peter O'Rourke*, No. 17-1679 addressed in a consolidated opinion was whether the Court had jurisdiction under 38 U.S.C. 502 or otherwise to hear these cases.

CERTIFICATE OF SERVICE

Pursuant to U.S. Vet.App. R. 25(c)(1), I certify under penalty of perjury under the laws of the United States of America that, on October 12, 2018, a copy of the foregoing Appellant Patrick M. Overton's Memorandum In Opposition To Motion For Reconsideration was filed with the Court's CM/ECF system, which sent notification to all attorneys of record, including:

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