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United States Senate

COMMITTEE ON VETERANS' AFFAIRS
WASHINGTON, DC 20510

LUPE WISSEL,
REPUBLICAN STAFF DIRECTOR

March 30, 2010

The Honorable Eric K. Shinseki
Secretary of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Dear Secretary Shinseki:

I am writing to request that you direct VA regional offices to review all claims for service-connected compensation that were held during the pendency of the *Haas v. Peake* litigation (Haas stay cases) and were subsequently denied. During oversight visits to VA offices, Committee staff reviewed 80 randomly selected Haas stay claims and found some alarming trends in adjudication. In addition, dozens of veterans have contacted the Committee complaining that VA failed to follow correct procedures for determining exposure to herbicides in Vietnam inland waterways, evaluating eligibility for non-Hodgkin's Lymphoma, or applying directives for evaluating exposure during perimeter duty at Air Force bases in Thailand.

A review of files and claims brought to the Committee's attention have revealed widespread noncompliance with procedures described in former Secretary Dunne's letter of February 13, 2009, a copy of which is enclosed. In particular:

- Many files reviewed had claims for disabilities associated with herbicide exposure denied without obtaining the veteran's personnel file to ascertain the time of service on particular ships.
- Most files reviewed did not have evidence such as deck logs, a captain's history or other documents which would enable the decision-maker to determine whether the veteran served exclusively off shore and, thus was not eligible for a presumption of exposure to Agent Orange, or on inland waterways, which does receive such a presumption, before the claim was denied.
- Most of the individual claims brought to the Committee's attention were granted after Committee staff reviewed pertinent VA regulations and directives with local regional office managers.

- Claims from veterans who served as security police and dog-handlers in Thailand were denied without following the instructions provided by the Compensation and Pension Service or were decided before the directives were issued.

I appreciate the effort VA is making to identify ships which sailed in inland waterways and to issue appropriate directives to regional office managers. However, most of the Haas stay claims were quickly decided and denied immediately after the stay was lifted. The decisions focused on the lack of evidence of "boots on the ground" in military records and fail to recognize or develop for actual or potential inland waterway exposure. In some of these cases, VBA will now have evidence of recently discovered service records which would support of service-connection under section 3.156 (c) of title 38, Code of Federal Regulations.

I am therefore requesting that Haas stay claims files be reviewed at regional offices to determine if a claim was denied without obtaining personnel records and deck logs or other evidence of ship location. In such cases, I am requesting that the relevant records be obtained and that the claim be readjudicated, under current criteria for identification of inland waterway service or service in other locations where VBA has evidence of herbicide exposure.

I have been reluctant to make this request, given VA's growing backlog of claims. However, given the significant number of errors which have been identified in this class of claims, I believe that in fairness to these Vietnam veterans, additional review is warranted.

Thank you for your attention to this request.

Aloha pumehana,



Daniel K. Akaka
Chairman



THE UNDER SECRETARY OF VETERANS AFFAIRS FOR BENEFITS
WASHINGTON, D.C. 20420
SENATOR DANIEL K. AKAKA
WASHINGTON, D.C.

FEB 19 AM 8:23

FEB 13 2009

The Honorable Daniel K. Akaka
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am responding to the letter you sent on behalf of Vietnam-era Navy Veterans who are concerned about how the Department of Veterans Affairs (VA) handles claims for service-connected disability benefits based on herbicide exposure.

The Agent Orange Act of 1991 authorized the presumption of exposure to herbicides for Veterans who served in the Republic of Vietnam between January 9, 1962, and May 7, 1975. VA believes that Congress did not intend for this presumption to apply to offshore "blue water" Veterans, since the available evidence does not show herbicides were sprayed over offshore coastal waters. VA considers open coastal harbors, such as the one at Da Nang, to be part of the offshore waters of Vietnam and not part of its "brown water" inland waterway system (i.e., rivers, canals, estuaries, and delta areas). Inland waterways were subjected to the same well-documented aerial herbicide spraying as the land areas surrounding them. Therefore, the presumption of herbicide exposure is extended to all Veterans who served on inland waterways, but not to those serving solely aboard a vessel anchored temporarily in Da Nang Harbor or any other harbor along the coast of Vietnam.

In *Haas v. Nicholson*, the United States Court of Appeals for Veterans Claims (CAVC) determined that Veterans who served aboard Naval vessels off the coast of Vietnam should be given the same presumption of herbicide exposure as Veterans who served on the ground in Vietnam or on its inland waterways. VA appealed the case to the United States Court of Appeals for the Federal Circuit, and a court-approved stay on processing "blue water" claims went into effect pending a final judicial decision. The Federal Circuit reversed the CAVC decision and determined that VA's interpretation of the statute was reasonable and valid. Recently, the United States Supreme Court declined to hear the *Haas* case appeal; the Federal Circuit decision is now final. VA is beginning to adjudicate herbicide-related claims that were affected by the stay.

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VA has procedures in place for developing and adjudicating disability compensation claims from Vietnam-era Navy and Coast Guard Veterans. These procedures have been communicated to the regional offices. Every claimant for service-connected disability compensation is sent a notification letter describing the specific evidence needed to support his or her claim. If the claimed disability is related to herbicide exposure, the Veteran is requested to provide details of such exposure. If the claim is based on the Veteran disembarking a vessel and going ashore for leave or work duties, VA will request all military records and ships' deck logs that may show the Veteran set foot on land. Before an adverse decision is made, VA requests information about the Veteran's ship from the Army and Joint Services Records Research Center, which is a Department of Defense-affiliated research facility.

To determine whether a Veteran who served aboard an open water vessel should receive the presumption of herbicide exposure, VA reviews official Navy and Coast Guard ships' deck logs held by the National Archives and Records Administration. These logs may show that a ship was anchored off the coast of Vietnam, but rarely do they contain the names of individual crewmembers who possibly went ashore for leave or work details. However, VA will continue to research ships' deck logs to help verify a Veteran's inland waterway service or visitation to the mainland of Vietnam.

In some cases, ships' deck logs will confirm that an open water vessel entered the inland waterways of Vietnam to conduct operations. Such was the case of the USS *Ingersoll*, a destroyer that traveled seven miles up the Saigon River to conduct a fire support mission in October 1965. Deck logs showed this inland waterway service, and the Veterans who served aboard were given the presumption of herbicide exposure. Fast Letter 07-27 was released on December 27, 2007, to provide guidance to all regional offices on processing compensation claims from Veterans who served aboard the USS *Ingersoll*.

The Board of Veterans' Appeals previously reviewed its decisions on herbicide exposure claims from Navy Veterans who served aboard vessels anchored in Da Nang harbor. A small number of decisions were identified (the most recent of which was in July 2004) that found Da Nang harbor to fall within the inland waters of Vietnam. However, the overwhelming majority of the decisions reviewed held otherwise. Hence, the Board concluded that these allowances, while not necessarily erroneous in the absence of clear regulatory guidance, are really aberrant from the mainstream and that it would therefore be inaccurate to claim that they were indicative of the Board's approach to the issue. Rather, these few allowances were the decisions of individual Veterans Law Judges that preceded the Federal Circuit's clear holding to the contrary in *Haas*, and are not reflective of any established position that service solely on

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board a vessel anchored in Da Nang harbor is sufficient to establish herbicide exposure.

VA is committed to providing a consistent and equitable evaluation process for all herbicide-related claims from Navy Veterans of the Vietnam era. Therefore, we will provide additional nationwide guidance to regional offices on the procedures to be followed when developing for evidence that a Navy Veteran served on the inland waterways of Vietnam or disembarked a ship and set foot on land. I will also direct our Quality Assurance Staff to conduct a focused review of these claims to ensure proper application of these procedures.

Thank you for your letter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "P. W. Dunne". The signature is written in a cursive style with a large, looped initial "P".

P. W. Dunne