

Blue Water Claims Update

Landmark Ruling of COA for Vet Claims

May 5, 2015

The Court of Appeals for Veteran Claims has made a landmark ruling that will help many Navy and Coast Guard vets who have been classified as Blue Water Sailors. The case was **Gray vs McDonald** and was **decided on April 24, 2015**. This will greatly benefit many Viet Nam Navy veterans effected by Agent Orange. In it they declared that the Harbors of Danang, Cam Ranh Bay, and Vung Tau must now be classified Brown water instead of Blue water. Basically the court said these ports were classified as deep-water but should have been classified as being in the spray area and not by the fact that large vessels could enter them. The VA must now declare all vessels that entered these harbors as dioxin (AO) exposed and compensate the sailors on them that have presumptive diseases that are recognized as having their genesis in AO exposure.

In regard to service in mouth of rivers, such as minesweepers, the court said that even the VA Secretary declared that there is no definite boundaries of a river mouths, therefore they cannot just make a decision by “flipping a coin” as to what vessels were exposed and which were not. The court further stated that inland water service cannot be limited to the ships that are on their “official” ships list. The emphasis should be on the likelihood of exposure to herbicide and that the fact that a large river’s brown water plume can extend far out to sea. It stated that the use of “mouth” and “borders” around Viet Nam may extend well beyond the physical land mass of a river and the VA’s current interpretation of the code of Federal Regulations that cover this area are “arbitrary and capricious”.

To put the icing on the cake, the court ruled that the VA’s reliance on the IOM’s (Institute of Medicine) 2011 report on dioxin exposure is unacceptable because the IOM was “to general and inconclusive in nature”. This means that the VA’s rating system cannot conclusively contend that that some offshore vessels were NOT contaminated by AO. Finally, the court ordered the VA to redraw its lines and rules as to what are the proper boundaries and “exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulations with emphasis on the probability of exposure”. In essence they said the present methods are patently unfair.

This ruling should bode well for sailors and Coast Guardsmen who sailed and flew into areas that should have been considered contaminated long ago. However, for all vets who may have a claim in the works, the regulations are going to have to be promulgated by the VA and they must decide if they wish to honor past claims as they may look at this as new rules that did not apply when the original case was denied. The VA can be very obtuse about how they honor a change of the code of Federal Regulations. They also have a right to appeal this to the U.S. district Court but that is very doubtful.

Synopsis prepared by:

Mike Day
Veteran Service Officer
Catholic War Veterans USA

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Alternative Interpretation.

The Executive director of the Vietnam Veterans Blue Water Navy Organization offered a different take to the conclusions of VSO Mike Day regarding the Court of Appeals for Veteran Claims ruling. He wrote:

The CAVC did in fact say that the current VA definitions for “inland water” and “river mouths” were thrown out because there was ambiguity and unreasonable logic involved; and no basis in the definition that referred to the regulation that requires connection to “sprayed exposure to herbicide” rather than to any geographical descriptions used by the VA. However, the Court did not specify what that definition should be and offered no direction on how the VA should solve their problems. They did not say whether any harbor was inland or blue water, but they invalidated the VA’s past approach to naming them one or the other. They instructed the VA to remove the ambiguity in previous determinations and to submit new definitions but they did not say how soon to do that or how many chances VA would receive to get it right. Essentially, the Court did nothing but remove the groundwork the VA established.

So there was no direction given about what the status a port or harbor had and no definition currently exists for what constitutes the ‘mouth of a river.’ There was no direction about how things “must now be classified.” The Court left all of that completely wide open. That leaves many avenues open for to CLAIMS that state a ship was in an “inland harbor” or “at the mouth of a river” based on the creativity of whoever is writing up the claim. There are currently no guidelines that claim raters can fall back on. **If the old rules are used, the claim is a CUE.**

My suggestion is that the emphasis of any rationale for exposure to herbicide that occurred within a harbor or bay be based on an exposure that resulted from herbicide that contaminated the bay or harbor by aerial spraying, either directly into the harbor (and there is evidence that Da Nang Harbor was sprayed by Ranch Hand Operations), or into water that fed into the harbor from rivers. River mouths could extend out into the South China Sea by virtue of the plume created by the discharge water of the river into the sea. In some satellite pictures that can be seen to be measured in kilometers or, in the case with the Mekong River, hundreds of kilometers. At present, there is no directive for the VA raters to halt the adjudication Blue Water Navy claims, but that may be the VA’s next step.

John Paul Rossie, Executive Director
Blue Water Navy Vietnam Veterans Association