

VA Blue Water Claims

Update 85: Court Orders VA to Redecide Thousands of Claims

On 5 NOV, the U.S. District Court for the Northern District of California ruled in favor of thousands of so-called Blue Water Navy Vietnam Veterans and their survivors in response to the motion filed by attorneys from the National Veterans Legal Services Program (NVLSP) to enforce the 29-Year Old Class Action Consent Decree in *Nehmer v. U.S. Department of Veterans Administration (VA)*. The Court **ordered the VA to automatically readjudicate** thousands of benefits claim that the Court found had been wrongly denied under the Consent Decree. The Court also ordered the VA to pay retroactive compensation if it finds the veteran served in the territorial seas of Vietnam. The motion was filed with the pro bono assistance of Paul Hastings LLP.

“We applaud the Court’s recognition that Blue Water Navy Vietnam Veterans and their survivors have been wrongly denied retroactive disability and death benefits ever since 2002, when VA reversed its prior position and denied the presumption of Agent Orange exposure to veterans who served in the territorial seas of Vietnam,” said National Veterans Legal Services Program Executive Director Bart Stichman. “These veterans and their surviving family members have already been waiting years for benefits to which they are entitled under the Consent Decree simply because they did not set foot in the land mass of Vietnam.” The 1991 Consent Decree applies to a class consisting of hundreds of thousands of Vietnam veterans and their survivors who applied to the VA for service-connected disability and death benefits due to exposure to Agent Orange, the toxic herbicide used by the U.S. government during the Vietnam War. That Decree required the VA, whenever it recognized an additional disease is associated with exposure to Agent Orange, to identify and readjudicate all prior VA denials of benefit claims filed for that disease and pay benefits retroactive to the date of the claim that led to the prior denial.

On July 10, 2020, NVLSP, which has served as counsel for the class since 1987, filed its fourth motion for enforcement to obtain compliance with the 1991 Consent Decree. The District Court had granted all three prior enforcement motions. As a result of the prior three successful enforcement actions, VA conceded that it paid billions of dollars in retroactive benefits to Vietnam veterans and their survivors. The VA’s 2002 change in policy challenged in the fourth enforcement motion was that these “Blue Water” Vietnam veterans were not covered by the language of the Agent Orange Act of 1991, which provided that veterans who “served in the Republic of Vietnam” during the Vietnam era “shall be presumed to have been exposed during such service” to Agent Orange. But in 2019, in *Procopio v. Wilkie*, the U.S. Court of Appeals for the Federal Circuit rejected VA’s interpretation of that language and ruled that Congress intended that all Vietnam veterans who served on ships in the territorial sea of Vietnam—within 12 nautical miles of the coast—be entitled to the presumption of exposure. NVLSP filed its enforcement motion after VA refused to redetermine the post-2002 claims of “Blue Water” Vietnam veterans and their survivors that were denied under the VA policy rejected in the *Procopio* decision.

“The Nehmer consent decree has been instrumental for nearly 30 years to ensure full comprehensive relief for veterans who have suffered greatly from Agent Orange-related diseases. We are gratified that the intended relief is now available to the Blue Water Navy Veterans,” said Stephen Kinnaird, Partner, Litigation Department, Paul Hastings LLP. Based on the Court’s decision, the VA must: (1). Identify within 120 days of the date of this order, all of the Nehmer readjudication decisions made based on the consent decree in which the VA denied compensation on the ground that the veteran was not entitled to the presumption of herbicide exposure because the veteran did not set foot on the landmass of Vietnam or serve in the inland waterways of Vietnam.

- (2). Within 240 days of the date of this order, issue a replacement decision that determines:
- (a) whether the veteran served in the territorial waters of the Republic of Vietnam during the war and, if so,
 - (b) the amount of retroactive compensation, if any, the veteran or the veteran’s survivor (or, if the veteran or survivor is deceased, the estate of the deceased veteran or survivor) is entitled under the terms of consent decree; and
- (3). Provide class counsel, pursuant to the Privacy Protection Order, with a copy of (a) all of the Nehmer readjudication decisions identified, (b) all of the replacement decisions issued, and (c) each notice letter sent to the class members and coding sheet associated with such replacement decisions. According to estimates, this ruling could impact 2,000 to 15,000 veterans and their survivors and potentially result in each receiving an average of \$28,000 tax-free in benefits. Ultimately, this decision could result in tens or hundreds of millions of dollars in relief to Blue Water Navy veterans and their survivors. The Department of Veterans Affairs has no plans to challenge the court ruling.

The Blue Water Navy Vietnam Veterans Act of 2019 (BWN Act) codified the presumption of herbicide exposure for Blue Water Vietnam veterans. However, the BWN Act does not automatically require the VA to assess if any Blue Water Vietnam veteran or survivor is eligible for retroactive compensation. The BWN Act requirement to pay retroactive compensation is triggered only if a Blue Water Vietnam veteran affirmatively files a claim after January 1, 2020 and the veteran specifically identifies the Agent-Orange related disease that was the subject of the earlier claim. The BWN Act does not completely correspond to the Nehmer Consent Decree. Some Blue Water Vietnam veterans and their survivors may be eligible for retroactive compensation under the Consent Decree but not eligible under the BWN Act and vice versa. As a result, the House Report on the BWN Act states that “Nothing in [the BWN Act] intends to limit the rights of Nehmer class members who seek relief for benefits under the Nehmer Consent Decree.”

The Department of Veterans Affairs has no plans to challenge the court ruling ordering it to make retroactive payments to a small class of "Blue Water Navy" Vietnam veterans and their survivors who were wrongly denied benefits for exposure to Agent Orange, the head of the Veterans Benefits Administration (VBA) said 16 NOV. The Justice Department has not indicated whether the 5 NOV ruling by federal District Judge William Alsup in San Francisco will be appealed, but Paul Lawrence, VA under-secretary and VBA chief, said the VA will comply with the decision in the complicated case.