



NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

Statement for the Record

Bart Stichman
Co-Founder and Executive Director
National Veterans Legal Services Program

Submitted to
House Committee on Veterans' Affairs

Hearing on
"Pending Legislation"

May 5, 2021

The National Veterans Legal Services Program (NVLSP) would like to thank Chairman Takano, Ranking Member Bost and distinguished members of the House Committee on Veterans' Affairs for the opportunity to present our views in a statement for the record regarding the pending legislation before the Committee.

Established in 1981, NVLSP is an independent, nonprofit veterans service organization that is dedicated to ensuring that our government lives up to its obligations to provide our 22 million veterans and active service members the VA and military department benefits they have earned due to disabilities resulting from their military service to our country. At NVLSP, we have a uniform code: to serve those who have served us.

NVLSP firmly supports legislation of the type pending before the Committee that addresses entitlement to VA disability and death compensation due to exposure during military service to toxic substances. The need for such legislation is particularly acute for exposure to (a) the toxic fumes spewed by the 250 open air burn pits used by the U.S. military departments in Southwest Asia to dispose of solid waste, instead of building safer mechanisms such as incinerators, and (b) toxic herbicides used by the U.S. military departments in Southeast Asia.

NVLSP encourages the Committee, in reviewing the bills before it today, to add legislative language that focuses on two issues of major importance: (1) the need for the government to begin forthwith to conduct a scientifically valid epidemiologic study of the adverse health effects of military personnel exposed to open air burn pits in Southwest Asia; and (2) entitlement to retroactive disability and death compensation for veterans and surviving family members exposed to Agent Orange in Vietnam due to diseases that are newly accorded presumptive service connected status due to such exposure. We explore these two issues below.

Requiring an Epidemiologic Study of Veterans Exposed to Burn Pit Fumes

There is a critical need for legislation governing the adjudication of claims based on exposure to toxins from burn pits that cannot be overstated. Although the VA currently presumes that more than a dozen different cancers and other diseases are associated with exposure to Agent Orange, the VA does not currently presume that *any* disease has a positive

association with exposure to burn pit smoke. It decides disability claims based on exposure to burn pit smoke on a case-by-case basis. Because of the general skepticism the VA has to disability claims based on toxic exposures, these are difficult claims to win. Unfortunately, veterans exposed to toxins from burn pits need, and rarely have, access to attorney representation and medical experts who can provide medical opinions linking exposure to the specific toxins involved and the veteran's specific disease. Consequently, VA statistics show that it has denied more than 80% of the claims that have been filed for diseases allegedly due to exposure to toxins from burn pits.

NVLSP is a staunch advocate for several bills that are before the Committee today that address the need for presumptive service connection for diseases due to exposure to burn pit fumes: specifically, H.R. 1355, H.R. 2127 and H.R.2372. These bills incorporate a very important VA benefits principle that has been consistently recognized by Congress and the VA over many decades whenever Congress or the VA has accorded presumptive service connected status to a disease due to exposure to a toxic substance. That principle is that presumptive service connected status is warranted when the available scientific evidence shows that there exists an epidemiologic, statistical association between exposure and disease. Both Congress and the VA have made clear that this epidemiologic, statistical association is a lower standard than a strict, tort-like cause and effect association, and this lower standard is warranted due to our nation's gratitude and solicitude to those who defended our country in military service.

Yet, NVLSP is mindful that some members of Congress are likely to oppose bills that grant presumptive service connection status to particular diseases on the ground that there is an alleged lack of sufficient scientific evidence of an association between exposure to the toxins and that disease. There exist today scientific studies of the association between specific chemicals that the Department of Defense has confirmed were present in the fumes and smoke spewed by the open-air burn pits and many different chronic diseases. But this may not satisfy those members of Congress who are opposed to granting presumptive service connection status on the ground that no epidemiologic studies currently exist that examine the incidence of disease in two cohorts – one of veterans exposed to open air burn pit fumes and the other of similarly situated veterans who were not so exposed.

The mission of the VA is to care for those who have borne the battle and their orphans. Given the enduring principle that presumptive service connected status is warranted when scientific evidence shows that there exists an epidemiologic, statistical association between exposure and disease, it is obvious that an agency with VA's mission should have begun years ago to conduct an epidemiologic study of the incidence of disease in a cohort of veterans exposed to open air burn pit fumes compared to a cohort of similarly situated non-exposed veterans. However, the VA has steadfastly eschewed the conduct of this obviously needed study, despite calls from members of Congress and veterans service organizations for it to do so. Some VA skeptics have speculated that VA's reluctance is based on the fear that if such a study were conducted, it could potentially show a statistically higher incidence of certain diseases in the exposed cohort and lead in turn to VA payment of disability and death compensation that would have a major impact on the VA's budget.

NVLSP believes that this unjust state of affairs cries out for a statutory mandate that VA conduct, or contract with an independent group to conduct, a scientifically valid epidemiologic study of the adverse health effects experienced by military personnel exposed to open air burn pits in Southwest Asia. There are legislative precedents directly on point. The systemic, large-scale exposure of U.S. troops in Southwest Asia to toxins from open air burn pits created by the U.S. military departments eerily echoes the exposure of U.S. troops five decades ago to the millions of gallons of toxic herbicides sprayed by the U.S. military departments in Southeast Asia. Eight years after the U.S. military stopped spraying these toxic herbicides, Congress took appropriate action. It enacted Public Law 96-151, 93 Stat. 1092 (Dec. 20, 1979), section 307(a)(1) of which required that the Administrator of the VA:

shall design a protocol for and conduct an epidemiologic study of persons who, while serving in the Armed Forces of the United States during the period of the Vietnam conflict, were exposed to any of the class of chemicals known as "the dioxins" produced during the manufacture of . . . herbicides (including the herbicide known as "Agent Orange") to determine if there may be long-term adverse health effects in such persons from such exposure.

This type of legislation is exactly what is needed now. NVLSP urges Congress to add this requirement when it is considering the bills that NVLSP supports – H.R. 1355, H.R.2127 and H.R. 2372.

Entitlement to Retroactive VA Compensation for Claims Based on Diseases Recently Accorded Presumptive Service Connection Status Due to Agent Orange Exposure

In last year's National Defense Authorization Act (NDAA), Congress granted three new diseases presumptive service-connected status due to their association with exposure to Agent Orange: Parkinsonism, bladder cancer, and hypothyroidism. See 38 U.S.C. § 1116(a)(2)(I), (J), (K). One of the bills now being considered by this Committee, H.R. 1972 -- which NVLSP supports -- would grant two additional diseases presumptive service-connected status due to its association with exposure to Agent Orange, including hypertension.

While both of these legislative efforts are laudable, they both leave disabled veterans and their survivors with half a loaf, or even less. Specifically, they require VA to pay them disability and death compensation benefits if they suffer or died from one of these diseases *on a prospective basis only* – that is, with an effective compensation date of no earlier than the date of enactment. But they do not by themselves require VA to pay benefits retroactive to the date of the first claim the veteran or survivor filed for that disease, which could well be decades before the date of enactment.

This stands in sharp contrast to the way veterans and their survivors are treated by VA if they suffer or died from one of the other diseases recognized by VA as associated with Agent Orange exposure prior to last year's NDAA. As we detail below, VA itself agreed that all of these veterans and survivors are entitled to disability and death compensation benefits retroactive to the date of their first claim.

As background, in 1987, a U.S. district court certified a case known as *Nehmer v. U.S. Veterans Administration* as a nationwide class action on behalf of more than 2 million Vietnam veterans and their survivors, including those who had been denied VA benefits for a condition allegedly associated with herbicide exposure and those who would be eligible to file a claim for

such benefits in the future. *Nehmer v. U.S. Veterans Administration*, 118 F.R.D. 113 (N.D. Cal. 1987). The court also certified NVLSP's lawyers as the counsel for all these class members.

As noted in the November 2014 report by the Congressional Research Service, ["Veterans Exposed to Agent Orange: Legislative History, Litigation, and Current Issues"](#), as a result of the *Nehmer* decision, Congress enacted the Agent Orange Act of 1991, 38 U.S.C. § 1116. The Agent Orange Act (AOA) required the VA to contract with an independent agency, the National Academy of Sciences (NAS), to review the emerging scientific studies on the adverse health effects of exposure to this herbicide and to prepare a report for the VA every two years with its conclusions. The AOA also required the Secretary of Veterans Affairs to decide within a specified period of time after receiving an NAS report whether to amend VA regulations by according presumptive service connected status to additional diseases.

In 1991, NVLSP's attorneys negotiated a favorable consent decree with the VA in *Nehmer*. The *Nehmer* consent decree requires VA, whenever it recognizes pursuant to the AOA that the emerging scientific evidence and NAS reports shows that a positive statistical association exists between Agent Orange exposure and a new disease, to (a) *automatically identify* all disability and death compensation claims based on the newly recognized disease that were previously denied and (b) *automatically readjudicate* these prior claims under the amended VA regulations recognizing the new disease, and (c) pay disability and death benefits to those claimants who prevail, *retroactive to the initial date of claim*. See *Nehmer*, 494 F.3d 846 (9th Cir. 2007). Most of the binding *Nehmer* Consent Decree rules are currently codified in 38 C.F.R. § 3.816.

Since the AOA was enacted, the numerous periodic NAS reports that have been issued have persuaded the Secretary of Veterans Affairs to amend VA regulations under the process set forth in the AOA to provide that many serious disabling diseases should be accorded presumptive service-connected status because they have a positive association with exposure to the toxic herbicides used in Vietnam, including Agent Orange. These diseases include:

AL Amyloidosis
All Chronic B-Cell Leukemias
Chloracne

Diabetes- Type 2
Hodgkin's Disease
Ischemic Heart Disease
Multiple Myeloma
Non-Hodgkin's Lymphoma
Parkinson's Disease
Peripheral Neuropathy - Early-Onset
Porphyria Cutanea Tarda
Prostate Cancer
Respiratory Cancers including Lung Cancer, Trachea Cancer and Larynx Cancer

Based on the *Nehmer* consent decree, over the last three decades, VA *automatically readjudicated*—without the necessity of filing a new claim—the prior VA denial of the claims of well more than 100,000 Vietnam veterans and their survivors that were based on the Agent Orange-related disease enumerated above. As a result of these *Nehmer* readjudications, VA has paid an aggregate of more than \$4.6 billion in retroactive disability and death benefits to these Vietnam veterans and their surviving family members.

But VA has not paid retroactive compensation to Vietnam veterans suffering from or surviving family members of Vietnam veterans who died from one of the three disease added by last year's NDAA. This means that these veterans and survivors are being disadvantaged to a dramatic degree compared to the hundreds of thousands of Vietnam veterans and survivors to whom VA has paid an aggregate of billions of dollars in retroactive disability and death benefits based on claims for the numerous other diseases associated with exposure to Agent Orange that are listed above.

The inequity of this treatment is unjustified. NVLSP urges Congress to enact legislation requiring VA to take all of the steps it has taken in the past pursuant to the *Nehmer* consent decree for the three new disease covered by last year's NDAA. In addition, Congress should pass H.R. 1972, which would grant hypertension and one other disease presumptive service-connected status due to its association with exposure to Agent Orange, and similarly require VA to take all of the steps it has taken in the past pursuant to the *Nehmer* consent decree for the two additional H.R. 1972 diseases.

Closing

NVLSP values the work being done by the House Committee on Veterans' Affairs and its distinguished members. We greatly appreciate the opportunity to provide our statement for the record on these significant pieces of legislation regarding toxic exposure. NVLSP is committed to working with the members of Congress and all appropriate federal agencies to ensure that servicemembers, veterans and their survivors receive the benefits to which they are entitled due to disabilities they incurred as a result of their military service to our nation. We look forward to being of assistance on these or other matters as they may develop in the future.