

**NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.**



**Statement of**

**Diane Boyd Rauber, Esq.  
Executive Director**

**Before the**

**House Committee on Veterans' Affairs  
Subcommittee on Disability Assistance and Memorial Affairs**

**Concerning**

**“Preparing for Blue Water Navy Claims –  
VA Status Update on Implementation”**

**October 30, 2019**

Chairman Luria, Ranking Member Bost, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to testify on the topic of "Preparing for Blue Water Navy Claims – VA Status Update on Implementation." We appreciate the Subcommittee's leadership in exercising its oversight authority over VA's implementation of the Blue Water Navy Vietnam Veterans Act of 2019.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents over 600 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for all persons seeking VA benefits. NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC) and U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

## OVERVIEW

NOVA members have long fought for the rights of Blue Water Navy veterans and their families, representing them in individual claims and appeals before VA, BVA, and the CAVC, as well as advocating for the outcome achieved in *Procopio v. Wilkie*, 913 F.3d 1371 (2019). NOVA filed an amicus brief on behalf of Mr. Procopio before the Federal Circuit, and was joined by AMVETS, Military Officers Association of America, Paralyzed Veterans of America, and the Veterans and Military Law Section of the Federal Bar Association.

In *Procopio*, the Federal Circuit reversed its prior holding in *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008), found 38 U.S.C. § 1116 was unambiguous, and held those who served in the 12 nautical mile territorial sea of the "Republic of Vietnam" are entitled to the presumption of service connection for diseases associated with herbicide exposure. 913 F.3d at 1381. Approximately five months after that decision, Congress passed the Blue Water Navy Vietnam Veterans Act of 2019. This legislation added to title 38, among other provisions, new section 1116A entitled: "Presumptions of service connection for veterans who served offshore of the Republic of Vietnam."

We detail below concerns regarding implementation of this legislation that should be addressed to ensure Blue Water Navy veterans receive all the benefits to which they are entitled in a fair and timely manner.

## POINTS OF CONCERN

### DEVELOPMENT OF REGULATIONS AND AGENCY GUIDANCE

#### **VA Must Not Use Agency Guidance To Skirt Notice And Comment Requirements.**

The Blue Water Navy Vietnam Veterans Act of 2019 permits VA, “[n]otwithstanding section 501” of title 38, to issue guidance before prescribing regulations. NOVA appreciates that this provision was intended to give the Secretary flexibility to adjudicate claims for Blue Water Navy veterans in an expeditious fashion. However, particularly given the Secretary’s decision to issue a blanket stay as discussed in more detail below, this Subcommittee should ensure VA follows notice and comment requirements when issuing its regulations and does not issue permanent substantive guidance in the form of agency manual provisions. In other words, VA should not be permitted to hide behind this legislative provision and use its M21-1 manual provisions to avoid notice-and-comment rulemaking.

### PENDING STAY ON BLUE WATER NAVY CLAIMS AND APPEALS

#### **The Secretary’s Implementation Of A Stay On All Blue Water Navy Claims And Appeals Is Overinclusive and Harmful, And VA Should Lift It Immediately To Resolve Claims and Appeals That Can Be Decided Based On The Existing Evidence Of Record.**

On July 1, 2019, Secretary Wilkie issued a memorandum entitled “Stay of Pending Claims Under the Blue Water Navy Vietnam Veterans Act of 2019.” He relied on the stay provision included in Public Law 116-23, to be codified at 38 U.S.C. § 1116A(c)(3)(A): “The Secretary may stay a claim described in subparagraph (B) until the date on which the Secretary commences the implementation of such section 1116A.” A claim under subparagraph (B) is a claim for disability compensation “relating to the service and diseases covered by such section 1116A; and that is pending at the Veterans Benefits Administration or the Board of Veterans’ Appeal on or after the date of the enactment of this Act and before the date on which the Secretary commences the implementation of such section 1116A.”

The validity of this stay has been challenged in the Federal Circuit. *See Procopio, et al., v. Wilkie*, No. 19-2184 (Fed. Cir. appeal docketed July 24, 2019; oral argument scheduled for November 8, 2019). Regardless of the Federal Circuit’s decision, the Secretary’s blanket stay on Blue Water Navy claims and appeals is overinclusive, unnecessary, and harmful.

Specifically, the *Procopio* decision addressed the right of veterans to recover for benefits under the provisions of 38 U.S.C. § 1116. The stay found in the new legislation addresses

only § 1116A claims. There simply is no reason for the agency to hold up pending § 1116 claims and appeals. In many of these actions, the veteran has a diagnosis of a qualifying presumptive condition and the evidence of his Blue Water Navy service is already of record or relatively easy to determine. For example, if a veteran has a diagnosis of diabetes and has already produced deck logs of service on a ship within the 12 nautical mile zone, the claim or appeal can be granted without delay.

In fact, after the Federal Circuit decided *Procopio*, BVA lifted its pending stay predicated on that litigation in April 2019. See Memorandum No. 01-19-02, *Stay Lifted On Adjudication of Appeals for Compensation Based on Alleged Exposure to Herbicide Agents In The Offshore Waterways Of The Republic Of Vietnam* (April 1, 2019). From April until the Secretary's July stay, BVA proceeded to decide and grant appeals where the evidence of record warranted it under *Procopio*. See, e.g., *Citation Nr: 19128696* (April 15, 2019) (BVA granted service connection for Parkinson's disease based on evidence of service on *USS Dunham* and *Procopio* decision); *Citation Nr: 19137213* (May 14, 2019) (BVA granted service connection for diabetes mellitus, coronary artery disease, and peripheral neuropathy; relying on *Procopio* and finding "Veteran was stationed on the *USS Lynde McCormick* when it was in the territorial waters of Vietnam"); *Citation Nr: 19137582* (May 15, 2019) (BVA granted service connection for cause of veteran's death based on evidence of service on *USS Cochrane* and *USS White Plains* and *Procopio* decision); *Citation Nr: 19148388* (June 20, 2019) (BVA granted service connection for diabetes mellitus; veteran served on *USS Capacon* and "even if the Veteran did not step foot in the Republic of Vietnam, his ship certainly was within 12 nautical miles of such and he is presumed exposed to herbicide pursuant to *Procopio v. Wilkie*"). It is likely there are other cases such as these that could be decided with no need for additional development.

Denying these veterans through a blanket stay is particularly harmful given the age and health of Blue Water Navy veterans. Many are eligible for priority processing at VBA or advancement on the docket at BVA due to their advanced age, financial hardship, or terminal illness. Even those who do not fall into these categories suffer from serious service-connected illnesses that have long limited or precluded their ability to work. After waiting years for justice, they are now faced with a longer wait for financial relief. Even if **some** claims and appeals must wait for additional evidentiary development and official VA guidance, the Secretary should lift the stay and allow VBA and BVA to dispatch – without further delay – all pending claims and appeals that can be decided based on the existing evidence of record.

## **DEVELOPMENT AND USE OF A SHIP LOCATOR TOOL**

In August 2019, the National Archives and Records Administration (NARA) entered into an agreement with VA to digitize U.S. Navy and Coast Guard deck logs dated from 1956

through 1978. *Digitization Partnership Supports Veterans Claims, Access to Records*, <https://www.archives.gov/press/press-releases-3> (August 21, 2019) (logs previously digitized are found at <https://www.archives.gov/research/military/logbooks/navy-online>). According to NARA's press release, the current scanning project will include "more than 20 million images." *Id.* Furthermore, NARA stated it "will begin the process of making digitized records available on archives.gov, after images are transferred by the VA and the images are screened for privacy concerns." *Id.* Based on this digitization process, VA plans to create a tool for use by its adjudicators to consider Blue Water Navy claims and appeals.

### **VA Must Ensure Adequate Quality Control And Expert Assistance For Scanning Of Deck Logs.**

VA's digitization processes are often problematic. For example, veterans and advocates experience problems with mail, forms, and evidence being properly scanned into VBMS through VA's Evidence Intake Center. These problems include delays in uploading, missing materials, mislabeling, and improper ordering. The CAVC noted "grave concerns regarding VA's implementation and oversight of its conversion to a paperless claims process," and concluded "the Secretary would be well served by reexamining both his records retention policies and his contracts with the vendors tasked to digitize veterans' records." *Robinson v. McDonald*, 28 Vet.App. 178, 191 (2016). Recent articles indicate that problems are not isolated to the scanning of veterans' claims files. *See, e.g., VA's Health Records Digitization Backlog Is 5 Miles High*, <https://www.nextgov.com/it-modernization/2019/08/vas-health-records-digitization-backlog-5-miles-high/159383/> (August 22, 2019).

Ship deck logs are dense and largely handwritten. As noted by NARA, these logs contain "information regarding movements (heading and speed), and the ship's location, and in some cases have information on combat operations, accidents, injuries, and other personnel events." *Digitization Partnership Supports Veterans Claims, Access to Records*, <https://www.archives.gov/press/press-releases-3> (August 21, 2019). In other words, these documents consist of critical numbers that will prove whether or not certain ships traveled in the territorial sea of the Republic of Vietnam. Sloppy scanning – whether through missed pages, unreadable images, or mislabeling – can result in denials to deserving veterans.

Therefore, Congress should ensure VA provides adequate quality control over this scanning process, using vendors and staff who are qualified for the task. Likewise, any "tool" created from scanned deck logs should be developed by people with the appropriate expertise.

## **Advocates Need Access To VA's Ship Locator Tools.**

According to NARA's press release, while VA is scanning deck logs, "this group of records will be closed to researchers at National Archives facilities," with access "restored as soon as possible after the paper records are returned." *Digitization Partnership Supports Veterans Claims, Access to Records*, <https://www.archives.gov/press/press-releases-3> (August 21, 2019). Regardless of when public access to the deck logs is restored, all properly accredited attorneys, agents, and VSOs should have access to the ultimate ship locator and/or mapping tool created by VA. Such access is critical to ensure all evidence is considered and properly interpreted so claimants receive all earned benefits.

## **VA Should Ensure The Tool Is Not Used To Deny Claimants.**

VA has stated at recent meetings that the ship locator tool will not be used to deny claimants. Rather, according to public statements, VA has represented that this tool will be used as a screening tool. If the tool indicates a veteran served on a ship within the designated coordinates, he or she will be deemed to have served in Vietnam for purposes of the presumption. If the evidence is inconclusive based on the tool, the veteran will not be denied but rather the claim will undergo additional development. In its regulations and manual guidance, VA must clearly explain this concept and provide adequate training to the field. VA guidance should also ensure that competent and credible lay evidence is given proper weight in deciding claims and appeals.

Other questions and concerns related to use of the tool include the following: (1) what assurances will the claimant have that the ship locator tool is not used to deny claims and appeals; (2) what information will VA and BVA be required to include in its decisions to indicate that it has fully developed each claim, particularly in light of AMA requirements; (3) will VA and BVA notify the claimant as to additional information necessary to substantiate the claim when notice under the Veterans Claims Assistance Act (VCAA) has been waived such as, for example, is permitted on VA's Supplemental Claim form (VA Form 20-0995, box 16); and (4) what additional guidance will be available to adjudicators beyond the ship locator tool or lists to grant claims.

## **VA COMMUNICATION AND ADJUDICATION**

### **VA Should Contact All Those Whose Claims Have Been Previously Denied With Instructions On How To Refile.**

The legislation does not require VA to automatically readjudicate previously denied claims. It requires VA to conduct certain outreach, i.e., publishing information on its website and notifying VSOs about the right to refile. However, blanket outreach is ineffective if does not reach the intended recipients. Therefore, it is critically important

that VA develop clear and appropriate materials, to include **notice to those previously denied**, explaining their right to refile their claim. Otherwise, deserving veterans stand to miss the opportunity to obtain their benefits. NOVA understands some VSOs have had the opportunity to review and comment on VA's intended communication, which currently does include such a letter; however, VA should continue to communicate with the broader group of stakeholders included in discussions of the AMA.

**VA Must Ensure That Claims And Appeals Entitled To Priority Processing or Advancement On the Docket Are Handled In An Expeditious Manner.**

As previously noted, many Blue Water Navy veterans are very ill, unable to work, and in great need of the benefits they have earned. VA's regulations and guidance should ensure that those entitled to priority processing or advancement on the docket are handled in the most expeditious manner possible.

**CONCLUSION**

NOVA is committed to continue working with this Subcommittee, VA, and fellow stakeholders to ensure Blue Water Navy veterans receive all the benefits to which they are entitled in a fair and timely fashion. We again thank the Subcommittee for allowing us to provide our views on implementation of this critical legislation, and we would be happy to answer any questions the Subcommittee members might have.

For more information:

NOVA would be happy to assist you with any further inquiries you may have regarding our views on this topic. For questions regarding this testimony or if you would like to request additional information, please feel free to contact:

Diane Boyd Rauber, Esq.  
Executive Director  
National Organization of Veterans' Advocates, Inc.  
1775 Eye Street, NW  
Suite 1150  
Washington, DC 20006  
(202) 587-5708  
[drauber@vetadvocates.org](mailto:drauber@vetadvocates.org)

**Diane Boyd Rauber, Esq.**  
**Executive Director**  
**National Organization of Veterans' Advocates, Inc. (NOVA)**  
**1775 Eye Street, NW**  
**Suite 1150**  
**Washington, DC 20006**  
**(202) 587-5708**

Diane Boyd Rauber is the Executive Director of the National Organization of Veterans' Advocates, Inc. (NOVA) in Washington, DC. NOVA is a not-for-profit 501(c)(6) educational membership organization, representing over 600 attorneys and agents assisting tens of thousands of our nation's military veterans, their widows, and their families to obtain benefits from the Department of Veterans Affairs.

Prior to joining NOVA in September 2015 as Director of Legislative and Regulatory Affairs, Ms. Rauber served as Associate General Counsel for Appeals at Paralyzed Veterans of America (PVA). In this capacity, she oversaw PVA client representation before the Board of Veterans' Appeals (BVA), provided support and training to PVA's service officers, and analyzed cases for potential appeal to the U.S. Court of Appeals for Veterans Claims (CAVC).

She previously worked as of counsel to the Law Office of Wildhaber and Associates and as a staff attorney for the National Veterans Legal Services Program, representing veterans and their families before BVA and the CAVC. She frequently presents at veterans' law conferences, on topics including successful advocacy, legislative reform, and military history research.

She also served as a consultant to the American Bar Association Center on Children and the Law. In this capacity, she collaborated on legal research projects, writing and editing numerous reports and publications on an array of child welfare topics, to include court improvement, education, child custody, parent representation, and judicial excellence.

Ms. Rauber received her B.S. in Communication Disorders from Penn State University, M.Ed. in Special Education from the University of Pittsburgh, and J.D. from the Catholic University of America School of Law. She is a member of the Maryland and District of Columbia Bar Associations, as well as a member of the CAVC Bar Association, the CAVC Historical Society, and the Maryland Bar Association Veterans Affairs and Military Law Section.