

A BROADER INTERPRETATION OF GRAY v. McDONALD and How it Impacts the Blue Water Navy Disability Claims

In taking a broad interpretation of the CAVC Ruling of April 23, 2015 in Gray v. McDonald, I believe the court made an extremely strong statement outside the question of harbor waters and river plumes. They effectively negated the entire prevailing attitude and existing regulations of the VA as it relates to Blue Water Navy personnel and their entitlement to disability status for herbicide exposure.

When the CAVC reviewed the VA's basic rules that were being used to deny disability claims of members of the Blue Water Navy (BWN), they analyzed the VA's reasons for doing so. The instant case related to the logic of the rules used to determine if certain bodies of water were "inland waterways" and to the consistency of how those rules were being applied. The Court found fault with VA's inconsistent application of rules used to define what constituted "inland waterways" and also inconsistency of definitions in determining what constituted the mouth of a river. In this last, the implication is that a river mouth may extend further out to sea than simply drawing a line across the mouth of that river as if the mouth were defined by a hard line based on geography rather than the flow of the river itself. That opened questions regarding the travel of contaminated particles within river water that extended out into the South China Sea. With this, they left the confines of a discussion limited to inland waterways.

It was quite evident that the CAVC was finding fault with several contentions used by VA to deny BWN claims for herbicide exposure. Having taken on those specific questions of rule definition, the CAVC went one step further and questioned the reasonability of the "boots on ground" principle. They did this by commenting on the IOM Report of 2011.

BACKGROUND ON "THE IOM REPORT"

The IOM Report was released in May, 2011 and the VA made no announcement regarding that study until 18 months later. One might imagine that, during that year and a half time period, the VA was intently studying the IOM Report and coming to a final conclusion as to how they reported the entire question of "Was the Blue Water Navy exposed to herbicides while serving offshore Vietnam?" This question had been looked into as an assignment from the VA to the IOM specifically to address the rising concerns of Blue Water sailors that they were presenting with and dying from the identical diseases that warranted VA benefits granted to other Vietnam Veterans under presumptive exposure; specifically those with their boots on the ground or with inland water service. These were veterans within the physical confines of the land boundaries of Vietnam. At times, these groups of men were separated by only a few feet.

All Vietnam veterans were given presumptive exposure under the Agent Orange Act (AOA) of 1991. The BWN was included in the AOA until the VA literally changed the definition of a Vietnam Veteran in 2002 to include only those in the new class of veterans who were within the physical confines of the land boundaries. What remained a mystery for the Blue Water Navy following this action by the VA was: "How could there be a second cause for the identical diseases being caused by herbicide exposure?"

In October, 2009, the VA requested that IOM to conduct a study to determine the probability of Blue Water Navy personnel exposure to herbicide. Such an assignment to the IOM is usually done to provide direct guidance in how the VA sets policy on specific issues of a medical or scientific nature. Ostensibly, this report was to put to rest the question of whether or not personnel of the Seventh Fleet were exposed to Agent Orange, and if so, to what extent.

The very wording of the VA's request seems to open a question of whether Blue Water Navy personnel had direct exposure to the herbicides sprayed onto the landmass of Vietnam rather than presumptive exposure. Had the IOM been asked solely about the probability of presumptive exposure, there would be no need to make determinations regarding the 'comparative nature of the amount of exposure' of the two designated 'groups' of Vietnam Veterans: those within the land boundaries and those outside. That report was released in May, 2011.

On December 26, 2012, the VA announced their conclusions of the IOM Report of May, 2011. They announced their conclusion in the Federal Register (Notice Citation 77 FR 76170) titled "Presumption of Exposure to Herbicides for Blue Water Navy Vietnam Veterans Not Supported [by the IOM Study titled "Blue Water Navy Vietnam Veterans and Agent Orange Exposure.]" (For more detail on this, see the website write-up at <<http://bluewaternavy.org/publiccensure.htm>>)

RETURNING TO THE CAVC RULING

The Court went one step beyond the confines of looking at inland waterways. They told the VA that the conclusions they had come to in their review of the IOM 2011 Report were wrong! They told the VA "...the general and inclusive nature of the report falls short of the Secretary's assertion that the report specifically "confirmed" that there was no likelihood of exposure to herbicide in Da Nang Harbor." (Emphasis mine.) Because the Court's focus was on the question of Da Nang Harbor, they addressed their statement directly to that. But the wider scope of the IOM Report and the published conclusions of the VA addressed a much broader question than the confines of Vietnamese Harbors. The Court's statement that on the surface applies to Da Nang Harbor actually applies as well to the wider scope of the IOM Report. The Court actually addressed the question regarding the basis of the total Report: "Was the Blue Water Navy as a group exposed to herbicides while offshore Vietnam?" And that question must likewise be answered by their resounding negation of the VA statements: The Report, because of its general and inclusive nature, falls short of "confirming" that there was no likelihood of exposure to any of the Seventh Fleet, whether in harbor or on station offshore. Therefore, the conclusion of "Was there exposure or not to Blue Water Navy personnel" is still an open question, regardless of the VA's attempt to limit exposure to in-country veterans only and regardless of the courts statement seemingly limiting their statement to an instance of ships in harbor!

The IOM Report did not limit its remarks to Da Nang Harbor. The VA's interpretation of the IOM Report did not limit itself to Da Nang Harbor. By addressing the fault of the VA interpretation of the IOM 2011 Report, the CAVC's comments cannot be limited to Da Nang Harbor.

Everything about the VA's underlying assumptions related to the separation of Blue Water Navy personnel from all other Vietnam Veterans who are given presumption of exposure to herbicide was negated by the Gray v. McDonald ruling. As of this moment, the VA has not yet responded to the CAVC with new rules for rating a BWN claim for exposure, either presumptive or direct. Can the VA justify its regulation that limits presumptive exposure to in-country veterans? No it cannot, according to this ruling. Why? Because the question of BWN exposure to herbicide was addressed by the CAVC and found to be groundless in relation to the conclusions of a study specifically being used by the VA to justify their 'now-negated' position. If the VA cannot come to the table with legitimate medical and scientific reasons that Blue Water Navy personnel should be denied the possibility of exposure inside or outside a harbor, their current reasons as to why this is so have been ruled as groundless, arbitrary and capricious.

On April 23, 2015, the CAVC negated the VA's ability to deny Blue Water Navy claims for merely

failing to show service in Vietnam. Until the VA submits reasonable and consistent rules deemed acceptable by the Court for denying any Blue Water Navy claim, well-reasoned and well-grounded claims for direct or presumptive exposure to herbicide should be granted by all adjudicators.

If any Blue Water Navy veteran received a denial for herbicide exposure from any Regional Office of the Board of Veterans Appeals after April 23, please contact Navy@BlueWaterNavy.org. It should be known that the VA provided an incorrect “training aid” to the BVA (and possibly the ROs) that gave false information upon which some decisions relied.

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