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STATEMENT OF THE CASE

Appellant adopts and incorporates by reference her statement of the case as delineated in her opening brief.

SUMMARY OF THE ARGUMENT

The Secretary has failed to address the appellant's issue that the Secretary denied the appellant information and assistance pursuant to 38 U.S.C. § 5103A. Instead the Secretary bizarrely argues that records and evidence, that should have been provided to appellant, should not be considered by this court.

This court's recent decision *Haas v. Nicholson,* ___ Vet. App. ____ (Vet. App. 2006) 2006 WL 2355588 has mooted the Secretary's arguments that the veteran did not see service "in the Republic of Vietnam." Thus the conditions for presumptive service connection are now established as a matter of law.

Additionally, based on validated scientific evidence, the appellant has established that the veteran's exposure to Agent Orange was enhanced by the effect of the ship's evaporators/distillers during the desalinization process. Consequently, the appellant has laid a firm foundation for remand, if not outright reversal of the decision of the Board of Veterans Appeals.

ARGUMENT

I THE APPELLANT WAS DENIED INFORMATION, AID AND ASSISTANCE AS REQUIRED BY 38 U.S.C. § 5103A

The Secretary does not dispute that the Regional Office and the Board of Veterans Appeals had a statutory duty under U.S.C. 5103A to provide reasonable assistance in the development of her case and in obtaining relevant records. Notably, every time Congress reviews the provisions of 38 U.S.C. § 5904, the Secretary steps forward to laud the assistance provided to veterans by the Department. In a recent letter to the Chairman of the Senate Veterans Committee, Deputy Under Secretary Ronald Aument criticized SB 2694, the "Veteran's Choice of Representation Act of 2006" currently passed by the House and pending before the Senate. Deputy Under Secretary Aument claimed in his June 8, 2006 letter to the Chairman:

> All a claimant need do is file a claim, and VA will *notify the claimant of the information and evidence necessary to substantiate the claim*, assist the claimant in obtaining relevant Government and private records .... If a claim is denied, all a claimant need do to initiate an appeal to the Board is to write the VA expressing dissatisfaction or disagreement with the decision and a desire to contest the result. The VA agency that made the original decision on the claim *will develop or review the claim* in a final attempt to resolve te disagreement and issue a statement of the case if the disagreement is not resolved. *VA assumes primary responsibility for leading a claimant through the administrative claims process* making the expenditure of a claimant's limited financial resources on an attorney unnecessary. Furthermore, we are concerned that enactment of this bill would impede the

> Government's paramount interest in promoting and maintaining a non-adversarial adjudicative process, as exemplified by the Veterans Claims Assistance Act of 2000, *requiring VA to notify a claimant of the information and evidence necessary to substantiate a claim and to assist a claimant in obtaining such evidence*. (Emphasis added).

Legislative History on SB 2694 found at www.thomas.gov (last visited September 2, 2006).

Assuming the Deputy Under Secretary meant what he said and was not just posturing for Congress, the Regional Office and the Board failed miserably in their duty to assist appellant in developing her case. Evidence of the *Orleck's* deck logs and the RAN report was during the adjudication process. While the issue of the deck logs is now moot, given the holding in *Haas V. Nicholson*, *supra*, the failure of the Secretary to notify the appellant of the RAN report is especially damning in light of the Deputy Under Secretary's articulation of such a duty. In the instant case, the Secretary has completely failed to attain or even approach the high standard that the Deputy Under Secretary set for him in his commitment to Congress.

Instead the Secretary now tries to claim that the evidence cited by the appellant should not be considered because it was not included in the record before this court. Here the Secretary is trying to compare apples and oranges. While including the report would have been beneficial to the court since it would allow

for easy reference to its findings, the lack of inclusion in the record does not preclude its citation in a legal brief. Notably, Rule 28(a) does not limit citations to case law but envisions other authorities as well. Notably the famed "Blue Book," *Uniform System of Citation*, recognized citation to secondary sources such as the RAN report in Rule 15. This court has impliedly recognized the need for citation in *Stone v. Gober*, 14 Vet.App. 116 (Vet. App. 2000). More importantly, the *Stone* court noted that the failure of the Secretary to inform the appellant that she needed to submit scientific studies was a breach of his duty to assist. *Id* at. 121.

The Secretary then tries to categorize the RAN report as a "medical study." That is both ludicrous and irrelevant. For the sake of accuracy, the reports authors were not medical doctors and the report was developed by the University of Queensland's Toxicology department not its medical school. Even if it was a medical study, it was not a medical text as discussed in *Brannon v. Derwinski*, 1 Vet. App. 314 (Vet.App. 1991) or *Smith v. Derwinski*, 1 Vet.App. 235 (Vet.App. 1991). Notably, the appellee misapplied the holdings of both cases. The *Brannon* court did consider the texts. *Brannon*, 1 Vet.App. At 316. The same held true in *Smith*, *supra*., 1 Vet. App. at 338. The courts declined, in both cases, to extend judicial notice, because there were reasonable disputes concerning the facts. That is not the case here.

Notably, the RAN report was developed at the request of and for the benefit of the Australian Department of Veterans Affairs. As discussed *infra*, the Australian VA has begun to incorporate its findings into their statements of principles.[1] The RAN report does not espouse theories which are subject to reasonable dispute. Instead it applies proven scientific principles of thermodynamics. It used established Total Monthly Intake levels, RAN Report at 7, and the accepted methodology of computing relative retention times. RAN report 17, 22 . The distilling plans were standard naval engineering distilling plants. RAN report at 11. Notably, unlike the case in *Smith, supra.* and *Brannon, supra*., here is no indication of a reasonable dispute of the findings. When, as here, scientific studies are so established as to have obtained the status of scientific law, such as the laws of thermodynamics applicable in the instant case, judicial notice is proper. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Both *Brannon*, *supra*. and *Smith*, *supra*. observed, in *dicta,* that medical texts are better considered before the Regional Office or the BVA. Appellant agrees that it is the better practice. That is why the Secretary should assist the veteran and develop the claim. Had that happened, or had federal law allowed the

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[1] The Australian Statement of Principles appears to be similar to the Code of Federal regulations in the United States. It provides the factors to be considered in rating veterans entitlement claims.

appellant to retain an attorney, the record would no doubt have been better developed. The best means of harmonizing current practice with the *dicta* in *Brannon* and *Smith* is to make the Secretary comply with his statutory responsibilities. The only other alternative would be for Congress to pass the "Veteran's Choice of Representation Act of 2006" currently pending before the Senate.

Here the Secretary is trying to impose a "Catch-22" with a vengeance. The Secretary failed to properly develop the claim and assist the appellant with evidence that would substantiate her claim. Then, when evidence is developed that is fatal to their position, they claim that it should not be considered - even as a basis to demonstrate the Secretary's own failure. This is not in keeping with the high sounding platitudes of the Deputy Under Secretary to Congress when he claims that there is no need for attorney advocates in the VA adjudication system. It is incumbent upon the government to act fairly with its citizens and especially with those who would risk their lives in its defense. As Justice Black once said:

> Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J.,

dissenting)

> Another court put it more simply:
>
> > To say to these appellants, "The joke is on you. You shouldn't have trusted us," is hardly worthy of our great government.

Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970).

If the Secretary is going to promise Congress that he will obey the law and the dictates of this court by properly assisting the appellant, then he should do so. When, as here, he flaunts that promise, he should not be allowed to wiggle out of the consequences by marginalizing or collaterally attacking the evidence that he should have provided in the first place. To do so not only violates the intent of Congress, but belies the words written on the Secretary's Vermont Avenue headquarters in which he promises to care for the veteran, his widow and his orphan. It is now time for this court to step forward and uphold the dictates of Chief Justice John Marshall's historic opinion in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803)

> > If [a party] has a right, and that right has been violated, do the laws of his country afford him a remedy?
> > The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> 5 U.S. (1 Cr.) at 162-63.

This court cannot abandon the appellant and leave her without a remedy. Justice and fundamental fairness demand that the Secretary not be allowed to escape from his own failure to properly develop the claim and assist the appellant. Consequently, this court should find that the Secretary failed in his statutory duty. The court should also consider the secondary authority cited in the opening brief.

II THE VETERAN MUST BE PRESUMED TO HAVE CONTRACTED HIS FATAL DISEASE AS A RESULT OF AGENT ORANGE

A. THE APPELLANT SERVED IN THE REPUBLIC OF VIETNAM

Appellee has conceded that the veteran served within the inland waters of Vietnam. Appellee brief at 15-16. This issue is moot, however, in light of *Haas v. Nicholson*, *supra*, which found that service in the near shore waters of Vietnam constitutes service in the Republic of Vietnam for presumption of service connection for herbicide exposure. The *Haas* court went on to note that the VA regulations relied upon by the Secretary in his brief and the VA Adjudication Procedure Manual were invalid under the federal Administrative Procedures Act.

Although the *Haas* court addressed the law of the sea issues raised by appellant in her opening brief, the holding was based on other grounds. Under *Haas* the Secretary could conceivably reinstate his ruling by following proper rulemaking procedures. That could require the issue to be revisited again. This court can find that as a matter of law, service in the Republic of Vietnam includes

its territorial waters. The *Haas* court presumably did not consider the controlling precedent of *Louisiana v. Mississippi,* 202 U.S. 1, 52 (1906) which supports the appellant's position. This position is also articulated in the United Nations Convention on the Law of the Sea and the Territorial Sea Convention.[2] Nor did *Haas* consider the persuasive authority of *C. A. B. v. Island Airlines, Inc*. 235 F.Supp. 990, 1007 (D.C.Hawaii 1964) which analyzed both national and international law. Accordingly, appellant urges this court to go one step past *Haas* and, based on both domestic and international law, find that service within the Republic of Vietnam included service in her twelve mile territorial waters.

B. AGENT ORANGE DIOXIN ENTERED THE SHIP'S POTABLE WATER SYSTEM AND WAS ENHANCED BY THE SHIP'S DISTILLING PLANT

Appellee did not challenge the distillation process discussed in the opening brief or the conclusions of the RAN report that the impact of the dioxin was enhanced by shipboard distilling plants. RAN Report at 42. Consequently, the Secretary has conceded that it cannot be shown that Mr. _____ was not exposed to Agent Orange.

The appellee dismissed the *Orleck*'s visit to Vung Tau, Vietnam in October

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[2] The United States has not ratified the United Nations Convention on the Law of the Sea but has ratified the Territorial Sea Convention.

of 1968 since appellant's spouse had not yet reported. Notably Vung Tau was the location of significant Agent Orange spraying. RAN report at 35.[3] Chemicals could be expected to adhere to the piping and potable water tanks, contaminating the water long after the ship left the source. The dioxin was not soluble and would carry over to any food washed in the contaminated water. As indicated in the opening brief, the dioxin also was carried into near shore waters. RAN report at 10. Additionally, the *Orleck* visited Vietnam again in April of 1969 with the veteran aboard.

Notably RAN ships made a 14 day deployment to Vietnamese waters. RAN report at 34. _____ was in Vietnamese or nearby waters for a significant portion of his six month tour. Consequently his exposure would have been higher than the RAN sailors. Nevertheless, the University of Queensland found that despite the more limited exposure, RAN sailors may have received exposure significantly above the acceptable intake values. RAN report at 36. It is becoming more and more obvious that many Navy veterans of several nations, along with appellant's spouse, were exposed to dangerous levels of Agent Orange.

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[3] The RAN report actually refers to Van Tau which may have been a phonetic spelling or based on memories of RAN service members. Based on Internet searches there does not appear to be a port of Vung Tau. Search results for Van Tau result in responses for the port of Vung Tau.

Continued inaction by the Secretary deprives the American veterans of compensation and medical treatment, at a time when our ally Australia is moving to extend service connection to its Navy veterans.

C. COMPENSATION IS PROPER UNDER 38 U.S.C. § 1113(b).

In many ways, this case is similar to *Stone v. Gober*, *supra*, because the BVA merely regurgitated the findings of the doctor who conducted a record review, and accepted them without providing justification for their adoption of his findings. In actuality, this case is more egregious than *Stone*, because, as discussed in the opening brief, the BVA actually misconstrued the statement of the doctor.

The appellee argues that the BVA did not err in finding that the veteran's cancer was not service connected, but they provide no justification for that position. Neither did the BVA. In light of the findings of the RAN report, there can be little doubt that the findings of the BVA were clearly erroneous.

Appellees argue that this court is not bound by *Brooks v. West*, 17 Vet. App. 335 (Table) 2000 WL 140020. *Brooks* was not cited for precedential value but illustratively to show that a remand in this situation is appropriate.

III THE APPELLANT'S CANCER WAS CONNECTED TO HIS SERVICE

Appellee argues that the findings of the Board of Veterans Appeals was plausible. It is certainly not plausible in light of the evidence provided by the RAN

report. It is also not plausible because the board, as a matter of law, did not properly apply the benefit of the doubt rule. It is well settled that the BVA cannot parrot the opinions of a VA employee. They must document why those opinions are credible. *Stone v. Gober*, *supra*, 14 Vet.App. At 120. The failure to provide an adequate basis for their reasoning is remandable error. *Forcier v. Nicholson*, 19 Vet.App. 414, 421 (Vet. App. 2006). This the BVA did not do. As discussed in the opening brief they merely misstated the findings of the VA doctor in order to bootstrap a basis for denial of the claim.

As discussed *supra*, the Australian government has taken the lead on this issue. They have recently revised their statement of principles to include compensation for lung cancer when the claimant has been:

> (i) on land in Vietnam, or
> (ii) at sea in Vietnamese waters, or
> (iii) on board a vessel and consuming potable water supplied on that vessel, when the water supply had been produced by evaporative distillation of estuarine Vietnamese waters.

Statement of Principles concerning Malignant Neoplasm of the Lung, NO. 17 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY REHABILITATION AND COMPENSATION ACT OF 2004. *See also*, *Statement of Principles concerning Malignant Neoplasm of the Larynx*, NO. 1 OF 2006 FOR THE PURPOSES OF THE VETERANS' ENTITLEMENT ACT OF 1986 AND THE MILITARY

REHABILITATION AND COMPENSATION ACT OF 2004. Notably the statement of principles for lung cancer also recognizes the squamous cell carcinoma which is mentioned on the veteran's death certificate. R. 186. While not binding on this court or on the Secretary, in light of the RAN report, the Australian approach is the correct choice. The Australians have embraced the RAN report while the Secretary tries to hide from it. The better view is that the American Department of Veterans Affairs is simply wrong and that hundreds and perhaps thousand of veterans are improperly being denied compensation and treatment.

Given the evidence of the RAN report and the BVA's clear error, this court should find that the claim is compensable. In the alternative, they should remand the matter to the BVA to further develop the claim and the record.

Conclusion and Prayer for Relief

For the reasons stated herein, appellant prays that the court reverse the findings of the Board of Veterans Appeals and rule as a matter of law that the Secretary should find that the veteran's death be rated as a disability incurred or aggravated by military service, and that appellant be found entitled to Dependent's Educational Assistance and Dependent's Indemnity Compensation. In the alternative, appellant prays that the case be remanded to the Board for veterans Appeals to consider their findings in light of the factual evidence delineated by the

RAN Report and the ship's deck logs. Additionally, Appellant prays that this honorable court award attorneys fees in a reasonable amount pursuant to the equal Access to Justice Act, 28 U.S.C. § 2412.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States of America that a copy of the foregoing motion was sent by mail postage prepaid to:

Bobbiretta E. Jordan
Office of General Counsel
U. S. Department of Veterans Affairs
810 Vermont Avenue, N. W. (027B)
Washington, D. C. 20420

on this the 5th day of September, 2006.

_____
JOHN B. WELLS