



DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

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Policy Letter 20-19-08

Director (21)

All Department of Veterans Affairs (VA) Regional Offices (ROs) and Centers

SUBJ: Stay of Pending Claims under the *Blue Water Navy Vietnam Veterans Act of 2019*

This letter provides guidance for claims affected by Public Law (P.L.) 116-23, *Blue Water Navy Vietnam Veterans Act of 2019*. For purposes of this letter, "claims affected" means all original, new, and supplemental claims.

Background

On January 29, 2019, the Federal Circuit issued a decision in *Procopio v. Wilkie* regarding service in the territorial sea of the Republic of Vietnam (RVN) and Agent Orange exposure. Veterans Benefits Administration (VBA) issued interim procedures for controlling claims affected by the *Procopio* decision in VBA Letter 20-19-05 on February 15, 2019. These procedures included staying decisions on affected claims and controlling them under end product (EP) 335.

On June 25, 2019, the President signed the *Blue Water Navy Vietnam Veterans Act of 2019*. Congress directed the statutory amendments in the new law to go into effect on January 1, 2020, and provided the VA with the authority to stay decisions on pending claims from the date of enactment.

On July 1, 2019, Secretary Wilkie issued a stay on all claims affected by the new law, except to effectuate a Board of Veterans' Appeals (Board) grant that was issued prior to the stay or where VA is obligated to comply with the order of any court. This stay applies to disability and survivors claims that are affected by the statutory amendments, namely, (1) claims based on service in the offshore waters of the RVN during the period beginning on January 9, 1962, and ending on May 7, 1975; (2) for service in or near the Korean Demilitarized Zone during the period beginning on September 1, 1967 and ending on August 31, 1971; and (3) for claims for benefits for spina bifida from children of Veterans who were allegedly exposed to herbicides while serving in Thailand during the period beginning January 9, 1962, and ending on May 7, 1975.

Components of the New Law

Under the new law

- Veterans aboard a vessel operating not more than 12 nautical miles seaward of a line commencing on the southwestern demarcation line of the waters of Vietnam and Cambodia and intersecting the coordinates listed in PL 116-23, during the period beginning January 9, 1962, and ending on May 7, 1975, are entitled to a presumption of service connection for any diagnosed condition listed in 38 C.F.R. § 3.309(e).
- Previously denied claimants whose claims are granted under PL 116-23 may be eligible for a retroactive effective date.
- The start date to be eligible for a presumption of service connection based on herbicide exposure in the Korean Demilitarized Zone is moved seven months earlier, from April 1, 1968, to September 1, 1967.
- Benefits for spina bifida (except spina bifida occulta) may be provided to children of Veterans with covered service in Thailand during the period beginning on January 9, 1962 and ending on May 7, 1975.

New Policy for Da Nang Harbor Service

Based on research of military records, VBA will be able to concede all service within Da Nang Harbor as qualifying offshore waters under the new law. If military records show that the Veteran was on board a ship during the time it served in Da Nang Harbor, all additional development actions must be undertaken, including any necessary VA examinations, in order to prepare the claim for rating action. Once the claim is ready for a decision, ROs must place the claim under control using the stay procedures below.

Interim Development Procedures

Effective immediately, ROs must discontinue requesting additional research of herbicide claims from the U.S. Army and Joint Services Records Research Center (JSRRC) and instead, follow the steps in the table below to develop any claim based on herbicide exposure and award benefits, if possible, for "boots on ground" service, or service on inland waterways, having docked to a pier or shore, or having sent crew ashore in the Republic of Vietnam. ROs should not grant or deny any claim based on service in the eligible offshore waters as defined in PL 116-23. If the RO is unable to establish if a Veteran's offshore service qualifies for exposure under current M21-1 procedures, a decision on the claim must be stayed. However, if evidence documents service in RVN, such as "boots on ground" or on the inland waterways or is confirmed by a prior rating decision or Board decision conceding such service, then ROs should take the necessary steps to adjudicate the claim as appropriate.

Note: The procedures outlined in this letter apply to claims for disability compensation, Chapter 18 benefits, and survivor benefits.

Follow the guidance in the table below to verify service on a ship in the offshore waters or inland waterways of the RVN during the period beginning on January 9, 1962 and ending on May 7, 1975.

Step	Action
1	<p>Review military service personnel records for:</p> <ul style="list-style-type: none"> • the ship on which the Veteran served in the waters offshore of the RVN, and/or • any service involving duty or visitation on land in the RVN.
2	<p>Do military records show the ship was located in Da Nang Harbor at the time the Veteran was on board?</p> <ul style="list-style-type: none"> • If <i>yes</i>, <ul style="list-style-type: none"> – continue all development, including any required VA examination(s), in order to prepare the claim for rating action, and once complete, – follow the stay procedures below. • If <i>no</i>, continue to the next step.
3	<p>Search the Vietnam Era Navy Ship Agent Orange Exposure Development Site to verify whether the ship on which the claimant served:</p> <ul style="list-style-type: none"> • traveled on inland waterways • docked to a pier or the shore of the RVN, or • sent crew ashore. <p>Reference: For more information on using the resources available on this site, see M21-1, Part IV, Subpart ii, 1.H.2.j.</p>
4	<p>Accept the Veteran's statement that he/she went ashore from a ship as evidence of presumptive exposure to herbicides <i>if</i> there is evidence that the Veteran's ship:</p> <ul style="list-style-type: none"> • docked to the shore of the RVN, or • sent crew members ashore, <i>and</i> • the claimant was stationed aboard the ship at that time. <p>Important: The presumption of herbicide exposure can be conceded at this step to any Veteran who served aboard a ship that entered <i>inland</i> waterways.</p>
5	<p>Can duty or visitation in the RVN be conceded based on the above steps?</p> <ul style="list-style-type: none"> • If <i>yes</i>, concede exposure and continue to process the claim, as appropriate. • If <i>no</i>, <ul style="list-style-type: none"> – ensure the development procedures in M21-1, Part IV, Subpart ii, 1.H.2.h-j have been properly completed, and – if exposure cannot be conceded, control the claim under the stay procedures below. <p>Important: Service on a ship operating on the RVN's inland waterways constitutes duty or visitation in the RVN.</p>

Placing Stayed Claims Under Control

Until the new law is effective, do not rate or decide these claims. Pending further guidance, ROs must control claims from “blue water” Vietnam Veterans seeking presumptive service connection with EP 335 as explained below. These instructions supersede the guidance provided in VBA Letter 20-19-05 related to controlling stayed claims.

New claims (Veteran or survivor) for service connection for a disease associated with herbicide exposure

- Establish the appropriate EP (110, 010, 020, 140 etc.) for all claimed condition(s)
- Apply the *Agent Orange – Vietnam* flash
- If the claimed condition is not shown under 38 CFR 3.309(e), decide the issue following normal processing rules
- Proceed with development and rating for all claimed issues, in the normal manner, based on existing regulations, manual provisions, and other guidance to include consideration of service connection for any claimed condition on a direct, indirect, or presumptive basis
- **Grant claimed contentions under previously existing exposure rules**
 - Rate and promulgate under pending EP, clearing the EP
 - Do not put at issue or defer any issues where the new law is the only basis for conceding herbicide exposure
 - If no issues can be granted without consideration of the new law, change (PCHG) to EP 335 Review or EP 335 PMC Review (as appropriate)
 - Send normal notification regarding issues addressed in the rating
- **Establish new EP for contentions potentially eligible under the new law**
 - Establish a separate EP using the EP 335- Review or EP335- PMC- Review claim labels
 - Apply the *Blue Water Navy* flash (regardless of branch of service)
 - Add contentions still requiring adjudication based on the provisions of the new law
 - Send notification to the claimant containing the approved paragraph below
 - Add an *AO - Blue Water Notice* tracked item with 30-day suspense date
 - Claim status: Open
 - The claim will recall during the next production run and be held in 499 until further action can be taken

Supplemental claims (Veteran or survivor) for service connection for a disease associated with herbicide exposure

If a Veteran’s or survivor’s claim for service connection for a disease associated with herbicide exposure has previously been denied (both on a direct and/or presumptive basis) and there is no basis to establish entitlement except under the new law:

- Establish EP 040 for all claimed condition(s).
- Apply the *Agent Orange – Vietnam* flash.
- If the claimed condition is not shown under 38 CFR 3.309(e), decide the issue(s) following normal processing rules.

- Proceed with development and rating for all claimed issues, in the normal manner, based on previously existing regulations, manual provisions, and other guidance to include consideration of service connection for any claimed condition on a direct, indirect, or presumptive basis.
- **If non-Blue Water Navy (BWN) issues can be granted** follow existing procedures and defer the BWN-related issues on EP 040 and include the approved paragraph below in the notification letter.
- **If no issues can be granted without consideration of the new law**, establish tracking EP 335 and add the *Blue Water Navy* flash (regardless of branch of service).
- Add an *AO - Blue Water Notice* tracked item on the EP 335 and EP 040, with a suspense date of January 1, 2020.
- Add the *Blue Water Agent Orange*¹ special issue to each BWN-related issue on the EP 040.
- Send a letter to the claimant including the approved paragraph below acknowledging the receipt of a supplemental claim that includes exposure under the provisions of the new law.

Approved paragraph:

The following language will be used to acknowledge receipt of a claim [or legacy appeal] for service connection that cannot be granted under existing law but relates to the provisions of the new law:

“We have received your claim [or appeal] for [insert the BWN-related disability(ies), or death, accrued or burial claim] based upon claimed herbicide exposure. Your claim [or appeal] may be affected by Public Law 116-23, *Blue Water Navy Vietnam Veterans Act of 2019*. Currently, VA has temporarily suspended deciding these claims and appeals until the new law is effective in January 2020. We will begin processing all issues affected by the *Blue Water Navy Vietnam Veterans Act of 2019* following implementation of the new law.”

For procedures on:

- Legacy appeals and higher-level reviews (HLRs) refer to the enclosure,
- Rapid Appeals Modernization Program (RAMP) see [RAMP Phase 3 Standard Operating Procedure \(SOP\)](#), and
- Processing grants by the Board related to *Procopio v. Wilkie*, refer to Appeals Management Office ([AMO Policy Letter 19-02](#)).


Targeted Outreach

In order to qualify for an effective date based on a prior claim, as provided in the new law, claimants will have to take specific action to submit a claim on or after January 1, 2020. VA has identified Veterans impacted by the new law and will be sending outreach letters to Veterans and survivors/dependents of deceased Veterans who may be eligible under the new law.

¹ The existing *Procopio* special issue will be renamed “*Blue Water Agent Orange*.”

Questions

Questions concerning this letter and other issues related to PL 116-23, *Blue Water Navy Vietnam Veterans Act of 2019*, should be submitted to the [VAVBAWAS/CO/211](#) Policy mailbox. For ease of communication and consistency, Compensation Service will coordinate appropriate responses with the Office of Field Operations, Appeals Management Office, and Pension and Fiduciary Service.


Paul R. Lawrence, Ph.D.
Under Secretary for Benefits

Enclosure

ENCLOSURE

Handling Legacy Appeals and Higher-Level Reviews (HLRs) Impacted by the *Blue Water Navy Vietnam Veterans Act of 2019*

This enclosure supersedes the instructions provided in VBA Letter 20-19-05 related to processing of Blue Water Navy legacy appeals. The below instructions only apply to legacy appeals related to herbicide exposure established and/or identified on or after the date of this letter.

Follow the instructions in Board remands carefully. For all other types of reviews or appeals, follow the earlier *Interim Development Procedures*, as appropriate.

Controlling NOD and Form 9 stage legacy appeals affected by the new law

For legacy appeals with **both** BWN and non-BWN issues create a separate VACOLS record to control for the issues not related to BWN and process those issues in accordance with existing manual provisions. Ensure both VACOLS records reflect the appropriate appeals stage.

- Establish a separate VACOLS record for all issue(s) on the appeal affected by the new law and add an entry using diary code *VBA046 Blue Water Stay* with a suspense date of January 1, 2020.
- Add the *Blue Water Agent Orange*² special issue to each BWN-related issue on the appeals EP.
- Establish a tracking EP 335 – Review / EP 335- PMC Review with the same date of claim as the appeals EP and add an *AO - Blue Water Notice* tracked item with a suspense date of January 1, 2020, and ensure the *Blue Water Navy* and *Agent Orange* flashes are added to the corporate record.
- Send a letter to the claimant including the aforementioned approved paragraph acknowledging receipt of a legacy appeal that includes exposure under the provisions of the new law.

Controlling Board remands affected by the new law

Follow the below guidance for Board remands with **both** BWN and non-BWN issues. Control and process all issues not related to BWN in accordance with existing manual provisions.

- Add an entry using diary code *VBA046 Blue Water Stay* with a suspense of January 1, 2020 to the pending remand VACOLS record.
- Establish a tracking EP 335 – Review / EP 335- PMC Review and add an *AO - Blue Water Notice* tracked item with a suspense date of January 1, 2020 and ensure the *Blue Water Navy* and *Agent Orange* flashes are added to the corporate record.
- Send a letter to the claimant with the aforementioned approved paragraph acknowledging receipt of a legacy appeal that may be entitled to a presumption of service connection under the provisions of the new law.

² The existing *Procopio* special issue will be renamed "*Blue Water Agent Orange*."

Controlling Higher-Level Reviews affected by the new law

HLRs affected by the new law will be treated as a failure to develop to determine whether a Veteran's offshore service qualifies for the expanded presumption, which is considered as an error in VA's duty to assist the claimant in securing military records relevant to substantiating the claim. **Note:** These cases will be considered as "duty to assist errors" and will be returned to the supplemental claim lane even though the prior rating decision was made before the new law and the decision maker was acting on guidance in place at the time.

- Establish EP 030 to control all claimed condition(s).
- Apply the *Agent Orange* flash.
- If the claimed condition is not shown under 38 CFR 3.309(e), decide the issue(s) following normal processing rules.
- Proceed with file review in the normal manner, based on existing regulations, manual provisions, and other guidance to include consideration of service connection for any claimed condition on a direct, indirect, or presumptive basis.
- **If no issues can be granted without consideration of the new law**, complete the rating decision in VBMS-R to return it to development and complete *VA Form 20-0999*, as appropriate.
- Promulgate EP 030 in VBMS-A, and Caseflow will auto-establish EP 040 with *DTA Error* claim label.
- Establish tracking EP 335 and add the *Blue Water Navy* flash (regardless of branch of service).
- Add an *AO - Blue Water Notice* tracked item on the EP 335 and EP 040, with a suspense date of January 1, 2020.
- Add the *Blue Water Agent Orange*³ special issue to each BWN-related issue on the EP 040.
- Send a letter to the claimant with the aforementioned paragraph acknowledging receipt of an HLR that may be entitled to a presumption of service connection under the provisions of the new law.

³ The existing *Procopio* special issue will be renamed "*Blue Water Agent Orange*."