



National Service & Legislative Headquarters
807 Maine Avenue, S.W.
Washington, D.C. 20024-2410
Phone (202) 554-3501
Fax (202) 554-3581
www.dav.org

**STATEMENT OF
SHANE L. LIERMANN
DEPUTY NATIONAL LEGISLATIVE DIRECTOR FOR BENEFITS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
OCTOBER 30, 2019**

Madame Chair, Ranking Member Bost and Members of the Subcommittee:

Thank you for inviting DAV (Disabled American Veterans) to testify at today's oversight hearing on "Preparing for Blue Water Claims – VA Status Update on Implementation."

DAV is a congressionally chartered national veterans' service organization (VSO) of more than one million wartime veterans, all of whom were injured or made ill while serving on behalf of this nation. To fulfill our service mission to America's injured and ill veterans and the families who care for them, DAV directly employs a corps of more than 260 National Service Officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every VA regional office (VARO) as well as other VA facilities throughout the nation. Together with our chapter, department, transition and county veteran service officers, DAV has over 4,000 accredited representatives on the front lines providing free claims and appeals services to our nation's veterans, their families and survivors.

We represent over one million veterans and survivors, making DAV the largest VSO providing claims assistance. This provides us with an expert understanding and direct knowledge in navigating the VA claims and appeals process.

Lift the Stay

We continue to call on Secretary Wilkie and the president to lift the stay placed on all Blue Water Navy claims issued on July 1st. 480,000 of our over one million members are Vietnam veterans. Achieving justice for Blue Water Navy veterans and their families is of vital importance to DAV, our membership, and the thousands of veterans suffering from Agent Orange linked illnesses and diseases.

Our testimony will address the decision by the U.S. Court of Appeals for the Federal Circuit in *Procopio v Wilkie*, the Secretary's stay and our concerns and

recommendations for VA and Congress on the implementation of the Blue Water Navy Vietnam Veterans Act of 2019.

Procopio v Wilkie

On January 29, 2019, the U.S. Court of Appeals for the Federal Circuit, in *Procopio v. Wilkie*, held that the intent of Congress is clear from its use of the term “in the Republic of Vietnam,” which under all available international law includes both its landmass and its territorial seas. This decision overruled VA’s previous misinterpretations and determined that service in the Republic of Vietnam includes service in the territorial waters within 12 nautical miles of the baseline.

This was true in 1991 when Congress adopted the Agent Orange Act, and the government has pointed to no law to the contrary. It is important to note that none of the Federal Circuit Judges determined the veteran should have been denied benefits. It has been well established that Blue Water Navy veterans were considered exposed to Agent Orange prior to the VA General Counsel Opinion of July 23, 1997. As noted by the Federal Circuit, the 1997 VA General Counsel Opinion was not based on any subsequent change of law, it was solely an interpretation of a regulation that was not specific to Agent Orange exposure.

It seemed that justice for Blue Water Navy Vietnam veterans was within in our grasp. DAV reached out to the Under Secretary for the Veterans Benefits Administration (VBA) and provided our recommendations for processing claims and appeals impacted by *Procopio*.

However, the Administration continued to submit motions to the U.S. Supreme Court to extend the time for filing an appeal to their jurisdiction. These actions placed a stay on claims pending due to a possible appeal. In late May, the Administration announced they would not pursue an appeal to the U.S. Supreme Court. The Board of Veterans’ Appeals lifted their stay on these cases and adjudicated 200 Blue Water Navy appeals. However, the Administration’s actions resulted in four months of delays on all pending Blue Water Navy claims within VA.

The Secretary’s Stay

Madame Chair, we thank you, Ranking Member Bost and all members of the subcommittee for your collective efforts in getting H.R. 299, the Blue Water Navy Vietnam Veterans Act of 2019, unanimously passed through the House in May. Subsequently, the Senate passed H.R. 299 unanimously and on June 25th, the entire veterans community celebrated after President Trump signed H.R. 299 (P.L. 116-23), into law. This will correct the decades-long injustice for Navy veterans who had been blocked from receiving Agent Orange benefits because their service was in the waters offshore of Vietnam.

However, our joy turned to dismay when VA Secretary Wilkie, on July 1, issued a “stay” that stopped all processing of all benefit claims by Blue Water Navy veterans, including those already eligible to receive Agent Orange-related benefits based on the *Procopio* decision from January.

In response, DAV and our VSO partners wrote to Secretary Wilkie on July 24th calling on him to lift or modify the blanket stay placed on all Blue Water claims, and immediately begin processing, adjudicating, granting and paying veterans for Agent Orange-related claims. We appealed on behalf of thousands of aging and ill Vietnam veterans and their survivors, many of whom have waited decades for the recognition that they too were exposed to Agent Orange and suffered negative health consequences as a result. We specifically asked the stay to be modified to address those claims of veterans and survivors with terminal illnesses, over the age of 85 or impoverished.

Our pleas were left unanswered. On September 24, DAV, VFW, VVA and our fellow VSOs stood with House Veterans’ Affairs Committee Chairman Takano and Senate Veterans’ Affairs Ranking Member Tester, calling on President Trump to meet with us and to overrule the Secretary’s choice to delay these earned benefits to the veterans and their families. As of today’s hearing, we have not had any response from the White House.

We do not believe it was Congress’ intention to prevent every single Blue Water Navy veteran from receiving Agent Orange benefits for at least six months. Although the law does include a provision stating that, “the Secretary may stay a claim...,” it clearly does not state that the Secretary “must” stay all pending Blue Water claims. The reality is that this deeply flawed action delays, and in some cases, denies, benefits for veterans who will pass away before we reach January 1. Further, there are widows whose spouses have died this year – after the Court’s ruling and after the law was enacted – who have no certainty whether they will receive survivor benefits.

Robert “Bobby” Daniels, from Missouri, served in the Navy from 1960 to 1964, including service onboard the USS Lexington, an Aircraft Carrier deployed to Vietnam. It was there, while serving as a Machinist’s Mate that he was exposed to Agent Orange in the offshore waters. Bobby says that he has the ship logs to prove it.

In 2011, Bobby was diagnosed with prostate cancer and diabetes, diseases that many of his former shipmates have also suffered from. Unfortunately, since 1997, VA has not provided the Agent Orange presumption of exposure for Blue Water Navy veterans like Bobby who served only in the waters offshore Vietnam without ever setting foot on the land. As he began this new battle, Bobby was blessed to have his wife of more than 50 years, Judy, a former school teacher, by his side. Over the years, Bobby and Judy have struggled through tough times together, including taking out a second mortgage to help pay for his medical expenses. Last year Bobby was told that his prostate cancer had reached a terminal stage with no cure possible. Although he had not previously sought benefits due to his prostate cancer or diabetes, he was now

worried about how his wife would get by after he was gone, and filed new claims in January and February of this year so that his wife might be eligible for survivor benefits.

It is unacceptable to force them to wait for life-changing benefits when VA has the authority to grant their claims right now. We call for immediate action on claims by Blue Water Navy veterans who already have sufficient evidence of record to grant benefits based on the Federal Circuit's *Procopio* decision, as well as those veterans who are terminally ill, of advanced age or impoverished.

It has now been 275 days since the *Procopio* decision and 122 days since the Secretary chose to place a stay on all Blue Water Navy claims. How many more days will Bobby and the thousands like him be left to suffer and possibly die without access to VA benefits?

VA's Implementation of Blue Water Navy Claims: Concerns & Recommendations

Since the Secretary chose to stay all Blue Water Navy claims and appeals, VA has included DAV and our fellow VSOs in several meetings regarding the stay and their implementation of the Blue Water Navy Vietnam Veterans Act of 2019. We have been provided updates and at times contradictory or unclear information. To date, we have not been provided with any written plan on VA's implementation or their oft-referenced operational action plan.

On several occasions, VA has indicated that they planned and were developing Blue Water Navy claims during the entire stay. We have been advised that they plan to start requesting VA examinations for those cases requiring them. Senior VA officials continue to make statements that on January 1, 2020, VA will be prepared to make decisions and award benefits. This is indicative of VA having cases essentially pre-adjudicated and are only waiting for January 1 to grant benefits. We have a question, if VA has cases ready to grant benefits on January 1, why can't VA grant those benefits today, especially to those suffering without medical care, from terminal illnesses and those who are impoverished?

Below are DAV's questions, concerns and recommendations regarding VA's implementation of the Blue Water Navy Vietnam Veterans Act of 2019.

- 1. Priority Cases.** On several occasions VA has advised they will prioritize cases for adjudication on January 1. Previously they noted that those veterans and survivors with terminal illnesses, over the age of 85 or impoverished would be their priority in adjudicating these cases. However, recently we have reviewed documents that indicate VA will only prioritize claims from veterans or survivors with terminal illnesses or over the age of 85, but not those suffering financial hardship or homelessness. We are concerned why these veterans and survivors have been left out of VA's prioritization of Blue Water Navy claims.

VA's adjudication manual, M21-1 III.ii.1.D.1.a, updated on October 15, 2019, lists the types of claims that require priority processing:

- claims from any claimant who is a participant in the Fully Developed Claim Program
- homeless
- terminally ill, or
- a survivor of a former prisoner of war (FPOW)
- disability compensation claims from any claimant who is experiencing extreme financial hardship, or
- more than 85 years old

38 C.F.R. § 20.902(c), the Board of Veterans Appeals Rule 902, Order of consideration of appeals, notes, a case may be advanced on the docket on the motion of the Chairman, the Vice Chairman, a party to the case before the Board, or such party's representative. Such a motion may be granted only if the case involves interpretation of law of general application affecting other claims, if the appellant is seriously ill or is under severe financial hardship, or if other sufficient cause is shown. "Other sufficient cause" shall include, but is not limited to, administrative error resulting in a significant delay in docketing the case, administrative necessity, or the advanced age of the appellant. For purposes of this Rule, "advanced age" is defined as 75 or more years of age.

Recommendation. VA should place a priority on all Blue Water Navy cases for veterans and survivors when there is a known terminal illness, severe financial hardship to include homelessness and those at risk, and those of advanced age.

As noted, VA's adjudication manual notes that advanced age is 85. However, the Board of Veterans' Appeals defines advanced age as those of 75 or older. We recommend that VA should adopt the Board's Rule 902 as priority for those with Blue Water Navy claims.

Thousands of veterans and survivors have been denied these benefits for decades based on VA's own misinterpretation of law and in contradiction to the actual intent of Congress. Justice has been delayed far too long and VA should give priority to those veterans and survivors suffering from terminal illnesses, those with financial hardship to include homelessness, and those of 75 years of age or older.

- 2. Cases handled by only eight VA Regional Offices.** In an effort to provide consistent rating decisions and correct promulgation of awards with potential staged ratings and retroactive effective dates, VA has stated it will process pending Blue Water Navy cases at eight specific VA Regional Offices. We have been advised that initially, only 50 employees will be provided the specific training to process and adjudicate these claims.

We agree with VA's decision to have claims handled with specific trained expertise to properly and consistently adjudicate and promulgate these decisions. However we do have some concerns and questions:

- Will these eight specific VA Regional Offices, with initially only 50 employees processing these claims be able to keep up with the current pending 8,000 cases or will it cause a delay in processing and create another backlog of cases? Do they have sufficient resources at the eight locations?
- VA has recently sent out approximately 77,000 letters to previously denied veterans and survivors. Will these potentially forthcoming claims create a processing back log?
- Currently, VA processes all survivor benefits claims at only three VA Regional Offices: Philadelphia, Milwaukee and St. Paul. Will these three locations be part of the eight VA regional offices handling Blue Water Navy claims? If not, will there be sufficient expertise, training, and resources at those eight locations?

3. VA Ship Locator Tool. VA, in concert with the Department of Defense (DOD) and the National Archives and Records Administration (NARA), has developed a tool that will track the locations of U.S. Navy ships that served in the waters offshore of Vietnam during the war. VA has received a list of ships with deck logs that DOD states were in the Vietnam waters. Millions of these deck logs with the ship's coordinates are being scanned, manually verified and logged into their tool.

The tool will determine if the ship was within zone defined by the Blue Water Navy Vietnam Veterans Act of 2019. If the ship's location is not verified by the tool within the specific locations, VA will not deny the claim for that reason but VA will continue to develop for additional information to try to verify the ship's location.

When the claims are being developed for the locations, VA will be taking screen shots of the tool's determinations and those images will be added to the veteran's or survivor's electronic file in the Veterans Benefits Management System (VBMS). This information will then be accessible via VBMS to those VSOs, agents, and attorneys, who are the appointed accredited representatives.

VA has stated that the tool will not be available to VSOs nor will it be public facing for veterans to use for their own claim development. However, it is our understanding that NARA may publish ship locations via their own website.

None of the VSOs, to include DAV, have seen or will have access to this tool. We would like to note that tentatively, VA has scheduled a demonstration on

November 18, 2019. We have several questions and concerns regarding the tool and its down-stream impact of the claims and appeals process.

- The information used by VA to create the tool is only the information as provided by the DOD. Are there ships that served within the determined area off shore of Vietnam that were not included or specifically excluded? Additionally, of those ships noted, are we certain that every deck log for every ship has been provided?
- DOD has specifically excluded submarines from the list provided to VA of ships that served in the waters offshore of Vietnam. While nuclear powered submarines can stay underwater for up to 90 days, diesel-power submarines had a limit of several days submerged. They couldn't run the air-breathing engines while fully submerged and had to rely on battery power and electric motors when underwater. They would have to surface and use the snorkel mast for air for the diesel engines to recharge the batteries and exchange fresh air. The last diesel-powered submarine was decommissioned in 1990. However, they were used throughout the Vietnam War. Why were diesel-powered submarines excluded from the list of U.S. ships serving in the waters offshore?
- The tool only tracks U.S. ships and not the veterans who served aboard. This information can be gleaned from a veteran's DD-214 or separation document, service medical records and service personnel records. What actions are VA undertaking for those veterans whose records have been determined to be destroyed by the 1973 fire at the National Personnel Records Center in St. Louis or destroyed in other ways?

When records are determined to be lost or destroyed, the U.S. Court of Appeals for Veterans Claims in *O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991), held that VA has a heightened duty to consider the applicability of the benefit-of-the-doubt rule, to assist the veteran in developing the claim, and to explain the reasons and bases for its decision.

Recommendation. VA needs to have a specific policy identified, trained and enforced regarding records for Blue Water Navy veterans that may not be available due to no fault of the veteran or survivor. This heightened duty to assist and application of the benefit of the doubt doctrine must be adhered to by VA decision makers to ensure that veterans and survivors are not being denied their benefits due to the federal government's inability to protect or locate federal records. To ensure VA properly follows the Court in *O'Hare* for all veterans cases to include Blue Water Navy, Congress should codify the Court's holdings.

- Will the ships locator tool be available to the Board of Veterans' Appeals for those legacy appeals and Appeals Modernization Act (AMA) pending appeals that have been impacted by the Secretary's stay?

The Board is prohibited from developing cases under its jurisdiction; will this include using the ship locator tool? Will this require the Board to remand legacy appeals? How will this impact AMA appeals as they can only be returned to the VA Regional Office of jurisdiction if there is a development error?

4. Letters to those previously denied. Although VA did engage VSOs in reviewing draft letters to previously denied Blue Water Navy veterans and survivors, none of our concerns, noted below, were included in the final letter.

- **Duty to Notify.** These letters advised previously denied veterans and survivors that if they intended to refile for those previously denied benefits, they needed to complete VA form 20-0995, Decision Review Request: Supplemental Claim, which was provided. However, it was noted that if the veteran wanted to file a new disability claim related to Agent Orange exposure, VA form 20-0995 could not be used and only directed them to VA's website.

Recommendation. In accord with VA's duty to notify, VA must provide VA form 21-526EZ, which is required for new claims, and VA should provide one with the letter.

DAV is extremely concerned about the lack of information and clarity provided by VA's letter to those previously denied and therefore we will be sending our own letters to over 8,000 veterans and survivors represented by DAV, who were previously denied.

5. Forms Issue. Currently, VA regulations state that in order for a claim to be considered it must be submitted on the appropriate claims form. If the veteran or survivor provides the wrong form, VA will not consider the claim, but will advise that the wrong form was used and not honor that submission or effective date. If the veteran or survivor responds with the correct form, the effective date will be the date the correct form is received.

If a veteran submits a claim to refile for a previously denied Blue Water Navy claim on 20-0995 with a new disease related to Agent Orange, VA will not accept that new claim and will eventually advise the veteran of the need to file a 21-526EZ. The reverse is true if a veteran attempts to claim a previously denied issue on a 21-526EZ. It is difficult for a veteran to remember what was filed many years in the past. Therefore, VA should accept Blue Water Navy claims, whether new or previously denied, on either form.

If VA does not change this policy, VSOs and veterans have no other choice than to file these claims on both forms as to ensure the proper claims are filed without veteran losing entitlements and effective dates. We acknowledge that this will create additional work for veterans, VSOs and the VA.

This issue, which also applies to the entire VA process, has been raised multiple times with VA over the past several months. However, it is clear VA has no intention of changing this policy.

Recommendation. Congress should enact legislation to require VA to accept any new claim or previously denied claim being filed on either VA form 20-0995 or VA form 21-526 EZ.

As former VA Administrator, General Omar Bradley once said, “We are dealing with veterans, not procedures; with their problems, not ours.”

Madame Chair, this concludes my testimony on behalf of DAV. I would be happy to answer any questions you or other members of the Subcommittee may have.