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Blue Water Sailors Who Were Exposed to Agent Orange during the Vietnam War and later Suffered from Designated Diseases Must Now Receive VA Compensation

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

11.0—Veterans' claims

Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019).³

In Law Review 16010 (February 2016), Captain Morgan Little and I addressed in detail the issue of Agent Orange exposure to U.S. Navy and Coast Guard personnel serving on vessels in the South China Sea near (in some cases very near) the coast of the Republic of Vietnam (South

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ This is an en banc decision of the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from the United States Court of Appeals for Veterans Claims. The citation means that you can find this decision in Volume 913 of *Federal Reporter Third Series* and the decision starts on page 1371.

Vietnam) during the Vietnam War. As a junior officer in the late 1960s and early 1970s, Little served on *USS Epperson*, a *Gearing*-class destroyer. For part of that time, the *Epperson* operated very close to the shore of South Vietnam while providing naval gunfire support and other support for United States and allied forces on the ground. Decades later, Little suffered from prostate cancer and filed a claim with the Department of Veterans Affairs (VA), claiming that his prostate cancer was attributable to Agent Orange exposure during his service. Finally, on 4/19/2019, Little received notice from the VA that it had found his prostate cancer to be service connected.

In Law Review 16010, Captain Little and I wrote:

Together with my VA claim, I [Little] presented evidence (from *USS Epperson* deck logs) that during the period [that I was on board] the ship was operating for periods of time well within the 12-mile limit of the Republic of Vietnam and well within the plume of the Mekong River. I presented evidence that the II Corps Area of South Vietnam (right up to the shoreline) was among the areas most heavily sprayed with Agent Orange, and that was also true of the Mekong River and other rivers that flowed into the South China Sea in the area where we operated. It is reasonable to conclude that the waters in which we operated contained substantial Agent Orange contamination.

The Agent Orange Act of 1991 applies to persons who served in the military, naval, or air forces of the United States in the Republic of Vietnam (South Vietnam) during the period from 1/9/1962 until 5/7/1975. Such a person is entitled to a *presumption* that he or she was exposed to Agent Orange. If the person later (even decades later) is diagnosed with one of the designated diseases or conditions (including prostate cancer and diabetes mellitus), the person is entitled to a *presumption* that the disease or condition was caused by Agent Orange exposure in Vietnam and, thus, that the condition or disease is service-connected. The *Procopio* case turned on a question of *statutory construction*—how to construe the words “in the Republic of Vietnam.”

For many years, the VA has made a clear distinction between service members who served with “*boots on the ground*” (BOG) in South Vietnam (however briefly) and on the *inland* waters of that country (like the Mekong River and other rivers), on the one hand, and those who served on ships in the South China Sea very near the coastline and within the territorial sea of South Vietnam. Those who served BOG or on inland waterways are entitled, according to the VA, to the presumption of Agent Orange exposure and to the presumption of service connection for the designated diseases and conditions. Those who served offshore are not entitled to the presumption, meaning that their VA claims are almost always denied.

In Law Review 16010, Captain Little and I argued that the VA’s policy of limiting the presumption to BOG veterans was arbitrary and capricious because there was ample scientific

evidence that service members like Little who served offshore could have been exposed to significant Agent Orange contamination. In footnote 12 of our article, we made the additional argument that the territorial sea of South Vietnam was part of the country and that under the language that Congress enacted in 1991 “blue water sailors” were entitled to the presumption:

The Agent Orange Act of 1991 expressly applies the Agent Orange presumption to the veterans who served in the military, *naval*, or air service “*in the Republic of Vietnam*.” When Congress used the phrase “*in the Republic of Vietnam*” it presumably intended that preexisting U.S. domestic law and international law definitions would apply. Thus, the territorial sea of the Republic of Vietnam (within the 12-mile limit) must be considered part of the Republic of Vietnam.⁴

Alfred Procopio, Jr. (a Navy veteran) served on *USS Intrepid* from November 1964 until July 1967. In July 1966 the ship was deployed in the waters offshore of the landmass of the Republic of Vietnam, including in the territorial sea of that nation. In the 21st Century, Procopio developed prostate cancer and diabetes mellitus, both of which are on the list of diseases and conditions that are presumptively service connected for veterans who served “*in the Republic of Vietnam*.” He filed a VA claim, which the VA denied because Procopio did not serve on the ground in South Vietnam or on the inland waterways of that former nation.

Procopio appealed the VA denial to the United States Court of Appeals for Veterans Claims, which affirmed the denial.⁵ Procopio appealed to the United States Court of Appeals for the Federal Circuit. Oral argument was heard by a three-judge panel of the Federal Circuit. Because of the importance of this case, the panel on its own motion directed the parties (Procopio and the VA) to file new briefs and referred the case to all 11 active judges⁶ of the Federal Circuit. By a vote of 9-2, the Federal Circuit held: “Because we hold that the unambiguous language of 38 U.S.C. 1116 entitles Mr. Procopio to a presumption of service connection for his prostate cancer and diabetes mellitus, we reverse.”

As I explained in detail in Law Review 18114 (December 2018), when the terms of a statute or regulation are ambiguous (capable of more than one reasonable interpretation), the interpretation adopted by the relevant administrative agency is entitled to some deference in the courts. The Federal Circuit majority held that there is no ambiguity in the phrase “*in the Republic of Vietnam*” and that the territorial sea of that former nation is part of the coverage. Thus, there was no room for VA interpretation of this unambiguous phrase and the VA’s exclusion of veterans like Procopio was unlawful.

⁴ Law Review 16010, footnote 12. Emphasis in original.

⁵ Please see Law Review 18114 (December 2018) for a detailed discussion of the VA’s unique process for adjudicating claims and the provisions for judicial review of VA decisions.

⁶ The active judges are those who have been appointed by the President with Senate confirmation and who have not taken senior status.

Because the Federal Circuit decided this case en banc, there was no opportunity for the VA to seek en banc reconsideration in that court. The final step in the federal appellate process is to apply to the Supreme Court for a writ of certiorari. Certiorari is granted in only about 1% of the cases where it is sought, but when the Federal Government seeks certiorari it is successful much more often. Certiorari is granted if four or more of the nine Justices vote for it at a conference to consider certiorari petitions.

The deadline for the Federal Government to apply for certiorari in the Supreme Court was 4/29/2019, 90 days after the announcement of the Federal Circuit decision. Just before the deadline for the Government to file its petition for certiorari, the Government sought, and the Supreme Court granted, a 30-day extension of the deadline—the deadline was extended to 5/29/2019.

As the new deadline approached, the Solicitor General decided that the Federal Government would not seek certiorari, and the decision of the Federal Circuit thus became final. In another case involving the issue of Agent Orange exposure of Navy veterans who served in the territorial sea of the former Republic of Vietnam, the Solicitor General filed a motion to dismiss that case as moot, writing: “The Solicitor General has decided not to file a petition for a writ of certiorari in *Procopio*, and the Department of Veterans Affairs (VA) will follow *Procopio*’s interpretation of the Act going forward.”⁷

The VA now accepts that Navy and Coast Guard veterans who can establish that they served within the 12-mile “territorial sea” of the Republic of Vietnam during the war are entitled to the two Agent Orange presumptions, just like veterans who served on the ground in South Vietnam. Deck logs of Navy and Coast Guard vessels are available, and it is worth the effort to find those deck logs if you are suffering or have suffered from one of the designated diseases or conditions.

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⁷ *Gray v. Wilkie*, No. 17-1679.

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