IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ALFRED PROCOPIO, JR.,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 15-4082
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the Board of Veterans' Appeals (BVA or Board), in its July 9, 2015, decision, properly denied entitlement to service connection for prostate cancer and properly denied entitlement to diabetes mellitus, type II, with edema (DMII), both to include as due to exposure to herbicides.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

In this case, Appellant seeks entitlement to service connection for prostate cancer and DMII, which were denied in the Board decision now on appeal. *See* [Record Before the Agency (R.) at 1-25]. On appeal, Appellant argues, *inter alia*, that the Board improperly relied on the controlling legal authority in this case and did not consider direct service connection. However, the Board properly considered the evidence of record, in light of the controlling legal authority, and properly found that entitlement to service connection for prostate cancer and DMII was not warranted because, *inter alia*, the evidence of record did not demonstrate exposure to Agent Orange.

In the instant decision, the Board also remanded Appellant's claim of entitlement to service connection for coronary artery disease, to include as due to exposure to herbicides, which is not now on appeal. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004).

C. Statement of Facts and Procedural History

Appellant had active military service from September 1963 to August 1967 and his service department records are of record. [R. at 1512-45, 1546-1602,

1688]. These records do not reflect diagnoses of, treatment for, or complaints regarding, DMII or a prostate condition during active military service. However, on his August 1963 Report of Medical History, Appellant noted that his grandmother "had diabetes." [R. at 1552 (1552-53)].

In October 2006, Appellant sought entitlement to service connection for DMII and noted that his disability began in January 2004. [R. at 1680 (1671-87)]. On his application, Appellant reported that he was in Vietnam from March 1966 to July 1967, but that he was not exposed to Agent Orange or other herbicides. [R. at 1674, 1681 (1671-87)]. Appellant explained that "the benefits I am seeking is service connection for type II diabetes with edema. While in the Navy, I served onboard the USS Intrepid. During my service, we sailed into Vietnam on two occasions and spent time in the Gulf of Tonkin and on the Southern Coast of Vietnam." [R. at 1681 (1671-87)]. Appellant explained that "I believe this to be the cause of my type II diabetes with edema". *Id*. Appellant's Department of Veterans Affairs (VA) treatment records were subsequently associated with the record. *See* [R. at 1616-57]. These records included a December 2004 treatment record reflecting an assessment of "Diabetes type 2, well managed." [R. at 1644 (1643-44)]. The Regional Office (RO) also requested the service department to "furnish dates of service in Vietnam." [R. at 1400]. The service department responded that "we are unable to determine whether or not this Veteran had in-country service in the Republic of Vietnam." *Id*. The RO also requested the service department to "furnish any documents showing exposure

to herbicides," but the service department responded that there are "no records of exposure to herbicides." [R. at 1395]. In the same month as these requests, Appellant submitted a statement reflecting that "I served aboard the U.S.S. Intrepid CVS-11 from Nov. 1964 to July 1967" and that "I stood daily watches in both engine rooms and boiler room, at all hours of the day." [R. at 1396 (1396-97)]. Later, in January 2007, the RO notified Appellant that his "claim may be affected by recent judicial action by the Court of Appeals for Veterans Claims in Haas v. Nicholson" and that "[w]e must await guidance from the Department of Veterans Affairs General Counsel prior to taking action on your claim." [R. at 1330]. For similar reasons, a decision on Appellant's DMII claim was, initially, deferred in the April 2007 RO rating decision. [R. at 1315 (1312-16)].

In October 2007, Appellant sought entitlement to service connection for prostate cancer and argued that "I believe that this condition is also as a result of my exposure to Agent Orange while stationed aboard the USS Intrepid." [R. at 1262 (1258-61)]. In response, additional VA treatment records were subsequently received by the RO. *See* [R. at 1190-1241]. These records reflect that Appellant presented for a VA urology consultation in June 2007 regarding a "prostatic specific antigen of 4.1." [R. at 1193 (1193-94)]. The physician recorded that "this year his prostatic specific antgen went up to 4.1 with a free prostatic specific antigen of 11%, which equates to a 28% probability of prostate cancer." *Id*. The physician also recorded that Appellant "has no history of exposure to Agent Orange in the field and no family history of prostate cancer."

Id. A biopsy was performed later that month revealing "adenocarcinoma Gleason 3+4 in 20% of the tissue with perineal invasion." [R. at 1192, 1192-93]. The RO also received additional evidence and argument from Appellant in March 2009. [R. at 1084-94]. Here, Appellant noted that "I believe that my exposure to Agent Orange was while serving onboard the aircraft carrier USS Intrepid from March to November 1966 and again from May 1967 to July 1967 in the Gulf of Tonkin." [R. at 1084 (1084-94)]. He argued that "[w]hile performing my duties onboard the ship, we quite frequently handled these chemicals and the aircraft and equipment that was used to spray these chemicals, as well as the water that was pulled from the Gulf and 'purified' through co-distillation for use as our drinking water." [R. at 1084 (1084-94)]. He further argued that "[t]his water was runoff water from Vietnam and the probability that we were drinking dioxin contaminated is high." *Id*. Along with his argument, Appellant submitted a scientific study entitled "Co-Distillation of Agent Orange and Other Persistent Organic Pollutants in Evaporative Water Distillation" (Australian scientific article). [R. at 1086-93 (1084-94)].

In April 2009, the RO issued a rating decision, denying entitlement to service connection for DMII with edema and entitlement to service connection for prostate cancer. [R. at 1063 (1060-66)]. The RO reasoned that entitlement to service connection was not warranted for these disabilities because, *inter alia*, the evidence of record did not show "a medical relationship between a current disability and a disease, event, or injury" during service and because the

evidence of record did not reflect "on-ground Vietnam service" to warrant entitlement to service connection on a presumptive basis. [R. at 1065 (1060-66)]. In response, Appellant submitted his Notice of Disagreement (NOD), along with a May 2009 private treatment record, authored by Gordon L. Grado, MD, FACRO, FACR. [R. at 1035-43]. This treatment record reflects that Appellant provided Dr. Grado with a "detailed description and discussion regarding his military history" and that he was concerned with "his exposure as a 'blue water sailor' where they were in the runoff from Vietnam of these sprays and of Agent Orange." [R. at 1035 (1035-43)]. Dr. Grado also opined that Appellant has "multiple problems associated with Agent Orange exposure including prostate cancer, erectile dysfunction, and diabetes" and recorded that the "patient reviewed not only direct exposure from planes on the flight deck but from the evaporators on board, which condensed the waters used for food, cleaning clothes, and showering." *Id*.

The RO issued a Statement of the Case (SOC) in October 2009, continuing the denial of entitlement to service connection for prostate cancer and DMII. [R. at 981 (979-1000)]. Here, the RO concluded that "there is simply no record of your purported exposure to herbicides in service" and that "there is neither a direct nor a presumptive basis for the grant of service connection for prostate cancer and diabetes mellitus type 2." [R. at 1000 (979-1000)]. In response, Appellant submitted his VA Form 9, perfecting his appeal and, on this form, he argued that "it remains my contention that my exposure to dioxin/agent

orange occurred while onboard ship handling the drums that carried these chemicals, as well as maintaining the aircraft that were responsible for flying over Vietnam and spraying these chemicals". [R. at 969 (967-78)]. A Supplemental SOC (SSOC) was subsequently issued in December 2009, continuing the denial of Appellant's claims, and, after additional VA treatment records were obtained in this case, the RO issued another SSOC in January 2010. [R. at 929-32, 933-45, 958-64].

This case was subsequently transferred to the Board and, in September 2010, Appellant presented for a Board hearing. [R. at 898-907]. During the hearing, Appellant testified that that he was exposed to "chemical exposure and herbicide exposure, due to . . . workings upon the flight deck, such as . . . when planes land and take off, there's fluid or chemicals that are on the deck that [he] worked in to replace landing lights . . . deck lights, any sort of electrical equipment that was on the deck, as well as in the hanger bay where they would repair these aircraft." [R. at 902 (898-907)]. Appellant also argued that his treating physician, Dr. Grado, opined that he was exposed to Agent Orange "[e]ither through direct contact or through the distillation of the water aboard ship." [R. at 904 (898-907)]. After presenting for the Board hearing, Appellant submitted additional medical evidence in support of his claim. [R. at 882-96]. This evidence included an October 2010 correspondence from Dr. Grado. [R. at 883-85]. In this correspondence, Dr. Grado noted that Appellant "was on a ship off the coast of Vietnam after and during the time Agent Orange was used as a

herbicide," but that "I am not privileged to receive copies of Mr. Procopio's service records or information that identify where he served, what position his ship was in while he served, or its proximity to Vietnam." [R. at 883 (882-96)]. Dr. Grado further explained that "I was made aware from other veterans that the VA was covering what was described as 'blue water sailors' who received herbicide exposure while off the coast of Vietnam" and that Appellant "volunteered that he served on a ship in that situation and circumstance. He also reviewed the issue of water distillation which would concentrate the herbicides and he again provided me documented evidence regarding this cause and effect." [R. at 885 (882-96)]. Dr. Grado concluded that "[i]f Mr. Procopio was exposed to Agent Orange or Agent Orange was used in the regions where he was off shore, then his claim would be 'as likely as not' related to Agent Orange." *Id*.

In March 2011, the Board issued a decision denying entitlement to service connection for prostate cancer and DMII with edema, both to include as secondary to herbicide exposure. [R. at 866-78]. In making these determinations, the Board found that Appellant "did not serve or visit on-shore in Vietnam" and was "not exposed to herbicide while on active duty." [R. at 867 (866-78)]. Additionally, the Board considered Appellant's contention that he was exposed to herbicides through the drinking water onboard the USS Intrepid, along with the Australian scientific article, of record, but found that "this article is too general in nature to provide, alone, the necessary evidence to show that the

Veteran was exposed to Agent Orange while onboard the USS INTREPID." [R. at 875 (866-78)]. This case was timely appealed to the Court and, in October 2012, the Court vacated and remanded the Board's decision. [R. at 788-802]; *see Procopio v. Shinseki*, 26 Vet.App. 76 (2012). The Court held that remand was warranted because Appellant was not provided with an adequate Board hearing. [R. at 794-98 (788-802)]. Specifically, the Court held, *inter alia*, that the "Board member did not alert Mr. Procopio that he was overlooking evidence of in-service exposure to herbicides" and that the "Board member should have informed Mr. Procopio that the issue of in-service exposure to herbicides was being overlooked, and the Board member's failure to do so thus constitutes error." [R. at 796, 797 (788-802)]. The Court also addressed, *inter alia*, Appellant's argument that the Board did not properly consider the Australian scientific article, but held that the Board's conclusion that "the Royal Australian Navy study was 'too general in nature to provide, alone, the necessary evidence to show that [Mr. Procopio] was exposed to Agent Orange while onboard [that ship]'" was "sufficient to enable Mr. Procopio to understand the precise basis for the Board's decision and to facilitate review in this Court." [R. at 799 (788-802)].

This case was, subsequently, returned to the Board and, in November 2012, Appellant submitted a statement requesting "consideration [be] given to the fact that I was also exposed to aircraft that flew through the spray of Agent Orange while on their missions." [R. at 777]. In March 2013, the Board remanded Appellant's claims for further adjudication and development, to include

additional VA notice. [R. at 760-65]. Additional VA notification was subsequently provided and a June 2013 private treatment record, authored by Dr. Grado, was received in conjunction with his claim of entitlement to service connection for coronary artery disease. [R. at 708-11]. Here, Dr. Grado provided an Impression, to include, "Agent Orange exposure in Vietnam as blue water sailor off the coast of Vietnam;" "[s]ide effects related to Agent Orange, including erectile dysfunction, prostate cancer, coronary artery disease;" and "[t]ype 2 diabetes mellitus (also associated with Agent Orange)." [R. at 711 (708-11)]. This evidence was considered in a June 2013 SSOC and, in September 2013, Appellant submitted another statement arguing that he was exposed to Agent Orange and that "[w]e often would have to work on the flight deck between launch and recoveries repairing or replacing aircraft landing lights, while the planes were being worked. That included washing down the Skyraiders that flew cover for the ones dropping the Agent Orange." [R. at 623 (623-24)].

This case was returned to the Board and, in November 2013, the Board, again, remanded Appellant's claims because Appellant "was not scheduled for a videoconference hearing before a Veterans Law Judge." [R. at 620 (617-21)]. This case was returned to the RO and, in January 2014, John B. Wells, Appellant's current counsel, filed his appearance and requested, *inter alia*, "[t]he name and contact of the medical representative evaluating this case," "[a] copy of the curriculum-vitae of any medical representative evaluating this case," and "[t]he name and contact information of the rater in this case." [R. at 608 (608-

16)]. Additional evidence was subsequently received in this case, to include the Deck Log Book of the U.S.S. Intrepid commencing on July 1, 1966, at Yokosuka, Japan, and ending on July 31, 1966, at Dixie Station, South China Sea. [R. at 423-512]. In November 2013, Appellant's counsel submitted additional evidence and argument in support of Appellant's claims, to include, *inter alia*, a "Memorandum in Support of Veteran Procopio's Claim," a pleading that Appellant's counsel filed regarding a separate case in The United States District Court for the District of Columbia, captioned as *Blue Water Navy Vietnam Veterans Association, Inc., et al; v. Eric Shinseki, Secretary of Veterans Affairs*,[1] multiple declarations, a "Comment by John B. Wells," and treatises. [R. at 187-410].

Ten days after Appellant's counsel submitted this additional evidence, Appellant presented for a Board hearing. [R. at 168-86]. During the hearing, Appellant testified that he has diabetes and that "I'm a survivor of prostate cancer, I'm cancer free right now." [R. at 171 (168-86)]. He noted that he had a "family history of diabetes," but no family history of prostate cancer. [R. at 173 (168-86)]. Appellant's counsel argued that "the river banks were sprayed. That was mixed with petroleum. The petroleum would then float down into the South China Sea." [R. at 176 (168-86)]. He also argued that the "evidence will support . . . that ships that were constantly anchoring within the South China Sea, within

[1] The case was dismissed and is currently on appeal. *See Blue Water Navy Vietnam Veterans Association, Inc., et al. v. McDonald*, 82 F.Supp.3d 443 (2015), *appeal docketed*, No. 15-5109 (D.C. Circuit April 14, 2015).

the territorial seas, would churn up the bottom. Now, coming from Louisiana, we know that Agent Orange floats, but it also falls to the bottom and emulsifies. Constant anchoring would turn that, would churn up the bottom." [R. at 176-77 (168-86)]. After Appellant presented for this hearing, he initially requested a third Board hearing, but, later, declined the third Board hearing and demanded "that the "case move forward based on the decision of the VLJ who conducted the hearing on November 13, 2014." [R. at 155 (154-56)].

In July 2015, the Board issued the decision that is now on appeal. [R. at 1-25]. In this decision, the Board denied entitlement to service connection for prostate cancer and DMII with edema, both to include as due to exposure to herbicides. [R. at 22 (1-25)]. In making its determinations, the Board found that "[t]he competent and credible evidence of record is against a finding that the Veteran was present on the landmass or the inland waters of Vietnam during service and, therefore, he is not presumed to have been exposed to herbicides, including Agent Orange." [R. at 4 (1-25)]. The Board also found that "[t]he competent and credible evidence of record is against finding that the Veteran was directly exposed to herbicides during service." *Id*.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's denials of entitlement to service connection for prostate cancer and DMII because the Board properly considered the evidence of record and had a plausible basis for its determination. Appellant has not carried his burden to demonstrate any error on the Board which would

justify the relief sought, nor has he presented the Court with any persuasive argument, based on controlling law or the facts of this case. Indeed, Appellant argues that the Board improperly relied on *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) because that decision by the United States Court of Appeals for the Federal Circuit (Federal Circuit) was incorrectly decided. *See* Appellant's Brief (App.Br.) at 8-13. However, Appellant's argument is inappropriate and without legal merit because this Court is bound by Federal Circuit decisions, does not have jurisdiction to overturn the Federal Circuit's decision in *Haas*, and, therefore, cannot provide the relief that Appellant seeks. Similarly, Appellant argues that the Board's, as well as the Federal Circuit's, reliance on the Federal Register notice was improper because 73 Fed. Reg. 20,566, 20,568 "has been a roundly debunked misrepresentation of facts punctuated with fatal leaps of logic that failed to connect facts to conclusions." *See* App.Br. at 13-16. However, direct, challenges to VA rulemaking remains exclusively with the Federal Circuit and not this Court. Therefore, Appellant's challenge to the Federal Register Notice is also not appropriately before this Court, as the Court is without jurisdiction to entertain direct challenges to VA rulemaking. This Court can only review VA rulemaking and regulations on an as-applied basis and to the extent that Appellant challenges the Federal Register Notice cited by the Board, he fails to recognize that the Board's citation to this Federal Register notice was in the context of its discussion of the Federal Circuit's analysis in *Haas*. Similarly, Appellant's request that the Court vacate the current regulation "excluding those

who served in the bays, harbors and territorial seas" *see* App.Br. at 30, which is based on Appellant's misunderstanding of the Court's holding in *Gray*. Additionally, contrary to Appellant's arguments, the Board considered direct service connection in this case and Appellant fails to demonstrate that the Board error based on the specific facts of the instant case under the controlling law.

For these reasons, the Secretary urges the Court to affirm the Board's decision.

IV. ARGUMENT

The Court should affirm the Board's denials of entitlement to service connection for prostate cancer and DMII.

To prevail in a claim of entitlement to service connection, a claimant must provide evidence that a particular injury or disease was incurred, aggravated, or caused by service. *See* 38 C.F.R. § 3.303. Particularly, to establish that an injury or disease was incurred in service, a claimant, generally, must show: 1) Medical evidence of a current, diagnosed disability; 2) medical or competent lay evidence of incurrence or aggravation of a disease or injury in service; and 3) evidence of a nexus between the in-service disease or injury and the current diagnosed disability. *See Washington v. Nicholson*, 19 Vet.App. 362, 367 (2005); *see also Hickson v. West*, 12 Vet.App. 247, 253 (1999).

A determination of entitlement to service connection "is a question of fact that the Court reviews under the 'clearly erroneous' standard of review." *Washington*, 19 Vet.App. at 366; *see* 38 U.S.C. § 7261(a)(4). Under the "clearly

erroneous" standard, the Court cannot overturn the Board's factual finding if it is supported by a plausible basis in the record, even if the Court may not have reached the same factual determination. *See Washington*, 19 Vet.App. at 366; *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

1. The Board properly considered the evidence of record and had plausible bases for its determinations.

Contrary to the thrust of Appellant's arguments, the Board properly considered the evidence of record and had plausible bases for denying entitlement to service connection for prostate cancer and DMII in this case. Specifically, in making its determinations, the Board reasonably found that Appellant "was not present on the landmass or the inland waters of Vietnam during service" and, therefore, was not presumptively exposed to Agent Orange. [R. at 4 (1-25)]; *see* [R. at 14, 17 (1-25), 423-512 (deck log book reflecting the location of the U.S.S. Intrepid from July 1, 1966, to July 31, 1966), 1084 (1084-94) (reflecting Appellant's assertion that his ship was in the Gulf of Tonkin from May 1967 to July 1967), 1681 (1671-87) (claim for benefits reflecting that "we sailed into Vietnam on two occasions and spent time in the Gulf of Tonkin and on the Southern Coast of Vietnam")]; 38 C.F.R. § 3.307(a)(6)(iii); *Haas*, 525 F.3d at 1197. The Board also considered the Court's recent holding in *Gray*, but found that the facts in *Gray* were distinguishable from the instant case because Appellant "has not specifically alleged that his ship anchored in the deep water harbor such as Cam Ranh Bay." [R. at 14 (1-25)]; *see Gray v. McDonald*, 27

Vet.App. 313, 321 (2015) (noting that *Haas v. Peake* "dealt with a veteran who only served miles off shore [and] did not decide the specific questions before the Court" regarding inland water ways).

The Board also considered entitlement to service connection on a direct basis, but reasonably found that Appellant's statements regarding exposure to Agent Orange were "outweighed by the more probative evidence to the contrary—namely, the responses from NPRC and review of the deck logs of the U.S.S. Intrepid showing no exposure to tactical herbicides, included Agent Orange." [R. at 17-18 (1-25)]; *see* [R. at 423-512 (Deck Log Book of the U.S.S. Intrepid), 1395]; *see Haas*, 525 F.3d at 1193 ("the line drawn by the agency does not cut off all rights of sea-going veterans to relief based on claims of herbicide exposure, in that even service members who are not entitled to the presumption of exposure are nonetheless entitled to show that they were actually exposed to herbicides"). Indeed, in response to VA's request for "any documents showing exposure to herbicides," the service department responded that there were "no records of exposure to herbicides." [R. at 1395]. The Board further reasoned that although Appellant "is competent to testify as to handling barrels of chemicals, or otherwise having been exposed to chemicals while on the U.S.S. Intrepid," he "has not demonstrated that he is competent to identify herbicides, including those (2, 4-D; 2, 4, 5-T and its contaminant TCDD; cacodylic acid; and picloram) for which presumptions of service connection may apply, nor is he competent to assert that he consumed herbicides in the distilled water aboard the

Intrepid." [R. at 18 (1-25)]. Moreover, the Board found that Appellant has not submitted "documentation to corroborate his factual assertions as to exposure to Agent Orange on the Intrepid." *Id*.; *see Haas*, 525 F.3d at 1193.

The Board also considered, *inter alia*, the Australian scientific article, but found "this article and the submissions made by the Veteran's representative . . . too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the U.S.S. Intrepid." *Id*. A similar analysis was previously upheld by the Court as being valid. *See Procopio*, 26 Vet.App. at 84. The Board further concluded that "the articles do not show to any degree of specificity that the Veteran was exposed to Agent Orange while drinking water in the Intrepid, or that he was otherwise shown to have been exposed to herbicides during service." [R. at 19 (1-25)]; *see Haas*, 525 F.3d at 1193. Additionally, the Board considered the positive medical opinions from Dr. Grado, but found that these opinions lacked probative value because "the Veteran did not have exposure to Agent Orange during service." [R. at 19-20 (1-25)]; *see* [R. at 1035-43]. Indeed, the Board observed that Dr. Grado's October 2010 medical opinion is conditional because he "states that the Veteran's prostate cancer would be a[t] least as likely as not related to Agent Orange exposure if the Veteran was exposed to Agent Orange." [R. at 20 (1-25)]; *see* [R. at 885 (882-96)]. Lastly, the Board noted that "there is no conclusive lay or medical evidence in the claims file of diabetes mellitus with edema and prostate cancer in service or within one year of service so as to allow

for presumptive service connection as chronic disease under 38 C.F.R. § 3.309(a)" and that Appellant "was first shown to have diabetes mellitus [in] 2004 and prostate cancer in 2007." [R. at 20 (1-25)]. Moreover, the Board found that, other than the medical opinions from Dr. Grado, the evidence of record does "not include any opinion as to the etiology of the Veteran's diabetes mellitus with edema and prostate cancer." [R. at 21 (1-25)]. These findings were plausibly based on the evidence of record and, on appeal, Appellant fails to point to any countervailing evidence.

Therefore, because the Board reasonably found that Appellant was not exposed to Agent Orange and reasonably found that his DMII and prostate cancer were not linked to active military service, the Board had plausible bases for its determinations in this case. *See Washington*, 19 Vet.App. at 366; *Gilbert*, 1 Vet.App. at 53.

2. Appellant fails to demonstrate error in the adjudication of his claims.

Despite the fact that Appellant is a Blue Water Veteran and the Board, as the fact-finder, plausibly found that Appellant was not exposed to Agent Orange, Appellant still argues that the Board erred in making its determinations. Specifically, Appellant argues that the Board erred by relying on the Federal Circuit's decision in *Haas* and that *Haas* "is not controlling and must be limited to its facts because it was not decided in accordance with the accepted canons of construction for Veteran's cases." *See* App.Br. at 1, 8. He further argues*, inter alia*, that the Federal Circuit "danced around the question of whether or not the

territorial seas constituted sovereign territory," "did not consider the Geneva Accords, the Paris Peace Treat or the J[oint] C[hiefs of] S[taff and the War in Vietnam] position that the United States had recognized sovereignty over the territorial seas out to the twelve mile limit," and inappropriately relied on 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008). *See* App.Br. at 10, 11, 13. Essentially, Appellant is requesting this Court to review and reverse a decision by the superior tribunal. Yet, such an argument is inappropriate and legally erroneous. Indeed, the Federal Circuit's decision in *Haas* is binding precedent on this Court, and this Court does not have the statutory authority to review decisions of a higher court and provide the relief that Appellant seeks in this case. *See Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) (holding that such binding precedent on this Court includes "a decision of the United States Court of Appeals for the Federal Circuit (which may review some of this Court's decisions)"; *see also* 38 U.S.C. § 7292. Additionally, to the extent that Appellant argues that *Haas* should be limited to its facts, implying that the facts of the instant case may be distinguishable from those in *Haas*, he fails to discuss any of the pertinent facts in this case, to include the specific nature of his alleged exposure to Agent Orange, or explain how the facts of the instant case are distinguishable from the facts considered by the Federal Circuit in *Haas*. As he has failed to carry his burden, the Court should reject his argument. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (Appellant bears "burden of demonstrating error in the Board's decision."). Moreover, to the extent that Appellant relies on this Court's holding

in *Gray* to support his argument that the legal ruling in *Haas* is not controlling, *see* App.Br. at 12, Appellant fails to recognize that *Gray* addressed a question that is very different from the one in this case and in *Haas*. That is, *Gray* addressed "whether VA's definition of inland waterways—which does not include Da Nang Harbor—is entitled to deference," which the Court held was "a question not addressed by *Haas v. Peake*." *Gray*, 27 Vet.App. at 321. Moreover, contrary to Appellant's argument, the Board properly found the Court's holding in *Gray* to be distinguishable because "the record reflects the Veteran's presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam" and that Appellant "has not specifically alleged that his ship anchored in the deep water harbor such as Cam Ranh Bay." [R. at 14 (1-25)]; *see Gray*, 27 Vet.App. at 320, Footnote 6 (noting that the veteran in *Haas* "never entered a harbor or port" and that "he served exclusively on the open ocean"). Appellant fails to address this finding or provide the Court with any evidence of record demonstrating that his ship anchored in a deep water harbor, as was the case in *Gray*. *See Hilkert*, 12 Vet.App. at 151. As a result, Appellant's main argument in this case is void of any legal or factual merit and not properly before the Court. As such, it should be rejected.

Similarly, Appellant argues that the Board's reliance on "73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008) in reaching their decision was clear error since that notice misstates the facts of naval operations off of Vietnam and has been repeatedly debunked," which is, fundamentally, a challenge to VA rulemaking

that is also inappropriately presented to this Court for consideration. *See* App.Br. at 13-16; 38 U.S.C. § 502 ("An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit."); *Am. Legion v. Nicholson*, 21 Vet.App. 1, 5 (2007). In this regard, Appellant argues that the VA notice contains false conclusions, is contrary to the Australian scientific study of record, that the "so called VA scientists and experts were never identified or made available for interview," and that the "author of the VA note does not even use proper nautical terminology." *See* App.Br. at 13-16. However, the Board considered, *inter alia* the Australian scientific study, which his argument mainly relies on, and found this treatise to be "too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the U.S.S. Intrepid." [R. ar 18 (1-25)]. Additionally, "Federal Courts are courts of limited jurisdiction," possessing "only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). This Court lacks jurisdiction to address Appellant's direct challenge to VA rulemaking because judicial review of VA rulemaking remains exclusively with the U.S. Court of Appeals for the Federal Circuit. 38 U.S.C. § 502; 38 U.S.C. § 7252(a); *Am. Legion*, 21 Vet.App. at 5; *Breeden,* 17 Vet.App. at 477 (reaffirming that "[t]his Court's jurisdiction derives exclusively from statutory grants and may not be extended beyond that permitted

by law."). Furthermore, to the extent that Appellant argues that the Board's reliance on this Federal Register notice was inappropriate, he fails to provide the Court with any explanation—based on the specific facts of this case—as to how such reliance equated to an even potentially prejudicial error, or recognize that the Board's citation to this Federal Register notice was in the context of its discussion of the Federal Circuit's analysis in *Haas*, which, again, is a decision that is binding on this Court.

Moreover, Appellant requests this Court to "vacate" portions 38 C.F.R. § 3.307. To the extent that Appellant presents this Court with a direct challenge to the regulation, this Court is without jurisdiction to grant such relief. *See* 38 U.S.C. § 7292(c) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section."). To the extent that Appellant is seeking review of the regulation as it was applied by the Board, his argument is based on a misunderstanding of the Court's holding in *Gray*. Specifically, Appellant argues that this Court found "the VA definition of inland waters irrational" and "went on to vacate the regulation and direct the Secretary to 'exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure,'" but that the Secretary "doubled down on his previous exclusions." *See* App.Br. at 29. Yet, contrary to the premise of Appellant's argument, in *Gray*, the Court did not vacate any portion of section 3.307.

Instead, the Court only rejected VA's interpretation of inland waterways that excluded Da Nang harbor. *See Gray*, 27 Vet.App. at 327. In this regard, to the extent that Appellant argues that the VA "acted against the will of this Court and the desires of Congress" by not changing the regulation to include discharge plumes, which he asserts can extend "for hundreds of kilometers," *see* App.Br. at 28, his argument is problematic because no part of section 3.307 was invalidated by this Court. Additionally, to the extent that he argues that "[t]he *Gray* [C]ourt has found that the Secretary acted irrationally in excluding the bays and harbors from the presumption of exposure," *see* App.Br. at 27-28, *Gray* specifically focused on VA's interpretation of inland waterways, which excluded Da Nang harbor, but included Quy Nhon Bay and Ganh Rai Bay, *see Gray*, 27 Vet.App. at 324, and, importantly, in this case Appellant does not allege that his ship entered into Da Nang Harbor, Quy Nhon Bay, Ganh Rai Bay, or any other bay or harbor in Vietnam. Instead, the evidence of record reflects that Appellant's ship was at Dixie Station in the South China Sea and in the Gulf of Tonkin. [R. at 423-512, 1084 (1084-94)]. Moreover, to the extent that Appellant "urges" the Court to provide a definition of inland waterways, this Court already held that "VA retains its discretionary authority to define the scope of the presumption" of exposure to herbicides. *See Gray*, 27 Vet.App. at 326. As a result, Appellant's arguments are without legal merit.

Next, Appellant argues that the Board "failed to consider the issue of direct exposure based on the presence of Agent Orange in the waters, including the

territorial sea, off the Mekong River, through which the Veteran's ship transited." *See* App.Br. at 16. However, contrary to Appellant's argument, the Board considered entitlement to service connection on a direct basis, but reasonably found that Appellant's statements regarding exposure to Agent Orange were "outweighed by the more probative evidence to the contrary—namely, the responses from NPRC and review of the deck logs of the U.S.S. Intrepid showing no exposure to tactical herbicides, included Agent Orange." [R. at 17-18 (1-25)]; *see* [R. at 423-512, 1395]; *see Haas*, 525 F.3d at 1193. Additionally, Appellant fails to demonstrate, based on the facts of this case, that he was actually exposed to herbicides. *See Haas*, 525 F.3d at 1193; *Hilkert*, 12 Vet.App. at 151; *see also Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (the appellant "always bears the burden of persuasion on appeals to this Court"). Particularly, Appellant bases his argument on the scientific theory that Agent Orange washed into the Mekong River where it combined with petroleum and other sediment and flowed out into the South China Sea, forming discharge plumes, and that this sea water was distilled on board ship and used for, *inter alia*, potable water. *See* App.Br. at 17 (arguing that "Agent Orange, which was mixed with petroleum to improve its adherence to plant life, floated down the rivers and streams and out to sea" and that sediment from the Mekong River discharged in plumes "similar to that of the Mississippi"), 18 (arguing *inter alia*, that "Agent Orange also washed into rivers, especially during the monsoon season" and would adhere to sediment), 20 ("If the Agent Orange flowed into Nha Trang Harbor there is no reason to doubt that

it flowed from MeKong into the South China sea"); 25 (arguing that the "co-distillation of the Agent Orange caused it to contaminate the distillers and the water supply").

Yet, Appellant fails to support his scientific theory with any empirical evidence of record. That is, Appellant failed to provide the Board with any evidence reflecting that the USS Intrepid actually entered into a discharge plume that contained Agent Orange sediment, nor is there any evidence of record reflecting that such Agent Orange due to the discharge plume, was pulled into the ships distillation system and converted into, *inter alia*, potable water. *See Hilkert*, 12 Vet.App. at 151; *Berger*, 10 Vet.App. at 169. To the extent that Appellant argues that the "*Intrepid* did enter the territorial seas off the MeKong delta where the discharge plume was at its most pronounced," he still fails to support this hypothesis with any evidence of record, to include evidence that such discharge plume contained Agent Orange, which was converted by the ship into potable water. Appellant fails to point to any evidence of record that he was "actually exposed to herbicides" and, therefore, his scientific argument in this case is without factual support. *See Haas*, 525 F.3d at 1193. Indeed, Appellant concedes that actual evidence of herbicide exposure does not exist. *See* App.Br. at 26 ("samples were not obtained by the ship as it transited these contaminated waters"), 27 (arguing that the "records the Board so wistfully required simply did not exist" and that there "was no explanation by the Board why the strong circumstantial case of Agent Orange infiltration was not sufficient"). In this

regard, however, the law is clear, because the evidence of record reflects that Appellant served in the Gulf of Tonkin and at Dixie Station in the South China Sea, the presumption of herbicide exposure does not attach in this case and Appellant needs to demonstrate actual exposure to herbicides, which he fails to do. *See* [R. at 423-512, 1084 (1084-94)]; 38 C.F.R. § 3.307(a)(6)(iii); *Haas*, 525 F.3d at 1193; *see also Gray*, 27 Vet.App. at 321.

Furthermore, Appellant argues that Agent Orange was present in Nha Trang Harbor, Da Nang harbor, and other bays and harbors in Vietnam, but, as noted above, he fails to point to any evidence of record suggesting that his ship was present in such locations. *See* App.Br. at 19, 20, 24. Again, the evidence of record in this case reflects that Appellant was in the Gulf and Tonkin and at Dixie Station in the South China Sea. [R. at 423-512, 1084 (1084-94)]. Appellant also argues that the Board did not satisfy its heightened duty to explain its findings. *See* App.Br. at 26. Yet, the fact that Appellant, admittedly, has no factual support for his scientific theories does not trigger this heightened duty. Instead, the heightened duty arises when evidence is lost or destroyed, and not when an appellant has no factual support for a particular argument. *See Washington*, 19 Vet.App. at 369-70; *Moore v. Derwinski*, 1 Vet.App. 401, 406 (1991) (holding that the duty to assist was "particularly great" where certain service department records were destroyed and could not be reconstructed); *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991) (holding that the Board has a heightened duty to explain its findings where service department records are destroyed). Similarly,

Appellant argues that the Board did not apply the benefit of the doubt rule. *See* App.Br. at 27. However, Appellant's argument is directly rebutted by the fact that the Board reasonably considered the evidence of record, as argued above, and found that a "preponderance of the evidence" was against the claims. [R. at 22 (1-25)]; *see Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (the benefit of the doubt rule does not apply when the Board determines that a preponderance of the evidence is against the claim); *Gilbert*, 1 Vet.App. at 56 ("if a fair preponderance of the evidence is against a veteran's claim, it will be denied and the 'benefit of the doubt' rule has no application").

Additionally, Appellant argues that the Board's decision is contrary to "the pro-veteran canons of construction required by law," but fails to specifically identify these canons or explain, based on the specific facts of this case, how any further consideration of such canons would be determinative in this case. *See* App.Br. at 26; *see also* App.Br. at 30 (inviting the Court to define inland waterways "by applying the pro-veteran canons of construction"); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."). He also argues that the "Board ejected (sic) key medical evidence that supported the [V]eteran's claim of direct exposure" and that "[t]he diagnosis was consistent with Agent Orange exposure and the VA physician found that it was 'at least as likely as not' that the diabetes and prostate (and now ischemic heart disease) was caused by

the dioxin if the [V]eteran was exposed to Agent Orange." *See* App.Br. at 24. Yet, as argued above, the Board reasonably found that the medical opinions from Dr. Grado lacked probative value because the evidence of record did not establish that Appellant was exposed to Agent Orange, the key factual predicate for his opinions. [R. at 19-20 (1-25)]; *see* [R. at 1035-43].

Moreover, Appellant's argument substantially relies on the Australian scientific article and he argues that this article represents "established science." *See* App.Br. at 24-25; [R. at 1086-93 (1084-94)]. However, as the Board found, this study is "too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the U.S.S. Intrepid," which is reasoning that this Court previously held to be sufficient. [R. at 18 (1-25), 799 (788-802) (holding that the Board's conclusion that "the Royal Australian Navy study was 'too general in nature to provide, alone, the necessary evidence to show that [Mr. Procopio] was exposed to Agent Orange while onboard [that ship]' was "sufficient to enable Mr. Procopio to understand the precise basis for the Board's decision and to facilitate review in this Court")]; *Procopio*, 26 Vet.App. at 84. Furthermore, contrary to Appellant's argument that this study represents "established science," the Federal Register reflects that "VA scientists and experts have noted many problems with the study that caution against reliance on the study to change our long held position regarding veterans who served off shore." [R. 19 (1-25)]; *see Haas*, 525 F.3d at 1194. As such,

Appellant fails to present this Court with a persuasive argument based on the specific facts of this case and controlling law.

Therefore, because the Board properly considered the evidence of record and had plausible bases for its determinations, and because Appellant's arguments are without legal or factual merit, the Court should affirm the decision now on appeal.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee, Robert A. McDonald, respectfully urges the Court to affirm the Board's July 9, 2015, decision that denied entitlement to service connection for prostate cancer and properly denied entitlement to DMII, both to include as due to exposure to herbicides.

Respectfully submitted,

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