2017-1821

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALFRED PROCOPIO, JR.,
Claimant-Appellant,

v.

DAVID J. SHULKIN,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in No. 15-4082, Judge Coral W. Pietsch

BRIEF FOR RESPONDENT-APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Rules

Other Authorities

STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.[1]

[1] Claimant-appellant's counsel states that *Gray v. Sec'y of Veterans Affairs*, No. 16-1782 (Fed. Cir.), and *Blue Water Navy Vietnam Veterans Assoc. v. Sec'y of Veterans Affairs*, No. 16-1793 (Fed. Cir.), "have similar issues" as the instant case. Appellant's Brief (App. Br.) 1. We disagree because the claimant-appellant did not serve on any bodies of water that were the subject of the agency guidance challenged in those two pending cases.

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STATEMENT OF THE ISSUES

1. Whether the Court's decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), *reh'g denied*, 544 F.3d 1306 (Fed. Cir. 2008), which affirmed the Department of Veterans Affairs' (VA) interpretation of the Agent Orange Act of 1991, 38 U.S.C. § 1116, as providing a presumption of exposure to herbicides only for veterans who set foot on the landmass of the Republic of Vietnam, including its inland waters, governs Mr. Procopio's benefits claim.

2. Whether the Court has jurisdiction to entertain Mr. Procopio's challenge to how the Board of Veterans' Appeals (Board) weighed the evidence in

concluding that Mr. Procopio failed to establish exposure to herbicides on a direct basis.

STATEMENT OF THE CASE

I. Nature Of The Case

The claimant-appellant, Alfred Procopio, Jr., appeals the decision of the Veterans Court in *Alfred Procopio, Jr. v. Robert A. McDonald, Secretary of Veterans Affairs*, No. 15-4082 (Vet. App. November 18, 2016), Appx4-15, which affirmed a July 9, 2015 Board decision, Appx19-40, which denied Mr. Procopio's claims for service connection for prostate cancer and diabetes mellitus with edema, both to include as due to exposure to herbicides.[2]

On April 26, 2017, Mr. Procopio filed a petition for *en banc* hearing, which this Court denied on June 12, 2017. Order, Dkt. No. 20 (June 12, 2017).

II. Background Of The Presumption Of Service Connection Due To Herbicide Exposure In Vietnam

A. Congress Provides Presumptive Service Connection For Certain Veterans Who Served In Vietnam

To receive disability compensation, a veteran must show that his or her disability was service connected, which means that it was "incurred or . . . aggravated in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16) (2012). Establishing service connection generally requires three

[2] "Appx__" refers to pages in the Joint Appendix.

elements: "'(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service' – the so-called 'nexus' requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). "Except as otherwise provided by law, a claimant has the responsibility to present and support" his or her claim for service connection. 38 U.S.C. § 5107(a).

In several instances, however, Congress has enacted presumptive service connection when veterans faced exposure to toxins during service, but where establishing the "nexus" requirement would be difficult or impossible. In 1991, Congress passed the Agent Orange Act (AOA), Pub. L. No. 102-4, 105 Stat. 11 (1991), codified as amended at 38 U.S.C. § 1116, and implemented via regulations at 38 C.F.R. §§ 3.307(a)(6), 3.309(e). In recognition of the use of herbicide agents over the Republic of Vietnam, the AOA established a framework for adjudicating disability compensation claims from certain Vietnam War veterans with diseases medically linked to herbicide exposure. The AOA provides that any veteran who "served in the Republic of Vietnam during [the Vietnam era]" and who suffers from any of certain designated diseases "shall be presumed to have been exposed during such service" to herbicides "unless there is affirmative evidence to establish that the veteran was not exposed[.]" 38 U.S.C. § 1116(f). The AOA established

several statutory presumptions and a methodology for VA to create additional regulatory presumptions that certain diseases were "incurred in or aggravated by" a veteran's service in Vietnam. 38 U.S.C. § 1116(a).

B. VA Issues Final Rules Implementing Presumptive Service Connection For Veterans Who Served "In The Republic Of Vietnam"

Pursuant to the AOA, VA issued regulations in May 1993 establishing presumptive service connection for diseases associated with exposure to herbicides in Vietnam. *Diseases Associated With Service in the Republic of Vietnam*, 58 Fed. Reg. 29,107 (May 19, 1993). Consistent with section 1116(a), VA's implementing regulation conditioned application of the presumption on the claimant having "served in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(1993); *see* 58 Fed. Reg. 29,107 (May 19, 1993). Pursuant to section 3.307(a)(6), service "in the Republic of Vietnam" included "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (1993).

VA's 1993 definition of "service in the Republic of Vietnam" incorporated VA's longstanding definition of that phrase as set forth in VA's general dioxin exposure regulation. 38 C.F.R. § 3.11a (1986). That regulation, in turn, incorporated VA's "longstanding policy of presuming dioxin exposure in the cases of veterans who served in the Republic of Vietnam during the Vietnam era." *Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation*, 50

Fed. Reg. 34,452, 34,454-55 (Aug. 26, 1985); *see Haas v. Peake*, 525 F.3d 1168, 1176-80 (Fed. Cir. 2008).

C. VA Confirmed That Service Members Who Served Offshore Did Not Serve "In The Republic Of Vietnam" Under The AOA

In 1997, VA's General Counsel issued a precedential opinion regarding whether service on a naval vessel in waters offshore Vietnam constituted service in the Republic of Vietnam for purposes of 38 U.S.C. § 101(29)(A), which defined the term "Vietnam era" for VA benefit purposes. VA Office of Gen. Counsel, Prec. Op. 27-97, *Service in the Republic of Vietnam for Purposes of Definition of Vietnam Era – 38 U.S.C. § 101(29)(A)* (July 23, 1997).[3] The General Counsel recognized that "[t]he term 'in the Republic of Vietnam' is to some degree inherently ambiguous in that it may be subject to differing interpretations regarding whether it refers only to areas within the land borders of the Republic or also encompasses, for example, Vietnamese air space or territorial waters." *Id.* at ¶ 3. The General Counsel explained, however, that the phrase "served in the Republic of Vietnam" applies to veterans who served on land and in Vietnam's inland waterways, but does not to apply to veterans who served on deep-water vessels off the Vietnam coast and who were never physically present on Vietnamese soil. *Id.* at ¶ 6. The General Counsel further stated that section 3.307(a)(6)(iii) "requires

[3] *Available at* <https://www.va.gov/ogc/docs/1997/Prc27-97.doc> (last visited September 28, 2017).

that an individual actually have been present within the boundaries of the Republic to be considered to have served there." *Id.* at ¶ 8. A summary of the opinion was published in the Federal Register later that year. *See Summary of Precedent Opinions of the General Counsel*, 62 Fed. Reg. 63,603 (Dec. 1, 1997).

Also in 1997, VA proposed to use the definition of "service in the Republic of Vietnam" from section 3.307(a)(6)(iii) in a new regulation regarding spina bifida among the children of veterans who served in Vietnam. *See Monetary Allowance Under 38 U.S.C. 1805 for a Child Born with Spina Bifida Who Is a Child of a Vietnam Veteran*, 62 Fed. Reg. 23,724, 23,725 (May 1, 1997). In response to a comment suggesting elimination of the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" from the rule, VA explained that its foot-on-the-ground policy appropriately limits application of the presumption to veterans who may have been in areas where herbicides were used:

> Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term service in the Republic of Vietnam to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered.

Monetary Allowance Under 38 U.S.C. 1805 for a Child Born with Spina Bifida Who Is a Child of a Vietnam Veteran, 62 Fed. Reg. 51,274 (Sept. 30, 1997).

In 2001, VA proposed to add type 2 diabetes to the diseases covered by section 3.307(a)(6)(iii). *See Disease Associated With Exposure to Certain*

Herbicide Agents: Type 2 Diabetes, 66 Fed. Reg. 2,376 (Jan. 22, 2001). In response to a comment requesting that service in Vietnam's "territorial waters" be included in the presumption's coverage, VA explained that even before the AOA, its position was that qualifying service required visitation in the Republic of Vietnam, and that offshore service did not qualify. *Disease Associated With Exposure to Certain Herbicide Agents: Type 2 Diabetes*, 66 Fed. Reg. 23,166 (May 8, 2011). VA further noted that the commenter had relied upon

> no authority for concluding that individuals who served in the waters offshore of the Republic of Vietnam were subject to the same risk of herbicide exposure as those who served within the geographic boundaries of the Republic of Vietnam, or for concluding that offshore service is within the meaning of the statutory phrase "Service in the Republic of Vietnam."

66 Fed. Reg. at 23,166.

Consistent with this guidance, VA amended its adjudication manual, the M21-1, to require evidence of service within the land borders of Vietnam for claimants to qualify for presumptive service connection based upon exposure to herbicides under the AOA.[4] M21-1, part III, paragraph 4.24(e)(1) (Feb. 27, 2002). This amendment made clear that veterans must have served "on land" to qualify

[4] Claimants who are not eligible for a VA presumption can still obtain disability compensation by satisfying the requirements for direct service connection. *See, e.g., Combee v. Brown*, 34 F.3d 1039, 1044-45 (Fed. Cir. 1994).

for the presumption, and that receipt of the Vietnam Service Medal would no longer be sufficient evidence to invoke the presumption. *Id.*

D. In *Haas v. Peake*, The Federal Circuit Upheld VA's Interpretation Of "Service In The Republic Of Vietnam"

In 2001, a veteran who served on a naval vessel off the coast of Vietnam but was never present within the Vietnamese land border, like Mr. Procopio, challenged VA's interpretation of section 3.307(a)(6)(iii)'s definition of "service in the Republic of Vietnam." The veteran, Jonathan Haas, unsuccessfully sought presumptive service connection for type 2 diabetes based on purported exposure to herbicides.[5] Mr. Haas appealed VA's denial of his claim to the Veterans Court, which found that VA's interpretation of 38 C.F.R. § 3.307(a)(6)(iii), as requiring service on land or an inland waterway, did not result from "valid or thorough reasoning" and was arbitrary because VA failed to offer sufficient scientific evidence to support drawing a line for presumptive eligibility at the coastline. *Haas v. Nicholson*, 20 Vet. App. 257, 273-75 (2006).

In response to the Veterans Court's decision, VA issued a proposed amendment to section 3.307(a)(6)(iii) in 2008, which sought to more clearly

[5] Type 2 diabetes is one of the conditions on VA's list of diseases that qualifies for presumptive service connection based upon service in Vietnam. 38 C.F.R. § 3.309(e).

integrate VA's interpretation of section 1116 into the text of its regulation. In its proposed rule, VA provided a detailed explanation of its position:

> As a factual matter, our legislative interpretation accords with what is known about the use of herbicides during Vietnam. Although exposure data is largely absent, review of military records demonstrate[s] that virtually all herbicide spraying in Vietnam, which was for the purpose of eliminating plant cover for the enemy, took place over land. . . . Regarding inland waterways, Navy riverine patrols reported to have routinely used herbicides for clearance of inland waterways . . . . Blue water Navy service members and other personnel who operated offshore were away from herbicide spray flight paths, and therefore were not likely to have incurred a risk of exposure to herbicide agents comparable to those who served in foliated areas where herbicides were applied . . .
>
> . . . It is both intuitively obvious and well established that herbicides were commonly deployed in foliated land areas and would have been released seldom, if at all, over the open waters off the coast of Vietnam. The legislative and regulatory history indicates that the purpose of the presumption of exposure was to provide a remedy for persons who may have been exposed to herbicides because they were stationed in areas where herbicides were used, but whose exposure could not actually be documented due to inadequate records concerning the movement of ground troops.
>
> Because it is known that herbicides were used extensively on the ground in the Republic of Vietnam, and because there are inadequate records of ground-based troop movements, it is reasonable to presume that any veteran who served within the land borders of Vietnam was potentially exposed to herbicides, unless affirmative evidence establishes otherwise. There is no similar reason to presume that veterans who served solely in the waters offshore incurred a significant risk of herbicide exposure.

> It is conceivable that some veterans of offshore service incurred exposure under some circumstances due, for example, to airborne drift, groundwater runoff, and the proximity of individual boats to the Vietnam coast. For purposes of the presumption of exposure, however, there is no apparent basis for concluding that any such risk was similar in kind or degree to the risk attending service within the land borders of the Republic of Vietnam. More significantly, because "offshore service" encompasses a wide range of service remote from land and thus from areas of actual herbicide use, there is no reason to believe that any risk of herbicide exposure would be similarly pervasive among veterans of offshore service as among veterans of service within the land borders of Vietnam.

Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566, 20,568-69 (Apr. 16, 2008).[6]

VA appealed the Veterans Court's decision in *Haas v. Nicholson* to this Court. In *Haas v. Peake*, the Court reversed the Veterans Court and held that it was not unreasonable for VA to "limit the presumptions of exposure and service connection to service members who have served, for some period at least, on land," and that VA's interpretation of 38 C.F.R. § 3.307(a)(6)(iii) "did not rise to the level of being 'plainly erroneous or inconsistent with the regulation.'" *Haas v. Peake*, 525 F.3d 1168, 1193 (Fed. Cir. 2008) (quoting *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945) and, *Smith v. Nicholson*, 451 F.3d 1344, 1349-51 (Fed. Cir. 2006)). The Court recounted VA's historical policies

[6] VA withdrew this proposed rule following the Federal Circuit's decision in *Haas v. Peake*. *See* 74 Fed. Reg. 48,689 (Sept. 24, 2009).

concerning "service in the Republic of Vietnam," and concluded that VA's interpretation of section 3.307(a)(6)(iii) was entitled to substantial deference. *Id.* at 1186-1191. In light of VA's explanation for denying the presumption of exposure to offshore service members, and "in the absence of evidence that the line drawn by DVA is irrational," the Court declined "to substitute [its] judgment for that of the agency and impose a different line." *Id.* at 1193.

The Court in *Haas* noted that under VA's regulation, a service member who served on land for only a short period would be entitled to the presumption of service connection, whereas a service member who served in coastal waters close to areas where herbicides were sprayed would not. *Id.* at 1193. But the Court held that "just because some instances of overinclusion or underinclusion may arise does not mean that the lines drawn are irrational." *Id*. (citing *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). The Court recognized that VA's line would appear unreasonable to those veterans who served outside of Vietnam:

> [t]he asserted arbitrariness of the line-drawing done by the agency in this case is in part the result of Congress's decision to extend the presumption of service connection to all persons who served for any period and in any area within the Republic of Vietnam. Because that blanket rule provides a presumption of service connection to some persons who were unlikely to be exposed, it makes virtually any line drawing effort appear unreasonable as applied to those who were outside of Vietnam but near enough to have had some chance of exposure.

Id. at 1193. Thus, the Court concluded that "[d]rawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable." *Id.*

Mr. Haas petitioned the Court for panel rehearing or rehearing *en banc*. *Combined Petition for Panel Rehearing or Rehearing En Banc*, *Haas v. Peake*, 2008 WL 2791816 (Fed. Cir. June 23, 2008). Several *amicus curiae* submitted briefs in support of the petition, including Patricia McCulley, who was represented by counsel for Mr. Procopio. *Amicus Curiae Brief on Behalf of Patricial McCulley in Support of Appellee Jonathan L. Haas in Support of Affirmance of the Court Below*, *Haas v. Peake*, 2007 WL 2272380 (Fed. Cir. June 27, 2007). The Court denied Mr. Haas's petition on October 9, 2008. *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008). The Supreme Court subsequently denied Mr. Haas's petition for writ of certiorari. *Haas v. Peake*, 129 S.Ct. 1002 (Jan. 21, 2009).

E. In 2012, VA Declined To Extend The Presumption Of Service Connection To Blue Water Navy Vietnam Veterans

Following *Haas*, and as required by the AOA, VA continued to review evidence concerning exposure to herbicides by veterans of the Vietnam War.[7] The

[7] The AOA required the Secretary "to enter into an agreement with the National Academy of Science (the Academy or NAS), an independent non-profit, non-governmental scientific organization, under which the Academy would 'review and summarize the scientific evidence and assess the strength thereof, concerning the association between exposure to an herbicide used in support of military operations in Vietnam,' and 'each disease suspected to be associated with

Institute of Medicine (IOM) of the National Academy of Science subsequently issued an update titled *Veterans and Agent Orange Update 2008* (Update 2008).[8] In it, the IOM suggested that limiting the presumption of service connection under the AOA to veterans who set foot in Vietnam "seem[ed] inappropriate" because "there is little reason to believe that exposure of US military personnel to the herbicides sprayed in Vietnam was limited to those who actually set foot in the Republic of Vietnam." Update 2008 at 655. The 2008 update did not, however, contain a detailed discussion of the scientific evidence related to exposure of veterans serving offshore.[9]

To address the IOM's statements regarding the presumption, VA asked the IOM "to study whether the Vietnam veterans in the Blue Water Navy experienced

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such exposure." *LeFevre v. Sec'y Dep't of Veterans Affairs*, 66 F.3d 1191, 1193 (Fed. Cir. 1995) (quoting 38 U.S.C. § 1116, Note, § 3(c)). Pursuant to the agreement, the Academy, through the Institute of Medicine, provides the Secretary with periodic reports as to whether presumptive service connection is warranted for diseases discussed in the report. *See* 38 U.S.C.A § 1116, Note, § 3(c).

[8] *Available at* <https://www.nap.edu/read/12662/chapter/1> (last visited September 25, 2017).

[9] The IOM's statement was also beyond the scope of the IOM's task as reflected in the "Charge to the Committee," at pp. 2-5 of Update 2008, which was to assist in reviewing potential associations between herbicide exposure and an increased risk of a disease. The IOM was not tasked with opining on whether veterans who served offshore were exposed to herbicides or how VA should define service in Vietnam.

exposures to herbicides and their contaminants comparable with those of the Brown Water Navy Vietnam veterans and those on the ground in Vietnam." *Blue Water Navy Vietnam Veterans and Agent Orange Exposure*, Institute of Medicine (The National Academies Press, 2011) (2011 IOM Report) at 2.[10]

In response, the IOM Committee on Blue Water Navy Vietnam Veterans and Agent Orange Exposure, Board on the Health of Select Populations, issued a detailed report in 2011, and presented its findings to VA. In the 2011 IOM Report, the IOM informed VA that it "was unable to state with certainty that Blue Water Navy personnel *were or were not* exposed to Agent Orange and its associated [Tetrachlorodibenzodioxin or TCDD]." 2011 IOM Report at 13 (emphasis in original). Indeed, "without information on the TCDD concentrations in the marine feed water, *it is impossible* to determine whether Blue Water Navy personnel were exposed to Agent Orange-associated TCDD via ingestion, dermal contact, or inhalation of potable water." *Id.* (emphasis added). In contrast, the IOM report concluded that "qualitatively, ground troops and Brown Water Navy veterans had more plausible pathways of exposure (that is, there was a greater number of plausible exposure mechanisms) to Agent Orange–associated TCDD than did Blue Water Navy veterans." *Id.* at 13.

[10] *Available at* <https://www.nap.edu/read/13026/chapter/1#xiv> (last visited September 25, 2017).

On December 28, 2012, VA published a notice in the Federal Register summarizing the 2011 IOM Report and notifying the public that, based on the report, VA would not extend the presumption in section 3.307(a)(6)(iii) to Vietnam veterans who served in offshore waters:

> After careful review of the IOM report, the Secretary determines that the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans. VA will continue to accept and review all Blue Water Navy Vietnam Veteran claims based on herbicide exposure on a case-by-case basis.

Presumption of Exposure to Herbicides for Blue Water Navy Vietnam Veterans Not Supported, 77 Fed. Reg. 76,170 (Dec. 26, 2012).

III. Statement Of Facts And Course Of Proceedings Below

Mr. Procopio served on active duty in the U.S. Navy from September 1963 to August 1967, including service aboard the U.S.S. *Intrepid* from November 1964 to July 1967. Appx5, Appx20. The *Intrepid* was deployed off the coast of Vietnam while Mr. Procopio was serving, but Mr. Procopio did not set foot on the landmass or enter the inland waters of Vietnam during his service. Appx5, Appx21, Appx31. Service records do not show any diagnoses or treatment of diabetes mellitus or any prostate condition during service. Appx5, Appx32.

Mr. Procopio filed claims for compensation for diabetes in October 2006 and for prostate cancer in October 2007. Appx5. He reported that he spent time in the Gulf of Tonkin and on the southern coast of Vietnam during his service aboard

the *Intrepid* and alleged that his conditions were due to exposure to Agent Orange. *Id.* He asserted 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." Appx6. Mr. Procopio further asserted that "[t]his water was runoff water from Vietnam and the probability that we were drinking dioxin[-]contaminated [water] is high." *Id.* In support of his claims, he submitted an article about an Australian scientific study titled "Co-Distillation of Agent Orange and Other Persistent Organic Pollutants in Evaporative Water Distillation." *Id.*

The VA regional office denied Mr. Procopio's service connection claims in April 2009. Appx6. Mr. Procopio appealed the decision and, following a 2012 remand from the Veterans Court, *Procopio v. Shinseki*, 26 Vet. App. 76 (2012), and a 2013 remand from the Board to the VA regional office, *see* Appx6-9, the Board issued the decision now on appeal in July 2015. The Board denied entitlement to service connection for prostate cancer and diabetes mellitus with edema, both to include as due to exposure to herbicides.[11] Appx9, Appx19-39.

[11] The Board also remanded the issue of entitlement to service connection for coronary artery disease, to include as due to exposure to herbicides. Appx21, Appx39-40. The Board denied Mr. Procopio's claim in a subsequent final decision, and an appeal of that decision is now pending before the Veterans Court. *See Procopio v. Shulkin*, No. 17-0537 (Vet. App.).

The Board found that Mr. Procopio's assertions of exposure to herbicides while stationed in the South China Sea, in the territorial seas of Vietnam, and the Gulf of Tonkin were outweighed by evidence from the National Personnel Records Center (NPRC) and the deck logs from the *Intrepid* "showing no exposure to tactical herbicides, including Agent Orange." Appx35.

The Board also found that although Mr. Procopio was "competent to testify as to handling barrels of chemicals, or otherwise having been exposed to chemicals while on the U.S.S. Intrepid . . . the Veteran 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." Appx35. The Board observed that Mr. Procopio had "submitted no documentation to corroborate his factual assertions as to exposure to Agent Orange on the Intrepid." Appx35.

The Board considered the detailed arguments, testimony, and articles submitted by Mr. Procopio's representative, including the Australian distillation study, but found that they were "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." Appx35. In particular, the Board quoted from the discussion of the Australian study in the *Haas* decision to explain that it "places

little weight" on the article Mr. Procopio submitted. Appx36; *see Haas*, 525 F.3d at 1194 (citing 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)).

Finally, the Board noted that Mr. Procopio conceded that he was considered a "Blue Water" veteran and, despite his arguments regarding "Blue Water" veterans in general, concluded that "the law as to 'Blue Water' veterans is clear as delineated by the Federal Circuit in *Haas*." Appx36.

By memorandum decision dated November 18, 2016, the Veterans Court affirmed the Board's decision. Appx4-15. The court affirmed the Board's application of 38 C.F.R. § 3.307(a)(6)(iii), in particular the VA's distinction between "brown water" and "blue water" Navy personnel as upheld in *Haas*, to Mr. Procopio's claims. Appx9. The court rejected Mr. Procopio's argument that, despite the holding in *Haas*, VA's exclusion of Vietnam's territorial seas from the regulatory definition of "inland waterway" was arbitrary and capricious in light of a 2015 Veterans Court decision, *Gray v. McDonald*, 27 Vet. App. 313 (2015). Appx10. The court explained that *Gray*, in which the Veterans Court found VA's definition of "inland waterways" as applied to the bays and harbors of Vietnam to be arbitrary and capricious, was not applicable to Mr. Procopio's claims because he never alleged that his ship entered or anchored in a bay or harbor in Vietnam. Appx10-11. The court cited footnote six in the *Gray* decision, wherein the court reiterated that *Haas* continues to apply where a veteran "never entered a harbor or

port" and "served exclusively on the open ocean." Appx11 (citing *Gray*, 27 Vet. App. at 320 n. 6.).

The Veterans Court also rejected Mr. Procopio's argument that *Haas* "must be limited to its facts and should not be applied to his claims 'because it was not decided in accordance with the accepted canons of construction for [v]eteran's cases.'" Appx11 (quoting Mr. Procopio's brief). The court found *Haas* to be controlling precedent in Mr. Procopio's case notwithstanding this assertion. Appx11.

Finally, the Veterans Court affirmed the Board's denial of service connection on a direct basis. The court quoted and agreed with the Board's analysis regarding the shortcomings of the Australian study. Appx12. The court rejected Mr. Procopio's objection to the Board's discussion of the April 2008 Federal Register notice. Appx12; *see* Appx36 (quoting 73 Fed. Reg. 20,566, 20,568). The court explained that the Board's reference to the Federal Register notice was in the context of applying *Haas* and reiterated that *Haas* is binding precedent. Appx13. Although the court acknowledged Mr. Procopio's arguments about the IOM reports that post-date the *Haas* decision, it observed that the salient issue was not whether there is scientific evidence that it is plausible that herbicides entered Vietnam's coastal waters, but whether Mr. Procopio was directly exposed. Appx13-14. The court determined that Mr. Procopio failed to support his scientific

theories of coastal contamination and exposure with any empirical evidence that the *Intrepid* actually entered a discharge plume containing Agent Orange or that Agent Orange was pulled into the ship's distillation system and converted into potable water. Appx14. The court found that the Board reasonably weighed the probative value of the evidence, and affirmed. Appx14.

On December 12, 2016, the Veterans Court entered judgment. Appx18. This appeal followed.

SUMMARY OF THE ARGUMENT

Mr. Procopio has not demonstrated error in the Veterans Court's decision, which correctly held that *Haas v. Peake* controls the outcome of Mr. Procopio's presumptive service connection claims. In 2008, the Court in *Haas* affirmed the validity of VA's interpretation of 38 U.S.C. § 1116 and 38 C.F.R. § 3.307(a)(6)(iii) as extending a presumption of service connection due to herbicide exposure only to veterans who set foot on land in the Republic of Vietnam, including its inland waterways. Following this binding precedent, the Veterans Court correctly held that Mr. Procopio could not use the statutory presumption to establish service connection for his disabilities because he served only on offshore waterways – the Gulf of Tonkin and South China Sea. Thus, because it is undisputed that Mr. Procopio did not set foot on land in Vietnam and that his ship, the *Intrepid*,

remained off the coast of Vietnam, Mr. Procopio is not entitled to service connection on a presumptive basis and the Court should affirm.

Recognizing the preclusive effect of *Haas* on his presumptive benefits claims, Mr. Procopio asks the Court to overrule *Haas en banc* and thereby invalidate VA's line of demarcation between inland and offshore waterways. *En banc* consideration to pursue such judicial policy-making is not warranted. None of Mr. Procopio's arguments, including his reliance on the Veterans Court's decision in *Gray*, demonstrate that *Haas* was wrongly decided or that it would (or should) be decided differently today. In fact, many of Mr. Procopio's arguments, notably his contention that Vietnam's territorial seas should be included in the statutory definition of "in the Republic of Vietnam," are recycled from *Haas*, where they were rejected. This Court should reach the same result.

In the alternative, Mr. Procopio argues that *Haas* should be limited to its facts such that it would not control the outcome of his presumptive claims. He argues that the Supreme Court's 2011 decision in *Henderson v. Shinseki*, 562 U.S. 428 (2011), requires reexamination of the deference that the Court afforded the VA in *Haas*. Yet *Henderson*, which merely referenced the pro-claimant canon of statutory construction, did not change the analytical structure of agency deference under which *Haas* was decided. And, as the Court in *Haas* already held, the pro-claimant canon of construction announced in *Brown v. Gardner*, 513 U.S. 115

(1994), and later referenced in *Henderson*, does not demand a different result. Likewise, Mr. Procopio's contention that *Haas* does not foreclose application of the presumption to service in Vietnam's territorial waters must give way in light of *Haas* and the VA line of demarcation between inland and offshore waters it affirmed.

Finally, Mr. Procopio argues that the Board and Veterans Court erred when they determined that he had not established direct exposure to herbicides during his service. Although Mr. Procopio ascribes error to the Board's findings of fact in this regard, the Court lacks jurisdiction to consider his challenges to the Board's weighing of the evidence or the Veterans Court's review thereof, and the Court should dismiss this part of his appeal. 38 U.S.C. § 7292(d)(2).

ARGUMENT

I. Jurisdiction And Standard Of Review

Pursuant to 38 U.S.C. § 7292(a), the Court may review "the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." Under 38 U.S.C. § 7292(c), the Court has exclusive jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought

under [section 7292], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision."

Section 7292(d)(1) provides that, when reviewing a Veterans Court decision, the Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions" and must set aside any regulation or interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be: "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." Section 7292(d)(2) further provides that, except to the extent that an appeal from a Veterans Court decision presents a constitutional issue, the Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(2). The Court has consistently applied section 7292 to bar fact-based appeals of Veterans Court decisions. *See, e.g.*, *Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (noting that the Court reviews only questions of law and cannot review any application of law to fact); *see also Andre v. Principi*, 301 F.3d 1354, 1363 (Fed. Cir. 2002). The Court reviews legal determinations of the Veterans Court *de novo*. *Cushman v. Shinseki*,

576 F.3d 1290, 1296 (Fed. Cir. 2009).

II. The Veterans Court Correctly Held That *Haas* Controls The Outcome Of Mr. Procopio's Presumptive Service Connection Claims

The Veterans Court did not err by relying upon *Haas* to affirm the Board's denial of Mr. Procopio's presumptive claims. *Haas* unquestionably holds that VA's interpretation of section 3.307(a)(6)(iii) as excluding veterans who did not serve within the land borders of Vietnam from the presumption of exposure to herbicides was reasonable and entitled to deference. *Haas*, 525 F.3d at 1185-87, 1193-95. Like Mr. Haas, Mr. Procopio served in the blue waters off the coast of Vietnam, and is therefore not entitled to presumptive service connection due to herbicide exposure. *See* Appx10, Appx35 ("Again, [Mr. Procopio] concedes that he is considered a "Blue Water" veteran.").

Mr. Procopio all but concedes that *Haas* controls the outcome of his presumptive claims by arguing that it should be overruled or otherwise limited in its application to his case. App. Br. 19-36; 47-49. Indeed, Mr. Procopio filed a petition for a hearing *en banc* shortly after his appeal was docketed, which the Court denied. Order, Dkt. No. 20, No. 17-1821 (Fed. Cir. June 12, 2017). Although he reiterates the same arguments for *en banc* consideration in his brief, *see* App. Br. 19-29, Mr. Procopio has not demonstrated that *Haas* should be reconsidered *en banc* or overruled.

A. *Haas* Was Correctly Decided And Should Not Be Overruled

Mr. Procopio argues that *Haas* was wrongly decided and should be overruled *en banc* for two reasons. First, he contends that "other studies and information have become available that call into question the reasonableness of the VA's interpretation and the level of deference applied by *Haas*." App. Br. 20-21. Second, he argues that the phrase "in the Republic of Vietnam" in section 1116 must mirror the reach of Vietnam's sovereignty, which encompasses its territorial seas. App. Br. 22-29. Neither argument undermines the holding in *Haas* or demonstrates that *en banc* consideration is warranted.

1. *Haas* Is Not Undermined By The "Other Studies And Information" Mr. Procopio Cites

Mr. Procopio argues that a 2002 Australian dioxin distillation study and IOM reports from 2009 and 2011 in the record here but not in *Haas* require *en banc* reconsideration of *Haas* and VA's interpretation of the phrase "service in the Republic of Vietnam" in sections 1116 and 3.307(a)(6)(iii). App. Br. 21. Yet, even accepting that such evidence can justify *en banc* reconsideration of an agency's long-settled statutory and regulatory interpretation, which we do not concede, Mr. Procopio presents no basis for overruling *Haas*.[12]

[12] Providing "new evidence" to the Court and claiming that it undermines an agency's already-affirmed statutory and regulatory interpretation cannot provide an adequate basis for *en banc* consideration of a precedential opinion. Rule 35 of the rules of this Court focuses on whether the decision to be reviewed *en banc* is

"An agency's interpretations of its regulations is entitled to 'substantial deference,' requiring a court to defer to the agency's interpretation 'unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Haas*, 525 F.3d at 1186 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The Court in *Haas* determined that substantial deference was due VA's statutory and regulatory interpretation because it "is a plausible construction of the statutory language and it is based on a simple but undisputed fact – that spraying was done on land, not over the water." *Id.* at 1195. The articulation of a possible pathway of herbicide exposure, through distillation or otherwise, outside of the presumptive line drawn in sections 1116 and 3.307(a)(6)(iii), would not change the fact that VA's interpretation is entitled to substantial deference, nor would it undermine the "simple but undisputed fact" upon which the *Haas* Court relied in finding VA's construction reasonable – that herbicides, which were

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contrary to Supreme Court or Federal Circuit decisions and/or asks one or more precedent-setting questions of exceptional importance. Conversely, arguing that "new evidence" suggests a different outcome of a previous decision does not fall under the bases for *en banc* consideration in Fed. Cir. R. 35. Instead, the appropriate course of action would have been for Mr. Procopio to petition the VA to revise section 3.307(a)(6)(iii) in light of this supposed "new evidence" and then, if dissatisfied with VA's response, to file a 38 U.S.C. § 502 petition in this Court. Otherwise, appellants could continually challenge settled statutory and regulatory interpretations under the guise of an *en banc* petition even though the statute of limitations for a proper statutory or regulatory challenge has long run.

sprayed for the purpose of eliminating plant cover for the enemy, were sprayed over the land. *Id.*

When properly considered, Mr. Procopio argues not that VA's interpretation of its regulation should now be invalidated based on new evidence, but that as a matter of judicial policymaking, the Court should overturn *Haas en banc* in order to force the VA to expand the presumption of service connection due to herbicide exposure beyond the Vietnamese landmass. Indeed, this is confirmed by Mr. Procopio's citation to evidence that he claims demonstrates dioxin contamination of the estuarine waters of Vietnam. App. Br. 21-22. While such evidence may be relevant to a policy decision concerning whether the presumption of exposure should be expanded by Congress or VA to the bays and harbors of Vietnam, it is not relevant to Mr. Procopio's benefits appeal, as Mr. Procopio himself did not serve in the bays or harbors (or other estuarine waters) of Vietnam and only entered the Gulf of Tonkin and South China Sea.[13] *See* Appx10. Thus, the evidence Mr. Procopio cites does not justify his *ex poste* attack upon VA's already-upheld interpretation of sections 1116 and 3.307(a)(6)(iii) as it relates to his benefits appeal, or his *en banc* request.

[13] The Veterans Court's affirmance of the Board's finding that Mr. Procopio did not serve in any of the bays or harbors of Vietnam is neither challenged by Mr. Procopio nor reviewable by this Court. *See* 38 U.S.C. § 7292(d); *see also* Webster's II New Riverside University Dictionary (defining "estuary" as "[t]he wide lower course of a river where its current is met by the tides").

Moreover, neither the 2002 Australian study nor the IOM reports undermine the reasonableness of VA's regulatory interpretation. Like Mr. Procopio, Mr. Haas argued that the VA's interpretation was irrational in light of the 2002 Australian study. *Haas*, 525 F.3d at 1193-94. And although the Court observed that the study was not part of the record before the agency in *Haas*, 525 F.3d at 1194, the Court noted that VA had explicitly discussed the Australian study in a 2008 Federal Register notice and had explained why it did not warrant a change in VA's position. *Id.* (citing 73 Fed. Reg. at 20,568 (Apr. 16, 2008)). The Court considered whether the study undermined VA's interpretation and concluded that "the DVA's interpretation is a plausible construction of the statutory language and [] is based on a simple but undisputed fact – that spraying was done on land, not over the water." *Haas*, 525 F.3d at 1195.

Although Mr. Procopio notes that the IOM "validated" the Australian study after the *Haas* decision, App. Br, 21, he ignores the IOM's 2011 conclusions that "exposure of Blue Water Navy Vietnam veterans to [herbicides] cannot be reasonably determined[,]" and that "qualitatively, ground troops and Brown Water Navy personnel had more pathways of exposure to [herbicides] than did Blue Water Navy personnel[.]" 2011 IOM Report at 2, 13. Far from undermining *Haas* or VA's regulatory interpretation, the IOM's conclusions regarding the relative exposure probabilities between Brown Water and Blue Water veterans lend further

support to the reasonableness of VA's regulatory interpretation. Indeed, given the deference due to agencies tasked with reconciling competing evidence in scientific reports for the purpose of policymaking, *see, e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976), the Court must decline Mr. Procopio's invitation to dictate VA policy based upon his identification of, at most, competing scientific evidence.

2. The *Haas* Court Addressed And Correctly Rejected Mr. Procopio's "Territorial Seas" Argument

Mr. Procopio argues that *Haas* erred when it found the phrase "in the Republic of Vietnam" in section 1116 ambiguous and deferred to VA's reasonable interpretation of the phrase. App. Br. 22-29; 33-35. Like Mr. Haas, Mr. Procopio argues that section 1116 "has a plain meaning that covers servicemembers in his position." *Haas*, 525 F.3d at 1184. And like Mr. Haas, who cited Presidential Proclamation 5928 (1989) and the United Nations Convention on the Law of the Sea, *Haas*, 525 F.3d at 1184, Mr. Procopio cites to a "1958 Treaty" and the "1954 Geneva Accords" to support his position, App. Br. 22-24. But none of these additional "methods for defining the reach of a sovereign nation" undermine the critical holdings in *Haas* in this regard, which are that (1) "[n]either the language of the statute nor its legislative history indicates that Congress intended to designate one of the competing methods of defining the reaches of a sovereign nation" and, (2) as a result, the phrase "served in the Republic of Vietnam" was ambiguous and subject to interpretation by the VA. *Haas*, 525 F.3d at 1184-85

("Congress did not indicate that service 'in' the Republic of Vietnam included service on the waters offshore or in any other location nearby."). Mr. Procopio identifies no statutory language or legislative history indicating that Congress intended to rely upon the 1958 Treaty or 1954 Geneva Accords, or any other particular method of defining the reach of a sovereign nation. Accordingly, this attack on *Haas* fails.

Mr. Procopio next argues that *Haas* was wrongly decided because either Congress or the Court, and not VA, should define the scope of the presumption established in section 1116. App. Br. 22 ("It is not the place of the VA to define the sovereign territory of a nation."). As the *Haas* Court recognized, however, "Congress has given the DVA authority to interpret [section 1116], both under its general rulemaking authority, 38 U.S.C. § 501, and in the Agent Orange Act itself, 38 U.S.C. § 1116(a)(1)(B)." *Id.* at 1186. Thus, Mr. Procopio misstates the VA rule challenged in *Haas* as one that defines "the sovereign territory of a nation" instead of one that defines the meaning of an ambiguous statute addressing benefits to be awarded by VA, for which authority is unquestionably provided to VA in this instance. Indeed, far from holding that, as a matter of law, "it could not be said that the territorial seas were part of the RVN," as Mr. Procopio suggests, App. Br. 27, the Court in *Haas* simply held that VA's chosen line of demarcation, based on the known use of herbicides, was reasonable. *See Haas*, 525 F.3d at 1183

(explaining that under the doctrine announced in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), courts defer to an agency's reasonable interpretations when the agency invokes its authority to issue regulations that interpret ambiguous statutory terms).

3. The Veterans Court's 2015 Decision in *Gray v. McDonald* Has No Bearing On Mr. Procopio's Benefits Appeal

Although Mr. Procopio concedes that *Gray* "is not controlling on this court and [that] it is not relevant to discuss the territorial seas[,]" App. Br. 47, he argues that *Gray* is nevertheless relevant "to show that the potential for exposure goes beyond the line drawn by the Secretary" and "confirms that the Secretary's line is flawed." *Id.* These arguments are meritless.

First, *Gray* concerned only whether VA reasonably determined "the scope of qualifying service 'within the land borders of Vietnam.'" 27 Vet. App. at 321. The court made clear that it was "*not* reexamin[ing] the validity of VA's interpretation limiting the presumption to brown water or inland waterways – *Haas* confirmed that it was reasonable for VA to distinguish between offshore and inland waterways." *Id.* at 320-21. Instead, the Veterans Court narrowly reviewed VA's treatment of Vietnam's bays and harbors – "the murky area where inland waterways open to the ocean and the brown water mixes with the blue." *Id.* at 322; *see id.* at 321 ("*Haas v. Peake* – which dealt with a veteran who only served miles off shore – did not decide the specific question before the Court."). *Gray* did not

address VA's treatment of territorial seas since those areas, "miles off shore," were already addressed in *Haas*.

Second, the Veterans Court did not deem VA's treatment of bays and harbors irrational based on a finding that there is possible herbicide exposure for veterans who served in offshore areas, as Mr. Procopio suggests. Instead, the court found that there was no rational explanation for VA's decision to treat Quy Nhon Bay and Ganh Rai Bay as inland waterways while declaring that "'Da Nang harbor and *all* other harbors along the Vietnam Coastline' are blue water." *Id.* at 324. The court concluded that VA had failed to define inland waterways based on "the likelihood of exposure to herbicides," *id.* at 323, and had instead impermissibly used other "factors unrelated to the regulation – like ease of entry[.]" *Id.* at 324. The court therefore remanded to VA "to reevaluate its definition of inland waterways [] and exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure."[14] *Id.* at 327. Thus, nothing in the Veterans Court's decision

[14] On February 5, 2016, VA completed its reevaluation of its definition of inland waterways, and set forth revised guidance to VA regional offices that excludes all of Vietnam's bays and harbors from the scope of the presumption in section 3.307(a)(6)(iii) based on the lack of evidence demonstrating that Blue Water personnel were likely exposed to herbicides. Petitioners, the Blue Water Navy Vietnam Veterans Association, represented by counsel for Mr. Procopio, and Mr. Gray, are currently challenging the validity of VA's revised guidance in *Gray v. Sec'y of Veterans Affairs*, No. 16-1783 (Fed. Cir.) and *Blue Water Navy Vietnam Veterans Assoc. v. Sec'y of Veterans Affairs*, No. 16-1793 (Fed. Cir.).

indicates the VA's exclusion of territorial seas from section 3.307(a)(6)(iii) is flawed.

As a result, the Veterans Court here correctly affirmed the Board's determination that *Gray* was not applicable because "the record reflects . . . [Mr. Procopio's] presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam, and because [Mr. Procopio] has not specifically alleged that his ship anchored in a deep water harbor such as Cam Rahnh Bay, Da Nang Harbor, Quy Nhon Bay, Ganh Rai Bay, or any other bay or harbor in Vietnam." Appx10 (quoting Appx31) (internal quotation marks omitted). Nothing in *Gray* suggests that this Court should reach a different result.

B. There Is No Basis For Limiting *Haas* To Its Facts

Beyond asserting that *Haas* should be overruled, Mr. Procopio also argues that *Haas* "must be limited to its facts" because (1) it was not decided under the pro-claimant canon of construction reaffirmed by the Supreme Court in *Henderson v. Shinseki*, 562 U.S. 428 (2011), App. Br. 29-33, and (2) it does not address Vietnam's territorial seas, App. Br. 33-36. Neither argument has any merit.

1. The Pro-Claimant Canon Reaffirmed In *Henderson* Does Not Support Limiting The Precedential Effect Of *Haas*

Mr. Procopio argues that following the Supreme Court's decision in *Henderson v. Shinseki*, this Court must not give VA *Chevron* deference if it "finds

that the Secretary's interpretation is unreasonable or in conflict with the spirit of the veteran's benefits scheme[.]" App. Br. 30. Thus, Mr. Procopio asks the Court to adopt a post-*Henderson* rule that would effectively negate *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003), by instructing the Court to limit otherwise precedential decisions "to their facts" if it finds VA's interpretation in conflict with the "spirit of the veteran's benefits scheme[.]"[15] App. Br. 32-33. And, Mr. Procopio contends, such a limitation is appropriate here because VA's regulatory interpretation is unreasonable and anti-veteran. The Court should reject this argument for several reasons.

First, the Court has already held that the pro-claimant cannon does *not* conflict with VA's foot-on-land rule. In *Haas*, although Mr. Haas had waived his pro-claimant argument, the Court still held that application of the canon would not invalidate VA's reasoned interpretation of section 1116. *Haas*, 544 F.3d at 1308-09. Citing *Sears*¸ 349 F.3d at 1331-32, the Court held that "the DVA has already interpreted the statute in a pro-claimant manner by applying it to any veteran who

[15] In *Sears*, the Court held that it "must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003). Applying this rule, the Court in *Haas* held that the VA's interpretation of sections 1116 and 3.307(a)(6)(iii) was reasonable even though it would not result in a pro-claimant outcome in every case. *Haas*, 525 F.3d at 1193-94 ("There are no doubt some instances in which the "foot-on-land" rule will produce anomalous results.").

set foot on land, even if for only a very short period of time." *Id.* at 1308-09. The Court also doubted Mr. Haas's assertion that defining "in the Republic of Vietnam" to include its territorial seas would necessarily be more pro-claimant. *Id.* (identifying practical difficulties that would arise from adopting Mr. Haas's interpretation of section 1116 and concluding that "it is by no means clear that [application of the pro-claimant canon] would have required that the statute cover Mr. Haas's case, or that the 'pro-claimant' canon would have provided clear construction and easy application for the statute in question."); *see Veterans Justice Group, LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1352 (Fed. Cir. 2016) ("[c]onsistency with the 'statutory framework' plainly cannot be reduced to the single-factor test of whether the regulation is uniformly 'pro-claimant.'" (quoting *Sears v. Principi*, 349 F.3d 1326, 1330 (Fed. Cir. 2003)). Thus, the Court has already addressed application of the pro-claimant canon to VA's interpretation of section 3.307(a)(6)(iii), and affirmed that interpretation.

Second, *Henderson* does not call *Sears* into question or otherwise suggest that *Haas* should be limited to its facts. Mr. Procopio argues that *Henderson* "calls into question attempts to limit" application of the pro-claimant canon, suggesting that *Sears* effects such a limitation, but *Henderson* cannot bear the weight Mr. Procopio places on it. App. Br. 32. *Henderson* merely reaffirmed "'the canon that provisions for benefits to members of the Armed Services are to be construed in

the beneficiaries favor.'" *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n.9 (1991)). This Court has already held that VA "interpreted [section 1116] in a pro-claimant manner by applying it to any veteran who set foot on land, even if for only a very short period of time." *Haas*, 544 F.3d at 1308-09. Moreover, the limited holding in *Henderson* cannot plausibly be read as (1) addressing the interplay between agency deference and the pro-claimant canon, (2) foreclosing deference to VA's considered resolution of genuine statutory or regulatory ambiguity, or (3) overruling *Sears*, as Mr. Procopio contends. Indeed, *Henderson* does not even cite or discuss *Chevron* or *Auer v. Robbins*, 519 U.S. 452 (1997), or discuss agency deference.

Furthermore, Mr. Procopio's contention that VA's statutory and regulatory interpretation "defies the laws of nature and national and international law" itself amounts to an assertion that the VA has taken an *unreasonable* position, which is to say that VA's position should not receive deference under either *Chevron* or *Auer*. App. Br. 32. Mr. Procopio implicitly concedes, therefore, that the analytical structures of *Chevron* and *Auer* have not been displaced by the reference to the pro-claimant canon in *Henderson*. *See Chevron*, 467 U.S. at 842-43 (agency's construction of an ambiguous statute must be a "permissible" one); *Auer*, 519 U.S. at 461-63 (agency construction of ambiguous regulation cannot receive deference if "plainly erroneous").

Mr. Procopio concedes that *Henderson* simply reaffirmed a longstanding canon of construction, App. Br. 32, and therefore must concede that *Henderson* did not alter the analytical structure under which *Haas* was decided, including the rule in *Sears*. That *Henderson* did not alter the Court's VA deference jurisprudence is further confirmed by (1) the Court's application of the *Sears* rule in cases since *Henderson*, *see, e.g.*, *Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 809 F.3d 1359, 1363 (Fed. Cir. 2016) (*NOVA*); *Veterans Justice Group LLC*, 818 F.3d at 1352, and (2) the Court's 2016 discussion of *Sears* in *NOVA*, wherein the Court cited *Brown v. Gardner*, 513 U.S. 115 (1994), as explaining the pro-claimant canon, not *Henderson*. 809 F.3d at 1363 ("There is no force to NOVA's suggestion that the DVA's interpretations are not entitled to *Chevron* deference because of *Gardner*.").

As a result, Mr. Procopio's pro-claimant argument founders on the same shoals as Mr. Haas's argument. Mr. Procopio, like Mr. Haas, simply believes that VA's interpretation of the AOA and its own regulation was insufficiently pro-claimant. Because the Court has already rejected that argument, and nothing since that decision requires its reexamination, the Court should affirm the Veterans Court's application of *Haas* to Mr. Procopio's benefits appeal.

2. There Is No Basis For A Limited Reading Of *Haas* That Would Permit Mr. Procopio To Establish Presumptive Service Connection

Mr. Procopio contends that interpreting section 1116 as including Vietnam's territorial seas is permissible despite *Haas* and further, that it is appropriate to do so because VA's foot-on-land rule is "arguably overbroad" in that it extends the presumption to veterans "who served in ships and aircraft out of the spray area[.]" App. Br. 33. This is wrong for at least two reasons.

First, VA's foot-on-land rule, which the Court in *Haas* found to be a reasonable interpretation of section 3.307(a)(6)(iii), clearly limits the scope of the presumption to service on the Vietnamese landmass. By definition, therefore, VA's interpretation excludes service on Vietnam's territorial seas. Indeed, the Court in *Haas* expressly rejected Mr. Haas's argument that section 1116 must be interpreted as extending the presumption to Vietnam's territorial seas. *Haas*, 525 F.3d at 1193 ("In our view, it was not arbitrary for the agency to limit the presumptions of exposure and service connection to servicemembers who had served, for some period at least, on land. Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable."). Thus, no reasonable reading of *Haas* supports Mr. Procopio's contention that the decision narrowly "found the VA decision to not use the

Vietnam Service Medal line as reasonable[,]" but left open the question of whether section 1116 applies to Vietnam's territorial seas. App. Br. 33.

Second, the fact that VA's rule may be "arguably overbroad" provides no basis for reading *Haas* as having left open the question of section 1116's application to Vietnam's territorial seas. As an initial matter, it is unclear what relevance the arguable overbreadth of VA's rule has to the precedential value of *Haas*. In any event, the over inclusiveness of VA's rule was expressly addressed in *Haas*, where the Court held that just because "instances in which the 'foot-on-land' rule will produce anomalous results . . . does not mean that the lines drawn are irrational. " *Haas*, 525 F.3d at 1193 (citing *Vance v. Bradley*, 440 U.S. 93 (1979) (line-drawing is upheld even if the classification "is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress is imperfect"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) ("Perfection in making the necessary classifications is neither possible nor necessary.")). "Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable." *Haas*, 525 F.3d at 1193.

At most, therefore, Mr. Procopio argues that the Court should adopt his interpretation of section 1116 because, he contends, veterans who served in territorial seas were more likely to be exposed to herbicides than veterans who served in parts of Vietnam where no herbicide spraying occurred. App. Br. 34-36.

As noted above, however, even if the Court accepts Mr. Procopio's contention regarding possible exposure pathways for Blue Water personnel, it would not change the fact that VA's interpretation is entitled to substantial deference, nor undermine the "simple but undisputed fact" upon which the *Haas* Court relied in finding VA's construction reasonable – that herbicides, which were sprayed for the purpose of eliminating plant cover for the enemy, were sprayed over the land. *Haas*, 525 F.3d at 1195.

Moreover, the Court in *Haas* questioned whether defining section 1116 to include Vietnam's territorial seas would necessarily produce less anomalous results:

> Although Mr. Haas advocates defining "in the Republic of Vietnam" to include the territorial seas adjacent to the Vietnamese mainland, adopting that standard would raise new questions of interpretation and present new difficulties in application. For example, Mr. Haas's interpretation would raise the question whether the statute applies to claimants who flew through Vietnamese airspace (including airspace above the territorial seas) but never landed in Vietnam.

Haas, 544 F.3d at 1309. Accordingly, there is no basis for the Court to adopt Mr. Procopio's limited reading of *Haas*.

III. The Court Lacks Jurisdiction To Review The Veterans Court's Determination That The Board's Factual Findings Were Not Clearly Erroneous

The Board concluded that Mr. Procopio failed to establish all of the elements of his claim for service connection. Appx37-39; *see Fagan v. Shinseki*, 573 F.3d

1282, 1287 (Fed. Cir. 2009) (claimant bears the "general evidentiary burden to establish all elements of his claim"); 38 U.S.C. § 5107(a) ("[e]xcept as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary."). The Veterans Court affirmed, explicitly crediting VA's view of the facts. Appx14 ("[t]he [c]ourt therefore agrees with the Secretary's conclusion that the appellant 'fails to support his scientific theory with any empirical evidence of record . . . reflecting that the U.S.S. *Intrepid* actually entered into a discharge plume that contained Agent Orange . . . [or] that such Agent Orange . . . was pulled into the ship[']s distillation system and converted into, *inter alia*, potable water.'") (ellipses, and third and fourth brackets, in original). Although the Court may not consider any challenge to the Board's weighing of evidence as affirmed by the Veterans Court, 38 U.S.C. § 7292(d), Mr. Procopio interposes several such challenges, which must be dismissed.

A. The Court May Not Consider Mr. Procopio's Challenge To The Board's Weighing Of A 2008 VA Federal Register Notice

Mr. Procopio objects to the Board's consideration of a 2008 VA Federal Register notice based on his assertion that it has been "roundly debunked." App. Br. 36-39 (discussing 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)). The Board quoted the notice in the context of weighing all of the evidence of record to determine whether Mr. Procopio had established direct exposure to herbicides

while serving on board the *Intrepid*. Appx36. Mr. Procopio submitted articles that he claims "debunked" the notice, but the Board afforded them little weight in evaluating Mr. Procopio's herbicide exposure because they did not "show to any degree of specificity that [Mr. Procopio] was exposed to Agent Orange while drinking water on the Intrepid, or that he was otherwise shown to have been exposed to herbicides during service." Appx36. The Board explained that it considered Mr. Procopio's detailed arguments, testimony, and articles but that they were too general, speculative, and generic to establish his direct service connection claim. Appx35 (citing *Sacks v. West*, 11 Vet. App. 314, 316-17 (1998); *Wallin v. West*, 11 Vet. App. 509, 514 (1998)).

To the Veterans Court, Mr. Procopio argued that the Board gave the Federal Register notice "undue weight," but the Veterans Court disagreed. Appx12. The Veterans Court reviewed the Board's fact findings, noting that the Board reviewed the Federal Register notice, as well as the Australian study and articles that Mr. Procopio submitted. *Id.* The Veterans Court reminded Mr. Procopio that, in the context of proving direct service connection, the issue it was deciding was whether he had "provided evidence to prove that he was directly exposed to Agent Orange," not whether *Haas* was correctly decided. Appx13.

Mr. Procopio continues in this appeal to dispute how the Board (and the Veterans Court) weighed the Federal Register notice. App. Br. 36-39. But

because this challenge requires the Court to review the Board's weighing of the evidence, and the Veterans Court's review of the Board's evidentiary findings, the Court does not have jurisdiction to entertain this part of Mr. Procopio's appeal. 38 U.S.C. § 7292(d)(2); *see Prinkey v. Shinseki*, 735 F.3d 1375, 1382 (Fed. Cir. 2013) (law creating judicial review of veterans claims "make[s] clear beyond any possible doubt that this Court has no power to resolve any factual dispute in a case decided by the Veterans Court."); *Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010) ("The evaluation and weighing of evidence and the drawing of appropriate inferences from it are factual determinations committed to the discretion of the fact-finder. We lack jurisdiction to review these determinations.").

B. Mr. Procopio's Remaining Factual Challenges Are Outside The Court's Jurisdiction And Otherwise Meritless

Mr. Procopio asserts that he "has established his direct exposure claim" through circumstantial evidence, and that his evidence should have sufficed at the Board because it would be "too much" to expect the ship he served on to have collected samples of Agent Orange. App. Br. 44, 46. Thus, Mr. Procopio asserts that the Board should have found his evidence of herbicide exposure sufficient to establish service connection. *Id.* But this argument challenges the Board's

weighing of the evidence, which this Court may not review.[16] 38 U.S.C. § 7292(d).

To the extent the Court nevertheless considers Mr. Procopio's evidentiary challenge, it should find it meritless. In asserting that the Veterans Court "has set the bar too high for any veteran to meet," App. Br. 40, Mr. Procopio suggests that the Court disregard 38 U.S.C. § 5107(a) and create a judicial presumption of exposure in the form of a lower evidentiary standard. But for Blue Water veterans such as Mr. Procopio, the decision in *Haas* confirms that they must establish a causal link between a present disability and exposure to herbicides in Vietnam through evidence of direct exposure. *Haas*, 525 F.3d at 1197 (". . . Mr. Hass is free to pursue his claim that he was actually exposed to herbicides while on board his ship as it traveled near the Vietnamese coast."); *see also* Appx14 ("Unfortunately, because presumptive service connection is not available, actual evidence of exposure to herbicides is needed to substantiate his claims."). The Court has no basis for overriding VA's and Congress's policy and legislative choices in the manner Mr. Procopio requests. *See Cromer v. Nicholson*, 455 F.3d

[16] Moreover, the premise of his circumstantial evidence argument is that the IOM acknowledged herbicide contamination in Vietnam's estuarine waters. App. Br. 40 (citing Appx92, Appx93). The *Intrepid*, upon which Mr. Procopio served, did not enter Vietnam's estuarine waters, rendering this IOM acknowledgement irrelevant to his direct service connection claim. Appx5.

1346, 1351 (Fed. Cir. 2006) ("In the absence of a statutory or constitutional imperative, it would be improper for this court to impose a judicial remedy to supplant or supplement the remedies and procedures already provided by Congress and the VA.").

Mr. Procopio next argues that the Board failed to adequately explain its findings and conclusions or to consider the benefit-of-the-doubt rule, citing *O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991). App. Br. 41. To the extent we understand Mr. Procopio to be arguing that the Board did not provide adequate reasons and bases in accordance with 38 U.S.C. § 7104(d)(1), the Court does not have jurisdiction to review the Veterans Court's decision in this regard. 38 U.S.C. § 7292(d)(2)(B); *Cook v. Principi*, 353 F.3d 937, 940-41 (Fed. Cir. 2003). And, in any event, Mr. Procopio has not explained how or demonstrated that the Board failed to explain its findings or conclusions, and ignores the Board's conclusion that that the benefit-of-the-doubt rule did not apply because the preponderance of the evidence was against Mr. Procopio's claim.[17] Appx39 (citing 38 U.S.C. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990)).

[17] Mr. Procopio also has not explained why the "heightened" reasons and bases standard referenced in *O'Hare* should apply here. In *O'Hare*, the Veterans Court held that the Board had a "heightened" regulatory obligation to explain its decision where the claimant's service medical records were presumed destroyed. *O'Hare*, 1 Vet. App. at 367. Where there simply are no contemporaneous records to support a claim (and never were), as is the case here, the limited reasoning of *O'Hare* does not support requiring the Board to meet these heightened obligations,

Finally, and as we alluded to above, we note that much of Mr. Procopio's challenge to the Board's weighing of the evidence hinges upon the claimed "absurdity" of the Board's conclusions given the possible herbicide contamination of Vietnam's estuarine waters. App. Br. 40. But, to the extent the Court considers this argument (and it should not), the evidence of contamination Mr. Procopio relies on is irrelevant for two reasons. First, Mr. Procopio's ship was not found to have traversed the estuarine waters. *See* Appx5 (listing where the *Intrepid* was deployed during Mr. Procopio's service). Second, as Mr. Procopio concedes, "[t]he presence of Agent Orange in the harbors and bays and territorial seas of Vietnam does not in itself prove exposure." App. Br. 45. Thus, on the question of Mr. Procopio's direct exposure to herbicides, Mr. Procopio's arguments fail to compel a different result from that reached by the Board, and fail to demonstrate legal error by the Veterans Court.

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however defined. *Id.* Nor is there precedential support for extending *O'Hare* in this way, which is unsurprising because such a rule would conflict with the foundational evidentiary rule of the veterans benefits system that a claimant must generally "present and support a claim for benefits." 38 U.S.C. § 5107(a). Thus, even in the context of records presumed destroyed in a fire while in Government custody, this Court has declined to establish an adverse presumption that would effectively presume direct service connection on the basis of a veteran's assertions, notwithstanding *O'Hare*. *See Cromer*, 455 F.3d at 1350-51; 38 U.S.C. § 5107(a).

CONCLUSION

For these reasons, we respectfully request that the Court dismiss Mr. Procopio's challenges to the Veterans Court's factual findings and application of law to fact, and otherwise affirm the decision of the Veterans Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 29th day of September, 2017, a copy of the foregoing "BRIEF FOR RESPONDENT-APPELLEE" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent-appellee's counsel certifies that this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 11,299 words.

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