

**Department of
Veterans Affairs**

Memorandum

Date: March 29, 2019

From: Principal Deputy General Counsel (02)

Subj: Issues Relating to Implementation of *Procopio v. Wilkie*

To: Under Secretary for Benefits (20)
Chairman, Board of Veterans' Appeals (01)

VAOPGCADVIS 1-19

QUESTIONS PRESENTED:

1. Does the Department of Veterans Affairs (VA) have the authority to promulgate regulations and implement policies regarding the evidence necessary to prove service within the 12 nautical mile territorial sea of Vietnam?
2. Is the Board of Veterans' Appeals (Board) permitted or required to remand cases where the evidence of record is insufficient to determine whether the veteran served within the 12 nautical mile territorial sea of Vietnam?

HELD:

1. VA has the authority to promulgate regulations and implement policies regarding the evidence necessary to establish service within the territorial sea of Vietnam, so long as the regulations and policies are consistent with the existing laws governing the consideration of evidence in VA benefits cases.
2. When the evidence of record is insufficient to determine whether the veteran served within the 12 nautical mile territorial sea of Vietnam, the Board should generally remand the case for further factual development. However, if the file contains sufficient evidence for such a determination, the Board should decide the case.

DISCUSSION:

1. Section 1116 of title 38, United States Code, provides that a veteran who "served in the Republic of Vietnam" during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be considered exposed to an herbicide agent, and that exposure in turn will be presumed to be the cause of certain enumerated diseases. VA had historically interpreted the statutory phrase "served in the Republic of Vietnam" as incorporating a requirement that the Veteran served on land or inland waterways. See *Haas v. Peake*, 525 F.3d 1168, 1180-83 (Fed. Cir. 2008). In *Procopio v. Wilkie*, 913 F.3d 1371, 1380-81 (Fed. Cir. 2019) (en banc), the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that veterans who "served in the 12 nautical mile territorial sea of the 'Republic of Vietnam'" are entitled to presumptive service connection under 38 U.S.C. § 1116, so long as they meet the section's other requirements.

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The court did not address the evidence necessary to support a finding that a particular veteran served within the territorial sea of Vietnam. The Veterans Benefits Administration (VBA) and the Board have asked the Office of General Counsel to address VA's authority to promulgate regulations and implement policies regarding that issue and the necessity or appropriateness of remanding appealed cases affected by the *Procopio* decision.

2. VA is authorized to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by VA and are consistent with those laws. 38 U.S.C. § 501(a). This includes rules regarding "the nature and extent of proof and evidence" required "to establish the right to benefits," *id.* § 501(a)(1), as well as "the methods of making investigations," *id.* § 501(a)(3). VA may also implement policies that convey guidance to VBA adjudicators, though they are not binding on the Board and do not have the force of law. See *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102, 1108-09 (Fed. Cir. 2017), *cert. granted*, 139 S. Ct. 451 (2018); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077-78 (Fed. Cir. 2017). Accordingly, VA may establish rules and policies regarding the evidence necessary to prove a veteran's service within the territorial sea of Vietnam, but any such rule or policy must be consistent with the existing laws governing the consideration of evidence in VA benefits cases.

3. For example, VA could promulgate a regulation requiring specific types of evidence supporting a veteran's bare assertion that his or her ship entered the territorial sea of Vietnam. See *Arzio v. Shinseki*, 602 F.3d 1343, 1347 (Fed. Cir. 2010) (noting that a regulation may provide "additional prerequisites for establishing service connection for particular circumstances"); *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1352 (Fed. Cir. 2003) (*NOVA*) (upholding 38 C.F.R. § 3.304(f)'s requirement that "credible supporting evidence" confirm a veteran's assertion of an in-service stressor for post-traumatic stress disorder claims). To be clear, VA is required to consider "all information and lay and medical evidence of record in a case," so VA can never limit its inquiry to the point of precluding the full and fair consideration of lay evidence on all matters that lay evidence is capable of establishing. 38 U.S.C. § 5107(b); see *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (noting that laypersons are competent to provide some kinds of evidence and may not be competent to provide others). However, VA could certainly make a regulation delineating scenarios in which lay evidence is sufficient to establish presence within the territorial sea of Vietnam and scenarios when it may be inherently unreliable. Alternatively, VA could review all procurable information and compile a confirmed list of the Naval ships that entered the territorial sea of Vietnam.

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4. As noted above, any such rule or policy could not preempt existing laws governing the consideration of evidence in VA benefits cases. This means that, even if VA were to compile a ship list or promulgate a corroboration requirement, "all information and lay and medical evidence of record" in a case must be considered. 38 U.S.C. § 5107(b); see *NOVA*, 330 F.3d at 1352 (noting that the "credible supporting evidence" requirement of § 3.304(f) "is consistent with § 5107(b) by not precluding the consideration of lay evidence"); 38 C.F.R. § 3.303(a). And in a given case, if there is an "approximate balance of positive and negative evidence" on the question of a veteran's service within the territorial sea of Vietnam after "careful consideration of all procurable and assembled data," that issue must be "resolved in favor of the claimant." 38 C.F.R. § 3.102; see 38 U.S.C. § 5107(b).¹

5. However, if the record before the decisionmaker does not supply a basis for resolving factual questions, that does not mean the evidence is in "equipoise"; rather, it means that additional development is needed. See *Chotta v. Peake*, 22 Vet. App. 80, 86 (2008) (issue that requires speculation "has not been proven to the level of equipoise"); see also *Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009) ("benefit of the doubt" rule is "not a means of reconciling actual conflict or a contradiction in the evidence" (citing 38 C.F.R. § 3.102)); 38 U.S.C. § 5103A(a) (requiring "reasonable efforts" in obtaining relevant records), (c) (requiring efforts to obtain Federal records to "continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile"); *Shoffner v. Principi*, 16 Vet. App. 208, 213 (2002) (VA has "discretion to determine how much development is necessary for a determination of service connection to be made" (citing 38 C.F.R. § 3.304(c))). Where all procurable data has not been assembled in a case before the Board, remand will be warranted. See *Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010) ("it is the Board's duty to remand for further development" if it is not clear that "all procurable and assembled data" has been obtained); *Tucker v. West*, 11 Vet. App. 369, 374 (1998) ("[W]here the record is otherwise inadequate, a remand is the appropriate remedy.").

6. Given that *Procopio* announced a rule of law conferring new significance to the 12 nautical mile demarcation, it is to be expected that many appellate records will not contain information necessary to determine whether the veteran ever crossed the 12 nautical mile threshold. In such cases, a Board remand for additional factual development is both permissible and necessary. Nevertheless, some cases may be capable of immediate decision. For example, if the record contains persuasive evidence that a given veteran entered a bay or harbor recognized as within Vietnam's territorial sea, or if the record contains a deck log

¹ This provision is commonly referred to as the "benefit of the doubt" rule or the "equipoise" standard. See *Mariano v. Principi*, 17 Vet. App. 305, 313 (2003).

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establishing that the ship went within 12 miles of the mainland while the veteran was serving on board, this evidence would support the conclusion that the veteran entered the territorial sea of Vietnam. Similarly, the Board may determine that all procurable data related to the factual questions at issue, including whether the veteran "served in the Republic of Vietnam" as defined in *Procopio*, has been assembled. In such a scenario, the Board may deny application of the presumption, although the circumstances under which the record can be deemed complete with respect to the newly significant question of whether the veteran crossed the 12 nautical mile threshold will likely be limited. In both of those scenarios, however, there would be no reason to remand for further development on the question of whether the veteran "served in the Republic of Vietnam", and the Board would be obligated to decide the case, absent other issues warranting remand.



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