



DEPARTMENT OF VETERANS AFFAIRS
Veterans Benefits Administration
Washington, D.C. 20420

February 15, 2019

VBA Letter 20-19-05

Director (00)

All VA Regional Offices and Centers

SUBJ: *Procopio v. Wilkie*

This letter provides interim procedures for controlling claims affected by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) decision in *Procopio v. Wilkie*.

Background

On January 29, 2019, the Federal Circuit held that the clear intent of 38 U.S.C. § 1116 is that a Veteran who served in the territorial sea of the "Republic of Vietnam" is entitled to the presumption of exposure to Agent Orange. This class of Veterans is generally known as "blue water" Navy Veterans; but any claim based on the court's expanded definition of exposure, regardless of branch of service, might be included.

Claims that might be affected by the *Procopio* ruling include those based on herbicide exposure for which the only evidence of exposure is service on a vessel within the 12-nautical mile territorial sea of the Republic of Vietnam or other service offshore, depending upon VA's evaluation of the court's decision.

The decision will require VBA to extend the presumption of service connection where the claimant can establish (1) service in the territorial seas of Vietnam in the time period specified in 38 USC 1116(a) and (2) that he or she suffers (or suffered, in the case of death claims) from one of the diseases listed in 38 C.F.R. § 3.309(e).

Current Status

VA filed a motion to stay implementation, which suspends final action on claims potentially affected by the *Procopio* decision, while VA continues to evaluate the court's decision.

Controlling claims potentially affected by *Procopio*

Until *Procopio* litigation and subsequent determinations have been resolved, rating decisions in these claims cannot take place. Pending further guidance, regional offices must control claims from “blue water” Vietnam Veterans seeking presumptive service connection with end product (EP) 335 as explained below.

New claims (Veteran or survivor) for service connection for a disease associated with herbicide exposure

- Establish the appropriate EP (110, 010, 020, 140 etc.) for all claimed condition(s)
- Apply the Agent Orange flash
- If the claimed condition is not shown under 38 CFR 3.309, decide the issue following normal processing rules
- Proceed with development and rating for all claimed issues, in the normal manner, based on existing regulations, manual provisions, and other guidance to include consideration of service connection for any claimed condition on a direct, indirect, or presumptive basis
- **Grant claimed contentions under existing exposure rules**
 - Rate and promulgate under pending EP, clearing the EP
 - Do not put at issue or defer any issues where *Procopio* is the only basis for conceding herbicide exposure
 - If no issues can be granted without consideration of *Procopio*, change (PCHG) to EP 335
 - Send normal notification regarding issues addressed in the rating
- **Establish new EP for contentions potentially eligible under *Procopio***
 - Establish separate EP 335- Review or EP335- PMC Review
 - Apply the “Blue Water Navy” Flash (regardless of branch of service)
 - Add contentions still requiring adjudication based on *Procopio* exposure
 - Send notification to the claimant containing the approved paragraph below
 - Add an AO - Blue Water Notice tracked item with 30-day suspense date
 - Claim status: Open
 - The claim will recall during the next production run and be held in 499 until further action can be taken

Reopened claims previously denied for Agent Orange exposure

If a Veteran’s or survivor’s claim for service connection for a disease associated with herbicide exposure has previously been denied (both on a direct and presumptive basis) and there is no basis to establish entitlement except under *Procopio*:

- Establish the claim using EP 335 REVIEW – Review, or EP335- PMC Review claim labels
- Send notification to the claimant containing the approved paragraph
- Add an AO - Blue Water Notice tracked item with 30-day suspense date

- Claim status: Open
- The claim will recall during the next production run and be held in 499 until further action can be taken.

Approved paragraph:

The following language will be used to acknowledge receipt of a claim [or appeal] for service connection that includes *Procopio* exposure:

- “We have received your claim [or appeal] for (insert the disability(ies), or death, accrued or burial claim) based upon claimed herbicide exposure. Your claim [or appeal] may be affected by a recent decision by the U.S. Court of Appeals for the Federal Circuit, *Procopio v. Wilkie*. VA is evaluating the court’s decision for further action. Currently, VA has temporarily suspended deciding these claims and appeals until further guidance is received from the Department of Veterans Affairs General Counsel. Once we have that guidance, we will resume processing your claim [or appeal].”

Controlling appeals affected by *Procopio*

Until VA resolves issues related to *Procopio* litigation, appeals teams must establish separate VACOLS records with the appropriate VACOLS diary code. In addition, the RO must control appeals from “blue water” Vietnam Veterans seeking presumptive service connection with end product (EP) 335 as explained below.

New Appeals involving only *Procopio* issues

- Establish a VACOLS record for only *Procopio* issue(s). In addition, add a VACOLS diary using diary code VBA046 Blue Water Stay with a suspense of 30 days (default).
- If a Veteran files an appeal on a *Procopio* issue together with an appeal of non-*Procopio* issue(s), control only the *Procopio* issue as explained above. Establish a separate VACOLS record for the non-*Procopio* issue(s) and process those issue(s) in the standard manner.
- Establish the claim using EP 335 - Review, or EP335- PMC Review claim labels as appropriate for the *Procopio* issue.
- Enter custom tracked item on the EP 335, “Appeal pending *Procopio* decision” with 30-day suspense date.
- Send a notification letter to the claimant containing the approved paragraph.

Existing appeals involving *Procopio* issues

- Continue to process the appeal for all non-*Procopio* issues. Process those issues in the standard manner (which could include issuing a SOC/SSOC or other actions).
- Establish a new VACOLS record for any *Procopio* issues. In addition, add a VAOLCS diary using diary code VBA046 Blue Water Stay with a suspense of 30 days (default).

- Establish the claim using EP 335 – Review, or EP335- PMC Review claim labels as appropriate for the *Procopio* issue.
- Enter custom tracked item on the EP 335, “Appeal pending *Procopio* decision” with 30-day suspense date.
- Send a notification letter to the claimant containing the approved paragraph.

Further guidance

This guidance provides the basic procedures for handling claims and appeals based on *Procopio* exposure that cannot be adjudicated under current Agent Orange exposure procedures. VBA will develop additional procedures and will provide further guidance to regional office personnel as necessary.

Questions

Questions concerning this letter and other issues related to *Procopio* should be submitted to the VAVBAWAS/CO/211 Policy mailbox. For ease of communication and consistency, Compensation Service will coordinate appropriate responses with the Office of Field Operations, Appeals Management Office, and Pension and Fiduciary Service.



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