



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

February 6, 2009

Director (00/21)  
All VA Regional Offices and Centers

In Reply Refer To: 211B  
Fast Letter 09-07

SUBJ: *Haas v. Peake*

This letter contains guidance for adjudicating cases affected by the United States Court of Appeals for the Federal Circuit decision in the case of *Haas v Peake*. The United States Supreme Court has denied a petition to review the case. By refusing to review the case, the Supreme Court leaves the Federal Circuit's decision intact as controlling law.

## **Background**

On August 16, 2006, the Court of Appeals for Veterans Claims (CAVC), in *Haas v. Nicholson*, determined that Vietnam veterans who served in the waters off Vietnam and did not set foot in Vietnam are entitled to a presumption of exposure to herbicide agents, to include Agent Orange. On May 8, 2008, the Federal Circuit reversed the CAVC decision in *Haas v. Peake*. The Federal Circuit held that the interpretation by the Department of Veterans Affairs (VA) of the phrase "served in the Republic of Vietnam," which required the physical presence of a veteran within the land borders of Vietnam during service, was a permissible interpretation of 38 U.S.C. § 1116(a)(1)(A) and 38 C.F.R. § 3.307(a)(6)(iii). The Federal Circuit reversed the judgment of the CAVC, which set aside VA's interpretation as too restrictive.

The Federal Circuit also held that the pre-2002 version of the Adjudication Procedures Manual M21-1, which conceded "service in Vietnam" if the veteran received the Vietnam Service Medal, was not a substantive rule, but merely an interpretative statement by VA. Hence, the Manual's amendment did not require compliance with the notice-and-comment rulemaking procedures required by the Administrative Procedures Act.

## **Current Status**

We must now take final action on claims affected by *Haas* that were suspended as a result of guidance provided to the field in Fast Letter 06-26, released December 11, 2006, which is rescinded effective January 21, 2009. This includes claims based on herbicide exposure for which the only evidence of

exposure is receipt of the Vietnam Service Medal or service on a vessel off the shore of Vietnam.

## **Controlling Claims Affected by *Haas***

- Pull all claims pending under end product (EP) 335 or 405, and all appeals DISPed to APHA.
- Provide notice under the Veterans Claims Assistance Act (VCAA) for the issues deferred under *Haas*, if the notice was not previously provided.
- CEST the appropriate EP (110, 010, 020, etc.) for the claim, if not previously cleared, in addition to the EP 335 or 405 (which will be cleared when the decision is promulgated). Use the date of this letter as the date of claim.
- Develop for information or evidence as necessary. This development should include requesting evidence of in-country Vietnam service, actual exposure to herbicides, or, for claims previously denied, new and material evidence.
- Note that the claims for service connection for non-Hodgkin's lymphoma are controlled by 38 CFR 3.313 and are not limited to those veterans who served within the land boundaries of Vietnam.

## **Appeals involving *Haas* issues**

If a veteran filed an appeal from the denial of service connection for an herbicide presumptive disability, you must enter the appeal into Veterans Appeals Control and Locator System (VACOLS) at this time and process according to the instructions provided above.

## **Language Approved by General Counsel**

The following language will be used in all rating decisions denying claims for service connection under *Haas*:

“Claims for presumptive service connection based on exposure to Agent Orange, in which the only evidence of such exposure is the receipt of the Vietnam Service Medal or service on a vessel in the waters off the shore of Vietnam, were delayed pending final determination of appellate actions in the case of *Haas v. Peake*. In its May 2008 decision, the United States Court of Appeals for the Federal Circuit found that VA reasonably interpreted 38 U.S.C. § 1116(a)(1)(A) and 38 C.F.R. § 3.307(a)(6)(iii) as requiring the physical presence of a veteran within the land borders of Vietnam (including inland waterways) during service, and that the receipt of the Vietnam Service Medal alone, does not establish service in Vietnam. The United States

Supreme Court, declined to review the case, and the decision of the Federal Circuit in *Haas v. Peake* is now final.

This rating decision complies with the applicable Laws and Regulations as interpreted by the Federal Circuit's decision in *Haas v. Peake*."

## Questions

Questions concerning this fast letter and other issues related to *Haas* should be submitted to the VAVBAWAS/CO/21Q&A mailbox.

/s/  
Bradley G. Mayes  
Director  
Compensation & Pension Service

Recission: Fast Letter 06-26