

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

ALFRED PROCOPIO, JOHNNIE  
HARPER, MICHAEL YATES, MICHAEL  
KVINTUS, BLUE WATER NAVY  
VIETNAM VETERANS ASSOCIATION,  
INC., AND MILITARY-VETERANS  
ADVOCACY, INC.

Petitioner,

v.

ROBERT L. WILKIE,  
Secretary of Veterans Affairs,

Respondent.

**PETITION FOR REVIEW OF VETERANS AFFAIRS**  
**AGENCY ACTION PURSUANT TO 38 U.S.C. § 502**

**Basis of the Petition**

Pursuant to 38 U.S.C. § 502, Federal Rules of Appellate Procedure Rule 15(a) and Federal Circuit Rules 15, 27 and 47.12, Petitioners Alfred Procopio, Johnnie Harper, Michael Yates and Michael Kvintus, Blue Water Navy Vietnam Veterans Association, Inc. (BWNVVA) and Military-Veterans Advocacy (MVA), Inc. petitions this Court for expedited review of a government action entitled Stay of Pending Claims under the Blue Water Navy Vietnam Veterans Act of 2019 (Pub. L. 116-23) issued by Respondent on July 1, 2019, hereinafter referred to as the stay. The stay remains in effect until January 1, 2020.

## **Petitioner's Standing**

Alfred Procopio is a Blue Water Navy veteran who served in the territorial sea of the Republic of Vietnam aboard the *USS Intrepid* (CVS-11), Mr. Procopio was the Appellant in the landmark case of *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019). That case was remanded to the Court of Veterans Appeals who has since remanded it, along with a companion case, to the Board of Veterans Appeals. Due to the stay that is the subject of this suit, further review of Mr. Procopio's case has been stayed.

Mr. Harper is a dying veteran, domiciled in Louisiana, who served in the territorial sea of the Republic of Vietnam. He has filed a supplemental claim that has been stayed. He is not expected to survive the stay.

Michael Yates is a Blue Water Navy veteran, domiciled in Nevada, who served in the territorial sea of the Republic of Vietnam aboard the *USS Bainbridge* (DLGN 25). Mr. Yates has filed a supplemental claim under 38 U.S.C. § 1116 and *Procopio, supra*. Mr. Yates is the National Commander of the Blue Water Navy Vietnam Veterans Association.

Michael Kvintus is a Blue Water Navy veteran, domiciled in Ohio, who served in the territorial sea of the Republic of Vietnam, specifically Da Nang Harbor, aboard the *USS Buchannan* (DDG-14). Mr. Kvintus has an appeal pending at the Board of Veterans Appeals filed under 38 U.S.C. § 1116. Mr.

Kvintus is the vice-Commander of the Blue Water Navy Vietnam Veterans Association.

BWNVVA is a non-profit corporation organized under the laws of Colorado who has been granted tax exempt status under 26 U.S.C. § 501(c)(3). BWNVVA is dedicated, *inter alia*, to promoting public awareness of Blue Water Navy Vietnam Veteran issues and to obtain the presumption of exposure to Agent Orange for members of the Armed Forces of the United States who served afloat off the coast of the Republic of Vietnam during the Vietnam War. BWNVVA members include those denied benefits despite their exposure to Agent Orange and the survivors of those who were denied benefits and later died from complication of Agent Orange. If this agency action stands, Petitioners and other members of the BWNVVA will continue to be denied their earned benefits for exposure to the Agent Orange dioxin.

MVA is a non-profit corporation organized under the laws of Louisiana who has been granted tax exempt status under 26 U.S.C. § 501(c)(3). MVA litigates, legislates and educates on behalf of members of the military and military veterans. This includes pursuing appeals on behalf of veterans who have been improperly denied earned veterans' benefits.

### **Jurisdiction**

Jurisdiction is alleged under 38 U.S.C. § 502 for judicial review pursuant

to Chapter 7 of Title 5 of the United States Code, specifically 5 U.S.C. § 706. This Court has jurisdiction under 5 U.S.C. § § 552 (a)(1)(d) and 553. The stay does constitute a final agency action for purposes of a Chapter 7 of Title 5 United States Code review. Review is proper under 5 U.S.C. § 704 since there is no other remedy at law.

### **FACTUAL BACKGROUND**

Commencing in 2002, the VA refused to grant the presumption of herbicide exposure to “Blue Water Navy” veterans who served in bays, harbors and the territorial seas of the Republic of Vietnam.<sup>1</sup> This Court in a 2-1 decision in *Haas v. Peake*, 525F.3d 1168 (Fed. Cir. 2008) granted *Chevron* deference to the VA’s decision to deny the presumption of exposure to those who served off the coastline. On rehearing, the *Haas* Court noted that they did not apply the pro-veteran canon of construction required by *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct.1197 (2011). *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir 2008).

In *Gray v. McDonald*, 27 Vet.App. 3 13 (2015), the Court of Appeals for Veterans Claims distinguished *Haas* by concentrating on Da Nang Harbor. The *Gray* court found that as the bays and harbors were outside the scope of *Haas*, they were free to review the VA policy. Noting that the rivers, which are awarded the

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<sup>1</sup> Previously the crews of ships operating within the Vietnam Service Medal demarcation area, approximately 100 nautical miles from shore, were granted the presumption.

presumption of exposure under the VA policy, discharge into the bays and harbors, the *Gray* court noted that river water would mix with the saltwater brought in via tidal surge from the South China Sea. As the rivers were heavily sprayed with Agent Orange the discharge “plume” from the rivers would carry the herbicide for some distance into the harbors, bays and the South China Sea. Thus, the *Gray* court determined that the exclusion of Da Nang Harbor from the "inland waterways" category did not comply with the intent of the underlying statute and regulation. *Gray*, 27 Vet. App. at 324-26. The Veterans Court went on to explain that the intent of the statute and regulation was "providing compensation to veterans based on the likelihood of[their] exposure to herbicides." *Id.* at 322. The VA explained that their decision to exclude bays and harbors was based on its "depth and ease of entry---and not on spraying." *Id.* at 324. This led the *Gray* court to properly hold that the VA policy was "irrational." *Id.* at 323-24 and "arbitrary and capricious because the decision was based on VA's flawed interpretation of [the regulation]." *Id.* at 326. The Secretary did not appeal *Gray* and the decision became final.<sup>2</sup>

On January 29, 2019, this Court, in a 9-2 decision, overruled their prior

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<sup>2</sup> After the case was remanded, the Secretary doubled down on his policy by issuing a change to the M21-1 Manual. *Gray* filed a petition under 38 U.S.C. § 502. This Court dismissed for lack of jurisdiction. *Gray v. Wilkie.*, 875 F.3d 1102, Fed.Cir.(2017). The Supreme Court granted *certiorari* *Gray v. Wilkie.*, 139 S.C. 451 (2018) and judgment vacated as moot 2019 WL 2570620, U.S., June 24, 2019.

decision in *Haas v. Peake* 525F.3d 1168 (Fed. Cir. 2008). *Procopio v. Wilkie*, supra. The *Procopio* court held that Congress spoke directly to the question of whether those who served in the 12 nautical mile territorial sea of the “Republic of Vietnam” are entitled to § 1116’s presumption. This court concluded they are. “[T]he intent of Congress is clear, that is the end of the matter”. *Procopio v. Wilkie*, 913 F.3d at 1380-81. The court stated:

[W]hen the Agent Orange Act was passed in 1991, the "Republic of Vietnam" included both its landmass and its 12 nautical mile territorial sea. The government has pointed to no law to the contrary. This uniform international law was the backdrop against which Congress adopted the Agent Orange Act. By using the formal term "Republic of Vietnam," Congress unambiguously referred, consistent with that backdrop, to both its landmass and its territorial sea. We also note that the statute expressly includes "active military, naval, or air service . . . in the Republic of Vietnam," § 1116(a)(1), reinforcing our conclusion that Congress was expressly extending the presumption to naval personnel who served in the territorial sea. We conclude at *Chevron* step one that the intent of Congress is clear from the text of § 1116.

913 F.3d 1371 (Fed. Cir. 2019).

Subsequently, on June 25, 2019, Congress passed, and President Trump signed, the Blue Water Navy Vietnam Veterans Act of 2019 (H.R. 299) (Pub.L. 116-23), hereinafter referred to as the Act. The Act did not repeal § 1116. Instead it added a completely new section.

The purpose of the Act, as described in § 1116A: *Presumptions of service connection for veterans who served offshore of the Republic of Vietnam*, was

touted as a means to “extend the presumption of exposure for purposes of entitlement to service connection for diseases associated with exposure to herbicide agents, such as Agent Orange to Blue Water Navy (BWN) Vietnam veterans<sup>3</sup>” *House Report number 116-58 from Congressman Takano of the Committee on Veterans’ Affairs on May 10, 2019*. Congressional intent to extend coverage for the BWN veterans, previously decided in *Procopio*, is apparent and unambiguous by noting the geographical coordinates listed in section (d) of the Act, labeled *Determination of offshore*, which does in fact expand the ruling in *Procopio* by approximately 360 square miles of ocean.

Congress authorized Respondent to issue guidance to implement the Act before prescribing new regulations. In addition, Congress authorized Respondent to stay pending claims related to service and diseases covered in the Act “pending at the Veterans Benefits Administration or the Board of Veterans’ Appeals on or after the date of the enactment of this Act and before the date on which the Secretary commences the implementation of such section 1116A”. The Act did not address claims brought under *Procopio* and § 1116.

Based on an erroneous and arbitrary interpretation of the effective date and the scope of his authority, Respondent issued the stay at issue here.

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<sup>3</sup> BWN veterans are defined as veterans who served offshore of the Republic of Vietnam (defined below) between the dates of January 9, 1962, and May 7, 1975.

On July 8, 2019, MVA wrote Respondent requesting the stay be rescinded or clarified. Due to the age of Vietnam veterans, time is certainly of the essence in this matter. According to ranking member of the House Committee on Veterans' Affairs, Phil Roe, M.D. (R-Tenn), "we're losing not just Blue Water, but all Vietnam-era veterans my age. 523 a day are dying". Accordingly, MVA requested the stay be rescinded or clarified so not to apply to claims submitted by veterans within Vietnam's territorial sea and requested a response within fourteen days.

Respondent failed to respond, and this petition followed.

**Based on the Plain Meaning of § 3(g), Respondent Is Not Authorized to Issue a Stay Until the Effective Date of January 1, 2020.**

The plain language authorizing Respondent to issue a stay, coupled with the plain language of the effective date, support the proposition that; Respondent does not have the authority to issue a stay of claims for benefits until the effective date of January 1, 2020.

§ 3(g), titled *Effective date*, plainly states "The amendments made by this section shall take effect on January 1, 2020". Nothing in § 3(c)(3), the amendment authorizing Respondent to issue a stay, allows Respondent to issue a stay prior to the effective date. Rather, § 3(c)(3) authorizes Respondent to stay a claim "until the date on which the Secretary commences the implementation of such section 1116A".



The plain meaning of § 2 (B)(i) reinforces this contention; “An individual described in this subparagraph is a veteran, or a survivor of a veteran, who...submitted a claim for disability compensation on or after September 25, 1985, and before January 1, 2020”. This further signifies Congress’ intent that claims for benefits would continue to be properly adjudicated under Procopio and § 1116 until the effective date of the Act.

In the first paragraph of the stay, Respondent erroneously claimed the Act “authorizes me to stay certain pending claims for benefits that may be affected by that Act until implementation of the statutory amendments Congress directed to go into effect on January 1, 2020”. This interpretation is arbitrary and capricious and is in direct opposition to the plain language of the statutory authority granting the stay.

Veterans have a property interest in their applications for benefits that is protected by the Fifth Amendment's Due Process Clause because their benefits are nondiscretionary and mandated by statute. *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). These claims for benefits are not handouts, rather they were earned through selfless service to their country. In return for that sacrifice their claims for benefits have been repeatedly denied and delayed by the one agency, the Department of Veterans Affairs (VA), that should be focused on assisting and mitigating the damage done by our own government’s actions.

**Even If the Court Decides the Language Authorizing the Stay Prior to the Effective Date is Ambiguous, the Pro-Claimant Canon of Statutory Construction Requires It be Construed in the Most Veteran-Friendly Manner.**

If the court decides there is ambiguity in the language authorizing the stay, the application of the accepted pro-claimant canon of construction should resolve the ambiguity in favor of veterans). *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). The Federal Circuit has also recognized the paternalistic, non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant.” *Id.* at 1316. As recently as last year, Judge O’Malley argued in dissent that there is little logic in deferring to agency regulations “promulgated pursuant to statutory schemes that are to be applied liberally for the very benefit of those regulated.” *Kisor v. Shulkin*, 880 F.3d 1378, 1379 (Fed. Cir. 2018) (O’Malley, J dissenting). *See also, Procopio v. Wilkie*, 913 F.3d 1371, 1382 (Fed. Cir. 2019) (O’Malley, J. Concurring).

An arbitrary decision to stay Blue Water Navy claims is not the most veteran-friendly manner of interpretation. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *Lamb v. Principi*, 284 F.3d 1378 (Fed. Cir. 2002). These are precisely the claims that will be affected by

Respondents untimely and unlawful decision to stay. This is especially true in the case of Petitioner Procopio whose claim for benefits, previously granted by this Court, are now stayed.

These veterans are dying at a high rate every single day. Veteran Harper will probably not survive the stay. These veterans deserve the peace of mind and sense of closure that accompanies a granted claim for earned benefits.

Blue Water Navy veterans represent a generation who were involuntarily drafted into an unpopular conflict, then returned home to an ungrateful nation., Some of these veterans endured physical assaults upon their return, simply for answering their nations call.

Review of Respondents interpretation of the Act must take place via this unique pro-claimant, pro-veteran canon of construction.

**The Act Does Not and Can Not Govern Implementation of *Procopio v. Wilkie*. §1116A, By Its Very Language, is a “New Section” and Does Not Replace §1116.**

The ruling in *Procopio* addresses claims for benefits brought under 38 U.S.C. § 1116 and for service in the Republic of Vietnam to include the territorial sea. By its very language, the Act does not repeal § 1116. § 2(a) of the Act states “In general.—Chapter 11 of title 38, United States Code, is amended by inserting after section 1116 the following new section”. Respondents untimely and unlawful stay does not differentiate between the §1116 and §1116A. Without clarification it

is highly likely that the Veterans Benefits Administration and the Board of Veterans' Appeals will interpret the stay as precluding all claims related to agent orange exposure, including those authorized by *Procopio*.

The Act added a new provision that addresses claims by veterans who served "offshore". Congress could have used the term "territorial sea" in their legislation or could have repealed § 1116. They chose not to do so. Instead they created another dubious area known as "offshore." Therefore, the stay provisions of the legislation, even if ripe prior to the effective date, are not applicable to claims brought under § 1116 that are based on service in the territorial sea as defined by *Procopio*.

The VA must abide by the ruling in *Procopio* and not delay claims brought under § 1116. This is confirmed by representations made to the Supreme Court by the Solicitor General in their June 4, 2019 Motion to Dismiss in the case of *Gray v. Wilkie*, 17-1679. In that pleading the Solicitor General declared: "[T]he Department of Veterans Affairs (VA) will follow *Procopio's* interpretation of the [Agent Orange] Act going forward".

Notably the Secretary petitioned the *Procopio* Court for a stay of mandate. After due consideration that Motion was denied. Now the Secretary has taken it upon himself to usurp the authority of this Court by imposing an illicit and unsanctioned stay of proceedings. The judicial system is a separate and equal

branch of government and the Secretary does not possess the ability to flaunt duly authorized orders of this or any other Court.

If there is any basis for a stay of proceedings, none exists to claims, brought under *Procopio* and § 1116. *Procopio* claims must be exempted by Respondent to ensure Blue Water Navy veterans receive the benefits they have earned.

### CONCLUSION

For the reasons delineated herein, the Court should vacate the stay as untimely until the effective date of January 1, 2020. In the alternative the Court should vacate the stay as applied to claims for benefits brought under § 1116 and *Procopio*. Petitioner also requests the Court to award reasonable attorney's fees and costs associated with this action pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d).

Respectfully Submitted,

//s// John B. Wells  
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**Certificate of Service**

I hereby certify that two copies of the foregoing Petition for Review were mailed, first-class postage prepaid, addressed to Robert L. Wilkie, Secretary of Veterans Affairs Department of Veterans Affairs 810 Vermont Avenue, NW Washington, DC 20420 this 22nd day of July 2019.

//s// John B. Wells  
John B. Wells

**CERTIFICATE OF COMPLIANCE**

The pleading contains 3116 words by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Microsoft Word with 14-point proportionally spaced face.

s/ John B. Wells  
John B. Wells

## Addendum

Secretary's stay order

**Department of  
Veterans Affairs**

**Memorandum**

Date: JUL 01 2019  
From: Secretary (00)  
Subj: Stay of Pending Claims under the Blue Water Navy Vietnam Veterans Act of 2019 (H.R. 299)  
To: Under Secretary for Benefits (20)  
Chairman, Board of Veterans' Appeals (01)

1. The Blue Water Navy Vietnam Veterans Act of 2019 (BWNVV) authorizes me to stay certain pending claims for benefits that may be affected by that Act until implementation of the statutory amendments Congress directed to go into effect on January 1, 2020. I exercise that authority.
2. The Veterans Benefits Administration (VBA) and Board of Veterans' Appeals (Board) are ordered to stay decisions regarding claims for disability compensation that are based on service in the offshore waters of the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and which claim disability resulting from at least one of the diseases listed in 38 C.F.R. § 3.309(e). See BWNVV at § 2(c)(3).
3. VBA and the Board are ordered to stay decisions regarding claims for disability compensation that are based on service in or near the Korean Demilitarized Zone, during the period beginning on September 1, 1967, and ending on August 31, 1971, and which claim disability resulting from at least one of the diseases listed in 38 C.F.R. § 3.309(e). See BWNVV at § 3(c)(3).
4. For purposes of this memorandum, the term "claims for disability compensation" shall include claims by the survivors of Veterans for benefits under chapter 13 of title 38, United States Code, that relate to the service and diseases identified in paragraphs 2 and 3.
5. VBA and the Board are ordered to stay decisions regarding claims for benefits for spina bifida from children of Veterans who were allegedly exposed to herbicides while serving in Thailand, during the period beginning on January 9, 1962, and ending on May 7, 1975. See BWNVV at § 4(d)(3).
6. The stays shall remain in effect until January 1, 2020. This memorandum shall not preclude VA from complying with an order of the Board issued before the date of this memorandum, directing a grant of benefits to a person whose claim otherwise is subject to stay under this memorandum, or with the order of any court.



Robert L. Wilkie