

Date: August 12, 1993

O.G.C. Precedent 7-93

From: General Counsel (022)

Subject: "Service in Vietnam" Under 38 C.F.R. § 3.313

To: Chairman, Board of Veterans' Appeals (01)

QUESTION PRESENTED:

Does "service in Vietnam," as referred to in 38 C.F.R. § 3.313, include service of a Vietnam era veteran who flew military missions in Vietnamese airspace, but who never actually landed in Vietnam?

COMMENTS:

1. This question arises in the case of a Vietnam era veteran who performed military service as a B-52 navigator stationed in Guam and Thailand. The veteran flew military missions over the Republic of Vietnam and the People's Republic of Vietnam, but never actually landed in either country. He contends that he is entitled to the presumption of service connection under 38 C.F.R. § 3.313 for nodular lymphocytic lymphoma on the basis of "service in Vietnam," as that term is used in 38 C.F.R. § 3.313.

2. Section 3.313(b) of title 38, Code of Federal Regulations, provides for the establishment of service connection for non-Hodgkin's lymphoma (NHL) based on "service in Vietnam" during the Vietnam era. Section 3.313(a) provides in pertinent part that, "[s]ervice in Vietnam includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam." (Emphasis in original.) The question raised in your request for opinion requires an interpretation of whether the term "duty or visitation in Vietnam," as it is used in section 3.313(a), includes the type of military missions performed by the subject veteran.

3. The language of 38 C.F.R. § 3.313(a) is somewhat ambiguous as to whether military missions flown in Vietnamese airspace are included in the term "duty or visitation in Vietnam" for purposes of determining whether such service is "service in Vietnam." "Duty" may be defined as "service under orders." Webster's Third New International Dictionary 705 (Philip B. Grove ed., 1981). A question then arises whether a person who performed duty in Vietnamese airspace may be considered to have been "in Vietnam" for purposes of the regulation. To clarify that ambiguity, it is appropriate to review the regulatory history of the provision. See

2A Norman J. Singer, Sutherland Statutory Construction §§ 48.01, 48.02 (5th ed. 1992) (use of extrinsic aids in construction; relevance of the history of a law); 1A Norman J. Singer, Sutherland Statutory Construction § 31.06 (4th ed. 1985) (Rules of interpretation applicable to statutes should be used in determining the meaning of a regulation which is legislative in character.). In our opinion, the phrase "service in Vietnam" should not be interpreted to include the service of the subject veteran.

4. In 1990, VA promulgated 38 C.F.R. § 3.313 to implement a determination by the Secretary of Veterans Affairs (Secretary) that there is a relationship between Vietnam service and non-Hodgkin's lymphoma (NHL). The preamble to the Federal Register notice proposing issuance of 38 C.F.R. § 3.313 indicated that the Secretary's decision was based on a study released on March 29, 1990, entitled "The Association of Selected Cancers with Service in the U.S. Military in Vietnam" [hereinafter Selected Cancers Study] by the Centers for Disease Control (CDC). 55 Fed. Reg. 25,339 (1990). The Selected Cancers Study was a case-control study, begun in 1983, "to examine the association between several rare cancers, Agent Orange exposure, and military service in Vietnam." Selected Cancers Study, Part I at 2. The Selected Cancers Study was conducted because of concern "about the health of Americans who were stationed in Vietnam." Id. (emphasis added). In Part I of the Selected Cancers Study, the CDC stated in part:

Results of this study strongly suggest that Vietnam veterans have a roughly 50% increased risk of developing NHL about 15-25 years after military service in Vietnam . . . . The results do not show a similar increased risk among veterans who served in other locations during the Vietnam era; this finding suggests that the association is specific to Vietnam service, rather than military service in general.

Id. at 16.

5. The Selected Cancers Study focused on veterans who were "stationed in Vietnam." That phrase was defined as including those veterans who were "'stationed in Vietnam or off the coast of Vietnam'." Selected Cancers Study at 7. For purposes of the study, veterans who reported that they served in Vietnam were categorized by military regions in which they served or by naval assignments, i.e., "Blue Water" (ocean-going vessels), "Brown Water" (smaller vessels patrolling near shore or along rivers), and "on Shore". Id. at 8. The "exposed group" of veterans for purposes of most study analyses was comprised of veterans identified as having been "stationed in Vietnam." Id. at 7. Veterans who reported that they served in or off the coast of Vietnam, but were not actually stationed in Vietnam, were only included in the analyses that tested the sensitivity of the Selected Cancers Study results to the study's definition of exposure (sensitivity analyses). Id. at 7, 8, 10. Consequently, the Selected Cancers Study results were based on analysis of veterans who were present on the ground or in the waters in Vietnam or in the waters off the shore of Vietnam. Veterans whose only service

with respect to Vietnam was in aircraft which flew in Vietnamese airspace were not included.

6. The preamble proposing issuance of 38 C.F.R. § 3.313 emphasized the Selected Cancers Study finding that, "Vietnam veterans have a roughly 50 percent increased risk of developing NHL after service in Vietnam. A similar increased risk was not shown among veterans who served in other locations during the Vietnam Era." 55 Fed. Reg. at 25,339. The preamble to the final regulation specifically stated that the Secretary's decision to issue the regulation was based on the Selected Cancers Study. 55 Fed. Reg. 43,123, 43,124 (1990). Neither the preamble to the final-rule notice, nor the preamble to the proposed regulation, provided further insight to the meaning of "service in Vietnam," although the preamble to the final regulation did state that the Secretary, in making his decision, and the Selected Cancers Study, both noted an increased risk of NHL "based on service in Vietnam during the Vietnam era rather than exposure to herbicides containing dioxin." 55 Fed. Reg. at 14,124. In any event, it is clear that section 3.313 was intended to provide compensation to veterans suffering from NHL who were shown by the Selected Cancers Study to have been placed at risk of contracting that disease through Vietnam service.

7. Section 3.313(a) specifically provides that the phrase "service in Vietnam" includes, "service in the waters off-shore, or service in other locations if the conditions of service involved duty or visitation in Vietnam." The group of Vietnam era veterans covered under 38 C.F.R. § 3.313 is thus somewhat broader than the "exposed group" analyzed in the Selected Cancers Study, since it includes veterans who served in Vietnam or in the waters off the shore of Vietnam, but who were not actually stationed there. In our view, it is reasonable to assume that inclusion within the scope of the regulation of such veterans was intended to assure that all veterans who may have shared the same experience as those included in the Selected Cancers Study group would be compensated if they subsequently developed NHL. Clearly, those veterans whose only contact with Vietnam was through high-altitude flights through Vietnamese airspace did not share the same experiences as those shown to be at increased risk in the Selected Cancers Study.

8. We believe that, in light of the above regulatory history of section 3.313, military missions flown in Vietnamese airspace should not be considered to be included in the term, "duty or visitation in Vietnam" for purposes of section 3.313. Consequently, service of a Vietnam era veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace should not be considered to be included in the phrase "service in Vietnam" as used in section 3.313.

HELD:

For purposes of 38 C.F.R. § 3.313, which authorizes service connection of non-Hodgkin's lymphoma developing after military service in a veteran with service in Vietnam during the Vietnam era, the term "service in Vietnam" does not include service of a Vietnam era veteran

whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace.

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