

# The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

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BY ELECTRONIC MAIL

Wesley T. Carter, Major, USAF Retired  
Chair  
The C-123 Veterans Association  
2349 Nut Tree Lane  
McMinnville, Oregon 97128

John Rowan  
National President  
Vietnam Veterans of America  
8179 Colesville Road, Suite 100  
Silver Spring, MD 20910

Re: Active military service of C-123 reservists

Dear Maj. Carter and Mr. Rowan,

On behalf of the C-123 Veterans' Association and Vietnam Veterans of America (VVA), you have asked us to consider whether Air Force Reserve personnel who were exposed to toxic herbicides on contaminated C-123 planes suffered an injury sufficient to make them legally eligible for service-connected VA benefits.

We conclude that a reservist who was exposed to herbicides aboard contaminated C-123s is a "veteran" for VA purposes. Because exposure to Agent Orange constitutes an "injury," these reservists qualify as having active military service under 38 U.S.C. § 101(24). This conclusion is confirmed by judicial precedent and by the VA's own interpretation of the relevant statute in a binding precedential memorandum from the VA Office of General Counsel, which holds that harmful "exposure to a foreign substance" constitutes an injury under §101(24). Any suggestion that a C-123 reservist exposed to Agent Orange is ineligible for VA benefits or must await congressional action is incorrect and contrary to the statutory text, judicial precedent, and longstanding agency interpretation.

## Background

It is well established that approximately 1,500 - 2,100 Air Force Reserve personnel were exposed to herbicides on C-123 aircraft that had been deployed in Vietnam as part of Operation Ranch Hand and were then redeployed on Air Force bases in the U.S. and Panama.<sup>1</sup> After VA requested that the Institute of Medicine (IOM) evaluate the health effects of this exposure, IOM concluded "with confidence" that these reservists experienced an increased risk of adverse health consequences.<sup>2</sup> IOM found that that the reservists working in these C-123s had bodily contact with the chemical components of Agent Orange.<sup>3</sup>

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<sup>1</sup> INST. OF MEDICINE, POST-VIETNAM DIOXIN EXPOSURE IN AGENT ORANGE-CONTAMINATED C-123 AIRCRAFT 1(2015) ("IOM Report").

<sup>2</sup> *Id.* at 8.

<sup>3</sup> *Id.* at 63.

and stated that they were exposed to these toxic chemicals through “multiple routes”<sup>4</sup> including absorption through the skin, inhalation, and accidental ingestion.<sup>5</sup> The report noted that toxic contaminants in these planes exceeded the levels deemed safe under established health guidelines.<sup>6</sup>

## Legal Analysis

There is a robust legal infrastructure for compensating military personnel who have been exposed to Agent Orange and incurred a disease or disability as a result. The 1991 Agent Orange Act establishes a presumption that any veteran who served in the Vietnam War was exposed to Agent Orange.<sup>7</sup> The Act also details a list of Agent Orange-connected diseases, and specifies that any veteran with one of these diseases who was exposed to Agent Orange will presumptively qualify for service connection, a disability rating, and medical care.<sup>8</sup> Since the Agent Orange Act was passed, VA has promulgated regulations extending this presumption of service connection to veterans who were exposed to Agent Orange outside of Vietnam;<sup>9</sup> it has also expanded the list of covered diseases presumed to be connected to Agent Orange exposure.<sup>10</sup>

The VA’s ability to compensate these reservists under 38 U.S.C. § 1110 depends on whether the reservist qualifies as a “veteran.”<sup>11</sup> Under the VA’s authorizing statute, a veteran is defined as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”<sup>12</sup> The term “active military, naval, or air service” is further defined in 38 U.S.C. §101(24) to include the following:

- (A) active duty
- (B) any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty; and
- (C) any period of inactive duty training during which the individual concerned was disabled or died—
  - i. from an injury incurred or aggravated in line of duty; or
  - ii. from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training.<sup>13</sup>

Some reservists who were exposed to contaminated planes may qualify under § 101(24)(A) due to other military service—for instance, active duty service in the Republic of Vietnam or in Operation Desert Shield/Storm. Some or many of the reservists who flew on contaminated C-123s, though, may

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<sup>4</sup> *Id.* at 53.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 63.

<sup>7</sup> See Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 (1991)(codified as amended at 38 U.S.C. § 1116).

<sup>8</sup> *Id.*

<sup>9</sup> See 66 Fed. Reg. 23166 (May 8, 2001) (“if a veteran who *did not serve* in the Republic of Vietnam, but was exposed to an herbicide agent defined in 38 C.F.R. § 3.307(a)(6) during active military service, has a disease on the list of diseases subject to presumptive service connection, VA will presume that the disease is due to the exposure to herbicides.”) (emphasis added); see also 38 C.F.R. § 3.309(e).

<sup>10</sup> *Id.* § 3.309.

<sup>11</sup> See 38 U.S.C. § 1110 (describing compensation available to veterans).

<sup>12</sup> *Id.* § 101(2).

<sup>13</sup> *Id.* § 101(24).

not have periods of active duty service. The question then becomes whether these reservists qualify as veterans under §101(24)(B) or (C).

Reservists who were exposed to herbicide on contaminated C-123 planes qualify as veterans because their exposure to herbicides is an injury incurred in the line of duty which qualifies as active service under §101(24)(B) and (C). This understanding of the term “injury” is consistent with VA’s own opinion as articulated by the VA Office of General Counsel (OGC). In 2002, the OGC issued a precedential legal memorandum interpreting the term “injury” in § 101(24) to “include . . . exposure to a foreign substance.”<sup>14</sup> The OGC found that disability suffered as a result of complications from anthrax vaccinations administered during periods of inactive duty training constitutes an “injury” under § 101(24).<sup>15</sup> The OGC explained that the term injury in the statute “includes serious adverse effects on body tissue or systems resulting from the introduction of a foreign substance.”<sup>16</sup>

The OGC’s interpretation of §101(24) has been recognized by both the U.S. Court of Appeals for Veterans Claims (CAVC) and the Board of Veterans’ Appeals (BVA). The CAVC has explained that the OGC’s “precedential opinion” defines injury under §101(24) “to include exposure to a foreign substance.” *See Shold v. Shinseki*, No. 11-3610, 2013 WL 541297, at \*1 (Vet. App. Feb. 14, 2013). The BVA has also adopted the OGC’s interpretation in a number of opinions,<sup>17</sup> including in cases extending beyond the vaccine context. *See, e.g., (Title Redacted by Agency)*, Bd. Vet. App. 1413195 (Mar. 28, 2014) (applying the OGC’s interpretation of § 101(24) in case involving hearing loss); *(Title Redacted by Agency)*, Bd. Vet. App. 0304876 (Mar. 14, 2003) (applying the OGC’s interpretation in case involving PTSD). It has been more than a decade since the OGC’s memo was issued, and the OGC has not retracted it or otherwise suggested that there is anything problematic with its precedential, binding interpretation of § 101(24).

The VA’s understanding of § 101(24) firmly establishes that reservists who were exposed to toxic herbicides on board C-123s qualify as having active military service. As the OGC has written, a period of training resulting in “exposure to a foreign substance” that entails “serious adverse effects on body tissue or systems” is sufficient under the law. The IOM report confirms that these C-123 reservists “were exposed” to toxic herbicides, whose negative effects on the human body are acknowledged by the long list of herbicide-connected diseases in statute and VA regulations.<sup>18</sup> These reservists ate in contaminated areas, resulting in inadvertent ingestion of these chemicals;<sup>19</sup> the herbicides in the C-123s were “well-absorbed” through the skin;<sup>20</sup> and inhaling vapor exposed the crews to herbicides through their lungs.<sup>21</sup> As the OGC has stated, where “an individual suffers from a disabling condition as a result of [such exposure] during inactive duty training, the individual may be considered disabled by an ‘injury’ incurred during such training as the term is used in 38 U.S.C. § 101(24).”<sup>22</sup> Thus all reservists disabled as a result of their exposure to toxic herbicides during periods of inactive duty training *or* active

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<sup>14</sup> DEPARTMENT OF VETERANS AFFAIRS, VAOPGPCREC 4-2002, MEANING OF “INJURY” FOR PURPOSES OF ACTIVE SERVICE – 38 U.S.C. § 101(24) ¶9 (2002) (“OGC Memo”).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g., (Title Redacted by Agency)*, Bd. Vet. App. 1111676 (Mar. 23, 2011); *(Title Redacted by Agency)*, Bd. Vet. App. 0304876 (Mar. 14, 2003); *(Title Redacted by Agency)*, Bd. Vet. App. 1043613 (Nov. 19, 2010).

<sup>18</sup> *See, e.g., Agent Orange Act of 1991*, Pub. L. No. 102-4, 105 Stat. 11 (1991); 38 C.F.R. § 3.309.

<sup>19</sup> IOM Report at 5.

<sup>20</sup> *Id.* at 44.

<sup>21</sup> *Id.* at 50.

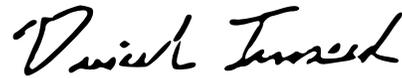
<sup>22</sup> OGC Memo at 4.

duty for training have suffered an injury which makes them eligible “for purposes of disability compensation under 38 U.S.C. § 1110.”<sup>23</sup>

### **Conclusion**

Reservists who were exposed to herbicides aboard contaminated C-123s are immediately eligible for service-connected disability compensation. Because these reservists were injured during their training, they qualify as having active military service under 38 U.S.C. § 101(24). This conclusion is confirmed by opinions of the CAVC and BVA and by the VA General Counsel’s own precedential opinion. Any suggestion that the eligibility of these reservists for disability compensation depends on future legislative amendment by Congress is incorrect.

Sincerely,



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Sarahi Uribe, Law Student Intern

Encl.

DEPARTMENT OF VETERANS AFFAIRS, VAOPGCPREC 4-2002, MEANING OF “INJURY” FOR PURPOSES OF ACTIVE SERVICE – 38 U.S.C. § 101(24) ¶9 (2002)

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<sup>23</sup> Id.