

# The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

## Memorandum

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To: Travis Murphy, Adrian Snead, Brooks Tucker, Adam Reece, Anna Gokaldas

Re: Application of 38 USC § 101(24) to C-123 reservists and crews

### **QUESTION PRESENTED:**

Whether former reservists who have no active duty service but were injured via herbicide exposure from C-123 aircraft during inactive duty training qualify for “veteran” status under 38 USC § 101(24) even if the resultant disability was diagnosed or manifested after service.

### **BACKGROUND:**

It is well established that approximately 1,500-2,100 Air Force Reserve personnel were exposed to herbicide 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> 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>

These former reservists are elderly, many very ill, and near death. One such reservist is Richard Matte, a seventy-one-year-old former C-123 reservist with twenty-nine years of service in the

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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.

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

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

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

Army National Guard, Coast Guard, and Air Force Reserve. Mr. Matte was stationed at Westover AFB as a reservist for many years while employed at the Enfield Police Department in Enfield, CT. Like many others at Westover, Mr. Matte was exposed to Agent Orange residues regularly in C-123 aircraft, which he maintained and flew between three and eight times per month for seven years.

Decades later, Mr. Matte's exposure to Agent Orange has left him with a long list of debilitating illnesses. Last year, Mr. Matte suffered from two heart attacks; his illnesses have required the recent amputation of his left leg and part of his right foot. He has also suffered from lung cancer and bladder cancer, diabetes and nerve pain, and received a heart transplant. *See Bryan Bender, Plagued by diseases, aging fliers find VA unwilling to help, THE BOSTON GLOBE, at A1 (June 29, 2014)* (detailing Mr. Matte's disabilities). Our clinic took on Mr. Matte's long-pending case in fall 2014, conducted a Decision Review Officer hearing in November, and secured a favorable decision in January 2015. Mr. Matte was fortunate that he had other qualifying active-duty service that established his "veteran" status, but his acute medical conditions are illustrative of the urgent needs and dire prognoses faced by C-123 reservists.

VA delay in recognizing the "veteran" status of C-123 reservists suffering from herbicide-connected disabilities leaves hundreds of veterans like Mr. Matte to cope with aggressive cancers, amputations, and other severe medical conditions without the VA care and assistance their service has earned. It also leaves these former service-members anxious about the welfare of their spouses and dependents who will survive them. But VA has taken the stance that these reservists do not qualify as having had active military service under 38 U.S.C. § 101(24). VA's apparent legal position is contrary to the statutory text and a departure from previous binding VA interpretations issued by the Office of General Counsel and recognized by the BVA and CAVC.

### **LEGAL ANALYSIS:**

#### *VA Office of General Counsel 08-2001 Memorandum*

A reservist injured during inactive duty training need not have the resultant disability manifest or be diagnosed while still in the service. In 2001, the VA Office of General Counsel (OGC) issued a precedential legal memorandum consistent with this analysis, an opinion that the VA OGC confirmed yesterday has not been withdrawn and remains binding on the agency. In that legal opinion the OGC considered whether a Naval Reservist who was sexually assaulted during inactive duty training but whose PTSD manifested only after being discharged "may be considered to have been *disabled* by an injury in determining whether the member had active service for purposes of 38 U.S.C. § 101(24)."⁷ (emphasis added) This reservist had no active duty training or service.

The VA OGC examined whether PTSD from a traumatic event in service that does not manifest until after service and concluded, unambiguously, that the reservist nonetheless qualified for "veteran" status under 38 U.S.C. § 101(24): "The service member may not show signs of a

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<sup>7</sup> DEPARTMENT OF VETERANS AFFAIRS, VAOPGCPREC 08-2001, MEANING OF "INJURY" FOR PURPOSES OF ACTIVE SERVICE—38 U.S.C. § 101 ¶1 (24).

psychiatric disorder during service, although the disorder was the result of service experiences. Stated another way, a claimant may be injured during service but the resulting disability may not be apparent until some time after service.”<sup>8</sup> The circumstances of C-123 reservists who were “injured during service” but whose “resulting disability . . . [was] not apparent until some time after service” are identical to the reservist who was sexually assaulted but whose PTSD did not manifest until after service.<sup>9</sup>

An interpretation of 38 U.S.C. § 101(24) that requires that both the injury and the resultant disability manifest during inactive duty training are contradictory to the VA OGC 2001 memorandum. This line of reasoning would negate the holding of the opinion. In essence, this narrow interpretation of 38 U.S.C. § 101(24) would mean that a reservist who is raped during inactive duty training is not eligible for benefits if the claimant’s PTSD does not manifest until after the conclusion of reserve service.

#### *Statutory Interpretation*

The OGC’s 08-2001 and 04-2002 opinions were precedential and binding. When VA changes its interpretation of a statute, its new view is “entitled to considerably less deference than a consistently held agency view.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987) (internal quotation marks omitted). The Federal Circuit has rejected OGC positions that conflict with prior OGC precedent. See, e.g., *Osman v. Peake*, 22 Vet. App. 252, 259 (2008). But even if VA persists in defending this new viewpoint, the very fact of disagreement between OGC now and OGC in 2001 and 2002 suggests that the statutory provisions involved are ambiguous. A basic rule of interpretation is that “a statute is ambiguous if it can be read in more than one way.” *Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 131 (D.C. Cir. 2000). The 2001 and 2002 OGC memos are “formal expression[s] of the VA’s position,” *O'Bryan v. McDonald*, 771 F.3d 1376, 1379 n.1 (Fed. Cir. 2014), and demonstrate that a reasonable interpretation of § 101(24) is one that would allow reservists who are injured by herbicides during training to qualify as having active military service.

This very ambiguity means that VA must select the interpretation that benefits the reservists. Where statutes are ambiguous, VA has a long-standing obligation to construe them “for the benefit of those who left private life to serve their country.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991). As courts have repeatedly acknowledged, Congress has directed that VA act in the best interests of claimants whenever possible. See, e.g., 38 U.S.C. § 5107(b) (directing that “the Secretary shall give the benefit of the doubt to the claimant” when reviewing claims); 38 U.S.C. § 5108 (requiring the Secretary to reopen disallowed claims when new evidence surfaces); 38 U.S.C. § 5103A (outlining Secretary’s duty to assist claimant in obtaining evidence for a claim);

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<sup>8</sup> *Id.* at ¶ 9.

<sup>9</sup> On April 15, 2015, members of the VA OGC expressed the opinion to authors of this memo that its 2001 precedential opinion was incorrectly decided and that the language quote above was only *dicta*. VA is not free to disregard a precedential OGC opinion, however, and the entire 2001 opinion would be surplusage if, as current VA OGC officials appear to believe, the disability must be manifest and diagnosable during service.

*see also* *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *United States v. Oregon*, 366 U.S. 643, 647 (1961) (recognizing that “[t]he solicitude of Congress for veterans is long standing”); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (“This court and the Supreme Court both have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant.”); *Trilles v. West*, 13 Vet. App. 314, 325-26 (2000) (discussing “the pro-claimant environment created by the general VA statutory scheme”). If OGC has recognized two possible interpretations, it is legally required to apply settled canons of construction and honor congressional intent by interpreting the statute liberally in these reservists’ favor.

Moreover, there is a second textual ambiguity in 38 U.S.C. § 101(24) that also compels an interpretation, consistent with legislative intent, in favor of recognizing veteran status. The disputed provision begins “The term ‘active military, naval, or air service’ *includes* –” *Id.* (emphasis added). In some statutory contexts, the word “includes” means “these and not others.” More often, however, “the word ‘includes’ is usually a term of enlargement, and not of limitation” Singer & Singer, *Sunderland Statutory Construction* § 47.7, p. 305 (7th ed.2007) (some internal quotation marks omitted). The Supreme Court has similarly recognized that in a statute, the word “includes” may be exhaustive, or it may mean “including but not limited to.” *See, e.g. Samantar v. Yousuf*, 560 U.S. 305, 316 (2010) (“use of the word ‘include’ [in a statute] can signal that the list that follows is meant to be illustrative rather than exhaustive”).

In short, the conflicting VA OGC interpretations and the ambiguity of the text of § 101(24) require the VA to construe the text in favor of veteran coverage for reservists whose disability caused by an injury in training manifests only after the completion of service. *Brown v. Gardner*, 513 U.S. at 118.

#### *VA Secretary’s Broad Regulatory Power*

The Secretary derives his authority from 38 U.S.C. § 501 which reads in relevant part: “The Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws.”<sup>10</sup> Congress has thus conferred on the Secretary expansive power to implement legislative intent in interpreting the statutory language of the provisions of Title 38. The VA invoked the broad Secretarial authority of § 501 in promulgating the regulation governing the binding nature of precedential legal opinions issued by the OGC:

A [General Counsel legal] opinion designated as a precedent opinion is binding on Department officials and employees in subsequent matters involving a legal issue decided in the precedent opinion, unless there has been a material change in a controlling statute or regulation or the opinion has been overruled or modified by a subsequent precedent opinion or judicial decision.<sup>11</sup>

The section of the promulgated regulation covering precedential opinions does not draw on any

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<sup>10</sup> 38 U.S.C. § 501(a) (2011).

<sup>11</sup> 38 C.F.R. § 14.507(b) (1996)

prescriptive textual provisions of Title 38, but rather is a construction emerging solely from the Secretary's regulatory authority under § 501. By extension, any precedential opinion issuing from the VA's OGC is a direct manifestation of the Secretary's interpretive authority granted by 38 U.S.C. § 501, and is immediately binding on all VA personnel "unless there has been a material change in a controlling statute or regulation or the opinion has been overruled or modified by a subsequent precedent opinion or judicial decision." 38 C.F.R. § 15.507(b). Neither of the OGC's 08-2001 and 04-2002 opinions have been rescinded.

**CONCLUSION:**

The Secretary has the authority under statute and binding legal opinion from its General Counsel to grant disability compensation immediately to reservists who were injured via herbicide exposure on C-123 aircraft but whose disabilities manifested or were diagnosed after service. This statutory construction was reasonable when recognized in the 2001 and 2002 VA OGC opinions, and remains reasonable today. It is also compelled by the obligation of VA, repeatedly recognized by the courts, to resolve any statutory ambiguity in favor of former service-members.

Encl.

DEPARTMENT OF VETERANS AFFAIRS, VAOPGCPREC 08-2001, MEANING OF "INJURY" FOR PURPOSES OF ACTIVE SERVICE—38 U.S.C. § 101(24) (2001)