STATEMENT
OF
THE AMERICAN LEGION
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
ON
"TOXIC EXPOSURE: EXAMINING THE PRESUMPTIVE DISABILITY DECISION-MAKING PROCESS."

SEPTEMBER 25, 2019

Chairman Isakson, Ranking Member Tester, and distinguished members of the committee; On behalf of National Commander James W. "Bill" Oxford, and the nearly 2 million members of The American Legion, thank you for inviting The American Legion to submit the following testimony on "Toxic Exposure and Examining the Presumptive Disability Decision-Making Process."

The American Legion has long been at the forefront of advocacy for veterans who have been exposed to environmental hazards such as Agent Orange, Gulf War-related hazards, ionizing radiation, the various chemicals and agents used during Project Shipboard Hazard and Defense (SHAD), and contaminated groundwater at Camp Lejeune. The American Legion continues to urge the study of all environmental hazards and their long-term effects they have on our servicemembers, veterans, and their families.

The effects of the often dangerous environments in which servicemembers operate is a top concern of The American Legion, as thousands of veterans who are or have been exposed to various toxins are often left behind when it comes to vital treatments and benefits. The American Legion remains committed to ensuring that all veterans who served in areas of exposure receive recognition and treatment for conditions linked to environmental exposures.

To this end, The American Legion has been meeting with the newly formed veteran and military toxic exposure working group called the Toxic Exposure in the American Military (TEAM) coalition, which includes 15+ Veteran Service Organizations (VSO) and Military Service Organizations (MSO) all addressing toxic exposure issues. Currently, the members of TEAM include, Wounded Warrior Project, BurnPit360, Cease Fire Campaign, Hunter Seven, Iraq and Afghanistan Veterans of America, Military Officers Association of America, Tragedy Assistance Program for Survivors, Veteran Warriors, Vietnam Veterans of America, Enlisted Association of the National Guard of the United States, California Communities Against Toxics, National Veterans Legal Services Program, Vets First, and the Dixon Center.

Our advocacy also includes the filing of an October 15, 2018 amicus brief in the case of *Procopio v. Wilkie*. On January 29, 2019, the U.S. Court of Appeals for the Federal Circuit handed a major victory for Blue Water Navy veterans in their long fight for Department of

Veterans Affairs (VA) benefits to treat illnesses linked to exposure to Agent Orange during the Vietnam War.[1]

Procopio presented two issues for the full Federal Circuit to consider:

1. Does the definition of "Vietnam" in 38 U.S.C. § 1116 include the territorial waters? (i.e. --- Should blue-water Navy veterans be presumed to have been exposed to Agent Orange and awarded benefits for conditions presumptively related to exposure?)

2. What is the interaction between the *Chevron* canon that courts defer to agencies in interpreting statutes and the *Gardner* canon that veterans benefits statutes are to be liberally construed in favor of veterans? (i.e. --- When a veterans benefits statute is unclear, do the courts generally have to accept VA's interpretation of what it says?)

The *Procopio* decision rested on the plain meaning of Congress's words in the 1991 Agent Orange Act, specifically "the Republic of Vietnam." According to international law, "the Republic of Vietnam" includes the territorial waters within twelve nautical miles of the coast. This reasoning convinced most of the judges; however, our brief alternatively argued that the pro-claimant canon would result in granting the presumption of service connection.

Because the court resolved the case without addressing our alternative argument, this testimony will rehearse some of the argument and considerations in our amicus brief on the second issue, which has bearing on the topic being considered by the committee in this hearing. The American Legion encourages Congress to review the amicus brief recognizing that court decisions commonly interpret congressional language.[2]

Summary of Amicus Brief Argument

In our brief, The American Legion joined Navy veteran Alfred Procopio Jr. in urging the Court to reverse the judgment of the lower court. It supported his argument that the intent of Congress is clear in this matter. However, it believes that the simple application of the principle of veteran-friendly interpretation of step one of the traditional analysis from *Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842 (1984),* misstates the long-established relationship between Congress and the VA on veterans issues and downplays the interpretive principle that the Supreme Court reaffirmed after *Chevron* in cases such as *King v. St. Vincent's Hospital, 502 U.S. 215 (1991),* and *Brown v. Gardner, 513 U.S. 115 (1994).*

The American Legion agreed that the application of proper deference resolves any lingering doubt as to the interpretive issue here. However, this particular application of the *Gardner* principle to a question of the scope of substantive entitlement serves an important role in counterbalancing the null hypothesis of science that typically works against veterans whose disabilities are related to service in hidden and complex ways. These are often difficult to understand on the timescales that flesh-and-blood veterans experience the employment impairment and mortality that the system was intended to compensate.

[1] Procopio v. Wilkie, 913 F.3d 1371, 1387 (Fed. Cir. 2019)
[2] http://www.vetlawyers.com/wp-content/uploads/2019/09/Procopio_Legion_Amicus_Brief_2018-10-15-1.pdf

Belatedly awarding benefits to Americans who served in Vietnam is small consolation to those who have lived a lifetime without proper compensation. The practical application of resolving interpretive doubt in favor of veterans often means erring on the side of supporting disabled veterans in need while their lives can still be changed, instead of waiting for a scientific consensus that might arrive—if ever—only after those who have borne the battle are no longer around to be cared for.

The Null Hypothesis of Science

One of the hallmarks of modern veteran disabilities is that invisible injuries can occur unnoticed, and often take years or decades to manifest as observable conditions. The general problem of caring for those harmed by exposures is a perpetual issue that will require constant attention due to the lack of knowledge about the conditions at the time of exposure. Despite advances in medicine and the ability to leverage big data, answers to complex issues of causation are still difficult to generate.

The null hypothesis in science often creates a gap in which veterans go uncompensated for decades while evidence is developed to prove an association between their conditions and harmful exposures in service. The most difficult foe for veterans is not uncaring government bureaucrats but the remorseless law of science known as the null hypothesis. This is the baseline assumption that two observed facts have no relationship to each other until a proper application of the scientific method provides reliable evidence of a relationship.

The development of this baseline was critical to overcoming ancient superstitions and developing the scientific method as a reliable way to generate knowledge. Nonetheless, when applied to the problem of providing benefits to veterans who were exposed to harmful agents in service, the result is that the award of benefits often lags decades behind the experiences of veterans and survivors who are affected by service but cannot successfully prove causation.

Inevitably, whenever a new type of exposure affects veterans, some are at the front edge and develop problems first. Based upon their experience in service, they might have an intuition about why they became sick. Typically, the first complaints are rejected based upon a "lack of evidence" to support their suspicions. For example, it was 1977 when VA received the first claim asserting a condition was caused by Agent Orange. However, that was only the beginning of a decades-long struggle to obtain recognition of the harms caused by the use of herbicides. As of 1988, VA recognized only the skin condition chloracne as related to Agent Orange and—even though it had received 150,000 claims for conditions related to Agent Orange exposure—it had not granted a single one.[3] Many of those most severely poisoned never lived to see their claims vindicated. Many others have now suffered for years without compensation.

[3] See GERALD NICOSIA, HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS' MOVEMENT 475 (2001); see also Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune, 82 Fed. Reg. 4,173 (Jan. 13, 2017) (recognizing service connection for conditions caused by exposure to contaminated water for the more than three decades between August 1, 1953, to December 31, 1987).

Typically, benefits are not retroactive prior to the filing of a claim, but even when large retroactive awards occur they still do not allow veterans to relive the years when they struggled without compensation. For example, veterans cannot retroactively choose to send their children to college without compensation. Veterans make endless choices about employment, retirement, health care treatment, and living circumstances that cannot be reversed decades later. Even when lost income is fully replaced, a lost lifetime of opportunity cannot be.

The application of *Gardner* to issues such as this one serves—at least in a small way—to mitigate the effects of the null hypothesis. Initially, it always operates to cause the system to err on the side of denying benefits. However, once evidence becomes sufficient to generate action by Congress, liberally interpreting benefits is an appropriate way of erring on the side of compensation when the system has a long history of going in the opposite direction.

In fact, there is no guarantee that science will ever be able to fully resolve the uncertainties involved in any issue.[4] Therefore, some approach is required to deal with scientific uncertainty, recognizing that any approach carries a risk that it might be someday be judged as wanting in retrospect. Consistent with *Gardner* and the history of interpreting veterans benefits statutes, the proper approach is to resolve lingering uncertainty in favor of veterans, within the bounds of the benefits authorized by Congress, rather than wait for certainty that might never come while veterans continue to suffer and die.

Additionally, rare conditions present additional difficulties. As Judge Newman lamented in her dissent in *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), the system is ill-equipped to handle rare conditions for which it is unlikely that there will ever be enough data to determine causation with scientific certainty, id. at 1307-08 (Newman, J., dissenting). Combining all these uncertainties into a single, binary determination under the benefit of the doubt is a problem has never been squarely addressed. The correlation between the rare lung disease obliterative or constrictive bronchiolitis and exposure to open air burn pits used in Iraq and Afghanistan is just one example of where causation may not have been determined as yet, but the volume of correlative evidence is fairly clear and mounting as veterans of the last 18 years of war are beginning to seek help.[5] If VA would empirically study the sample of veterans who have self-identified as having exposure symptoms in its own Airborne Hazards and Burn Pit Registry (with 165,000 registered thus far), perhaps causation and trends could be identified from the collected data.

Fortunately, the veterans benefits system is not based upon the scientific gold standard of ninety-five-percent confidence that an observed effect is real and not simply a random variation within a small sample. The paternalistic system is willing to act in the face of more uncertainty than that with which scientists are comfortable. Courts cannot change the standards established by Congress, they can apply interpretive doubt liberally in favor of veterans, as a partial bridge over

[4] See, e.g., INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, GULF WAR AND HEALTH, TREATMENT FOR CHRONIC MULTISYMPTOM ILLNESS 1 (2010). ("Despite considerable efforts by researchers in the United States and elsewhere, there is no consensus among physicians, researchers, and others as to the cause of C[hronic] M[ultisymptom] I[llness]. *There is a growing belief that no specific causal factor or agent will be identified*." (emphasis added)).

[5] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3296566/

the gap between differences in how the legal and the scientific worlds handle uncertainty. This dynamic, specifically the way in which the laws it writes are interpreted, is something Congress must consider as the presumptive disability decision-making process is reviewed.

Conclusion

In 2017, Secretary Shulkin was considering recommending "bladder cancer, hypothyroidism and Parkinson-like symptoms" to the list of presumptive conditions linked to Agent Orange exposure as a result of a recently released Institute of Medicine study.[6] The consideration of adding these conditions, some of which have not yet been implemented, comes nearly 50 years after the initial exposure and has resulted in some veterans suffering with these conditions for decades without the proper compensation.

The American Legion has been the leading advocate for veterans exposed to Agent Orange since the first file was claimed in 1977. When VA failed to conduct congressionally-mandated studies, The American Legion commissioned its own study, not once, but twice.[7] For over 40 years, Legionnaires have tirelessly advocated on behalf of those that were exposed to these herbicides, to include filing lawsuits in Federal District Court.[8] We are proud to have contributed to the efforts to pass the long overdue Blue Water Navy Act this past summer, but it is imperative that we do not put the current generation of servicemembers and veterans through an equally painful process.

We call on VA to empirically study the sample of 165,000 registrants of the Airborne Hazards and Burn Pit Registry, all of whom served on or after 9/11, during operations Desert Shield and Desert Storm, or in the Southwest Asia theater of operations after August 2, 1990, and were deployed to a base or station where open burn pits were used or where possible exposures to toxic substances occurred. It also makes sense to separate these eras of war in order to accurately assess causation and trends in hazardous exposures.

As Congress considers implementing new procedures to deal with contemporary toxic exposure issues like burn pits, it is crucial that the lessons of previous generations are taken into consideration. Due to the retrospective and ambiguous nature of this process, it is imperative that the presumptive disability decision-making processes, no matter what form they take, err on the side of the veteran.

The American Legion is thankful for the invitation to submit this statement for the record and stand ready to assist when needed on these issues and any others that may arise. For additional information regarding this testimony, please contact Senior Legislative Associate Mr. Jeffrey Steele at (202) 861-2700 or jsteele@legion.org.

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[6] https://www.stripes.com/news/veterans/shulkin-will-decide-whether-to-add-more-conditions-to-agent-orange-list-by-nov-1-1.481353

[7] This study was known as The American Legion-Columbia University Vietnam Veteran Health Study. Approximately 12,000 members were surveyed to better understand, among other things, the impacts of herbicides exposure.

[8] https://www.nytimes.com/1990/08/02/us/american-legion-to-sue-us-over-agent-orange.html