

Date: July 23, 1997

VAOPGCPREC 27-97

From: General Counsel (022)

Subj: Service in the Republic of Vietnam for Purposes of Definition of Vietnam Era--38 U.S.C. § 101(29) (A)

To: Director, Compensation and Pension Service (213A)

QUESTION PRESENTED:

Whether service on a naval vessel in the waters off the shore of Vietnam constitutes service in the Republic of Vietnam for purposes of 38 U.S.C. § 101(29) (A), which defines the Vietnam era as the period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period.

COMMENTS:

1. In the claim giving rise to the request for opinion, the veteran served aboard an aircraft carrier during the period November 1961 through at least June 1962. The veteran reported that during some part of that period the carrier was stationed off the coast of the Republic of Vietnam. The question arises whether such service may be considered wartime service for purposes of determining eligibility for improved pension.

2. Section 505 of the Veterans' Benefits Improvements Act of 1996 (VBIA), Pub. L. No. 104-275, 110 Stat. 3322, 3342, amended the definition of "Vietnam era" in section 101(29) of title 38, United States Code, to refer to the period beginning on February 28, 1961, and ending on May 7, 1975, "in the case of a veteran who served in the Republic of Vietnam during that period" and the period beginning on August 5, 1964, and ending on May 7, 1975, in all other cases. Prior to enactment of the VBIA, 38 U.S.C. § 101(29) had provided that the term "Vietnam era" meant the period beginning on August 5, 1964, and ending on May 7, 1975. See 38 U.S.C.A. § 101(29) (1991). Thus, under current section 101(29) (B), all service within the period August 5, 1964, through May 7, 1975, is considered service during the Vietnam era for Department of Veterans Affairs (VA) benefit

purposes, whether or not the service was performed in the Republic of Vietnam. Under section 101(29)(A), service during the period

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February 28, 1961, through August 4, 1964, may also be considered service during the Vietnam era, but only for veterans who "served in the Republic of Vietnam during that period."

3. As the Supreme Court has instructed, "[t]he starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) (alteration omitted) (quoting *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). Thus, interpretation of the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 101(29)(A) must begin with the statutory language itself. We do not believe that the language of section 101(29)(A) conclusively resolves whether service in the waters off the shore of Vietnam is included in the statutory reference to service in the Republic of Vietnam. The definition in section 101(29)(A) does not specifically address whether service "in the Republic of Vietnam" was meant to include service in the waters off the shore of Vietnam. The term "in the Republic of Vietnam" is to some degree inherently ambiguous in that it may be subject to differing interpretations regarding whether it refers only to areas within the land borders of the Republic or also encompasses, for example, Vietnamese air space or territorial waters. See generally VAOPGCPREC 7-93 (O.G.C. Prec. 7-93) ("service in Vietnam" for purposes of 38 C.F.R. § 3.313 does not include high altitude missions in Vietnamese airspace). Accordingly, we find it necessary to look beyond the terms of the statute for a definitive answer to the question posed.

4. We note that, in 38 U.S.C. § 101(30), the term "Mexican border period" is defined to mean the period beginning on May 9, 1916, and ending on April 5, 1917, "in the case of a veteran who during such period served in Mexico, on the borders thereof, or in the waters adjacent thereto." (Emphasis added.) While this language may suggest that the term "in Mexico" does not include service in the waters adjacent thereto in the absence of a clause specifically referencing such service, it may be that Congress felt it necessary to include the reference to adjacent waters to avoid

what it perceived as ambiguity inherent in the term "in Mexico," rather than from a conviction that the term did not include adjacent waters.

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5. Because the language of section 101(29) (A) does not conclusively resolve whether service in the waters off the shore of Vietnam is included in the phrase "served in the Republic of Vietnam," we will examine the statute's legislative history to determine the intent of Congress. The report of the Senate Committee on Veterans' Affairs on the VBIA explains that "United States military personnel were, in fact, serving within the borders of the Republic of Vietnam prior to August 5, 1964, principally as advisors to the armed forces of the Republic of South Vietnam."

S. Rep. No. 371, 104th Cong., 2d Sess. 21 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3762, 3772. The report indicates an intention to amend the definition of the Vietnam era to reflect "the date U.S. forces generally began to accompany their Vietnamese counterparts on combat operations." *Id.* The report states that the amendment to section 101(29) would apply the expanded period "only with respect to those veterans who *actually served within the borders of the Republic of Vietnam during that time frame.*" *Id.* (Emphasis added.) In addition, Senate Committee on Veterans' Affairs Chairman Alan K. Simpson, in discussing the provision on the Senate floor, stated that "U.S. troops were subjected to the real perils of ground combat at least as early as February 28, 1961. This bill would recognize that fact . . . ." 142 Cong.

Rec. S11,779 (daily ed. Sept. 28, 1996).

6. It is clear from this discussion that Congress' intent in amending the definition of the Vietnam era in section 101(29) was to include the service of veterans who actually served within the borders of the Republic of Vietnam during the period February 28, 1961, through August 4, 1964. Congress' focus was on ground forces, and there is no suggestion that Congress intended to liberalize the "Vietnam era" definition with respect to naval personnel serving on deep-water vessels off the shores of Vietnam. Accordingly, we conclude that service on a deep-water vessel in waters off the shores of Vietnam may not be considered service in the Republic of Vietnam for purposes of the definition of "Vietnam era" in 38 U.S.C. § 101(29) as amended by section 505 of the VBIA.

7. We note that section 505(b) of the VBIA amended 38 U.S.C. §§ 1116 and 1710 to expand the period during which an individual could have served in the Republic of Vietnam in order to qualify for benefits under those provisions.

Section 1116 provides presumptions of service connection for diseases associated with exposure to certain herbicide agents for certain veterans who served in the Republic of

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Vietnam during the period January 9, 1962, through May 7, 1975, and also provides that a veteran who served in the Republic of Vietnam during that period shall be presumed to have been exposed to a herbicide agent containing dioxin. Section 1710 provides for eligibility for hospital and nursing home care and medical services for herbicide-exposed veterans of service in the Republic of Vietnam during the specified period. The amendments to sections 1116 and 1710 substituted for the general definition of the Vietnam era for purposes of those provisions the period beginning on January 9, 1962, and ending on May 7, 1975. The legislative history of section 505(b) indicates that Congress intended that the applicable period of service reflect the period in which the herbicide agents and defoliants were introduced and present within Vietnam. S. Rep. No. 371, 104th Cong. 21, *reprinted in* 1996 U.S.C.C.A.N. at 3772. VA regulations, currently codified at 38 C.F.R. § 3.307(a)(6)(iii), on which the statutory presumption of exposure to herbicide agents was based, see former 38 C.F.R. § 3.311(a) (1990) (predating the statutory presumption added by Pub. L. No. 102-4, § 2(a), 105 Stat. 11 (1991)), provide that "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

8. The references to service "in the Republic of Vietnam" in sections 1116 and 1710 were included for a specific purpose relating to the use of herbicide agents in Vietnam. In contrast, the general definition of the Vietnam era in section 101(29) was amended, as discussed above, to acknowledge the period during which United States personnel accompanied Vietnamese troops on combat missions within Vietnam. Accordingly, we believe the references may reasonably be interpreted as having different meanings in the context of the particular statutes in which they appear. See *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 819 (1991) (an imprecise term may be interpreted differently in two separate sections of a statute which have different purposes); *Common Cause v. Federal Election Comm'n*, 842 F.2d 436, 441-42 (D.C. Cir. 1988) (*in*

*pari materia* doctrine did not require that same term be similarly interpreted as used in two provisions of a statute, where the two provisions had different purposes). In any event, the regulatory definition in 38 C.F.R. § 3.307(a)(6)(iii), which permits certain personnel not actually stationed within the borders of the Republic of Vietnam to be considered to have served in that Republic, requires that an individual actually have been present within the boundaries of the Republic

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to be considered to have served there, through inclusion of the requirement for duty or visitation in the Republic. Thus, the definition of "[s]ervice in the Republic of Vietnam" in section 3.307(a)(6)(iii) is not inconsistent with our interpretation of the reference to service in the Republic of Vietnam in section 101(29)(A).

HELD:

Service on a deep-water naval vessel in waters off the shore of the Republic of Vietnam does not constitute service in the Republic of Vietnam for purposes of 38 U.S.C. § 101(29)(A), as added by section 505 of the Veterans' Benefits Improvements Act of 1996, which provides that the term "Vietnam era" means the period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period.

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