

Agent Orange

Bryan Watters

ND Dept of Veterans Affairs



Background

Vets who can establish exposure in service to herbicides containing 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram, are generally entitled to presumptive SC for diseases listed in 38 C.F.R. §3.309(e), including IHD, type 2 diabetes, Parkinson's disease, respiratory cancers, non-Hodgkin's lymphoma, Hodgkin's disease, multiple myeloma, soft tissue sarcomas, and prostate cancer.

“Agent Orange”

Agent Green: used prior to 1963

Agent Pink: used prior to 1964

Agent Purple: used 1961–65

Agent Blue used from 1962–71 in powder and water solution[4]

Agent White used 1966–71

Agent Orange or Herbicide Orange, (HO): 1965–70

Agent Orange II: used after 1968.

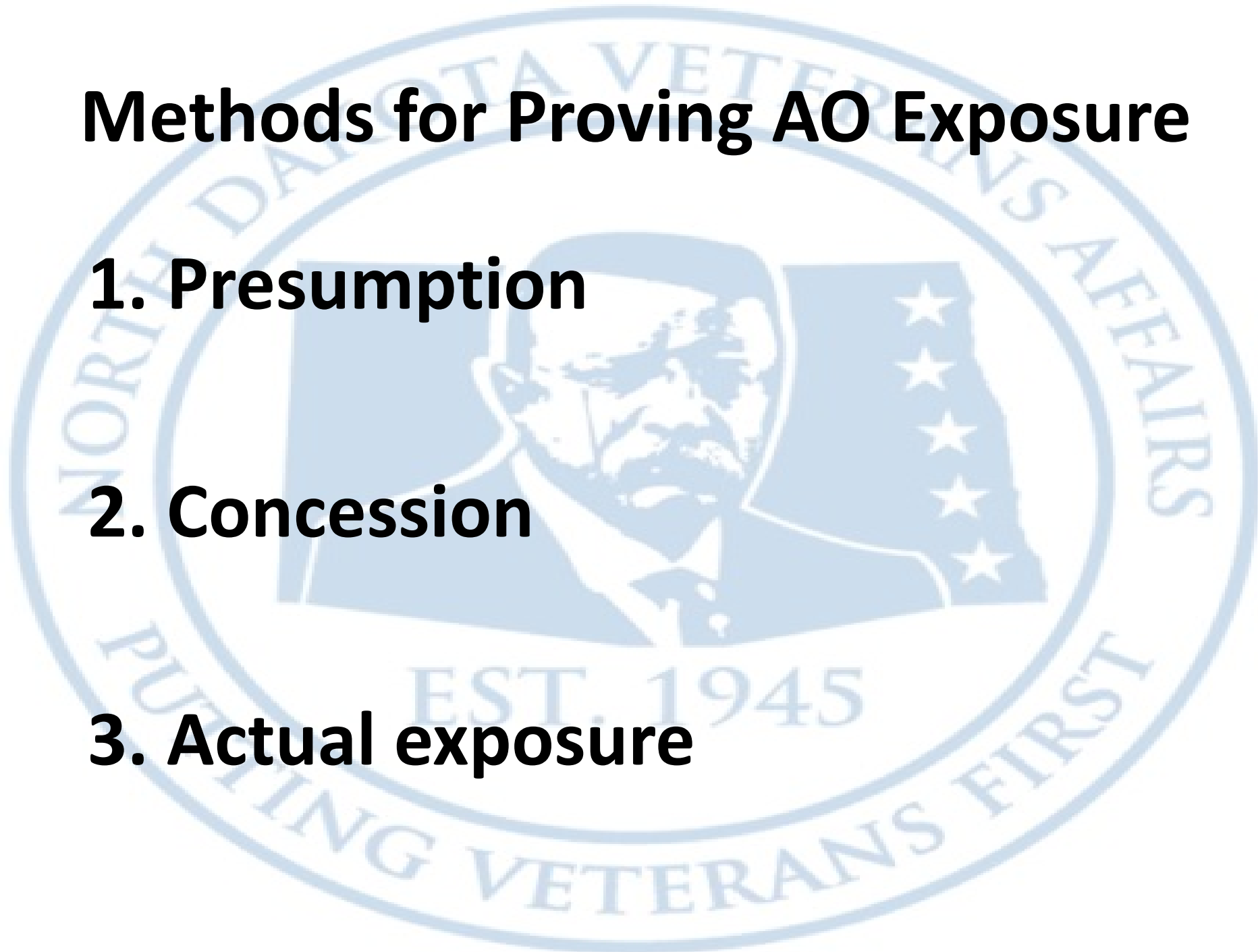
Agent Orange III: Enhanced Agent Orange, Orange Plus, or Super Orange (SO)

Methods for Proving AO Exposure

1. Presumption

2. Concession

3. Actual exposure



Presumption

- **VA will presume AO exposure for Vets who:**
 - **Served on the land or inland waterways of the Rep. of Vietnam any time from 1/9/1962 through 5/7/1975.**
 - **Served along the Korean DMZ any time from 4/1/1968 through 8/31/71.**
 - **Regularly and repeatedly operated, maintained, or served onboard C-123 aircraft that, during the Vietnam era, sprayed AO.**

Presumptive Exposure –Vietnam

- Brief service in RVN difficult to prove
 - Short assignments / travel by Vets regularly stationed outside RVN
 - Not usually noted in service records
- Vet's testimony or written statement can be enough to establish boots on the ground.
 - Statement competent evidence (usually)
 - "Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person." [38 C.F.R. §3.159\(a\)\(2\)](#).
 - No corroboration requirement!
 - BUT, the statement must be found credible by VA.

Presumptive Exposure –Vietnam

- **Even though Vet's statement alone can be enough to prove Vietnam service, Vet will have a better chance at success with corroborating evidence:**
 - **Official Military Records, including unit histories**
 - **Letters home**
 - **Buddy statements**
 - **Unofficial unit histories**
 - **Pictures sufficient to show location**

Special procedures for RVN service from 1/9/1962 to 8/5/1964

- **Awarded the Armed Forces Expeditionary Medal (AFEM) rather than the VSM.**
- **Often sent on TDY from other SE Asian countries or U.S.**
- **Because U.S. not officially involved in the war, duties may have been classified and presence in RVN not noted in personnel record.**

Special procedures for RVN service from 1/9/1962 to 8/5/1964

- **If Vet alleges service in RVN, but it is not otherwise apparent, VA must obtain and review Vet's entire personnel record.**
 - **Must pay attention to receipt of AFEM, travel/flight orders, statements in performance evals related to travel/flights, and TDY orders, and give Vet the benefit of the doubt.**
 - **For Vets who flew on C-123 aircraft that conducted AO spray missions, other indications of RVN service include evidence of flight status and type of aircraft assignments.**
 - **VA Compensation Service Bulletin, *Adjudicating Certain Agent Orange Exposure-Related Claims*, 2 (Dec. 2012).**

Presumptive Exposure –Vietnam

- **Avenues of AO exposure not recognized by VA:**
 - 1. Navy Vets who served in the waters offshore (blue water) of Vietnam**
 - In *Haas v. Peake*, Federal Circuit upheld VA's interpretation of 38 C.F.R. §3.307 as requiring Vets to have set foot on the landmass of RVN or served on inland waterways.
 - **NOTE: VA DOES presume that blue water Vietnam Vets are entitled to presumptive SC for NHL and CLL under 38 C.F.R. §3.313 (unrelated to AO exposure).**

Blue Water Navy

- CAVC held in Gray v. McDonald that BVA's finding that Da Nang Harbor was not an inland waterway was arbitrary and capricious.
 - Ordered VA to reevaluate definition of inland waterways.
- In Feb. 2016, VA updated Manual M21-1, IV.ii.1.H.2 to "reevaluate its definition of inland waterways"
- Da Nang Harbor, Nha Trang Harbor, Qui Nhon Bay Harbor, Cam Ranh Bay Harbor, Vung Tau Harbor, and Ganh Rai Bay are all offshore waters.
- VA continues to extend the presumption of exposure to Vets who served aboard vessels that entered Qui Nhon Bay Harbor or Ganh Rai Bay during periods that are already on VA's ships list.
- VA will no longer add new vessels to the ships list, or new dates for vessels currently on the list, based on entering Qui Nhon Bay Harbor or Ganh Rai Bay.

Avenues of AO exposure not recognized by VA (cont.)

- 2. Loading AO aboard a ship for transport to RVN
- 3. Serving on a ship that transported, stored, used, or tested AO
- 4. Working on shipboard aircraft that flew over Vietnam or equipment that was used in Vietnam
- 5. Vets who flew over Vietnam in aircraft, but did not land

Presumptive Exposure –Korean DMZ

- **DoD estimates that over 12,000 U.S. troops were exposed to Agent Orange along the Korean DMZ.**
- **An area 151 miles long and up to 350 yards wide along the south edge of the DMZ and north of the civilian control line was hand sprayed with AO and similar herbicides between April 1968 and July 1969.**

Presumptive Exposure –Korean DMZ

- DoD has identified several units that operated in or near the DMZ in South Korea, in an area where AO is known to have been sprayed.
 - [MANUAL M21-1, IV.ii.1.H.4.b](#) (change date Aug. 22, 2017).
- Vets who served in an identified unit between April 1, 1968, and August 31, 1971, are presumed to have been exposed to AO.
 - [38 C.F.R. §3.307\(a\)\(6\)\(iv\)](#)

Presumptive Exposure –Korean DMZ

- **Units presumed exposed to AO:**
 - **Combat Brigade of the 2nd Infantry Division (ID) or 3rd Brigade of the 7th ID**
 - **Individuals with Duties at the DMZ**

Presumptive Exposure –C-123 Aircraft

- **During the Vietnam War, AO was sprayed by C-123 Provider Aircraft as part of Operation Ranch Hand.**
- **After spraying operations ended, between 1972 and 1982, these aircraft were used for routine cargo and medical evacuation missions.**
- **Approximately 1,500-2,100 Air Force Reservists trained and worked on these aircraft during this period.**

Presumptive Exposure –C-123 Aircraft

- **C-123s that sprayed AO continued to have AO residue on their interior surfaces years after returning to the U.S.**
- **Air Force Reservists would have been exposed to AO residue when working inside the aircraft, and some of them “quite likely experienced non-trivial increases in their risks of adverse health outcomes.”**

Presumptive Exposure –C-123 Aircraft

- **VA now presumes that a person who served in the Air Force or Air Force Reserve and “regularly and repeatedly operated, maintained, or served onboard C-123 aircraft known to have been used to spray an herbicide agent during the Vietnam era” was exposed to AO.**
 - **[38 C.F.R. §3.307\(a\)\(6\)\(v\)](#)**

Conceded Exposure –Thailand

- **In 2010, VA found that there was significant use of herbicides on the fenced perimeters of military installations in Thailand based on the declassified DoD document Project CHECO Southeast Asia Report: Base Defense in Thailand.**
 - **May have included AO and strong commercial herbicides similar to AO**
- **VA created special rules for the concession of herbicide exposure for Vets whose duties placed them on or near the perimeter of Thailand military bases during the period 2/28/1961 to 5/7/1975.**

Conceded Exposure –Thailand

1. Air Force Vets who served at the RTAFBs of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, or Don Muang as security policemen, security patrol dog handlers, or members of a security police squadron, or otherwise served near a base perimeter, as shown by their military occupational specialty (MOS), daily work duties, performance evaluations, or other credible evidence.

Conceded Exposure –Thailand

2. Army Vets who served on a RTAFB who state they were involved with perimeter security duty, but only if there is additional credible evidence supporting their statement.

3. Vets who served at a U.S. Army base in Thailand, were members of a military police unit or assigned a military police MOS, and who state their duty placed them at or near the base perimeter.

Conceded Exposure –Thailand

- VA often fails to properly consider whether non-security personnel “otherwise served near a base perimeter.”
- VA often fails to consider lay evidence of service near a base perimeter, which, if credible, is enough to support claim.
 - “Near” a base perimeter is not defined.
 - “Service” is not defined
 - Frequency?
 - Type of activity?

Conceded Exposure –Thailand

- The closer the proximity to, the greater the frequency of visits near, and the longer the period of time spent near the perimeter, the more likely VA will concede exposure.
- Advocates should help Vet prepare a detailed statement regarding service near the perimeter.
- Help Vet obtain base maps and pictures on which he can show where the service occurred.
- Since criteria are vague, most Vets should appeal if VA denies concession of exposure.

Conceded Exposure –Thailand

- **M21-1 rules can only help Vets prove exposure.**
- **VA can't find Vet not exposed to herbicides solely because criteria not met.**
 - **Must consider the places, types and circumstances of Vet's service as shown by service records, the official history of each organization in which he served, medical records and all pertinent medical and lay evidence.**
 - **Determinations must be based on review of the entire evidence of record, with due consideration to the policy of the VA to administer the law under a broad and liberal interpretation consistent with the facts in each case.**

Actual Agent Orange Exposure

- Vets who do not qualify for the presumption or concession of AO exposure can still qualify for presumptive SC of diseases linked to AO exposure.
- Vets must prove “actual” exposure to AO, which is often difficult. (see also: “Futile”)

Actual Agent Orange Exposure

- **To support such a claim, Vet should submit:**
 - **Detailed statement regarding the exposure, including an explanation of how the Vet knew the substance was AO.**
 - **Buddy statements corroborating the exposure.**
 - **Articles from reputable sources confirming the use of AO in the location.**
 - **BVA decisions in which exposure at the location was conceded, ideally for the dates the Vet alleges exposure.**

Mental Health Claims

Q & A

