United States Senate
WASHINGTON, DC 20510

April 23, 2015

The Honorable Robert A. McDonald
Secretary of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Dear Secretary McDonald:

We write to urge you to utilize the Department of Veterans Affairs' existing statutory authority to quickly begin providing care and benefits to veterans who were exposed to toxic herbicide residue while serving on Fairchild UC-123 Provider (C-123) aircraft after the era when those aircraft were used to transport Agent Orange in Vietnam. Justice for these veterans is long overdue and you have the authority and the ability to finally right this wrong.

For nearly four years, the VA denied these reservists' exposure to toxic Agent Orange residue in contaminated C-123s. On January 9, 2015, the Institute of Medicine issued a final report titled "Post–Vietnam Dioxin Exposure in Agent Orange-Contaminated C-123 Aircraft," which "emphatically" rejected VA's assertion as to exposure. As a result, we understand you conceded that this group of veterans was, in fact, exposed to toxic Agent Orange herbicide. However, we also understand a question has arisen about whether some of these reserve airmen satisfy the statutory definition of "veteran" for purposes of eligibility for VA benefits. We fundamentally disagree and believe VA's precedential interpretations of the relevant statute and the policy principle and legal precedent of construing statutes in favor of veterans requires VA to find these reservists eligible for benefits. We ask that you stand by those interpretations, which we outline in this letter, and which show that no additional statutory authority is necessary for you to immediately begin providing care and benefits to the C-123 veterans.

The relevant statute defines "veteran" to include a person whose "active military, naval, or air service" includes any period of "active duty for training or inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in the line of duty."[1] With regard to the C-123 veterans, VA's Office of General Counsel (OGC) has taken the position that a reservist (1) must have incurred an injury and (2) his or her injury must manifest itself into a disability during the period of training to qualify an individual for veteran status. This not only contradicts VA's previous interpretations of the same statutory language, but also leads to absurd results. For instance, a reservist who contracted Ebola while flying patients during training but shows no symptoms until they are in civilian life would not satisfy VA's newfound interpretation.

There are two OGC precedential legal memoranda interpreting the relevant statute such that an injury need not manifest into a disability during training for a reservist to qualify as a

[1] 38 U.S.C. § 101(24)(B) and (C).

"veteran." In a 2002 opinion, OGC opined on the term "injury" in a case of a veteran who claimed health effects as a result of anthrax inoculations. It concluded that the term injury in section 101(24) would include "...serious adverse effects on body tissue or systems *resulting* from the introduction of a foreign substance," without stipulating that the resulting effects manifest during a period of training.[2]

In another precedential legal memorandum interpreting the relevant statute, OGC opined on the ability of a former Naval Reservist to seek disability compensation for post-traumatic stress disorder resulting from being raped during inactive duty training.[3] In discussing the issue, OGC noted, "a claimant may be injured during service but the resulting disability may not be apparent until some time after service."[4] In this case, OGC held, "An individual who suffers from post-traumatic stress disorder as a result of a sexual assault that occurred during inactive duty training may be considered disabled by an 'injury' for purposes of section 101(2) and (24)."[5]

The holdings of both precedential legal memoranda state that the individual claimant "may be considered disabled by an 'injury'" for purposes of the statute. The analysis and holdings in these two opinions clearly establish that OGC, at least since 2001, has connected a "disability" to an injury without regard for the period during which the disability manifested itself.

Had OGC's policy been otherwise, there would be some evidence in the opinion, some limiting language, some statement that while these claimants could claim injury from training, they still had to establish that their resulting "disability" manifested itself during a period of training. Indeed, in the PTSD opinion, the discussion section notes that the "claimant was discharged from the Naval Reserve under 'other than honorable conditions,'" a general statutory disqualification for veterans status. If OGC had the foresight to mention this limitation, which was outside the scope of the opinion, then it is reasonable to conclude that an additional qualification for veteran status—when a disability manifests—that is so tied to the term being discussed would likewise have been raised.

There is no doubt, and in fact VA concedes, these reserve airmen suffered an injury when exposed to Agent Orange residue. 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 both the reservist who received anthrax inoculations and the reservist who was sexually assaulted but whose PTSD did not manifest until after service. Therefore, as these two precedential opinions make clear, a reservist would not be precluded from receipt of benefits merely because a disability has not manifested itself during the same period of training as an injury.

We strongly believe these two precedential opinions are correct and consistent with the long-standing principle of construing statutes liberally "for the benefit of those who left private

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[2] VAOPGCPREC 4-2002. (Emphasis added).
[3] VAOPGCPREC 8-2001.
[4] *Id.*
[5] *Id.*

life to serve their country."[6] Indeed, Congress has directed that VA act in the best interests of claimants whenever possible.[7]

Federal regulations make all VA OGC opinions designated as a precedent binding on VA officials and employees in subsequent matters, "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."[8] We have not been made aware of any relevant material change in controlling statute or regulation, or any subsequent OGC precedential opinion modifying or withdrawing VA's earlier liberal interpretation of the statute.

As VA's own interpretations of its statutory authority make clear and the legal principle of liberally construing statutes in favor of veterans requires, the reserve airmen who served aboard C-123 aircraft are entitled to veteran status and the resulting care and benefits necessary to address their health conditions. As Secretary, you have the authority to make the decision that would provide these veterans the care and benefits they have earned. We ask that you do so without delay.

We thank you for your attention to this matter and would ask for your response within 14 days.

Sincerely,

Richard Blumenthal
United States Senator

Jeffrey Merkley
United States Senator

Richard Burr
United States Senator

Michael Bennet
United States Senator

[6] *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).

[7] *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); *see also 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").

[8] 38 C.F.R. § 14.507(b) (1996).

Sherrod Brown
United States Senator

Elizabeth Warren
United States Senator

Ron Wyden
United States Senator