

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW (JL)

DECLARATION OF MICHAEL HOGAN

I, MICHAEL HOGAN, hereby declare and say:

1. I am the Assistant General Counsel for Management & Operations in the Office of General Counsel (“OGC”) of the Department of Veterans Affairs (“VA”), a position I have held since May 2008. In this capacity, I report to John H. Thompson, VA Deputy General Counsel.
2. As Assistant General Counsel for Management & Operations, I am responsible for: (1) formulating and executing OGC's budget; (2) effecting and advising on human resource matters; (3) preparing reports from OGC's case and time management system (GCLAWS); and (4) maintaining OGC's library and electronic reference material. I am also chiefly responsible for supervising the 22 Regional Counsel Offices which collectively comprise about two-thirds of OGC's total staffing.
3. In this role, I am familiar with VA’s operations and organizations. I am aware of this litigation, the Plaintiffs’ claim against VA, and Plaintiffs’ discovery requests directed to VA.
4. I am aware that Plaintiffs have requested that the VA produce “a subset of the 1,200 identified files” for mustard gas and Lewisite test veterans, “specifically all claims files for test participants whose claims are based on exposure to a chemical or biological substance, and

1 who served in the military between 1938 and 1975.” Plaintiffs’ request would encompass claims
2 made by both veterans to whom a presumption of service connection for full-body exposure to
3 mustard agents applies as well as veterans for whom there is no such presumption.

4 5. Since 1992, VA regulations have provided presumptions of service connection for
5 several health effects in veterans who experienced full-body exposure to mustard gas and
6 Lewisite in service. 38 C.F.R. § 3.316. Accordingly, many claims alleging disability or death as
7 a result of full body mustard gas exposure are automatically granted due to the presumption of
8 service connection, without the need for any factual finding or judgment by VA adjudicators as to
9 whether the veterans’ disabilities or deaths were related to their exposure. *See* 38 C.F.R. § 3.316.
10 All claims not subject to this presumption, based on mustard-gas exposure, would be claims for
11 direct service connection, which require evidence showing: (1) the veteran has a current
12 disability; (2) an injury or disease that was incurred or aggravated in service, symptoms that were
13 noted during service and that persisted until diagnosis of an injury or disease causing the
14 symptoms; or an event in service capable of causing injury or disease; and (3) the veteran’s
15 current disability is related to the veteran's inservice disease, injury, symptoms, or event. 38
16 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303. The only way for VA to determine which files involve
17 a denial of presumptive service connection or a claim for direct service connection based on
18 mustard gas exposure would be to examine all the individual files at great expenditure of time and
19 resources by the Veterans Benefits Administration (“VBA”).

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22 6. I understand that, at the direction of Magistrate Judge Corley, VBA matched the
23 names and dates of birth (“DOBs”) of veterans in the Department of Defense (“DOD”) mustard
24 gas database against the VBA corporate database, and I have been advised of the following
25 results of the match. VBA found that the first and last names and dates of birth (“DOBs”) of
26 approximately 1,153 veterans in the DOD database match the first and last names and DOBs of
27 veterans in the VBA corporate database. VBA also found that the last names and DOBs of an
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1 additional 470 veterans in the DOD database match the last names and DOBs of veterans in the
2 VBA corporate database.

3 7. VBA's data runs also show that at least 650 of these 1623 veterans and/or their
4 survivors in these matches have filed a disability and/or DIC claim. To determine how many of
5 these claims are based on mustard-gas exposure would involve considerable time, expense, and
6 burden in order to review each individual claims file, and, as needed, copy, scan, transfer, and
7 review such files for material protected under 38 U.S.C. § 7332 and 42 U.S.C. § 290dd-2. For
8 purposes of this declaration, however, I will explain the burden of producing 650 of the claims
9 files requested by Plaintiffs in their motion to compel.
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11 8. My estimate of the burden of producing these claims files is deduced from the
12 effort and expense VA incurred in producing to Plaintiffs the claims files of certain chem-bio test
13 subjects described below. In accordance with a previous agreement, VA has produced to
14 Plaintiffs the claims files of 862 veterans whose names are contained in the DOD Chemical and
15 Biological database and for whom sufficient identifying information exists and: (1) who have
16 filed VA claims for disability compensation; and (2) whose survivors have filed VA claims for
17 DIC or burial benefits. VA also agreed to produce to Plaintiffs the claim files for veterans whose
18 names appear in the DOD Chem-Bio mailbox but not on the list of 862 identifiable chem-bio
19 veterans. VA has obtained, scanned, copied, reviewed and produced such files as they have been
20 made available on a rolling basis. Thus, to date, VA has produced to Plaintiffs a total of
21 approximately 900 claims files.
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23 9. I understand that, in order to produce these claims files, the VA regional offices
24 copied each file. VBA estimates that it cost approximately \$50,000 to copy 500,000 pages of
25 documents contained in these claims files. These VA claims files generally contain original
26 copies of the veteran's service medical records and other historic documents, which, due to their
27 age and paper quality, require careful handling to preserve such documents. The copied files
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1 were then sent to VBA headquarters in Washington, D.C. VBA then paid contractors
2 approximately \$61,750 to scan the files.

3 10. VBA then placed the scanned files on a server that is accessible to VA's Office of
4 General Counsel for legal review. Given that many of the claims files are close to 1,000 pages,
5 VA estimates it took three to six hours to screen each claims file. In less than 3 months,
6 approximately 100 VA OGC attorneys and legal assistants spent almost 3,300 hours reviewing
7 these files to determine whether they contained documents protected from disclosure under 38
8 U.S.C. § 7332 and 42 U.S.C. § 290dd-2 and to redact protected material. In order to accomplish
9 this goal by the end of discovery, at least 50 OGC employees worked approximately 500
10 overtime hours to complete the review of the 900 claims files, costing nearly \$23,000 in overtime
11 pay from the VA Office of General Counsel.
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13 11. After reviewing the claim files, VA OGC then used the services of a contractor,
14 CACI, to process and Bates-stamp the claim files in an accessible production format for
15 Plaintiffs. The cost to VA for CACI processing of these 900 claims files was approximately
16 \$25,000. Since February 2011, VA has paid close to \$350,000 to CACI on this case to complete
17 litigation support tasks. In 2012, VA renewed its contract with CACI for an additional year to
18 process documents, for a total cost to VA of approximately \$650,000.
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20 12. Despite being overwhelmed with the burden and cost of this production, VA has
21 agreed in principle with Plaintiffs to produce a substantial number of the approximately 620
22 additional Chem-Bio claim files that were identified in late December 2011 based upon further
23 data matches ordered by this Court. Specifically, VA agreed to produce relevant files containing
24 a claim based upon chem-bio testing, which will require several phases of screening and review
25 by VA attorneys and employees, similar to the efforts described above concerning the
26 approximately 900 produced files, and will thus require significant additional time, cost, and
27 burden to VA.
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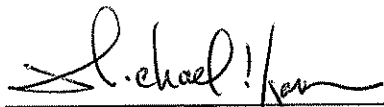
1 13. Plaintiffs' demand that VA copy, scan, review, and produce an additional 650 files
2 that may contain mustard gas and Lewisite claims would be arduous, time consuming, and unduly
3 burdensome for VA for the following reasons. As stated above, the production of approximately
4 900 Chem-Bio claim files required VA to spend approximately: 3 months of its employees' time,
5 \$50,000 for copying files, \$61,750 for scanning files, \$25,000 for CACI to processing and Bates-
6 stamping the claims files, and 3,300 hours of time from 100 attorneys and legal assistants,
7 including 500 hours of overtime and \$23,000 in overtime pay. Based upon the time and cost
8 incurred to produce approximately 900 claims files to Plaintiff, I estimate it would take VA a
9 minimum of 2.2 months to locate, conduct a legal review, and process 650 mustard gas and
10 Lewisite claims files, which is 72% of the 900 VA already produced. I estimate that it would cost
11 at least the following: \$36,000 to copy claims files, \$44,460 for scanning claims files, 2,376
12 hours of regular time and 360 hours of overtime for 72 VA attorneys and legal assistants to
13 review the files at a cost to OGC of approximately \$16,560 in overtime pay, and approximately
14 another \$18,000 in payments to CACI for document processing.

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17 14. The burden of responding to Plaintiffs' discovery requests, including their Rule 45
18 subpoena and 236 requests for production, has also had a significant impact on VA's Office of the
19 General Counsel. Professional Staff Group II of the Office of the General Counsel, which
20 currently has a total of 10 staff attorneys, has devoted 2 of those attorneys to this case on a nearly
21 full-time basis. Professional Staff Group II is responsible for providing legal advice and
22 assistance to VA on all matters relating to VA's disability compensation and pension programs,
23 insurance, national cemetery administration, fiduciaries, and accreditation of veterans'
24 representatives. To date, Professional Staff Group II has devoted more than 3,700 hours to this
25 case. This commitment of time has imposed significant burdens on Professional Staff Group II
26 and the Office of the General Counsel.
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15. If VA were ordered to produce the additional mustard gas claims files, such an arduous production effort would divert enormous staff and resources from VA's mission to provide benefits to veterans and their survivors. In addition, the review of these files would divert limited OGC resources from the other legal tasks assigned to VA attorneys and legal assistants. Due to budgetary constraints, the VA Office of General Counsel has been in a hiring freeze since February 2011, and has been unable to hire additional attorneys or legal assistants to assist in this case or in the production of claim files.

I declare under penalty of perjury that the foregoing is true and correct. Executed in Chapel Hill, North Carolina, on March 13, 2012.



Michael Hogan
Assistant General Counsel for Management & Operations
Office of General Counsel
U.S. Department of Veterans Affairs