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The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

<html><head></head><body><pre style="word-wrap: break-word; white-space: pre-wrap;">Citation Nr: 0734812
Decision Date: 11/05/07 Archive Date: 11/19/07

DOCKET NO. 06-18 270) DATE
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On appeal from the
Department of Veterans Affairs Regional Office in Boston,
Massachusetts

THE ISSUE

Entitlement to service connection for type 2 diabetes mellitus, claimed as secondary to herbicide exposure in service.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

K. J. Kunz, Counsel

INTRODUCTION

The veteran served on active duty from February 1952 to February 1956, and from October 1962 to November 1962. The veteran also had reserve service over many years.

This appeal comes before the Board of Veterans' Appeals (Board) from an August 2004 rating decision by the Boston, Massachusetts Regional Office (RO) of the United States Department of Veterans Affairs (VA). In that decision, the RO denied service connection for type 2 diabetes mellitus.

FINDINGS OF FACT

1. The veteran was exposed to an herbicide agent during active reserve service, when he cleaned a C-123 airplane that had been used to spray herbicides in Vietnam.
2. After service, the veteran was diagnosed with type 2 diabetes mellitus.

CONCLUSION OF LAW

The veteran's type 2 diabetes mellitus is presumed to be service connected. 38 U.S.C.A. §§ 1110, 1116, 1131, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2007).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Service connection may be established for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a claim, VA shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107.

The veteran's physician reported that the veteran has been diagnosed with type 2 diabetes mellitus since 1992. The veteran does not claim that he was diagnosed with diabetes during active service. He contends that his diabetes developed as a result of exposure during service to Agent Orange or other herbicides.

Under certain circumstances, service connection for specific diseases may be presumed if a veteran was exposed during service to certain herbicides, including Agent Orange. 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307, 3.309(e). If a veteran was exposed to Agent Orange or another herbicide agent, service connection for certain conditions listed under 38 C.F.R. § 3.309(e), including type 2 diabetes mellitus, will be presumed if the condition becomes manifest to a degree of 10 percent disabling or more at any time after service. 38 C.F.R. §§ 3.307(a)(6), 3.309(e).

A veteran who served on active duty in the Republic of Vietnam during the period from January 9, 1962 to May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during service. 38 C.F.R. § 3.307(a)(6)(iii). In this case, the veteran did not serve in Vietnam. He reports that he was exposed to an herbicide during reserve service in the United States in the early 1970s, through working on an airplane that was used to spray herbicides in Vietnam. The circumstances of the veteran's service do not raise a presumption that he was exposed to an herbicide. His claim of herbicide exposure will be considered based on the assembled evidence.

In a March 2004 claim for VA benefits, a July 2004 VA medical examination, and in testimony under oath at a September 2007 Travel Board hearing before the undersigned Acting Veterans Law Judge, the veteran described the circumstances of his exposure to an herbicide. He reported that, after his active

service in the United States Air Force (USAF), he served for many years in the Air Force Reserve as an Air Reserve Technician (ART). He stated that during this service in 1972, at Hanscom Air Force Base (AFB) in Massachusetts, the base received a particular C-123 airplane, with the serial number 56-4362. He and others were assigned to clean out the airplane. Under the floorboards of the airplane there was a big container of a substance. The supervising officer said that the substance was defoliant. The substance had also spilled around and dried in the inside of the aircraft, including in the ribs and spars. The veteran and the others worked cleaning the inside of the aircraft over a period of weeks. The veteran wore some protective equipment such as goggles and rubber gloves, but he was not provided a mask. The veteran reported that the same airplane was later transferred to the Air Force Museum.

In March 2004, Mr. J. A. V. wrote that he had served as an ART at Hanscom Field from 1966 to 1973. Mr. V. stated that in 1972 and 1973 he was on a crew that was assigned to decontaminate a C-123, serial number 56-4362. He reported that the veteran was one of the other technicians assigned to that task. He related that the floor boards were removed, and they scrubbed areas that were saturated with Agent Orange. He stated that the process went on for weeks.

The veteran submitted a printed out page from the website of the National Museum of the United States Air Force, at Wright-Patterson AFB in Ohio. The page describes a C-123 that is on display at the museum. The serial number of the airplane is 56-4362, and the photograph of the airplane shows the numbers 64362 on the tail. The page indicates that the airplane entered service in 1957, and served in Vietnam in 1961 to 1972, flying low level defoliant and insecticide spray missions. The airplane was flown to the museum in 1980.

The claims file contains statements of service reports dated in 1967 and 1976 that list the veteran's dates of active service from 1952 to 1975. During those years, the veteran had periods of active reserve service ranging from one to seventeen days. In 1972 and 1973, he had twelve periods of one to six days, and one of seventeen days.

The claims file also contains a service aerospace vehicle history/posting report. That report shows that the C-123 serial number 56004362 was in Vietnam in January 1972, and was at Hanscom AFB in December 1972, and again in May 1973.

Mr. V. corroborated the veteran's account of cleaning a defoliant out of a particular C-123 during reserve service at Hanscom. The service and museum records document the veteran's reserve service in 1972 and 1973, the presence of that C-123 at Hanscom in 1972 and 1973, the use of that C-123 in spraying defoliant in Vietnam, and service of that airplane in Vietnam in 1972. Overall, the evidence reasonably supports the veteran's account of herbicide

exposure. The Board will concede that the veteran was exposed to an herbicide during service.

The Board accepts that the veteran was exposed to an herbicide during service. The veteran was diagnosed with type 2 diabetes after service. The Board presumes that the veteran's diabetes is service connected, and grants his claim.

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), the United States Department of Veterans Affairs (VA) has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2007); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2007). In this case, the Board is granting in full the benefit sought on appeal. Therefore, the Board need not provide further notification or assistance to the veteran. The Board also does not need to discuss further VA's compliance with the laws and regulations involving notification and the development of evidence.

ORDER

Entitlement to service connection for type 2 diabetes mellitus is granted.

M. E. LARKIN
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

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Decision Date: 09/05/01 Archive Date: 12/03/01

DOCKET NO. 99-04 864

DATE SEP 05, 2001

On appeal from the Department of Veterans Affairs Regional Office
in Cleveland, Ohio

THE ISSUE

Entitlement to service connection for prostate cancer.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Kristi Barlow, Associate Counsel

INTRODUCTION

The veteran served on active duty from February 1953 to February 1957, from May 1957 to May 1961, from October 1962 to November 1962. He also served on numerous periods of active duty for training between 1970 and 1982, when he was released from Reserve duty.

This matter comes before the Board of Veterans' Appeals (BVA or Board) on appeal from a July 1998 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Cleveland, Ohio, which, among other things, denied the benefit sought on appeal.

The Board notes that this matter came before it in May 2000, but was remanded for further development. The RO completed the requested developed, but continued the denial of benefits. Therefore, this matter was returned to the Board for further consideration. In June 2001, the Board granted service connection for prostate cancer on a presumptive basis, but that decision was vacated for procedural reasons. Therefore, this matter is properly before the Board at this time for adjudication on the merits.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the veteran's appeal has been obtained by the RO.
2. Resolving all reasonable doubt in favor of the veteran, the evidence shows that the veteran was exposed to an herbicidal agent during active duty for training between 1970 and 1975.

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3. There is a positive medical association between exposure to herbicides used in the Republic of Vietnam during the Vietnam

Conflict and the subsequent development of prostate cancer.

4. The veteran currently has a diagnosed disability of prostate cancer.

CONCLUSION OF LAW

The veteran's prostate cancer was incurred as a result of active military service. 38 U.S.C.A. 11 10, 5107 (West 1991); Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 C.F.R. 3.102, 3.303, 3.304 (2000).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

At the outset of this decision, the Board finds that VA has met its duty to assist the veteran in the development of his claim under the provisions of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000). By virtue of the Statement of the Case and Supplemental Statements of the Case issued during the pendency of the appeal, the veteran and his representative were given notice of the information, medical evidence, or lay evidence necessary to substantiate the veteran's claim. The RO made reasonable efforts to obtain relevant records. It appears that all evidence identified by the veteran relative to this claim has been obtained and associated with the claims folder, including a search for records with the U.S. Armed Services Center for Research of Unit Records, and a request for medical records indicated in a May 2000 Board Remand.

Service connection for VA disability compensation purposes will be granted for a disability resulting from disease or personal injury incurred in the line of duty or for aggravation of a preexisting injury in the active military, naval, or air set-vice.

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See 38 U.S.C.A. 1110; 38 C.F.R. 3.303(a) (2000). When a veteran seeks service connection for a disability, due consideration shall be given to the supporting evidence in light of the places, types, and circumstances of service, as evidenced by service records, the official history of each organization in which the veteran served, the veteran's military records, and all pertinent medical and lay evidence. See 38 U.S.C.A. 1154 (West 1991); 38 C.F.R. 3.303(a).

The veteran contends that he was exposed to Agent Orange or herbicides, as well as insecticides, during his active duty for training service from 1970 through 1975, when he worked on C-123 spray aircraft returning from the Republic of Vietnam. He wrote that he was assigned to remove the spray tanks from the aircraft, did so without safety equipment, was exposed to the liquids contained therein, though he did not know what they were, and that he was required to undergo a blood test every six months.

The evidence of record reveals that the veteran served honorably on numerous periods of active duty for training between 1970 and 1975; he was an aircraft mechanic at Rickenbacker Air Force Base during those years. A statement submitted from the foreman at the spray

shop at Rickenbacker Air Force Base from 1970 to 1977 supports the veteran's contention that he was charged with cleaning aircraft used in the Republic of Vietnam to spray Agent Orange and other material, including insecticides. The foreman also reported that the proper safety equipment was not used at that time.

The U.S. Armed Services Center for Research of Unit Records reported that the veteran's unit conducted a regular insecticide control spray program during the Vietnam Conflict and that maintenance technicians worked on spray system corrosion problems. Unit histories noted the spray program, although they did not specifically document the unit's involvement with herbicides or maintenance of planes returning from the Republic of Vietnam.

The medical evidence reveals that the veteran currently has a medical diagnosis of prostatic adenocarcinoma. Treatment records show minimal problems with urinary

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voiding and bowel movements. The veteran has complaints regarding erections and the ability to perform sexual activity. Although the veteran's treatment records do not contain a medical opinion as to the etiology of his prostate cancer, the Board acknowledges that a positive association between exposure to herbicides used in the Republic of Vietnam during the Vietnam Conflict and subsequent development of prostate cancer has been made in various medical studies specifically cited and considered by VA in its development of regulations regarding the presumptive allowance of service connection for certain diseases, including prostate cancer, under 38 C.F.R. 3.307 (2000). See 61 Federal Register 57586 and, specifically, the 1996 National Academy of Sciences (NAS) report entitled, Veterans and Agent Orange: Update 1996. Also see, 61 Federal Register 41368 and 61 Federal Register 341. The cited medical studies were even relied upon in designating prostate cancer as a presumptive disease for which service connection would be granted under 38 C.F.R. 3.307, provided a veteran had served in the Republic of Vietnam during the conflict era. A medical nexus between a currently diagnosed disability and service may be demonstrated not only by the opinion of a medical professional, but by medical treatise evidence where the treatise evidence discusses generic relationships with a sufficient degree of certainty. See *Mattern v. West*, 12 Vet. App. 222, 228 (1999); *Wallin v. West*, 11 Vet. App. 509 (1998).

The Board notes that it is the defined and consistently applied policy of VA to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. See 38 C.F.R. 3.102.

Given the evidence as outlined above, especially the lay statement of the veteran's supervisor corroborating that the veteran worked on planes returning from the Republic of Vietnam which had been used to spray herbicides, and the report of the

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U.S. Armed Services Center for Research of Unit Records which corroborated that the veteran worked on spray system corrosion problems of planes returning from the Republic of Vietnam, the Board finds the existence of reasonable doubt exists on the question of the veteran's exposure to herbicidal agents. Therefore, the Board resolves such reasonable doubt in favor of the veteran to find that the veteran was exposed to an herbicide agent used in support of the United States and its allied military operations in the Republic of Vietnam during his active duty for training performed at Rickenbacker Air Force Base between 1970 and 1975. 38 U.S.C.A. 5107(b) (West Supp. 2001); 38 C.F.R. 3.102.

Furthermore, based on the medical studies showing a medical nexus between exposure to herbicides used in the Republic of Vietnam and the subsequent development of prostate cancer, the Board finds that the veteran developed prostate cancer as a result of his exposure to the herbicidal agent. Where, as in this veteran's case, an appellant is found not entitled to a regulatory presumption of service connection, the appellant may still establish service connection with proof of actual direct causation. See *Combee v. Brown*, 34 F.3d 1039 (Fed Cir. 1994). For these reasons, the Board finds that service connection for prostate cancer is warranted as directly related to service. 38 U.S.C.A. 1110, 5107; Veterans Claims Assistance of Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 C.F.R. 3.102, 3.303, 3.304.

ORDER

Service connection for prostate cancer is granted.

JEFFREY D. PARKER
Acting Member, Board of Veterans' Appeals

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Decision Date: 06/12/01    Archive Date: 06/18/01
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DOCKET NO.  99-04 864    )    DATE
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On appeal from the
Department of Veterans Affairs Regional Office in Cleveland,
Ohio

THE ISSUE

Entitlement to service connection for prostate cancer,
including as a result of exposure to an herbicide agent.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Kristi Barlow, Associate Counsel

INTRODUCTION

The veteran served on active duty from February 1953 to February 1957, from May 1957 to May 1961, from October 1962 to November 1962. He also served on numerous periods of active duty for training between 1970 and 1982, when he was released from Reserve duty.

This matter comes before the Board of Veterans' Appeals (BVA or Board) on appeal from a July 1998 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Cleveland, Ohio, which, among other things, denied the benefit sought on appeal.

The Board notes that this matter came before it in May 2000, but was remanded for further development. The RO completed the requested developed, but continued the denial of benefits. Therefore, this matter has been returned to the Board for further consideration.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the veteran's appeal has been obtained by the

RO.

2. Resolving all reasonable doubt in favor of the veteran, the evidence shows that the veteran was exposed to an herbicidal agent during active duty for training between 1970 and 1975.

3. The veteran currently has a diagnosis of prostate cancer.

CONCLUSION OF LAW

The veteran's prostate cancer was incurred as a result of exposure to an herbicide agent used in support of the United States and its allied military operations in the Republic of Vietnam. 38 U.S.C.A. §§ 1110, 1112, 1113, 1116, 5107 (West 1991); Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2000).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

At the outset of this decision, the Board finds that VA has met its duty to assist the veteran in the development of his claim under the provisions of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000). By virtue of the Statement of the Case and Supplemental Statements of the Case issued during the pendency of the appeal, the veteran and his representative were given notice of the information, medical evidence, or lay evidence necessary to substantiate the veteran's claim. The RO made reasonable efforts to obtain relevant records and it appears that all evidence identified by the veteran relative to this claim has been obtained and associated with the claims folder, including a search for records with the U.S. Armed Services Center for Research of Unit Records, and request for medical records indicated in a May 2000 Board Remand.

Service connection for VA compensation purposes will be granted for a disability resulting from disease or personal injury incurred in the line of duty or for aggravation of a preexisting injury in the active military, naval, or air service. See 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). When a veteran seeks service connection for a disability, due consideration shall be given to the supporting evidence in light of the places, types, and circumstances of service, as evidenced by service records, the official history of each organization in which the veteran served, the veteran's military records, and all pertinent medical and lay evidence. See 38 U.S.C.A. § 1154; 38 C.F.R. § 3.303(a).

A chronic, tropical, prisoner of war related disease, or a disease associated with exposure to certain herbicide agents will be considered to have been incurred in service under the circumstances outlined in the Code of Federal Regulations

even though there is no evidence of such disease during the period of service. See 38 C.F.R. § 3.307(a). The term "herbicide agent" means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning January 9, 1962, and ending on May 7, 1975. See 38 C.F.R. § 3.307(a)(6). The specified diseases shall have become manifest to a degree of ten percent or more at any time after service except for chloracne, other acneform diseases, and respiratory cancers, which have set time limits for manifestation. See 38 C.F.R. § 3.307(a)(6). Prostate cancer is a specified disease under 38 C.F.R. § 3.309(e).

The veteran contends that he was exposed to Agent Orange or herbicides, as well as insecticides, during his active duty for training service from 1970 through 1975, when he worked on C-123 spray aircraft from Vietnam. He wrote that he was assigned to remove the spray tanks from the aircraft, did so without safety equipment, was exposed to the liquids contained therein, though he did not know what they were, and that he was required to undergo a blood test every six months.

The evidence of record reveals that the veteran served honorably on numerous periods of active duty for training between 1970 and 1975; he was an aircraft mechanic at Rickenbacker Air Force Base during those years. A statement submitted from the foreman at the spray shop at Rickenbacker Air Force Base from 1970 to 1977 supports the veteran's contention that he was charged with cleaning aircraft used in Vietnam to spray Agent Orange and other material, including insecticides. The foreman also reported that the proper safety equipment was not used at that time.

The U.S. Armed Services Center for Research of Unit Records reported that the veteran's unit conducted a regular insecticide control spray program during the Vietnam Conflict and that maintenance technicians worked on spray system corrosion problems. Unit histories noted the spray program, although they did not specifically document the unit's involvement with herbicides or maintenance of planes returning from Vietnam.

The medical evidence reveals that the veteran currently has a medical diagnosis of the disability of prostatic adenocarcinoma. Treatment records show minimal problems with urinary voiding and bowel movements. The veteran has complaints regarding erections and the ability to perform sexual activity.

The Board notes at this juncture that it is the defined and consistently applied policy of VA to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the

claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. See 38 C.F.R. § 3.102.

Given the evidence as outlined above, especially the lay statement of the veteran's supervisor corroborating that the veteran worked on planes returning from Vietnam which had been used to spray herbicides, and the report of the U.S. Armed Services Center for Research of Unit Records which corroborated to the extent that the veteran worked on spray system corrosion problems of planes returning from Vietnam, and resolving all reasonable doubt in favor of the veteran, the Board finds that the veteran was exposed to an herbicide agent used in support of the United States and its allied military operations in the Republic of Vietnam during his active duty for training performed at Rickenbacker Air Force Base between 1970 and 1975. Presumptively, the veteran developed prostate cancer as a result of his

exposure to the herbicide agent. Therefore, the Board finds that service connection for prostate cancer must be granted on a presumptive basis under 38 C.F.R. §§ 3.307 and 3.309.

ORDER

Service connection for prostate cancer due to exposure to an herbicide agent is granted.

JEFFREY D. PARKER
Acting Member, Board of Veterans' Appeals

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