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On appeal from the Department of Veterans Affairs Regional Office in Boston, Massachusetts

THE ISSUE

Entitlement to service connection for diabetes mellitus secondary to herbicide exposure.

REPRESENTATION

Veteran represented by: Massachusetts Department of Veterans Services

WITNESSES AT HEARING ON APPEAL

The veteran and his brother

ATTORNEY FOR THE BOARD

L. J. N. Driever, Counsel

INTRODUCTION

The veteran had active service from December 1966 to December 1970, including in Guam from December 1966 to October 1968.

This claim comes before the Board of Veterans' Appeals (Board) on appeal from a March 2002 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Boston, Massachusetts.

The veteran and his brother testified in support of this claim at a hearing held at the RO before the undersigned in May 2004. In September 2004, the Board remanded this claim to the RO via the Appeals Management Center in Washington, D.C.

FINDINGS OF FACT

1. VA provided the veteran adequate notice and assistance with regard to his claim.
2. Diabetes mellitus is related to the veteran's active service.

CONCLUSION OF LAW

Diabetes mellitus was incurred in service. 38 U.S.C.A. §§ 1110, 5102, 5103, 5103A (West 2002); 38 C.F.R. §§ 3.159, 3.303 (2004).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

VA's Duties to Notify and Assist

On November 9, 2000, the Veterans Claims Assistance Act of 2000 (VCAA), codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002), became law. Regulations implementing the VCAA were published at 66 Fed. Reg. 45,620, 45,630-32 (August 29, 2001) and codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326 (2004). The VCAA and its implementing regulations are applicable to this appeal.

The VCAA and its implementing regulations provide that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim. They also require VA to notify the claimant and the claimant's representative, if any, of the information and medical or lay evidence not previously provided to the Secretary that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion of the evidence is to be provided by the claimant and which portion of the evidence VA will attempt to obtain on behalf of the claimant.

The United States Court of Appeals for Veterans Claims (Court) has mandated that VA ensure strict compliance with the provisions of the VCAA. See *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). In this case, VA has strictly

complied with the VCAA by providing the veteran adequate notice and assistance with regard to his claim. Regardless, given that the decision explained below represents a full grant of the benefit being sought on appeal, the Board's decision to proceed in adjudicating this claim does not prejudice the veteran in the disposition thereof. See *Bernard v. Brown*, 4 Vet. App. 384, 392-94 (1993).

Analysis of Claim

In multiple written statements submitted during the course of this appeal and during his personal hearing, the veteran alleged that he developed diabetes mellitus as a result of his exposure to herbicide agents while serving on active duty in Guam. His military occupational duties as an aircraft maintenance specialist allegedly required him to work in an air field, the perimeter of which was continuously brown due to herbicide spraying every three months. The veteran also alleges that he recalls seeing storage barrels at the edge of the base, which he now knows housed herbicides. Following discharge, Anderson Air Force base in Guam, where the veteran was stationed, underwent an environmental study, which showed a significant amount of dioxin contamination in the soil and prompted the federal government to order a clean up of the site.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303 (2004). Service connection may also be granted for any disease diagnosed after discharge when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Subsequent manifestations of a chronic disease in service, however remote, are to be service connected, unless clearly attributable to intercurrent causes. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or diagnosis including the word "chronic." Continuity of symptomatology is required only where the condition noted during service is not, in fact, shown to be chronic or when the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim. 38 C.F.R. § 3.303(b).

In some circumstances, a disease associated with exposure to certain herbicide agents will be presumed to have been incurred in service even though there is no evidence of that disease during the period of service at issue. 38 U.S.C.A. § 1116(a) (West 2002); 38 C.F.R. §§ 3.307(a)(6), 3.309(e) (2004). In this regard, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era shall be presumed to have been exposed during such service to a herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. 38 U.S.C.A. § 1116(a)(3).

Diseases associated with such exposure include: chloracne or other acneform diseases consistent with chloracne; Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes); Hodgkin's disease; multiple myeloma; non-Hodgkin's lymphoma; acute and subacute peripheral neuropathy; porphyria cutanea tarda; prostate cancer; respiratory cancers (cancer of the lung, bronchus, larynx, or trachea); and soft-tissue sarcomas (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). 38 C.F.R. § 3.309(e) (2004); see also 38 U.S.C.A. § 1116(f), as added by § 201(c) of the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (2001).

These diseases shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year after the last date on which the veteran was exposed to an herbicide agent during active military, naval, or air service. 38 C.F.R. § 3.307(a)(6)(ii). The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the Vietnam era. "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. 38 C.F.R. § 3.307(a)(6)(iii).

The Secretary of Veterans Affairs has determined that there is no positive association between exposure to herbicides and any other condition for which the Secretary has not specifically determined that a presumption of service connection is warranted. See Notice, 59 Fed. Reg. 341, 346 (1994); see also 61 Fed. Reg. 41,442, 41,449 and 57,586, 57,589 (1996); 67 Fed. Reg. 42,600, 42,608 (2002).

Notwithstanding the aforementioned provisions relating to presumptive service connection, which arose out of the Veteran's Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 5, 98 Stat. 2,725,

2,727-29 (1984), and the Agent Orange Act of 1991, Pub. L. No. 102-4, § 2, 105 Stat. 11 (1991), the United States Court of Appeals for the Federal Circuit has determined that a claimant is not precluded from establishing service connection with proof of direct causation. *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994); see also 38 C.F.R. § 3.303(d).

In order to prevail with regard to the issue of service connection on the merits, "there must be medical evidence of a current disability, see *Rabideau v. Derwinski*, 2 Vet. App. 141, 143 (1992); medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary. The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107 (West 2002); see also *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

The veteran's service medical records reflect that, during service, the veteran did not report herbicide exposure. In addition, he did not receive treatment for and was not diagnosed with diabetes mellitus. His DD Form 214, DD Form 7 and Airmen Performance Reports dated in March 1968 and October 1968, however, confirm that he had active service from December 1966 to December 1970, including at Anderson Air Force base in Guam from December 1966 to October 1968.

He has submitted copies of articles indicating that Agent Orange may have been stored and/or used on Guam from 1955 to the late 1960s, which is the time period during which the veteran served there. These articles also reflect that in the 1990s, the Environmental Protection Agency listed Anderson Air Force base as a toxic site with dioxin contaminated soil and ordered clean up of the site. Given this evidence, particularly, the articles reflecting the latter information, and the veteran's testimony, which is credible, the Board accepts that the veteran was exposed to herbicides during his active service in Guam.

The veteran did not serve in Vietnam; therefore, he is not entitled to a presumption of service connection for his diabetes mellitus under the aforementioned law and regulations governing claims for service connection for disabilities resulting from herbicide exposure. As previously indicated, however, the veteran may be entitled to service connection for this disease on a direct basis if the evidence establishes that his diabetes mellitus is related to the herbicide exposure.

Post-service medical evidence indicates that, since 1993, the veteran has received treatment for, and been diagnosed with, diabetes mellitus. One medical professional has addressed the question of whether this disease is related to such exposure. In June 2005, a VA examiner noted that the veteran had had the disease for 12 years, had no parental history of such a disease, and had served in Guam, primarily in an air field, which was often sprayed with chemicals. She diagnosed diabetes type 2 and opined that this disease was 50 to 100 percent more likely than not due to the veteran's exposure to herbicides between January 1968 and April 1970, when he served as a crew chief for the 99th bomb wing on the ground and tarmac. She explained that such exposure, rather than hereditary factors, better explained the cause of the disease given that the veteran's parents did not have diabetes.

As the record stands, there is no competent medical evidence of record disassociating the veteran's diabetes mellitus from his in-service herbicide exposure or otherwise from his active service. Relying primarily on the VA examiner's opinion, the Board thus finds that diabetes mellitus is related to the veteran's service. Based on this finding, the Board concludes that diabetes mellitus was incurred in service. Inasmuch as the evidence supports the veteran's claim, that claim must be granted.

ORDER

Service connection for diabetes mellitus secondary to herbicide exposure is granted.

ROBERT E. SULLIVAN
Veterans Law Judge, Board of Veterans' Appeals
Department of Veterans Affairs