Uploaded to the VFC Website

July 2014

This Document has been provided to you courtesy of Veterans-For-Change!

Feel free to pass to any veteran who might be able to use this information!

For thousands more files like this and hundreds of links to useful information, and hundreds of "Frequently Asked Questions, please go to:

Veterans-For-Change

If Veterans don't help Veterans, who will?

Note: VFC is not liable for source information in this document, it is merely provided as a courtesy to our members & subscribers.

Citation Nr: 0726432
Decision Date: 08/23/07 Archive Date: 08/29/07

DOCKET NO. 06-42 315) DATE
)
)

On appeal from the
Department of Veterans Affairs Regional Office in Hartford, Connecticut

THE ISSUE

Entitlement to service connection for diabetes mellitus type 2, asserted as secondary to exposure to herbicides.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Steven D. Reiss, Counsel

INTRODUCTION

The veteran served on active duty from October 1970 to April 1972 and from August 1990 to August 1991. He also served in the Air Force Reserves.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a November 2005 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Hartford, Connecticut, that denied the veteran's claim of entitlement to service connection for diabetes mellitus type 2.

In September 1997, the veteran testified at a hearing held before the undersigned Veterans Law Judge in support of claims of service connection for multiple joint pain, which was asserted as a left shoulder condition, and for multiple chemical sensitivity, which was asserted as a blood disorder. These issues were remanded by the Board in October 2003 to

the RO via the Appeals Management Center (AMC) in Washington, DC. As May 2007 letters reflect, the AMC continues to develop the remanded claims. The veteran's diabetes mellitus claim was certified by the RO to the Board in January 2007, and thus, the only issue before the Board is the veteran's claim of service connection for diabetes mellitus type 2. The Board notes that because the AMC continues to develop the remanded claims, the issues previously before should be returned to the AMC for appropriate action. Thus, the Board is returning the claims folder and transferring the temporary folder, i.e., the entire record, to the AMC.

FINDINGS OF FACT

1. The veteran did not serve in the Republic of Vietnam and was not awarded the Vietnam Service Medal and thus is not presumed to be exposed to herbicides, including Agent Orange, and there is no evidence showing that the veteran was exposed to herbicides during service, including Agent Orange.

2. Diabetes mellitus was not present in service or until many years thereafter, and is not shown to be related to service or to an incident of service origin.

CONCLUSION OF LAW

Diabetes mellitus was not incurred in or aggravated by service. 38 U.S.C.A. §§ 101(24), 1110, 1112, 1116, 5107 (West 2002); 38 C.F.R. §§ 3.6, 3.102, 3.303, 3.307, 3.309 (2006).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

VA's Duties to Notify and Assist

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a) (West 2002); 38 C.F.R. § 3.159(b) (2006). The notice must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate

the claim; (2) that VA will seek to provide; (3) that the claimant is expected to provide; and (4) must ask the claimant to provide any evidence in his possession that pertains to the claim in accordance with 38 C.F.R. § 3.159(b)(1). See Sanders v. Nicholson, 487 F.3d. 881 (Fed. Cir. 2007). The notice should be provided to a claimant before the initial RO decision. Pelegrini v. Principi, 18 Vet. App. 112 (2004); see also Mayfield v. Nicholson, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006).

In a November 2004 letter, which predates the November 2005 rating decision on appeal, the RO notified the veteran of the first element, i.e., that the evidence needed to show that his diabetes mellitus had its onset in or was aggravated by service. The letter also satisfied the second and third elements because it notified the veteran of the evidence he was responsible for submitted and identified the evidence that VA would obtain. As to the fourth element, the letter advised the veteran to send VA any evidence that he had, which shows that he was notified that he should submit to VA any evidence in his possession that pertained to the claim.

In prosecuting this appeal, the veteran acknowledges that he never served in Vietnam and instead argues that service connection is warranted on a presumptive basis due to exposure to herbicides from aircraft on which he flew from 1979 to 1982. His arguments demonstrate his understanding of what was necessary to substantiate his claim, i.e., any notice defect was cured by the veteran's actual knowledge. See Sanders; see also Simmons v. Nicholson, 487 F.3d 892 (Fed. Cir. 2007). In any event, the Board finds that a reasonable person could be expected to understand from the notice what was needed to substantiate his claim and thus the essential fairness of the adjudication was not frustrated. Id. As such, the Board concludes that, even assuming a notice error, that error was harmless. See Medrano v. Nicholson, 21 Vet. App. 165, 170 (2007); Mayfield v. Nicholson, 20 Vet. App. 537, 543 (2006).

Notice requirements also apply to all five elements of a service connection claim: veteran status, existence of a disability, a connection between the veteran's service and the disability, degree of disability, and effective date of the disability. Dingess v. Nicholson, 19 Vet. App. 473 (2006). Here, in a March 2006 letter, the RO notified the veteran of these criteria.

With respect to VA's duty to assist, the Board notes that pertinent records from all relevant sources identified by him, and for which he authorized VA to request have been associated with the claims folder. 38 U.S.C.A. § 5103A. In this regard, the Board acknowledges that the veteran maintains that he was exposed to Agent Orange while flying aircraft from 1979 to 1982 in the Air Force Reserves because the aircraft were used to spray Agent Orange in Vietnam from 1962 to 1971 and that he was thus exposed to Agent Orange residue. As will be discussed below, despite a specific request to do so, the veteran has not provided VA with any information to permit the RO to verify the identity of the precise aircraft on which he flew to determine whether the specific planes were involved in spraying Agent Orange in Vietnam or had herbicide residue. Thus, VA was unable to take further action on this matter.

The Board notes that the VA has neither afforded the veteran an examination nor solicited a medical opinion as to the onset and/or etiology of his diabetes mellitus. Under 38 U.S.C.A. § 5103A(d)(2), VA must provide a medical examination and/or obtain a medical opinion when there is: (1) competent evidence that the veteran has a current disability (or persistent or recurrent symptoms of a disability); (2) evidence establishing that he suffered an event, injury or disease in service or has a disease or symptoms of a disease within a specified presumptive period; (3) an indication the current disability or symptoms may be associated with service; and (4) there is not sufficient medical evidence to make a decision. See Wells v. Principi, 326 F.3d 1381 (Fed. Cir. 2003); McLendon v. Nicholson, 20 Vet. App. 79 (2006). The Board finds that the evidence of record in this case is sufficient to decide the claim and a current VA examination is not necessary.

The veteran did not serve in Vietnam and there is no evidence showing that he was exposed to herbicides during service. In addition, he does not contend that his diabetes mellitus had its onset in service. The evidence shows that the veteran was initially diagnosed as having this disease in May 2001, many years after his discharge from his second period of active duty, and he does not contend otherwise. Moreover, diabetes mellitus is not the type of disability that is observable by a lay person. See 38 C.F.R. § 3.159(a)(2) (2006). In the absence of any competent evidence linking the disease to service, there is no reasonable possibility that a

VA examination would result in pertinent findings. Thus, VA is not required to afford him a medical examination and/or obtain medical opinions as to the etiology or onset the claimed disorders. As such, the Board finds that no additional assistance is required to fulfill VA's duty to assist. Smith v. Gober, 14 Vet. App. 227 (2000), aff'd 281 F.3d 1384 (Fed. Cir. 2002); Dela Cruz v. Principi, 15 Vet. App. 143 (2001).

Background and Analysis

The veteran essentially contends that service connection is warranted for diabetes mellitus because he developed the condition as a consequence of his exposure to Agent Orange while flying aircraft from 1979 to 1982 in the Air Force Reserves. He maintains that the aircraft were used to spray Agent Orange in Vietnam from 1962 to 1971 and that he was thus exposed to herbicides.

Service connection may be established for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a pre-existing injury suffered or disease contracted in line of duty. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303. Active, military, naval, or air service constitutes active duty, any period of active duty for training during which the claimant was disabled or died from a disease or injury incurred or aggravated in the line of duty, and any period of inactive duty training during which the claimant was disabled or died from an injury incurred or aggravated in the line of duty. 38 U.S.C.A. § 101(24) and 38 C.F.R. § 3.6(a).

As to the veteran's service in the Air Force Reserves, service connection may be granted only for disability resulting from injury or disease incurred in or aggravated during a period of active duty for training or for disability resulting from injury during inactive duty training. The law also provides that service connection may be granted for any disease diagnosed after discharge when all the evidence, including that pertinent to service, establishes that the disease was incurred in active service. 38 C.F.R. § 3.303(d).

If the disorder is a chronic disease, service connection may be granted if it becomes manifest to a degree of 10 percent within the presumptive period; the presumptive period for diabetes mellitus is one year. 38 U.S.C.A. §§ 1101, 1112,

1113; 38 C.F.R. §§ 3.307, 3.309.

In addition, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era is presumed to have been exposed to herbicides during that service. 38 U.S.C.A. § 1116; 38 C.F.R. § 3.307. If a veteran was exposed to an herbicide agent during active military, naval, or air service, presumptive service connection for numerous diseases, including diabetes mellitus, type 2, will be established even though there is no record of such disease during service, provided that the disease is are manifest to a degree of 10 percent or more at any time after service. 38 C.F.R. §§ 3.307(a)(6)(ii), 3.309(e).

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. 38 U.S.C.A. § 5107; Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

As the RO has pointed out, although presumptive service connection is available for diabetes mellitus type II due to herbicide exposure, there is no competent evidence that the veteran was exposed to herbicides during service. In this regard, the Board notes that although the veteran served during the Vietnam era, he acknowledges that he never served in Vietnam. The veteran contends that he was exposed to Agent Orange because he flew C-130 aircraft while in the Air Force Reserves from 1979 to 1982. While these planes may be of the type that were used in Vietnam to dispense Agent Orange from 1962 to 1971, there is no evidence that any of the planes on which the veteran flew dispensed Agent Orange in Vietnam or that there was any residual Agent Orange on the aircraft the veteran served on. Further, the veteran has not submitted any evidence substantiating his contention that there was any residual Agent Orange material on the aircraft he served on. His assertion, standing alone, is not sufficient to show he had actual exposure to Agent Orange, years after it was used in Vietnam.

The veteran was discharged from his second period of active duty in August 1991, and he was not diagnosed as having diabetes mellitus type II until May 2001, and he does not contend otherwise. Thus, presumptive service connection for

diabetes mellitus type II as a chronic disease under 38 C.F.R. § 3.309(a) is not available. In addition, because he did not serve in Vietnam and was not awarded the Vietnam Service Medal, he cannot be presumed to have been exposed to herbicides during service. Thus, presumptive service connection is not warranted under 38 C.F.R. § 3.309(e) is not warranted. Finally, there is no medical evidence linking his diabetes mellitus type II to service. As such, service connection is not warranted on either a direct or a presumptive basis. See Stefl v. Nicholson, 21 Vet. App. 120 (2007).

ORDER

Service connection for diabetes mellitus type II is denied.

_____

STEVEN L. COHN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs