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On appeal from the
Department of Veterans Affairs Regional Office in Nashville, Tennessee

THE ISSUES

1. Entitlement to service connection for Type II diabetes mellitus as a result of exposure to herbicides.

2. Entitlement to service connection for chloracne as a result of exposure to herbicides.

3. Entitlement to service connection for coronary artery disease as secondary to a service-connected disability.

4. Entitlement to service connection for erectile dysfunction as secondary to a service-connected disability.

5. Entitlement to service connection for peripheral neuropathy of the right arm as secondary to a service-connected disability.

6. Entitlement to service connection for peripheral neuropathy of the lower extremities as secondary to a service-connected disability.

7. Entitlement to service connection for a fungal infection of the hands and feet as a result of exposure to herbicides.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Douglas E. Massey, Counsel

INTRODUCTION

The Veteran had active military service from July 1967 to

June 1970.

This case comes before the Board of Veterans' Appeals (Board) on appeal from a September 2006 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Nashville, Tennessee, which adjudicated the aforementioned issues on appeal.

In September 2008, the Veteran appeared and offered testimony at a video-conference hearing before the undersigned acting Veterans Law Judge. A transcript of that hearing is of record.

The issues involving service connection for erectile dysfunction, peripheral neuropathy of the right arm and lower extremities, and a fungal infection of the hands and feet are addressed in the REMAND portion of the decision below and are remanded to the RO via the Appeals Management Center (AMC), in Washington, DC.

FINDINGS OF FACT

1. The Veteran did not serve in the Republic of Vietnam during the Vietnam era, but evidence shows that he was exposed to various herbicides while performing duties as a game warden in service.

2. The Veteran's type II diabetes mellitus has been medically linked to herbicide exposure in service.

3. The Veteran's chloracne has been medically linked to herbicide exposure in service.

4. The Veteran's coronary artery disease is proximately due to his service-connected type II diabetes mellitus.

CONCLUSIONS OF LAW

1. Type II diabetes mellitus was incurred in service. 38 U.S.C.A. §§ 1110, 1112, 1116, 5107 (West 2002 and Supp. 2009); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.313 (2009).

2. Chloracne was incurred in service. 38 U.S.C.A. §§ 1110, 1112, 1116, 5107 (West 2002 and Supp. 2009); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.313 (2009).

3. Coronary artery disease is proximately due to service-connected type II diabetes mellitus. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.303, 3.307, 3.309, 3.310 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran claims that he developed type II diabetes mellitus and chloracne as a result of exposure to herbicides

in service. He also claims that he developed coronary artery disease as a result of his service-connected type II diabetes mellitus. After carefully reviewing the evidence of record, the Board finds that service connection for each of these disabilities is warranted. Thus, in light of the favorable outcome, there is no need to discuss whether VA has satisfied its duties to notify and assist the Veteran with his claim pursuant to the Veterans Claims Assistance Act of 2000 (VCAA). 38 U.S.C.A. § 5100 et seq.

I. Legal Criteria

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by service. See 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). Stated somewhat differently, service connection requires: (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247, 253 (1999).

Type II diabetes mellitus and heart disease may be presumed to have been incurred in service if manifest to a compensable degree of at least 10 percent within one year of discharge from service. See 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309. In addition to these provisions, a Veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era, and has a disease listed in 38 C.F.R. § 3.309(e), shall be presumed to have been exposed during such service to an herbicide agent, such as Agent Orange, unless there is affirmative evidence to establish that he or she was not exposed to any such agent during that service. See 38 C.F.R. § 3.307(a)(6)(iii).

For the purpose of this section, "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 on January 9, 1962, and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram."

If a Veteran was exposed to Agent Orange during active military, naval, or air service, certain specified diseases shall be service-connected, if the requirements of 38 C.F.R. § 3.307(a) are met, even if there is no record of such disease during service. 38 C.F.R. § 3.309(e). The list of diseases includes: chloracne or other acneform disease consistent with chloracne, type 2 diabetes, Hodgkin's disease, multiple myeloma, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, respiratory cancers, and soft-tissue sarcoma. See 38 C.F.R. § 3.309(e).

These diseases, however, must 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) must 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. See 38 C.F.R. § 3.307(a)(6)(ii). VA has determined 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, 68 Fed. Reg. 27630- 27641 (2003).

Thus, service connection may be presumed for residuals of Agent Orange exposure by showing two elements. First, a Veteran must show that he served in the Republic of Vietnam during the Vietnam War era. See 38 U.S.C.A. § 1116; 38 C.F.R. § 3.307(a)(6). Second, the Veteran must be diagnosed with one of the specific diseases listed in 38 C.F.R. § 3.309(e). Brock v. Brown, 10 Vet. App. 155, 162 (1997). However, the availability of presumptive service connection for a disability based on exposure to herbicides does not preclude a Veteran from establishing service connection with proof of direct causation. See Stefl v. Nicholson, 21 Vet. App. 120 (2007); see also Combee v. Brown, 34 F.3d 1039 (Fed. Cir. 1994).

II. Type II Diabetes Mellitus

The Veteran was diagnosed with type II diabetes mellitus in 2005, which he claims is related to herbicide exposure while working as a game warden at Fort Gordon, Georgia, during his military service. For the reasons set forth below, the Board will resolve all reasonable doubt in his favor and grant the claim.

The Board finds that presumptive service connection due to herbicide exposure is not warranted for the Veteran's type II diabetes mellitus. While type II diabetes mellitus is one of the specific diseases listed in 38 C.F.R. § 3.309(e), the record does not show, nor does the Veteran allege, that he served in the Republic of Vietnam during the Vietnam era, or at any other time.

Therefore, service connection for type II diabetes mellitus may only be established with proof of actual direct causation. Combee, supra; see also McCartt v. West, 12 Vet. App. 164, 167 (1999) (holding that the provisions set forth in Combee, which actually concerned radiation exposure, are nonetheless equally applicable in cases involving claimed Agent Orange exposure). In other words, medical evidence must show the Veteran's type II diabetes mellitus is directly related to his military service.

In this case, no evidence shows that his diabetes mellitus had its onset either in service or during the one year presumptive period after service. However, medical evidence supports the Veteran's claim that his type II diabetes mellitus is related to herbicide exposure in service from

1967 to 1968, even though that exposure took place outside of the Republic of Vietnam.

The evidence establishes that he was exposed to various herbicide agents while performing his duties as a game warden at Fort Gordon. His service records show that his military occupational specialty (MOS) was Military Police. In an October 2006 letter, Adjutant General J.W. indicated that, drawing on her 30-plus years of experience in military personnel, the entry of Military Police listed on the Veteran's DA Form 2-1 is consistent with having duty as a game warden. She then explained that the Army does not have a specific MOS designated for game warden. Since the evidence confirms that he worked as a game warden at Fort Gordon, the issue then becomes whether he was exposed to an herbicide agent in his capacity as a game warden.

The Board finds that the evidence is in relative equipoise - i.e., about evenly balanced for and against the claim - concerning the issue of whether the Veteran was actually exposed to herbicides at Fort Gordon. At his hearing, the Veteran testified that he used various chemical agents while performing "vegetation management" as a game warden. He said these chemicals were stored in large 55-gallon drums in a shed, which he used to fill smaller 5-gallon drums for spraying. He explained that, during hot summer days, he would often spray these chemicals without a wearing a shirt and that the substance would often cover his skin. The Board finds the Veteran's testimony to be credible. See Wood v. Derwinski, 1 Vet. App. 190, 192-193 (1992) (VA decision makers have the responsibility to assess the credibility of evidence and determine the degree of weight to give the evidence); see also Buchanan v. Nicholson, 451 F3d. 1331, 1336 (Fed. Cir. 2006) (observing that "38 C.F.R. § 3.303(a) provides that each disabling condition for which a Veteran seeks service connection, 'must be considered on the basis of . . . all pertinent medical and lay evidence'").

The evidence also suggests that these chemicals used by the Veteran were in fact herbicides. In a July 2006 letter, the Division Director, Pesticide Division, of the Georgia Department of Agriculture explained that it is possible that anyone involved in vegetation management during the 1960s would have used one or both of these herbicides (i.e., 2,4-D and 2,4,5-T). In addition, correspondence from the Department of Defense confirms the use, testing, or storage of Agent Orange, Agent Blue, Agent Purple, Agent White, or other herbicides containing dioxin, at various facilities, including Fort Gordon. The Veteran also submitted evidence of an Internet web site showing a report titled: Technical Report 114 Field Evaluation of Desiccants and Herbicide Mixtures As Rapid Defoliants. Location: Fort Gordon," Dates: 7/151967 to 7/17/1967. The record shows, however, that the Veteran was not stationed at Fort Gordon until September 1967, a few months after these herbicides were used at that location.

In light of this ambiguity, the issue of whether the Veteran was exposed to herbicides while station at Fort Gordon is in relative equipoise, i.e., about evenly balanced for and against his claim. In these situations, the Veteran is given the benefit of the doubt. Consequently, resolving all reasonable doubt in the Veteran's favor, the Board finds that the Veteran was exposed to herbicides in service. 38 C.F.R. § 3.102. See Ashley v. Brown, 6 Vet. App. 52, 59 (1993), citing 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102 (under the "benefit- of-the-doubt" rule, where there exists "an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter," the Veteran shall prevail upon the issue). Therefore, the Board must now determine whether there is medical evidence of a nexus, or link, between the Veteran's inservice herbicide exposure and his type II diabetes mellitus.

The Veteran was first diagnosed with type II diabetes mellitus in November 2005, although the record suggests that it was actually present at the time he suffered a myocardial infarction in 1997. In any event, type II diabetes mellitus was not diagnosed until many years after his last exposure to herbicides in 1968. Such a lengthily period of time is generally considered highly probative evidence against a claim for service connection on a direct basis. See Maxson v. Gober, 230 F.3d 1330 (Fed. Cir. 2000) (ruling that a prolonged period without medical complaint can be considered, along with other factors, as evidence of whether an injury or a disease was incurred in service which resulted in any chronic or persistent disability).

Nevertheless, medical evidence indicates that the Veteran's type II diabetes mellitus is related to his inservice herbicide exposure. This evidence includes: (i) an August 2006 report from A.C., M.D., which states that the Veteran's diabetes mellitus could have been brought on by exposure to Agent Orange; (ii) an August 2006 report from M.B., M.D., which states that the Veteran's diabetes mellitus may have been brought on by Agent Orange; (iii) an October 2006 letter from L.W., M.D., which states that exposure to Agent Orange in service caused the Veteran's diabetes mellitus; (iv) a July 2007 report from E.D.R, Ph.D., an epidemiologist with a background in Agent Orange and Military research, which states that the Veteran's exposure to Agent Orange in service caused his type II diabetes mellitus; and (v) an August 2007 letter from A.B., a nurse portioner specializing in diabetic treatment, which states that the Veteran's diabetes mellitus is due to Agent Orange exposure.

Thus, in light of the Veteran's credible statements that he used various chemical agents during service, which he is competent to attest to, the evidence showing that herbicides may have been used at Fort Gordon at the time the Veteran was using chemicals, and the uncontradicted medical opinions which relate the Veteran's type II diabetes mellitus to herbicides, the Board finds that service connection for type

II diabetes mellitus is warranted.

III. Chloracne

The Veteran also claims that he developed chloracne as a result of his exposure to herbicides at Fort Gordon. After carefully reviewing the evidence, the Board finds that service connection for chloracne is warranted on a direct basis, since medical evidence relates this skin condition to his now-confirmed exposure to herbicides in service.

The Veteran's service treatment records note a history of acne at a teenager prior to service. However, a clinical evaluation at his enlistment physical examination was unremarkable for any kind of skin problem. The Board will therefore presume that he entered service in sound condition. See 38 U.S.C.A. § 1111 (West 2002).

The record shows that the Veteran developed chloracne many years after his exposure to herbicides at Fort Gordon. A VA Agent Orange examination in September 2006 lists a diagnosis of chloracne, which the Veteran said had been present since his military service. A March 2007 VA treatment record also notes that acne on the Veteran's back, neck, and ears was consistent with chloracne. Thus, a diagnosis of chloracne has been confirmed.

In addition, several medical professionals have indicated that his chloracne was caused by exposure to herbicides in service. In this regard, P.H., PharmD, stated in a June 2007 letter that she firmly believed that chloracne was a biomarker for Agent Orange exposure. In a May 2007 report, B.R., M.D., the Veteran's primary care physician, noted that chloracne was present on the Veteran's back, arms, and neck. He also noted the Veteran's history of Agent Orange exposure in service before concluding that the Veteran's "skin condition is at least as likely as not to have been caused by his prior chemical exposure." Dr. L.W.'s October 2006 letter also notes that the Veteran's exposure to Agent Orange in service caused his chloracne.

In conclusion, since there is overwhelming medical evidence of a nexus between the Veteran's chloracne and his confirmed exposure to herbicides in service, the Board finds that the evidence supports his claim for service connection for chloracne. Hence, service connection for chloracne is hereby granted.

IV. Coronary Artery Disease

The Veteran suffered a heart attack in 1997 and was subsequently diagnosed with coronary artery disease. He claims that his heart disease was caused by his service-connected type II diabetes mellitus. After carefully reviewing the evidence of record, the Board finds that the medical evidence supports his claim. Accordingly, service connection for coronary artery disease is warranted under a

secondary theory of service connection.

VA regulation provides that a "disability that is proximately due to or results from another a disease or injury shall be service connected." See 38 C.F.R. § 3.310(a). See also Allen v. Brown, 7 Vet. App. 439, 448 (1995) (allowing secondary service connection for a condition when the nonservice-connected condition was aggravated by the service-connected disability). This generally requires: (1) evidence of a current disability; (2) evidence of a service-connected disability; and (3) medical evidence establishing a nexus (i.e., link) between the service-connected disability and the current disability. See Wallin v. West, 11 Vet. App. 509, 512 (1998).

The Veteran's heart attack occurred in January 1997. As a result, he underwent a triple bypass and eventually had a pacemaker implanted in December 1999. His diagnoses included coronary artery disease. However, he was not diagnosed with type II diabetes until November 2005, as a VA treatment report at that time lists a diagnosis of "new onset type 2 diabetes mellitus." It thus appears that his heart disease preceded his type II diabetes mellitus.

Nevertheless, medical evidence indicates that his type II diabetes mellitus was indeed present at the time of his heart attack and probably contributed to his heart disease. In his August 2006 report, Dr. A.C. indicated that he had been involved in the Veteran's cardiac care since 1997 and that, based on his review of the medical records, the Veteran's diabetes mellitus could have caused progressive ischemic heart disease. An August 2006 report form Dr. M.B. notes that, although blood work did not confirm a diagnosis of diabetes mellitus until October 2005, it is likely that the Veteran had diabetes mellitus at the time of his heart attack in 1997. Dr. M.B. explained that, had glucose testing been performed at that time, it would have at least revealed glucose intolerance and would have likely revealed type II diabetes mellitus. Dr M.B. then concluded that the Veteran's diabetes mellitus and heart disease are closely related. Finally, in her August 2007 report, Nurse Practitioner A.B. stated that the Veteran's diabetes mellitus was indeed present at the time of his heart attack and was a major contributor in the development of his cardiovascular disease. Her opinion was based on the fact that the Veteran exhibited clear symptoms of diabetes mellitus prior to his heart disease, namely weight loss, thirst, nocturia, lethargy, and numbness in his extremities.

These medical opinions clearly support the Veteran's claim that his coronary artery disease was caused by his service-connected type II diabetes mellitus. In particular, since several opinions appear to be based on a review of the pertinent medical history, are consistent with the evidence of record, and are supported by sound medical rationale, they provide compelling in support of his claim. See Nieves-Rodriguez v. Peake, 22 Vet App 295 (2008); see also Wray v.

Brown, 7 Vet. App. 488, 493 (1995) (holding that the adoption of an expert medical opinion may satisfy the Board's statutory requirement of an adequate statement of reasons and bases if the expert fairly considered the material evidence seemingly supporting the Veteran's position.).

For these reasons and bases, since there is overwhelming medical evidence that the Veteran's coronary artery disease developed as a result of his service-connected type II diabetes mellitus, service connection for coronary artery disease is hereby granted. 38 C.F.R. § 3.310.

ORDER

Service connection for Type II diabetes mellitus is granted

Service connection for chloracne is granted

Service connection for coronary artery disease is granted.

REMAND

The Board finds that additional medical development is needed before it can adjudicate the Veteran's claims for service connection for erectile dysfunction, peripheral neuropathy of the right arm, and peripheral neuropathy of the lower extremities, all claimed as secondary his service-connected type II diabetes mellitus, and his claim for service connection for a fungal infection involving his hands and feet as a result of exposure to herbicides.

The record shows that the Veteran developed erectile dysfunction and peripheral neuropathy in his right upper and both lower extremities many years after his separation from active duty. In an August 2007 report, however, Nurse Practitioner A.B. indicated the Veteran's erectile dysfunction and peripheral neuropathy are a complication of his service-connected type II diabetes mellitus. In other words, A.B. suggests that theses disabilities may be secondary to his service-connected diabetes mellitus. Although insufficient to grant these claims, the Board finds that this opinion is sufficient to trigger VA's duty to secure a medical opinion on the question as to whether the Veteran's erectile dysfunction and peripheral neuropathy involving his right upper and lower extremities are related to his service-connected type II diabetes mellitus. See 38 U.S.C.A. § 5103A(d) and 38 C.F.R. § 3.159(c)(4); see also McLendon v. Nicholson, 20 Vet. App. 79 (2006).

Medical evidence also shows that the Veteran has received treatment for a fungal infection involving his hands and feet. However, the Veteran has not been afforded a VA examination to determine whether this condition is related to service, to include exposure to herbicides therein. A VA examination is therefore needed prior to adjudication by the

Board. Id.

Accordingly, the case is REMANDED for the following action:

1. Schedule the Veteran for an appropriate VA examination to determine the exact nature and etiology concerning his erectile dysfunction and peripheral neuropathy involving his right upper and both lower extremities. The claims file should be made available to the examiner for review, and all necessary studies and tests should be conducted. Following the examination and a review of the claims file, the examiner should provide an opinion as to whether it is at least as likely as not (50 percent probability or greater) that the Veteran's erectile dysfunction, peripheral neuropathy of the right upper extremity, and peripheral neuropathy of both lower extremities are caused or aggravated by his service-connected type II diabetes mellitus, and, if not, is it at least as likely as not that they are related to his period of military service, to include his confirmed exposure to herbicides therein.

2. Also schedule the Veteran for a VA examination to determine the nature and etiology of any fungal infection on his hands and feet. The Veteran's claims file should be made available to the examiner for review, and all necessary studies and tests should be conducted. Following an examination of the Veteran and a review of the claims file, the examiner is asked to offer an opinion as to whether it is at least as likely as not (50 percent probability or greater) that any diagnosed skin disorder on his hands and feet is related to service, to include his confirmed exposure to herbicides therein.

3. Then readjudicate the claims in light of the additional evidence. If either claim is not granted to the Veteran's satisfaction, send him and his representative a Supplemental Statement of the Case and give them an opportunity to respond before the record is returned to the Board for further appellate review.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded.

Kutscherousky v. West, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2009).

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Michael J. Skaltsounis
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs