Uploaded to the VFC Website

⏩⏩ February 2015 ⏪⏪

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.

AGENT ORANGE ASSOCIATED DISORDERS APPROVED BVA DECISIONS OUTSIDE OF VIETNAM

IN ORDER BELOW OF:

GUAM - DIABETES TYPE II
THAILAND - MALIGNANT LYMPHOMA
OKINAWA - PROSTATE CANCER

Democrat Senator B.J. (D) Cruz is requesting a congressional investigation into the use of Agent Orange on Guam. The candidate for lieutenant governor is basing his inquiry on a United States Court of Appeals for veterans claims ruling that acknowledged claims of Agent Orange exposure from an air force veteran while stationed at Andersen Air Force Base in the mid-1960's.

According to Senator Cruz this is the first acknowledgement by a federal agency that Agent Orange was used on Guam.

Now they, (our government) have known about the use and storage for drop ship to Vietnam on Guam for decades. Many Veterans have sent in photos of Agent Orange and White on Guam.

Only the United States Government can spend millions of dollars cleaning up the toxic chemical mess on Guam and then deny the existence of the toxic chemicals even being there. Pacific Dailey News had many articles on this subject.

Agent Orange on Guam confirmed

By Mar-Vic Cagurangan
Variety News Staff
A U.S. Court of Appeals for Veterans' ruling in 2005, which concluded that a veteran contracted a disease as a result of his exposure to Agent Orange while stationed on Guam in the late 1960s, is a confirmation that toxic herbicide agents had been used on Guam, Sen. Benjamin Cruz, D-Piti, said on Wednesday.

Cruz said his discovery of the court's decision would strengthen Guam's call for a congressional investigation into the U.S. military's use of toxic chemicals on island.
"This is the first acknowledgement by an agency of the federal government that Agent Orange was used on Guam. The diseases attributed to Agent Orange exposure are also prevalent on Guam, which would seem to indicate a real connection that must be investigated," Cruz said.

During the Vietnam war era, Guam was used as storage facility for agent orange, a kind of chemical herbicide used in Vietnam in 1968 and 1969. A CBS News report on June 12, 2005, said Agent Orange was sprayed on Guam from 1955 to 1960s, and in the Panama Canal Zone from 1960s to 1970s.

Cruz obtained an electronic copy of Veteran Law Judge Robert Sullivan's ruling in favor of an unidentified Air Force veteran who developed diabetes mellitus as a result of his exposure to Agent Orange while stationed on duty at the Andersen Air Force Base from Dec. 1966 to Oct. 1968.

After the reviewing the appeal from the Department of Veterans Regional Office in Boston, the appeals court established that "diabetes mellitus is related to the veteran's active service." The court thus ordered the VA office to extend assistance and grant the veteran's claim.

"His military occupation duties as an aircraft maintenance specialist allegedly required him to work in an airfield, the perimeter of which was continuously brown due to herbicide spraying every three months," the court document

reads.
“The veteran also alleges that he recalls seeing storage barrels at the edge of the base, which he now knows housed herbicide.”

An environmental study and subsequent cleanup was later done at Andersen Air Force Base.

AGENT ORANGE IN GUAM ASSOCIATED TO PROSTATE CANCER

Citation Nr: 0527748
Decision Date: 10/13/05 Archive Date: 10/25/05

DOCKET NO. 02-11 819) DATE
)
)

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

AGENT ORANGE IN THAILAND ASSOCIATED TO MALIGNANT LYMPHOMA

Citation Nr: 0418252
Decision Date: 07/09/04 Archive Date: 07/21/04

DOCKET NO. 99-08 894A) DATE
)
)

On appeal from the
Department of Veterans Affairs Regional Office in Newark, New Jersey

THE ISSUE

Entitlement to restoration of service connection for histiocytic type malignant lymphoma.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARING ON APPEAL

The veteran

ATTORNEY FOR THE BOARD

K.S. Hughes, Counsel

INTRODUCTION

The veteran served on active duty from August 1968 to August 1972.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a July 1998 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Newark, New Jersey, severing service connection for histiocytic type malignant lymphoma.

In connection with this appeal, the veteran testified at a Travel Board hearing before the undersigned Acting Veterans Law Judge in December 2003. A transcript of that hearing is associated with the claims file.

FINDINGS OF FACT

1. The veteran was awarded service connection for histiocytic type malignant lymphoma in a January 1995 rating decision.

2. At the time of the initial award of service connection for histiocytic type malignant lymphoma, the record contained medical evidence confirming a diagnosis of histiocytic type malignant lymphoma shortly after discharge, the veteran's plausible allegations of in-service herbicide exposure, and corroboration of the veteran's service in Thailand and his maintenance work on B-57 aircraft.

3. The January 1995 award of service connection for histiocytic type malignant lymphoma was not clearly and unmistakably erroneous.

CONCLUSION OF LAW

The criteria for severance of service connection for histiocytic type malignant lymphoma were not met. 38 U.S.C.A. § 5109A(b) (West 2002); 38 C.F.R. § 3.105(d) (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

On November 9, 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), which has since been codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002). This change in the law is applicable to all claims filed on or after the date of enactment of the VCAA, or filed before the date of enactment and not yet final as of that date. The Board has considered this new legislation with regard to the issue on appeal and finds that, given the favorable action taken herein, no further notification or assistance pertinent to the issue on appeal is required.

The veteran challenges the propriety of the RO's severance of service connection for histiocytic type malignant lymphoma. Once service connection has been granted, it can be severed only upon the Secretary's showing that the rating decision granting service connection was "clearly and unmistakably erroneous," and only after certain procedural safeguards have been met. 38 C.F.R. § 3.105(d); Graves v. Brown, 6 Vet. App. 166, 170-71 (1994).

The United States Court of Appeals for Veterans Claims (Court) has held that 38 C.F.R. § 3.105(d) places the same burden of proof on the VA when it seeks to sever service connection as 38 C.F.R. § 3.105(a) places upon a claimant seeking to have an unfavorable previous determination overturned. Baughman v. Derwinski, 1 Vet. App. 563, 566 (1991). Clear and unmistakable error is defined the same under 38 C.F.R. § 3.105(d) as it is under 38 C.F.R. § 3.105(a). See Venturella v. Gober, 10 Vet. App. 340, 342 (1997).

The veteran claims that he was exposed to Agent Orange at Ubon, Thailand, where he worked on airplanes which were used for spraying herbicides in Vietnam. Specifically, he states that he worked on Hayes Dispensers which were coated with a substance, which was foreign to him, and which he now believes was Agent Orange. The veteran essentially

reaffirmed his contentions during his December 2003 Travel Board hearing.

The veteran's service personnel records reflect that he had one year, three months, and two days of foreign and/or sea service. These records further show that he served as a weapons mechanic at Ubon Airfield, Thailand.

Private treatment records show that the veteran complained of a mass at the right axillary region in November 1974. A December 1974 cytology and tissue examination report reflects a microscopic diagnosis of changes in lymph nodes consistent with diagnosis of lympho histiocytic type of malignant lymphoma. Subsequent medical records, including a May 1990 report of VA examination for Agent Orange, show treatment for recurrent skin lesions.

The rating decision that granted service connection for histiocytic type malignant lymphoma in 1995 listed the evidence used for the determination as the service administrative records, a May 1994 VA examination report, and private medical records. The rating decision notes that, although the veteran did not serve in Vietnam, he presented a plausible explanation as to how he could have come in contact with Agent Orange and, given the fact that he had histiocytic type malignant lymphoma diagnosed in 1974, all reasonable doubt was resolved in his favor and service connection was granted and a schedular evaluation of 30 percent was assigned.

Thereafter, in February 1995, the RO requested verification from the United States Army and Joint Services Environmental Support Group (ESG) as to the storage, handling, or use of Agent Orange at Ubon Airfield.

In May 1995, the ESG responded that herbicides were not stored or sprayed near United States personnel in Thailand and that it was unable to confirm that the veteran worked on equipment that contained Agent Orange.

In August 1995, the RO requested an advisory opinion from the

Veterans Benefits Administration, Compensation and Pension Service, as to whether the January 1995 rating decision was clearly and unmistakably erroneous in granting service connection for histiocytic type malignant lymphoma.

The Director of Compensation and Pension Service subsequently replied that action to sever service connection may not be initiated unless it can be clearly established that the veteran was never exposed to herbicide agents during his military service. The RO was further advised that the burden of establishing this fact rests with VA.

In an October 1997 rating decision, the RO proposed to sever service connection for histiocytic type malignant lymphoma. The veteran was advised of the proposed severance in an October 1997 letter.

The veteran responded to the notification of the proposed severance in October 1997, stating that he was assigned to replace and inspect Hayes Dispensers while on duty in Thailand. He said that the dispensers came from Vietnam and "were coated with an oily petrol type substance" which he believed was Agent Orange. In addition, the veteran provided a copy of a performance report, dated in March 1971, which notes that he performed inspections and replacement of items on all assigned Hayes Dispensers.

In a July 1998 rating decision, the RO severed service connection for histiocytic type malignant lymphoma on the basis that "the preponderance of the evidence is unfavorable" and "the rule regarding benefit of reasonable doubt does not apply." The veteran disagreed with the July 1998 rating decision and initiated this appeal.

In a September 1999 letter to the Director, Compensation and Pension Service, the veteran's accredited representative argued that it had not been shown by VA that there was no conceivable way to maintain service connection and, thus, the severance of service connection was premature. Specifically, the veteran's representative argued that the veteran's claim of herbicide exposure as a result of contact with aircraft

equipped with Hayes Dispensers had not been resolved.

In March 2000, the RO was instructed by the Director, Compensation and Pension Service, to contact the United States Armed Services Center for Unit Records Research (USASCURR) (formerly ESG) and request information about the possible contamination of the Hayes Dispensers which the veteran came into contact with during his tour in Thailand.

In October 2001, USASCURR responded that it was unable to confirm or locate documentation indicating that Ranch Hand aircraft (used to spray herbicides over South Vietnam) originated from Ubon Air Force Base in Thailand. However, USASCURR further stated that the "Hayes Company" developed the spray equipment used in the Ranch Hand defoliation program. The issue of "possible contamination" of the Hayes Dispensers with which the veteran came into contact was not addressed.

In a June 2003 Supplemental Statement of the Case, the RO again declined to restore service connection on the basis that "the evidence does not establish that the veteran was exposed to Agent Orange while in service" and the "the preponderance of the evidence is against his claim, and there is no doubt to be resolved."

The RO has simply applied the wrong legal standard. As noted previously, 38 C.F.R. § 3.105(d) mandates that there be clear and unmistakable error in the prior rating decision in order to sever service connection, and the burden is on VA to produce evidence of such error. While the RO stated "it has not been verified that the veteran handled, used, stored, or was in any way exposed to Agent Orange, or that he came into contact with equipment that may have been exposed to Agent Orange, during his service in Thailand" that statement is not correct. In fact, the veteran did come into contact with equipment that may have been exposed to Agent Orange, the Hayes Dispensers.

It is not disputed that the veteran served in Ubon, Thailand, and worked on the Hayes Dispenser weapons system on B57

aircraft. It is not disputed that the Hayes Dispenser weapons system and B57 aircraft were used in the Operation Ranch Hand defoliation program. It is not disputed that the defoliation program continued during the time period the veteran worked on the Hayes Dispenser weapons system. It is not disputed that the veteran developed a lympho histiocytic type of malignant lymphoma shortly after his discharge from active service.

On the other hand, it could not be verified that B-57G aircraft were used to spray herbicides during 1970 and 1971, and it could not be confirmed that Ranch Hand aircraft flew missions out of Ubon, Thailand.

The RO essentially used a lack of information concerning herbicide exposure as the evidence to sever service connection. This had the effect of placing the burden of proof on the veteran, impermissible under 38 C.F.R. § 3.105(d), and insufficient to justify a finding of clear and unmistakable error in the grant of service connection.

While, in hindsight, the decision to grant service connection for histiocytic type malignant lymphoma in 1995 may certainly be second-guessed, it may not be overturned based on the evidence of record. Accordingly, service connection for histiocytic type malignant lymphoma is restored. 38 U.S.C.A. § 5109A(b); 38 C.F.R. § 3.105(d).

ORDER

The appeal is granted, and service connection for histiocytic type malignant lymphoma is restored.

_____

RONALD W. SCHOLZ
Acting Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

? Appeal to the United States Court of Appeals for Veterans Claims (Court)

? File with the Board a motion for reconsideration of this decision

? File with the Board a motion to vacate this decision

? File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

? Reopen your claim at the local VA office by submitting new and material evidence.

There is no time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court before you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have 120 days from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the United States Court of Appeals for Veterans Claims. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal

to the Court. As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you, you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, it is your responsibility to make sure that your appeal to Court is filed on time.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's web site on the Internet at www.vetapp.uscourts.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal with the Court, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to:
Director, Management and Administration (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

VA
FORM
JUN

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management and Administration, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management and Administration, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and seek help from a qualified representative before filing such a motion. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. See 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: www.va.gov/vso. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information is also provided on the Court's website at www.vetapp.uscourts.gov.

Do I have to pay an attorney or agent to represent me? Except for a claim involving a home or small business VA loan under Chapter 37 of title 38, United States Code, attorneys or agents cannot charge you a fee or accept payment for services they provide before the date BVA makes a final decision on your appeal. If you hire an attorney or accredited agent within 1 year of a final BVA decision, then the attorney or agent is allowed to charge you a fee for representing you before VA in most situations. An attorney can also charge you for representing you before the Court. VA cannot pay fees of attorneys or agents.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. For more information, read section 5904, title 38, United States Code.

In all cases, a copy of any fee agreement between you and an attorney or

accredited agent must be sent to:

Office of the Senior Deputy Vice Chairman (012)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

The Board may decide, on its own, to review a fee agreement for reasonableness, or you or your attorney or agent can file a motion asking the Board to do so. Send such a motion to the address above for the Office of the Senior Deputy Vice Chairman at the Board.

VA
FORM
JUN
2003
(RS)

AGENT ORANGE IN OKINAWA ASSOCIATED TO PROSTATE CANCER

Citation NR: 9800877
Decision Date: 01/13/98 Archive Date: 01/21/98
DOCKET NO. 97-05 078) DATE)
)

On appeal from the
Department of Veterans Affairs Regional Office in San Diego, California

THE ISSUE

Entitlement to service connection for prostate cancer due to Agent Orange exposure.

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Alice A. Booher, Counsel

INTRODUCTION

The veteran had active service from July 1960 to October 1963.

This appeal to the Board of Veterans' Appeals (the Board) is from rating action by the Department of Veterans Affairs (VA) Regional Office (RO) in Salt Lake City.

The veteran testified before a Hearing Officer at the RO in March 1997. A transcript of the hearing is of record. [Tr.]

The Board remanded the case in October 1997 for clarification with regard to a Travel Board hearing. The veteran has since asked that the appeal proceed expeditiously without an additional personal hearing.

The Board notes that the veteran also has service connection for major depression (previously diagnosed as schizophrenic reaction), currently evaluated as 70 percent disabling.

During the course of this appeal, the veteran's claim with regard to an increased rating for that disability was denied in a rating by the RO in August 1997, and the veteran was so informed and advised of his appellate rights.

At virtually the same time as the Board remand was dispatched on the Agent Orange issue, a packet containing the veteran's responses to the RO decision with regard to his psychiatric rating was received by the Board without written waiver of initial RO consideration pursuant to 38 C.F.R. § 20.1304(c). It is unclear whether the packet was or was not included with the claims folder when it was returned to the RO for the

development on remand, but there is no RO reference to the contents thereof in the claims folder.

There is no Substantive Appeal, i.e., a VA Form 9 or anything in lieu thereof, in the file, and thus, that issue is not before the Board at present. However, the Board calls the attention of the RO thereto for required processing of that claim under all pertinent criteria.

CONTENTIONS OF APPELLANT ON APPEAL

In substance, the veteran argues that while he was never in Vietnam, per se, his exposure to dioxins including Agent Orange and others, was extensive as a result of loading planes and in other circumstances while he was stationed in Okinawa and that his prostate cancer is the result thereof.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991 & Supp. 1997), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the record supports a grant of entitlement to service connection for prostate cancer due to Agent Orange exposure.

FINDINGS OF FACT

1. Credible evidence sustains a reasonable probability that the veteran was exposed to dioxins while serving in Okinawa.

2. The veteran’s recent prostate cancer must be reasonably attributed to his inservice dioxin exposure.

CONCLUSION OF LAW

The veteran’s prostate cancer is the result of inservice dioxin exposure. 38 U.S.C.A. §§ 1110, 5107 (West 1991); 38 C.F.R. §§ 3.303, 3.307, 3.309 (1996).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Criteria

Service connection may be established for a disability incurred in or aggravated by active service. 38 U.S.C.A. § 1110 (West 1991). Additional provisions are to the effect that service connection may be presumed in the case of a veteran who served continuously for 90 days or more during a period of war, if a certain disease, i.e., cancer, was present to a compensable degree within a year of separation from service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137 (West 1991 & Supp. 1997); 38 C.F.R. §§ 3.307, 3.309 (1997).

For a 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 a diagnosis including the word “chronic”. Continuity of symptomatology is required where the condition noted during service is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, the showing of continuity after discharge is required to support the claim. 38 C.F.R. § 3.303(b) (1996).

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 service. 38 C.F.R. § 3.303(d) (1996). Service connection may be granted for disability which is the result of service-connected disease or injury. 38 C.F.R. § 3.310 (1996).

Under modifications described below in 38 C.F.R. § 3.307, [and through a new regulatory revision effective November 1996], if a veteran was exposed to an herbicide agent during active military, naval, or air service, the following

diseases [i.e., prostate cancer] shall be service-connected...even though there is no record of such diseases during service. 38 C.F.R. § 3.309(e) (1996).

In pertinent part, 38 C.F.R. § 3.307(6)(ii) (1996) further states that in general except for chloracne, these diseases so named must become manifest to a degree of 10 percent or more at any time after service.

Provisions of 38 C.F.R. § 3.307(6)(iii) (1997) further state that such a veteran who served in the Republic of Vietnam during the Vietnam era and has such a (listed) disease shall be presumed to have been exposed to the herbicides. However, presumptive provisions are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and VA regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid. See Horowitz v. Brown, 5 Vet. App. 217, 222 (1993).

In a case relating to radiation exposure, but which has been transferred in theory to other situations, the Court has held that special presumptions, etc. and/or other standards do not preclude a veteran from establishing service connection with proof of actual direct causation. See Combee v. Brown, 34 F.3d 1039(1994).

It remains the duty of the Board as the fact finder to determine credibility of the testimony and other lay evidence. See Culver v. Derwinski, 3 Vet. App. 292, 297 (1992). Lay persons are not competent to render testimony concerning medical causation. See Grottveit v. Brown, 5 Vet. App. 91, 93 (1993). However, service connection may be established through competent lay evidence, not medical records alone. Horowitz, op. cit. In such a case, as in other situations dealing with special provisions of 38 U.S.C.A. § 1154, an individual may well provide data with regard to incidents which took place, etc. although a lay witness is not capable of offering evidence requiring medical knowledge. Espiritu v. Derwinski, 2 Vet. App. 492, 494

(1992).

The Board has the duty to assess the credibility and weight to be given the evidence. Wilson v. Derwinski, 2 Vet. App. 614, 618 (1992) (quoting Wood v. Derwinski, 1 Vet. App. 190, 193 (1991), reconsideration denied per curiam, 1 Vet. App. 406 (1991)).

It has been determined that a well-grounded claim requires three elements: (1) medical evidence of a current disability; (2) lay or medical evidence of a disease or injury in service; and (3) medical evidence of a link between the current disability and the in-service injury or disease. Caluza v. Brown, 7 Vet. App. 498 (1995).

In a case that coincidentally also provides significant supportive data regarding claims with regard to Agent Orange and the legislative and other machinations associated therewith, the United States Court of Veterans Appeals (the Court) recently found that plausible medical evidence of the existence of a current presumptively service-connected disease with an open-ended presumption period is sufficient to present a well-grounded service connection claim as to that disease. The case also holds that the presence of the disease would carry with it the presumption of nexus to service as well. See Brock v. Brown, 10 Vet. App. 155, 162 (1996).

Factual Background

The veteran's DD 214 shows that his primary military specialty was as a motor vehicle operator (MOS 3531). At the time of his discharge, he was assigned to the U.S. Marine Corp's 4thAMTrac Bn(Reinf), ForTrps, FMF after having had 1 year, 3 months and 3 days of foreign service. His partial 201 file also further documents the units to which he was assigned in that motor vehicle operator capacity.

According to a NAVMC Form 118(17)-PD, the veteran embarked onboard the USNS GEN. J.C. BRECKENRIDGE in and departed from San Diego on February 2, 1961; he arrived in and disembarked

in Okinawa on February 18, 1961. He further embarked onboard the USS BEXAR at White Beach, Okinawa on April 5, 1962, departed Okinawa on April 6, 1962, and arrived in and disembarked in San Diego on May 5, 1962.

Service medical records show that after several months in Okinawa, he was admitted to hospitalization for psychiatric evaluation after having attempted suicide due to, among other things, the stressful (not otherwise described) situation there.

The veteran has described his inservice experiences as not having included Vietnam. In a letter in December 1996, he stated that his job in the Marines was as a motor transport operator, which was to transport troops and cargo. At the time, they had been on Vietnam standby, and he reported that he had been exposed to Agent Orange while in the process of transport, as well as when it was used in Northern Okinawa for War Games training. He reported that this exposure lasted at least two months or more.

Private clinical records in the file from David A. Kimball, MD, who has treated the veteran for prostate cancer after prostate-specific laboratory testing had been positive. The veteran underwent a radical retropubic prostatectomy for the prostate cancer, pathologically described as moderately well differentiated adenocarcinoma, in November 1995. Thereafter, records show he was seen for complaints associated with hesitant urinary stream. He underwent surgery for a bladder neck contracture post radical retropubic prostatectomy.

In his VA Form 9, dated in January 1997, the veteran reiterated that he was not and had never claimed that he was in Vietnam but that, as stated by the RO in rating decisions and other communications, service connection for certain disabilities under the new regulations relating to herbicide exposure could be either from being in Vietnam in which case exposure was assumed, or as a result of some other military experience, which was subject to the same requirement of any other acquired disability. He stated further that

I served in Okinawa in 1961-62 at which time we began a massive build-up of supplies and ordnance which included herbicides known as 2, 4, D and 2, 4, 5, T. The combined product of these two chemicals was a 50-50 mix which was then mixed 50-50 with diesel fuel and given the code name “Agent Orange”, for the orange band that was used to mark the drums it was stored in. The purpose of the product was to deny an enemy cover and concealment in dense terrain by defoliating trees and shrubbery where the enemy could hide. In Okinawa we had other uses for it, particularly near base camp perimeters. Spraying from both truck and back pack were utilized along roadways too. The term “Agent Orange” was at the time merely one of several used to identify various herbicides used in the South Pacific. Others included Agents White, Blue, Purple, Pink and Green. Agent Orange was used by far the most. It was my job, MOS-3531 Motor Transport operator (see DD-214 #25 A&B as evidence) to transport troops and cargo. On many occasions the cargo was herbicides known as 2-4-D and 2-4-5T. Sometimes they were full and sometimes they were empty. Sometimes the drums were half full of a 50-50 mix of herbicides and I would have to take them and add the remaining 50% of diesel fuel or kerosene for better dispersion. On many occasions while handling the drums the contents would get on my hands and clothing and when we were spraying along the roadways by truck and back pack the wind would change and blow the herbicides onto our skin and clothing. The thing that bothers me the most is that we were not told or warned

about the hazards of the herbicides that we were handling nor were we issued any protective clothing such as gloves and etc. I believe that the frequent exposure to the concentrated unmixed herbicides was much more hazardous than if I would have been sprayed with a diluted thin down mixture.

At the time of the hearing held at the RO in March 1997, the veteran further testified that while in Okinawa, he was a motor transport operator, whose job it was to transport troops and cargo, often times the cargo being herbicides. Tr. at 1. He stated that he would often transport people for work details and had even worked with the Seabees with whom he helped with road repairs, where they also used herbicides, spraying them on the sides of the roads, etc. Tr. at 1-2. He indicated that (even when not moving people but rather supplies), he often had to take the barrels and mix the contents at the motor pool with a 50/50 mixture of diesel fuel; that often his clothing became saturated with and he had to replace uniform parts so as to be able to pass inspection. Tr. at 2.

The veteran indicated that herbicides were used on Okinawa for landscaping, and were also taken to the remote areas for training maneuver areas. Tr. at 2. He confirmed that he had been assigned in Okinawa to the C Company, 9th Motor Transport Battalion, 3rd Marine Division Reinforced, and that he was exposed to herbicides that entire time. Tr. at 3. He summarized by indicating that he had been exposed by the spraying in the area perimeters (which they were required to police themselves), on the sides of the roads, on details, at maneuver areas, when he mixed them for transport and when he actually sprayed them from back pack. Tr. at 3. He said that they were only told that it was a defoliant used for killing weeds, etc. Tr. at 3-4.

The RO asked the U.S. Army and Joint Services Environmental Support Group (ESG), now known as U.S. Armed Services Center for Research of Unit Records (USASCRUR) to verify any

exposure to herbicides the veteran may have had while in Okinawa. The ESG responded in April 1997 to the effect that they had been generally unable to document the use of herbicides in Okinawa, but that they had sent copies of various Agent Orange briefs, etc. for the veteran's information.

Correspondence from the veteran in January 1997 reiterated his repeated Okinawan exposure to herbicides, and further indicated that at that time, "Operation Ranch Hand" was already in full swing in January 1961. He said that they primarily handled Agent Orange since it was not, and the others were, water soluble and would not wash away when used. This was particularly important for use in Vietnam but also in Okinawa (for the other purposes) because of the significant amount of rain that fell there.

Analysis

In a case such as this, there are several kinds of pertinent service records. Admittedly, available service medical records are somewhat wanting since they primarily relate to the veteran's significant psychiatric problems later in service rather than dioxin exposure, etc. It is entirely possible that additional service medical records are somewhere available. However, given the pertinent regulations, there would seem to be no special benefit to be gained by delaying the claim further in a search for additional but unnecessary records.

Also of record are some other service documents, i.e., data comparable to a partial 201 file which confirm assignment units, duties, locations, etc., identified elsewhere in this decision. In this case, these are more important to the disposition of the case. In that regard, it is not known if additional pertinent records may be readily if at all available. To the extent that the veteran is able to provide pertinent information, he has clearly done so. An attempt was made to officially verify those factors. However, while the service department experts have been unable to verify specific dioxin exposure in Okinawa, they do not negate that

possibility. [In this regard, it should be noted that given the records-development history in other factual cases with which the Board is familiar, that there is no guarantee that even if further development were undertaken, that Army Personnel or other military sources would be able in any event to verify the filling of, and mixing of solvents in, 55 gallon drums with herbicides in Okinawa for use in this particular time period, including as a part of Operation Ranchhand].

In order, however, to fill in the resultant gaps, there are certain factors which the Board must address with regard to credibility. If found credible, these could be adequate for an equitable disposition of this claim without further development.

Accordingly, in concert with that judgment and consistent with providing the veteran with all due process and the benefit of the result of an expeditious and equitable decision, the Board finds that the duty to assist the veteran in obtaining evidence has been fulfilled in this case pursuant to pertinent regulations.

In this case, the veteran clearly has had prostate cancer, which as of November 1996 is one of those diseases incorporated in the special presumptions with regard to disabilities as a result of exposure to Agent Orange.

Thus, the only significant issue to be resolved is whether he was in fact exposed to dioxins in service. The evidence in this regard may not be independently verifiable or overwhelming, but the aggregate data is entirely consistent therewith. In that regard, the Board finds that the veteran's explanations for the gaps in the otherwise contemporaneously documented information of record in that regard are quite credible. He has provided a comprehensive description of the activities through which he was exposed to concentrated dioxins, as well as the reasons why the mixing of the concentrated chemicals with diesel fuel or other agents was necessary. [Parenthetically, it is unnecessary in this context to address his opinion that the dioxin in its

concentrated state, i.e., before he mixed it, was more toxic than the dispersed version sprayed as a defoliant in whatever location for whatever purpose].

These asserted facts mesh well with those more readily recognizable things for which there is no need for verification, i.e., why the secondary chemicals utilized for dilution of the concentrates, such as diesel fuel or kerosene, would have been most readily, and perhaps almost exclusively, available in the environment in which the veteran then worked.

They also make good common sense when placed next to the known problems such as the ongoing rain in the Far East during that portion of the year which made the requirement for nonsoluble defoliants a reality in the first place. All are entirely believable and consistent with the other known information.

The service department has verified that the veteran was indeed where he said he was, at a time when military build-up from a support standpoint was considerable, doing a job which was entirely consistent with the mixing and other transport of herbicides, and at a time when these were both used and warnings not necessarily given, as he stated, since the hazards were not fully understood. He can scarcely be faulted for the no verifiability of specific practices in the so-called Okinawan theater of operations. His assertions in that regard are both reasonable and justifiable and appear both sound and factually accurate, all of which raises a certain premise from which conclusions may be reasonably drawn. It is exactly such situations in which the Court has mandated that the Board make judgments with regard to ultimate and relative credibility, which in this case, the Board finds in the affirmative.

Thus, having concluded that the veteran was exposed to herbicides while assigned to motor transport duties in Okinawa in 1961-2, not coincidentally concurrent with other entirely reasonable circumstances enumerated by the veteran, the Board finds that a doubt is thus raised which must be

resolved in his favor, and in so doing, that service connection must be granted for prostate cancer as being the result of Agent Orange exposure under pertinent exceptions to the regulations. 38 U.S.C.A. §§ 1110, 5107; 38 C.F.R. §§ 3.303, 3.307, 3.309.

ORDER

Service connection for prostate cancer due to Agent Orange exposure is granted.

RONALD R. BOSCH
Member, Board of Veterans' Appeals

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991 & Supp. 1997), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue, which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.