Uploaded to VFC Website
~October 2012~

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

Veterans-For-Change is a 501(c)(3) Non-Profit Corporation
Tax ID #27-3820181

If Veteran's don't help Veteran's, who will?

We appreciate all donations to continue to provide information and services to Veterans and their families.

https://www.paypal.com/cgi-bin/webscr?cmd=_s-xclick&hosted_button_id=WGT2M5UTB9A78

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

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 09-2585

DOUGLAS L. KELLEY, APPELLANT,

V.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge.*

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

SCHOELEN, *Judge*: The appellant, veteran Douglas L. Kelley, appeals through counsel a June 16, 2009, Board of Veterans' Appeals (Board) decision that denied his claims for entitlement to service connection for (1) hypertension, to include as secondary to diabetes mellitus; (2) coronary artery disease (CAD), to include as secondary to diabetes mellitus; and (3) type II diabetes mellitus as a result of herbicide exposure. R. at 3-18. The Board also denied service connection for a heart murmur and a right leg blood clot, but the appellant expressly withdraws these claims on appeal. R. at 16-18; Appellant's Brief (Br.) at 1. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the Board's decision, and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served honorably in the U.S. Air Force from January 1963 to May 1966. R. at 301. Service records indicate he was stationed at Pease Air Force Base (AFB) in New Hampshire, and later at Anderson AFB on Guam. R. at 357. In January 2003, he applied for VA disability

benefits for type II diabetes, hypertension, and blockage in a heart vessel. R. at 1592-1605. He indicated that his disabilities were related to exposure to Agent Orange while serving on Guam. R. at 1599.

The regional office (RO) requested additional information (R. at 1551-55), and the appellant submitted a statement attesting to his exposure while working "in supply" and "on reloading bombs on the B52s that returned to Guam from bombing missions" in Vietnam (R. at 1543). The RO denied the appellant's claims in June 2003. R. at 1442-48. The appellant appealed this decision (R. at 1394, 1398) and submitted additional information regarding Agent Orange use on Guam and contaminants on Pease AFB. R. at 1248, 1282-83, 1298, 1328-32. The RO continued to deny the appellant's claims in a February 2004 Statement of the Case. R. at 1197-1218.

In his February 2004 Substantive Appeal, the appellant stated that he had submitted additional supporting evidence of herbicide contamination on Guam, and added that he had to drink, cook food with, wash clothes, and bathe in contaminated water for 18 months while stationed at Anderson AFB. R. at 1102-03. In September 2005, the Board remanded the appellant's claims to the RO to obtain his service records and to "contact the appropriate Air Force or other service unit to attempt to obtain any information regarding any medical or other studies addressing the question of herbicide exposure at Anderson [AFB]." R. at 860.

The Appeals Management Center (AMC) subsequently contacted Headquarters Air Force Personnel Center (AFPC), requesting "any medical or other studies addressing the question of herbicide exposure at Anderson [AFB]." R. at 709. The response was negative. R. at 633, 705.

In October 2006, the appellant underwent a VA medical examination to determine "whether it is at least as likely as not . . . that the disorder in question is causally due to herbicide exposure." R. at 677-78. The examiner noted that the appellant "served on Guam and reports that he handled drums of herbicides." R. at 667. The examiner diagnosed "essential hypertension" and opined that this was "not due to any other condition." R. at 669. The examiner noted that the appellant's diabetes was "diagnosed in 2003 with fair control on oral medication taken 3 times daily." *Id.* The examiner opined that the appellant's CAD was "as likely as not related to the veteran's diabetes mellitus as well as to his hyperlipidemia, hypertension[,] and long history of tobacco abuse." *Id.* The examiner did not provide an opinion as to whether any of the appellant's conditions were

"causally due to herbicide exposure." In June 2007, the AMC continued its denial of the appellant's claims. R. at 607-28.

The appellant continued to pursue his appeal to the Board, submitting a statement from his then-representative (R. at 602-06), as well as letters from several servicemen regarding the use and storage of herbicides on Anderson AFB (R. at 557-61, 566, 568). The appellant also informed the Board that he had "witnessed 55 gallon drums lined up on the tarmac" and "the spraying of the perimeter of the runway and around the barracks to keep down the tropical growth." R. at 556. He added: "A lot of these barrels were rusted and leaking into the soil and into the water aquifer." *Id*.

In December 2007, the Board remanded the appellant's claim again, directing the RO or AMC to "obtain information regarding any medical or other studies addressing the question of herbicide exposure at Anderson [AFB]." R. at 403-06. The AMC continued its denial of the appellant's claims in August 2008. R. at 194-205. The appellant certified his appeal to the Board, and the Board remanded the appellant's case again in 2009, with the following instruction:

> The RO/AMC must provide a detailed statement of the veteran's claimed herbicide exposure be sent to the [Compensation and Pension] C&P Service and a review be requested of the DoD [Department of Defense] inventory of herbicide operations to determine whether herbicides were used, tested, or stored as alleged. If the exposure is not verified, a request must then be sent to the JSRRC [Joint Services Records Research Center] for verification of the veteran's possible Agent Orange exposure at Anderson [AFB].

R. at 180-81.

In a February 10, 2009, memorandum to the director, of the Compensation and Pension (C&P) Service, the AMC recited the Board's remand order and provided the text of the appellant's initial January 2003 application for benefits regarding his claimed herbicide exposure. R. at 174-75. In its February 12, 2009, response, the C&P Service informed the AMC that

> the list [of herbicide use and test sites outside Vietnam] does not contain any references to routine base maintenance activities such as range management, brush clearing, weed killing, etc. We have been advised by DoD that such small scale non-tactical herbicide applications have not been compiled into a list and records of such activity have not been kept.
>
> . . . .
>
> Herbicides and spray equipment were stored on Guam during the Korean War (1951-53) but never used. Following the armistice, all herbicides and equipment [were]

> shipped back to Fort Detrick, Maryland. Since that time[,] there is no DoD record of any use, testing, or storage of tactical herbicides, such as Agent Orange, at any location on Guam.

R. at 172.

The AMC then requested information from the JSRRC, and was informed by the Center for Unit Records Research (CURR) that the appellant's claims of herbicide exposure could not be documented or verified; that Guam is not on the list of spray areas and test sites outside Vietnam; and that the appellant's "unit historical data does not document any herbicide spraying, testing, storage or usage at Anderson [AFB], Guam." R. at 166-67. The AMC continued its denial of the appellant's claims that same day. R. at 122-30.

In its June 16, 2009, decision here on appeal, the Board denied the appellant's claims, finding that "the evidence of record does not demonstrate that the Veteran was exposed to Agent Orange." R. at 11-18. The Board discussed the information provided by the CURR and C&P Services, as well as the appellant's lay evidence, and found "the official service department records showing no use or storage of pertinent tactical herbicide where the Veteran served during the time he served" more probative than the appellant's lay evidence. R. at 12-15. The Board acknowledged the appellant's lay assertions and letters from fellow servicemen, but found that "it has not been shown that the Veteran or the other servicemen . . . have the professional expertise to identify the chemicals that were stored and used at [Anderson] AFB." R. at 14. The Board noted that the newspaper articles and studies submitted by the appellant only show "that Guam may now be contaminated with various toxic substances," and not that the appellant "was exposed to a pertinent herbicide agent during service." R. at 15. The Board added that while there has been "increased attention . . . towards the question of alleged tactical herbicide use in Guam during the Vietnam War . . . [,] there remains no official documented indication of such tactical herbicide [use], nor has Guam been added to the list of locations for which exposure to such herbicide agents may be presumed." *Id*. Having found no exposure to herbicides in service, the Board denied the appellant's diabetes claim, and thus denied his cardiovascular claims as secondary to diabetes and herbicide exposure. R. at 16-18.

II. ANALYSIS

The appellant argues that remand is required because the Board failed to ensure compliance with its prior remand orders, failed to provide an adequate statement of reasons and bases for rejecting the appellant's lay evidence, and failed to provide an adequate medical examination. Appellant's Br. at 13-22. The Secretary concedes that remand is necessary to obtain a medical examination relating to direct service connection for hypertension only, but otherwise urges the Court to affirm the remaining issues, asserting that the Board substantially complied with its prior remand orders and provided adequate reasons and bases for its decision. Secretary's Br. at 7-16. In his reply brief, the appellant argues that the Secretary's substantial-compliance argument relies on "a gross misrepresentation of the actual content of the CURR's February 2009 report," and that the Board's reasons and bases rest on an incomplete record. Reply at 1-5. The Court finds the appellant's arguments persuasive.

This Court has held that a remand by the Board "confers on the veteran, as a matter of law, the right to compliance with the remand orders," and the Board itself errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary is correct that substantial – not absolute – compliance is required, the Court finds that the Board did not ensure substantial compliance in this case. *See Donnellan v. Shinseki*, 24 Vet.App. 167, 176 (2010); *D'Aries v. Peake*, 22 Vet.App. 97, 105 (2008); *Dyment v. West*, 13 Vet.App. 141, 147 (1999); *see also Mo. Veterans Comm'n v. Peake*, 22 Vet.App. 123, 127 (2008) (noting "the general legal concept that substantial compliance means actual compliance with the essential objectives of a statute or regulation, so as to carry out its intent").

In its January 2009 remand order, the Board directed the RO or AMC to "provide a detailed statement of the veteran's claimed herbicide exposure." R. at 180. The AMC provided a portion of the appellant's initial application for benefits regarding his claimed exposure at Anderson AFB, but did not provide any additional information, such as statements from fellow servicemen and the appellant's allegation of contamination at Pease AFB. R. at 174-75, 557-61, 566, 568, 1298, 1543-45. Contrary to the Secretary's argument that the appellant's allegations "have been solely related to his service and alleged exposure to herbicides on Guam," the record shows that when the appellant submitted additional information concerning his claim in January 2004, he stated that he was

including a "document showing Pease AFB being contaminated" and noted that he was stationed there from 1962 to 1964, before being sent to Guam. R. at 1298. The AMC should have included this information in its "detailed statement of the veteran's claimed herbicide exposure," as required by the Board's 2009 remand order.

In addition, the Court notes that the C&P Service report states that the list of test sites outside Vietnam "does not contain any references to routine base maintenance activities such as range management, brush clearing, weed killing, etc." and that "such small scale non-tactical herbicide applications have not been compiled into a list and records of such activity have not been kept." R. at 172. This is precisely the sort of activity the appellant alleges resulted in his direct exposure to herbicides. R. at 556, 559, 566, 568 (letters from the appellant and fellow servicemen stating that defoliants were used to maintain the base perimeter, air strips, and area around the barracks). The Board stated that "the [C&P] report correctly points out that '[n]on-tactical herbicides with unknown chemical content are not covered by 38 [C.F.R. § 3.307(a)(6)(i).'" R. at 13. However, this regulation pertains to establishing *presumptive* service connection, whereas the appellant here is required to establish entitlement to *direct* service connection through a showing of *actual* exposure to herbicides. It appears that the Board impermissibly relied on a finding that the appellant would not be entitled to presumptive service connection to support its denial of service connection on a direct basis. *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994) ("[T]he presumptive service connection procedure . . . does not foreclose proof of direct service connection.").

Remand is warranted to enable the Board to ensure compliance with its 2009 remand order and to then readjudicate the appellant's claims. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"); *see also Hicks v. Brown*, 8 Vet.App. 417, 422 (1995) (stating that remand is the appropriate remedy where the record is incomplete). The Court notes the Secretary's concession that remand is warranted to obtain a medical opinion relating to the appellant's hypertension. Because a determination on the remanded matters here may implicate the question of entitlement to service connection for hypertension, the Court will remand this matter to the Board for further development. *See Tyrues v. Shinseki*, 23 Vet.App. 166, 178 (2009) (holding that "the

Court retains its discretion to determine at the threshold that a claim or theory denied by the Board in any such decision or portion of a decision on review is so inextricably intertwined with matters still pending before VA that it should be remanded to VA to await development or disposition of a claim or theory not yet finally decided by VA"); *see also Gurley v. Nicholson*, 20 Vet.App. 573, 575 (2007) (recognizing the validity of remands based on judicial economy when issues are inextricably intertwined).

On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *Kay v. Principi*, 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the portions of the June 16, 2009, Board decision relating to service connection for hypertension, CAD, and diabetes, are VACATED, and the matters are REMANDED to the Board for further proceedings consistent with this decision.

DATED: April 19, 2011

Copies to:

Katrina J. Eagle, Esq.

VA General Counsel (027)