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Citation Nr: 1311032
Decision Date: 04/03/13 Archive Date: 04/19/13

DOCKET NO. 08-15 442) DATE
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On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO) in
Providence, Rhode Island

THE ISSUE

Entitlement to service connection for diabetes mellitus, type II, including as secondary to exposure to herbicides.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

D. Bredehorst

INTRODUCTION

The Veteran served on active duty from July 1967 to June 1971.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2008 rating decision of the Providence RO. In May 2010, the Veteran testified at a local (Travel Board) hearing before the undersigned; a transcript of this hearing is associated with the claims file.

In August 2010, the case was remanded for additional development.

The Board has reviewed the contents of the Veteran's electronic ("Virtual VA") file and found no medical or other evidence pertinent to this appeal that is not in the claims file.

FINDINGS OF FACT

By extending reasonable doubt in the Veteran's favor, the Veteran's diabetes mellitus type II is at least as likely as not related to his military service.

CONCLUSION OF LAW

The criteria to establish service connection for diabetes mellitus type II have been met. 38 U.S.C.A. §§ 1110, 1116, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2012).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

In this decision, the Board grants service connection for diabetes mellitus type II. As this represents a complete grant with respect to these benefits sought on appeal, no discussion of VA's duty to notify and assist is necessary regarding this claim.

Legal Criteria and Analysis

The law provides that service connection may be granted for a disability or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110. The resolution of this issue must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which the claimant served, his medical records and all pertinent medical and lay evidence. Determinations relative to service connection will be based on review of the entire evidence of record. 38 C.F.R. § 3.303(a).

As a general matter, service connection for a disability on the basis of the merits of such claim is focused upon (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004); see also Caluza v. Brown, 7 Vet. App. 498 (1995).

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) (2012). To establish service connection based on continuity of symptomatology, the claimant must have one of the chronic diseases enumerated at 38 C.F.R. § 3.303(a). Walker v. Shinseki, __ F.3d __, No. 2011-7184, 2013 WL 628429 (Fed. Cir. Feb. 21, 2013).

Service incurrence may be presumed for some chronic disorders, including diabetes mellitus when demonstrated to a compensable degree within one year following separation from service. See 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

In addition, for Veterans who have served 90 days or more of active service during a war period or after December 31, 1946, certain chronic disabilities, including diabetes mellitus, is presumed to have been incurred in service if they manifested to a compensable degree within one year of separation from service. 38 U.S.C.A. §§ 1101, 1112; 38 C.F.R. §§ 3.307(a), 3.309(a).

A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era (beginning in January 1962 and ending in May 1975) 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); 38 C.F.R. §§ 3.307, 3.309.

If a veteran was exposed to an herbicide agent in the Republic of Vietnam during the period beginning January 9, 1962, and ending May 7, 1975, a number of diseases, which include diabetes mellitus type II, will be presumed to have been incurred in service if manifest to a compensable degree within specified periods, even if there is no record of such disease during service. 38 U.S.C.A. § 1116(a)(2); 38 C.F.R. § 3.307(a)(6), 3.309(e). 38 C.F.R. § 3.309(e), Note 2.

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), 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); 38 C.F.R. § 3.303(d).

The Board must assess the credibility and weight of all the evidence, including the medical evidence, to determine its probative value, accounting for evidence which it finds to be persuasive or unpersuasive, and providing reasons for rejecting any evidence favorable to the claimant. See Masors v. Derwinski, 2 Vet. App. 181 (1992); Wilson v. Derwinski, 2 Vet. App. 614, 618 (1992); Hatlestad v. Derwinski, 1 Vet. App. 164 (1991); Gilbert v. Derwinski, 1 Vet. App. 49 1990). Equal weight is not accorded to each piece of evidence contained in the record; every item of evidence does not have the same probative value.

The evaluation of evidence generally involves a three-step inquiry. First, the Board must determine whether the evidence comes from a "competent" source. The Board must then determine if the evidence is credible, or worthy of belief. See Barr v. Nicholson, 21 Vet. App. 303 at 308 (2007) (observing that once evidence is determined to be competent, the Board must determine whether such evidence is also credible). The third step of this inquiry requires the Board to weigh the probative value of the proffered evidence in light of the entirety of the record.

Competent lay evidence means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person. 38 C.F.R. § 3.159(a). Lay evidence may be competent and sufficient to establish a diagnosis of a condition when:

(1) a layperson is competent to identify the medical condition (i.e., when the layperson will be competent to identify the condition where the condition is simple, for example a broken leg, and sometimes not, for example, a form of cancer);

(2) the layperson is reporting a contemporaneous medical diagnosis, or;

(3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional.

Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007); see also Davidson v. Shinseki, 581 F.3d 1313 (Fed. Cir. 2009) (where widow seeking service connection for cause of death of her husband, the Veteran, the Court holding

that medical opinion not required to prove nexus between service connected mental disorder and drowning which caused Veteran's death).

In ascertaining the competency of lay evidence, lay persons are competent to provide opinions on some medical issues. See Kahana v. Shinseki, 24 Vet. App. 428, 435 (2011). Specifically, lay evidence has been found to be competent with regard to a disease with "unique and readily identifiable features" that is "capable of lay observation." See, e.g., Barr v. Nicholson, 21 Vet. App. 303 (2007) (concerning varicose veins); see also Jandreau v. Nicholson, 492 F. 3d 1372 (Fed. Cir. 2007) (a dislocated shoulder); Charles v. Principi, 16 Vet. App. 370 (2002) (tinnitus); Falzone v. Brown, 8 Vet. App. 398 (1995) (flatfeet). However, laypersons have also been found to not be competent to provide evidence in more complex medical situations. See Woehlaert v. Nicholson, 21 Vet. App. 456 (2007) (concerning rheumatic fever).

In terms of competency, lay evidence has been found to be competent with regard to a disease with "unique and readily identifiable features" that is "capable of lay observation." See Barr v. Nicholson, 21 Vet. App. 303, 308-09 (2007) (concerning varicose veins); see also Jandreau v. Nicholson, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007) (a dislocated shoulder); Charles v. Principi, 16 Vet. App. 370, 374 (2002) (tinnitus); Falzone v. Brown, 8 Vet. App. 398, 405 (1995) (flatfoot).

The standard of proof to be applied in decisions on claims for veterans' benefits is set forth in 38 U.S.C.A. § 5107 (West 2002). A claimant is entitled to the benefit of the doubt when there is an approximate balance of positive and negative evidence. See 38 C.F.R. § 3.102. When a claimant seeks benefits and the evidence is in relative equipoise, the claimant prevails. See Gilbert v. Derwinski, 1 Vet. App. 49 (1990). The preponderance of the evidence must be against the claim for benefits to be denied. See Alemany v. Brown, 9 Vet. App. 518 (1996).

The Veteran contends that he developed diabetes mellitus type II as a result of his exposure to herbicides during military service. There is ample evidence of record to establish that the Veteran currently had diabetes mellitus type II. See January 2007 treatment record. As noted previously, diabetes mellitus type II is one of the listed disabilities for which service connection may be established based on a legal "presumption based on herbicide exposure." See 38 C.F.R. § 3.307(a)(6)(iii), 3.309(a) (2012). Significantly, however, because the Veteran did not serve on active duty "in the Republic of Vietnam" during the Vietnam era nor has he alleged such service, he is not presumed to have been exposed to herbicide agent during service. 38 U.S.C.A. § 1116 (West 2002); 38 C.F.R. § 3.307(a)(6)(iii) (2012). As such, his exposure to herbicides outside of the Republic of Vietnam must be verified before service connection for diabetes mellitus based on herbicide exposure may be established.

The Veteran's claim is based on his reported exposure to herbicides while service in Guam. He reported having a 6 month tour in Guam from September 1968 to February 1969. He also reported that he worked on the flight line, which was approximately 200 yards from the perimeter that was periodically sprayed with herbicides to prevent and/or reduce foliage growth.

His DD Form 214 shows that his military occupational specialty (MOS) was jet engine mechanic and although efforts to confirm the exact dates of his Guam service have been unsuccessful, a December 1968 service treatment record does show that he was treated at Anderson Air Base in Guam. Thus, there is sufficient evidence to establish his presence in Guam during his military service.

While the record contains various VA examinations and opinions regarding the issue, the crux of the case essentially rests upon whether there were herbicides such as Agent Orange in Guam. Accordingly, a significant amount of development was undertaken during the course of the appeal to determine whether herbicides were used in Guam. In fact, the Board's remand in August 2010 was to obtain some form of verification.

Information obtained from the U.S. Army and Joint Services Records Research Center (JSRRC) was unable to verify the use of herbicides in Guam. A response from the Guam Project Manager for Military clean-up sites in Guam stated that he was not familiar with any tactical use of pesticides in Guam nor has he seen any reports identifying the presence of Agent Orange in Guam. The DoD information provided to VA does not contain any herbicide test, storage or use sites in Guam, although there may have been some small scale commercial herbicides for brush or weed clearing activity around military bases; however, there is no way to know the chemical content of these non-tactical herbicide use.

An August 2007 newspaper article notes that the "Department of Defense has never officially admitted to storing and using Agent Orange and other herbicides on Guam, despite Dow Chemical's earlier report which disclosed a huge amount of dioxin contamination at AAFB".

The Veteran also submitted a Dow Chemical Investor Risk Report dated in April 2004 indicating that TCDD (dioxin) contamination as a result of Agent Orange handling had been measured at up to 1900 ppm in some areas of Andersen Air Force Base on Guam.

The report from JSRRC indicates that there may have been some small scale commercial herbicides for brush or weed clearing activity around military bases; although, there is no way to know the chemical content of these non-tactical herbicide use. The Veteran also testified that while working on the flight line he saw men with tanks on their back spraying foliage. Given the foregoing, the benefit-of-the doubt must be resolved in the Veteran's favor. Therefore, for the purposes of this decision, the Veteran is found to have been exposed to herbicides during service, and in light of his diagnosis of diabetes mellitus, service connection for the claimed disability is granted.

ORDER

Service connection for diabetes mellitus is granted.

Why was this statement omitted from the report from the JSRRC to the VA in my case?

_____

P. M. DILORENZO
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs