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On appeal from the

Department of Veterans Affairs Regional Office in Atlanta, Georgia

THE ISSUE

Entitlement to service connection for diabetes mellitus, type II, as due to Agent Orange exposure.

REPRESENTATION

Appellant represented by: Georgia Department of Veterans Services

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

J. Murray, Counsel

INTRODUCTION

The Veteran served on active duty in the United States Army from December 1975 to September 1982.

This matter comes on appeal before the Board of Veterans' Appeals (Board) from a February 2008 rating decision of the Department of Veterans Affairs, Regional Office located in Atlanta, Georgia (RO), which denied the benefit sought on appeal.

In connection with his appeal, the Veteran testified before the undersigned during a Board hearing held at the RO in February 2014. A transcript of the hearing has been associated with the claims file. A VA Form 21-4138, executed in February 2014, reflects that the Veteran waived initial agency of original jurisdiction (AOJ) consideration of additional evidence submitted at the hearing.

The Board has not only reviewed the Veteran's physical claims file but also the Veteran's file on the "Virtual VA" system to ensure a total review of the evidence.

FINDINGS OF FACT

1. The Veteran was likely exposed to Agent Orange while he was stationed on Johnston Island from June 1977 to June 1978.

2. The competent evidence establishes a current diagnosis of diabetes mellitus type II.

CONCLUSION OF LAW

Diabetes mellitus type II is presumed to have been incurred in service. 38 U.S.C.A. §§ 1131, 1116 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

1. VA's Duty to Notify and Assist

There has been a significant change in the law with the enactment of the Veterans Claims Assistance Act of 2000 (VCAA). See 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326. In this case, the appellant claim for diabetes mellitus is being granted. As such, any deficiencies with regard to VCAA are harmless and nonprejudicial.

2. Service Connection

Service connection will be granted for disability resulting from a disease or injury incurred in or aggravated by military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. §§ 3.303, 3.304.

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 a diagnosis including the word "Chronic." When the disease entity is established, there is no requirement of evidentiary showing of continuity. Continuity of symptomatology is required only 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, then a showing of continuity after discharge is required to support the claim. 38 C.F.R. § 3.303(b).

In order to establish service connection for the claimed disorder, there must be (1) evidence of a current disability; (2) evidence of in-service incurrence or aggravation of a disease or injury; and (3) evidence of a nexus or relationship between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247, 253 (1999).

Service connection may also be granted for a disease first 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).

If a veteran was exposed to a herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of 38 U.S.C.A. § 1116, 38 C.F.R. § 3.307(a)(6)(iii) are met, even though there is no record of such disease during

service, provided further that the rebuttable presumption provisions of 38 U.S.C.A. § 1113; 38 C.F.R. § 3.307(d) are also satisfied. 38 C.F.R. § 3.309(e).

The diseases listed at 38 C.F.R. § 3.309(e) shall have become manifest to a degree of 10 percent or more any time after service, except that chloracne and porphyria cutanea tarda 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).

In essence, if the Veteran did not serve in the Republic of Vietnam during the Vietnam era, actual exposure to herbicides must be verified through appropriate service department or other sources in order for the presumption of service connection for a herbicide-related diseased under 38 C.F.R. § 3.309(e) to be applicable. Exposure to herbicides is not presumed in such instances. However, once exposure to herbicides has been established by the evidence of record, the presumption of service connection found in 38 C.F.R. § 3.309(e) for herbicide-related diseases is applicable.

When all the evidence is assembled, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a preponderance of the evidence is against a claim, in which case, the claim is denied. Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

The Veteran claims entitlement to service-connection for diabetes mellitus as due to exposure to Agent Orange during his active duty service. In essence, the Veteran contends that his exposure to herbicides occurred when he was stationed on Johnson Island from June 1977 to June 1978, and he worked as a Military Policeman, which sometimes required him to be in close proximity to storage areas where barrels of Agent Orange were being stored. Although he denies actually handling any of the barrels that contained Agent Orange, he believes he was exposed to Agent Orange by being in very close proximity. He further stipulates that such exposure was the primary cause of his diabetes mellitus, type II. See the February 2014 hearing transcript, pages 4, 8 and 11.

As discussed above, in order to establish service connection for the claimed disorder, there must be (1) evidence of a current disability; (2) evidence of in-service incurrence or aggravation of a disease or injury; and (3) evidence of a nexus between the claimed in-service disease or injury and the current disability. See Hickson,12 Vet. App. at 253.

The RO denied the Veteran's claim for service connection for diabetes mellitus, type II, in part because it was unclear whether the competent medical evidence established a current diagnosis of type II diabetes mellitus. In this regard, the Board notes that the available private treatment records show that the Veteran has a long history of diabetes mellitus, type I. See private treatment records from Dr. D. S. dated in 2007. However, the more recent VA treatment records show that the Veteran has been diagnosed with both type I and type II diabetes mellitus based on reported medical history and clinical evaluations. See VA treatment records starting in August 2007. The competent medical records reflect that the

Veteran currently has a current diagnosis of type II diabetes mellitus during the pendency of his claim. Accordingly, Hickson element (1) is satisfied.

Concerning Hickson element (2), in-service disease or injury, the Veteran asserts that he was exposed to Agent Orange while serving on Johnson Island from June 1977 to June 1978. As discussed above, type II diabetes mellitus is a disease that is presumed to be associated with herbicide exposure. 38 C.F.R. § 3.309(e). The Board notes that the Veteran has limited his claim of exposure to herbicides to exposure on Johnston Island, obviating the need for a discussion of exposure elsewhere, to include the Republic of Vietnam, and exposure to herbicides is not presumed in such instances. Thus, at its core, the Veteran's service-connection claim turns on whether there is sufficient evidence to demonstrate that the Veteran had actual in-service exposure to herbicides. 38 U.S.C.A. § 1116(a); 38 C.F.R. §§ 3.307(a)(6)(iii), 3.313(a).

The service records document that the Veteran was stationed on Johnston Island from June 1977 to July 1978, and he was assigned as a member of the Military Police to the 267th Chemical Company on Johnston Island. The Veteran stated that while performing his duties on upon on Johnston Island, he would come in close proximity to barrels containing Agent Orange. The Veteran further reported that as Military Police on Johnson Island, he would patrol storage areas by foot, and that he observed barrels of Agent Orange leaking and there was a strong odor. The Veteran provided sworn testimony to the effect that he had been informed by service personnel that the barrels contained Agent Orange. The Veteran himself has confirmed that he never actually handled any of the barrels, and he maintains that came with 20 feet of the barrels in the restricted storage areas. See the February 2014 hearing transcript, pages 4, 8 and 11.

Also submitted in support of the claim is a photograph of a storage area with thousands of barrels that the Veteran asserts was taken on Johnson Island and the barrels contain Agent Orange. Regarding the alleged exposure on Johnston Island, the Veteran has submitted a copy of a 2004 letter from Congressman Lane Evans, a Ranking Democratic Member on the House Committee on Veterans' Affairs, who sought establishment of a presumption of herbicide exposure for all veterans who served on Johnston Island in the North Pacific between 1971 and 1977. However, the Secretary has not provided a presumption to exposure to Agent Orange has been established for veterans who served on Johnston Island.

The record also contains a VA Fact Sheet pertaining to Storage of Agent Orange on Johnston Island that documents that Department of Defense has confirmed that Agent Orange was stored on Johnston Island between April 1972 and September 1977 and that leakage into the coral below began in 1974. It was further noted that between 1974 and 1977, the equivalent of the contents of 405 drums was leaked. Moreover, it was noted that soil samples in 1974 revealed that herbicide contamination was not detected outside of the storage yard except in close proximity to the redrumming operation.

In the present case, the Board finds that there is sufficient verification that the Veteran was likely exposed to Agent Orange while he was stationed on Johnston Island. As noted above,

the service records show that the Veteran was stationed on Johnston Island from June 1977 to June 1978. The Department of Defense has confirmed that Agent Orange was stored on Johnston Island from April 1972 until September 1977 and during that time there was leakage from barrels and evidence of contamination of the ground within close proximity of barrels. Essentially, there is a period of four months while the Veteran was station on Johnston Island during which the Department of Defense confirmed that Agent Orange was stored and leaked on Johnston Island.

Notably, members of the Military Police, generally do patrol restricted areas, such as where Agent Orange would be stored and redrummed. Given that the Veteran's service personnel records confirmed that he served as an MP on Johnston Island, along with his credibly testimony of patrolling areas where the Agent Orange was being stored, there is sufficient evidence to strongly suggest that the Veteran was, in fact, exposed to such herbicides, including Agent Orange, during his period of service. Thus, having resolved doubt in favor of the appellant, the Board concludes that there is sufficient verification that the Veteran was likely exposed to herbicide agents on Johnston Island. Accordingly, element (2), in-service injury, exposure to Agent Orange, has been established.

With respect to Hickson element (3), nexus or relationship, if a veteran was exposed to a herbicide agent during active military, naval, or air service, service connection for diabetes mellitus type II shall be presumed if there is competent evidence that the diabetes mellitus type II became manifest to a degree of 10 percent or more any time after service. 38 C.F.R. § 3.307(a)(6)(ii). As noted above, there is competent evidence that the diabetes mellitus type II manifested to a degree of 10 percent or more after service. VA treatment records, dated in August 2007, show a diagnosis of diabetes mellitus, type II, and treatment for such thereafter.

In conclusion, the Board finds that there is sufficient evidence which verifies that the Veteran was exposed to Agent Orange while stationed on Johnston Island and there is competent evidence of diabetes mellitus type II manifested to a compensable degree after service. Therefore, the Board finds that the evidence is in favor of the claim. Consequently, the benefits sought on appeal are granted.

ORDER

Entitlement to service connection for diabetes mellitus type II is granted.

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MICHAEL LANE

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs