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On appeal from the
 Department of Veterans Affairs Regional Office in Buffalo,
 New York

THE ISSUE

Entitlement to service connection for peripheral neuropathy
 claimed as due to herbicide exposure.

REPRESENTATION

Appellant represented by: New York State Division of
 Veterans' Affairs

ATTORNEY FOR THE BOARD

Timothy D. Rudy, Associate Counsel

INTRODUCTION

The veteran served on active duty from February 1966 to
 January 1969.

This matter comes before the Board of Veterans' Appeals
 (Board) on appeal from a June 2002 rating decision issued by
 the Department of Veterans Affairs (VA) Regional Office (RO)
 in Buffalo, New York. The Board subsequently remanded this
 matter for further development in January 2004, July 2006,
 and August 2007.

FINDINGS OF FACT

1. All notification and development action needed to fairly
 adjudicate the claim herein decided has been accomplished.
2. The Veteran has verified service in the Korean
 Demilitarized Zone at the time Agent Orange was applied.
3. There is no competent evidence that the Veteran has acute
 or subacute peripheral neuropathy.

4. There is competent medical evidence establishing that the Veteran's peripheral neuropathy disability is etiologically related to his exposure to Agent Orange while in service.

CONCLUSION OF LAW

With resolution of reasonable doubt in the Veteran's favor, peripheral neuropathy was incurred in active service. 38 U.S.C.A. §§ 1101, 1110, 5103, 5103A (West 2002 & Supp. 2008); 38 C.F.R. §§ 3.102, 3.303 (2008).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

VCAA

The provisions of the Veterans Claims Assistance Act of 2000 (VCAA) are codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) and interpreted by the Court. (See 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a), *Quartuccio v. Principi*, 16 Vet. App. 183 (2002), *Pelegri v. Principi*, 18 Vet. App. 112 (2004). See also *Mayfield v. Nicholson*, 19 Vet. App. 103, 110 (2005), reversed on other grounds, 444 F.3d 1328 (Fed. Cir. 2006), *Dingess/Hartman v. Nicholson*, 20 Vet. App. 473 (2006); *Mayfield v. Nicholson (Mayfield II)*, 20 Vet. App. 537 (2006)). Given the determination reached in this decision, the Board is satisfied that adequate development has taken place and that there is a sound evidentiary basis for resolution of this claim for service connection for peripheral neuropathy without detriment to the due process rights of the Veteran.

Laws and Regulations

Service connection may be granted for a disability resulting from personal injury suffered or disease contracted in line of duty or for aggravation of preexisting injury suffered or disease contracted in line of duty. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303.

Diseases associated with exposure to certain herbicide agents used in support of military operations in the Republic of Vietnam during the Vietnam era will be considered to have been incurred in service. 38 U.S.C.A. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6). The following diseases are associated with herbicide exposure for the purposes of the presumption: chloracne or other acneform disease consistent with chloracne, Type II diabetes mellitus, Hodgkin's disease, chronic lymphocytic leukemia, 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 certain soft-tissue sarcomas. 38 U.S.C.A. § 1116(a)(2); 38 C.F.R.

§ 3.309(e).

VA regulations state that, for the purposes of 38 C.F.R. § 3.309(e), the term "acute and subacute peripheral neuropathy" means "transient peripheral neuropathy that appears within weeks or months of exposure to an herbicide agent and resolves within two years of the date of onset." 38 C.F.R. § 3.309(e), Note 2. For the presumption to apply, the veteran's peripheral neuropathy must have become manifest to a degree of 10 percent or more within a year after the last date the veteran was exposed to an herbicide agent during military service. 38 C.F.R. § 3.307(a)(6)(ii).

Additionally, the United States Department of Defense (DOD) has confirmed that Agent Orange was used from April 1968 through July 1969 along the demilitarized zone (DMZ) in Korea. The DOD has identified specific units that served in areas along the DMZ in Korea where herbicides were used between April 1968 and July 1969. In See VA Manual M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, Paragraph 10, subsection (1).

Service connection also may be granted for any disease diagnosed after discharge, when all of the evidence, including that pertinent to service, establishes the disease was incurred in service. 38 C.F.R. § 3.303(d). For the showing of chronic disease in service, there are required a combination of manifestations sufficient to identify a 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 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 order to prevail on the issue of service connection on the merits, there must be medical evidence of (1) a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. *Hickson v. West*, 12 Vet. App. 247, 253 (1999). The Federal Circuit has held that a veteran seeking disability benefits must establish the existence of a disability and a connection between service and the disability. *Boyer v. West*, 210 F.3d 1351, 1353 (Fed. Cir. 2000).

Factual Background and Analysis

The Veteran contends that his exposure to herbicides, while stationed in the Republic of Korea, resulted in the development of progressive peripheral neuropathy.

Service treatment records are negative for any complaints of, or any diagnosis of, peripheral neuropathy. The Veteran's January 1969 discharge examination did not show any abnormalities of the lower or upper extremities.

Service personnel records show that the Veteran was stationed in the Republic of Korea from January 1968 to January 1969 as a Hawk Search radar repairman. The Veteran was assigned to the 30th Ordinance between January 1968 and April 1968. From April 1968 to January 1969, the Veteran was assigned to the 7th Battalion (Hawk), 5th Artillery Division. His MOS (military occupational specialty) was radar repairman on the Hawk Missile System.

Post-service, there are indications by medical personnel in private medical records, dated from October 1998 to February 2005, and in VA outpatient treatment records, dated from July 1999 to August 2002, that as the Veteran served in the Republic of Korea it was likely that his peripheral neuropathy was secondary to herbicide exposure.

The Veteran underwent a VA neurological examination in April 2005 in which he complained of herbicide exposure and stated that since his discharge from the military he had intermittent problems with initially very mild sensory complaints in his feet. This developed over the years to progressive and painful sensory neuropathy. The examiner opined that the Veteran's impairments were all related to a progressive motor sensory neuropathy that was progressive and as likely as not related to his prior Agent Orange exposure. The examiner was unable to provide any other possible etiology for the Veteran's neuropathy.

An August 2007 submission by the U.S. Army and Joint Services Records Research Center (JSRRC) reported that lineage documents for the 7th Battalion, 5th Artillery revealed that in 1962 that unit moved into positions near the DMZ in Korea on some of the highest missile sites in the world and joined the 38th Artillery Brigade. The 1968 history submitted by the 38th Artillery Brigade showed that the 7th Battalion, 5th Artillery was still at those sites (with the headquarters element at Camp Page in South Korea, which was 6.2 miles from the DMZ). Further, JSRRC noted that military records showed that herbicides were used in Korea between 1967 and 1969 along the southern boundary of the DMZ and that Agent Orange was used from April to August 1968.

The Veteran underwent a VA neurological examination in September 2008 by the same VA neurologist who had conducted the April 2005 examination. The examiner noted that the Veteran had a better than 10-year history of sensory loss, initially in his distal lower extremities and subsequently in the distal upper extremities. The VA examiner noted that other screening tests noted in the Veteran's medical records indicated no other potentially treatable reversible causes for peripheral neuropathy. The examiner opined that the recently confirmed fact that the Veteran had been exposed to

Agent Orange during service in Korea suggested that it was as likely as not that his progressive sensory neuropathy was related to the Agent Orange exposure.

The Board notes that there is no basis for a grant of service connection for the Veteran's peripheral neuropathy on a presumptive basis under the provisions of 38 U.S.C.A. § 1116 and 38 C.F.R. § 3.309(e). Although the regulation allows for service connection for acute and subacute peripheral neuropathy on a presumptive basis, there is no medical evidence that the Veteran's peripheral neuropathy has ever been described as acute or subacute. Further, in order to meet the regulatory criteria for service connection on a presumptive basis, it is required that any acute or 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 in service. See 38 C.F.R. § 3.307(a)(6)(ii). In this case, there is no indication that the Veteran had any symptoms of peripheral neuropathy until many years after service.

However, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that when a claimed disorder is not included as a presumptive disorder direct service connection may nevertheless be established by evidence demonstrating that the disease was in fact "incurred" during service. See *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

In view of the totality of the evidence, including the fact that the JSRRC has verified the Veteran's service in the Korean DMZ when Agent Orange was applied and the medical opinions of a VA neurologist in April 2005 and September 2008 that it was as likely as not that the Veteran's progressive sensory neuropathy was due to his exposure to Agent Orange while in service in Korea, and with resolution of reasonable doubt in the veteran's favor, the Board concludes that service connection for peripheral neuropathy is warranted.

ORDER

Entitlement to service connection for peripheral neuropathy, claimed as due to herbicide exposure, is allowed.

RENÉE M. PELLETIER

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

