Uploaded to the VFC Website

2019

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.

Citation Nr: 1015063
Decision Date: 04/20/10 Archive Date: 04/30/10

DOCKET NO. 05-19 039) DATE
)
)

On appeal from the Department of Veterans Affairs Regional Office in Waco, Texas

THE ISSUES

1. Entitlement to service connection for prostate cancer, to include as due to Agent Orange exposure.

2. Entitlement to an extra schedular evaluation in excess of 40 percent for service connected back disability, to include residuals of a fracture of the second lumbar vertebra (L-2).

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

K. Hudson, Counsel

INTRODUCTION

The Veteran had active service from February 1968 to February 1970.

This matter comes before the Board of Veterans' Appeals (Board) from a Department of Veterans Affairs (VA) Regional Office (RO) rating decision of August 2003, which granted service connection for a lumbar spine disability (diagnosed as fracture, transverse process, L-2, lumbar spine), evaluating it at 40 percent, and denied service connection for prostate cancer. The Veteran initially requested a Board hearing on this matter, but subsequently withdrew that request in writing in July 2005 and again in January 2007. 38 C.F.R. § 20.704(e). He testified at an RO hearing in October 2005.

In a DECISION/REMAND dated in January 2008, the Board denied an evaluation in excess of 40 percent for the Veteran's service-connected low back condition, on a schedular basis, but remanded the issue of an

extraschedular rating for referral to the appropriate officials for consideration of an extraschedular evaluation pursuant to 38 C.F.R. § 3.321(b)(1). In addition, service connection for prostate cancer was remanded for further development.

The issue of entitlement to an extraschedular rating for service connected back disability is herein REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC. VA will provide notice when further action is required by the appellant.

FINDINGS OF FACT

1. The Veteran did not serve on active duty in the Republic of Vietnam, or in Korea during the time Agent Orange was used in Korea, and has not otherwise been shown to have been exposed to Agent Orange while on active duty.

2. Prostate cancer was first manifested many years following the Veteran's separation from service, and is unrelated to any in-service events.

CONCLUSION OF LAW

Prostate cancer was not incurred in or aggravated by service, nor may service incurrence be presumed. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1116 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duty to Notify and Assist

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his representative of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b); Quartuccio v. Principi, 16 Vet. App. 183 (2002).

In a letter dated in March 2008, the RO notified the Veteran of the information necessary to substantiate the service connection claim on appeal, and of his and VA's respective obligations for obtaining specified different types of evidence. He was told that the evidence must show a relationship between his current disabilities and an injury, disease or event in military service. He was advised of various types of lay, medical, and employment evidence that could substantiate his service connection claim based on Agent Orange exposure. He was also provided with information regarding ratings and effective dates, as to all claims on appeal. See Dingess v. Nicholson, 19 Vet. App. 473 (2006). This letter was not sent until after the initial adjudication of the claims. However, subsequently, the claim was read judicated, and a supplemental statement of the case was provided in October 2009, thus correcting the timing defect. See Prickett v. Nicholson, 20 Vet. App. 370, 376 (2006) (the issuance of a fully compliant VCAA notification followed by read judication of the claim, such as an SOC or SSOC, is sufficient to cure a timing defect).

The U.S. Supreme Court has held that an error in VCAA notice should not be presumed prejudicial, and that the burden of showing harmful error rests with the party raising the issue, to be determined on a case-by-case basis. Shinseki v. Sanders, 129 S. Ct. 1696 (2009). In this case, neither the Veteran nor his representative has alleged any prejudicial or harmful error in VCAA notice.

The Board also concludes VA's duty to assist has been satisfied. Service treatment and personnel records have been obtained, and the service department verified that there was no evidence that the Veteran had been exposed to herbicides. All identified VA and private treatment records. The appellant has not identified any other potentially relevant records, and, in April 2008, in response to the VCAA notice letter, the Veteran said he had no further information or evidence to provide. A VA medical examination is not warranted because there is no competent, credible evidence of service incurrence or of exposure to Agent Orange in service. See McLendon v. Nicholson, 20 Vet. App. 79 (2006); 38 U.S.C.A. § 5103A(d)(2); 38 C.F.R. § 3.159(c)(4). He testified at an RO hearing in October 2005.

Thus, the Board finds that all necessary notification and development has been accomplished, and therefore appellate review may proceed without prejudice to the appellant. See Bernard v. Brown, 4 Vet. App. 384 (1993). Significantly, neither the appellant nor his representative has identified, and the record does not otherwise indicate, any additional existing evidence that is necessary for a fair adjudication of the claim that has not been obtained. Hence, no further notice or assistance to the appellant is required to fulfill VA's duty to assist the appellant in the development of the claims. Smith v. Gober, 14 Vet. App. 227 (2000), aff'd 281 F.3d 1384 (Fed. Cir. 2002); Dela Cruz v. Principi, 15 Vet. App. 143 (2001); see also Quartuccio v. Principi, 16 Vet. App. 183 (2002).

II. Service Connection

Service connection may be established for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. Service connection for certain chronic diseases, such as malignant tumors, will be rebuttably presumed if manifest to a compensable degree within one year after separation from active service. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. § 3.307, 3.309. To establish service connection, a veteran must show (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the current disability and the in-service disease or injury (or in-service aggravation), "the so-called 'nexus' requirement." Holton v. Shinseki, 557 F.3d 1362, 1355 (Fed. Cir. 2009); Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Service medical records do not show the presence of prostate cancer in service. Many years subsequent to service, VA medical records show that biopsies in May 2002 confirmed the presence of prostate cancer. In August 2002, the Veteran underwent a radical prostatectomy, with a final diagnosis of prostate cancer. There is no competent evidence of the presence of prostate cancer until many years after service, or relating prostate cancer to service, nor was prostate cancer shown to have been manifested to a compensable degree within one year following the veteran's separation from service.

In the case of a veteran who served in the Republic of Vietnam during the Vietnam era, service connection based on exposure to herbicide agents (e.g., Agent Orange) in Vietnam will be presumed for certain specified diseases, including prostate cancer, which are first manifest after service. 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309(e).

However, it is not alleged or shown that the Veteran served on active duty in Vietnam, and thus the legal presumption of service connection for certain conditions does not apply.

The Veteran contends, however, that while stationed in the Panama Canal Zone, he was exposed to Agent Orange. He was stationed in the Panama Canal Zone from July 1968 to February 1970.

Where the use of Agent Orange has been confirmed in other locations, VA has taken the position that the relevant presumptions should be applied, on a factual basis. See MR21-1MR, Part IV, Subpart ii, Chapter 2, § C, para.10; see Combee v. Brown, 34 F.3d 1039, 1040 (1995); Stefl v. Nicholson, 21 Vet. App. 120 (2007). In other words, if the Veteran establishes that he was exposed to Agent Orange, the disease presumptions would apply. If he is found to have been present in a location, at a time during which VA acknowledges that Agent Orange was used, the presumption-of-exposure provision would be applied as well. Otherwise, exposure must be established as a factual matter. See Stefl, supra.

In an August 2002 letter, and in a longer letter dated in January 2004, the Veteran recounted his duties while serving in Panama, which included attachment to a testing group named "Pot Led." He recalled that one of the training areas to which he had to drive often did not have any grass or underbrush growing about it, which was very unusual in that area, and he believes that Agent Orange was used there. At his October 2005 Decision Review Officer (DRO) hearing, the veteran testified that during his service in Panama, he had been exposed to Agent Orange, which had been used to kill elephant grass.

In support of this assertion, the Veteran has offered additional lay evidence, in the form of a buddy statement corroborating this impression as well as newspaper articles indicating that military personnel had stated that Agent Orange had been used in testing performed in Panama in the 1960s and 1970s. Specifically, a September 2005 letter from the Veteran's comrade in Panama, T.J.F., indicates that he observed personnel spraying some sort of chemical along the fence lines from time to time. Although T.J.F. stated that he did not know what substance the spray consisted of, he observed that grass and other shrubbery died if sprayed. T.F.J. reported that he had heard individuals refer to the use of Agent Orange in the Canal Zone about a lookout hill and in the area where the military conducted land mine testing. He also attested that a group of soldiers, named "POT LID," worked around those areas, and that the Veteran had belonged to that group.

The Veteran submitted newspaper articles from the Dallas Morning News (in August 1999), alleging that the United States had tested herbicides, such as Agent Orange, in Panama during the 1960s and 1970s. Other newspaper articles also allege that the military used Agent Orange and other herbicides in Panama during the 1960s and 1970s.

However, the service department has stated that there is no record that the Veteran was exposed to herbicides in service. Moreover, DoD has not acknowledged having used herbicides such as Agent Orange in the Panama Canal Zone, unlike other areas, such as Korea, where the military has admitted that Agent Orange was used. According to the articles, Panama has unsuccessfully sought to obtain confirmation of Agent Orange use by the U.S. military.

The evidence of use in the Canal Zone consists of the Veteran's statements, as well as statements from other servicemen, who recall herbicide sprays being used. In addition, the news articles speculate that Agent Orange was used. However, neither the government of Panama nor the United States has been able to confirm that Agent Orange was used in the Canal Zone, let alone during the time that the Veteran was stationed there. The evidence that Agent Orange was used is therefore speculative and circumstantial, and is

insufficient to place the evidence in approximate balance so as to invoke the reasonable-doubt doctrine. Service connection may not be based on a resort to speculation or remote possibility. 38 C.F.R. § 3.102. See, e.g., Stegman v. Derwinski, 3 Vet. App. 228, 230 (1992) (favorable evidence which does little more than suggest possibility of in-service causation is insufficient to establish service connection). Accordingly, the Board finds that the Veteran was not exposed to Agent Orange in service, including in the Panama Canal Zone.

In view of the foregoing, since prostate cancer was first manifested many years after service and there is no other basis to connect the onset of the condition to service, the Board finds that the preponderance of the evidence is against the claim. Consequently, the Board finds that the benefit-of-the-doubt rule does not apply, and the claim for service connection for prostate cancer must be denied. 38 U.S.C.A. § 5107(b); see Ortiz v. Principi, 274 F.3d 1361 (Fed. Cir. 2001); Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

ORDER

Service connection for prostate cancer is denied.

REMAND

In the decision dated in January 2008, the Board denied an evaluation in excess of 40 percent for the Veteran's service-connected low back disorder, on a schedular basis, but remanded the issue of an extraschedular rating for referral to the appropriate officials for consideration pursuant to 38 C.F.R. § 3.321(b)(1). See Bagwell v. Brown, 9 Vet. App. 337, 338 (1996); Shipwash v. Brown, 8 Vet. App. 218, 227 (1995). However, these remand instructions were overlooked. Board remand instructions are neither optional nor discretionary, and full compliance is required. See Stegall v. West, 11 Vet. App. 268 (1998).

Subsequent to the prior remand, however, the United States Court of Appeals for Veterans Claims has set forth a three-step analysis which provides additional guidance in determining whether referral for extraschedular consideration is appropriate. See Thun v. Peake, 22 Vet. App. 111 (2008). According to Thun, the initial step is a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the Rating Schedule for that disability. Id. If the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the Rating Schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required.

In the second step of the inquiry, however, if the schedular evaluation does not contemplate the claimant's level of disability and symptomatology and is found inadequate, the RO or Board must determine whether the claimant's exceptional disability picture exhibits other related factors such as those provided by the regulation as "governing norms." 38 C.F.R. 3.321(b)(1) (related factors include "marked interference with employment" and "frequent periods of hospitalization"). When the Rating Schedule is inadequate to evaluate a claimant's disability picture and that picture has related factors such as marked interference with employment or frequent periods of hospitalization, then the case must be referred to the Under Secretary for Benefits or the Director of the Compensation and Pension Service, for completion of the third step - a determination of whether, to accord justice, the claimant's disability picture requires
the assignment of an extra schedular rating. Id.

Accordingly, the case is REMANDED for the following action:

1. Provide the Veteran written notification specific to the claim for an extra schedular rating for his back disability under 38 C.F.R. § 3.321(b)(1), to include informing him of the relevancy of any evidence from an employer or former employer relating to his claim of significant work impairment caused by his back disability. See Thun discussion, above.

2. Thereafter, refer the case to the Under Secretary for Benefits or the Director, Compensation and Pension Service, for consideration of an extra schedular evaluation for the Veteran's service connected back disability. 38 C.F.R. § 3.321(b) (2009).

3. Then, if the decision remains adverse to the Veteran, issue an appropriate SSOC and provide an opportunity to respond before returning the case to the Board.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. Kutscherousky v. West, 12 Vet. App. 369 (1999). This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2009).

_____

ANDREW J. MULLEN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs