



Uploaded to VFC Website

▶▶ **November 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](http://www.veteransforchange.org)

*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.





BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF

DOCKET NO. 04-00 250

)
)
)

DATE

NOV 02 2009

On appeal from the
Department of Veterans Affairs Regional Office in St. Petersburg, Florida

THE ISSUE

Entitlement to service connection for diabetes mellitus type II, to include as due to herbicide exposure.

REPRESENTATION

Appellant represented by: The American Legion

ATTORNEY FOR THE BOARD

R. Morales, Associate Counsel

IN THE APPEAL OF

INTRODUCTION

The Veteran served on active duty from July 1962 to August 1966, including service in the waters offshore of the Republic of Vietnam.

This appeal comes before the Board of Veterans' Appeals (Board) from an October 2002 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in St. Petersburg, Florida. The appeal was remanded for additional development in March 2009.

FINDINGS OF FACT

1. The Veteran served in the Republic of Vietnam, specifically in an inland waterway, during Vietnam era active service.
2. The Veteran has a current diagnosis of diabetes mellitus.
3. The Veteran's diabetes mellitus is presumed to be etiologically related to his service in Vietnam.

CONCLUSIONS OF LAW

1. The conditions of the Veteran's service meet the requirements for service or visitation in the Republic of Vietnam during the Vietnam era. 38 C.F.R. §§ 3.307(a)(6)(iii), 3.313(a) (2009).
2. The Veteran's diabetes mellitus is presumed to have been incurred as a result of the Veteran's exposure to Herbicide during service. 38 U.S.C.A. §§ 1110, 1116 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran is seeking entitlement to service connection for diabetes mellitus. In essence, he contends that he was exposed to herbicides in the inland waters of the Vietnam and that service connection for diabetes mellitus should therefore be granted on a presumptive basis.

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) describes VA's duty to notify and assist claimants in substantiating a claim for VA benefits. See 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2008). Here, the Board is granting service connection. Thus, no further discussion of the VCAA is required.

Service Connection

At the outset, the Board notes that the claims file consists of voluminous evidence submitted by the Veteran, including deck logs, articles, service records, medical records, and statements from the Veteran and his medical providers. All of this evidence has been carefully reviewed and considered.

A Veteran who, during active military, naval, or air service, served in the Republic of Vietnam (Vietnam) during the Vietnam era shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the Veteran was not exposed to any such agent during that service. 38 C.F.R. § 3.307 (2009). "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. See 38 C.F.R. §§ 3.307(a)(6)(iii) (2009).

The VA General Counsel has held the regulatory definition (which permits certain personnel not actually stationed within the borders of the Vietnam to be considered to have served in Vietnam) requires that an individual *actually have been present*

within the boundaries of the Republic. See VAOPGCPREC 27-97. Specifically, the General Counsel has concluded that to establish qualifying “service in Vietnam” a Veteran must demonstrate actual duty or visitation in the Republic of Vietnam. Service on a deep water naval vessel in waters off the shore of the Republic of Vietnam, without proof of actual duty or visitation in Vietnam, does not constitute service in Vietnam for purposes of 38 U.S.C.A. § 101(29)(A) (establishing that the term “Vietnam era” means the period beginning on February 28, 1961 and ending on May 7, 1975 in the case of a Veteran who served in Vietnam during that period). See VAOPGCPREC 27-97; see also *Haas v. Nicholson*, 20 Vet. App. 257 (2006), rev’d sub nom. *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), cert. denied, 77 U.S.L.W. 3267 (Jan. 21, 2009) (No. 08-525).

If a Veteran was exposed to an herbicide agent during active military, naval, or air service, Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes) shall be service-connected, even though there is no record of such disease during service. 38 C.F.R. § 3.309(e). The diseases listed at 38 C.F.R. § 3.309(e), including Type II diabetes mellitus, shall have become manifest to a degree of 10 percent or more at any time after service. 38 C.F.R. § 3.307(a)(6)(ii). The record shows the Veteran has a current diagnosis of diabetes mellitus. Private medical records note a history of diabetes mellitus that was diagnosed in the 1980s. A VA examination in July 2005 diagnoses insulin-dependant diabetes mellitus type II which was poorly controlled.

The Veteran’s personnel records show that he was awarded the Vietnam Service Medal (VSM) and a National Defense Service Medal for service during the period of June 1962 to August 1966. The VSM was awarded to all members of the armed forces who served in Vietnam and contiguous waters and airspace between July 3, 1965 and March 28, 1973. The fact that the Veteran received this award does not establish that he actually was present within the boundaries of Vietnam.

It is undisputed that given the guidance in VAOPGCPREC 27-97, if the Veteran’s service had been limited to service on the U.S.S. Oklahoma City outside the territorial boundaries of the Republic of Vietnam, the presumptions contained in the regulations would be inapplicable to his case as he would not have met the criteria

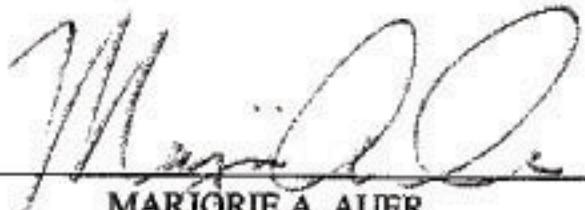
IN THE APPEAL OF

for service in the Republic of Vietnam. However, in the instant case, the Veteran's service was conducted on a ship that frequently anchored in a harbor within the territorial borders of Vietnam. The evidence of record clearly shows that Da Nang Harbor is well sheltered and surrounded on three sides by the shoreline of Vietnam. The harbor is nearly totally surrounded by land and that the entire harbor is located within the territorial boundaries of Vietnam. As such, given the location of the harbor as being surrounded by the land on three sides and the evidence that the harbor is within the territory of Vietnam, and resolving all doubt in the Veteran's favor, the Board finds that Da Nang Harbor is an inland waterway for the purposes of the regulation.

The Board finds that there is credible evidence that the Veteran set foot on land in Vietnam during the Vietnam Era, and he now has diabetes mellitus. Accordingly, presumptive service connection for diabetes mellitus based on herbicide exposure in Vietnam is granted.

ORDER

Service connection for diabetes mellitus type II is granted.



MARJORIE A. AUER
Veterans Law Judge, Board of Veterans' Appeals