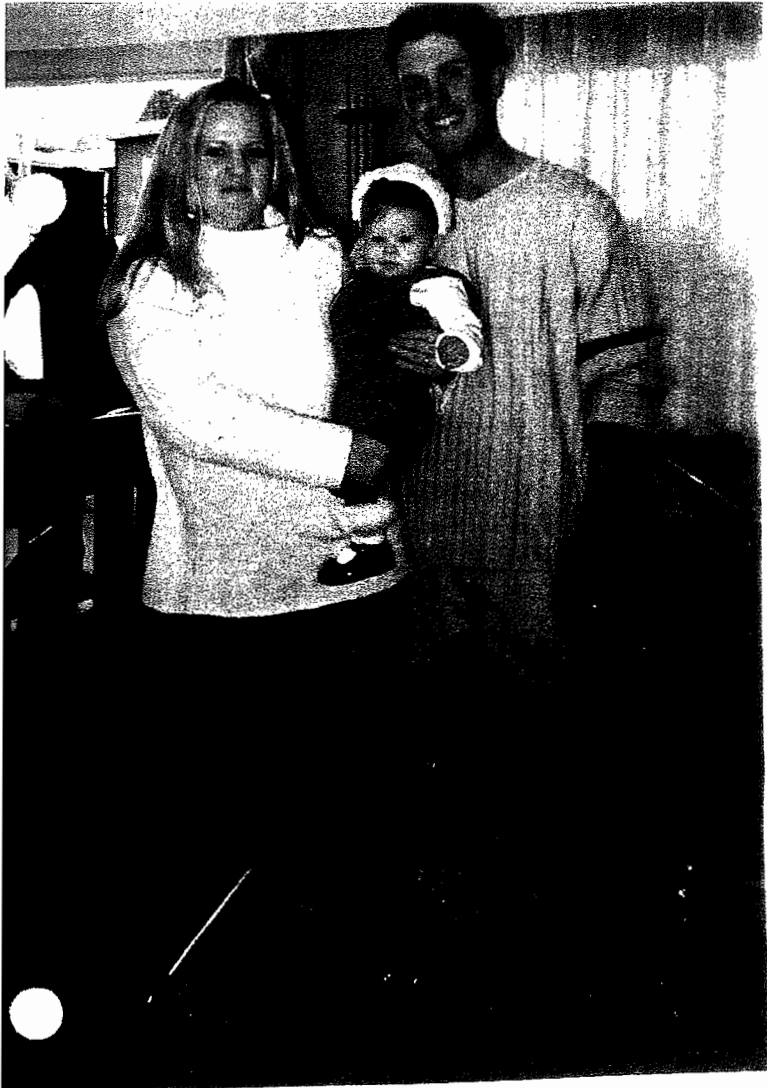
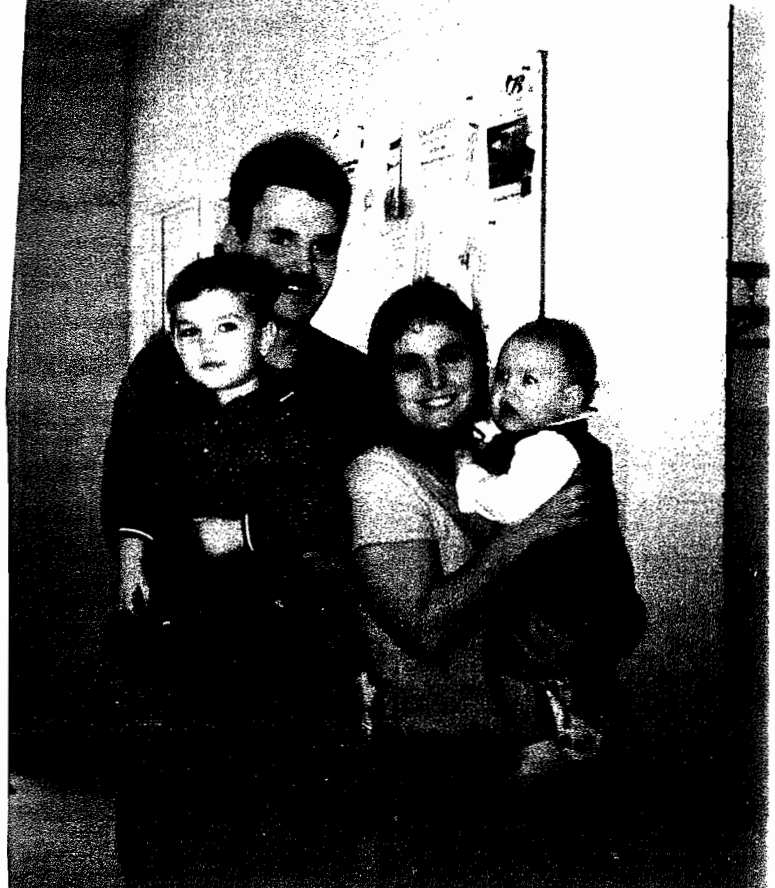
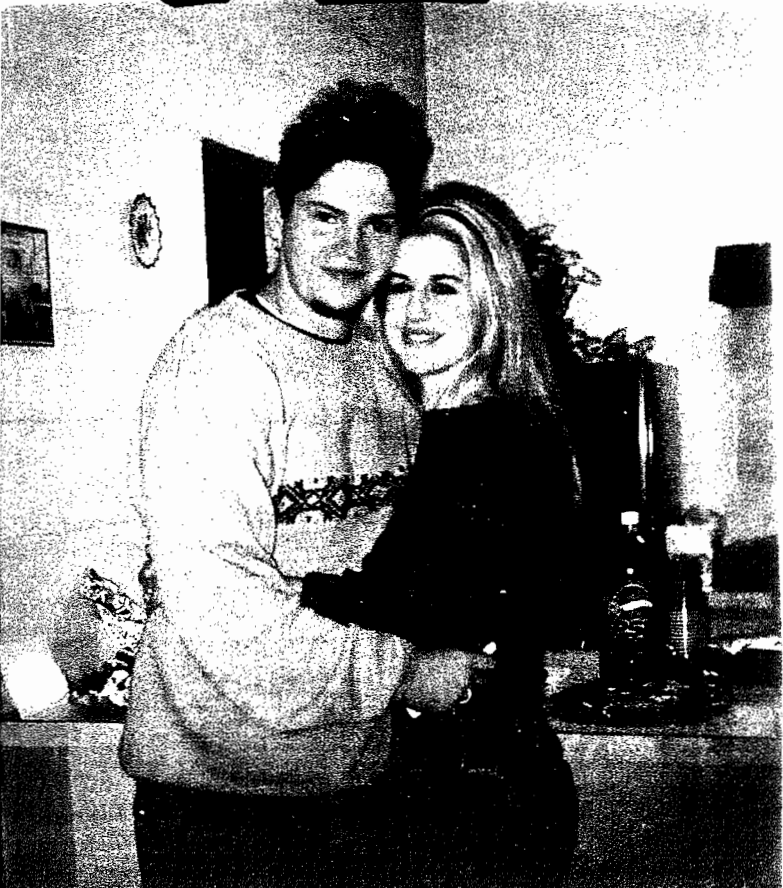


Came Nial Scott



Jace Curt Hailey Jane





Department Of Veterans Affairs
19, 2003
Oakland Regional Office 1301 Clay Street
Oakland CA 94612-5209

June



To Who It May Concern,

I would like to thank VA for providing Veterans and their families the opportunity to acquired benefits when a disability or death occurs. I appreciate the fact that VA acknowledges those that have served this Nation and has taken into account the possibility that the Veteran suffered injuries during his or her service.

I understand that if a Veteran develops or dies of an illness not considered presumptive under 3.309 and those having filed the claim are subsequently denied benefits then the Veteran and or family is allowed an opportunity to request a review and the benefit of submitting new evidence to support the claim. The purpose of this review would be to present new information which would allow VA to reconsider their original decision. VA has provided the following laws which allows me the right to a review based on Reasonable Doubt under 3.102, 3.304, 4.3 and 4.6. These laws offer me the opportunity to prove that there is or possibly is an association between my husband's death and herbicide exposure. I also understand that if I can show reasonable doubt then VA is obligated to rule on behalf of the Veteran and or his family. I am confident the enclosed evidence meets VA's criteria.

I have been advised that a physicians statement is crucial in all VA claims whether an illness is or is not on the presumptive. I understand the importance of this standard protocol and requirement set forth by VA in attaining such a letter form my husband's Oncologist, Dr. Freeman. It has been made clear that if it is Dr. Freeman's opinion that there is a possibility that chemical compounds found in herbicides used during the Vietnam conflict affected my husband's health, then his statement must include the following language, " the patience's brain cancer is as least as likely as not, to have been caused by herbicide exposure while having served in Vietnam during 1968." I will also be discussing occupational chemicals my husband used while in service in hopes of getting Dr. Freeman opinion on this subject too. I am currently awaiting for the opportunity to consult with Dr. Freeman and other relevant documentation vital to this claim. I hope to provide this documentation at the time of my hearing, which I also understand to be another courtesy offered by VA.

A claim for benefits was filed and on March 19th, 2003, I received a denial letter for DIC, Educational Assistance and Glioblastoma which resulted in my husband's death. In this document your office made clear that they did not receive evidence I had submitted in order that a decision of the case could be made. A Notice of Disagreement was filed and I have been advised to formally request an in-person review. Your time and efforts in reviewing the information enclosed is greatly appreciated.

- **Accrued Back Pay on behalf of the Veteran:**

I understand that because my husband had an open claim at the time of death I qualify for accrued back pay on behalf of the Veteran. I therefore am requesting that VA take into consideration VA medical records reflecting the events involving the purpose of his claim.

██████ served in Vietnam with COA, 1st Battalion, 28th Inf., First Inf., Division better know as the "Big Red One" in 1968. Jerry suffered a combat injury to the hip and was subsequently hospitalized in Vietnam from January through May of 1968. In May of 1968 he was evacuated to Okinawa, then sent to Fort Ord in August of 1969. Jerry was discharged January- February of 1970.

My husband had been granted a disability rating of 60% due to the mentioned combat injury in 1968 followed by a hip replacement. Prior to his death he filed a claim for an increase of benefits due to urological disorders such as ED, shrinking male genitalia, forgetfulness and PTSD (see binder under medical records for PTSD diagnoses and current medical records showing he had been diagnosed with severe depression). He had long suffered with hearing loss and sensitivity to sound, changes in vision, tingling and numbness, drowsiness, sleep disorders, nightmares, night sweats, bladder disorders, memory loss, severe depression, personality changes to include anger and irritability. Due to these symptoms ██████ sought out the assistance of Redding VA Medical Clinic and Martinez VA Medical Clinic and had been seen on numerous occasions.

Prior to the onset of these symptoms, ██████ was a very positive, vital, loving husband and father. His family including his children, sister, mother, father and friends noted the dramatic change at the onset of symptoms which would be deemed brain cancer. These illness are not common in his family; furthermore his mother and father are still living and are in their 80's.

On 8/15/2000 while at a baseball game my husband began to experience severe tingling at which time I took him to our local emergency room. Dr. Jennifer Rozum ask if ██████ had ever been exposed to pesticides. He responded negatively. It never entered his mind that herbicides used some 30 years ago in Vietnam could affect his health to date. On 3/15/03 an MRI revealed three brain tumors known as Astocytoma. On 3/21/02 ██████ was diagnosed with Glioblastoma. After under going brain surgery, we were notified that Jerry was considered terminal.

Having reviewed information relating to illnesses connected with herbicide and occupational exposures and I have come to realize the fact that these exposures affect ones DNA. I now understand that my children's health issues are a reflection of my husband's exposures. Jerry has a son form a previous marriage who was born prior to his military service and has always been quite healthy. I find it vital to mention that in 1971 soon after ██████ return from Vietnam I became pregnant but lost the child at three months. After the births of our other sons each displayed some kind of unusual illness or symptom, again uncommon to family history. Our son Kevin was continually ill. He had

a deformity of the kidney which required surgery. Scott had learning disabilities, and Jim was hospitalized at birth for a rash he was born with. Doctors were unclear as to its nature, therefore, they deemed it a staff infection of unknown origin. As I reflect back I now see that my husband and children had long exhibited symptoms uncommon to family history but common to chemical exposures.

Having researched the laws and pertinent information relating to this claim I would like to address the following areas of concern. I ask that the evidence and additional issues be submitted into evidence and other subjects reconsidered.

- **3.2600 Review of benefits claims decisions:**

A Notice of Disagreement was filed with the Oakland Regional Office. Since this time I have received instructions as to what options are available to me in order that this claim can be allowed the opportunity of a fair assessment. I thank you for the opportunity to resubmit my claim and therefore I respectfully would like to request an in-person hearing. I would like to make clear that I am requesting a De Novo Review so the facts and evidence can be presented to VA for reconsideration.

- **Title 38-1116 Presumptions of service connection for diseases associated with exposure to certain herbicide agents. Subsection 3 and 4:**

Subsection 3 of Title 38-1116 states:

“a veteran who, during active military, naval, or air service, served in the Republic of Vietnam...shall be presumed... and may be presumed to have been exposed during service **to any other chemical compound in an herbicide agent**, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.”

Subsection 4 of Title 38 states:

“the term herbicide agent means a chemical in an herbicide used in the support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975.”

- **Title 38-Section 1154 Consideration to be accorded time, place, and circumstances of service:**

Subsection 2-B states: “ In the case of **any veteran who engaged in combat** with the enemy in active duty with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, **the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence** of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, **shall resolve every reasonable doubt in favor of the veteran.**”

- **3.304 Direct service connection: wartime peace time:**

Under 3.304 (# 3 subsection D) titled Combat, it states:

“Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat **will be accepted as sufficient proof of service connection** if the evidence is consistent with the circumstances, conditions or hardship of such service even though there is no official record of such incurrence or aggravation.”

- **Service connection for:**

I have enclosed a copy of my husbands DD-214 proving he served in the Republic of Vietnam. I submit that herbicide exposure and exposure to occupational chemicals Jerry was required to use while in service resulted in brain cancer. It is my belief that these exposures led to brain cancer and Jerry’s ultimate demise. A few such solvents used in the occupational setting and in herbicides are known as: 2,4-D, carbon tetrachloride, trichloroethylene, benzene, toluene, xylene, methanes, ethenols, ethanes, vinyl chloride, acrylonitrile, phenols PAH’S-hydrocarbons, metal compounds such as lead found not only in solvents and herbicides but also in weapon residues and petroleum based chemicals such as kerosene and diesel which were mixed with herbicides in-order that they could be dispersed. Jerry was required to use these types of solvents by the military including lubricating oils to maintain his weapons. He was supplied insecticides such as DDT, DDD, DDE and Lidane to repel bug . These are only a few of the chemicals common to solvents and are also components of insecticides, pesticides and herbicides used in Vietnam. Many of which cause brain cancer. I also contend that prior exposure to TCE at Fort Lewis Washington is a hydrocarbon and causes brain cancer as it contains vinyl chloride. Evidence has been enclosed in support of this claim.

- **3.102 Reasonable doubt:**

- **4.3 Resolution of reasonable doubt:**

- **4.6 Evaluation of evidence:**

The law states that if I can provide evidence which creates doubt regarding the cause of brain cancer then VA can remove speculation and find on behalf of the Veteran. Evidence enclosed will provide VA the opportunity to review important documentation showing that pesticides also know as herbicides, agricultural chemicals, polycyclic aromatic hydrocarbons petroleum based chemicals, formaldehyde, lubricating oils, vinyl chloride, polyvinyl chloride, acrylonitrile, phenols and more cause brain cancer.

- **3.156 New and material evidence:**

New evidence will show that occupational chemicals and components of herbicides my husband was exposed to during service in fact causes brain cancer.

- **3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents: (SEE 3.309 next subject)**

- **3.309 Disease subject to presumptive service connection:**

While I realize my husband served during the Vietnam conflict and was exposed to herbicides, I am not clear as to why herbicide and occupational exposures wouldn’t apply under **3.309 Subsection A**. See Tumors , malignant, or of the brain or spinal cord or peripheral nerves.

- **3.340 Total and permanent total ratings and unemployability:**
- **4.16 Total disability for compensation based on unemployability of the individual:**
- **4.29 Ratings for service-connected disabilities requiring hospital treatment or observation:**

██████ was diagnosed with brain cancer March 21, 2002 and hospitalized on several occasions for treatment. He at no time was able to return to work. See medical records.

- **3.352 Criteria for determining need for aid and attendance and permanently bedridden:**

██████ was in need of my , his sisters and the assistance of my children in order to function on a daily basis. He also required in home health care.

He was bedridden much of the time during and after his surgery and unable to function on a normal level.

██████ sister provided a van equipped for handicapped individuals and in home health care was required.

- **4.124a Schedule of ratings—neurological conditions and conclusive disorders:**

- **Seizures secondary to brain tumor-brain cancer:**

My husband was diagnosed with astrocytoma, three brain tumors which were then identified as malignant glioblastoma. His symptoms began with tingling to include a metallic taste of the mouth and fatigue. The tingling sensation would eventually be classified as recurring seizures effecting his whole body. Other symptoms would eventually require high doses of morphine to control pain. He then suffered loss of use of his body rendering him helpless until his demise.

- **3.1600 Subpart B-Burial Benefits:**

If service connection is granted reimbursement for burials benefits would be in order. Please see attached receipt for expenses incurred on behalf of the Veteran.

- **3.57 Child**

- **3.807 Dependents' educational assistance: certification.**

Our son, ████████, has been attending Cal State University, San Diego, CA for higher education. In the event VA finds in my favor of this claim I am requesting that my son be granted educational benefits and reimbursement of tuition already paid.

- **Decision Review Program form:**

I have enclosed a signed Decision Review Program Form requesting an in-person review.

- **Evidence includes:**

- **VA applicable laws:**

Laws I have enclosed which I believe to be pertinent to this claim.

- **DD 214:**

Reflecting service in Vietnam.

DA form 20 reflects service in Vietnam, occupation and combat injury requiring hospitalization.

- **First Inf. Division better known as the “Big Red One”:**
Unit history of service in Vietnam.

- **Exposure sites:**

An actual map Jerry carried in field showing the locations he served in, Corp 111, the most heavily sprayed are in Vietnam.

A list of areas sprayed.

Additional maps reflecting the units location.

Herbicide spray map.

Life in the Times, Bases Known To Be Contaminated:

Fort Lewis, WA, is considered to be contaminated with TCE. Evidence will show that component of TCE are cancer causing agents including brain cancer and is also found in herbicides and occupational chemicals Jerry was exposed to.

Location where Jerry served

The Air Force and Herbicides in Southeast Asia 1961-1971:

This is an official document acquired from the USAF Military Archives. Jerry spent some R and R time in Thailand while serving in Southeast Asia. Documentation show that President Kennedy ordered spray missions in Thailand at the request of The Thai Government for a severe locust problem

- **VA Documented Studies:**

Veterans and Agent Orange : Update 2002 (2003)

Increase evidence of Brain Cancer in Agency Veterans.

This document is an update of prior IOM reports reflecting changes and or new studies. It is then provided to VA to inform VA staff of changes in the law regarding added illnesses and is then provided to the public to help inform Veterans of those studies and subsequent changes. In this particular update I states that there is an increased incidence of brain cancer among aging Veterans who served in Vietnam. It has made clear that **there is a rise in astrocytomas and glioblastoma** which are typically considered to be rare. The committee supports further steps be taken to develop collaborative programs to research specific illnesses to include brain cancer. It is suggested that VA's database is out dated causing poor investigation on the subject. Suspected chemicals most noted and sited in studies were, (2,4-D) (2,4,5-T) (2,3,7,8-T) picloram, cacoldylic, phenoxy herbicides and chlorophenoxy herbicides.

Numerous references supporting the committee's concerns are listed in this report for your review.

- **Admiral Zumwalt's report to the Department Of Veterans Affairs on brain cancer:**

Page 2-3, Zumwalt concludes that there is adequate evidence to reasonably conclude that it is as least as likely as not that there is a relationship between Veterans exposed to Agent Orange and the following health problems: Brain cancer.

Page 44 – 46 sites studies; see foot note 87, 88, 89, 90 and 91 cancer of the brain.

limited or lacking, are typically placed in Group 2. Those considered to be probably carcinogenic to humans appear in Group 2A (e.g., acrylonitrile, cadmium, formaldehyde, and silica), and those considered to be possibly carcinogenic to humans are placed in Group 2B (including butadiene, carbon tetrachloride, chlorophenoxy herbicides, DDT, styrene, and tetrachloroethylene). The other categories are considered not classifiable as to carcinogenicity (Group 3), or not carcinogenic to humans (Group 4).

*Insecticide
used on
skin*


The agents carcinogenic to humans (those listed in Table 1) and those probably or possibly carcinogenic to humans (Table 2) do not fall into any particular class of substances. They include metals (arsenic, chromium, nickel, cadmium), solvents (benzene, styrene, carbon tetrachloride, dichloromethane), organic and inorganic dusts (leather or wood dusts, asbestos, silica), chemicals used to construct polymers (acrylonitrile, formaldehyde, vinyl chloride), and pesticides (ethylene oxide, amitrole, chlorophenoxy herbicides, DDT, toxaphene). Tumors in humans associated with occupational exposures from substances or processes listed Tables 1 and 2 are shown in Table 3. Space here is too short for a detailed discussion of each of the agents in Tables 1 and 2 and the tumors they cause, but such information can be found in various reviews, including the IARC Monographs and the Annual Report on Carcinogens by the U.S. Department of Health and Human Services.

Under Primer of Brain Tumors-Causes:

The American Brain Tumor Association's document supports the above information published by the NCI.

American Journal Of Industrial Medicine: (Also located and posted on the NCI site under dictionary): Occupational Risk Factors for Cancer of the Central Nervous System: A case-Control Study on Death Certificates for 24 U.S. States:

The risk of cancer involving the central nervous system (CNS) by industry and occupation was investigated with a case-control analysis of the death certificates of 28,416 cases and 113, 664 controls, selected from over 4.5 million deaths in 24 U.S. states between 1984 and 1992. Industries showing consistent increases in risk by gender and race included textile mills, paper mills, petroleum refining. The application of job-exposure matrices to the industry/occupation combinations revealed a modest increase in risk for potential contact

with the public at work and exposure to solvents. Agricultural exposures were associated with significant risk increases among white women and white men. Am. J. Ind. Med. 33:247-255, 1998. r 1998 Wiley-Liss, Inc. **KEY WORDS:** neoplasms; socio-economic status; occupation; industry; epidemiology; job-exposure matrices. 

Rachel's Environmental and Health Week: Cancer Down on the Farm:

Brain Cancer & Immune disorders

Between 1969 and 1986 cancer in six industrial countries increased significantly including brain cancer. Farmers have consistently shown a higher than general population risks for certain cancers due to pesticide exposure such as brain cancer. Another important fact is that evidence has proven pesticides are linked to a variety of immune disorders which then decreases host resistance to disease rendering the human

incapable of suppressing or fighting diseases it could commonly word off. Information has been provided by the Environmental Research foundation.

Rachel's Environmental and Health Week:

Brain Cancer is Rapidly Increasing:

The National Cancer Institute reveals that brain cancer is dramatically increasing. The overall figures have tripled since 1968 due to chemical exposures. Chemicals that have been implicated with brain cancer to one degree or another include lubricating oil, acrylonitrile, vinyl chloride and polyvinyl chloride (PVC), polycyclic aromatic hydrocarbons [PAHs], and phenolic compounds [phenol, chlorophenols, cresol, resorcinol, hydroquinone, and quinone], hexamethylenetetramine, coal tar, carbon tetrachloride, methylenechloride, tetrachloroethylene, benzene, toluene, PCBs, acrylates, acrylonitrile, diesel exhaust, welding fumes, dyes, pigments, organochlorine pesticides, N-nitroso compounds, and formaldehyde.

Rachel's Environmental and Health Week:

Chemicals Cause Cancer In Workers And Nearby Residents.

(9 more studies show)

Chemicals found most often at toxic waste sites are trichloroethylene (TCE), lead, chromium, toluene, benzene, tetrachloroethene, trichloroethane, chloroform, arsenic, polychlorinated biphenyls (PCBs), cadmium, and zinc.[1] If you look at a list of the top 200 chemicals found at hazardous waste sites, you quickly see that these dozen are representative: a few metals, and many chlorinated compounds made from petroleum. Petroleum products and chlorine can be combined to make "chlorinated hydrocarbons," which do not ordinarily occur in nature, which tend to be toxic, which tend to persist in the environment once they are created, and which enter food chains and concentrate as they move from small plants to small animals and then into bigger animals. In general exposure to hydrocarbons (petroleum products) and especially to chlorinated hydrocarbons cause severe health effects.

*Combined
diesel
fuel
and
component
of chlorinated*

A study[3] of 1015 male workers at a Canadian oil refinery revealed an excess of cancers of the brain, bone, skin, kidneys, lymph system, and blood-forming cells (leukemia), as well as fatal diseases, including cancer, of the digestive tract.

*diesel
fuels*

A study[4] of 2509 active and retired workers at three oil refineries in Beaumont/Port Arthur, Texas, revealed an excess of brain cancer, stomach cancer, leukemia, multiple myeloma.

Environmental Causes of Cancer:

Again the fact that immune system is compromised and or damaged due to chemicals exposure is a huge concern in the battle against cancer. If the immune system is damaged it can not protect the body as intended. This document list all the same chemicals already mentioned including PCB's; Kelthane; DDT and DDE. This document also continues to support the fact that pesticides are a cohort of astrocytomas and glioblastoma (brain cancer).

*Herbic.
and
Pestic
Insect.
used on
Skin*

• Chemical Data:

U.S. Environmental Pesticides Agency:

Provides a list of 22 UN PIC pesticides. 4 UN Severely Hazardous Pesticides Formulation, 6 UN PIC pesticides added during the interim period, and 36 additional U.S. actions reported. Many of these chemicals have been banned since the Vietnam conflict.

10th Report on Carcinogens:

Is a listing of all chemicals know to be cancer causing agents published by the U.S. Department of Health and Human Services.

Herbicide Name List:

The University Of Nebraska has compiled a list of herbicides that can be used by VA to cross reference those chemicals considered to cause brain cancer by the National Cancer Institutes list which has also been provided

National Library of Medicine:

The rest of this particular section is a search includes chemical compounds found in herbicides and solvents that cause either changes in the brain, tumors and or brain cancer. Also included is a list of all known chemicals containing dioxin. Other facts concerning the chemical compounds listed in this presentation prove that these compounds are either in pesticides (also defined as herbicides) or found in solvents used by the military to maintain weapons or are munitions residues such as lead which cause ill effects on the brain.

• **Case Studies:**

The National Library of Medicine has provided studies on their internet site consisting of chemicals causing changes in the brain, tumors, astrocytomas and glioblastomas (brain cancer). A few such studies enclosed site that 2,4-D, acrylonitrile, bromoethane, ethyl chloride, formaldehyde, N-Methyl-N'-Nitrosoguanidine, tetraethyl lead and vinyl chloride cause such ill effects on the brain. There are numerous studies that can be viewed at this site location.

• **Chemicals Used in Vietnam:**

Chemical properties:

Reflects the chemicals used for aerial spray mission in Vietnam.

Chemicals Used In Military Operations During the Vietnam War:

Many substances such as insecticides, repellants, rodenticides and herbicides Vietnam Veterans were supplied ~~with~~ by the military are also listed under the Department of Health and Human Services and the National Cancer Institute as carcinogenics or causing effects or cancer of the brain.

Public Health Statement for DDT, DDE AND DDD:

According to the U.S. Environmental Protection Agency DDT has been long banned due to it's toxicity. The National Cancer Institute sites studies in this document concerning insecticides, repellants and rodenticides and herbicides as also being cancer causing some of which effect the brain.

Lindane Carbaryl
Lindane no longer manufactured in US due to toxicity levels 10

Definitions:

Defines chemicals found in herbicide such as hydrocarbons which are also found in solvents a herbicides, organophosphate and chlorophenols contaminants. Again these can be found to cause ill effects.

- **Duty to assist:**

(Please provide the following information as it is pertinent to this case.)

- 1) **A release form for medical records was signed and given to VA during the claims process. In correspondence received from your office regarding the absence of medical records and Jerry's death certificate having not been received is quiet concerning. I contacted the appropriate office and was told they had been sent to VA and have not been returned to the doctors office. I am requesting that VA please make every effort to locate these documents, copy them and send the originals to my home.**
- 2) **I would like to request a copy of all known chemicals my husband was required to use during service in order to perform his job tasks. (Example Solvents required to clean weapons.)**
- 3) **In the event that my research has not uncovered all the components used to comprise herbicides, I am requesting that VA provide a list of all known components and or compounds found in herbicides used for defoliation during the Vietnam conflict.**
- 4) **I am requesting that VA disclose any radiation or nuclear tests that were conducted in areas located with in the Republic of Vietnam or any such chemicals that were used during this time.**
- 5) **It has come to my attention that Fort Lewis, Washington is highly contamination with TCE. My husband was stationed at Fort Lewis during 1968 prior to his tour in Vietnam. According to the National Cancer Institute these chemicals are considered harmful to the human body. I would appreciate any official documents regarding the contamination of this base.**
- 6) **My husband had a 60% rating due to a combat injury which he was hospitalized for and which required surgery while in service. He was hospitalized in Vietnam from January through May of 68 and was then sent to Okinawa for further treatment. He was hospitalized for approximately a year. He later received a hip replacement. Records have already shown that other shrapnel fragments were still present after the surgery. He was awarded the Purple Heart at the time. There was a question as to whether he was injured by friendly fire or enemy fire which cost him the Purple Heart. I now understand that it did not matter if he was injured by friendly fire or enemy fire, the fact that he was injured during war time allows him the privilege of the Purple Heart. I am requesting that VA assist me in seeing that [REDACTED] Purple Heart be reinstated. I have already begun this process but find that there seems to be some problems in completing this process and I am in need of assistance due to a lack of understanding relating to the issue.**

- 7) My husband has had a long standing relationship with VA while receiving VA benefits. Prior to his death he had a claim for other issues which I would like to address. In order for me to do so I will need a complete copy of his C file. This request has already been made but I have had no response.
- 8) Under VA Documented Studies, Admiral Zumwalt's report to the Department of Veterans Affairs refers to studies conducted regarding brain cancer. See page 44 – 46. I am unable to access the referenced studies and since it is clear that this information has been provided to VA I would like to request that VA submit these studies as evidence on my behalf.

- **In Closing:**

I am convinced that [REDACTED] death was due to chemical exposures suffered while in service. Our lives have forever been positively changed by the loving example set by [REDACTED] yet our lives have been unjustly changed due to this unnecessary and tragic death. Jerry's parents have out lived their son. I have been left without the love and companionship of my husband and my children are suffering deeply and no longer have the example of their dad to help guide them through life. His sister and brother in law have been robbed of his affection. My grandchildren will never know their grandpa. We have all been traumatized by this loss and have had to seek medical assistance. Most important is the fact that Jerry's life was unimportant to those who did not consider the long term effects these exposures would have on the human body. My husband was such a young man, truly loved life and had much life yet to live. My husband life is worth more than money. But due to our loss and financial constraints I was forced to sell our home which was the one thing I had left that held the memories [REDACTED] and I developed with our children. I doubt if many can realize the enormity of our overall loss unless they themselves have had such a devastating loss.

Our Veterans served our nation and earned the right to honest answers and assistance, instead they have continually been ignored or dismissed when illness falls upon them due to the hazardous practices our government forces upon them. I am in hopes that VA has become the spokes person for Veterans suffering from illnesses incurred due to their service in the military. Therefore I ask that VA reconsider the merits of this claim and their prior decision by speaking on behalf of my husband, myself and my children and finding in favor of this claim. I believe the evidence will speak for itself and allow VA to feel confident in their decision. I truly Thank You for the opportunity to state my case and the time spent reviewing the enclosed information.

Sincerely,

[REDACTED]

June 2003



This claim was based on the enclosed evidence (with exception to the appeal dated May 26-2006 which all enclosed was used to win that claim also-

**DEPARTMENT OF VETERANS AFFAIRS
Oakland DVA Regional Office
1301 Clay Street
Oakland Federal Bldg
Oakland, CA 94612-5209**

████████████████████
VA File Number
████████████████████

**Decision Review Officer Decision
February 26, 2004**

INTRODUCTION

DVA records reflect that the veteran served honorably in the U.S. Army from 7/10/68 to 3/2/70 with combat service in the Republic of Vietnam, as an infantryman, with the 1st Infantry Division from 12/68 until he was wounded in 5/69. The Decision Review Officer completed a decision on 2/26/04. Based on a review of the evidence listed below, the Decision Review Officer made the following decision.

DECISION

- 1 . Service connection for the cause of the veteran's death and entitlement to Dependency and Indemnity Compensation (DIC) is established.
- 2 . Entitlement to accrued benefits is established, under 38 USC 5121, for the veteran's malignant brain tumor/cancer, an astrocytoma, with a 100% evaluation, effective 3/25/02, and for the veteran's chronic post traumatic stress disorder (PTSD) with a 70% evaluation, effective 3/28/02, to include special monthly compensation based on being housebound, effective 3/25/02.
- 3 . Entitlement to Dependents' Educational Assistance, under 38 U.S.C. Chapter 35, effective 3/25/02, is established.

EVIDENCE

- As delineated in Rating Board Decision, dated 2/10/03, DVA letter, dated 3/19/03, Notice of Disagreement from the widow, dated 3/31/03, received on 4/7/03, and DVA letter, dated 5/5/03. Biopsy report by Dr. Mooney, M.D., dated 4/8/02, from the Redding Medical Center. Letter from the widow, dated 6/19/03. Letter from Department of the Army, Review Boards Agency, dated 7/23/03. Statements from Dr. DeGuzman, M.D., VAMC, Martinez, dated 12/22/03, & Dr. Ballard, M.D., dated 12/30/03. Numerous copies of medical treatises and Board of Veterans Appeals Decisions, included BVA Decision, Docket # 00-09 317, Decision Date 3/28/01 (Citation # 0109193). Testimony and medical treatises presented at the widow's personal hearing conducted on 1/8/04. Letter from the widow, dated February, 2004, received on 2/24/04, with a medical statement from Dr. Figueroa, M.D., an oncologist, dated 2/14/04, as well as, a listing of Dr. Figueroa's credentials, and a letter from Dr. DeGuzman, M.D., VAMC, Martinez, dated 1/27/04, along with a letter from the Department of the Army, Board For Correction of Military Records, dated 1/26/04, and page 1 of hospital reports commencing on 4/10/02, 4/26/02 & 5/1/02 from the Redding Medical Center.

REASONS FOR DECISION

1. Service connection for the cause of the veteran's death and entitlement to Dependency and Indemnity Compensation (DIC).

Facts: In this regard, some history of the widow's claim for service connection for the cause of the veteran's death, entitlement to Dependency and Indemnity Compensation (DIC) and entitlement to accrued benefits, under 38 USC 5121, is required. That is, the widow's initial claim for entitlement to service connected death benefits and accrued benefits was denied by Rating Board Decision, dated 2/10/03, which held that the veteran's malignant brain tumor/cancer, described as a gliomatosis cerebri or a Grade IV astrocytoma, was not incurred in or aggravated by military service nor manifested to a degree of 10% disablement within one year after military discharge nor included as a presumptive service connected condition resulting from exposure to Agent Orange herbicides in the Republic of Vietnam. Further, Rating Board Decision, dated 2/10/03, found that the veteran's death had not been materially contributed to nor substantially hastened by his service connected disabilities which included a right hip replacement, residuals of a gunshot wound of the right thigh with right femur fracture, low back strain and erectile dysfunction. Finally, Rating Board Decision, dated 2/10/03, found that service connection for a chronic post traumatic stress disorder (PTSD) was not warranted because it was held that although the veteran was treated on 3/28/02 at VAMC, Martinez for probable PTSD that this was not a confirmed diagnosis of PTSD, resulting from combat in the Republic of Vietnam.

Additionally, in this regard, after the Rating Board Decision, dated 2/10/03, the veteran's biopsy report from the Redding Medical Center by Dr. Mooney, M.D., dated 4/8/02, was received which disclosed the presence of a brain tumor, described as glioblastoma multiforme. In addition, statements were received from Dr. DeGuzman, M.D., VAMC, Martinez, dated 12/22/03, and Dr. Ballard, M.D., dated 12/30/03. In his statement, Dr. DeGuzman stated that "there is no family history of cancer, cerebral or otherwise. It is my opinion that the exposure to herbicides in Vietnam, is as least as likely as not, a cause or contributing factor to the cancer of the brain that Mr. Palmer experienced." Additionally, Dr. Ballard in his statement indicated that although he was merely a humble Family Practice Medical Doctor that it was possible that Agent Orange and other chemicals were "as good a cause as anything else".

Further, in this regard, the widow testified at her personal hearing, on 1/8/04, with the assistance of her friend, Mrs. Taura King, as well as, her representative, Mr. Jose Morales of the Military Order of the Purple Heart, concerning service connection for the cause of the veteran's death, entitlement to Dependency and Indemnity Compensation (DIC) and entitlement to accrued benefits, under 38 USC 5121. In essence, the widow contended that the veteran's malignant brain tumor/cancer, an astrocytoma, was incurred during military service as the result of exposure to Agent Orange herbicides in the Republic of Vietnam. That is, while the widow acknowledged that the veteran's malignant brain tumor/cancer, an astrocytoma, was not presently a presumptive service connected condition resulting from exposure to Agent Orange herbicides in the Republic of Vietnam, the widow contended that service connection for the veteran's malignant brain tumor/cancer, an astrocytoma, could be established on a direct basis, as the result of the medical opinion by Dr. DeGuzman, cited above. In addition, it was noted that the Board of Veterans Appeals Decision, Docket # 00-09 317, Decision Date 3/28/01 (Citation # 0109193) presented an identical case and that the medical opinions contained therein, regarding a causal connection between a malignant brain tumor/cancer, an astrocytoma, and exposure to Agent Orange herbicides in the Republic of Vietnam were equally applicable to the veteran's case.

Subsequently, a letter was received from the widow, dated February, 2004, with an attached medical statement from Dr. Figueroa, M.D., an oncologist, dated 2/14/04, as well as, Dr. Figueroa's credentials, and a letter from Dr. DeGuzman, M.D., VAMC, Martinez, dated 1/27/04, along with a letter from the Department of the Army, Board For Correction of Military Records, dated 1/26/04, and page 1 of hospital reports commencing on 4/10/02, 4/26/02 & 5/1/02 from the Redding Medical Center. In his statement, dated 2/14/04, Dr. Figueroa, a medical oncologist, Director of Mercy Regional Cancer Center, stated that "it is reasonable to conclude that it is as likely, as not, that the cause of ~~the~~ brain tumor was due to pesticide exposure while in Vietnam". In this regard, Dr. Figueroa listed nine factors on which he based his opinion which are herein incorporated by reference without further elaboration being required. Additionally,

the letter from Dr. DeGuzman, dated 1/27/04, indicated that he was credentialed in internal medicine.

Analysis: In this regard, under the authority granted by the Agent Orange Act of 1991 (38 U.S.C. 1116), the DVA has determined that a presumption of service connection based on exposure to Agent Orange herbicides in the Republic of Vietnam is not warranted for any conditions other than those for which the DVA has found a positive association between the condition and such exposure. That is, the DVA has determined that a positive association exists between exposure to herbicides and the subsequent development of 11 conditions, under 38 C.F.R. 3.309 (e). Thus, to date, the available scientific and medical evidence does not supported service connection for malignant brain tumors or cancer, described as a gliomatosis cerebri, an astrocytoma and a glioblastoma multiforme, as a result of exposure to Agent Orange herbicides in the Republic of Vietnam. That is, the National Academy of Sciences (NAS) most recently found that a presumption of service connection based on exposure to herbicides was not warranted for malignant brain tumors (page 27639, of the Federal Register, dated 5/20/03 (Volume 68, No. 97)). Therefore, in order to establish service connection for the veteran's malignant brain tumor/cancer, an astrocytoma, the presence of his malignant brain tumor/cancer, an astrocytoma, must have been manifested to a compensable degree (10%) within one year after military discharge or a causal connection must be demonstrated between the veteran's malignant brain tumor/cancer, an astrocytoma, and the veteran's exposure to Agent Orange herbicides in the Republic of Vietnam. That is, in accordance with *Combee v. Brown*, 34 F.3d. 1039 (Fed. Cir. 1994), the Agent Orange Act of 1991 (38 U.S.C. 1116) does not preclude establishing service connection based on proof of actual direct causation.

Therefore, in the instant case, it is concluded after a thorough review of all of the evidence of record that service connection for the cause of the veteran's death and entitlement to Dependency and Indemnity Compensation (DIC) is established because the medical opinions, cited herein by Dr. Figueroa & Dr. DeGuzman, as well as, the medical opinions contained within the Board of Veterans Appeals Decision, Docket # 00-09 317, Decision Date 3/28/01 (Citation # 0109193), create an approximate balance of positive and negative evidence, such that it is "as likely as not" that a causal connection exists between the veteran's malignant brain tumor/cancer, an astrocytoma, and the veteran's exposure to Agent Orange herbicides in the Republic of Vietnam (*Gilbert v. Derwinski*, 1 Vet. App. 40 (1991) & *Colvin v. Derwinski*, 1 Vet. App. 171 (1991)). That is, it is concluded that these medical opinions are of medico-evidentiary value, such that it is "as likely as not" that a causal connection exists between the veteran's malignant brain tumor/cancer, an astrocytoma, and his exposure to Agent Orange herbicides in the Republic of Vietnam (*Reonal v. Brown*, 5 Vet. App. 458 (1993), *Owens v. Brown*, 7 Vet. App. 429 (1995), *Godfrey v. Brown*, 8 Vet. App. 113, 121 (1995) and *LeShore v. Brown*, 8 Vet. App. 406 (1995)). Therefore, in this regard, the rule regarding resolution of the benefit of a reasonable doubt in a veteran's favor has been applied because the evidence is in approximate equipoise (*Gilbert*, supra). That is, it is concluded that although BVA

Decisions do not constitute legal precedent that the BVA Decision, Docket # 00-09 317, Decision Date 3/28/01 (Citation # 0109193), cited herein, presents such an identical case that the logic and analysis contained within this BVA Decision (Citation # 0109193) must be found to be equally applicable to this veteran's malignant brain tumor/cancer, an astrocytoma. Thus, entitlement to service connection for the cause of the veteran's death and entitlement to Dependency and Indemnity Compensation (DIC) is established and benefits sought on appeal are granted.

2. Entitlement to accrued benefits, under 38 USC 5121.

As delineated above, under issue # 1, service connection for the veteran's malignant brain tumor/cancer, an astrocytoma, has been established. Therefore, entitlement to accrued benefits, under 38 USC 5121, is established for the veteran's malignant brain tumor/cancer, an astrocytoma, with a 100% evaluation, effective 3/25/02. That is, the veteran's claim for service connection for his malignant brain tumor/cancer, an astrocytoma, on DVA form 4138, dated 3/22/02, was received by the DVA, on 3/25/02. In addition, as cited above, the veteran's claim on DVA form 4138, dated 3/22/02, included a claim for service connection for PTSD. In this regard, in as much as, the veteran served in combat in the Republic of Vietnam and received a Combat Infantryman Badge, as well as, incurring an accidentally gunshot wound, it is concluded that entitlement to accrued benefits, under 38 USC 5121, for service connection for PTSD is likewise warranted with a 70% evaluation, effective 3/28/02, on the basis of veteran's Mental Health Clinic treatment record, dated 3/28/02, which reported an assessment of probable PTSD with a Global Assessment of Functioning (GAF) of 49 which indicates severe social and industrial impairment. In addition, entitlement to special monthly compensation, under 38 U.S.C. 1114, subsection (s) and 38 CFR 3.350(i), on account of malignant brain tumor/cancer, an astrocytoma, rated 100% with additional service-connected disabilities independently ratable at 60% or more is established, effective 3/25/02. Therefore, since entitlement to accrued benefits, under 38 USC 5121, has been established, benefits sought on appeal are granted.

3. Entitlement to Dependents' Educational Assistance, under 38 U.S.C. Chapter 35.

Entitlement to Dependents' Educational Assistance, under 38 U.S.C. Chapter 35, is established because the veteran's service-connected malignant brain tumor/cancer, an astrocytoma, warranted a permanent 100% evaluation, effective 3/25/02.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.



DEPARTMENT OF VETERANS AFFAIRS

Oakland Regional Office
1301 Clay Street
Oakland CA 94612-5209

MAR 16 2004

[REDACTED]

In Reply Refer To: [REDACTED]

Dear Mrs. [REDACTED]

The Decision Review Officer made a decision for dependency and indemnity compensation (DIC), death pension and accrued claim based on the notice of disagreement received on April 7, 2003.

This letter tells you about your entitlement amount and payment start date and what we decided. It includes a copy of our rating decision that gives the evidence used and reasons for our decision. We have also included information about additional benefits, what to do if you disagree with our decision, and who to contact if you have questions or need assistance.

What Is Your Entitlement Amount And Payment Start Date?

Your monthly entitlement amount is shown below:

Monthly Entitlement Amount	Payment Start Date	Reason For Change
[REDACTED]	May 1, 2002	Month of death benefit
[REDACTED]	Jun 1, 2002	DIC begins
[REDACTED]	Dec 1, 2002	cost of living increase
[REDACTED]	Dec 1, 2003	cost of living increase

Your payment for May 2002 is the rate we would have paid the deceased veteran.

We're paying you as a surviving spouse with no dependents. *Let us know right away if there is any change in your marital status.*

When Can You Expect Payment?

Your payment begins the first day of the month following your effective date. You will receive a payment covering the initial amount due under this award, minus any withholdings,

[REDACTED]
[REDACTED]

in approximately 15 days. Payment will then be made at the beginning of each month for the prior month. For example, benefits due for May are paid on or about June 1.

Please note the pension we have previously been paid will be deducted from this payment.

What Did We Decide?

We granted service connected death benefits, called dependency and indemnity compensation (DIC), effective June 1, 2002.

We have determined that you are entitled to both dependency and indemnity compensation (DIC) and death pension benefits. However, you can't receive both benefits at the same time. We're paying you DIC benefits as the greater benefit.

We have approved your claim for accrued benefits for [REDACTED]. You will receive this payment separately.

We have enclosed a copy of your Rating Decision for your review. It provides a detailed explanation of our decision, the evidence considered and the reasons for our decision. You can find the decision discussed in the section titled "*Decision*." The evidence we considered is discussed in the section titled "*Evidence*." The reasons for our decision can be found in the portion of the rating titled "*Reasons for Decision*" or "*Reasons and Bases*."

How Do You Start Direct Deposit?

Your money may be deposited directly into your checking or savings account. This is the safest and most reliable way to get your money. For more information about Direct Deposit, please call us toll free by dialing 1-877-838-2778.

Are You Entitled To Additional Benefits?

We've enclosed VA Form 21-8765, "Service-Connected Death Award Attachment," which explains other benefits.

You and your dependent(s) may be eligible for Dependents' Educational Assistance. We are enclosing a VA pamphlet 22-73-3, "Summary of Education Benefits," which explains the program. To make a claim, complete and return the enclosed VA Form 22-5490.

You and your dependent(s) may be entitled to benefits under CHAMPVA. CHAMPVA is a health benefits program in which the Department of Veterans Affairs (VA) shares the cost of certain healthcare services and supplies with eligible beneficiaries. To be eligible for the CHAMPVA program a dependent must be the surviving spouse or child of a veteran who died

[REDACTED]
[REDACTED]

as a result of a service connected disability, or who was permanently and totally disabled from a service connected disability at the time of death. The Health Administration Center in Denver, Colorado administers the CHAMPVA program. You should call 1-800-733-8387 if additional information is needed.

What You Should Do If You Disagree With Our Decision.

If you do not agree with our decision, you should write and tell us why. You have *one year from the date of this letter to appeal the decision*. The enclosed *VA Form 4107, "Your Rights to Appeal Our Decision,"* explains your right to appeal.

Do You Have Questions Or Need Assistance?

If you have any questions or need assistance with this claim, please call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 1-800-829-4833.

If you call, please refer to your VA file number 25 800 137. If you write to us, put your full name and VA file number on the letter. Please send all correspondence to the address at the top of this letter. You can visit our web site at www.va.gov for more information about veterans' benefits.

We sent a copy of this letter to Military of Purple Heart because you appointed them as your representative. If you have questions or need assistance, you can also contact them.

Sincerely yours,

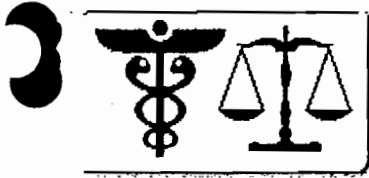
F. M. Hoffschneider

F. M. Hoffschneider
Veterans Service Center Manager

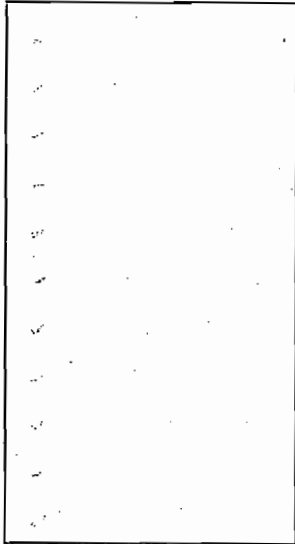
Email us at: Oakland.Query.VSC@vba.va.gov

Enclosure(s): Rating Decision
VA Form 21-8765
VA Pamphlet 22-73-3
VA Form 22-5490
VA Form 4107

cc: Military Order of the Purple Heart



Over 1 Million Attorneys, Physicians, Dentists



Michael Louis Figueroa MD

Oncology (Cancer)

Contact Info

PO Box 993100
Redding, CA 96099

PH [REDACTED] E-MAIL
Fa [REDACTED]

Education and Training

Medical School: Univ Of Nv Sch Of Med, Reno Nv 89557

Primary Specialty: Medical Oncology

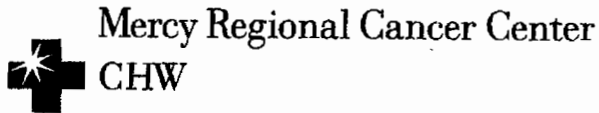
Secondary Specialty: Hematology-Internal Medicine

Graduation Year: 1986

Medical Practice

Major Activity: Office Based Practice

If the information above is incomplete or inaccurate, you can update the record by



2175 Rosaline Avenue
P.O. Box 496009
Redding, CA 96049-6009
Telephone [REDACTED]
Facsimile [REDACTED]

February 14 2004

Department of Veterans Affairs
Oakland Regional Office
1301 Clay Street
Oakland, CA 94612-5209

[REDACTED]
To Whom It May Concern:

I am a medical oncologist, Director of Mercy Regional Cancer Center. I have been asked by the [REDACTED] family to review [REDACTED] records regarding the diagnosis of glioblastoma multiforme (GBM) and history of chemical exposure while in Vietnam. The following facts were used to draw my conclusions.

1. Pesticides contain known carcinogens, especially Dioxin, that cause genetic damage, resulting in the development of cancers.
2. Human populations exposed to these pesticides have a significantly increased rate of cancers. There is a linear correlation to the amount of exposure and the incidence of tumors. These pesticides are fat-soluble and have a tendency to concentrate in the brain (central nervous system). Occupations at risk for pesticide exposure include workers at pesticide factors, horticulture workers, farmers, airline crews, field workers, forestry employees and military personnel.
3. Tumors of the brain are one of the cancers that are associated with an increased incidence in human populations exposed to pesticides. This is reported in a number of scientific articles, including the International Journal of Epidemiology, Volume 22, #4, page 579, 1993, archives of Environmental Health January through February 1998, International Journal of Epidemiology, 1989, December, Volume 18, #4, page 768-774. I would also refer the reader to the article "Cancer down on the farm" by Peter Montague, which can be found on the website- greenleft.org.au and the publication by P.T. Thomas and others "Immunologic effects of pesticides", Princeton Scientific Publishing, 1990.

Michael L. Figueroa, M.D.
Medical Director

Clark, M.D. Inc.
Director
Radiation Oncology

Sharon E. Pereira, M.D.
Radiation Oncology

[REDACTED]

IN THE CASE OF

[REDACTED]

INTRODUCTION

The appellant is the surviving spouse of the veteran who served on active duty from July 1969 to April 1971. This matter is before the Board of Veterans' Appeals (Board) on appeal from a May 1996 rating decision of the Chicago, Illinois Department of Veterans Affairs (VA) Regional Office (RO). In November 2003, the appellant appeared before the undersigned at a Travel Board hearing at the RO. A transcript of this hearing is of record. This case was previously before the Board in October 2005 when it referred the case to the Armed Forces Institute of Pathology (AFIP) for an advisory opinion. The matter of the appellant's right to have her case remanded to the agency of original jurisdiction (AOJ) for initial review of the AFIP's opinion will be discussed below.

FINDINGS OF FACT

1. The veteran served in Vietnam.
2. The veteran died in October 1995; the immediate cause of his death was glioblastoma.
3. Glioblastoma multiforme is reasonably shown to be related to the veteran's herbicide exposure in Vietnam.

CONCLUSION OF LAW

Service connection for the cause of the veteran's death is warranted. 38 U.S.C.A. §§ 1110, 1112, 1113, 1116, 1310, 5107 (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.312, 3.313 (2005).

IN THE APPEAL OF [REDACTED]

IN THE CASE OF [REDACTED]

REASONS AND BASES FOR FINDINGS AND CONCLUSION

A. *Veterans Claims Assistance Act of 2000*

The Veterans Claims Assistance Act of 2000 (VCAA), in part, describes VA's duties to notify and assist claimants in substantiating a claim for VA benefits. 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(a). The VCAA applies to the instant claim.

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant 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). Proper VCAA notice must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; (3) that the claimant is expected to provide; and (4) must ask the claimant to provide any evidence in his or her possession that pertains to the claim. 38 C.F.R. § 3.159(b)(1). VCAA notice should be provided to a claimant before the initial unfavorable agency of original jurisdiction decision on a claim. *Pelegri v. Principi*, 18 Vet. App. 112 (2004).

The appellant was advised of VA's duties to notify and assist in the development of the claim. While she did not receive notice prior to the initial May 1996 rating decision (since the VCAA was not in effect at that time), letters from May 2001, and May, June, and December 2004 explained the evidence necessary to substantiate her claim for service connection for cause of the veteran's death, the evidence VA was responsible for providing, and the evidence she was responsible for providing. Additionally, a December 2005 letter informed the appellant of the AFIP's advisory opinion and provided her with 60 days to submit additional evidence. While she did not receive complete notice regarding effective dates as outlined by the U.S. Court of Appeals for Veterans Claims (Court) in

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Dingess/Hartman v. Nicholson, 19 Vet. App. 473 (2006), since this decision grants what the appellant seeks, she is not prejudiced by the decision. Furthermore, it would be unconscionable to delay the favorable decision being made herein to ensure technical compliance with effective date notice provisions. She is not prejudiced by any defect in notice as she has had full opportunity to supplement the record and participate in the adjudicatory process. Finally, it is not alleged that notice in this case was less than adequate.

The appellant submitted additional evidence in March 2006 and requested AOJ review of this evidence. However, as the decision below constitutes a full grant of the appellant's claim, she is not prejudiced by the Board proceeding with a review of her claim.

B. Factual Background

The veteran's DD-214 reflects that he served in Vietnam from June 1970 to April 1971.

An administrative memorandum by the RO in May 2001 reports that the National Personnel Records Center (NPRC) informed it that while a thorough search for the veteran's service medical records (SMRs) had been conducted at their facility, they were unable to locate them. The RO concluded that the veteran's SMRs were unavailable.

A January 1985 letter from the VA informed the veteran that results from all laboratory tests taken at an October 1984 Agent Orange screening examination were within normal limits. The letter did not state what tests were completed.

An August 1994 surgical pathology report from the Michael Reese Hospital and Medical Center reflects that brain tumor biopsies revealed small fragments of glioblastoma multiforme.

IN THE APPEAL OF [REDACTED]

IN THE CASE OF [REDACTED]

An August 1995 letter from the appellant to Dr. N. V. details the course of the veteran's brain cancer treatment prior to his death. The veteran was diagnosed with a glioblastoma multiforme in approximately August 1994. Subsequent to his diagnosis, he underwent a craniotomy and then radiation therapy, which halted the growth of the tumor for a short time. After a January 1995 MRI revealed his tumor had grown, he underwent Gamma Knife radiation. An April 1995 MRI revealed his tumor had increased in size again and that he had significant edema on the left side of his brain. At that time, his speech became very impaired and he was unable to read or write. Chemotherapy was halted in May 1995 and a de-bulking procedure was performed in hopes the edema would decrease, so he could undergo Gamma Knife radiation again. The edema never decreased and, at the time of the appellant's letter, his doctors had recently informed them there was no more treatment they could successfully pursue for him.

As noted previously, the veteran died in October 1995. He was 45 years old at the time of his death. His death certificate lists the immediate cause of death as glioblastoma and the significant condition contributing to death as cerebral edema. Service connection was not in effect for any disability at the time of death.

The appellant filed an application for VA death benefits in April 1996, alleging that the aggressive glioblastoma that took the veteran's life developed as a consequence of his exposure to herbicides (Agent Orange) in Vietnam.

In June 1997, the appellant submitted two items of scientific literature: *A Draft Review of an August 1994 EPA Health Assessment* and a section from *CANCER, Principles & Practice of Oncology*, 5th Edition, Volume 2, regarding *Neoplasms of the Central Nervous System*. The latter text contained the statement that "[a] higher than expected increase in the incidence of brain tumors has been observed as a result of purported exposure to pesticides, herbicides, and fertilizers,..." Musicco M. Filippini G, et al., *Gliomas and (occupational) exposure to carcinogens: Case-control study*, AM J. EPIDEMIOL 1982; 116:782.

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At the November 2003 hearing, the appellant testified that prior to the veteran's diagnosis with glioblastoma multiforme, he had always feared and worried that his exposure to Agent Orange in Vietnam would cause him or his three children to have health problems. She noted he did not have a family history of brain cancer, had never used a cell phone, and had never lived near high tension wires. She stated he was a white collar worker in a school system and never worked in an industry where he would have been exposed to chemicals. The veteran suffered from persistent headaches for at least as long as she had known him (fifteen years).

In October 2005, the Board referred the case for an AFIP advisory opinion requesting responses to two questions: 1) Based on the assembled clinical evidence what is the likelihood (i.e. *very likely, as likely as not, or unlikely*) that the veteran's malignant brain tumor which was diagnosed in mid-1994 had its initial onset between July 23, 1969 and April 24, 1972?; and 2) What is the likelihood (*very likely, as likely as not, or unlikely*) that the veteran's malignant brain tumor was caused by his exposure to herbicides, including Agent Orange, while he was on military duty in Vietnam?

In November 2005, AFIP specialists reviewed the slides of the veteran's tumor and found that its features were consistent with a glioblastoma multiforme (astrocytoma grade IV). In answering the Board's first question, the AFIP specialists laid out the uncertainties surrounding the determination of initiating events for glioblastoma multiforme:

As stated in Veterans and Agent Orange: Update 2004, "The causes of most cancers of the brain and nervous system are not known". . . . The only environmental factor "unequivocally associated with an increased risk of brain tumors" is therapeutic X-irradiation. . . . In children who received prophylactic CNS irradiation for acute lymphoblastic leukemia, brain tumors (including gliomas) presented as early as 7-9 years after irradiation. Occupational exposure to

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IN THE CASE OF

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vinyl chloride may carry a weakly enhanced risk of developing brain tumors (mostly glioblastomas) reportedly after an exposure period averaging 21 years.

The specialists noted that the question of when glioblastoma multiforme might have begun was difficult to answer since “the time period from normalcy to the development of a low grade lesion or to a ‘primary’ glioblastoma is generally not known” and since “it is currently not possible in most cases to ascribe an initiating event to the subsequent development of a primary brain tumor.” The specialists concluded that “[a]ssessing the likelihood of the initial onset being during the timeframe specified from the information provided is speculation. While it is possible, we do not consider it ‘very likely’”.

The AFIP specialists did not specifically respond to the second question as it related to the facts of the veteran’s case, but noted that the EPA study of record was a draft review that was over ten years old, was not to be cited or quoted (since it was a draft), and was merely a review of scientific literature, much of which was reviewed in the more recently updated *Veterans and Agent Orange* report. Additionally, the study documented in the *Neoplasms of the Central Nervous System* section of the *CANCER* textbook was based on a small group of 51 cases which grouped all gliomas together. Accordingly, the specialists concluded that it was unclear from that study whether the reported risk associated with the occupation of farming was specifically for glioblastoma. They noted the Institute of Medicine’s conclusion, from the *Veterans and Agent Orange* report, that “there is limited or suggestive evidence of *no* association for exposure to the compounds of interest and brain or central nervous system cancer.” Finally, the specialists noted that a 1989 AFIP publication reported no significant increase in brain tumors among Vietnam veterans versus non-Vietnam veterans; however, this study was based on very few cases.

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In March 2006, the appellant submitted several Board decisions in which service connection for cause of veterans' deaths had been granted based on medical opinions concluding that it was "as likely as not" and "quite possible" that the veterans' glioblastomas (or astrocytomas) resulted from their exposures to herbicides. She also submitted documents from another veteran's wife's claim for service connection for the cause of death of her husband: a letter that listed several research studies linking glioblastoma to herbicide exposure; a hearing transcript outlining the facts and studies pertinent to her case; and the February 2004 Oakland, California RO decision that granted her claim for service connection for the cause of her husband's death, concluding that glioblastoma was related to his herbicide exposure.

C. Legal Criteria

As the veteran's service records were unavailable, VA has a heightened duty to assist the appellant in developing her claim. *O'Hare v. Derwinski*, 1 Vet. App. 365 (1991). This duty includes a heightened obligation on the Board's part to explain its findings and conclusions and to carefully consider the benefit-of-the-doubt rule. *See Cromer v. Nicholson*, 19 Vet. App. 215 (2005).

To establish service connection for the cause of the veteran's death, the evidence must show that a disability incurred in or aggravated by active service was the principal or contributory cause of death. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312(a). In order to constitute the principal cause of death the service-connected disability must be one of the immediate or underlying causes of death, or be etiologically related to the cause of death. 38 C.F.R. § 3.312(b). It is not sufficient to show that a service-connected disability casually shared in producing death; rather it must be shown that there was a causal connection. 38 C.F.R. § 3.312(c)(1).

Service connection for a brain tumor, such as glioblastoma multiforme, may be established on a presumptive basis if such disease is shown to have been manifested

IN THE APPEAL OF [REDACTED]

IN THE CASE OF [REDACTED]

to a compensable degree within one year following the veteran's discharge from active duty. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309.

If a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam Era (from January 9, 1962 to May 7, 1975), has one of the following diseases associated with exposure to certain herbicide agents [to include Agent Orange], then that disease shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service. The diseases include Non-Hodgkin's lymphoma; Hodgkin's disease; chronic lymphocytic leukemia (CLL); multiple myeloma; respiratory cancers (cancer of the lung, bronchus, larynx or trachea); and soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). See 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6)(iii), 3.309(e), 3.313.

The United States Court of Appeals for the 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, 1042 (Fed. Cir. 1994).

It is the policy of VA to administer the law under a broad interpretation, consistent with the facts in each case, with all reasonable doubt to be resolved in favor of the claimant. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102.

When all of 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 fair preponderance of the evidence is against the claim, in which case the claim is denied. *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

IN THE APPEAL OF

IN THE CASE OF

D. *Analysis*

The appellant's claim seeking service connection for the veteran's cause of death is based on a theory of entitlement that the glioblastoma that caused his death was due to herbicide exposure in Vietnam. Brain tumors (glioblastomas) are not enumerated among the diseases the Secretary has determined are related to herbicide (Agent Orange) exposure. Consequently, the presumptive provisions of 38 U.S.C.A. § 1116 do not apply.

The appellant may still establish service connection for the veteran's cause of death by competent and probative evidence showing that such disease is somehow related to service (including to Agent Orange exposure therein). *See Combee, supra.*

In hopes of clarifying whether the veteran's glioblastoma resulted from his herbicide exposure in Vietnam, the Board referred the case to the AFIP for an advisory opinion. The AFIP's conclusion was that it was possible, but not very likely that the veteran's glioblastoma multiforme occurred during service or within the one year presumptive period after his service. By the AFIP's own admission, this conclusion was based on a number of uncertainties about glioblastoma multiforme, including what initiating events cause the disease and how long it takes to "go from normalcy to the development of a low grade lesion or to a *de novo* 'primary' glioblastoma." Additionally, the AFIP did not provide a conclusion as to the likelihood that herbicide exposure caused *this veteran's* glioblastoma, but instead explained general research about the disease and its link to herbicides, reiterating the *Veterans and Agent Orange* report findings that there was "limited or suggestive evidence of *no* association for exposure to the compounds of interest and brain or central nervous system cancer."

In rebuttal to the AFIP's opinion, the appellant submitted Board and RO decisions that granted service connection for the cause of veterans' deaths based on medical opinions that it was "as likely as not" and "quite possible" that glioblastoma (or

IN THE APPEAL OF

[REDACTED]

~~XXXXXXXXXX~~

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[REDACTED]

astrocytoma) resulted from exposure to herbicides. The Board has reviewed the medical opinions in those decisions in conjunction with this claim. The Board recognizes that 38 C.F.R. § 20.1303 instructs that previously issued Board decisions are not precedent; however, the rule also states that Board decisions "can be considered in a case to the extent that they reasonably relate to the case." While the prior Board decisions submitted by the appellant are not specific to her case, the facts are analogous, and the logic and analysis contained in the medical opinions cited in these decisions must be given appropriate weight in balancing the evidence.

As noted above, the AFIP opined that it was possible, but not very likely that the initial onset of the veteran's glioblastoma occurred in service or within his first postservice year and did not provide an "as likely as not" opinion as to whether herbicide exposure could have been the precipitating event for *this veteran's* glioblastoma. Significantly, the dictionary definition of "very" is "to a high degree: exceedingly". The appellant does not need to meet that high a standard in order to establish service connection for the cause of the veteran's death; she merely needs to meet the standard of "as likely as not." She has testified as to the lack of risk factors in the veteran's civilian life, an absence of a family history for the disease, and a history (for at least fifteen years) of headaches. In weighing the AFIP's opinion, the absence of risk factors in the veteran's civilian life, and the medical opinions in other Board decisions that have been associated with the record that specifically note that in factually similar cases glioblastoma was "as likely as not" related to herbicide exposure, the Board finds that there is an approximate balance of the evidence in the appellant's favor and that against her claim. Resolving reasonable doubt in her favor as the law requires in such circumstances, the Board concludes that service connection for the cause of the veteran's death is warranted.

IN THE APPEAL OF

IN THE CASE OF

ORDER

Service connection for the cause of the veteran's death is granted.

George R. Senyk

George R. Senyk

Veterans Law Judge, Board of Veterans' Appeals

appeal.

FINDINGS OF FACT

1. The veteran had active military service in the Republic of Vietnam during the Vietnam era and is presumed to have been exposed to Agent Orange.
2. The service medical records do not show any headaches, dizziness, or vision problems; the service medical records are negative for a diagnosis of meningioma during service.
3. The medical evidence of record reveals that the veteran was first diagnosed with meningioma in 1978, approximately 10 years after his final separation from active military service.
4. The evidence shows that meningioma is a slow growing tumor and the evidence contains medical opinions that support a finding that the veteran's meningioma was caused or promoted by exposure to a herbicide during service.
5. The veteran died in May 1988 and the certificate of death notes the immediate cause of death as cardiorespiratory arrest (of one hour duration); listed under other significant conditions was meningioma of the tentorium, partially resected.

CONCLUSION OF LAW

The criteria for service connection for the cause of the veteran's death, claimed as due to Agent Orange exposure during service, are met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1310 (West 1991); 38 C.F.R. §§ 3.303, 3.307, 3.309, 3.312 (2000).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The appellant contends that the veteran was a fuel specialist during service and was exposed to Agent Orange when he washed out the tanks of the planes that were used to spray herbicides. She further contends that this exposure caused the veteran's meningioma, which was rare for a person of his age to have.

I. Factual Background

The veteran's service medical records are entirely negative for a brain tumor or possible symptoms such as headaches, dizziness, and vision problems. His service personnel records show that he had 11 months and 27 days of foreign service, and he was an Aircraft Fuel System Mechanic in the Republic of Vietnam from August 1966 to September 1967.

The first documented evidence of a brain tumor are private medical reports dated in February 1978. In March 1978, the veteran underwent a right temporal parietal craniotomy and partial removal of a tentorial meningioma. The records show that during the operation, part of the brain tumor was removed and found to be a meningioma. The entire tumor could not be removed as it was firmly attached to the brain stem and it was determined that any attempts to remove that portion of the tumor would be detrimental to the veteran. Additional private medical records show treatment and follow up for the meningioma until the veteran's death in May 1988.

The certificate of death shows that the veteran was 43 years old at the time of death. The immediate cause of death was cardiorespiratory arrest (of one hour duration between onset and death). Listed under other significant conditions was meningioma of tentorium, partially resected. No autopsy was performed.

In June 1998, the appellant filed a claim for dependency and indemnity compensation and death pension benefits. In rating decision of November 1998, the RO denied the claim for service connection for cause of death as a result of exposure to herbicides. The RO found that the veteran's service medical records were silent for meningioma, the private medical records showed treatment for this disability only from 1978, and there was no evidence of this disorder between separation from service in 1968 and the diagnosis in 1978.

The appellant appealed that decision. She submitted numerous articles about Agent Orange. In addition, in May 1999, she submitted an article and opinion from E. G. E., Ph. D., who noted that the veteran's exposure to Agent Orange "caused or promoted the brain tumor with a high degree of scientific certainty. This tumor was classified as a meningioma a benign tumor of the meninges that sometimes develops into a malignant sarcoma." He further noted that there was

conclusive scientific data for tetrachlorodibenzo-p-dioxin "to conclude that [the veteran's] exposure to Agent Orange with high scientific probability caused his meningioma."

In addition, the medical evidence of record contains a statement dated in May 1999 from A. K., M.D., who had been the veteran's private treating neurologist. He noted that "[i]t is a fair statement to conclude that a meningioma 'could as likely as not' be caused by exposure to a herbicide."

The appellant submitted additional articles concerning Agent Orange and brain tumors. One of the articles notes that meningiomas are tumors that develop in the meninges that cover the brain and spinal cord; they usually grow slowly.

A VA consultation report, dated in January 2000, from H. D., M.D., indicates that this physician reviewed the veteran's claims file. The physician noted the history of the veteran's headaches which included a February 1978 medical record noting that the veteran reported having had headaches for one week, and the appellant's statement dated in August 1998 that she married the veteran in 1968 and early in their marriage he began to have bad headaches that worsened over the years. The physician noted that the veteran's meningioma was diagnosed approximately 11 years after the presumed exposure to Agent Orange. According to this physician, "[i]f the headaches started in late 1969 . . . [t]he meningioma was most likely already present at the time of presumed exposure to Agent Orange. Hence exposure to Agent Orange is less likely to be the cause of meningioma." The physician further noted that meningioma is a slow growing tumor and there was "no epidemiologic evidence that meningioma is caused by Agent Orange." In addition, he noted that "[a]lthough meningioma is a mesenchymal tumor it is not classified as soft tissue sarcoma."

In another statement from E. G. E., Ph. D., dated in March 2000, he notes that the opinions of Dr. H. D. were subjective and based upon gross speculation. No scientific support was presented with Dr. H. D.'s medical opinions. In addition, Dr. H. D. offered no clinical evidence that the veteran's meningioma was present prior to the exposure to Agent Orange.

In January 2001, the appellant and T. B., her daughter, testified at a videoconference hearing before the undersigned Board Member. The appellant testified that the veteran was

initially diagnosed with cancer (meningioma) in 1978 when he was 33 years old. According to the appellant, a doctor told her that it was very rare for a person of the veteran's age to have been diagnosed with this type of cancer. The appellant testified that the veteran had told her that he thought his exposure to Agent Orange in service caused his cancer. He had been a fuel specialist in service and while in Vietnam, he had washed out the tanks of the planes that were used to spray the herbicide. The appellant stated that the veteran had not had VA treatment and had never applied for VA benefits. According to the appellant, the veteran's neurologist stated that the meningioma could as likely as not have been caused by exposure to a herbicide.

II. Analysis

To establish service connection for the cause of the veteran's death, the evidence must show that disability incurred in or aggravated by service either caused or contributed substantially or materially to cause death. For a service-connected disability to be the cause of death, it must singly or with some other condition be the immediate or underlying cause, or be etiologically related. For a service-connected disability to constitute a contributory cause, it is not sufficient to show that it casually shared in producing death, but, rather, a causal connection must be shown. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312.

A veteran, who during active military, naval, or air service, served in the Republic of 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 such agent during that service. 38 C.F.R. § 3.307.

Service connection may be granted on a presumptive basis for certain disabilities based on exposure to an herbicide agent. It has been determined that a positive association exists between exposure to herbicides in Vietnam and the following conditions: chloracne or other acneform diseases consistent with chloracne, Hodgkin's disease, 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 soft-tissue sarcomas (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). 38 C.F.R. § 3.309(e) (2000). Note 1 under section 3.309(e) provides a list of

disorders which are included in the term "soft-tissue sarcoma."

The diseases listed in 38 C.F.R. § 3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acne form disease consistent with chloracne 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 service. 38 C.F.R. §§ 3.307, 3.309.

The Veterans' Dioxin and Radiation Exposure Compensation Standards (Radiation Compensation) Act, Pub. L. No. 98-542, § 5, 98 Stat. 2725, 2727-29 (1984) does not preclude a veteran from establishing service connection with proof of actual direct causation. *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

In the instant case, the Board finds that the preponderance of the evidence supports the appellant's claim of service connection for the cause of the veteran's death. Both the opinions of Dr. A. K. and Dr. E. G. E. support the conclusion that the veteran's death was due to meningioma caused by exposure to Agent Orange. Although there is a conflicting medical opinion from Dr. H. D., this opinion is premised on a speculation that the veteran's headaches in approximately 1969 were related to the later diagnosed meningioma and, therefore, that it was likely that the meningioma was present before the presumed exposure to Agent Orange in service. There is no evidence to support this speculative opinion that the veteran had meningioma prior to service. There are no pre-service medical records to this effect and the service medical records are negative for meningioma or any symptoms such as headaches. Thus, the more probative medical evidence shows a nexus between the veteran's meningioma and his presumed exposure to Agent Orange during service.

The medical evidence does not show that the veteran had a soft-tissue sarcoma or any other presumptive disease listed in 38 C.F.R. § 3.309(e). However, as noted above, service-connection may be established with proof of actual direct causation. See *Combee*, supra. In this case, the appellant has provided proof of direct causation through the medical opinions from Dr. A. K. and Dr. E. G. E.

ORDER

Entitlement to service connection for the cause of the
veteran's death is granted.

A. BRYANT
Member, Board of Veterans' Appeals

Citation Nr: 0109193

Decision Date: 03/28/01

Archive Date: 04/03/01

DOCKET NO. 00-09 317) DATE

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On appeal from the
Department of Veterans Affairs Regional Office in Oakland,
California

THE ISSUES

1. Entitlement to service connection for the cause of the veteran's death.
2. Entitlement to service connection for astrocytoma for the purpose of accrued benefits.

REPRESENTATION

Appellant represented by: California Department of
Veterans Affairs

ATTORNEY FOR THE BOARD

D. M. Fogarty, Associate Counsel

INTRODUCTION

The veteran served on active duty from August 1969 to March 1971. The veteran died in April 1998; the appellant is his surviving spouse.

This matter is before the Board of Veterans' Appeals (Board) on appeal of a November 1999 rating decision from the Department of Veterans Affairs (VA) Regional Office (RO) in Oakland, California, which denied entitlement to service connection for the cause of the veteran's death.

FINDINGS OF FACT

1. The veteran served in the Republic of Vietnam.
2. Private medical records reflect the veteran was diagnosed with a grade II astrocytoma, also described as a brain stem glioma, in 1996.
3. In October 1997, a private physician opined that it was as likely as not that the veteran's diagnosis of astrocytoma was directly related to his exposure to herbicides in Agent Orange.
4. In January 1998, the Board remanded the issue of entitlement to service connection for astrocytoma to the RO for the purpose of obtaining the opinion of a VA oncologist.
5. The veteran died in April 1998; the immediate cause of death was noted as bronchopneumonia with an onset of days and a brain stem glioma with an onset of 1.5 years.
6. In May 1998, a VA Chief of Hematology and Oncology opined that epidemiologic studies of astrocytoma and related diseases consistently demonstrated a relationship to herbicide exposure and it was quite possible that the veteran's disorder was related to Agent Orange exposure. The physician cited four specific references in support of his opinion.
7. The appellant timely filed her claim for accrued benefits in November 1998.
8. In March 2000, a private physician opined that medical literature discussed case studies noting a relationship between exposure to herbicides and brain gliomas.
9. The veteran's astrocytoma may not be disassociated from his active military service.

CONCLUSIONS OF LAW

1. The cause of the veteran's death was incurred during active military service. 38 U.S.C.A. §§ 1110, 1310 (West 1991 & Supp. 2000); 38 C.F.R. §§ 3.102, 3.303, 3.312 (2000).
2. Entitlement to service connection for astrocytoma, also

described as a brain stem glioma, for the purpose of accrued benefits is granted. 38 U.S.C.A. § 1110, 5121 (West 1991 & Supp. 2000); 38 C.F.R. §§ 3.102, 3.303, 3.1000 (2000).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Factual Background

Service personnel records reflect the veteran served in the Republic of Vietnam. He received numerous citations and awards, including the Bronze Star Medal, the Vietnam Service Medal, and the Vietnam Campaign Medal. Service medical records reflect treatment for malaria, chest pains, possible heat exhaustion, upper respiratory infections, and a left foot injury.

In a June 1971 rating decision, the RO granted entitlement to service connection for recurrent malaria, evaluated as 10 percent disabling from March 15, 1971 and as noncompensable effective from March 15, 1972.

In August 1996, the veteran sought entitlement to service connection for a brain tumor.

An August 1996 letter from a private physician reflects that the veteran presented with complaints of severe and progressive headaches. It was noted that a biopsy of a pontine glioma confirmed it as a Grade II astrocytoma. It was noted that the veteran had a significant exposure to Agent Orange, but no other risk factors for a brain tumor. It was also noted the veteran would undergo radiation therapy.

Additional private treatment records dated in 1996 reflect that the veteran presented in May with symptoms of dizziness and unsteadiness in his gait. An initial magnetic resonance imaging report showed an ill-defined area of low intensity without mass effect. A subsequent examination in June showed progression of the abnormal area with enlargement and mass effect. Impressions of astrocytoma, grade II, were noted.

In a November 1996 rating decision, the RO denied entitlement to service connection for astrocytoma as a result of exposure to herbicides.

In a May 1997 statement, Dr. J. A. stated that several studies had shown an elevated risk for prostate cancer and malignant glioma in agriculture workers exposed to herbicides. He also noted that the defoliant Agent Orange used in Vietnam contained herbicides similar to agricultural components. The physician noted that a medical search revealed case reports involving veterans and malignant glioma. The physician opined that Vietnam veterans exposed to the herbicides in Agent Orange presented at a younger age and tended to be less responsive to treatment. He noted that the veteran was receiving whole brain radiation therapy with short-lived response lasting only two months.

In June 1997, the RO received copies of private treatment records dated from 1989 to 1997. These records reflect treatment for reactive airways disease, complaints of chest pain, tinnitus, hearing loss, an asthmatic condition, left arm pain, left ankle pain, a nerve injury, and a brain tumor.

In an October 1997 statement, Dr. J. A. repeated his prior May 1997 statements and opined that it was as likely as not that the veteran's current diagnosis was related to a malignant ganglioneuroma.

In a January 1998 decision, the Board remanded the veteran's claim of entitlement to service connection for astrocytoma, claimed as due to exposure to herbicides, to the RO for a VA opinion as to the relationship, if any, between the veteran's astrocytoma and his exposure to herbicides.

The veteran died in April 1998. The death certificate reflects the immediate causes of death as bronchopneumonia with an onset of days and brain stem glioma with an onset of 1.5 years.

In a May 1998 statement, Dr. M. E., a VA Chief of Hematology and Oncology, noted that astrocytomas were not related to malignant ganglioneuroma or any of the other diseases recognized by VA as causally related to herbicide exposure. The VA physician also noted that epidemiologic studies of astrocytoma and related diseases consistently demonstrated a relationship to herbicide exposure. He further opined that it was quite possible that the veteran's disorder was in fact related to Agent Orange exposure despite the absence of legislation declaring such a relationship. In July 1998, the VA physician provided the RO with a list of four specific references in support of his opinion.

The appellant filed a claim of entitlement to DIC benefits, including accrued benefits in November 1998.

In January 1999, the RO submitted the veteran's claim to the Director of Compensation and Pension Services for VA. The Director requested a medical opinion from the Under Secretary for Health. In February 1999, Dr. S. M., the Chief Public Health and Environmental Hazards Officer, stated that a recent report of veterans and Agent Orange concluded that there was "limited/suggestive evidence of no association" between exposure to herbicides used in Vietnam and brain tumors. Dr. M. also opined that the studies cited by the VA physician did not appear to be specific to herbicide exposures. Dr. M. opined that it was unlikely that the veteran's brain tumor could be attributed to exposure to herbicides while in Vietnam. In an April 1999 letter to the RO, the Director of Compensation and Pension Services stated that it was their opinion that there was no reasonable possibility that the veteran's disability was the result of herbicide exposure.

In a November 1999 rating decision, the RO denied entitlement to service connection for a brain stem glioma, claimed as astrocytoma, as a result of herbicide exposure; entitlement to service connection for the cause of the veteran's death, entitlement to DIC benefits pursuant to 38 U.S.C.A. § 1318, and eligibility for Dependent's Educational Assistance.

In a January 2000 statement, Dr. J. A. stated that the veteran had been under his care from August 1996 through April 1998, and had been diagnosed with a grade II astrocytoma. It was noted that the veteran's treatment consisted of chemotherapy and whole brain radiation. Dr. A. noted that the veteran had been exposed to Agent Orange and no other risk factors for a brain tumor. He also noted the veteran had no lasting response to treatment for his tumor. Dr. A. opined that it was as likely as not that the diagnosis of astrocytoma was directly related to the veteran's exposure to the herbicides in Agent Orange.

In a March 2000 statement, Dr. F. P. noted that the veteran had presented with a tumor in the brainstem which biopsy revealed to be a grade II malignant glioma. It was noted that he was treated with radiation with a temporary response and did not do well on chemotherapy. Dr. P. stated that it was noted in literature that herbicides and gliomas were

related.

Medical treatise evidence received in May 2000 note case studies suggesting a possible etiologic role of exposure to organic pesticides, fertilizers, and herbicides. One article noted that study results corroborated the evidence that pesticides in vineyards contributed to the mortality rate from brain cancer among farmers.

Analysis

I. Cause of Death

To establish service connection for the cause of the veteran's death, the evidence must show that a disability incurred in or aggravated by service either caused or contributed substantially or materially to the cause of death. For a service-connected disability to be the cause of death, it must singly, or with some other condition be the immediate or underlying cause, or be etiologically related. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312.

Basic entitlement to disability compensation may be established for a disability resulting from personal injury suffered or disease contracted in the line of duty or for aggravation of a preexisting injury suffered or disease contracted in the line of duty. 38 U.S.C.A. § 1110. Service connection connotes many factors but basically means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. 38 C.F.R. § 3.303(a) (2000). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

A disease associated with exposure to certain herbicide agents listed in 38 C.F.R. § 3.309 (2000) will be considered to have been incurred in service under the circumstances outlined in that section, even though there is no evidence of such disease during the period of service. See 38 C.F.R. § 3.307 (2000). Currently, if a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even though there is no

record of such disease during service, provided further that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied: chloracne or other acneform disease consistent with chloracne; Hodgkin's disease; Non-Hodgkin's lymphoma; porphyria cutanea tarda; multiple myeloma, respiratory cancers (cancers of the lung, bronchus, larynx, or trachea), acute and subacute peripheral neuropathy, prostate cancer, and soft-tissue sarcoma. 38 C.F.R. § 3.309(e).

These diseases shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne, or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year, and respiratory cancers within 30 years, 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). The Secretary has also determined that there is no positive association between exposure to herbicides and any other condition for which he has not specifically determined a presumption of service connection is warranted. 59 Fed. Reg. 341-46 (January 4, 1994).

A review of the record clearly reflects that the veteran was diagnosed and treated for a brain tumor. The record further reflects that the veteran's brain tumor was the cause of his death. However, the veteran was not diagnosed with a disease associated with exposure to certain herbicide agents as listed in 38 C.F.R. § 3.309, nor has his death been linked by medical evidence to any of the diseases associated with herbicide exposure in that regulation. Thus, entitlement to service connection on a presumptive basis is not warranted. 38 C.F.R. § 3.307.

However, the Board must also consider the appellant's claim on a direct basis pursuant to 38 C.F.R. § 3.303. Additionally, the United States Court of Appeals for Veterans Claims (known as the United States Court of Veterans Appeals prior to March 1, 1999) (hereinafter, "the Court") has held that when all evidence is assembled, the Secretary 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 record reflects three medical opinions citing a relationship between the veteran's brain tumor and his exposure to herbicides during active military service in the Republic of Vietnam. Dr. J. A. opined that it was as likely as not that the veteran's diagnosis of astrocytoma was directly related to the veteran's herbicide exposure during active military service. That statement is consistent with the May 1998 VA physician's opinion that it was quite possible that the veteran's disorder was in fact related to agent orange exposure and Dr. F. P.'s March 2000 statement. Furthermore, the veteran's April 1998 death certificate noted the immediate causes of death as bronchopneumonia and brain stem glioma.

The Board recognizes that the Chief Public Health and Environmental Hazards Officer for VA has opined that it is unlikely that the veteran's brain tumor could be attributed to herbicide exposure while in Vietnam. However, the three physician opinions in favor of the appellant's claim are from oncologists, two of whom treated the veteran. The Board has accorded those three opinions considerable weight in light of their consistency and the fact that two of the physicians treated the veteran and were familiar with his medical history. Additionally, although Dr. M. stated that the studies cited by the VA physician did not appear to be specific to herbicide exposure, it does not appear from her opinion report that the cited studies were actually reviewed in their entirety. Thus, following a thorough consideration of the aforementioned evidence of record, the Board is compelled to conclude that there is at least an approximate balance of positive and negative evidence in support of the appellant's claim. With all reasonable doubt resolved in favor of the appellant, entitlement to service connection for the cause of the veteran's death is warranted.

II. Accrued Benefits

Upon the death of a veteran, periodic monetary benefits to which that individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at the date of his death (hereinafter referred to as "accrued benefits") and due and unpaid for the period not to exceed two years, shall, upon the death of such individual be paid to the living person first listed as follows: (1) his spouse, (2) his children (in equal shares), (3) his dependent parents (in equal shares). 38 U.S.C.A. § 5121; 38 C.F.R.

§ 3.1000(a).

Generally, entitlement to accrued benefits must be based on evidence in the file at the time of death, or evidence, such as VA records, deemed to be of record at that time. 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000; *Zevalkink v. Brown*, 6 Vet. App. 483 (1994). Additionally, the appellant must have filed a claim for such benefits within one year of the veteran's death. See 38 C.F.R. § 3.1000. In the present case, additional documents were associated with the claims file after the veteran's death as a result of a January 1998 Board remand of the veteran's claim of entitlement to service connection for a brain stem glioma. Certain records may be viewed by the Court as either in the constructive possession of VA or as a continuation of a regulatory process rather than the creation of new evidence. Thus, the Board will consider the May 1998 VA opinion as well as the opinion of the Chief Public Health and Environmental Hazards Officer because they are a continuation of the regulatory process.

At the time of the veteran's death, service connection was in effect for malaria evaluated as noncompensable. The appellant's claim of entitlement to accrued benefits was received in November 1998, within one year of the veteran's death.

A review of the evidence deemed to be of record at the time of the veteran's death reflects an approximate balance of positive and negative evidence. The Chief Public Health and Environmental Hazards Officer opined that the veteran's astrocytoma was not related to his active military service; however, the May 1998 VA physician and Dr. J. A. both opined that there it was likely or possible that the veteran's astrocytoma was related to his active military service. As previously noted, the latter two opinions are accorded considerable weight in light of the fact that they were provided by an oncologist and the veteran's treating physician who was familiar with the veteran's medical history. Resolving all reasonable doubt in the appellant's favor, the Board concludes that service connection for astrocytoma should be granted for the purpose of payment of accrued benefits.

ORDER

Entitlement to service connection for the cause of the

veteran's death is granted.

Entitlement to service connection for astrocytoma for the purpose of accrued benefits is granted.

John E. Ormond, Jr.
Member, Board of Veterans' Appeals

BVA 9412231

DOCKET NO. 92-11 109)

DATE

On appeal from the decision of the Department of Veterans Affairs Regional office in Cleveland, Ohio

THE ISSUE

Entitlement to an increased evaluation for loss of sensation of the right side and leg, currently rated as 10 percent disabling.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

W. H. Wetmore, Counsel

INTRODUCTION

The veteran served on active duty from September 1974 to May 1977.

The Board of Veterans' Appeals (Board) of the Department of Veterans Affairs (VA) received this case from the regional office (RO) in July 1992.

The RO granted the veteran service connection in May 1983 for the residuals of a brain tumor. A 70 percent evaluation is in effect for incoordination of his right arm, a 30 percent evaluation is in effect for bilateral optic atrophy and a 10 percent evaluation is in effect for loss of sensation of the right side and leg. Also, special monthly compensation under 38 U.S.C.A. § 1114(K) (West 1991), 38 C.F.R. § 3.350 (1993) based on loss of use of one eye is in effect.

Previous Rating was granted for Brain Tumor

[Handwritten signature]

CONTENTIONS OF APPELLANT ON APPEAL

The veteran contends that his right foot causes him increased difficulty in walking, climbing stairs, etc. He claims that he has greater problems with coordination recently involving the right leg. He asserts that he has sensory diminution from the right kneecap area to the foot, in a patchy distribution.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the preponderance of the evidence supports the claim for an increased rating of 40 percent for loss of sensation of the right side and leg.

FINDING OF FACT

The incomplete paralysis of the veteran's right side and leg is moderately severe.

CONCLUSION OF LAW

A 40 percent for loss of sensation of the right side and leg is warranted. 38 U.S.C.A. §§ 1155, 5107, 7104 (West 1991); 38 C.F.R. §§ 3.102, 3.321, 4.3, 4.7, 4.124a, Diagnostic Codes 8002, 8520 (1993).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Board finds the veteran's claim to be well grounded within the meaning of 38 U.S.C.A. § 5107 because it is plausible. The Board is also satisfied that all relevant facts have been properly developed and there is no further assistance required in order to comply with § 5107.

The veteran underwent a suboccipital craniectomy due to a cystic cerebellar astrocytoma at a VA hospital in October 1976. At the time of discharge from this hospitalization, in November 1976, he still had a moderate amount of dysmetria of the right leg.

At a VA examination in July 1990, the veteran complained of a lack of coordination. The examination revealed mild midline cerebellar ataxia on gait. Other, mild gait disorders were identified. The motor strength was unimpaired. The deep tendon reflexes were increased but no pathologic ones were identified. The diagnosis was mild midline and right cerebellar symptoms with increased deep tendon reflexes.

The veteran has not been hospitalized for additional treatment of his tumor or for any problems he has had with his right side and leg. The outpatient records do include an examination in September 1991 which disclosed he walked with a slight broad based gait.

The significant manifestation of his right side and leg disability is in the leg and that is what he contends. He is evaluated under 38 C.F.R. § 4.124a, Diagnostic Code 8520, which provides for a 10 percent evaluation when there is mild impairment of the sciatic nerve, a 20 percent evaluation when there is moderate impairment there and a 40 percent evaluation when the degree of impairment is moderately severe. Severe impairment of the sciatic nerve, with marked muscle atrophy, may be assigned a 60 percent evaluation. Service connection has been established for this disability as secondary to the tumor for which he was treated in 1976 and that etiology of this disability is contemplated by the assignment of 38 C.F.R. § 4.124a, Diagnostic Code 8002 which applies to malignant tumors. He is, as indicated above, separately evaluated for other residuals of his brain tumor.

Restricting consideration to the right side and leg, the Board notes that the veteran has a definite gait problem. At his March 1992 hearing at the RO, he described a lack of coordination which had resulted in falls, a problem significantly affected by the lack of sensation in his right foot. His area of reduced sensation reportedly extended from his kneecap to his foot. These problems, in combination with the medical findings, lead the Board to conclude that the impairment is moderately severe in degree. The Board is well satisfied that severe impairment is

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not shown since there is no indication of muscle atrophy, even as late as May 1991 VA examination, and none is contended.

ORDER

An increased evaluation for loss of sensation of the right side and leg is granted to the extent indicated, subject to the law governing the effective dates of awards.

STEPHEN L. WILKINS

The Board of Veterans' Appeals Administrative Procedures Improvement Act, Pub. L. No. 103-271, § 6, 108 Stat. 740, (1994), permits a proceeding instituted before the Board to be assigned to an individual member of the Board for a determination. This proceeding has been assigned to an individual member of the Board.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

Citation Nr: 0028276

Decision Date: 10/26/00

Archive Date: 11/01/00

DOCKET NO. 99-11 629)

DATE

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

THE ISSUE

Entitlement to an earlier effective date for payment of
accrued benefits.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Raymond F. Ferner, Counsel

*Previous Rating
for Brain Tumor
was granted*

INTRODUCTION

This matter comes before the Board of Veterans' Appeals (BVA
or Board) on appeal from a February 1999 rating decision of
the Department of Veterans' Affairs (VA) Regional Office (RO)
in Buffalo, New York which denied the benefit sought on
appeal. The appellant, the surviving spouse of a veteran who
had active service from August 1966 to August 1968 and died
in September 1998, appealed that decision to the BVA and the
case was forwarded to the Board for appellate review.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable

disposition of the appellant's appeal has been obtained by the RO.

2. The veteran died on September [redacted], 1998 and at the time of his death had a claim pending for service connection for status post craniotomy due to an astrocytoma.

3. A rating decision dated in February 1999 granted service connection for status post craniotomy due to an astrocytoma and assigned a 100 percent evaluation effective November 15, 1994.

4. The appellant was paid monetary benefits to which the veteran was entitled at the time of his death which were due and unpaid for a period of two years prior to his death.

CONCLUSION OF LAW

The requirements for an earlier effective date for payment of accrued benefits have not been met. 38 U.S.C.A. § 5121 (West 1991); 38 C.F.R. § 3.1000 (1999).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The appellant contends that she should be entitled to all of the benefits the veteran would have been entitled to had he not died prior to the VA making a decision on his claim. She asserts that the VA procrastinated in making a decision on the veteran's claim to avoid paying him benefits to which he was rightfully entitled.

The basic facts in this case are not in dispute. A rating decision dated in August 1988 initially denied the veteran's claim for service connection for status post craniotomy due to an astrocytoma. On November 15, 1994 the veteran filed a request to reopen the claim for service connection for status post craniotomy due to an astrocytoma. A rating decision dated in September 1995 denied the veteran's claim and the veteran filed a Notice of Disagreement to that decision and a Substantive Appeal after the issuance of a Statement of the Case. Prior to the resolution of this appeal the veteran died on September 19, 1998. Additional evidence was submitted following the veteran's death and a rating decision dated in February 1999 granted service connection for status

post craniotomy due to an astrocytoma and assigned a 100 percent evaluation effective November 15, 1994. The appellant was informed of this decision by the RO in a letter dated in March 1999. She was also informed in that letter that her payment of accrued benefits based on the grant of service connection was limited to a period of not more than two years prior to the veteran's death.

Laws prescribed by Congress and implemented by VA regulation clearly limit payment of accrued benefits to a period of no more than two years prior to the veteran's death. See 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000. Accrued benefits are defined as "periodic monetary benefits (other than insurance and servicemembers' indemnity) authorized under laws administered by the Department of Veterans Affairs, to which a payee was entitled at his death under existing ratings or decisions, or those based on evidence in the file at date of death, and due and unpaid for a period not to exceed 2 years prior to the last date of entitlement" 38 C.F.R. § 3.1000(a). The Board has no authority to ignore law prescribed by Congress and enacted by regulation. Accordingly, an earlier effective date for payment of accrued benefits is not warranted. See Sabonis v. Brown, 6 Vet. App. 426 (1994).

ORDER

An earlier effective date for payment of accrued benefits is denied.

WARREN W. RICE, JR.
Veterans Law Judge
Board of Veterans' Appeals

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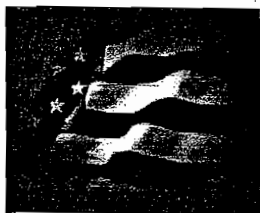
94-00 844) DATE)) On appeal from the Department of Veterans Affairs Regional Office in New Orleans, Louisiana THE ISSUE Whether new and material evidence has been submitted in support of the veterans claim of entitlement to service connection for post-operative residuals of a head injury. This case comes before the Board of Veterans' Appeals (hereinafter BOVA) on appeal from the Department of Veterans Affairs Regional Office in New Orleans, Louisiana (hereinafter RO).

<http://www.va.gov/vetapp98/files1/9809934.txt>

CONTENTIONS OF APPELLANT ON APPEAL The appellant essentially contends that he was exposed to Agent Orange, and that this exposure caused his oligodendroglioma of the frontal lobe, which resulted in the veterans death. Since the appellant has not introduced into the record competent medical evidence that establishes a nexus between the cause of the veterans disability related to the veterans exposure to Agent Orange during service, the appellants contention is not sustained.

<http://www.va.gov/vetapp02/files03/0212785.txt>

98-17 943) DATE)) On appeal from the Department of Veterans Affairs Regional Office in Atlanta, Georgia THE ISSUE Entitlement to service connection for the cause of the veteran's disability.



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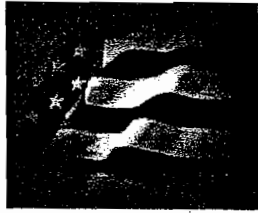
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93-05 176) DATE)) On appeal from the Department of Veterans Affairs (VA) Region Washington, DC THE ISSUE Entitlement to service connection for the cause of the ve This matter comes to the Board of Veterans Appeals (Board) on appeal from a Septer decision by the Washington, D.C., Department of Veterans Affairs (VA) Regional Office denied the appellants claim for service connection for the cause of the veterans death



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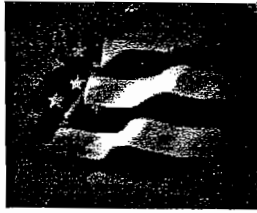
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<http://www.va.gov/vetapp98/files2/9813143.txt>

95-27 398) DATE)) On appeal from the Department of Veterans Affairs Regional Office of Insurance Center, in St. Paul, Minnesota THE ISSUE Entitlement to service connection of the veterans death. CONTENTIONS OF APPELLANT ON APPEAL The appellant contends service connection is warranted for the cause of the veterans death from a glioblastoma. Service connection for the cause of the veterans death is warranted when a veteran d

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incidences
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<http://www.va.gov/vetapp98/files1/9802450.txt>

95-13 649) DATE)) On appeal from the Department of Veterans Affairs Regional Office Cleveland, Ohio THE ISSUE Entitlement to service connection for the cause of the veteran's death. REASONS AND BASES FOR FINDINGS AND CONCLUSION The appellant has claimed service connection for the veteran's cause of death, i.e., brain cancer, as secondary to exposure to the herbicide Agent Orange during service in the Republic of Vietnam. The appellant maintains that the

<http://www.va.gov/vetapp92/files2/9212323.txt>

This matter came before the Board of Veterans' Appeals (the Board) from a decision of the California, Regional Office (VARO), in July 1991, which denied the appellant's claim for service connection. In his appeal to the Board, received in November 1991, the appellant indicated that

