

CONCLUSION OF LAW

Entitlement to presumptive service connection for the cause of the Veteran's death is warranted. See 38 U.S.C.A. §§ 1110, 5107(b) (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.307, 3.309(e) (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Veterans Claims Assistance Act of 2000 (VCAA)

The appellant's claim of entitlement to service connection for the cause of the Veteran's death is granted, as explained below. As such, the Board finds that any error under the VCAA with regard to the appellant's claim is moot. See 38 U.S.C.A. §§ 5103, 5103A (West 2002); 38 C.F.R. § 3.159 (2009); *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

II. Analysis

In the case of veterans exposed to an herbicide agent during active military, naval, or air service, presumptive service connection is provided for certain diseases listed in 38 C.F.R. § 3.309(e) that that manifest to a degree of 10 percent or more at any time after service. See *id.*; see also 38 C.F.R. § 3.307(a)(6)(ii) (2009). Soft-tissue sarcoma is one of the diseases listed in 38 C.F.R. § 3.309(e) for which presumptive service connection may be provided based on exposure to herbicides, and Note 1 to subsection (e) provides that "soft-tissue sarcoma" includes liposarcoma.

VA regulations provide for presumptive herbicide exposure for veterans who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. See 38 C.F.R. § 3.307(a)(6)(iii).

"Service members who are not entitled to the presumption of [herbicide] exposure [based on service in the Republic of Vietnam] are nonetheless entitled to show that they were actually exposed to herbicides." *Haas v. Peake*, 525 F.3d 1168, 1193 (Fed. Cir. 2008) (citing 38 C.F.R. § 3.309(e)).

The Veteran served on active duty in Thailand from October 1969 to October 1970 on the Takhli Air Force base, and from November 1971 to November 1972 on the Korat Air Force base. Service personnel records reflect that the Veteran served as an F-105 aircraft mechanic in Takhli and a crew chief in Korat.

In May 2007, the appellant, the Veteran's widow, filed a claim for service connection for the cause of the Veteran's death. The appellant claims that the Veteran was exposed to herbicide agents while serving on active duty in Thailand that caused his sarcoma that led to his death. The Board acknowledges that the Veteran filed an original claim for service connection for sarcoma in December 2006 and died three months later in March 2007.

By way of background, the Board notes that VA treatment records reflect that in October 2006, the Veteran was a walk-in at the VA outpatient clinic complaining of pelvic pain for about a week

(and weighing only 129 lbs at 69" height), and he was referred for a CT scan. Other VA treatment records reflect the Veteran reported a history of a left thigh/groin mass since July 2006. See VA Treatment Record, November 1, 2006. A November 2006 CT scan report reflects an impression of a left pelvis/thigh soft-tissue mass, and that the Veteran was referred for a biopsy. A November 2006 biopsy revealed "soft-tissue" sarcoma. See VA Treatment Record, December 7, 2006. A January 2007 VA treatment record reflects that a surgical resection was performed, with a post-operative diagnosis of left thigh sarcoma. A post-surgical January 2007 VA pathology report reflects an assessment of left thigh liposarcoma. Likewise, a January 2007 oncology report also reflects a diagnosis of left thigh liposarcoma, status post resection, as well as possibly incomplete resection. A February 2007 private oncology consultation record reflects a diagnosis of pleomorphic liposarcoma status post incomplete resection.

A March 2007 death certificate reflects that the Veteran's underlying causes of death were metastatic carcinoma as well as sarcoma. No "significant conditions contributing to death" were listed on the death certificate.

Clearly, sarcoma was a cause, if not the cause, of the Veteran's death per the death certificate and VA treatment records noted above. Also, per the January 2007 pathology and oncology records, the Veteran's type of sarcoma was liposarcoma, which is a type of soft-tissue sarcoma that is listed in 3.309(e) for which presumptive service connection may be granted based on herbicide exposure.

The appellant concedes that the Veteran never served in Vietnam, and the Board notes that the Veteran never asserted that he served in Vietnam in his own original claim for service connection for sarcoma. See Forms 21-4138, December 2006 (Veteran's claim) and July 2007 (the appellant's statement in support of her claim). Therefore, the 38 C.F.R. § 3.307(a)(6)(iii) presumption of herbicide exposure based on service in Vietnam does not apply.

Rather, the appellant asserts actual exposure of the Veteran to herbicides while he served in Thailand as noted above (and, therefore, that the Veteran is entitled to presumptive service connection under 38 C.F.R. § 3.309(e)). See *Haas v. Peake*, supra at 1193.

Based thereon, in September 2009, the Board remanded this case for further development, including so that a request could be made to the Armed Forces Pest Management Board ("Pest Board") for information regarding the use of herbicides at the Takhli and Korat Air Force Bases during the relevant periods. A March 2010 response from the Armed Forces Pest Management Board reflects that while they did not maintain any records specifically pertaining to the Takhli and Korat bases relating to the periods of time the Veteran served there, the Pest Board directed VA's attention to several other sources of information (and enclosed copies with their response letter), including an article written by retired sergeant K.P., who, according to his article, served at the Korat Air Force base in Thailand around the same time as the Veteran. This article indicates that herbicide agents were used at the Korat Air base beginning in June 1972. See *Herbicide Use in Thailand*, K.P., at 18 (quoting *Checo Report*, Base Defense in Thailand, U.S. Air Force, Maj. B. and Capt. B., Feb. 12, 1973 at 68).

In light of the above article reflecting that herbicide agents were used for defoliation on the Korat Air Force base beginning in June 1972, which was while the Veteran was serving there, and in light of the fact that the Pest Board referenced these record in response to VA's request for information relating to this particular claim, the Board finds that the evidence is at least in equipoise as to whether the Veteran was exposed to herbicide agents while serving on the Korat Air base from November 1971 to November 1972 as a flight mechanic. Therefore, resolving doubt in favor of the appellant, the Board finds that the Veteran was exposed to herbicide agents while serving in Thailand, and that presumptive service connection is warranted.

The Board recognizes that the Veterans Benefits Administration has issued a Fast Letter providing procedures for developing claims based on exposure to herbicides in Thailand. VBA Fast Letter 09-20 (May 6, 2009). However, given that the information already of record appears sufficient to resolve doubt in favor of the Veteran, the Board finds that undertaking further development in that regard is unnecessary and would needlessly delay adjudication of the claim.

The Board has also considered the observation in that Fast Letter that there are no records to show that the same tactical herbicides used in Vietnam were used in Thailand, and that the herbicides used therein were commercial. However, given the lack of evidence in the record as it stands regarding the nature of the tactical herbicides used in Vietnam and the commercial herbicides used in Thailand, which prevents the Board from determining any meaningful distinction, the Board is of the opinion that the evidence remains at least in equipoise as to whether presumptive service connection is warranted based on the Veteran's service in Korat in 1972.

In short, because the Veteran's cause of death, sarcoma (soft-tissue, liposarcoma) is one of the diseases listed in 38 C.F.R. § 3.309(e) for which presumptive service connection may be granted, and because the Veteran is found to have been exposed to herbicides in service, the Board concludes that the appellant is entitled to a grant of service connection for the cause of the Veteran's death.

ORDER

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

MICHAEL LANE
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Citation Nr: 1022979

Decision Date: 06/21/10 Archive Date: 07/01/10

DOCKET NO. 07-10 253A) DATE
))
)

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

THE ISSUE

Entitlement to service connection for prostate cancer, to
include as due to herbicide exposure.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

P. Sorisio, Counsel

INTRODUCTION

The Veteran had active service from September 1966 to
September 1970.

This matter comes before the Board of Veterans' Appeals (BVA
or Board) from a September 2005 rating decision of the
Department of Veterans Affairs (VA) Regional Office (RO) in
New York, New York.

In September 2009, a Travel Board hearing was held before the
undersigned. A transcript of that hearing is of record.

FINDINGS OF FACT

1. The Veteran has a current diagnosis of prostate cancer
(with residuals), which is a disease associated with exposure
to certain herbicide agents as enumerated under 38 C.F.R. §
3.309(e).
2. Resolving all doubt in favor of the Veteran, the Veteran
more likely than not was on an airplane that stopped in
Vietnam while en route from the Philippines to Thailand in
August 1967.
3. The Veteran briefly visited Vietnam in 1967, resulting in
his physical presence on Vietnam soil.

CONCLUSION OF LAW

Residuals of prostate cancer are presumed to have been incurred in active service. 38 U.S.C.A. §§ 1110, 1112, 1113, 1154, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309 (2009).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Veterans Claims Assistance Act of 2000 (VCAA)

As provided for by the VCAA, VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2009). In this case, the Board is granting in full the benefit sought on appeal. Accordingly, assuming, without deciding, that any error was committed with respect to either the duty to notify or the duty to assist, such error was harmless and will not be further discussed.

Legal Criteria and Analysis

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303 (2009). For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. 38 C.F.R. § 3.303(b). If chronicity in service is not established, a showing of continuity of symptoms after discharge is required to support the claim. *Id.* Evidence of a chronic condition must be medical, unless it relates to a condition to which lay observation is competent. *Savage v. Gober*, 10 Vet. App. 488, 495-98 (1997). Service connection may also be granted for any disease diagnosed after discharge when all of the evidence establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

In order to establish service connection for a claimed disorder, the following must be shown: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

If a Veteran was exposed to a herbicide agent during active military, naval, or air service, certain diseases shall be service-connected if the requirements of § 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 section 3.307(d) are also satisfied. 38 C.F.R. § 3.309(e). Section 3.307(a)(6) provides that the term "herbicide agent" means a chemical in a herbicide used in 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. Section

3.307(a)(6)(iii) also provides that a Veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to a herbicide agent, unless there is affirmative evidence to establish that the Veteran was not exposed to any such agent during that service. For the purposes of section 3.307, the term herbicide agent means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam era. 38 C.F.R. § 3.307(a)(6)(i). Agent Orange is a herbicide agent.

Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. 38 C.F.R. § 3.307(a)(6)(iii). According to the VA Adjudication Procedure Manual, M21-1MR, part IV, subpart ii, ch. 2, section C, 10,b. (M21-1MR), service in the Republic of Vietnam means service in the Republic of Vietnam or its inland waterways, or service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. Service in the Republic of Vietnam under 38 C.F.R. § 3.307(a)(6)(iii) requires the service member's presence at some point on the landmass or the inland waters of Vietnam. *Haas v. Peake*, 525 F.3d 1168, 1197 (Fed. Cir. 2008). Cf. VAOPGCPREC 7-93 (Aug. 12, 1993) (holding that service in Vietnam does not include service of a Vietnam era Veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace); VAOPGCPREC 27-97 (July 23, 1997) (holding that mere service on a deep-water naval vessel in waters off shore of the Republic of Vietnam is not qualifying service in Vietnam).

If a Veteran was exposed to a herbicide agent during active military, naval, or air service, certain enumerated diseases, to include prostate cancer, 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. 38 C.F.R. § 3.309(e).

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the Veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); 38 U.S.C.A. § 5107(b) (West 2002); 38 C.F.R. § 3.102 (2009).

After a review of the evidence, the Board has determined that service connection is warranted for residuals of prostate cancer. The Board finds that, with resolution of doubt in the Veteran's favor, the Veteran set foot in the Republic of Vietnam during the Vietnam Era and is thus entitled to the presumption of service connection for prostate cancer. The Board's reasons for this decision are detailed below.

The Board first examines the record to determine whether there is evidence of a current disability. An October 1999 surgical pathology report from Saint Francis Hospital

reflects that the Veteran was diagnosed with adenocarcinoma of the prostate. A February 2000 private medical report indicates that the Veteran underwent a radical prostatectomy in October 1999. This private medical report notes that, postoperatively, the Veteran experienced urinary incontinence and erectile dysfunction. The impression was adenocarcinoma of the prostate with positive margin after radical prostatectomy. Based on the foregoing, the Board finds that the first element of a service connection claim, that of a current disability, has been met.

The Board's next inquiry focuses on the incurrence of an event, injury, or disease in service. The Veteran contends he was exposed to herbicides while serving in Thailand and/or that he was presumptively exposed when he briefly deplaned in Pleiku, Vietnam, during the course of returning from a period of hospitalization for a skin infection in the Philippines. The Veteran testified that he developed a rash while serving in Thailand and was flown to a hospital in the Philippines for treatment. (See September 2009 Board hearing Transcript "Tr." at 3.) The Veteran testified that while flying back to Thailand after his skin infection had resolved, his plane stopped in Pleiku, Vietnam, and he deplaned there to get some food. (Id. at 4.) The Board notes that the Veteran has contended exposure to Agent Orange from several different sources while serving in Thailand, but because the Board is granting service connection for prostate cancer based on him being on the ground in Vietnam, his other contentions will not be addressed.

An August 1967 Narrative Summary reflects that the Veteran was admitted for hospitalization at the U.S. Air Force controlled Clark Hospital in the Philippines. More specifically, the Veteran was hospitalized at that hospital due to a penile lesion from June 1967 to August 1967.

Regarding the Veteran's statements that his transport plane stopped in Vietnam in approximately August 1967 during his return flight from the Philippines to Thailand, the Board finds that the Veteran is competent and credible to make such statements. See *Washington v. Nicholson*, 19 Vet. App. 362, 368 (2005) (noting that a Veteran and other persons can attest to factual matters of which they had first-hand knowledge, e.g., experiencing and witnessing events in service). Indeed, the Veteran is competent and credible to report that the airplane he was on stopped in Pleiku, Vietnam, on the return trip from the Philippines, and that he deplaned at the Pleiku air base, thereby stepping foot in Vietnam. The Board notes that a March 2008 response from the Joint Services Records Research Center (JSRRC) indicates that pertinent flight records are not available because they were not permanently maintained. Notwithstanding the absence of supporting military records that do not exist, there is no evidence of record to call into question the credibility of the Veteran's statements concerning this in-service event.

Additionally, a book titled, *WHERE WE WERE IN VIETNAM*, indicates that there was an airfield at Pleiku, Vietnam, as well as a U.S. Air Force Base Hospital. See Michael P. Kelley, *WHERE WE WERE IN VIETNAM* 5-412 (2002); see also Stanley Karnow, *VIETNAM: A HISTORY* 412 (1983) (noting that U.S. transportation and observation aircraft and helicopters were parked at an airstrip near Pleiku). These books serve as credible

supporting evidence that there was, in fact, an air base located in Pleiku, Vietnam. Based on the Veteran's credible testimony and the cited books, as well as the geographical relationship between Thailand, Vietnam, and the Philippines, with Vietnam being positioned between the other two countries, the Board finds that there is credible evidence of record that there was an airfield located at Pleiku and that the Veteran was on the landmass of Vietnam when his plane stopped at that location when flying from the Philippines back to Thailand.

Upon consideration of the foregoing, the Board finds that the evidence both for and against the material issue of whether the Veteran had in-country service in Vietnam is, at least, in equipoise and, consequently, resolves reasonable doubt in the Veteran's favor in finding that he had qualifying service in Vietnam during the Vietnam era. Thus, the Veteran is presumed to have been exposed to Agent Orange in service.

Thus, because he currently suffers from a disease that has been identified as associated with herbicide exposure (i.e., prostate cancer), and is presumed exposed to herbicide agents in service during a temporary stop in the Republic of Vietnam, the Board finds that the Veteran is entitled to service connection for prostate cancer on a presumptive basis. 38 C.F.R. § 3.309(e). Therefore, the appeal is granted.

In arriving at its decision on this question, the Board acknowledges that it has relied upon material obtained subsequent to the RO's issuance of its statement of the case in June 2009. Although reliance on such material generally gives rise to a duty on the part of the Board to notify the claimant of the material and of the reliance proposed to be placed upon it, see *Thurber v. Brown*, 5 Vet. App. 119 (1993), such notification would serve no useful purpose here, as the Board is granting the full benefit sought on appeal and there is consequently no risk of prejudice to the appellant. See 38 C.F.R. §§ 19.37, 20.1304(c) (2009) (noting that new evidence received at the Board subsequent to the issuance of the last statement of the case or supplemental statement of the case need not be referred to the agency of original jurisdiction for review and preparation of a supplemental statement of the case if the Board determines that the benefit sought may otherwise be allowed). Indeed, such a procedure would serve only to further delay an allowance of the full benefit sought on appeal.

ORDER

Entitlement to service connection for residuals of prostate cancer is granted.

Richard C. Thrasher
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs