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

THE ISSUES

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

2. Entitlement to an effective date earlier than December 1, 2009, for grant of service connection for chronic renal failure secondary to coronary artery disease and hypertensive heart disease.

3. Entitlement to an effective date earlier than July 11, 2011 for entitlement to special monthly compensation (SMC) at the housebound rate.

REPRESENTATION

Appellant represented by: J. Bryan Jones, III, Attorney

ATTORNEY FOR THE BOARD

Roya Bahrami, Associate Counsel

INTRODUCTION

The Veteran had active service from July 1970 to July 1990.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from July 2007 and March 2012 rating decisions of the Department of Veterans Affairs (VA) Regional Office (RO) in New Orleans, Louisiana.

In February 2016, the Board remanded the appeal to schedule the Veteran for a hearing before a Veterans Law Judge. In November 2016, he submitted a letter withdrawing his request for a Board hearing. Therefore, the Board deems his request for a hearing withdrawn. See 38 C.F.R. § 20.704(e) (2016).

This appeal is now being processed utilizing the paperless, electronic Veterans Benefits Management System and Virtual VA claims processing systems.

As a final preliminary matter, the Board notes that, the RO previously denied a claim for SMC based on aid and attendance on April 1, 2015, and notified the Veteran of the denial via letter dated April 6, 2015. In May 2016, the Veteran submitted an additional statement regarding the need for aid and attendance. As this statement was not received within a year of the rating decision denying the claim, the statement is not considered to be a notice of disagreement. Therefore, the Board does not have jurisdiction over the claim. As the record shows that the AOJ has yet to take action on this claim, the Board must refer the issue to the AOJ for appropriate action.

FINDINGS OF FACT

1. The Veteran's duties at Korat and Udorn Royal Thai Air Force Bases as likely as not placed
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him near the perimeter of each base, and herbicide exposure may be presumed.

2. The competent evidence of record establishes a current diagnosis of diabetes mellitus type II.

3. Prior to December 1, 2009, the Veteran did not file an informal or formal claim of entitlement to service connection for chronic renal disease.

4. Prior to July 11, 2011, the Veteran did not have an additional service-connected disability independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability; nor was he permanently housebound by reason of service-connected disability or disabilities.

CONCLUSIONS OF LAW

1. With resolution of reasonable doubt in the Veteran's favor, the criteria for establishing service connection for diabetes mellitus type II have been met. 38 U.S.C.A. §§ 1110, 1116, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309 (2016).

2. The criteria for entitlement to an effective date prior to December 1, 2009, for the grant of service connection for chronic renal disease with coronary artery disease and hypertensive heart disease, have not been met. 38 U.S.C.A. § 5110 (West 2014); 38 C.F.R. § 3.400 (2016).

3. The criteria for an effective date earlier than July 11, 2011 for the grant of SMC based on the housebound criteria are not met. 38 U.S.C.A. §§ 1114 (s) 5103, 5103A, 5107(b), 5110 (West 2014); 38 C.F.R. §§ 3.350, 3.400, 3.401(a) (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified as amended at 38 U.S.C. §§ 5100, 5102, 5103, 5103A, 5107 (West 2014), sets forth VA's duties to notify and assist claimants in substantiating claims for VA benefits. See 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2016).

With regard to the claim for service connection granted herein, the Board finds that VA has satisfied the duties to notify and assist required by the VCAA. To the extent that there may be any deficiency of notice or assistance, there is no prejudice to the Veteran in proceeding with adjudication of the appeal given the fully favorable nature of the Board's decision.

Under the VCAA, when VA receives a complete or substantially complete application for benefits, it is required to notify the claimant and his representative, if any, of any information and 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). In order to satisfy its duty to notify the claimant under the VCAA, the United States Court of Appeals for Veterans Claims (Court) held that VA 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; and (3) that the claimant is expected to provide. Quartuccio v. Principi, 16 Vet. App. 183, 187 (2002).

VA has also satisfied its duties to notify and assist under the VCAA with regard to the claims for earlier effective dates. Initially, the Board notes that the appeal presents "downstream" issues in that it arose following the grant of renal disease with coronary artery disease and hypertensive heart disease and SMC; regardless, the Veteran's claim was readjudicated in a May 2015 statement of the case (SOC).

VA has also satisfied its duty to assist with regard to the issues decided herein. The claims folder contains available VA medical center records and examination reports, as well as private medical records identified by the Veteran and lay statements from the Veteran and his spouse. The claims folder also contains a Nehmer Memorandum for the Record dated August 2011 indicating the AOJ's steps in determining that the Veteran did not have any Vietnam service. Additional VA examinations are not necessary as current findings would not serve to establish entitlement to an earlier effective date for renal disease with coronary artery disease and hypertensive heart disease or SMC, nor would current findings establish entitlement to an increased level of renal disease with coronary artery disease and hypertensive heart disease or SMC, as the Veteran is already in receipt of the maximum schedular rate.

In light of the foregoing, the Board finds that VA's duties to notify and assist have been

satisfied and, thus, appellate review may proceed without prejudice to the Veteran. See Bernard v. Brown, 4 Vet. App. 384, 394 (1993).

II. Service Connection

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303. Regulations also provide that 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).

If a veteran was exposed to an herbicide agent during active military, naval, or air service, then certain diseases, such as type II diabetes mellitus, shall be service connected even though there is no record of such disease during service. For the purposes of this section, 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 U.S.C.A. § 1116 (West 2014); 38 C.F.R. §§ 3.307 (a)(6), 3.309(e), 3.313 (2016).

In addition to exposure within the Republic of Vietnam, exposure to Agent Orange has been noted to have occurred in various places, including Thailand. VA has determined that U.S. Air Force Veterans who served on Royal Thai Air Force Bases (RTAFBs) at U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, and Don Muang, near the air base perimeter anytime between February 28, 1961 and May 7, 1975, may have been exposed to herbicides. Particularly, to benefit from the presumption of herbicide exposure at one of the above listed air bases, a veteran must have served as a security policeman, security patrol dog handler, member of a security police squadron, or otherwise served near the air base perimeter, as shown by military occupational specialty, performance evaluation, or other credible evidence. See M21-1MR, Part IV, Subpart ii, Chapter 2, Section C.10(q).

When there is an approximate balance of evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each issue shall be given to the claimant. See 38 U.S.C.A. § 5107 (West 2014); 38 C.F.R. §§ 3.102, 4.3 (2016). A claimant need demonstrate only an approximate balance of positive and negative evidence in order to prevail. See Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990). For a claim to be denied on the merits, a preponderance of the evidence must be against the claim. See Alemany v. Brown, 9 Vet. App. 518, 519 (1996).

In the present case, the Veteran asserts, and VA concedes, that the Veteran has been diagnosed with diabetes mellitus type II. The Veteran contends that his diabetes mellitus type II is related to herbicide exposure during active duty.

The Veteran's service personnel records reflect that he served in Thailand at the Udorn RTAFB from February 1972 to February 1973, and at the Korat RTAFB from February 1973 to December 1973. Both of these time periods are covered by the VA-designated timeframe for which herbicide exposure may be presumed. His military occupational specialty (MOS) is listed as an aircraft maintenance specialist. His duties included pre-flight and post-flight inspections of F-4D aircraft. While the Veteran's awards include the National Defense Service Medal, Vietnam Service Medal with a bronze star, Republic of Vietnam Campaign Medal, and Republic of Vietnam Gallantry Cross with Palm Device, there is no indication in the available service records that the Veteran served in the Republic of Vietnam. The Veteran asserts that he was exposed to Agent Orange during his time at Korat and Udorn RTAFB.

Thus, the remaining critical element as to whether the Veteran is entitled to the presumption of herbicide exposure is whether he served along the perimeter of the Korat and Udorn RTAFB. The Board is satisfied that the Veteran has established this fact. The Veteran has stated, and his service personnel records verify that, while stationed in Thailand, he worked as an aircraft maintenance specialist with the 555th Tactical Fighter Squadron. The Veteran has also stated that, while he was at Camp Udorn, the barracks for the enlisted men, including himself, were around the perimeter of the camp. Additionally, while he was at Korat RTAFB, his fighter squadron had their base around the perimeter of the camp. The Veteran has also submitted maps of Korat and Udorn RTAFB, which corroborate his assertions.

The Board notes that the RO has not been able to corroborate the Veteran's contentions that his responsibilities took him to the base perimeter; however, there is no basis in the record to question the Veteran's credibility regarding his statements as to the nature and responsibility of his service while at Udorn and Korat RTAFB. He clearly appears to have served in an area that was close proximity to the base perimeter. His statements indicate that he regularly had contact with the flight line. This description appears to be consistent with the duties of his MOS. 38 U.S.C.A. § 1154 (a) (West 2014). Moreover, his accounting as to the type of duties he performed within the perimeter of Korat and Udorn RTAFB are deemed competent lay evidence of what the

Veteran observed during his period of service in Thailand. See Layno v. Brown, 6 Vet. App. 465, 469-70 (1994) (holding that a lay witness is competent to testify to that which the witness has actually observed and is within the realm of his personal knowledge). Upon review of the record, there is no evidence available that would refute the Veteran's recollections or cause the Board to question his credibility at this time.

Therefore, based on his credible assertion of serving along the perimeter of Korat and Udorn RTAFB, and resolving all reasonable doubt in favor of the Veteran, the Board finds that the Veteran is presumed to have been exposed to herbicide agents during active service. 38 U.S.C.A. § 5107 (b); 38 C.F.R. § 3.102 (2016). As the Veteran is now presumed to have been exposed to herbicide agents in service, and diabetes mellitus type II is a disease that has been shown to be associated with exposure to herbicide agents, it is presumed that this disorder was incurred in service even without evidence of that disease during service. 38 U.S.C. § 1116 (a); 38 C.F.R. §§ 3.307 (a)(6), 3.309(e). As such, service connection for diabetes mellitus type II, due to herbicide exposure, is warranted.

III. Earlier Effective Date for Service Connection for Renal Disease with Coronary Artery Disease and Hypertensive Heart Disease

The Veteran contends that he is entitled to an effective date earlier than December 1, 2009 for service connection for renal disease with coronary artery disease and hypertensive heart disease. Specifically, he argues that the effective date should be the date of his initial claims for hypertensive heart disease and type II diabetes mellitus.

The effective date of an award of compensation based on direct service connection is the date following separation from service, if the claim is received within one year of that date. Otherwise, the effective date is the date VA receives the claim, or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110 (a), (b)(1); 38 C.F.R. §3.400 (b)(2).

The date of receipt of a claim is the date on which a claim, information, or evidence is received by VA. 38 C.F.R. § 3.1 (r). A "claim" is defined broadly to include a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. See 38 C.F.R. §3.1 (p); see also Brannon v. West, 12 Vet. App. 32, 34-35 (1998); Servello v. Derwinski, 3 Vet. App. 196, 199 (1992).

Further, 38 U.S.C.A. § 5110 (g) (West 2014) provides that, subject to the provisions of 38 U.S.CA. § 5101, where compensation, dependency and indemnity compensation, or pension is awarded or increased pursuant to any Act or administrative issue, the effective date of such award or increase shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue. See 38 C.F.R. § 3.114 (a) (2016).

Where compensation is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for a retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. Id. The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase. Id. If a claim is reviewed on the initiative of VA under this section within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue. See 38 C.F.R. § 3.114 (a)(1) (2016).

An exception to the regulations regarding effective dates for disability compensation involves members of the Nehmer class under 38 C.F.R. § 3.816 (2016). VA has promulgated special rules for the effective dates for the award of presumptive service connection based on exposure to herbicides, pursuant to orders of a United States District Court in the class action of Nehmer v. United States Department of Veterans Affairs. See 38 C.F.R. § 3.816. In accordance with Nehmer and its implementing regulation, if VA denied compensation for the same covered herbicide disease in a decision issued between September 25, 1985 and May 3, 1989; or if there was a claim for benefits pending before VA between May 3, 1989, and the effective date of the applicable liberalizing law, which in this case is August 31, 2010. See 38 C.F.R. § 3.816 (c)(1)-(3) (2016). In such circumstances, the effective date of the award will be the date VA received the claim, unless the claim was filed within a year of separation from service or some other exception is applicable. See 38 C.F.R. § 3.816 (c). If the requirements of 38 C.F.R. § 3.816 (c)(1)-(2) are not met, the effective date shall be assigned according to 38 C.F.R. §§ 3.114 and 3.400. See 38 C.F.R. § 3.816 (c)(4).

A Nehmer class member is defined as a Vietnam veteran who has a "covered herbicide disease." Id. According to 38 C.F.R. § 3.816 (b)(2), a "covered herbicide disease" includes a disease for which the Secretary of Veterans Affairs has established a presumption of service connection

pursuant to the Agent Orange Act of 1991, Public Law 102-4. The Nehmer decision, and the corresponding regulations set forth in 38 C.F.R. § 3.816 only apply to "Vietnam veterans" which does not include veterans with service outside of Vietnam, including in the United States, the Korean Demilitarized Zone, or Thailand. Id.

Initially, the Veteran asserts that he is entitled to an earlier effective date under Nehmer, because he qualifies as a Nehmer class member as he was exposed to herbicides in Thailand during the Vietnam War, and developed a "covered herbicide disease." However, the Veteran does not meet the qualifications of a Nehmer class member, as the record reflects that the Veteran did not serve in the Republic of Vietnam. See also August 2011 Nehmer Memorandum for the Record. Moreover, the Veteran has not claimed that he served in Vietnam. As such, the Board is unable to assign an effective date earlier than December 1, 2009 under the provisions of 38 C.F.R. § 3.816.

The Board also finds that an earlier effective date for the Veteran's chronic renal disease cannot be granted under 38 U.S.C.A. § 5110 (a); 38 C.F.R. § 3.400.

To this end, a review of the record demonstrates that the Veteran filed an original claim of entitlement to service connection for hypertension and coronary artery disease in September 2005. See also the Veteran's clarifying statement dated January 2006. His claims were granted in a January 2010 rating decision, which granted service connection for hypertension, as well as coronary artery disease with hypertensive heart disease.

In a December 2009 statement, the Veteran reported that he suffered from kidney problems due to his hypertension. He submitted a claim for chronic renal disease as secondary to hypertension in May 2011. His claim was granted in a March 2012 rating decision, which assigned a 100 percent combined rating for chronic renal failure with coronary artery disease and hypertensive heart disease from December 1, 2009 through July 11, 2011; a separate 100 percent rating was granted for chronic renal failure from July 11, 2011 and a separate 60 percent rating was resumed for coronary artery disease with hypertensive heart disease effective July 11, 2011. See 38 C.F.R. §§ 4.114, 4.115a, Diagnostic Codes 7500, 7507, 7530.

Critically, prior to December 1, 2009, VA received no communication from the Veteran which can be construed as expressing an intent or belief in entitlement to service connection for chronic renal disease.

VA is not required to anticipate any potential claim for a particular benefit where no intention to raise it was expressed. See Brannon v. West, 12 Vet. App. 32, 35 (1998) (holding that before VA can adjudicate a claim for benefits, "the claimant must submit a written document identifying the benefit and expressing some intent to seek it"); see also Talbert v. Brown, 7 Vet. App. 352, 356-57 (1995).

There is evidence showing that the Veteran was suffered from renal failure earlier than December 1, 2009. See, e.g., the VA examination report dated October 2009, which documented a diagnosis in August 2009 for acute renal failure. However, the effective date for the award of service connection for chronic renal failure can arise no earlier than the date on which the Veteran applied for benefits for the secondary condition. See Ellington v. Peake, 531 F.3d 1364 (Fed. Cir. 2008); Roper v. Nicholson, 20 Vet. App. 173, 181 (2006). The effective date for an original claim for service connection will be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110 (a) (West 2014); 38 C.F.R. § 3.400 (b)(2).

It has neither been alleged nor has it been shown on review of the record that there is a claim or communication prior to December 1, 2009, which may be considered a formal or informal claim for service connection for renal failure. Therefore, based on the above-stated facts and regulations, the Board finds that the legally correct date for the award of service connection for chronic renal failure is December 1, 2009, the date VA received the Veteran's original statement asserting kidney problems due to hypertension. As such, the Veteran is not entitled to an earlier effective date and his claim must be denied.

IV. Earlier Effective Date for SMC at the Housebound Rate

The Veteran alleges that he is entitled to an effective date prior to July 11, 2011 for the award of SMC based on housebound criteria. Specifically, he contends that he was permanently housebound as of December 1, 2009.

An award of SMC based on housebound status requires that the veteran have a single service-connected disability rated as 100 percent, and (1) an additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems, or (2) is permanently housebound by reason of service-connected disability or disabilities. This

permanently housebound requirement is met when the veteran is substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime. 38 U.S.C.A. § 1114 (s) (West 2014); 38 C.F.R. § 3.350 (i) (2016).

The evidence of record reflects that, from December 1, 2009, the Veteran was in receipt of a 100 percent evaluation for chronic renal failure with coronary artery disease and hypertensive heart disease. Effective July 11, 2011, the RO assigned a 100 percent evaluation for chronic renal failure requiring dialysis, along with a separate 60 percent evaluation for coronary artery disease and hypertensive heart disease.

Under 38 C.F.R. § 4.115, "separate ratings are not to be assigned for disability from disease of the heart and any form of nephritis, on account of the close interrelationships of cardiovascular disabilities. If, however, chronic renal disease has progressed to the point where regular dialysis is required, any co-existing hypertension or heart disease will be separately rated." 38 C.F.R. § 4.115. The regulations forbid granting separate compensable ratings for renal dysfunction and heart conditions, unless the renal dysfunction has caused either loss of a kidney or regular dialysis, neither of which is demonstrated by the evidence of record prior to July 11, 2011.

In this case, the VA treatment records reflect that, on July 11, 2011, the Veteran's treating provider advised that he will probably require continuation of hemodialysis for his chronic renal insufficiency. Medical reports do not reflect that the Veteran's chronic renal disease required dialysis prior to this date. Consequently, the assignment of separate 100 percent and 60 percent evaluations for chronic kidney disease and coronary heart disease and hypertensive heart disease is prohibited prior to July 11, 2011. 38 C.F.R. § 4.115. Additionally, the evidence of record does not show that the Veteran was permanently housebound prior to July 11, 2011. In this regard, the Board notes that, on November 2010 VA spine examination, the Veteran reported that he was still employed full-time as a file clerk. Moreover, he has not argued that he was permanently housebound prior to July 11, 2011.

In conclusion, the preponderance of the evidence is against an effective date prior to July 11, 2011 for the reasons outlined above, namely that the medical evidence did not demonstrate that entitlement to SMC based on the housebound rate arose prior to this date. In denying an earlier effective date, the Board finds the benefit of the doubt doctrine is not applicable. 38 U.S.C.A. § 5107; 38 C.F.R. §§ 4.3, 4.7.

ORDER

Service connection for type II diabetes mellitus is granted.

An effective date prior to December 1, 2009 for the grant of service connection for chronic renal disease with coronary artery disease and hypertensive heart disease is denied.

An effective date prior to July 11, 2011 for entitlement to SMC at the housebound rate is denied.

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KATHERINE KIEMLE BUCKLEY
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

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