

CONCLUSIONS OF LAW

1. The criteria for withdrawal of the appeal for the issues of service connection for an enlarged spleen and cirrhosis of the liver have been met. 38 U.S.C.A. § 7105 (b) (2), (d) (5) (West 2002 & Supp. 2016); 38 C.F.R. § 20.204 (2016).
2. The criteria for entitlement to service connection for colon cancer, including metastatic cancer of the lymph nodes have been met. 38 U.S.C.A. §§ 1110, 1116, 5107 (West 2002 & Supp. 2016); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309 (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Withdrawal of Issues on Appeal

The Veteran's appeal included the issues of service connection for service connection for an enlarged spleen and for service connection for cirrhosis of the liver. In March 2017, the Veteran's attorney, in writing, stated the Veteran wished to withdraw these issues from his appeal.

A substantive appeal may be withdrawn on the record or in writing at any time before the Board promulgates a decision. Withdrawal of a substantive appeal may be made by the Veteran or his representative. 38 C.F.R. § 20.204.

As there is no longer an allegation of error of fact or of law as to these two claims, the Board does not have appellate jurisdiction and the appeal as to the claims for service connection for an enlarged spleen and cirrhosis of the liver is dismissed. 38 U.S.C.A. § 7105.

Service Connection for Colon Cancer and Residuals Including Metastatic Cancer of the Lymph Nodes.

Generally, service connection may be established for disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110; 38 C.F.R. §§ 3.303 (d), 3.304.

In this instance, the Veteran was diagnosed with colon cancer in May 2013, with a biopsy revealing the cancer had also spread to lymph nodes. Although the Veteran had surgery to remove the tumor and subsequently received chemotherapy, the cancer unfortunately recurred by November 2014. The Veteran has claimed exposure to herbicides while stationed in Thailand. He has also presented evidence that his duties in Thailand required several trips to Vietnam.

If a veteran was exposed to an herbicide agent during active military, naval, or air service, certain diseases are presumed to be service connected if the requirements of 38 C.F.R. § 3.307 (a)(6) are met, even though there is no record of the disease during service, provided that the rebuttable presumption provisions of 38 C.F.R. § 3.307 (d) are also satisfied. 38 C.F.R. § 3.309 (e). Colon cancer is not listed as a disease associated with exposure to herbicide agents. 38 C.F.R. § 3.309 (e). Nevertheless, a claimant is not precluded from establishing service connection with proof of direct causation. *Combee v. Brown*, 34 F. 3d 1039, 1042 (Fed. Cir. 1994).

VA's Compensation & Pension Service (C&P) has issued information concerning the use of herbicides in Thailand during the Vietnam War. In a May 2010 bulletin, C&P indicated that it had determined that there was significant use of herbicides on the fenced in perimeters of military bases in Thailand intended to eliminate vegetation and ground cover for base security purposes. C & P has determined that special consideration should be given to Veterans whose duties placed them on or near the perimeters of Thailand military bases. Consideration of herbicide exposure on a "facts found or direct basis" should be extended to those Veterans. See VA Adjudication Manual, M21-1MR, Part IV, Subpart ii, Chapter 2, Section C (M21-1MR).

Evidence of record clearly establishes that the Veteran served at two designated Thailand air bases: Udorn Royal Thai Air Force Base (RTAFB) and U-Tapao RTAFB. At all relevant times, the Veteran's military occupational specialty was inventory management.

Evidence of such a specialty by itself does not provide evidence that he served near the perimeter of the base.

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The Board acknowledges the Veteran has presented evidence of herbicide exposure such as temporary duty in Vietnam or the location of his barrack to demonstrate the Veteran's duties placed him on or near the perimeters of the Udorn RTAFB. The Board finds, however, the Veteran

has presented enough evidence of service in the perimeter area of the Udorn RTAFB as an inventory specialist. The Veteran reported that as an inventory specialist, his duties placed him on the perimeters of the base recovering classified equipment. A performance review covering the period he was stationed at Udorn RTAFB mentions the Veteran had specific responsibilities for accounting for all communications equipment. He also had a top secret security clearance. The Veteran also served on active duty for a period of the Vietnam War during which VA has acknowledged that herbicides were used near those air base perimeters in Thailand.

The Board finds the Veteran credible that his duties as an inventory specialist required work at or near the perimeter as consistent with the circumstances, conditions, and hardships for service of an inventory specialist handling communications equipment, which on occasion may have been classified equipment. There also is no evidence in the file that is inconsistent with the Veteran's evidence that he worked on the perimeters of Udorn RTAFB. Resolving all doubt in favor of the Veteran, and based on the facts found, the Board has determined that the Veteran was exposed to herbicide agents, to include Agent Orange, during active service in Thailand. 38 C.F.R. § 3.102.

Turning to whether the Veteran's herbicide exposure caused his colon cancer, the Veteran has submitted reports from two experts, Dr. Cassano, an expert in occupational medicine, and Dr. Krem, an oncologist, both of whom have concluded more likely than not the Veteran's colon cancer is the result of service. Both doctors have relied upon recent medical research to support their conclusions. The Board is aware that a VA examiner, an internal medicine specialist, reached a negative opinion in March 2017. The credibility and weight to be attached to a medical opinion are within the Board's province as finder of fact. Guerrieri v. Brown, 4 Vet. App. 467, 470-71 (1993). In assigning probative weight to a medical opinion, the Board may consider, among other things, the expertise of the expert providing the opinion. See D'Aries v. Peake, 22 Vet. App. 97, 108 (2008) (acknowledging that it was proper for Board to assign more weight to a physician's opinion when the opinion was in an area within that physician's medical expertise).

Accordingly, the Board places greater weight upon the favorable opinions of the medical experts who have relied upon the latest research and have more medical expertise (occupational medicine and oncology) than the VA examiner (internal medicine) to determine what relationship there is between the Veteran's colon cancer and his herbicide exposure. The Board therefore finds the Veteran has established his colon cancer is the result of his herbicide exposure in Thailand

Thus, the Board finds all elements of service connection are present and the Veteran's claim for service connection for colon cancer must be granted. Hickson v. West, 12 Vet. App. 247, 253 (1999).

The Veterans Claims Assistance Act of 2000 (VCAA)

Under the Veterans Claims Assistance Act of 2000 (VCAA), VA has a duty to notify and to assist a claimant in developing information and evidence necessary to substantiate a claim. 38 U.S.C.A. §§ 5103, 5103A; 38 C.F.R § 3.159

As the claim for entitlement to service connection for colon cancer is resolved in the Veteran's favor and the Veteran has withdrawn an appeal of the issues of service connection for an enlarged spleen and for service connection for cirrhosis of the liver, the only matters disposed of in this decision, further discussion of compliance with the VCAA with regard to the claim is not necessary.

ORDER

The appeal for service connection for an enlarged spleen and service connection for cirrhosis of the liver is dismissed.

Entitlement to service connection for colon cancer, including metastatic cancer of the lymph nodes, is warranted.



JOHN J. CROWLEY
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

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