



5. The Veteran's kidney disease is proximately due to his diabetes mellitus type II and hypertension.

6. The Veteran's congestive heart failure is proximately due to his diabetes mellitus type II and hypertension.

#### CONCLUSIONS OF LAW

1. New and material evidence has been received, and the claim of service connection for diabetes mellitus type II may be reopened. 38 U.S.C.A. §§ 5108, 7105 (West 2015); 38 C.F.R. § 3.156 (2016).

2. 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 2015); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309 (2016).

3. The Veteran's kidney disease is proximately due to his diabetes mellitus type 2 and hypertension. 38 U.S.C.A. §§ 1110, 1116, 5107 (West 2015); 38 C.F.R. §§ 3.303, 3.307, 3.309, 3.310 (2016).

4. The Veteran's congestive heart failure is proximately due to his diabetes mellitus type 2 and hypertension. 38 U.S.C.A. §§ 1110, 1116, 5107 (West 2015); 38 C.F.R. §§ 3.303, 3.307, 3.309, 3.310 (2016).

#### REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

##### I. Duties to Notify and Assist

The Board finds that VA has satisfied the duties to notify and assist, as required by the Veterans Claims Assistance Act of 2000. See 38 U.S.C.A. §§ 5103, 5103A (West 2015); 38 C.F.R. § 3.159 (2016). 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.

##### II. New and material evidence

In general, rating decisions that are not timely appealed are final. See 38 U.S.C.A. § 7105; 38 C.F.R. § 20.1103. An exception to this rule is 38 U.S.C.A. § 5108, which provides that, if new and material evidence is presented or secured with respect to a claim which has been disallowed, VA shall reopen the claim and review the former disposition of the claim.

New evidence is defined as existing evidence not previously submitted to agency decisionmakers. Material evidence means evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence previously of record, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a).

In determining whether evidence is new and material, the credibility of the evidence is generally presumed. *Justus v. Principi*, 3 Vet. App. 510, 512-513 (1992). The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held, however, that evidence that is merely cumulative of other evidence in the record cannot be new and material even if that evidence had not been previously presented. *Anglin v. West*, 203 F.3d 1343, 1347 (2000).

In deciding whether new and material evidence has been received, the Board looks to the evidence submitted since the last final denial of the claim on any basis. *Evans v. Brown*, 9 Vet. App. 273, 285 (1996). The threshold for determining whether new and material evidence raises a reasonable possibility of substantiating a claim is "low." *Shade v. Shinseki*, 24 Vet. App. 110, 117 (2010).

Regardless of whether the RO determined new and material evidence had been submitted, the Board must address the issue of the receipt of new and material evidence in the first instance because it determines the Board's jurisdiction to reach the underlying claims and to adjudicate the claims de novo. See *Jackson v. Principi*, 265 F.3d 1366, 1369 (2001) (the statutes make clear that the Board has a jurisdictional responsibility to consider whether it was proper for a claim to be reopened, regardless of whether the previous action denying the claim was appealed to the Board).

The claim for entitlement to service connection for diabetes mellitus type II was initially denied by the RO in a February 1994 rating decision. The RO determined that the evidence of record, including the service treatment records, established that the Veteran's diabetes mellitus type II was not related to active duty service. The Veteran did not appeal the denial and the February 1994 rating decision became final. 38 U.S.C.A. § 7105 (c) (West 2015); 38 C.F.R. § 20.1103 (2016).

In December 2000, the Veteran submitted a claim to reopen service connection for diabetes mellitus type II, including as due to exposure to Agent Orange. In a December 2002 rating decision, the RO determined that, because the Veteran did not serve in the Republic of Vietnam during the Vietnam era, service connection was not warranted on a presumptive basis. The Veteran did not appeal the denial of the claim and the December 2002 rating decision became final. 38 U.S.C.A. § 7105 (c) (West 2015); 38 C.F.R. § 20.1103 (2016).

The evidence received since the December 2002 rating decision includes statements from the Veteran and his representative linking his diabetes mellitus type II to herbicide exposure during active duty service in Thailand, and details about his service therein. The service personnel records obtained indicate that the Veteran served in Thailand from July 1972 to July 1973. The Board finds this evidence to be new and material because since April 2006 VA has recognized the use of herbicides in Thailand and set forth a policy of granting presumptive service connection if actual exposure is established based upon the Veteran's service. Consequently, the Board finds that the new evidence goes directly to the facts needed to establish exposure to herbicides in Thailand during the Vietnam era and, therefore, this new evidence is material and sufficient to reopen the previously denied claim for service connection for diabetes mellitus, type II.

### III. 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 prostate cancer, 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 2015); 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 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).

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 Korat RTAFB from July 1972 to July 1973, a period covered by the VA-designated timeframe for which herbicide exposure may be presumed. His military occupational specialty (MOS) is listed as a medical service technician. A Performance Report pertaining to his period of service at Korat RTAFB indicated that his current duty was medical service technician. While the Veteran's awards include the National Defense Service Medal, Air Force Good Conduct Medal, Vietnam Service Medal, and Republic of Vietnam Campaign Medal, 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 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 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 medical service

technician. The Veteran asserts that he was consistently called to duty on the flight line of Korat due to in-flight emergencies and other discipline that required medical personnel to be in place for take-off and/or landings. See, e.g., June 2014 lay statement. His service personnel records confirm that, before and after his deployment to Thailand, he performed routine and/or emergency medical and surgical procedures, operated all emergency and therapeutic equipment, and supervised medical technicians assigned to the Emergency Room. He also performed duties as a medical attendant or driver on routine and emergency ambulance runs. Moreover, a performance report from his time in Thailand indicated that on a twice weekly basis, the Veteran accompanied "civic action personnel to local schools and villages, where he assists with the treatment of Thai nationals." The Veteran has also provided a map of Korat RTAFB showing the locations where he was required to live and work, including the barracks near the southern corner, and the dispensary west of the barracks, where he worked. The map reflects that these locations were within the 500 meter "herbicide drift zone." The drift zone, according to an Army field manual on the "Tactical Employment of Herbicides," dated December 1971, indicates that herbicide spray used on the ground can drift for 500 meters from the intended spray area.

The Board notes that while the RO has not been able to corroborate the Veteran's testimony that his responsibilities took him to the perimeter of the base; 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 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 military occupational specialty. 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 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 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, as secondary to herbicide exposure, is warranted.

Next, with regard to the Veteran's claims for renal disease and congestive heart failure, the Veteran asserts that they are caused or aggravated by his diabetes mellitus type II.

Establishing service connection on a secondary basis requires evidence sufficient to show: (1) that a current disability exists; and (2) that the current disability was either (a) caused by or (b) aggravated by a service-connected disability. Allen v. Brown, 7 Vet. App. 439 (1995).

In this case, the December 2010 VA examiner opined that the Veteran's congestive heart failure is related to his insulin-dependent diabetes. In addition, the Veteran's treating physician has opined that, as a result of the end-organ damage from his diabetes and hypertension, the Veteran has developed chronic kidney disease and congestive heart failure. See October 2010 letter from C.R., M.D. The Board notes that the Veteran is also service-connected for hypertension.

As such, the evidence supports a finding that the Veteran's diagnosed kidney disease and congestive heart failure are secondary to his service-connected disabilities. Thus, the benefit-of-the-doubt rule is for application as to these claims. 38 U.S.C.A. § 5107 (West 2014); 38 C.F.R. § 3.102 (2016). Service connection for kidney disease and congestive heart failure is granted.

ORDER

As new and material evidence has been received, the claim of service connection for diabetes mellitus type II is reopened.

Service connection for diabetes mellitus type II is granted.

Service connection for chronic kidney disease is granted.

Service connection for congestive heart failure is granted.

---

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

Department of Veterans Affairs

</pre></body></html>