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On appeal from the
Department of Veterans Affairs Regional Office in Des Moines, Iowa

THE ISSUE

Entitlement to service connection for lung cancer claimed as secondary to Agent Orange (AO) exposure.

REPRESENTATION

Appellant represented by: Vietnam Veterans of America

WITNESSES AT HEARINGS ON APPEAL

Appellant and his son

INTRODUCTION

The veteran served on active duty with the United States Air Force from March 1960 to April 1968. The current appeal arose from an August 2003 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Des Moines, Iowa. The RO denied entitlement to service connection for lung cancer claimed as secondary to AO exposure.

In December 2003 the veteran provided oral testimony before a Decision Review Officer (DRO) at the RO, a transcript of which has been associated with the claims file.

In April 2004 the veteran and his son provided oral testimony before the undersigned Veterans Law Judge via a video conference with the RO. A transcript of their testimony has been associated with the claims file.

In May 2004 the Board granted the representative's motion to advance the veteran's case on the Board's docket.

FINDINGS OF FACT

1. Lung cancer was not shown in active service or for many years thereafter.

2. Lung cancer was not disabling to a compensable degree during the first post service year.

3. The veteran has testified under oath on two occasions and has submitted a sworn statement to the effect that he stopped of in Tan Son Nhut Air Base in Saigon for approximately two hours on his way to his duty assignment in Takhli, Thailand.

4. In January 2003 while undergoing preoperative work-up for shoulder surgery the veteran was found to have small cell lung cancer.

5. The probative and competent medical evidence of record establishes that the veteran's lung cancer cannot satisfactorily be dissociated from exposure to AO in Vietnam.

CONCLUSION OF LAW

Lung cancer may be presumed to have been incurred in active service as secondary to AO exposure. 38 U.S.C.A. §§ 1110, 1116, 5103, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.159, 3.303, 3.307, 3.309(a), (e) (2003).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Factual Background

The service medical records contain no findings or evidence of lung cancer. Administrative personnel records show that the veteran was assigned as a munitions specialist to Takhli Air Base in Thailand, in January 1966. His records of service (DD-214) show that his military occupational specialty was aircraft guidance equipment repairman.

The respiratory system was reported as normal when the veteran was examined by VA in September 1968. His chest x-ray was negative for any abnormalities.

A January 1978 VA general medical examination report shows that the lungs were reported as clear to auscultation and percussion on evaluation of the respiratory system.

An August 1994 VA peripheral nerves examination report shows the veteran reported that he smoked one to two packs of cigarettes per day.

In March 2003 the veteran filed a claim of entitlement to service connection for lung cancer as secondary to AO exposure. He related that he had stopped off in Tan Son Nhut Air Base in Vietnam on his way to a duty assignment in Thailand.

In an April 2003 statement in support of claim the veteran advised that he was assigned to the 355th Tactical Fighter Wing, 355 Munitions Maintenance Squadron, at Takhli Royal Air Base in Thailand from January 1966 to January 1967. He advised that a stop was made at Tan Son Nhut Air Base in Saigon, Vietnam, to offload troops. He stated that he was not stationed in Vietnam.

Associated with the claims file are VA medical treatment reports variously dated in 2003. It was noted that in January 2003 while undergoing preoperative work-up for shoulder surgery, the veteran was found to have small cell lung cancer. His smoking history was acknowledged.

In May 2003 the service department advised, in response to the RO's inquiry, that it could not confirm whether or not the veteran had service in Vietnam.

In December 2003 the veteran provided oral testimony before a Decision Review Officer at the RO. A transcript of his testimony has been associated with the claims file. His testimony was essentially a reiteration of and consistent with contentions presented on appeal. It was acknowledged by the veteran that he did not have documentation of service in Vietnam, nor could he remember names of individuals who could verify his claimed service therein.

In April 2004 the veteran and his son provided oral testimony before the undersigned Veterans Law Judge via a video conference with the RO. His testimony was essentially a reiteration of contentions and testimony previously advanced on appeal. He agreed to obtain additional medical evidence in support of his claim for VA compensation benefits.

On file is a later dated in April 2004 from MMK, MD. She identified herself as the diagnosing and attending physician at the VA Medical Center in Iowa City when cancer was found in the veteran's kung. She stated that it was a primary site and consistent with the lung cancer found in many Vietnam veterans who were exposed to herbicides in the course of their military duties in Vietnam.

Dr. MMK acknowledged that while the veteran had a history of smoking, in determining etiology of the disease, even minimal exposure to AO was a risk factor, which was recognized and presumed to cause the kind of carcinoma discovered to exist in the veteran's lung. She advised that it was at least as likely as not that the veteran's lung condition had been caused by his exposure to AO while serving in the Air Force in Southeast Asia.

On file is a letter dated in April 2004 from TC, MD. He identified himself as having participated in the veteran's care while he was being treated at the VA Medical Center in Iowa City when cancer was discovered in his lung. Dr. TC advised that it was a primary site and consistent with lung cancer found in many Vietnam veterans who were exposed to herbicides in the course of their military duties in Vietnam. Dr. TC acknowledged that while the veteran had a smoking history, in determining etiology of the disease, even minimal exposure to AO was a risk factor, which was recognized and presumed to cause the type of carcinoma discovered in the veteran's lung. Dr. TC concluded that it is at least as likely as not that the veteran's lung cancer had been caused by his exposure to AO while serving with the Air Force in Southeast Asia.

In a May 2004 sworn and notarized statement on file the veteran reiterated that he got off the plane when it landed in Vietnam in January 1966, enroute to Thailand.

On file is a medical statement from a private physician dated in May 2004, noting the veteran is a hospice patient with Stage IV lung cancer.

Criteria

General Service Connection

Service connection will be granted if it is shown that a veteran has a disability resulting from an injury or disease contracted in the line of duty, or for aggravation of a preexisting injury or disease in active military service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303.

To establish service connection for a disability, a claimant must submit (1) medical evidence of a current disability, (2) medical evidence, or in certain circumstances lay testimony, of in-service incurrence or aggravation of an injury or disease, and (3) medical evidence of a nexus between the current disability and the in-service disease or injury. Pond v. West, 12 Vet. App. 341, 346 (1999).

Where the determinative issue involves a medical diagnosis, competent medical evidence is required. This burden may not be met by lay testimony because laypersons are not competent to offer medical opinions. Espiritu v. Derwinski, 2 Vet. App. 492, 494-95 (1992).

If there is no evidence of a chronic condition during service, or an applicable presumptive period, then a showing of continuity of symptomatology after service is required to support the claim. 38 C.F.R. § 3.303(b).

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, 495-498 (1997).

Service connection may also be granted for any disease diagnosed after discharge, when all the evidence establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Where a veteran served 90 days or more, and a presumptive disease such as malignant tumors become manifest to a degree of 10 percent or more within one year from date of termination of such service, such diseases shall be presumed to have been incurred in or aggravated by service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309(a).

Agent Orange

With regard to disabilities a veteran attributes to exposure to Agent Orange, the law provides that for veterans who served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending May 7, 1975, service connection may be presumed for certain diseases enumerated by statute and regulations that become manifest within a particular period, if any such period is prescribed.

The specified diseases are: chloracne, Hodgkin's disease, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, soft tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma), multiple myeloma, respiratory cancers (cancers of the lung, bronchus, trachea, or larynx), and diabetes mellitus (Type 2). For purposes of this section, the term acute and subacute peripheral neuropathy means transient peripheral neuropathy that appears within weeks or months of exposure to a herbicide agent and resolves within two years of date on onset. 38 U.S.C.A. § 1116; 38 C.F.R. § 3.309(e), including Note 2.

The Secretary of Veterans Affairs has determined that there is no positive association between exposure to herbicides and any other condition for which the Secretary has not specifically determined that a presumption of service connection is warranted. See Notice, 59 Fed. Reg. 341-346 (1994); see also Notice, 61 Fed. Reg. 41,442-449 (1996). "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).

The VA General Counsel has determined that the regulatory definition (which permits certain personnel not actually stationed within the borders of the Republic of Vietnam to be considered to have served in that Republic) requires that an individual actually have been present within the boundaries of the Republic. See VAOPGCPREC 27-97.

Specifically, the General Counsel has concluded that in order to establish qualifying "service in Vietnam" a veteran must demonstrate actual duty or visitation in the Republic of Vietnam. Service on a deep water naval vessel in waters off the shore of the Republic of Vietnam, without proof of actual duty or visitation in the Republic of Vietnam, does not constitute service in the Republic of Vietnam for purposes of 38 U.S.C.A. § 101(29)(A) (establishing that the term "Vietnam era" means the period beginning on February 28, 1961 and ending on May 7, 1975 in the case of a veteran who served in the Republic of Vietnam during that period). See VAOPGCPREC 27-97.

Similarly, in another precedent opinion, the VA General Counsel concluded that the term "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. See VAOPGCPREC 7-93. Again, a showing of actual duty or visitation in the Republic of Vietnam is required to establish qualifying service in Vietnam.

Notwithstanding the foregoing presumptive provisions, which arose out of the Veteran's Dioxin and Radiation Exposure Compensation Standards Act, Public Law No. 98- 542, § 5, 98 Stat. 2725, 2727-29 (1984), and the Agent Orange Act of 1991, Public Law No. 102-4, § 2, 105 Stat. 11 (1991), the CAFC has determined that 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); Ramey v. Brown, 9 Vet. App. 40, 44 (1996), aff'd sub nom. Ramey v. Gober, 120 F.3d 1239 (Fed. Cir. 1997), cert. denied, 118 S. Ct. 1171 (1998). Thus, presumption is not the sole method for showing causation. Accordingly, the Board will also address whether service connection may be awarded for peripheral neuropathy on a direct incurrence basis or on a presumptive basis other than on the basis of Agent Orange exposure.

The probative value of a physician's statement is dependent, in part, upon the extent to which it reflects "clinical data or other rationale to support his opinion." Bloom v. West, 12 Vet. App. 185, 187 (1999). The use of the word "possible" makes an opinion speculative in nature. See Bostain v. West, 11 Vet. App. 124 (1998).

If all the evidence is in relative equipoise, the benefit of the doubt should be resolved in the veteran's favor, and the claim should be granted. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102. However, if the preponderance of the evidence is against the claim, the claim must be denied. Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

When all the evidence is assembled, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the appellant 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); 38 C.F.R. §§ 3.102, 4.3 (2003).

The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary.

When, after consideration of all of the evidence and material of record in an appropriate case before VA, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107; Alemany v. Brown, 9 Vet. App. 518, 519 (1996).

Analysis

Preliminary Matter: Duties to Notify & to Assist

At the outset, it should be noted that on November 9, 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000).

This law eliminates the concept of a well-grounded claim, redefines the obligations of VA with respect to the duty to assist, and supersedes the decision of the CAVC in Morton v. West, 12 Vet. App. 477 (1999), withdrawn sub nom. Morton v. Gober, 14 Vet. App. 174 (2000) (per curiam order), which had held that VA cannot assist in the development of a claim that is not well grounded.

This change in the law is applicable to all claims filed on or after the date of enactment of the VCAA, or filed before the date of enactment and not yet final as of that date. VCAA, Pub. L. No. 106-475, §7(b), 114 Stat. 2096, 2099-2100 (2000), 38 U.S.C.A. § 5107 note (Effective and Applicability Provisions).

On August 29, 2001, the final regulations implementing the VCAA were published in the Federal Register. The portion of these regulations pertaining to the duty to notify and the duty to assist are also effective as of the date of the enactment of the VCAA, November 9, 2000. 66 Fed. Reg. 45,620, 45,630-32 (August 29, 2001) (to be codified at 38 C.F.R. § 3.159).

The Board, however, is satisfied that all necessary development pertaining to the issue of entitlement to service connection for lung cancer claimed as secondary to AO exposure has been properly undertaken.

The Board is confident in this assessment because the evidence as presently constituted is sufficient in establishing a full grant of the benefit sought on appeal. Therefore, any outstanding development not already conducted by VA is without prejudice; hence, any deficiencies in the duties to notify and to assist constitute harmless error.

Additional development by the Veterans Benefits Administration Appeals Management Center (VBA AMC) would only serve to further delay resolution of the claim. Bernard, supra.

Service Connection

Following the point at which it is determined that all relevant evidence has been obtained, it is the Board's principal responsibility to assess the credibility, and therefore the probative value of proffered evidence of record in its whole. Owens v. Brown, 7 Vet. App. 429, 433 (1995); see Elkins v. Gober, 229 F. 3d 1369 (Fed. Cir. 2000); Madden v. Gober, 125 F. 3d 1477, 1481 (Fed. Cir. 1997) (and cases cited therein); Guimond v. Brown, 6 Vet. App. 69, 72 (1993); Hensley v. Brown, 5 Vet. App. 155, 161 (1993).

In determining whether documents submitted by a veteran are credible, the Board may consider internal consistency, facial plausibility, and consistency with other evidence submitted on behalf of the claimant. Caluza v. Brown, 7 Vet. App. 498, 511 (1995); see also Pond v. West, 12 Vet. App. 341, 345 (1999) (Observing that in a case where the claimant was also a physician, and therefore a medical expert, the Board could consider the appellant's own personal interest; citing Cartwright v. Derwinski, 2 Vet. App. 24, 25 (1991) (holding that while interest in the outcome of a proceeding "may affect the credibility of testimony it does not affect the competency to testify." (citations omitted).

The Board reiterates the basic three requirements for prevailing on a claim for service connection. To establish entitlement to service connection, there must be (1) competent evidence of a current disability (a medical diagnosis) Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992); Rabideau v. Derwinski, 2 Vet. App. 141, 144 (1992); (2) incurrence or aggravation of a disease or injury in service (lay or medical evidence) Layno v. Brown, 6 Vet. App. 465, 469 (1994); Cartright v. Derwinski, 2 Vet. App. 24, 25 (1991); and (3) a nexus between the in-service disease or injury and the current disability (medical evidence) Grottveit v. Brown, 5 Vet. App. 91. 93 (1993). See Caluza v. Brown, 7 Vet. App. 498 (1995); Hickson v. West, 12 Vet. App. 247, 253 (1999).

In the case at hand the veteran seeks entitlement to service connection for lung cancer. Initially he satisfies the first requirement for prevailing on a claim for service connection; that is, he has the disability at issue.

Applying the various pertinent criteria relevant to his claim, the Board notes that such disorder was not shown in service or for many years thereafter. Accordingly, there is no basis upon which to predicate a grant of service connection on a presumptive basis with application of the general service connection criteria as lung cancer was not shown to be disabling to a compensable degree during the first post service year.

There are other criteria applicable to the veteran's case at hand. The veteran has claimed entitlement to service connection for his lung cancer on the basis of his exposure to AO while in Vietnam, although briefly, enroute to his permanent duty station in Thailand. Such exposure is claimed to have taken place in January 1966. There is service personnel documentation of the veteran's assignment to Takhli Royal Air Base for a tour of duty commencing in January 1966.

Unfortunately, there is no service personnel documentation of the veteran's ever having made a visitation in Vietnam. The pertinent governing criteria do require that there be verification of visitation to Vietnam which is the nature of the veteran's location there briefly enroute to his permanent duty station in Thailand. The Board notes that it was not uncommon for American servicemen stationed in Thailand and other neighboring countries during the Vietnam war to have been transported to and from Vietnam for various reasons including temporary duty, brief missions, or just for rest stops which included picking up and dropping off servicemen whose duties were to varying degrees related to the conflict.

It was also not uncommon that such trips, especially those which were brief, as described by the veteran, were not documented. In fact, it was not uncommon that such temporary stays in Vietnam were last minute decisions due to the exigencies of wartime and the need to use available resources to complete a variety of missions. The RO has already conceded the credibility of the veteran. The Board has no reason not to do the same. As the Board noted earlier in this discussion, it is the Board's principal responsibility

to assess the credibility, and therefore the probative value of proffered evidence of record in its whole.

In this regard, the Board finds that the veteran has been consistent in his recounting of the circumstances of his temporary landing for a brief period of time enroute to his permanent duty station in Thailand. The record clearly shows that he has been cooperative and expeditious in seeking out sources of collateral evidence to support his claim. The Board finds no reason not to accept the veteran's claim of having been in Vietnam for the brief period and under the circumstances he has testified to under oath, and incorporated into his written statements of record including one of which is sworn and notarized. For the purpose of the present determination, the Board accepts as totally credible the veteran's account of the facts and circumstances surrounding his visitation to Vietnam in January 1966 enroute to his permanent duty station in Thailand.

Having overcome the first hurdle in analyzing the veteran's claim of entitlement to service connection for lung cancer, the Board must now determine, in view of the veteran's rather significant smoking history, whether his lung cancer can be attributed to his brief two hour stay in Vietnam. In this regard, as the Board noted earlier, the Veteran cooperated in the development of his claim by obtaining competent medical evidence referable to the likely etiology of his lung cancer.

The veteran submitted a supporting statement from the VA physicians who not only identified his lung cancer, but who participated in his treatment. Both physicians have expressed their opinions and both opinions are supportive. The two physicians have taken cognizance of the veteran's smoking history, a history he did not deny while under oath and testifying before the undersigned. Both physicians are in agreement that the very nature of the veteran's lung cancer is such found in many Vietnam veterans exposed to AO in connection with their duties in Vietnam.

Both physicians are in agreement that even minimal exposure is sufficient to cause the development of lung cancer. Both physicians acknowledged that it was as likely as not that the veteran's lung cancer was related to exposure to AO in Vietnam, an exposure which has been conceded by the undersigned and accepted as fact. There is no competent medical opinion of record discounting any relationship between the veteran's lung cancer and his in service exposure to AO. There is no competent medical opinion of record linking the veteran's post service lung cancer entirely to his smoking history. The Board has no authority or standing to provide a contrary medical opinion. Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991).

The Board finds that the evidentiary record, with application of all pertinent governing criteria, permits the grant of entitlement to service connection for lung cancer as secondary to AO exposure. 38 U.S.C.A. §§ 1110, 1116, 5103, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.159, 3.303, 3.307, 3.309(a), (e) (2003).

ORDER

Entitlement to service connection for lung cancer as secondary to AO exposure is granted.

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RONALD R. BOSCH
Veterans Law Judge, Board of Veterans' Appeals