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

THE ISSUES

1. Entitlement to service connection for diabetes mellitus,type 2, as secondary to herbicide exposure.

2. Entitlement to service connection for erectile dysfunction, as secondary to diabetes mellitus, type 2.

3. Entitlement to service connection for hypertension.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

L. Jeng, Associate Counsel

INTRODUCTION

The veteran had active duty from May 1966 to February 1970.

This matter comes before the Board of Veterans' Appeals Board) from a January 2005 rating decision. In January 2006, the veteran appeared at a hearing at the RO before the undersigned.

FINDINGS OF FACT

1. The veteran is presumed to have been exposed to herbicides while in Vietnam en route to Thailand during active service and diabetes mellitus, type 2, is presumed to have been incurred in service.

2. Erectile dysfunction is the result of service-connected diabetes mellitus, type 2.

3. The preponderance of the evidence is against finding that hypertension is related to service.

CONCLUSIONS OF LAW

1. The criteria for service connection for diabetes mellitus, type 2, as secondary to herbicide exposure have been met. 38 U.S.C.A. §§ 1110, 1116 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2005).

2. The criteria for service connection for erectile dysfunction, as secondary to service-connected diabetes mellitus, type 2, have been met. 38 U.S.C.A. §1110 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2005).

3. The criteria for service connection for hypertension have not been met. 38 U.S.C.A. § 1101, 1110, 1112, 1113, 1137, 5107 (West 2002); 38 C.F.R. §§ 3.307, 3.307, 3.309 (2005).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA), codified in pertinent part at 38 U.S.C.A. §§ 5103, 5103A (West 2002), and the pertinent implementing regulation, codified at 38 C.F.R. § 3.159 (2005), provides that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim. It also requires VA to notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. In addition, VA must also request that the claimant provide any evidence in the claimant's possession that pertains to the claim.

In the present case, the veteran was provided with the notice required by the VCAA by an October 2004 letter. The RO specifically informed the veteran of the evidence required to substantiate his claims, the information required from him to enable VA to obtain evidence on his behalf, the assistance that VA would provide to obtain evidence on his behalf, that he should submit such evidence or provide VA with the information necessary for VA to obtain such evidence on his behalf, and to submit any evidence in his possession pertaining to his claims. Therefore, the Board finds that he was provided with the notice required by the VCAA.

Moreover, all available evidence pertaining to the veteran's claims has been obtained. As the original claims folder was lost, the veteran's claims file has been rebuilt and he has been provided opportunity to submit evidence and argument in support of his claims. The record before the Board contains VA medical records and VA examination reports. In addition, neither the veteran nor his representative has identified any additional pertinent evidence that could be obtained to substantiate his claims. The Board is also unaware of any such evidence. Therefore, the Board is satisfied that VA has complied with its duty to assist the veteran in the development of the facts pertinent to the claims.

Any defect with respect to the correct disability rating or effective date for the claims for diabetes mellitus and erectile dysfunction will be rectified by the agency of original jurisdiction when effectuating any award. The veteran was adequately notified of the requirements service connection for these claims and there is no prejudice to the veteran in granting the claims. Additionally, in light of the Board's denial of the appellant's claim for service connection for hypertension, no disability rating or effective date will be assigned, so there can be no possibility of any prejudice to the appellant under the holding in Dingess v. Nicholson, 19 Vet. App. 473 (2006). For the above reasons, it is not prejudicial to the appellant for the Board to proceed to finally decide the issues on appeal. See Conway v. Principi, 353 F.3d 1369 (Fed. Cir. 2004); Quartuccio, 16 Vet. App. 183; Sutton v. Brown, 9 Vet. App. 553 (1996); Bernard v. Brown, 4 Vet. App. 384 (1993); see also 38 C.F.R. § 20.1102 (2005) (harmless error).

Analysis

When seeking VA disability compensation, a veteran generally seeks to establish that a current disability results from disease or injury incurred in or aggravated by service. 38 U.S.C.A. § 1110. "Service connection" basically means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may

be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. 38 C.F.R. § 3.303(a). Where chronicity of a disease is not shown in service, service connection may yet be established by showing continuity of symptomatology between the currently claimed disability and a condition noted in service. 38 C.F.R. § 3.303(b).

1. Service connection for diabetes mellitus, type 2, as secondary to herbicide exposure.

The veteran contends that he was exposed to herbicides en route to service in Thailand when his flight stopped over in Vietnam for 24 hours.

A veteran who, during active military service, served in Vietnam during the period beginning in January 1962 and ending in May 1975, is presumed to have been exposed to herbicides. See 38 U.S.C.A. § 1116(a)(2)(F); 38 C.F.R. 3.307(a)(6)(ii).

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 nation) 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). Id. 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.

According to the veteran's DD Form 214, the veteran had two years of Foreign Service during his service from May 1966 to February 1970. At his hearing, the veteran testified that he stopped in Vietnam for 24 hours en route to Thailand. Based on the veteran's sworn testimony, the Board finds that he was in Vietnam and thus he is presumed to have been exposed to herbicides.

If a veteran was exposed to a herbicide agent during active military, naval, or air service, diabetes mellitus shall be service-connected, if the requirements of 38 C.F.R. § 3.307(a) are met, even if there is no record of such disease during service. 38 C.F.R. § 3.309(e). Furthermore, the last day on which a veteran is presumed to have been exposed to an herbicide agent shall be the last date on which he served in Vietnam. 38 C.F.R. § 3.307(6)(iii).

There is no question that the veteran has a current diagnosis of diabetes mellitus, type 2. For example, the November 2004 VA examination report noted an assessment of diabetes mellitus, type 2. Since the veteran has a current diagnosis of diabetes mellitus and he is presumed to have been exposed to herbicides, service connection based on herbicide exposure is granted.

2. Service connection for erectile dysfunction, as secondary to diabetes mellitus, type 2.

Establishing service connection on a secondary basis essentially requires evidence sufficient to show: (1) that a current disability exists; and (2) that the current disability was either caused or aggravated by a service-connected disability. 38 C.F.R. §§ 3.303, 3.310.

The veteran has a current disability. The November 2004 VA examination report noted an assessment of erectile dysfunction. In this decision, as indicated above, the veteran has been service connected for diabetes mellitus, type 2. The question is whether erectile dysfunction was either caused or aggravated by

service-connected diabetes mellitus. The November 2004 VA examination report noted the erectile dysfunction was secondary to diabetes. Based on this evidence, service connection for erectile dysfunction, as secondary to diabetes mellitus, type 2, is granted.

3. Service connection for hypertension

Where a veteran served 90 days or more during a period of war or during peace-time service after December 31, 1946, and hypertension becomes manifest to a degree of 10 percent within one year from date of termination of such service, such disease shall be presumed to have been incurred in 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, 1112, 1113, 1137; 38 C.F.R. § 3.307, 3.309. This presumption, however, does not apply in this case as there is no evidence that hypertension manifested to a degree of 10 percent within one year of service separation.

The veteran has a current diagnosis of hypertension. The November 2004 VA examination report noted an assessment of hypertension. While service medical records are unavailable (as indicated above, the veteran's original claims folder was lost), there is no indication that hypertension is related to service. At his January 2006 hearing, the veteran testified that he may have been treated in-service for stress or hypertension. However, there is no competent medical evidence providing a nexus between the veteran's current hypertension and service. In any case, the first indication of disability post-service is 37 years after discharge. The veteran testified that his current disability manifested in 1991. In view of the lengthy period without treatment, there is no evidence of continuity of symptomatology and this weighs against the claim. Maxson v. Gober, 230 F.3d 1330 Fed. Cir. 2000). Service connection for hypertension is unwarranted.

While the veteran has suggested that he currently has hypertension related to service, as a lay person, he is not competent to give an opinion on the etiology of a condition. Espiritu v. Derwinski, 2 Vet. App. 492 (1992).

The preponderance of the evidence is against finding that the veteran has hypertension related to service. When the preponderance of evidence is against a claim, it must be denied. 38 U.S.C.A. § 5107; see also Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

ORDER

Service connection for diabetes mellitus, type 2, as secondary to herbicide exposure, is allowed.

Service connection for erectile dysfunction, as secondary to diabetes mellitus, type 2, is allowed.

Service connection for hypertension is denied.

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RONALD W. SCHOLZ
Acting Veterans Law Judge, Board of Veterans' Appeals