

I. Duty to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) describes VA's duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2005).

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his or her representative, if any, of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a) (West 2002 & Supp. 2005); 38 C.F.R. § 3.159(b) (2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). Proper VCAA notice 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; (3) that the claimant is expected to provide; and (4) must ask the claimant to provide any evidence in her or his possession that pertains to the claim in accordance with 38 C.F.R. § 3.159(b) (1). VCAA notice should be provided to a claimant before the initial unfavorable agency of original jurisdiction (AOJ) decision on a claim. *Pelegri v. Principi*, 18 Vet. App. 112 (2004); see also *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

Given the fully favorable determination, detailed below, the Board finds that any error as to the content or timing of the veteran's notice, including notice required under *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006), is harmless error. Such deficiency will be corrected when the veteran's award is assigned.

II. Analysis

Service connection may be granted for disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, in the active military, naval, or air service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303(a).

Service connection may also be granted for any disease initially 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).

When there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107(b) (West 2002).

The veteran has contended that his lung cancer is due to exposure to Agent Orange during service.

38 U.S.C.A. § 1116(a) (West 2002) provides presumptive service connection on the basis of herbicide exposure for specified diseases manifested to a degree of 10 percent within a specified period in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. It also provides presumptive service connection on the basis of herbicide exposure for each additional disease that the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having a positive association with exposure to an herbicide agent, and that becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

The following diseases shall be service connected if the veteran was exposed to an herbicide agent during active service, even though there is no record of such disease during service, and provided further that the requirements of 38 C.F.R. § 3.307(d) are satisfied: chloracne or other acneform disease consistent with chloracne, Hodgkin's disease, type II diabetes mellitus, multiple myeloma, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, certain respiratory cancers (including lung cancer), and soft tissue sarcoma. 38 C.F.R. § 3.309(e).

The Board notes the evidence of record indicates the veteran has a current diagnosis of lung cancer. Therefore, it must be determined whether the veteran was exposed to Agent Orange. In this case, the veteran's DD Form 214 shows he was in receipt of the Vietnam Service Medal.

In *Haas v. Nicholson*, No. 04-491 (U.S. Vet. App. Aug. 16, 2006), the U.S. Court of Appeals for Veterans Claims (Court) indicated that for purposes of applying the presumption of exposure to herbicides under 38 C.F.R. § 3.307(a)(6)(iii), "service in the Republic of Vietnam" will, in the absence of contradictory evidence, be presumed based upon the veteran's receipt of a Vietnam Service Medal, without any additional proof required that a veteran who served in waters offshore actually set foot on land in the Republic of Vietnam. In other words, exposure to herbicides will be presumed based on the receipt of a Vietnam Service Medal.

Therefore, while the veteran did not contend that he served on land in Vietnam, his receipt of the Vietnam Service Medal is acceptable proof of his service in the Republic of Vietnam. Based on this, the Board will resolve any doubt in favor of the veteran and find that presumptive service connection is granted for lung cancer, based on the veteran's presumed exposure to Agent Orange while on active duty. See 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6)(iii), 3.313(a); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

ORDER

Service connection for lung cancer, to include as due to exposure to Agent Orange, is granted, subject to the regulatory criteria relating to the payment of monetary awards.

JEFF MARTIN

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs