



otherwise shown; the veteran did not file a timely appeal following appropriate notice, and that decision became final.

2. Evidence received since the December 2003 rating decision raises a reasonable possibility of substantiating the service connection claim for diabetes mellitus, claimed as due to Agent Orange exposure in Ubon, Thailand.

3. Resolving any doubt in the veteran's favor, exposure to Agent Orange at the Ubon, Thailand Air Field in January 1969 has been shown.

#### CONCLUSIONS OF LAW

1. A December 2003 rating decision declining to reopen a service connection claim for diabetes mellitus is final. 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2002, 2006).

2. Evidence received since the December 2003 rating decision that declined to reopen a service connection claim for diabetes mellitus based on herbicide exposure is new and material, and the veteran's service connection claim for such disability is not reopened. 38 U.S.C.A. § 5108 (West 2002 & Supp. 2006); 38 C.F.R. § 3.156 (2006).

3. Diabetes mellitus was incurred during active service. 38 U.S.C.A. §§ 1101, 1110, 1131 (West 2002 & Supp. 2006); 38 C.F.R. § 3.303 (2006).

#### REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veterans Claims Assistance Act of 2000 (VCAA) redefined the obligations of VA with respect to the duty to assist, and imposed on VA certain notification requirements. 38 U.S.C.A. § 5100 (West 2002 & Supp. 2006); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2006). Without deciding whether the notice and development requirements of VCAA have been satisfied in the present case, it is the Board's conclusion that the new law does not preclude the Board from adjudicating this portion of the veteran's claim. This is so because the Board is taking action favorable to the veteran by reopening his service connection claim for diabetes, and ultimately granting service connection for such disability. Thus, a decision on the merits poses no risk of prejudice to the veteran. See *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006); *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 (2006) (harmless error).

#### New and Material Evidence Claim

Rating decisions are final and binding based on evidence on file at the time the claimant is notified of the decision and may not be revised on the same factual basis except by a duly constituted appellate authority. 38 C.F.R. § 3.104(a). The claimant has one year from notification of a RO decision to initiate an appeal by filing a notice of disagreement with the decision, and the decision becomes final if an appeal is not perfected within the allowed time period. 38 U.S.C.A. § 7105; 38 C.F.R. §§ 3.160, 20.201, and 20.302.

In a December 2003 decision, the RO denied service connection for diabetes; claimed as due to herbicide exposure; the veteran was notified of that decision in the same month. He did not file a timely appeal, and the December 2003 decision became final. 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2003, 2006).

Since the December 2003 rating decision is final, the veteran's service connection claim for diabetes may be considered on the merits only if new and material evidence has been received since the time of the prior adjudication. See 38 U.S.C.A. §§ 5108, 7104 (West 2002 & Supp. 2006); 38 C.F.R. § 3.156 (2006); *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996).

New evidence means existing evidence not previously submitted to agency decisionmakers. Material evidence means existing 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 of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a) (2006). In determining whether evidence is new and material, the credibility of the new evidence is to be presumed. *Justus v. Principi*, 3 Vet. App. 510, 513 (1992).

With respect to the issue of materiality, the newly presented evidence need not be probative of all the elements required to award the service connection claim. In *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998), the Federal Circuit noted that new evidence could be sufficient to reopen a claim if it could contribute to a more complete picture of the circumstances surrounding the origin of a veteran's injury or disability, even where it would not be enough to convince the Board to grant a claim.

The evidence associated with the claims folder at the time of the December 2003 rating decision included the veteran's service medical records which were negative for complaints, treatment, or diagnosis of diabetes mellitus. VA and private medical evidence showed a current diagnosis of diabetes. The record did not contain evidence of herbicide exposure in Vietnam or otherwise. Therefore, the RO denied the veteran's claim in December 2003 on the basis that there was no evidence of Vietnam service, and therefore exposure to Agent Orange could not be presumed, nor was there evidence showing that he was otherwise exposed to herbicides while performing his military duties in Ubon. Thus, in this case, to be new and material, the evidence needs to show the requisite service in Vietnam, or exposure to herbicides in connection with his duties in Ubon.

As the last final disallowance of the veteran's service connection claim for diabetes, was a December 2003 rating decision, the Board must now determine whether new and material evidence sufficient to reopen the claim has been received subsequent to the December 2003 decision.

On review, the Board finds that the veteran has submitted new and material evidence since the December 2003 rating decision sufficient to reopen his service connection claim for diabetes. The evidence received since the December 2003 rating decision includes an excerpt from a book titled "Herbicide Warfare: The RANCH HAND Project in Vietnam," in which it was noted that in January 1969, seven spray planes flew to Ubon, Thailand to attack a special target in Laos the following day. This newly-received evidence is material in that it raises a reasonable possibility that the veteran may have been exposed to herbicides in Ubon, as he was stationed there in January 1969. That evidence, either by itself or when considered with the previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. 38 C.F.R. § 3.156 (2006). It raises a reasonable possibility of establishing the claim. *Id.* Therefore, the evidence is considered new and material for the purpose of reopening the service connection claim for diabetes. Accordingly, the claim is reopened.

Legal Criteria - 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, 1131. Service connection may also 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). Disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. 38 C.F.R. § 3.310.

There must be medical evidence of a current disability, medical or lay evidence of in-service incurrence or aggravation of a disease or injury, and medical evidence linking the current disability to that in-service disease or injury. *Pond v. West*, 12 Vet. App. 341, 346 (1999); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

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, and has a disease listed at 38 C.F.R. § 3.309(e) shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

If a veteran was exposed to a herbicide agent during active military, naval, or air service, the following diseases 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: chloracne or other acneform diseases consistent with chloracne, Hodgkin's disease, multiple myeloma, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, respiratory cancers, diabetes mellitus and soft-tissue sarcomas. 38 C.F.R. § 3.309(e).

#### Analysis

Medical evidence confirms a current diagnosis of diabetes mellitus, type II, thereby satisfying the first element of the veteran's service connection claim.

The veteran attributes his diabetes mellitus to Agent Orange exposure. His only contention is that he was exposed to Agent Orange while serving in Ubon, Thailand between September 1968 and August 1969. He states that he loaded and unloaded Agent Orange from C-123s that had stopped at Ubon Airfield on their way to Vietnam and Laos. The veteran states that, as a supplyman, his duties included logistical support for all units that transported Agent Orange. He reports that he handled Agent Orange in leaky containers once or twice per month during its storage and transferring process. He also observed that the liquid from the containers got on his skin and clothing, despite the gloves that were issued.

Initially, the Board acknowledges that diabetes is a disability which is afforded a presumption of exposure to herbicides. However the presumption of exposure to herbicides is only for all veterans who served in Vietnam during the Vietnam Era; no such presumption exists for veterans stationed in Thailand during the veteran's period of service. 38 C.F.R. § 3.307(a)(6)(iii). In this case, as the veteran's service personnel records show that he was stationed in Ubon, Thailand, he is not entitled to a finding of presumptive herbicide exposure on the basis of loading and unloading material in Thailand thought to contain Agent Orange.

The veteran's service personnel records also show that he was attached to the 8th Supply Squadron. The veteran testified that such squadron was a sub-unit of the 8th Tactical Fighter Wing.

In 1979, the veteran underwent a VA examination based on his claim of Agent Orange exposure. He indicated that while serving in Ubon, Thailand, he was exposed to such

chemicals for approximately nine months while unloading aircrafts. He reported memory loss and numbness in his hands and feet since 1969.

Service personnel records show that the veteran's military occupational specialty was a material facility supervisor, which included receiving all incoming shipments. In other words, he was a warehouseman with various supply-related duties. Personnel records include a performance appraisal for the period from September 1968 to May 1969 while the veteran was stationed in Ubon. It was noted that the veteran was to be promoted due to his outstanding performance.

The record also contains a response from the National Personnel Records Center dated in January 2002, which notes that there are no records showing that the veteran was exposed to herbicides.

According to a February 2002 statement, a service member with the 8th Tactical Fighter Wing was stationed at Ubon Airfield from March 1969 to March 1970 indicated that his unit was involved in special operational missions involving Agent Orange; the planes were flown from Ubon Airfield into Vietnam and Laos.

According to an internal email dated in October 2003, the Department of Defense has no evidence of herbicide use, testing, or disposal in Thailand in 1968 or 1969.

According to the Department of the Air Force, the Ranch Hand used Thailand Air bases as stops en route to missions in Laos (see June 2005 letter in response to an inquiry regarding the dates and location of Ranch Hand activities based in Thailand).

According to a March 2006 statement, a private physician, Dr. Clarke, stated that the veteran's exposure to Agent Orange while serving in Thailand is a contributory cause of his type II diabetes mellitus.

In December 2006, the veteran submitted an excerpt from a book titled "Herbicide Warfare: The RANCH HAND Project in Vietnam." According to the excerpt, a C-123 pilot stated that on January 17, 1969, seven spray planes flew to Ubon, Thailand to attack a special target in Laos the following day.

In March 2007, the Board received a statement by an airman who served with the 8th Tactical Fighter Wing at Ubon between 1969 and 1972. He recalled loading barrels of Agent Orange onto C-123's. He recalled rolling the barrels up the ramp, loading them into the cargo hold, and seeing the spray equipment inside the planes.

In this case, although the Department of Defense confirmed that there was no actual use of herbicides in Thailand during the applicable time period, there still remains the question as to whether spray planes stopped at Ubon Airfield for loading and unloading of herbicides. With regard to this question, the Board finds that the evidence is in equipoise.

The excerpt from "Herbicide Warfare" indicates that seven spray planes stopped at Ubon Airfield in January 1979 before flying into Vietnam; significantly, the veteran's service records show that he was stationed in Ubon in January 1979. Also, the various lay statements of record suggest that Agent Orange was loaded and unloaded onto C-123s at Ubon Airfield, and the Department of the Air Force indicated that Operation Ranch Hand used Thailand air bases as stops en route to missions in Laos. Lastly, the Board notes that the veteran's statements regarding his claimed exposure have been relatively consistent since 1979. Therefore, based on the record as a whole, the Board finds that, resolving any doubt in the veteran's favor, the veteran was exposed to Agent Orange while serving in Ubon. Accordingly, service connection for diabetes mellitus, type II, secondary to Agent Orange exposure is warranted.

ORDER

New and material evidence has been submitted sufficient to reopen a service connection claim for diabetes mellitus.

Service connection for diabetes mellitus, type II, is granted.

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THOMAS J. DANNAHER  
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs