

Occupation 1: Technical Order Library Clerk.

Occupation 2: Security/Police Department Augmentee

Citation Nr: 1113603

Decision Date: 04/06/11 Archive Date: 04/15/11

DOCKET NO. 00-21 562) DATE
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On appeal from the
Department of Veterans Affairs Regional Office in Indianapolis, Indiana

THE ISSUE

Entitlement to service connection for a cardiovascular disease, to include ischemic cardiomyopathy with congestive heart failure, as due to exposure to herbicides.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

M. J. In, Associate Counsel

INTRODUCTION

The Veteran served on active duty from September 1966 to September 1970. This matter comes properly before the Board of Veterans' Appeals (Board) on appeal from a March 2000 rating decision by the Department of Veterans Affairs (VA) Regional Office in Indianapolis, Indiana (RO).

In a July 2004 decision, the Board remanded the Veteran's claim for service connection for diabetes mellitus, claimed as a residual of Agent Orange exposure in service. In the remand decision, the Board directed the RO to readjudicate the claim after undertaking further development to determine if the Veteran was exposed to Agent Orange in Thailand during service. The RO has not yet readjudicated and recertified this issue to the Board. Accordingly, the issue of entitlement to service connection for diabetes mellitus, claimed as a residual of Agent Orange exposure, is referred to the RO for the appropriate action.

FINDINGS OF FACT

1. The medical evidence of record shows that the Veteran has a current diagnosis of ischemic cardiomyopathy, with congestive heart failure.
2. The competent evidence of record shows that the Veteran was exposed to herbicides during active military service.

CONCLUSION OF LAW

Ischemic cardiomyopathy, with congestive heart failure, is presumed to have been incurred in active military service. 38 U.S.C.A. §§ 1110, 1116, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As provided for by the Veterans Claims Assistance Act of 2000, VA has a 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); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2010). In this case, the Board is granting in full the benefit sought on appeal. Accordingly, without deciding that any error was committed with respect to the duty to notify or the duty to assist, such error was harmless and need not be further considered.

Generally, service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). In addition, 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).

Additionally, a Veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era 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. 38 U.S.C.A. § 1116(f); 38 C.F.R. § 3.307. The following diseases are deemed associated with herbicide agent exposure, under VA law: 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 (cancer of the lung, bronchus, larynx, or trachea), soft-tissue sarcomas (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma and diabetes mellitus (Type 2)). 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6)(iii), 3.309.

The most recent issuance by the Secretary has added hairy cell leukemia and other chronic B-cell leukemias, Parkinson's disease, and ischemic heart disease to the list of presumptive disabilities in the regulation. See Final Rule, 75 Fed. Reg. 53,202-16 (Aug. 31, 2010).

While all Veterans who served in the Republic of Vietnam during the Vietnam era are presumed to have been exposed to an herbicide agent, the Veteran's service personnel records do not show that he ever served in Vietnam, nor does he claim that he did. See 38 U.S.C.A. § 1116(f); 38 C.F.R. § 3.307. Instead, the Veteran claims exposure to herbicides while stationed at the Udorn Air Force Base in Thailand.

VA has established a procedure for verifying exposure to herbicides in Thailand during the Vietnam Era. See the VA Adjudication Manual, M21-1MR, Part IV, Subpart ii, Chapter 2, Section C ("M21-1MR"). VA has determined that there was significant use of herbicides on the fenced-in perimeters of military bases in Thailand intended to eliminate vegetation and ground cover for base security purposes as evidenced in a declassified Vietnam era Department of Defense document titled "Project CHECO Southeast Asia Report: Base Defense in Thailand." Special consideration of herbicide exposure on a facts-found or direct basis should be extended to those veterans whose duties placed them on or near the perimeters of Thailand military bases. This allows for presumptive service connection of the diseases associated with herbicide exposure.

The majority of troops in Thailand during the Vietnam era were stationed at the Royal Thai Air Force Bases of U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, and Don Muang. If a veteran served on one of these air bases 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 MOS (military occupational specialty), performance evaluations, or other credible evidence, then herbicide exposure should be acknowledged on a facts found or direct basis. However, this applies only during the Vietnam era, from February 28, 1961, to May 7, 1975. See M21-1MR, Part IV, Subpart ii, Chapter 2, Section C.10.(q).

The Veteran's service treatment records are negative for any diagnoses of an ischemic heart disease.

After separation from military service, a December 1999 letter from the Veteran's private physician, Dr. R.K., gave a diagnosis of ischemic cardiomyopathy with a left ventricular ejection fraction of 20 percent. Dr. K. stated that this was due to a clinically silent anterior myocardial infarction due to total occlusion of his left anterior descending coronary artery.

The medical evidence of record shows that the Veteran has a current diagnosis of an ischemic heart disease. Accordingly, if the Veteran is found to have been exposed to an herbicide agent during military service, to include Agent Orange, presumptive service connection is warranted for the Veteran's ischemic heart disease.

The Veteran's service personnel records show that he was stationed at the Udorn Air Force Base (AFB) in Thailand from July 1968 to July 1969. This time period is during the Vietnam era during which VA has acknowledged that herbicides were used near the air base perimeter. Accordingly, if the Veteran is found to have served on or near the air base perimeter during his tour in Thailand, the preponderance of the evidence will show presumptive exposure to herbicide.

The Veteran's service personnel records indicate that his period of service in Thailand was with 432nd Tactical Reconnaissance Wing at the Udorn Air Force Base as a Technical Order Library Clerk. This is not one of the listed MOSs in the M21-1MR that has been shown to have served on or near the air base perimeter.

However, in written statements and sworn testimony before the RO at a hearing conducted in December 2002, the Veteran has provided competent credible evidence that his duties involved servicing the aircraft that were used to

spray herbicide along the perimeter of the bases in Thailand. In a March 2001 statement, the Veteran reported that he was assigned to the Chief of Maintenance of the Quality Control Section when he arrived in Thailand in July 1968. He stated that he served in the Technical Order Library where his responsibilities were to maintain up-to-date all manuals, instructions, procedures, and technical orders, inspect other units to ensure compliance with the changes, and to destroy outdated confidential technical orders at a landfill near the perimeter. He also reported that one of his primary duties was to inspect any type of aircraft assigned to Udorn AFB that received any type of battle damage and prepare a written report as to the nature of the damage. During his December 2002 RO hearing, he stated that these airplanes included Air Force aircraft, any transit aircraft, Thai aircraft, and Air America aircraft operated by the Central Intelligence Agency (CIA). He described

Many of the their aircraft were equipped with spray nozzle systems which allowed the herbicides to be sprayed from the 50 gallon barrels out along the bottom of the fixed wing aircraft area, or along the bottom of the helicopter. When these aircraft sustained damage and an inspection was required many times the herbicide would drip onto me from the spray mechanisms. At times I discussed the spray systems with the Air America people, they indicated they were spraying weed killer mostly along the perimeter of the bases in Thailand, and also along the Mekong River in Vietnam and Laos.

The Veteran's Form DD-214 lists his MOS as an Aircraft Mechanic. His service personnel records indicate his duty as Technical Order Library Clerk during his tour in Thailand. This is consistent with his contentions as to the type of duties performed during his service in Thailand.

In addition, the Veteran reported that about halfway through his tour in Thailand, he was temporarily assigned to the Security/Police Department on a one month temporary duty (TDY) as an augmentee security guard to assist other regular security personnel. He stated that he was assigned to posts in remote areas along the runway, taxi way, landfill, and an area called "salt and pepper grinder" where all ordnance was stored at the Udorn AFB, along with all of the 50 gallon barrels of herbicides, pesticides, and other chemicals. He described that he was required to walk in and around all of the areas to make sure all the material was secure; however, it was not uncommon that both the ordnance and the containers of herbicide would leak badly.

The Board remanded the case in July 2004 for further development to determine whether Agent Orange was used at Udorn Airbase, Thailand during the period from July 1968 to August 1969, mandating a research by the US Army & Joint Services Records Research Center (JSRRC) in accordance with the M21-1MR. A September 2007 JSRRC response indicated that the historical records were unavailable to verify that Agent Orange were stored, transported, sprayed, or tested at Udorn Royal Air Base. Subsequently, however, the JSRRC stated in December 2007 that the Agent Orange request on behalf of the Veteran had not been researched based on review and that the request should be re-submitted via mail or fax only. The RO re-submitted the request in December 2007 via mail, but the record includes no further information received by the JSRRC. Further, in December 2007 and August 2008, the RO contacted the CIA to confirm whether aircraft operated by the CIA and used to spray Agent Orange were based out of Udorn Airbase, Thailand during the period from July 1968 to August 1969. However, the CIA indicated in November 2008, only that it had

no information on the Veteran and that the Veteran was never part of a covert activity in the Republic of Vietnam.

In summary, the evidence of record shows that the Veteran served in Thailand during the Vietnam era the period in which VA has acknowledged that Agent Orange was used near the air base perimeter at Udorn AFB. While the JSRRC finding does not clearly identify whether the Veteran was exposed to Agent Orange while stationed at Udorn Air Base in Thailand, the Board highlights that there is no basis in the record to question the Veteran's credibility regarding his statements. The statements by the Veteran indicate that he regularly had contact with the base perimeter while servicing damaged aircraft assigned to Udorn AFB and served on a TDY as an augmentee security guard, which is one of the MOSs conceded to have been exposed to herbicides in Thailand. The Veteran's statements as to the type of duties performed by him within the perimeter of the Udorn Air base in Thailand are 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). It is the defined and consistently applied policy of VA to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. As there is no evidence of record that contradicts the Veteran's claim as to the type of duties performed during his service in Thailand, they must be presumed to be accurate. Any reasonable doubt regarding the accuracy of the Veteran's statements is resolved in favor of the Veteran. See 38 C.F.R. § 5107(b).

Accordingly, applying the doctrine of reasonable doubt, presumptive service connection is warranted for ischemic cardiomyopathy, with congestive heart failure. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Service connection for ischemic cardiomyopathy with congestive heart failure, as due to exposure to herbicides, is granted.

JOY A. MCDONALD
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs