

Occupation 1: Inventory management specialist

Citation Nr: 1113898

Decision Date: 04/08/11 Archive Date: 04/15/11

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On appeal from the
Department of Veterans Affairs Regional Office in Pittsburgh, Pennsylvania

THE ISSUE

Entitlement to service connection for the cause of the Veteran's death.

REPRESENTATION

Appellant represented by:

ATTORNEY FOR THE BOARD

Saira Spicknall, Associate Counsel

INTRODUCTION

The Veteran served on active duty from June 1963 to June 1967 and from June 1967 to January 1968, with service in Thailand from July 1966 to July 1967.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a March 2006 rating decision of the Pittsburgh, Pennsylvania Department of Veterans' Affairs (VA) Regional Office (RO).

FINDINGS OF FACT

1. The Veteran died on December [redacted], 2004, at the age of 58; the Certificate of Death establishes that the cause of the Veteran's death was a lymphatic gland cancer.
2. At the time of the Veteran's death, he had not established entitlement to service connection for any disabilities.
3. The information of record establishes that the Veteran served in Thailand from July 1966 to July 1967 at the Takhli Royal Thai Air Force Base near an area in which herbicides were sprayed within fenced perimeters; and thus the record evidence is in relative equipoise as to whether the Veteran was exposed to herbicide agents in service.

4. The record evidence is in relative equipoise as to whether there is a causal relationship between the Veteran's exposure to herbicide agents in service and the subsequent development of his fatal non-Hodgkin's lymphoma.

CONCLUSION OF LAW

Resolving all reasonable doubt in favor of the Appellant, a disease or injury of service origin contributed substantially or materially to the Veteran's death. 38 U.S.C.A. §§ 1110, 1112, 1116, 1310, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.312 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veterans Claims Assistance Act (VCAA)

The VCAA, codified, in part, at 38 U.S.C.A. § 5103, was signed into law on November 9, 2000. Implementing regulations were created, codified at 38 C.F.R. § 3.159 (2010). The legislation has eliminated the well-grounded claim requirement, has expanded the duty of VA to notify the Appellant and the representative, and has enhanced its duty to assist an appellant in developing the information and evidence necessary to substantiate a claim. See generally VCAA.

In this case, the Board finds that the RO has substantially satisfied the duties to notify and assist, as required by the VCAA. To the extent that there may be any deficiency of notice or assistance, there is no prejudice to the Appellant in proceeding with this issue given the fully favorable nature of the Board's decision.

Background and Analysis

The Appellant contends that during her husband's service in Thailand, during the Vietnam War era, all the airmen assigned to Thailand were flown by military chartered civilian aircrafts which went into Vietnam to refuel. She also alleged that his DD form 214 indicates that he was discharged at the Takhli Royal Thai Air Force Base (RTAFB), Thailand in June 1967, allowing him to go on reenlistment leave to Vietnam for three days.

In the instant case, the Veteran's Certificate of Death indicates that he died on December [redacted], 2004, at the age of 58. The Certificate of Death also establishes that the cause of the Veteran's death was a lymphatic gland cancer.

At the time of the Veteran's death, he had not established entitlement to service connection any disabilities.

The survivors of a Veteran who has died from a service-connected disability or compensable disability may be entitled to receive dependency and indemnity compensation. 38 U.S.C.A. § 1310 (West 2002). The death of a Veteran will be considered as having been due to a service-connected disability when the evidence establishes that such disability was either the principal or contributory cause of death. 38 U.S.C.A. § 1101, 1112; 38 C.F.R. § 3.312(a).

To establish service connection for the cause of the Veteran's death, the evidence must show that a disability incurred in or aggravated by service either caused or contributed substantially or materially to cause death. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312. The service-connected disability will be considered as the principal (primary) cause of death when such disability, singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto. 38 C.F.R. § 3.312(b). A contributory cause of death is inherently one not related to the principal cause. In determining whether a service-connected disability contributed to death, it must be shown that it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death. It is not sufficient to show that it casually shared in producing death, but rather it must be shown that there was a causal connection. 38 C.F.R. § 3.312(c)(1).

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303(a) (2010). In addition, service connection may be granted for any disease diagnosed after discharge, when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

In order to establish service connection for a claimed disorder on a direct basis, there must be: (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of the in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

The determination as to whether the requirements for service connection are met is based on an analysis of all of the evidence of record and the evaluation of its credibility and probative value. 38 U.S.C.A. § 7104(a) (West 2002); 38 C.F.R. § 3.303(a) (2010). See *Baldwin v. West*, 13 Vet. App. 1 (1999). When there is an approximate balance of positive and negative evidence regarding a material issue, 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); 38 C.F.R. § 3.102 (2010). See *Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001). If the Board determines that the preponderance of the evidence is against the claim, then it has necessarily found that the evidence is not in approximate balance, and the benefit of the doubt rule will not be applicable. *Ortiz*, 274 F.3d at 1365.

For purposes of establishing service connection for a disability resulting from exposure to herbicide agents, a veteran who had active military, naval, or air service in the Republic of Vietnam during the Vietnam Era, beginning on January 9, 1962, and ending on May 7, 1975, will be presumed to have been exposed to an herbicide agent during that service, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. U.S.C.A. § 1116(f); 38 C.F.R. §§ 3.307(a)(6)(iii), 3.309(e).

The following diseases are deemed associated with herbicide exposure, under current VA law: chloracne or other acneform diseases consistent with chloracne, Type 2 diabetes, 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), and soft-tissue sarcomas (other than

osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). The foregoing diseases shall be service connected if a veteran was exposed to an herbicide agent during active military, naval, or air service, if the requirements of 38 U.S.C.A. § 1116, 38 C.F.R. § 3.307(a)(6)(iii) are met, even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of 38 U.S.C.A. § 1113 (West 2002); 38 C.F.R. § 3.307(d) are also satisfied. 38 U.S.C.A. §§ 501(a), 1116; 38 C.F.R. §3.309 (e).

The diseases listed at § 3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year after the last date on which the veteran was exposed to an herbicide agent during active military, naval, or air service. 38 C.F.R. § 3.307(a)(6)(ii). This statutory presumption, however, is not for application in this case as the Veteran does not have the requisite service in Vietnam during the Vietnam era.

Notwithstanding the foregoing presumption provisions, a claimant is not precluded from establishing service connection for disability due to exposure to herbicides 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).

VA has developed specific procedures to determine whether a Veteran was exposed to herbicides in a vicinity other than the Republic of Vietnam or along the demilitarized zone (DMZ) in Korea. VA's Adjudication Procedure Manual, M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, para. 10(n), directs that a detailed statement of the Veteran's claimed herbicide exposure be sent to the Compensation and Pension (C&P) Service via e-mail and a review be requested of the inventory of herbicide operations maintained by the Department of Defense (DOD) to determine whether herbicides were used or tested as alleged. If the exposure is not verified, a request should then be sent to the U.S. Army and Joint Services Records Research Center (JSRRC) for verification. See VBA Fast Letter 09-20 (May 6, 2009). The M21-1MR also specifies when herbicide exposure may be conceded in certain cases where the Veteran served in Thailand during the Vietnam era.

The VBA Fast Letter 09-20 provides updated information concerning herbicide use in Thailand during the Vietnam era. Previous development procedures that VBA was using for purposes of developing information concerning possible Agent Orange exposure in Thailand was replaced by a memorandum for the record that was jointly prepared by the Compensation and Pension Service and the Department of Defense. If a claimed herbicide exposure cannot be resolved based on the information contained in the memorandum, then follow-up inquiries must be sent to the JSRRC before the claim can be properly adjudicated. *Id.*

The memorandum reports that tactical herbicides, such as Agent Orange, were used at the Pranburi Military Reservation from April to September 1964, but not near any U.S. military installation or Royal Thai Air Force Base. Other than the 1964 tests on the Pranburi Military Reservation, tactical herbicides were not used or stored in Thailand. See VBA Fast Letter 09-20. The memorandum also reflects that some Operation RANCH HAND aircrafts flew insecticide missions in Thailand from August 1963 to September 1963 and in

October 1966. Id. While there was no reported use of tactical herbicides on allied bases in Thailand, the memorandum indicated evidence of sporadic use of non-tactical (commercial) herbicides within fenced perimeters.

The Veteran's DD form 214, service personnel records, and a response from the National Personnel Records Center all reflect that the Veteran served with the United States Air Force in Thailand from July 1966 to July 1967 at the Takhli RTAFB, for a period of 369 days. His military occupational specialty (MOS) during this time was an inventory management specialist. Service personnel records also indicate that the Veteran served in an isolated area in Thailand and that he had counterinsurgency experience from July 1966 to July 1967 in Thailand. The Veteran's service medical records also reflect that he was found medically qualified for remote site assignment in March 1966.

The C&P Service has determined that a special consideration of herbicide exposure on a factual basis should be extended to Veterans whose duties placed them on or near the perimeters of Thailand military bases. VA's Adjudication Procedure Manual, M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, para. 10(q) provides that herbicide exposure may be conceded on a direct/facts-found basis if the Veteran served with the U.S. Air Force in Thailand during the Vietnam Era at one of the Royal Thai Air Force Bases (RTAFBs) at U-Tapao, Ubon, Nakhon Phanom, Udorn, Takhli, Korat, or Don Muang, and as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence.

In considering the Veteran's MOS of an inventory management specialist, his counterinsurgency experience from July 1966 to July 1967 in Thailand, he served in an isolated area in Thailand, and he was medically qualified for remote site assignment, the Board will resolve doubt in favor of the Appellant and find the Veteran worked near the Takhli RTAFB air base perimeter. See generally *Pentacost v. Principi*, 16 Vet. App. 124 (2002).

As the evidence of record reflects that the Veteran served with the U.S. Air Force in Thailand from July 1966 to July 1967 at the Takhli RTAFB during the Vietnam era, and worked otherwise near the air base perimeter, the evidence is also in relative equipoise as to whether the Veteran was exposed to herbicide agents in service. Id. Accordingly, the Veteran's in-service exposure to herbicide agents may be conceded on a factual basis. See M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, para. 10(q) (2010).

It has been shown by competent medical evidence that the Veteran was diagnosed with non-Hodgkin's lymphoma following discharge from military service. VA outpatient treatment reports from October 2000 to March 2001 and a May 2002 VA examination all reflect the Veteran was treated for and diagnosed with, marginal lymphoma, low grade lymphoma, and non-Hodgkin's lymphoma. In January 2001, a VA physician specified that the Veteran had non-Hodgkin's lymphoma, a cancer of the lymphatic system.

After a careful review of the record and resolving all doubt in favor of the Appellant, the Board finds that a service-connected disability (i.e., non-Hodgkin's lymphoma) did cause or contribute substantially or materially to the Veteran's death. In this regard, the Board initially notes that herbicide exposure has been conceded on a factual basis. The Board also notes the Secretary's discussion of the findings by the National Academy of

Sciences (NAS) based upon its extensive review of sound medical and scientific studies and reports, which contain a great deal of medical and scientific data of many diseases, including non-Hodgkin's lymphoma, found to be related to exposure to herbicide agents. See 64 Fed. Reg. 59232, 592233 (Nov. 2, 1999). In addition, the competent medical evidence of record reflects that the Veteran had been diagnosed with non-Hodgkin's lymphoma. Finally, the Certificate of Death establishes that the cause of the Veteran's death was lymphatic gland cancer. Accordingly, the Board finds it reasonable to conclude that the evidence shows a causal relationship between the Veteran's in-service exposure to herbicide agents and the subsequent development of non-Hodgkin's lymphoma, which did cause or contribute substantially or materially to the Veteran's death. 38 C.F.R. § 3.102 (2010). See also 38 U.S.C.A. § 5107(b); Gilbert v. Derwinski, 1 Vet. App. 49, 53-56 (1990). The appeal is granted.

ORDER

Entitlement to service connection for the cause of the Veteran's death is granted.

DEBORAH W. SINGLETON
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs