

Occupation: Working on aircrafts

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On appeal from the
Department of Veterans Affairs Regional Office in Nashville, Tennessee

THE ISSUE

Entitlement to service connection for prostate cancer, to include as secondary to herbicide exposure.

REPRESENTATION

Appellant represented by: Tennessee Department of Veterans' Affairs

ATTORNEY FOR THE BOARD

A. Spector, Associate Counsel

INTRODUCTION

The Veteran served on active duty from April 1966 to April 1970, and June 1971 to April 1976.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a September 2005 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Nashville, Tennessee, which denied the above claim.

The claim was first reviewed by the Board in April 2008, and remanded the claim for further development. The claim was again reviewed by the Board in July 2010, at which time the claim was denied. The Veteran subsequently submitted a Notice of Appeal to the United States Court of Appeals for Veterans Claims (Court), indicating his disagreement with the denial of his claim of service connection for prostate cancer. The Court issued a March 2011 Order vacating the July 2010 Board decision and remanding the appeal for readjudication consistent with the parties' Joint Motion for Remand (JMR).

FINDING OF FACT

The Veteran's prostate cancer is presumed to be etiologically related to in-service exposure to an herbicide agent.

CONCLUSION OF LAW

The Veteran's prostate cancer is presumed to have been incurred in service.

38 U.S.C.A. §§ 1110, 1131, 5103, 5103A, 5107 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2010).

REASONS AND BASES FOR FINDING AND CONCLUSION

I. Duties to Notify and Assist

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 light of the favorable disposition, a discussion as to whether VA's duties to notify and assist the appellant have been satisfied is not required. The Board finds that no further notification or assistance is necessary, and deciding the appeal at this time is not prejudicial to the Veteran.

II. Service Connection

Service connection may be granted for a 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 of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service occurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the present disability. *Hickson v. West*, 12 Vet. App. 247, 253 (1999); 38 C.F.R. § 3.303(a).

Certain diseases are presumed by law to have been caused or aggravated by herbicide exposure. 38 U.S.C.A. § 1116; see also 38 C.F.R. §§ 3.307, 3.309. In such circumstances, service connection may be granted on a presumptive basis for the diseases listed in 38 C.F.R. § 3.309(e), including prostate cancer. See 38 C.F.R. § 3.307(a)(6)(ii).

The Board must assess the credibility and weight of all the evidence, including the medical evidence, to determine its probative value, accounting for the evidence which it finds to be persuasive or unpersuasive, and providing reasons for rejecting any evidence favorable to the claimant. See *Masors v. Derwinski*, 2 Vet. App. 181 (1992). Equal weight is not accorded to each piece of evidence contained in the record; every item of evidence does not have the same probative value.

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the Veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. 38 U.S.C.A. § 5107; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the benefit of the doubt is afforded to the Veteran.

Prostate Cancer

The Veteran contends that his prostate cancer was a result of his time in active service. Specifically, the Veteran contends that he developed prostate cancer from exposure to Agent Orange while serving in Thailand.

Regarding in-service herbicide exposure, the Veteran specifically asserts that he served at Korat Royal Thai Air Force Base from March 1972 until March 1973, and at U-Tapao Air Base from November 1974 until October 1975. The Veteran's service personnel records in the claims file confirm the reported service in Thailand. The Veteran further submitted statements that affirmed that he was required to perform his duties while working on aircrafts that were parked on ramps close to the base perimeter. Additionally, the Veteran reported that while at U-Tapao, he resided in a small village outside the base. Furthermore, the Veteran reported that in order to get to the village he had to travel along the outer perimeter of the base. Moreover, the Veteran stated that he made these trips on a daily basis. According to the Veteran, herbicides were sprayed to clear areas within and around U-Tapao to prevent the enemy from invading the base. In support of this assertion, the Veteran has provided photographs depicting the location of the previously described areas.

Although the claims file shows that previous attempts by VA in April 2010 to corroborate the Veteran's reported exposure to herbicides through the U.S. Joint Services Records Research Center (JSRRC) was unsuccessful, the Veteran's representative produced a VA Compensation and Pension (C&P) bulletin issued in May 2010 that acknowledges Agent Orange was used to defoliate airbase perimeters in Thailand between February 28, 1961 and May 7, 1975, and directed VA adjudicators to consider claims on a case-by-case basis to include the claimant's proximity to the airbase perimeter and military occupational specialty. In this case, the Veteran has demonstrated he traveled and worked in proximity to the perimeter as part of his duties.

Under the circumstances, the Board finds that the Veteran's personnel records and lay contentions concerning his service and exposure to herbicides in Thailand are credible. The balance of the evidence is, at a minimum, in relative equipoise as to the issue of whether the Veteran was exposed to herbicides during his service in Thailand. Additionally, there is no affirmative evidence in the record to establish that the Veteran was not exposed to herbicides during service. Accordingly, having resolved reasonable doubt as to that question in the Veteran's favor, the Board finds that the Veteran was exposed to herbicides during his active duty service.

The Veteran's private treatment records reflect a diagnosis of prostate cancer. The Veteran's condition was first noted in a March 2004 letter by the Veteran's private physician, which noted that the Veteran was a patient of his since December 2003, and that the Veteran was first diagnosed with prostate cancer in January 2004. Subsequently, multiple private treatment records noted treatment for prostate cancer.

The record supports the conclusion that the Veteran has a current disability of prostate cancer. As the Veteran is presumed to have been exposed to herbicides and has been diagnosed with a disability presumptively linked to herbicide exposure, the Board finds that service connection for prostate cancer is warranted.

ORDER

Entitlement to service connection for prostate cancer, to include as secondary to herbicide exposure is granted.

J. A. MARKEY
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs