

Occupation: a jet engine mechanic.

Citation Nr: 1120212

Decision Date: 05/24/11 Archive Date: 06/06/11

DOCKET NO. 05-12 931) DATE
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On appeal from the
Department of Veterans Affairs Regional Office in Seattle, Washington

THE ISSUES

1. Entitlement to service connection for residuals of prostate cancer.
2. Entitlement to service connection for type II diabetes mellitus.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

ATTORNEY FOR THE BOARD

B. Diliberto, Associate Counsel

INTRODUCTION

The Veteran had active service from February 1964 to February 1968.

This matter comes before the Board of Veterans' Appeals (BVA or Board) on appeal from September 2003 and April 2004 rating decisions of the Department of Veterans Affairs (VA) Regional Office (RO) in Seattle, Washington, that denied the benefits sought on appeal. The Veteran appealed those decisions and the case was referred to the Board for appellate review.

The Board notes that the Veteran requested a hearing before a Veterans Law Judge in his Substantive Appeal (VA Form 9). However, he withdrew his hearing request in March 2009. 38 C.F.R. § 20.704(e) (2010). Accordingly, that request has been withdrawn.

The Veteran's claim was previously before the Board in October 2009, at which time it was remanded for additional development. Unfortunately, with regard to the Veteran's claim of entitlement to service connection for diabetes mellitus, the claims file reflects that further action is warranted, even though such will, regrettably, further delay an appellate decision on this issue.

The issue of entitlement to service connection for diabetes mellitus is addressed in the REMAND portion of the decision below and is REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC.

FINDINGS OF FACT

1. The Veteran was exposed to herbicides while serving in Thailand at Korat Royal Air Force Base between July 1966 and August 1967.
2. The Veteran has been diagnosed with prostate cancer and currently has residuals from prostate cancer.

CONCLUSION OF LAW

The Veteran's residuals of prostate cancer are presumed to have been incurred during his active service in Thailand during the Vietnam era. 38 U.S.C.A. §§ 1101, 1110, 1116, 5103, 5103A, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304, 3.307, 3.309(e), 3.310 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Board is required to ensure that the VA's "duty to notify" and "duty to assist" obligations have been satisfied. See 38 U.S.C.A. §§ 5103, 5103A (West 2002 & Supp. 2010); 38 C.F.R. § 3.159 (2010). In this case, however, no further notice or assistance is required relative to the claim of entitlement to service connection for residuals of prostate cancer as the outcome of the Board's decision is favorable to the Veteran, and no prejudice to the Veteran could result from this adjudication. See *Bernard v. Brown*, 4 Vet. App. 384, 393 (1993).

The Veteran has claimed entitlement to service connection for residuals of prostate cancer. Service connection will be granted for a disability resulting from an injury or disease incurred in or aggravated by active service. See 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303. If there is no showing of a resulting chronic disorder during service, then a showing of continuity of symptomatology after service is required to support a finding of chronicity. 38 C.F.R. § 3.303(b). Service connection may also be granted for any disease diagnosed after discharge, when all evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Generally, to establish service connection, the record must contain (1) medical evidence of a current disability, (2) medical evidence, or in certain circumstances, lay testimony, of an in-service incurrence or aggravation of injury or disease, and (3) evidence of a nexus or relationship between the current disability and the in-service disease or injury. *Coburn v. Nicholson*, 10 Vet. App. 427 (2006); *Disabled American Veterans v. Secretary of Veterans Affairs*, 419 F.3d 1317 (Fed. Cir. 2005). If the Veteran fails to demonstrate any one element, denial of service connection will result.

When all the evidence is assembled, 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 a claim, in which case, the claim is denied. 38 U.S.C.A. § 5107(b); Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

In the case of a veteran who, during active military, naval or air service, served in the Republic of Vietnam during the Vietnam era, namely from February 28, 1961, to May 7, 1975, VA regulations provide that he 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 C.F.R. § 3.307(a)(6)(iii).

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, type II diabetes mellitus, Hodgkin's disease, chronic lymphocytic leukemia, multiple myeloma, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, certain respiratory cancers, and soft tissue sarcoma. 38 C.F.R. § 3.309(e).

Post-service treatment records reflect that the Veteran has been diagnosed with and treated for prostate cancer. Residuals from prostate cancer have also been shown. Therefore, the Veteran has a current disability that may be presumed to be due to herbicide exposure.

Nevertheless, the record does not demonstrate that the Veteran served in the Republic of Vietnam during his military service. Despite the Veteran's assertions that he was on a TDY flight that had to land in DaNang, Vietnam, due to mechanical problems, there is no evidence in the claims file to support such an assertion. Thus, in the absence of evidence that the Veteran served in Vietnam, the automatic presumption of service connection afforded for specific disease associated with exposure to herbicides is not for application.

The Board does note that service connection may still be granted for a disease associated with herbicide exposure if such exposure can be otherwise established. In this regard, the Veteran has alleged exposure to herbicides while stationed in Thailand.

In such cases VA must follow the evidentiary development procedures located in the VA Adjudication Procedure Manual (Manual of M21-1MR) that are applicable to the Veteran's claim. See Campbell v. Gober, 14 Vet. App. 142, 144 (2000); Patton v. West, 12 Vet. App. 272, 282 (1999). Recently, M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, para. 10(q) was adopted for application when the Veteran alleges exposure to herbicides in Thailand. That provision states that if a Veteran served with the U.S. Air Force in Thailand during the Vietnam Era at one of several Royal Thai Air Force Bases, and his or her duties involved being near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports or other credible evidence, herbicide exposure is to be conceded on a direct basis.

In this case, the Veteran's service personnel records show that he served in Thailand from July 1966 to August 1967, and that he served in Korat during that period. Moreover, the record indicates that the Veteran worked as a jet engine mechanic. His performance evaluation reports indicate that his duties involved being near the air base perimeter. Accordingly, the Board concedes that the Veteran was exposed to herbicides during service.

As such, and because the medical evidence reflects that the Veteran was diagnosed with and treated for prostate cancer, the Board finds that service connection is warranted for residuals of prostate cancer.

ORDER

Entitlement to service connection for residuals of prostate cancer is granted.

REMAND

The Veteran has also claimed entitlement to service connection for type II diabetes mellitus on the same basis as his claim of entitlement to service connection for residuals of prostate cancer. However, the Board finds that additional development is necessary with respect to this claim. Accordingly, further appellate review will be deferred and the claim is remanded to the RO/AMC for further action as described below.

As noted above, type II diabetes mellitus is included on the list of diseases which 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. 38 C.F.R. § 3.309(e). Moreover, the Board has conceded herbicide exposure based on the Veteran's service in the Air Force at Korat Royal Air Force Base in Thailand between July 1966 and August 1967.

However, a review of the Veteran's claims file does not indicate a clear diagnosis of type II diabetes mellitus. In this regard, the Board does note that private treatment records from January 2003 indicate findings of "early diabetes." However, that cannot be considered a clear diagnosis of type II diabetes mellitus. Moreover, subsequent private and VA treatment records are negative for findings of diabetes and do not list that condition in the Veteran's medical history. The single clear reference to type II diabetes mellitus is from an August 2004 VA Form 21-2680, but on review this examination applies only to the Veteran's spouse.

Accordingly, the Board finds that a VA examination is necessary to determine whether the Veteran actually has type II diabetes mellitus. The Veteran's post-service treatment records are sufficient to require VA to obtain a medical opinion. See *McLendon v. Nicholson*, 20 Vet. App. 79 (2006). Consequently, this matter must be remanded for additional development of the medical record pursuant to 38 C.F.R. § 3.159(c)(4).

In order to give the appellant every consideration with respect to the present appeal, further development of the case is necessary. This case is being returned to the RO via the Appeals Management Center (AMC) in Washington, D.C., and the Veteran will be notified when further action on his part is required. Accordingly, the case is REMANDED for the following action:

1. The RO/AMC should contact the Veteran and ask him to provide updated information on all private treatment records indicating a diagnosis of type II diabetes mellitus. If the Veteran indicates that he has received any other treatment or evaluations, and provides appropriate releases, the RO/AMC should obtain and associate those records with the claims file. Any negative responses received must be associated with the claims file. The RO/AMC

should also obtain all VA treatment records not already associated with the claims file.

2. Thereafter, the RO/AMC should schedule the Veteran for an appropriate VA examination in support of his claim of entitlement to service connection for type II diabetes mellitus. Any and all indicated evaluations, studies and tests deemed necessary by the examiners should be accomplished. The claims folder should be made available to and be reviewed by the examiner prior to the examination. Following a thorough evaluation of the Veteran the examiner is asked to determine whether or not the Veteran has type II diabetes mellitus. A complete rationale for each opinion offered must be included in the report and an explanation of the principles involved would be of considerable assistance to the Board. Specifically, that rationale should explain the extent to which the opinion is based on medical principles and the extent to which it is based on the history provided by the Veteran.

3. When the requested development has been completed the case should again be reviewed by the RO, to include consideration of any additional evidence submitted. If the benefits sought are not granted the Veteran and his representative should be furnished a Supplemental Statement of the Case, and be afforded a reasonable opportunity to respond before the record is returned to the Board for further review.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2010).

V. L. JORDAN

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs