Occupation: Hard to determine.

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On appeal from the
Department of Veterans Affairs Regional Office in Milwaukee, Wisconsin

THE ISSUES

1. Whether new and material evidence has been received to reopen a claim for entitlement to service connection for non-Hodgkin's lymphoma.

2. Entitlement to service connection for non-Hodgkin's lymphoma.

REPRESENTATION

Veteran represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

J.A. Flynn, Associate Counsel

INTRODUCTION

The Veteran served on active duty in the United States Army from May 1966 to February 1969, including service in Thailand from March 1968 to February 1969. The Veteran received the Vietnam Service Medal, among other decorations.

This case comes before the Board of Veterans' Appeals (the Board) on appeal from an April 2008 rating decision of the Department of Veterans Affairs (VA) Regional Office in Milwaukee, Wisconsin (RO), which reopened the Veteran's claim for service connection for non-Hodgkin's lymphoma but denied the Veteran's claim on the merits.

The Veteran provided testimony at a hearing before the undersigned Veterans Law Judge in February 2011. A transcript of this hearing has been associated with the Veteran's claims folder.

FINDINGS OF FACT

1. Service connection for non-Hodgkin's lymphoma was last denied in an unappealed May 2002 rating decision, which found that no nexus had been demonstrated between the Veteran's military service and his non-Hodgkin's lymphoma.

2. The evidence received since the May 2002 rating decision relating to the Veteran's non-Hodgkin's lymphoma is neither cumulative nor redundant, relates to unestablished facts necessary to substantiate the claim, and raises a reasonable possibility of substantiating the claim for service connection for non-Hodgkin's lymphoma.

3. The competent and credible evidence of record is at least in equipoise as to whether a relationship exists between the Veteran's non-Hodgkin's lymphoma and his military service.

CONCLUSIONS OF LAW

1. The May 2002 rating decision denying the Veteran's claim of entitlement to service connection for non-Hodgkin's lymphoma is final. 38 U.S.C. § 7105(c) (West 2002); 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2001).

2. New and material evidence has been received sufficient to reopen the claim of service connection for non-Hodgkin's lymphoma. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 (2010).

2. Resolving the benefit of the doubt in the Veteran's favor, non-Hodgkin's lymphoma was incurred in active duty military service. 38 U.S.C.A. §§ 1110, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.385 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veterans Claims Assistance Act of 2000 (VCAA)

As will be discussed below, the Veteran's claim for service connection for non-Hodgkin's lymphoma has been reopened and been granted. As such, the Board finds that any error related to the VCAA regarding this claim is moot. See 38 U.S.C.A. §§ 5103, 5103A (West 2002 & Supp. 2010); 38 C.F.R. § 3.159 (2010); Mayfield v. Nicholson, 19 Vet. App. 103, (2005), rev'd on other grounds, Mayfield v. Nicholson, 444 F.3d 1328 (Fed. Cir. 2006).

A veteran is entitled to the benefit of the doubt when there is an approximate balance of positive and negative evidence. See 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2010). When a veteran seeks benefits and the evidence is in relative equipoise, the veteran prevails. See Gilbert v. Derwinski, 1 Vet. App. 49 (1990). The preponderance of the evidence must be against the claim for benefits to be denied. See Alemany v. Brown, 9 Vet. App. 518 (1996).

New and Material Evidence

In general, decisions of the RO and the Board that are not appealed in the prescribed time period are final. See 38 U.S.C.A. §§ 7104, 7105 (West 2002); 38 C.F.R. §§ 3.104, 20.1100, 20.1103 (2010). A finally disallowed claim may be reopened when new and material evidence is presented or secured

with respect to that claim. See 38 U.S.C.A. § 5108 (West 2002). If new and material evidence is presented or secured with respect to a claim that has been disallowed, VA must reopen the claim and review its former disposition. See id.; see also Hodge v. West, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

New evidence means existing evidence not previously submitted to agency decision makers. 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 it must raise a reasonable possibility of substantiating the claim. See 38 C.F.R. § 3.156 (2010); Smith v. West, 12 Vet. App. 312, 314 (1999) (noting that if the evidence is new, but not material, the inquiry ends and the claim cannot be reopened.)

To reopen a previously disallowed claim, new and material evidence must be presented or secured since the last final disallowance of the claim on any basis, including on the basis that there was no new and material evidence to reopen the claim since a prior final disallowance. See Evans v. Brown, 9 Vet. App. 273, 285 (1996). For the purposes of reopening a claim, the credibility of newly submitted evidence is generally presumed. See Justus v. Principi, 3 Vet. App. 510, 513 (1992) (noting that when determining whether evidence is new and material, the credibility of newly presented evidence is to be presumed unless the evidence is inherently incredible or beyond the competence of a witness).

If it is determined that new and material evidence has been submitted, the claim must be reopened. VA may then proceed to evaluate the merits of the claim on the basis of all evidence of record, but only after ensuring that the duty to assist the veteran in developing the facts necessary for his claim has been satisfied. See Elkins v. West, 12 Vet. App. 209 (1999); but see 38 U.S.C.A. § 5103A (West 2002) (eliminating the concept of a well-grounded claim).

Service connection may be granted for disability or injury incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303(a) (2010). In order to establish service connection for the Veteran's claimed disorders on a direct basis, there must be evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247, 253 (1999).

In the instant case, the Veteran's claim of entitlement to service connection for non-Hodgkin's lymphoma was denied by an RO decision dated May 2002. The RO denied the Veteran's claim for service connection because the evidence did not demonstrate that the Veteran's non-Hodgkin's lymphoma occurred in or was caused by service. Additionally, the RO found that there was no evidence that the Veteran's condition manifested to a compensable degree within one year of the date of discharge. Finally, the RO found that there was no evidence of record other than the Veteran's lay statements that he served in the Republic of Vietnam. The evidence under consideration at the time of this rating decision consisted of the Veteran's service treatment records, the Veteran's lay statements, treatment reports from a VA Medical Center, and treatment reports from H.M. Hospital. The Veteran did not timely appeal this

decision, and the RO's May 2002 decision became final. See 38 U.S.C.A. § 7105(c) (West 2002).

The Board must now determine if new and material evidence has been submitted since the time of the May 2002 decision. See 38 U.S.C.A. § 5108 (West 2002).

The evidence of record added to the record subsequent to the May 2002 final denial includes, in pertinent part, documentation that Agent Orange was used in Thailand, a copy of a military pay voucher, and lay evidence from the Veteran, including the transcript of a February 2011 hearing before the undersigned.

The Veteran's previous claim for service connection for non-Hodgkin's lymphoma was denied because the RO found no evidence of a relationship between the Veteran's non-Hodgkin's lymphoma and his military service. The new lay and medical evidence of a possible nexus between the Veteran's non-Hodgkin's lymphoma and his military service thus relates to unestablished facts necessary to substantiate the claim. The credibility of the newly submitted evidence is presumed in determining whether or not to reopen a claim. See Justus v. Principi, 3 Vet. App. 510 (1992). Thus, this evidence raises a reasonable possibility of substantiating the claim. See 38 C.F.R. § 3.156(a) (2010). Accordingly, the additional evidence is also material. As new and material evidence has been received, the claim for service connection for non-Hodgkin's lymphoma is reopened.

Service Connection

The Veteran essentially contends that he has non-Hodgkin's lymphoma as a result of his active duty military service.

Service connection may be granted for disability or injury incurred in or aggravated by active military service. See 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. § 3.303(a) (2010). In order to establish service connection for the Veteran's non-Hodgkin's lymphoma, there must be evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247, 253 (1999).

Certain diseases associated with exposure to certain herbicide agents used in support of military operations in Vietnam during the Vietnam era will be considered to have been incurred in service. See 38 U.S.C.A. § 1116(a)(1) (West 2002); 38 C.F.R. § 3.307(a)(6) (2010). Non-Hodgkin's lymphoma is one of the diseases associated with herbicide exposure for purposes of the presumption. See 38 U.S.C.A. § 1116(a)(2) (West 2002); 38 C.F.R. § 3.309(e) (2010). For non-Hodgkin's lymphoma, the presumption requires exposure to an herbicide agent and manifestation of the disease to a degree of 10 percent or more at any time after service. See 38 C.F.R. § 3.307(a)(6)(ii) (2010). A veteran must simply set foot on the landmass of the Republic of Vietnam to be entitled to the presumption of herbicide exposure. See Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008).

Further, a recent directive from the VA Office of Public Health and Environmental Hazards indicates that United States Army Veterans who provided perimeter security on Royal Thai Air Force bases, including the base at Korat, anytime between February 28, 1961 and May 7, 1965, may have been exposed to herbicides and may qualify for VA benefits. The directive references a recently declassified 1973 Department of Defense report entitled

"Project CHECO Southeast Asia Report: Base Defense in Thailand 1968 to 1972," which states that there was significant use of herbicides on the fenced-in perimeters of certain Thai military bases to remove foliage that provided cover for enemy forces. VA has determined that herbicides used on the Thailand base perimeters may have been tactical and procured from Vietnam, or a strong, commercial type resembling tactical herbicides. See Agent Orange: Thailand Military Bases located at http://www.publichealth.va.gov/exposures/agentorange/thailand.asp.

Turning to the facts in the instant case, the Veteran has been diagnosed with non-Hodgkin's lymphoma, which, as noted above, is a disease associated with herbicide exposure. The Veteran is therefore entitled to presumptive service connection of this disease if it is established that he was exposed to herbicides in support of military operations in Vietnam.

In the instant case, the Veteran alleged that he was exposed to herbicides during active duty both in Vietnam and Thailand. The Veteran's presence in Thailand during the Vietnam era is conceded. The RO has made a number of attempts to verify the Veteran's presence in Vietnam. In January 2002, the RO sent a letter to the Veteran requesting evidence of service in Vietnam, and the RO received no response. Also in January 2002, the RO requested evidence of the Veteran's Vietnam service from the National Personnel Records Center (NPRC). The response from the NPRC was negative as to service in Vietnam, but it reflected duty service in Thailand. A second letter was sent to the Veteran in August 2007 requesting evidence of service in Vietnam, and the RO received no response. Also in August 2007, the Veteran's Official Military Personnel File was requested and received, but it was negative for any service in Vietnam. In April 2008, the NPRC reported no record of exposure to herbicide were available. Following these efforts, in April 2008, the RO issued a Formal Finding of Unavailability regarding the Veteran's service in the Republic of Vietnam.

In August 2009, the RO requested pay records for the month of March 1968 to corroborate the Veteran's assertion that he was tax exempt for that month due a stopover at Tan Son Nut Air Base in Vietnam. The NPRC responded in August 2009 that such information was not a matter of record. The RO additionally requested flight manifests for the relevant World Airways flights from both the NPRC and the Modern Military Reference Branch at the National Archives; none of these requests yielded any information.

While VA has been unable to independently verify that the Veteran was in Vietnam on stopovers to and from Thailand, the Veteran has provided a variety of evidence in support of his contention. The Veteran alleged that he was in Vietnam for approximately an hour and a half at Tan Son Nhut Air Base during stopovers en route to Thailand and from Thailand. The Veteran stated that he travelled by Military Air Command (MAC) flights onboard civilian-contracted World Airways aircraft during the months of March 1968 and February 1969. Most pertinently, the Veteran provided a pay voucher dated February 1969 that contains the notation "CZ" under "Number of Tax Exemptions." The Veteran alleges that this notation stands for "Combat Zone," and supports his contention that his flight landed in Vietnam en route from Thailand. Additionally, the Veteran provided a memorandum entitled "The Routes to and from Southeast Asia Go Through Vietnam." This memorandum, authored by a retired Master Sergeant in the United States Air Force, indicates that the route to and from Thailand taken by MAC flights in the autumn and winter typically transited through Vietnam. The Veteran also related his own recollection of the flight: in an August 2007 statement, the Veteran stated

that "we went from Oakland . . . to Honolulu, to Wake Island, to Guam, to Tan Son Nut (Saigon) and finally Bangkok." He recalled landing at Tan Son Nhut and seeing "scrap metal remains of Huey Helicopters and corrugated temporary runway piled up along the newly replaced runway." While the Board acknowledges that the RO's many attempts to find evidence corroborating the Veteran's statements were unsuccessful, the Board finds the Veteran's lay statements regarding a stopover in Vietnam to be both competent and credible. Accordingly, the Board finds that the evidence is at least in equipoise as to whether the Veteran's flights to and from Thailand stopped over in Vietnam.

Though the Board finds that the Veteran is entitled to presumptive service connection on the basis of his presence in Vietnam alone, for the sake of completeness, the Board will also address the Veteran's presence in Thailand. The Veteran indicated that he was stationed with United States Army Support, Thailand at Camp Friendship, which shared a common border with the Royal Thai Air Force (RTAF) base in Korat. The Veteran stated in a hearing before the undersigned that his office with the 35th Finance Detachment was located approximately 150 yards from the perimeter of the camp, and his barracks was located approximately 75 yards from the opposite perimeter. Additionally, the Veteran stated that during alerts, which happened approximately quarterly, he had to stand at the perimeter of the base. While the Board acknowledges that the evidence does not indicate, pursuant to the recent directive from the VA Office of Public Health and Environmental Hazards, that the Veteran provided perimeter security on a RTAF base, the Veteran's presence for a year on a military base that adjoined a RTAF base, along with his periodic work on the perimeter of the base puts the evidence at least in equipoise as to whether the Veteran was exposed to herbicides in Thailand.

In sum, the Board finds that the Veteran's statements as to being onshore in Vietnam are credible and are corroborated by the evidence of record. The Board additionally finds that the Veteran's service adjacent to the RTAF base at Korat could have resulted in exposure to herbicides. Resolving the benefit of the doubt in favor of the Veteran, the Board finds that the Veteran set foot within the land borders of Vietnam during the Vietnam conflict and thus, he is presumed to have been exposed to the herbicide Agent Orange. See 38 U.S.C.A. § 1116(f) (West 2002). As he has been diagnosed with non-Hodgkin's lymphoma, a disease listed in 38 C.F.R. § 3.309(e), the Board finds that a grant of presumptive service connection for non-Hodgkin's lymphoma due to herbicide exposure is warranted in this case.

ORDER

Service connection for non-Hodgkin's lymphoma is granted.

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DAVID L. WIGHT
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs