

**Occupation: Flight Mechanic**

Citation Nr: 1028449

Decision Date: 07/29/10

Archive Date: 08/10/10

DOCKET NO. 08-09 393 )  
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On appeal from the  
Department of Veterans Affairs Regional Office in Muskogee,  
Oklahoma

THE ISSUE

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

REPRESENTATION

Appellant represented by: Oklahoma Department of Veterans  
Affairs

ATTORNEY FOR THE BOARD

J. Schroader, Associate Counsel

INTRODUCTION

The Veteran served on active duty from August 1968 to May 1975. The Veteran died in March 2007, and the appellant is his widow.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from May 2007 and August 2007 rating decisions of the Muskogee, Oklahoma Regional Office (RO) of the Department of Veterans Affairs (VA) that denied the appellant's claim for service connection for the Veteran's cause of death.

In September 2009, the Board remanded this case for further development. Such development has been completed and associated with the claims file, and this case is ready for further appellate review.

FINDINGS OF FACT

1. In January 2007, the Veteran was diagnosed with liposarcoma, a type of soft-tissue sarcoma.
2. The Veteran died in March 2007. The death certificate shows that the immediate causes of death were metastatic carcinoma and

sarcoma.

3. The evidence is at least in equipoise as to whether the Veteran was exposed to herbicide agents while serving on active duty at the Korat Air Force Base in Thailand.

#### CONCLUSION OF LAW

Entitlement to presumptive service connection for the cause of the Veteran's death is warranted. See 38 U.S.C.A. §§ 1110, 5107(b) (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.307, 3.309(e) (2009).

#### REASONS AND BASES FOR FINDINGS AND CONCLUSION

##### I. Veterans Claims Assistance Act of 2000 (VCAA)

The appellant's claim of entitlement to service connection for the cause of the Veteran's death is granted, as explained below. As such, the Board finds that any error under the VCAA with regard to the appellant's claim is moot. See 38 U.S.C.A. §§ 5103, 5103A (West 2002); 38 C.F.R. § 3.159 (2009); *Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

##### II. Analysis

In the case of veterans exposed to an herbicide agent during active military, naval, or air service, presumptive service connection is provided for certain diseases listed in 38 C.F.R. § 3.309(e) that that manifest to a degree of 10 percent or more at any time after service. See *id.*; see also 38 C.F.R. § 3.307(a)(6)(ii) (2009). Soft-tissue sarcoma is one of the diseases listed in 38 C.F.R. § 3.309(e) for which presumptive service connection may be provided based on exposure to herbicides, and Note 1 to subsection (e) provides that "soft-tissue sarcoma" includes liposarcoma.

VA regulations provide for presumptive herbicide exposure for veterans who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. See 38 C.F.R. § 3.307(a)(6)(iii).

"Service members who are not entitled to the presumption of [herbicide] exposure [based on service in the Republic of Vietnam] are nonetheless entitled to show that they were actually exposed to herbicides." *Haas v. Peake*, 525 F.3d 1168, 1193 (Fed. Cir. 2008) (citing 38 C.F.R. § 3.309(e)).

The Veteran served on active duty in Thailand from October 1969 to October 1970 on the Takhli Air Force base, and from November 1971 to November 1972 on the Korat Air Force base. Service personnel records reflect that the Veteran served as an F-105 aircraft mechanic in Takhli and a crew chief in Korat.

In May 2007, the appellant, the Veteran's widow, filed a claim for service connection for the cause of the Veteran's death. The appellant claims that the Veteran was exposed to herbicide agents while serving on active duty in Thailand that caused his sarcoma that led to his death. The Board acknowledges that the Veteran filed an original claim for service connection for sarcoma in December 2006 and died three months later in March 2007.

By way of background, the Board notes that VA treatment records reflect that in October 2006, the Veteran was a walk-in at the VA outpatient clinic complaining of pelvic pain for about a week (and weighing only 129 lbs at 69" height), and he was referred for a CT scan. Other VA treatment records reflect the Veteran reported a history of a left thigh/groin mass since July 2006. See VA Treatment Record, November 1, 2006. A November 2006 CT scan report reflects an impression of a left pelvis/thigh soft-tissue mass, and that the Veteran was referred for a biopsy. A November 2006 biopsy revealed "soft-tissue" sarcoma. See VA Treatment Record, December 7, 2006. A January 2007 VA treatment record reflects that a surgical resection was performed, with a post-operative diagnosis of left thigh sarcoma. A post-surgical January 2007 VA pathology report reflects an assessment of left thigh liposarcoma. Likewise, a January 2007 oncology report also reflects a diagnosis of left thigh liposarcoma, status post resection, as well as possibly incomplete resection. A February 2007 private oncology consultation record reflects a diagnosis of pleomorphic liposarcoma status post incomplete resection.

A March 2007 death certificate reflects that the Veteran's underlying causes of death were metastatic carcinoma as well as sarcoma. No "significant conditions contributing to death" were listed on the death certificate.

Clearly, sarcoma was a cause, if not the cause, of the Veteran's death per the death certificate and VA treatment records noted above. Also, per the January 2007 pathology and oncology records, the Veteran's type of sarcoma was liposarcoma, which is a type of soft-tissue sarcoma that is listed in 3.309(e) for which presumptive service connection may be granted based on herbicide exposure.

The appellant concedes that the Veteran never served in Vietnam, and the Board notes that the Veteran never asserted that he served in Vietnam in his own original claim for service connection for sarcoma. See Forms 21-4138, December 2006 (Veteran's claim) and July 2007 (the appellant's statement in support of her claim). Therefore, the 38 C.F.R. § 3.307(a)(6)(iii) presumption of herbicide exposure based on service in Vietnam does not apply.

Rather, the appellant asserts actual exposure of the Veteran to herbicides while he served in Thailand as noted above (and, therefore, that the Veteran is entitled to presumptive service connection under 38 C.F.R. § 3.309(e)). See *Haas v. Peake*, supra at 1193.

Based thereon, in September 2009, the Board remanded this case for further development, including so that a request could be made to the Armed Forces Pest Management Board ("Pest Board") for information regarding the use of herbicides at the Takhli and Korat Air Force Bases during the relevant periods. A March 2010 response from the Armed Forces Pest Management Board reflects that while they did not maintain any records specifically pertaining to the Takhli and Korat bases relating to the periods of time the Veteran served there, the Pest Board directed VA's attention to several other sources of information (and enclosed copies with their response letter), including an article written by retired sergeant K.P., who, according to his article, served at the Korat Air Force base in Thailand around the same time as the Veteran. This article indicates that herbicide agents were used at the Korat Air base beginning in June 1972. See *Herbicide Use in Thailand*, K.P., at 18 (quoting Checo Report, Base Defense in Thailand, U.S. Air Force, Maj. B. and Capt. B., Feb. 12, 1973 at 68).

In light of the above article reflecting that herbicide agents were used for defoliation on the Korat Air Force base beginning in June 1972, which was while the Veteran was serving there, and in light of the fact that the Pest Board referenced these records in response to VA's request for information relating to this particular claim, the Board finds that the evidence is at least in equipoise as to whether the Veteran was exposed to herbicide agents while serving on the Korat Air base from November 1971 to November 1972 as a flight mechanic. Therefore, resolving doubt in favor of the appellant, the Board finds that the Veteran was exposed to herbicide agents while serving in Thailand, and that presumptive service connection is warranted.

The Board recognizes that the Veterans Benefits Administration has issued a Fast Letter providing procedures for developing claims based on exposure to herbicides in Thailand. VBA Fast Letter 09-20 (May 6, 2009). However, given that the information already of record appears sufficient to resolve doubt in favor of the Veteran, the Board finds that undertaking further development in that regard is unnecessary and would needlessly delay adjudication of the claim.

The Board has also considered the observation in that Fast Letter that there are no records to show that the same tactical herbicides used in Vietnam were used in Thailand, and that the herbicides used therein were commercial. However, given the lack of evidence in the record as it stands regarding the nature of the tactical herbicides used in Vietnam and the commercial herbicides used in Thailand, which prevents the Board from determining any meaningful distinction, the Board is of the opinion that the evidence remains at least in equipoise as to whether presumptive service connection is warranted based on the Veteran's service in Korat in 1972.

In short, because the Veteran's cause of death, sarcoma (soft-tissue, liposarcoma) is one of the diseases listed in 38 C.F.R. § 3.309(e) for which presumptive service connection may be granted, and because the Veteran is found to have been exposed to

herbicides in service, the Board concludes that the appellant is entitled to a grant of service connection for the cause of the Veteran's death.

ORDER

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