

Duty: Pipeline construction

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On appeal from the
Department of Veterans Affairs Regional Office in St. Petersburg, Florida

THE ISSUES

1. Entitlement to service connection for diabetes mellitus.

2. Entitlement to service connection for a right knee disorder, to include as secondary to service-connected left knee disability.

3. Entitlement to service connection for a right hip disorder, to include as secondary to service-connected left knee disability.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

Tresa M. Schlecht, Counsel

INTRODUCTION

The Veteran had active service from September 1967 to September 1970, including service from June 1968 to June 1969 in Thailand. This matter comes before the Board of Veterans' Appeals (Board) on appeal from rating decisions of the St. Petersburg, Florida, Regional Office (RO) of the Department of Veterans Affairs (VA).

The RO accepted an October 2001 statement as a claim for service connection for diabetes mellitus and as a request to reopen claims of entitlement to service connection for a right knee disorder and a right hip disorder. The RO determined that new and material evidence had not been submitted to reopen the

claims for service connection for a right knee disorder and a right hip disorder. However, the RO failed to consider that a denial on the merits of service connection for a right knee disorder and a right hip disorder which had been issued in June 2001 was not yet final when the Veteran again submitted that claim in October 2001. Therefore, the claims on appeal are more accurately identified as claims for service connection, not requests to reopen those claims. The issues on appeal are more accurately stated as set forth on the title page of this decision.

The claims for service connection for right knee and right hip disorders are addressed in the REMAND portion of the decision below and are REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC.

FINDINGS OF FACT

1. The medical evidence establishes that a diagnosis of diabetes mellitus has been assigned.
2. The Veteran's military occupational specialty was as a pipeline helper with a construction unit during the 12 months he was stationed in Thailand.
3. The Veteran received medical treatment at the Royal Thai Air Force Base at U-Tapao, one of the bases recognized as a location at which herbicides were stored and used.
4. The Veteran's statements that his unit laid pipes and concrete to extend and enlarge facilities being used by the military after the areas were defoliated and cleared are consistent with his military records and generally-available historical information about his location and unit in Thailand, and herbicide exposure in his case may be conceded.

CONCLUSION OF LAW

The criteria for service connection for diabetes mellitus, as presumed related to active military service, are met. 38 U.S.C.A. §§ 1110, 1112, 1113, 1116, 5107(b) (West 2002 & Supp. 2010); 38 C.F.R. §§ 3.1, 3.6, 3.102, 3.303, 3.307, 3.309 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran contends that he is entitled to service connection for diabetes mellitus because he was exposed to herbicides in Thailand, where he laid pipes and concrete in areas that had been covered by the jungle.

Governing Statutes and Regulations

Establishing service connection generally requires (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of 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 present disability. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303. See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (table); see also *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

In certain circumstances, a disease associated with exposure to certain herbicide agents will be presumed to have been incurred in service even though there is no evidence of that disease during the period of service at issue. 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309 (e). A Veteran who served in the Republic of Vietnam during the Vietnam era is presumed to have been exposed during such service to an herbicide agent (i.e., Agent Orange). 38 C.F.R. § 3.307(a). Certain locations in Thailand are also known to have been sites at which herbicides were stored and used. VA, Adjudication Manual Rewrite (M21-MR) (2011), Part IV, Subpart ii, Subsection 2 ("Rating"), Chapter 10 ("Service Connection for Disabilities Resulting From Exposure to Herbicides or Based on Service in the Republic of Vietnam (RVN)"), Para. q ("Exposure to Herbicides in Thailand During the Vietnam Era").

Diseases associated with exposure to certain herbicide agents (listed at 38 C.F.R. § 3.309(e)) can be service-connected if the requirements of § 3.307(a)(6) are met even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of § 3.307(d) are also satisfied. See 38 C.F.R. § 3.307(a)(6). Type 2 diabetes (diabetes mellitus) is one of the diseases associated with herbicide agents, as identified in § 3.309(e). In order to be service-connected under 38 C.F.R. § 3.309(e), the diabetes mellitus must have become manifest to a degree of 10 percent or more at any time after service. See 38 C.F.R. § 3.307(a)(6)(ii). In this case, the Veteran's VA treatment records establish that a diagnosis of diabetes mellitus has been assigned by the Veteran's medical providers.

Facts and analysis

The Veteran contends that he was exposed to herbicide and Agent Orange in Thailand. The Veteran's military occupational specialty was as a pipeline helper with a construction unit during the 12 months he was stationed in Thailand. In service, the Veteran sought medical evaluation for knee pain reported to have been incurred when he stumbled in a construction ditch. The Veteran was seen at the U-Tapao based in Thailand.

In 1971, the Veteran submitted a statement that referenced his work constructing facilities at Camp Vayama, Thailand, which the Veteran described as in the middle of nowhere in Thailand. For Veterans stationed at U-Tapao, exposure to herbicides may be conceded on a facts-found basis if the Veteran was engaged in activities which took them to the base perimeter repeatedly, such as security patrol duties. In the Veteran's case, he was in an MOS where he assisted in constructing the perimeter and

maintaining pipes laid in the ground.

The Appeals Management Center (AMC) obtained a 2007 response from the Personnel Information Exchange Systems that stated that there was no verification that the Veteran was exposed to herbicides. However, the PIES response failed to note that the Veteran was stationed in Thailand, or where his unit was located. The AMC did not discuss where the Veteran was stationed, or where the service treatment records showed that he was seen, and did not obtain information as to the locations or duties of the Veteran's unit. The AMC did not discuss the current version of the VA Adjudication Manual with respect to claims of exposure to herbicides outside Vietnam or the procedures outlined in M21-MR for the adjudication of such a claim.

The Board directed, in its 2007 and 2009 Remands, that adjudication of the claim of exposure to herbicides in Thailand be conducted. Therefore, the Board has addressed this claim based on the service personnel records, service treatment records, and the generally-available historical information. Historical information generally available includes pictures taken by individuals in the Veteran's unit showing newly-cleared areas of the jungle in various phases of construction. Narratives available indicate that the Veteran's unit engaged in pipeline construction in the area of Korat, Thailand. That area, along with U-Tapao, is also recognized as a location where herbicides were used and stored. The Veteran's exposure to herbicides during his year of duty in Thailand is conceded, consistent with the Compensation and Pension Service "Memorandum for the Record" shown in M21-1MR, Part IV, Subpart ii, 2.C.10.r.

As the outcome of the adjudication of this claim is favorable to the Veteran, no further discussion of VA's duties to assist or notify the Veteran is required.

Since exposure to herbicides is conceded on a facts-found basis in this case, and the Veteran has a medical diagnosis of a disorder which may be presumed related to exposure to diabetes, the criteria for service connection for diabetes are met, and the claim may be granted.

ORDER

The appeal for service connection for diabetes mellitus is granted.

REMAND

As the claims for service connection for a right hip and right knee disorder have not been adjudicated on the merits following the rating decision issued in June 2001, and since that decision has never become final, completion of adjudication on the merits is required. The Veteran should be afforded VA examination which addresses his claims, after appropriate development.

Accordingly, the case is REMANDED for the following action:

1. Advise the Veteran of the procedural posture of his claims for service connection for a right hip disorder and a right knee disorder.
2. Remove records related to the Social Security benefits application for the Veteran's son from volume III of the claims files and dispose of the records in accordance with guidelines for protection of privacy of the individual identified in the records.
3. Afford the Veteran an opportunity to identify any additional clinical records for the period from 1980 to 1989, including records of a hospitalization in Hawaii, employment medical or administrative records which might substantiate the claim, or other records, especially related to 1980 or 1981.

In particular, the Veteran should identify records of any VA or non-VA facility at which radiologic examination of the right hip or right knee were conducted in 1980 and/or 1981 or 1982. Identified records should be sought.

4. Obtain the Veteran's VA clinical records since March 2008, when the statement of the case (SOC) was issued.
5. Afford the Veteran an opportunity to submit or identify any alternative evidence which might assist him to substantiate his claims, to include records from an employer, educational institution, pharmacy, insurance company, or the like.
6. Afford the Veteran VA examination as necessary to obtain opinions as to the onset and etiology of a right hip disorder and a right knee disorder. The claims folder and a copy of this Remand should be made available to the examiner(s) for review in connection with each examination. The examiner(s) should obtain a complete history from the Veteran, review the entire claims file, and each examiner should indicate, in each examination report, that such review was performed. Any tests or studies deemed necessary for an accurate assessment should be conducted, and the results should be associated with the claims file and discussed in the examination report. The examination report should include a detailed account of all pathology found to be present.

(i). The examiner who provides examination as to the etiology and onset of a right knee disorder should review the Veteran's statements, clinical evaluations of the right knee, beginning in 1975, the radiologic examinations of record, beginning in January 1980, and relevant later records, and should address the following:

- (a) Is it at least as likely as not (50 percent or greater probability) that the Veteran has a right knee disorder that is a result of the Veteran's service-connected left knee disability?
- (b) Is it at least as likely as not (50 percent or greater probability) that a current right knee disorder has been chronic and continuous since the Veteran's active service?
- (c) Is it at least as likely as not (50 percent or greater probability) that a service-connected left knee

disability increases the severity of or permanently increases the symptoms of a right knee disorder?

In answering each question, the examiner must comment on the Veteran's lay statements as to onset of right knee pain.

(ii). The examiner who provides examination as to the etiology and onset of a right hip disorder should review records of radiologic examinations of the right hip, including the report of VA radiologic examination conducted in May 1991, VA clinical records and evaluations obtained for a 1990 claim for service connection for a right hip disorder, a 1995 private evaluation at the Matthews Orthopaedic Clinic, a November 1999 opinion from L. Brady, MD (indicating need for review of 1980 or 1981 radiologic examinations of right hip), and other relevant records. The examiner should address the following:

(a) Is it at least as likely as not (50 percent or greater probability) that the Veteran has a current right hip disorder which was incurred as a result of a trauma to the right hip in about 1981?

(b) If the Veteran has a current right hip disorder which at least as likely as not was incurred as a result of trauma in about 1981, is it at least as likely as not that the Veteran's service-connected left knee disability was manifested by instability in about 1981, when the Veteran contends he incurred a fall as a result of left knee instability that injured his right hip?

(c) If it is not at least as likely as not (50 percent or greater probability) that a right hip disorder was incurred as a result of a trauma to the right hip resulting from instability of the left knee, please provide an opinion as to the etiology of a current right hip disorder.

In answering each question, the examiner must comment on the Veteran's lay statements as to incurrance of trauma to the right hip in about 1980 or 1981, or include a 2002 statement from friends.

The rationale for all opinions expressed should be provided in a legible report. If any requested opinion cannot be provided without resort to pure speculation, the examiner should state the reason why speculation would be required in this case (e.g., if the requested determination is beyond the scope of current medical knowledge, actual causation cannot be selected from multiple potential causes, etc.). Development and an attempt to obtain the necessary additional information, if such information is identified, should be conducted, and the claims file should be returned to the examiner for an updated opinion.

7. After completing the above actions, and any other development as may be indicated by any response received as a consequence of the actions taken in the paragraphs above, readjudicate the claims on appeal. If any claim remains denied, a supplemental statement of the case must be provided to the Veteran and his representative. After the Veteran and his representative have had an adequate opportunity to respond, the appeal should be returned to the Board for appellate review, if appropriate.

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).

MARJORIE A. AUER
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs