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On appeal from the  
Department of Veterans Affairs Regional Office in Roanoke, Virginia

## THE ISSUES

1. Entitlement to service connection for lung cancer, including due to Agent Orange exposure, for accrued benefits purposes.
2. Entitlement to service connection for the cause of the Veteran's death.

## REPRESENTATION

Appellant represented by:    The American Legion

## ATTORNEY FOR THE BOARD

A. Novak, Associate Counsel

## INTRODUCTION

The Veteran had active military service from August 1965 to July 1969. He died in May 2005, shortly after filing this claim for disability benefits. The appellant is his surviving spouse. She appealed to the Board of Veterans' Appeals (Board/BVA) from a February 2006 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO).

In January 2010, the Board found that the Appellant-widow was not entitled to Dependency and Indemnity Compensation (DIC) pursuant to the provisions of 38 U.S.C.A. § 1318, as the Veteran had not been rated as totally (100-percent) disabled for ten continuous years immediately preceding his death. But as regarding the remaining

claims of entitlement to service connection for lung cancer due to herbicide exposure and for service connection for cause of death, the Board remanded these others claims to provide her additional notice required by the Veterans Claims Assistance Act (VCAA) and, in particular, the holdings in *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006) and *Hupp v. Nicholson*, 21 Vet. App. 342 (2007). The remand also was to obtain all outstanding medical records, VA and non-VA, but especially those concerning treatment for the lung cancer at Tazewell Community Based Outpatient Clinic (CBOC).

The Board again remanded these claims in May 2011, for still further development and consideration, but this time primarily on account of a change in VA policy concerning herbicide exposure for Veterans of the United States Air Force who served on certain Royal Thai Air Force Bases in Thailand during the Vietnam War. See VBA Fast Letter 09-20 (May 6, 2009).

The RO has since readjudicated these claims but continued to deny them in a May 2012 Supplemental Statement of the Case (SSOC), so they are again before the Board.

#### FINDINGS OF FACT

1. It is at least as likely as not that the Veteran's job duties and responsibilities at U-Tapao Air Force Base in Thailand during the Vietnam War involved exposure to herbicides (namely, the dioxin Agent Orange) along the base's perimeter.
2. It also is at least as likely as not that his ultimately fatal lung cancer was the result of that Agent Orange exposure during his military service.

#### CONCLUSIONS OF LAW

1. Resolving all reasonable doubt in his favor, the Veteran's lung cancer was due to injury (specifically, exposure to Agent Orange) incurred during his military service. 38 U.S.C.A. §§ 1110, 1116, 5107 (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.102, 3.300, 3.303, 3.307, 3.309(e) (2011).

2. His death in May 2005 was the result of this lung cancer, so a service-connected disability caused or contributed substantially or materially to his death. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312.

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

### I. The Duties to Notify and Assist

As provided by the VCAA, upon receipt of a complete or substantially complete application, VA has duties to notify and assist a claimant in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2011). Here, though, because the Board is granting these claims for service connection for lung cancer, for purposes of accrued benefits, and for cause of death, so awarding the full benefits sought on appeal, the Board need not discuss whether there has been compliance with the notice and duty to assist provisions of the VCAA since any such failure, even assuming for the sake of argument it occurred, ultimately would be inconsequential and, thus, amount to no more than nonprejudicial, i.e., harmless error. 38 C.F.R. § 20.1102. See also *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) (indicating VCAA notice and assistance errors are not presumptively prejudicial, instead, must be determined on a case-by-case basis, and that, as the pleading party attacking the agency's decision, the claimant, not VA, bears this burden of proof of identifying such error and, above and beyond this, showing how it is unduly prejudicial, meaning outcome determinative of the claim). There simply is no such possibility in this particular instance.

### II. Analysis

The Veteran filed a claim for service connection for his lung cancer due to herbicide (Agent Orange) exposure in April 2005, just prior to his death in May 2005. This claim is now being pursued by the Appellant, his surviving spouse. **As cause of this cancer, she alleges he was exposed to Agent Orange during his active military service between August 1968 and July 1969 at U-Tapao Royal Air Force Base in Thailand during the Vietnam War.**

Service connection is granted for disability resulting from an injury sustained or a disease contracted in the line of duty during active military service, or, if a preexisting condition, for aggravation of this

condition during service beyond its natural progression. 38 U.S.C.A. §§ 1110, 1153; 38 C.F.R. §§ 3.303(a), 3.306.

To establish entitlement to direct service connection, there must be (1) competent and credible evidence confirming the Veteran had the claimed disability or, at the very least, showing he had it at some point since filing his claim; (2) competent and credible evidence of in-service incurrence or aggravation of a relevant disease or an injury; and (3) competent and credible evidence of a nexus or link between the in-service injury or disease and the current disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Malignant (i.e., cancerous) tumors are chronic, per se, and therefore will be presumed to have been incurred in service if manifested to a compensable degree (generally meaning to at least 10-percent disabling) within one year after service. This presumption, however, is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309(a).

Lung cancer also may be service connected on the basis that it is presumptively associated with Agent Orange exposure. 38 U.S.C.A. § 1116; 38 C.F.R. § 3.309(e). First, however, a Veteran must show that he served in the Republic of Vietnam during the Vietnam War era or at some other location that Agent Orange was used or sprayed. See 38 U.S.C.A. § 1116; 38 C.F.R. § 3.307(a)(6). Vietnam service requires a presence on the ground (landmass) or in the inland waterways of the country; mere service on deep-water offshore vessels is insufficient to trigger the presumption. 38 C.F.R. § 3.307(a)(6)(iii). See also *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008); cert. denied, 77 U.S.L.W. 3267 (Jan. 21, 2009) (No. 08-525); VAOPGCPREC 27-97. Second, the Veteran must have a diagnosis of one of the specific diseases listed in 38 C.F.R. § 3.309(e). *Brock v. Brown*, 10 Vet. App. 155, 162-63 (1997). Lung cancer is one of the presumptive diseases listed in § 3.309(e), and the available medical records from the Veteran's lifetime document his treatment for this condition, so there is no disputing he had it.

However, the availability of presumptive service connection for a disability based on exposure to herbicides does not preclude a Veteran from establishing service connection with proof of direct causation. *Stefl v. Nicholson*, 21 Vet. App. 120-23 (2007); see also *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994); and *McCartt v. West*, 12 Vet. App. 164, 167 (1999). In *McCartt*, the Court indicated the principles set forth in *Combee*, which, instead, concerned exposure to radiation,

are equally applicable in cases involving Agent Orange exposure to establish direct causation.

But in order for the presumption of herbicide exposure to apply, the Veteran must have had qualifying service in the Republic of Vietnam during the Vietnam era or elsewhere where herbicides like Agent Orange were used or sprayed. Quite recently, a new provision expanding the herbicide presumption was instituted for certain Veterans who served in Korea along the demilitarized zone (DMZ). See 76 Fed. Reg. 4245 (January 25, 2011). Effective February 24, 2011, VA amended its adjudication regulations to extend a presumption of herbicide exposure to certain Veterans who served in Korea. Specifically, VA is adding a new paragraph (a)(6)(iv) to 38 C.F.R. § 3.307 that reads as follows:

(a)(6)(iv) A Veteran who, during active military, naval, or air service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, 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.

These amendments are applicable to all applications for benefits that are received by VA on or after February 24, 2011, and to all applications for benefits that are pending before VA, the Court, or the Federal Circuit on February 24, 2011. 76 Fed. Reg. 4245 (January 25, 2011).

In addition to this new regulation based on Korean service during the Vietnam War, service on certain air force bases in Thailand also has recently been included in the presumption. VA Fast Letter 09-20 (May 6, 2009). According to the Fast Letter, limited testing of tactical herbicides was conducted in Thailand from April to September 1964 at the Pranburi Military Reservation. The only other documented uses of herbicides in Thailand were commercial herbicides approved by the Armed Forces Pest Control Board after 1957. In addition, the Fast Letter indicated, there is no presumption of exposure based solely on flying aircraft over Vietnam or handling equipment that had been used in Vietnam. In the present case, in a letter dated in May 2009, the Joint Services Records Research Center (JSRRC) found no evidence that spraying, testing, transporting, or storage of herbicides occurred at U-Tapao.

In February 2011, however, VA's Office of Public Health and Environmental Hazards released a report indicating that Vietnam-era Veterans whose service involved duty on or near the perimeters of military bases in Thailand between February 1961 and May 1975 may have been exposed to herbicides. In particular, herbicides may have been used in the base perimeters of seven military bases in Thailand, including U-Tapao, in fenced-in perimeters to remove foliage that provided cover for enemy forces. The herbicides used in the Thailand bases may have been tactical and procured from Vietnam, or a strong, commercial type resembling tactical herbicides. Because of this implicit change in policy, the Board remanded this case in May 2011 for further development on whether the Veteran had exposure to the base perimeter during his time at U-Tapao military base.

According to a letter from a Compensation and Pension (C&P) Service researcher dated in March 2009, herbicides were sporadically used inside fenced perimeters at bases in Thailand. *As a consequence, certain units and occupational specialties that regularly had contact with the base perimeter had a greater likelihood of contact with the herbicides. Security police units were known to have walked the base perimeters, especially dog handlers. If the Veteran was a supply materiel handler, it is likewise possible that he may have come into contact with the base perimeter. It is also likely that the same tactical herbicides used in Vietnam were used on the base perimeters.*

The determination as to whether the requirements for service connection are met is based on an analysis of all the relevant evidence of record, medical and lay, and the evaluation of its competency and credibility to determine its ultimate probative value in relation to other evidence. See *Baldwin v. West*, 13 Vet. App. 1, 8 (1999).

Reasonable doubt concerning any matter material to the determination is resolved in the claimant's favor. 38 C.F.R. § 3.102.

Here, following and as a result of the Board's remand, the RO/AMC procured the Veteran's service personnel records (SPRs) relating to his time in service, including in Thailand. In addition, the Appellant submitted seven signed statements from her and other family members attesting to their memories of his recollections about his wartime service made after returning from the Vietnam War.

According to his SPRs, he worked as a material facilities specialist at U-Tapao Air Base and had previously worked as an apprentice material

facilities specialist and a warehouseman in the military supply system. A material facilities specialist is similar to a warehouse supervisor, which generally includes duties such as maintaining inventory and managing assets.

While he did not work as a supply material handler, per se, one of the occupational specialties for which herbicide exposure is conceded, it is also clear from his job description and duties that his position was not limited to the warehouse that he supervised. Rather, as a material facilities specialist, he also helped plan delivery routes through the base and was trained on making deliveries to other locations on base. Although this training was in 1966 and 1967 and therefore occurred prior to his service in Thailand, it was nonetheless essential training for the material facilities specialist position. He also completed basic coursework on supply chain operations and equipment handling and safety. In his prior duty location at Grand Forks Air Force Base in North Dakota, shortly before his service in Thailand, he was commended for averaging over sixty deliveries per night and processing fifty incoming requests for materials. In one review, he was considered to be the best member among the servicemen assigned to the Pick-up and Delivery Section. He was reportedly responsible for equipment deliveries directly to their destinations according to a performance review for the period through June 1968, immediately before he traveled to Thailand.

None of his SPRs directly document that he had exposure to the base perimeter at U-Tapao Air Base in Thailand. By analogy to the position of supply material handler, however, for whom exposure to herbicides is conceded because the handler made deliveries throughout the base, the position of material facilities specialist may well have made similar deliveries from the warehouse. Both positions were in the base's material supply chain and the occupational description of the material facilities specialist includes deliveries made outside the warehouse. In addition, the evidence shows he specifically completed training in delivery and supply-related tasks. As a theoretical matter, it is impossible to know now whether he himself actually had exposure to herbicides on base between 1968 and 1969. The evidence suggests, however, that he could have had such exposure, and this is precisely the type of inference that may be made in his favor in close cases.

The recent lay statements by his surviving family members also tend to support a finding that he may have had exposure to herbicides during his tour of duty in Thailand. The statement by his Appellant-widow alleged that he served on police duty and patrolled the base,

and she stated she had a photograph of him doing this. **He also was present when cargo was loaded and unloaded.** The Appellant, her daughter, and the Veteran's brother recounted an anecdote told by the Veteran that he was lost for several days in rough terrain while on a mission. His sister and her husband wrote that he had told them he went on "black" or covert missions in Vietnam. A statement by another relative indicated the Veteran was assigned to nighttime duty patrolling the base during an assignment to a military police attachment. The Board has no inherent reason to doubt the credibility of any of these supporting statements, and the statement by the Veteran's daughter, a certified or registered nurse, may be particularly probative given her medical training, although an opinion may be reduced in probative value, even where the statement comes from someone with medical training, if the medical issue requires special knowledge. See *Black v. Brown*, 10 Vet. App. 279 (1997).

**Ultimately, the Board finds that it is at least as likely as not that the Veteran was exposed to herbicides during his duty station at U-Tapao Air Base in Thailand.** As a result, he benefits from the herbicide presumption of 38 U.S.C.A. § 1116 and 38 C.F.R. § 3.309(e). Stage IV squamous cell carcinoma of the lung was diagnosed in April 2005, and he died the following month. He was a smoker for as many as fifty pack years according to his medical treatment records. Precedent opinions of VA's General Counsel have discussed the cause-and-effect correlation between chronic smoking and the eventual development of respiratory disorders such as lung cancer. See VAOPGCPREC 2-93 (Jan. 13, 1993) and VAOPGCPREC 19-97 (May 13, 1997). And indeed, for a claim, as here, filed on or after June 9, 1998, there is an express prohibition against granting service connection for any disability resulting from injury or disease attributable to the use of tobacco-based products. 38 U.S.C.A. § 1103; 38 C.F.R. § 3.300.

He also had work experience as a coal miner and a history of chronic bronchitis, pneumonia, and chronic obstructive pulmonary disease (COPD). But his signed death certificate states he died of lung cancer and listed "Agent Orange exposure" as a contributory cause. A copy of the certified death certificate dated seven days later, however, had removed Agent Orange as a contributory cause.

The presumption that his lung cancer originated as a result of herbicide exposure may be rebutted if sound medical reasoning and consideration of all evidence of record support a conclusion that the disease was not incurred in service. 38 C.F.R. § 3.307(d)(1). Here, though, the medical evidence on this point is at best inconclusive. In a



report dated in April 2005, for instance, the commenting physician indicated the Veteran had started smoking at age 18 and "may have been Agent Orange exposed." So this physician seemingly cited both, not just one, as a possible source of the Veteran's lung cancer.

The Veteran's service treatment records (STRs) are unremarkable for complaints or treatment referable to his lungs, although he reported "shortness of breath" during his military separation examination in May 1969. On clinical evaluation, his lungs and chest were normal. Records of VA treatment dated between December 1976 and May 2005 document a long pattern of smoking, varying between a half-pack of cigarettes per day to as much as five packs per day. He continued to have normal X-rays until October 1997, however, when it was first reported he had COPD. Between January and April 2005, numerous bilateral pulmonary masses were observed. In April 2005, a bronchoscopy showed he had squamous cell carcinoma.

These records show his history of smoking undoubtedly contributed at least in part to his lung cancer. But these medical treatment records speak much less, if at all, to whether exposure to Agent Orange during his military service caused or contributed substantially or materially to this lung cancer, yet, there is no indication the type of lung cancer he had could not have been caused by herbicide exposure.

He had a lung disease process that encompassed the whole of his lungs and that was the result of a cumulative series of causes, both environmental and biological. The Board is unable to apportion the disease in a quantifiable way. As a consequence, it is at least as likely as not that his lung cancer arose, at least in part, as a consequence of his wartime Agent Orange exposure. Thus, resolving all reasonable doubt in her favor, his Appellant-widow's accrued benefits claim for service connection for this lung cancer must be granted.

So, too, must the Board grant the claim for cause of death inasmuch as there is no disputing this lung cancer was the reason the Veteran died. That is to say, it caused or contributed substantially and materially to his death. In order to establish entitlement to service connection for the cause of a Veteran's death, applicable law requires that the evidence show that a disability incurred in or aggravated by his active military service either caused or contributed substantially or materially to death. For a service-connected disability to be the cause of death, it must singly or with some other condition be the immediate or underlying cause, or be etiologically related. For a service-connected disability to constitute a contributory cause, it is not

sufficient to show that it casually shared in producing death, but rather it must be shown that there was a causal connection. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312. In order to constitute the principal cause of death the service-connected disability must be one of the immediate or underlying causes of death, or be etiologically related to the cause of death. 38 C.F.R. § 3.312(b). In order to constitute the contributory cause of death it must be shown that the service-connected disability contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death. 38 C.F.R. § 3.312(c). If the service-connected disability affected a vital organ, careful consideration must be given to whether the debilitating effects of the service-connected disability rendered the Veteran less capable of resisting the effects of other diseases. 38 C.F.R. § 3.312(c)(2).

Here, the Veteran's lung cancer was ultimately terminal. And since as it has been attributed to his military service, i.e., determined to have been a service-connected disability on account of his as likely as not exposure to Agent Orange in Thailand, this then provides the grounds for also granting the Appellant's cause-of-death claim as the necessary linkage has been established between this service-connected disability and the Veteran's death.

ORDER

The accrued benefits claim of entitlement to service connection for the Veteran's lung cancer is granted.

Also granted is the Appellant-widow's cause-of-death claim.

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KEITH W. ALLEN  
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs