

Citation Nr: 1338846

Decision Date: 11/25/13 Archive Date: 12/06/13

DOCKET NO. 12-27 226A) DATE

)

)

**On appeal from the Department of Veterans Affairs Regional Office
and Insurance Center in Philadelphia, Pennsylvania**

THE ISSUE

**Entitlement to service connection for the Veteran's cause of death, to
include as due to exposure to herbicides.**

ATTORNEY FOR THE BOARD

J. Fussell, Counsel

INTRODUCTION

**The Veteran served on active duty from February 1953 to February
1979. The Veteran died in November 2003. The appellant is his
surviving spouse.**

**In April 2009, the Board denied the appellant's claim for service
connection for the cause of the Veteran's death.**

**This appeal to the Board of Veterans' Appeals (Board) arose from a
November 2011 rating decision (reflected in the Veteran's paperless,
electronic (Virtual VA) file) in which the RO denied a request to reopen
the appellant's claim for service connection for the Veteran's cause of
death, to include as a result of exposure to herbicides.**

**The appellant initiated this appeal by filing a notice of disagreement
(NOD) in April 2012, and after a statement of the case (SOC) was issued**

in August 2012, she perfected her appeal by filing VA Form 9 (Appeal to the Board of Veterans' Appeals), in October 2012. A review of the Virtual VA paperless claims processing system does not reveal any additional documents pertinent to the present appeal except as noted herein.

In response to her request, the appellant was scheduled for n April 2013 hearing before a Veterans Law Judge in Washington D.C. but prior thereto she cancelled the hearing and did not request that the hearing be rescheduled. Rather, she indicated her desire that the case be adjudicated on the basis of the evidence of record.

In April 2013, the Acting Chairman of the Board granted the appellant's motion to advance this appeal on the Board's docket, pursuant to 38 U.S.C.A. § 7107(A)(2) (West 2002); 38 C.F.R. § 20.900(c) (2012).

In a May 2013 decision, the Board reopened the claim for service connection for the cause of the Veteran's death, to include as due to exposure to herbicides, but deferred de novo consideration of the merits pending evidentiary development. The case has now been returned to the Board.

FINDINGS OF FACT

- 1. All notification and development actions needed to fairly adjudicate the claim on appeal have been accomplished.**
- 2. The Veteran died in November 2003. His death certificate listed the immediate cause of his death as retroperitoneal sarcoma.**
- 3. At the time of his death, the Veteran was service-connected for residuals of a left wrist fracture, rated as 20 percent disabling; herniated nucleus pulposus, rated as 10 percent disabling; and residuals of right femur fracture and left tibia fracture, each rated as noncompensable (zero percent) disabling.**
- 4. The Veteran had no service within the land borders of Vietnam (including inland waterways) during service; however, the evidence is at**

least in equipoise as to whether the Veteran was exposed to herbicide agents during his period of service at Udorn Air Base, Thailand.

5. The Veteran's fatal retroperitoneal sarcoma of unspecified etiology is first shown many years after the Veteran's separation from service, but is a disease recognized by VA as etiologically associated with exposure to certain herbicide agents.

CONCLUSION OF LAW

Resolving reasonable doubt in the appellant's favor, the criteria for service connection for the cause of the Veteran's death from retroperitoneal sarcoma, as due to herbicide exposure, are met. 38 U.S.C.A. §§ 1110, 1112, 1116, 1131, 5103, 5103A, 5107 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309(e) (2012); VA's Adjudication Procedures Manual, M21-1MR, Part IV.ii.2.C.10.q.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. VA's Duties to Notify and Assist

VA has statutory duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. § 5100, 5102, 5103, 5103A, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a); see also *Pelegrini v. Principi*, 18 Vet. App. 112 (2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). In light of the favorable action taken by the Board, any defects with respect to the duties of notice or assistance are non-prejudicial.

II. Service Connection for Cause of Death

When any veteran dies after December 31, 1956, from a service-connected or compensable disability, VA will pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents. 38 U.S.C.A. § 1310. When service connection was not established for the fatal disability prior to the death of the veteran, the initial inquiry is to determine whether the fatal disorder had been

incurred in or aggravated by service. The Board must determine whether the fatal disorder should have been service-connected. 38 C.F.R. § 3.312.

When service connection is established for a disability prior to the death of a veteran, the initial inquiry is to determine whether the service-connected disability was either the principal or contributory cause of the veteran's death. 38 C.F.R. § 3.312. To establish service connection for the cause of the veteran's death, the evidence must show that a disability incurred in or aggravated by active service was the principal or contributory cause of death. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312(a). 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).

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. Service connection may be established for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes the disease was incurred in service. 38 C.F.R. § 3.303(d). Also, service connection shall be granted if a veteran had 90 days or more days of active service and a malignant tumor manifests to a compensable degree within one year following such service. 38 U.S.C.A. § 1112; 38 C.F.R. § 3.307, 3.309.

Service connection is warranted, presumptively, if a Veteran manifests certain enumerated diseases associated with exposure to certain herbicide agents, and this includes soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma) having become manifest to a degree of 10 percent or more at any time after service. 38 C.F.R. § 3.307, 3.309; 38 U.S.C.A. § 1116 (West 2002 & Supp. 2012). 38 C.F.R. §§ 3.307(a)(6)(ii), 3.309(e).

A veteran 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 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). "Service in

Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam. 38 C.F.R. § 3.313(a).

VA's Secretary has determined that a presumption of service connection based on exposure to herbicides used in the Republic of Vietnam during the Vietnam era is not warranted for any condition for which the Secretary has not specifically determined a presumption of service connection is warranted. See 67 Fed.Reg. 42600-42608 (2002).

The ultimate credibility or weight to be accorded evidence must be determined as a question of fact. The Board determines whether (1) the weight of the evidence supports the claim, or (2) the weight of the "positive" evidence in favor of the claim is in relative balance with the weight of the "negative" evidence against the claim: the appellant prevails in either event. However, if the weight of the evidence is against the appellant's claim, the claim must be denied. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102; Gilbert v. Derwinski, 1 Vet. App. 49, 53-56 (1990).

III. Background

The Veteran's service treatment records, including the February 1953 entrance examination and May 1978 retirement examination reports, are devoid of any complaints, treatment, or diagnosis of retroperitoneal sarcoma, and no gastrointestinal complaints were recorded on the retirement physical examination.

Service personnel records reflect that the Veteran was stationed in Thailand at Udorn Air Force Base (AFB) from September 1971 to September 1972 and was awarded the Vietnam Service Medal (VSM). The Veteran's DD Form 214 (Report of Discharge From Service) noted that his military occupational specialties (MOS) were aircraft mechanic and aircraft maintenance technician. A July 1972 performance report indicated that the Veteran's current duty at Udorn AFB was NCOIC Maintenance Technical Administration and Training.

Post-service private treatment records from multiple providers, including Roper Hospital, and dated from August 2002 through November 2003 show that the Veteran received chemotherapy,

radiation, and surgical treatment for malignant fibrous histiocytoma of the retroperitoneal space, high grade retroperitoneal sarcoma, and malignant fibrohistiocytoma with bilateral lung metastases.

In an April 2003 statement, the Veteran indicated that he was stationed in Thailand during active service and he serviced airplanes going to and from Vietnam.

The Veteran's death certificate lists the immediate (and only) cause of his death in November 2003 as retroperitoneal sarcoma.

In September 2003 Dr. A. B., who is Board Certified in Oncology and Hematology, stated that he had treated the Veteran since September 2002 for a malignant soft tissue sarcoma. It was his opinion that the sarcoma was most likely caused by chemical carcinogenesis, and that Agent Orange exposure that was document was the only known chemical exposure and, so, the most likely cause of the fatal cancer.

In August 2004 the appellant stated that the Veteran was exposed to herbicides which were sprayed all over the foliage in Vietnam, just across the border of Thailand. Also, he was most likely exposed by working on planes that returned from Vietnam to his base in Thailand.

In a June 2005 statement, a private oncologist, A.B., M.D., opined that the Veteran's soft tissue sarcoma of the abdominal retroperitoneal space was most likely caused by environmental exposures, such as chemicals or radiation. The physician further indicated that if the Veteran was apparently exposed to environmental chemicals during his service in Southeast Asia in the 1960's or 1970's, then this exposure would be the most likely cause of his sarcoma.

In an April 2007 letter the appellant reported that the Veteran had been awarded the Vietnam Service Medal. In June 2007 she reported that, now being 70 years old, she did not have access to "buddy statements, photographs, or letters" relative to the Veteran's herbicide exposure. In May 2008 she reported that he had been an aircraft mechanic and worked on planes that were flown into Vietnam and that it was highly likely that he may have been sent "TDY" to Vietnam to repair or recover aircraft. She stated that Agent Orange was stored in Thailand and delivered into Vietnam on aircraft leaving and returning to

Thailand, thus likely contaminating airfields in Thailand. She also believed that Agent Orange had spread through air from Vietnam to Thailand.

In an October 2012 letter the appellant stated that the Veteran had been a "runner" and had spent his year in Thailand running three or more miles around the base almost every day. Thus, he was "near the base perimeter."

The case was remanded in May 2013 to afford the appellant an opportunity to submit an additional statement regarding any duties that required the Veteran be at or near the base perimeter of Udorn Airbase from September 1971 to September 1972. Thereafter, a request was to be sent to Joint Services Records Research Center (JSRRC) for any information that Compensation and Pension Services (C&P) could not provide to corroborate any claimed exposure in an effort to verify the Veteran's exposure to herbicides consistent with his service in Thailand.

In May 2013 and again in August 2013, the appellant was sent a letter requesting the submission or specification of evidence as to the Veteran's in service herbicide exposure. In response, she submitted duplicate private clinical records, as well as duplicates of the September 2003 and June 2005 statements of Dr. A. B.

Thereafter, the RO made a Formal Finding of Lack of Information as to the Veteran's in-service herbicide exposure in Thailand for the purpose of submission of the case to the JSRRC. The appellant's failure to provide further details concerning the Veteran's in-service herbicide exposure in Thailand was noted. It was concluded that the case should not be sent to JSRRC because the range of dates of the Veteran's service at Udorn were too expansive. Moreover, his job duties, according to his personnel records, did not show that he would have been near the airbase perimeter and, thus, in-service herbicide exposure at Udorn, Thailand, was not conceded.

Consistent with Fast Letter 09-20, the RO has placed in the claims file a memorandum for the record regarding herbicide use in Thailand during the Vietnam era. See Fast Letter 09-20 (May 6, 2009). Attached to the Formal Finding is "IV.II2.C.10.rr. Memorandum of Record - Herbicide Use in Thailand." That memorandum noted that official

Department of Defense monographs describing use, testing, and storage of herbicides had been reviewed, as had the "Project CHECO Southeast Asia Report: Base Defense in Thailand" during the Vietnam era. The CHECO report indicated that there was no tactical use of herbicides in Thailand after in 1964. However, there was sporadic use of non-tactical (commercial) herbicides within fenced perimeters. Thus, if a military occupational specialty or unit was one that regularly had contact with the base perimeter, there was a greater likelihood of exposure to pesticides and herbicides. Security police units, especially dog handlers, were known to have walked the perimeter. Also, there was no presumption of "secondary exposure" based on being near or working on aircraft that flew over Vietnam or handling equipment once used in Vietnam. Any submission of a case to the JSRRC for further information had to be limited to a time frame of 60 days.

The memorandum further states that C&P has determined that special consideration should be given to veterans whose duties placed them on or near the perimeters of Thailand military bases. Consideration of herbicide exposure on a "facts found or direct basis" should be extended to those veterans. Significantly, C&P stated that "[t]his allows for presumptive service connection of the diseases associated with herbicide exposure." A May 2010 bulletin identifies several bases in Thailand, including Udorn Royal Air Force Base for the United States Air Force (RTAFB). C&P indicated that herbicide exposure should be acknowledged on a facts found or direct basis if a United States Air Force veteran served at one of the air bases as a security policeman, a security patrol dog handler, a member of a security police squadron, or otherwise served near the air base perimeter, as shown by his or her military occupational specialty, performance evaluations, or other credible evidence. See also M21-1MR at IV.ii.2.C.10.qq.

IV. Analysis

At the time of his death, the Veteran was service-connected for residuals of a left wrist fracture, rated as 20 percent disabling; herniated nucleus pulposus, rated as 10 percent disabling; and residuals of right femur fracture and left tibia fracture, each rated as noncompensable (zero percent) disabling.

It is undisputed that the Veteran's fatal sarcoma did not manifest until many years after the determination of his military service in 1979. The Veteran's service personnel records reflect that he was stationed in Thailand from September 1971 to September 1972 at Udorn Air Force Base. Moreover, it is clear that herbicides were sprayed in areas of Thailand around the perimeter of certain airbases, including Udorn Air Force Base. Thus, the Veteran may, in fact, have been exposed to herbicides, to include Agent Orange, as alleged, depending on the nature and circumstances of his period of his duties and presence on base.

The Veteran indicated that he served as a mechanic at an airbase at Udorn, Thailand. His service personnel records, including very favorable performance reviews, confirm this fact. To the Veteran's, and, by extension, the appellant's, benefit, the performance reviews describe the Veteran as being extremely conscientious and of sound judgment. The appellant's descriptions are generally credible and consistent with the circumstances of the Veteran's service and information made public by VA. The Board finds the statements as to the circumstances of his service in Thailand to be competent and credible. Thus, under the ordinary meaning of the words, the evidence demonstrates that the Veteran did serve "near the perimeter" while at Udorn Royal Air Force Base in performing his duties there and in engaging in exercise by running around the perimeter of that airbase.

Although there is no specific record of assignment to perimeter duty, the Board finds that consistent assertions regarding the time the Veteran spent along the perimeter of the Royal Thai Air Force Bases in Udorn to be credible. Therefore, as a factual matter, i.e., on a fact found basis, in view of the aforementioned guidance from the M21-1 MR, the Board finds that the Veteran was exposed to herbicide agents while he was stationed at the Royal Thai Air Force Bases in Udorn during his one-year tour of duty from September 1971 to 1972, during the Vietnam era. See M21-1 MR, Part IV, Subpart ii, Chapter 2, Section C, Paragraph 10(q).

In view of this finding, the Board need not address the appellant's other contentions concerning the means of exposure of the Veteran to herbicides.

In sum, the evidence shows that the Veteran was at least as likely as not exposed to herbicides during his period of service near the perimeter at Udorn Royal Air Force Base in Thailand and that he died of peritoneal sarcoma. Peritoneal sarcoma shall be presumed to be due to exposure to certain herbicide agents if manifested to a degree of 10 percent or more at any time after service. See 38 C.F.R. §§ 3.307, 3.309(3). Accordingly, under these circumstances, and after resolving any reasonable doubt in the appellant's favor on the specific facts of this case, service connection for the cause of the Veteran's death is warranted.

ORDER

Service connection for the cause of the Veteran's death from retroperitoneal sarcoma, as due to herbicide exposure, is granted.

JACQUELINE E. MONROE
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs