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On appeal from the Department of Veterans Affairs Regional Office in Montgomery, Alabama

THE ISSUE

Entitlement to service connection for testicular cancer, status post right radical orchiectomy with sterility.

REPRESENTATION

Appellant represented by: The American Legion

ATTORNEY FOR THE BOARD

S. Coyle, Associate Counsel

INTRODUCTION

The veteran served on active duty from July 1967 to November 1968.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a June 2003 rating decision by the Montgomery, Alabama, Regional Office (RO) of the Department of Veterans Affairs (VA), which denied entitlement to the benefit currently sought on appeal.

The case was referred for a VHA opinion in October, 2007, and now again returns to the Board.

FINDINGS OF FACT

1. The veteran served in the Republic of Vietnam, where he is presumed to have been exposed to herbicides.
2. Testicular cancer is not presumptively linked to herbicide exposure.
3. Resolving all doubt in the veteran's favor, testicular cancer status post right radical orchiectomy with sterility is related to the veteran's service.

CONCLUSION OF LAW

Testicular cancer, status post right radical orchiectomy with sterility, was incurred in service. 38 U.S.C.A. §§ 1110, 5103-5103A, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.159, 3.303 (2007).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

As a preliminary matter, the Board notes that the RO has a duty to notify and assist the veteran under 38 U.S.C.A. §

5103 and 38 C.F.R. § 3.159. As will be discussed below, the Board finds that service connection for testicular cancer, status post right radical orchiectomy with sterility, is warranted; therefore, a full discussion of whether VA met these duties is not needed. Additionally, as the Board is granting the claim for service connection, the agency of original jurisdiction will be responsible for addressing any notice defect with respect to the rating and effective date elements when effectuating the award.

Therefore, it is not prejudicial to the appellant for the Board to proceed to finally decide the issue discussed in this decision. See *Conway v. Principi*, 353 F.3d 1369 (Fed. Cir. 2004); *Quartuccio*, 16 Vet. App. 183; *Sutton v. Brown*, 9 Vet. App.

553 (1996); *Bernard v. Brown*, 4 Vet. App. 384 (1993); *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006); see also 38 C.F.R. § 20.1102 (2007) (harmless error).

Presumptive Service Connection

For purposes of establishing service connection for a disability resulting from exposure to a herbicide agent, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam between January 1962 and May 1975, shall be presumed to have been exposed during such service to a herbicide agent, absent affirmative evidence to the contrary demonstrating that the veteran was not exposed to any such agent during service. 38 U.S.C.A. § 1116(f). In this case, the record reflects that the veteran served in the Republic of Vietnam during the relevant time period. Therefore, he is presumed to have been exposed to herbicides.

The Agent Orange Act of 1991 (in part) directed the Secretary of VA to enter into an agreement with the National Academy of Sciences (NAS) to review and summarize the scientific evidence concerning the association between exposure to herbicides used in support of military operations in the Republic of Vietnam during the Vietnam Era and each disease suspected to be associated with such exposure. The Secretary's determination must be based on consideration of NAS reports and all other sound medical and scientific information and analysis available to the Secretary. See 38 U.S.C.A. § 1116 (b) and (c). As a result of this ongoing research, certain diseases have been found to be associated with exposure to herbicide agents and will be presumed by VA to have been incurred in service even though there is no evidence of such disease during such period of service. 38 C.F.R. §§ 3.307(a), 3.309(e).

The Secretary of the Department of Veterans Affairs 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 testicular cancer. See Notice, 72 Fed. Reg. 32395-32407 (2007). It was specifically indicated that the National Academy of Sciences, after reviewing pertinent studies, did not feel that the evidence warranted altering its prior determination that there was inadequate or insufficient evidence of an association between exposure to herbicide agents and the subsequent development of testicular cancer. See Notice, 67 Fed. Reg. 42604 (2002). Thus, it may not be presumed that the veteran's testicular cancer, status post right radical orchiectomy with sterility, is linked to herbicide exposure.

A presumption also exists for certain chronic diseases that become manifest to a compensable degree within one year following active service. 38 C.F.R. §§ 3.307, 3.309. Malignant tumors do qualify as one of the enumerated chronic diseases. 38 C.F.R. § 3.307(a)(3); 38 C.F.R. § 3.309(a). However, the first diagnosis of the veteran's testicular cancer was in April 1977, almost ten years after his separation, and therefore was not manifest to a degree of ten percent or more within one year from his date of separation from service. Accordingly, the Board finds no basis for granting service connection under this provision.

Direct Service Connection

Although the evidence does not support a presumptive link between the veteran's testicular cancer and his active service, the United States Court of Appeals for the Federal Circuit has determined that an appellant is not precluded from establishing service connection with proof of actual direct causation. *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994).

In general, service connection will be granted for disability resulting from injury or disease incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. If a condition noted during service is not determined to be chronic, then generally a showing of continuity of symptomatology after service is required for service connection. 38 C.F.R. § 3.303(b). Service connection may also 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).

There must be medical evidence of a current disability, medical or lay evidence of in-service incurrence or aggravation of a disease or injury, and medical evidence linking the current disability to that in-service disease or injury. *Pond v. West*, 12 Vet. App. 341, 346 (1999); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

Once the evidence has been assembled, it is the Board's responsibility to evaluate the record. 38 U.S.C.A. § 7104(a). When there is an approximate balance of evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving such issue shall be given to the claimant. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102. In *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990), the United States Court of Appeals for Veterans Claims stated that "a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail." To deny a claim on its merits, the evidence must preponderate against the claim. *Aleman v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*, 1 Vet. App. at 54.

The veteran's service medical records are negative for testicular complaints. His separation examination makes no mention of cancer or testicular ailments. Post-service medical evidence also makes no mention of treatment for cancer until April 1977, at which point embryonal cell carcinoma of the right testicle was diagnosed. A right radical orchiectomy was performed, and there has been no evidence of recurrence of the veteran's cancer.

In May 2003, the veteran's treating physician, Dr. C.L., indicated that the veteran's testicular cancer was the result of herbicide exposure during his Vietnam service. In July

2003, Dr. C.L. submitted the results of his research on a link between testicular cancer and herbicide exposure. He presented a study conducted by an Australian medical team that "seems to indicate there is some association," however, he did note that the low number of cases studied made it difficult to reach a solid conclusion.

In view of Dr. C.L.'s opinion and supporting research, the Board submitted the matter to the Veterans Health Administration (VHA) for the opinion of a specialist in oncology. In January 2008, a response was received from Dr. L.M.S., chief of oncology at VA Western New York Healthcare System, who had reviewed the claims folder.

On the question of whether the veteran's testicular cancer and subsequent right radical orchiectomy was related to his herbicide exposure, Dr. L.M.S. cited two references supporting a potential nexus between testicular cancer and herbicide exposure. One of these studies showed that, out of 33,000 studied pesticide applicators, the risk of testicular cancer was 2.48, a "significantly elevated risk" according to the study's authors. A second study found that Navy veterans serving in the Republic of Vietnam had an increased risk of testicular cancer. Based on these findings, the physician found that "it is as likely as not that the veteran's testicular cancer is etiologically related to his presumed in-service herbicide exposure."

On review of the evidence, including the opinions of Drs. C.L. and L.M.S. and their supporting research, the Board finds that the evidence is at least in equipoise on the matter of direct service connection for testicular cancer, status post right radical orchiectomy with sterility. The Board is also required to resolve all reasonable doubt in favor of the veteran. See 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102. Accordingly, service connection for testicular cancer, status post right radical orchiectomy with sterility, is granted.

ORDER

Entitlement to service connection for testicular cancer, status post right radical orchiectomy with sterility, is granted.

THOMAS J. DANNAHER Veterans Law Judge, Board of Veterans' Appeals
Department of Veterans Affairs