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THE ISSUES

1. Entitlement to service connection for the cause of the veteran's death.
2. Entitlement to service connection for diabetes mellitus, for purposes of accrued benefits.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARINGS ON APPEAL

The appellant

ATTORNEY FOR THE BOARD

David A. Brenningmeyer, Counsel

INTRODUCTION

The veteran served on active duty from August 1962 to September 1966. He died in June 2002, and the appellant is his widow.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a September 2002 decision by the RO in Togus, Maine. After that decision was entered, the case was transferred to the jurisdiction of the RO in New York, New York.

In October 2004, the appellant testified before the undersigned at a hearing held in Washington, D.C. In January 2005, the Board remanded her case for additional development.

In August 2006, the appellant testified at a second hearing before the undersigned at a hearing held in Washington, D.C. Later that same month, the United States Court of Appeals for Veterans Claims (Court) issued an opinion in *Haas v. Nicholson*, 20 Vet. App. 257 (2006), wherein the Court reversed a decision of the Board that had denied service connection for disabilities claimed as a result of exposure to herbicides. *Haas v. Nicholson*, 20 Vet. App. 257 (2006). In that case, the Board had determined that, although the appellant had served in waters off the shore of the Republic

of Vietnam, such service did not warrant application of the presumption of herbicide exposure because the appellant never actually set foot on land in that country. In reversing the Board's decision, the Court held that a VA manual provision, VA Adjudication Procedure Manual M21-1, Part III, 4.08(k)(1)-(2) (Nov. 1991), created a presumption of herbicide exposure based on receipt of the Vietnam Service Medal. In so holding, the Court found the manual provision to be a substantive rule and invalidated a subsequent amendment to that provision. The Court also found that neither the statute nor the regulation governing herbicide exposure claims precluded application of the presumption of exposure to persons who served aboard ship in close proximity to the Republic of Vietnam.

VA disagrees with the Court's decision in Haas and is seeking to have the decision appealed to the United States Court of Appeals for the Federal Circuit. To avoid burdens on the adjudication system, delays in the adjudication of other claims, and unnecessary expenditure of resources through remand or final adjudication of claims based on court precedent that may ultimately be overturned on appeal, the Secretary of VA has imposed a stay at the Board on the adjudication of claims affected by Haas. The specific claims affected include claims for service connection based on herbicide exposure where the only evidence of exposure is receipt of the Vietnam Service Medal or service on a vessel off the shore of Vietnam.

In the present case, both of the appellant's claims are premised on the veteran's exposure to herbicides. However, as set forth below, the appellant has produced evidence tending to show that the conditions of the veteran's military service at least as likely as not involved actual duty or visitation in the Republic of Vietnam. Accordingly, her claim for service connection for the cause of the veteran's death is not affected by the stay.

With respect to her claim for service connection for diabetes mellitus, however, the Board notes that that claim is a claim for accrued benefits. In adjudicating such a claim, VA may consider only that evidence which was actually or constructively of record at the time of the veteran's death. See, e.g., 38 U.S.C.A. § 5121(a); 38 C.F.R. § 3.1000(a). In the appellant's case, the evidence of record at the time of the veteran's death showed that he served on a vessel off the shore of Vietnam. However, there was no evidence to show that he had actual duty or visitation in Vietnam. Therefore, the appellant's claim for service connection for diabetes mellitus, for purposes of accrued benefits, falls within the parameters of the stay. Once a final decision is reached on appeal in the Haas case, the adjudication of stayed cases, including the appellant's claim for accrued benefits, will be resumed.

FINDINGS OF FACT

1. During his lifetime, the veteran was diagnosed with Type II diabetes.
2. The veteran died in June 2002; diabetes was identified as

a condition that led to his death.

3. It is at least as likely as not that the conditions of the veteran's military service involved actual duty or visitation in the Republic of Vietnam.

CONCLUSION OF LAW

Resolving reasonable doubt in the appellant's favor, the veteran's death can be attributed to exposure to herbicides in service. 38 U.S.C.A. §§ 1110, 1116, 1310, 5103, 5103A (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.159, 3.303, 3.307, 3.309, 3.312 (2006).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The appellant maintains that service connection should be established for the cause of the veteran's death. She contends, in essence, that Type II diabetes mellitus, which led to the veteran's death, can be attributed to his in-service exposure to herbicides.

I. Preliminary Matters

On November 9, 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002 & Supp. 2005)). The VCAA imposes obligations on VA in terms of its duty to notify and assist claimants.

Under the VCAA, upon receipt of a complete or substantially complete application for benefits, VA must inform the claimant of any information and evidence not of record that is necessary to substantiate the claim; that VA will seek to provide; and that the claimant is expected to provide; and must ask the claimant to provide any evidence in her possession that pertains to the claim. 38 U.S.C.A. § 5103(a) (West 2002 & Supp. 2005); 38 C.F.R. § 3.159(b) (2006); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Pelegri v. Principi*, 18 Vet. App. 112, 121 (2004). VA is also required to make reasonable efforts to help the claimant obtain evidence necessary to substantiate her claim, to include relevant records from Federal and private sources, and must obtain a medical examination and/or opinion when necessary to make a decision on the claim. 38 U.S.C.A. § 5103A(b)-(d) (West 2002); 38 C.F.R. § 3.159(c)(1)-(4) (2006).

The Court has held that the VCAA notice requirements apply generally to all five elements of a service connection claim; namely, (1) veteran status, (2) existence of a disability, (3) a connection between the veteran's service and the disability, (4) degree of disability, and (5) effective date of the disability. *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). Ordinarily, notice with respect to each of these elements must be provided to the claimant prior to the initial unfavorable decision by the agency of original jurisdiction. *Id.*

In the present case, the Board is granting the appellant's

claim for service connection for the cause of the veteran's death. As a matter of law, that grant will not involve the assignment of a disability rating. Consequently, no justiciable issue remains as to the timing or adequacy of the notice provided with respect to elements (1)-(4), above, or with respect to the duty to assist. As to the fifth element of notice, pertaining to the effective date of the award, the Board acknowledges that the appellant has not received any specific notice with respect to the manner in which an effective date will be assigned. However, inasmuch as the Board is not assigning an effective date presently (and, indeed, has no current jurisdiction to consider that question), there is no possibility that the appellant will be prejudiced by the Board's issuance of the present decision. The agency of original jurisdiction will be responsible for addressing any notice defect with respect to the effective date element when effectuating the award.

II. The Merits of the Appellant's Claim

Under applicable law, service connection is warranted where the evidence of record establishes that a particular injury or disease resulting in disability was incurred in the line of duty in the active military service or, if pre-existing such service, was aggravated thereby. 38 U.S.C.A. § 1110 (West 2002); 38 C.F.R. § 3.303(a) (2006).

The death of a veteran will be considered as having been due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. 38 U.S.C.A. § 1310 (West 2002 & Supp. 2005); 38 C.F.R. § 3.312(a) (2006). A service-connected disability is considered the "principal" (primary) cause of death when that disability, "singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto." 38 C.F.R. § 3.312(b). A "contributory" cause of death is inherently one not related to the principal cause. *Id.* § 3.312(c). A contributory cause must be causally connected to the death and must have "contributed substantially or materially" to death, "combined to cause death," or "aided or lent assistance to the production of death." *Id.*

If a veteran was exposed to an "herbicide agent" during active military, naval, or air service, Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes) is presumed to be service connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even though there is no record of the disease during service, provided that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied. 38 U.S.C.A. § 1116(a) (West 2002 & Supp. 2005); 38 C.F.R. § 3.309(e) (2006). In this context, the term "herbicide agent" is defined as a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram. 38 C.F.R. § 3.307(a)(6)(i) (2006).

Under 38 C.F.R. § 3.307(a)(6), 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, is presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to the contrary. Id.

§ 3.307(a)(6)(iii). Under current regulation, "service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. Id.

In the present case, the evidence of record clearly shows that the veteran was diagnosed with Type 2 diabetes during his lifetime. The evidence also shows that he died in June 2002, and that diabetes was identified as a condition that led to his death. (His death certificate shows that the immediate cause of his death was cardiac arrhythmia, due to or a consequence of end stage congestive heart failure, due to or a consequence of diabetes.) Thus, the only question that remains, in terms of establishing service connection for the cause of the veteran's death, is whether the conditions of his service involved duty or visitation in the Republic of Vietnam.

In this regard, the Board finds that the evidence supports a finding that the veteran did, in fact, have duty or visitation in Vietnam. Service department records clearly show that the veteran departed California in early November 1965 for an assignment with Navy Attack Squadron 195. They also show that he arrived onboard the U.S.S. Bon Homme Richard (CVA-31) on November 17, 1965, when that vessel was located at Yankee Station; a position off the coast of Vietnam. There is no direct evidence to show the precise means whereby the veteran arrived on the deck of the U.S.S. Bon Homme Richard. The appellant maintains, however, that his likely path of travel would have involved a COD (carrier on-deck delivery) flight from Cubi Point, in the Republic of the Philippines, to a position in Vietnam (probably Chu Lai or Da Nang), and then to the deck of the U.S.S. Bon Homme Richard. In support of this theory, she has provided statements from others who served in and around Vietnam, including pilots who flew COD flights, which, when taken together, tend to show that servicemen ordinarily arrived on mid-cruise carriers via COD flights and that, due to fuel/range limitations and other considerations, COD flights from Cubi Point ordinarily stopped in Vietnam before continuing on to the destination carrier. In the Board's view, this evidence demonstrates to a reasonable likelihood (i.e., it is at least as likely as not) that the veteran had actual duty or visitation in Vietnam during service. Certainly, the Board cannot conclude that the preponderance of the evidence is against the claim. Consequently, and resolving reasonable doubt in the appellant's favor, the Board will grant service connection for the cause of the veteran's as due to exposure to herbicides.

The Board commends the appellant and her representative for their efforts at gathering and presenting evidence in this case. The appellant has provided testimony which is both credible and sincere, and has, through tireless efforts, provided a wealth of information that bears on her claim, including the question of the veteran's likely presence in

Vietnam. The Board sincerely appreciates the honest and thorough assistance she and her representative have provided in resolving the difficult questions presented by this appeal.

ORDER

The claim for service connection for the cause of the veteran's death is granted.

STEVEN L. COHN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs