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

THE ISSUE

Entitlement to service connection for Type II diabetes mellitus, claimed as due to exposure to Agent Orange.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

The veteran

ATTORNEY FOR THE BOARD
J. H. Nilon, Counsel

INTRODUCTION

The veteran had active military service from November 1965 to August 1969.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a March 2004 RO rating decision.

The veteran testified before the undersigned Veterans Law Judge in a hearing at the RO in August 2007.

During the hearing, the veteran submitted lay evidence in the form of a "buddy statement" attesting to his physical presence in the Republic of Vietnam, along with a waiver of initial RO review of that document. The Board has accepted this additional evidence for inclusion into the record on appeal. See 38 C.F.R. § 20.800.

The Board notes at this point that the claim was originally based on a claim of exposure to herbicides while serving in the waters off Vietnam. The United States Court of Appeals for Veterans Claims issued a decision in *Haas v. Nicholson*, 20 Vet. App. 257 (2006) that reversed a Board decision denying service connection for disabilities claimed as a result of exposure to herbicides offshore. VA appealed the *Haas* to the United States Court of Appeals for the Federal Circuit, and such claims were placed in "stay" pending resolution of that appeal.

However, the veteran now asserts that he was physically present in Vietnam, rather than simply offshore, so the claim may be adjudicated outside the boundaries of *Haas*.

Finally, the Board notes that review of the file shows the veteran filed a claim for service connection for prostate cancer in July 2007. There is no indication that the RO has developed or adjudicated that claim. That issue is accordingly referred to the RO for appropriate and prompt action.

FINDINGS OF FACT

1. All notification and development action needed to fairly adjudicate the issue on appeal has been accomplished.
2. The veteran is shown as likely as not to have been physically present in the Republic of Vietnam during the presumptive period for exposure to Agent Orange.
3. The veteran currently is shown to have Type II diabetes mellitus.

CONCLUSION OF LAW

The veteran's disability manifested by Type II diabetes mellitus is due to disease that was incurred in active service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1131, 1132, 5103, 5103A, 5107 (West 2002 & Supp. 2007); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309, 3.313 (2007).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duties to Notify and Assist

Initially, the Board notes that, in November 2000, the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000), was signed into law. See 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, and 5107 (West 2002).

To implement the provisions of the law, VA promulgated regulations at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2003).

VCAA and its implementing regulations include, upon the submission of a substantially complete application for benefits, an enhanced duty on the part of VA to notify a claimant of the information and evidence needed to substantiate a claim, as well as the duty to notify the claimant what evidence will be obtained by whom. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b).

Considering the claim on appeal in light of the duties imposed by VCAA and its implementing regulations, and given the favorable action granting service connection, the Board finds that no further notification or assistance is required

as to the issue on appeal.

II. Analysis

Service connection may be granted for a disability resulting from disease or injury incurred or aggravated during a veteran's active service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303.

Service connection may be presumed for certain chronic diseases, including Type II diabetes mellitus, which develop to a compensable degree within one year after discharge from service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by probative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309. However, there is no medical evidence in this case that diabetes mellitus was manifest to any degree during the first year after discharge.

The Board also notes that if a veteran was exposed to an herbicide agent during active military service, diabetes mellitus shall be service-connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even if there is no record of such disease during service, provided further that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied. 38 C.F.R. § 3.309(e).

There is a presumption of exposure to herbicides for all veterans who served in Vietnam during the Vietnam War. See 38 C.F.R. § 3.307(a)(6)(iii).

Specifically, 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. See 38 C.F.R. §§ 3.307(a)(6)(iii); see also VAOPGCPREC 7-93.

The veteran served on the USS New Jersey during a period when that ship provided naval gunfire support to land forces in Vietnam.

"Service in Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation to Vietnam. 38 C.F.R. § 3.313. However, the VA General Counsel has determined that this regulatory definition, which permits certain personnel not actually stationed within the borders of Vietnam to be considered to have served in that Republic, requires that an individual actually have been present within the boundaries of the Republic.

Specifically, the General Counsel has concluded that in order to establish qualifying "service in Vietnam" a veteran must

demonstrate actual duty or visitation in the Republic of Vietnam; service on a deep water vessel in waters off the shore of the Republic of Vietnam, without proof of actual duty or visitation in the Republic of Vietnam, does not constitute "service in the Republic of Vietnam" for the purposes of 38 U.S.C.A. § 101(29)(A) (establishing that the term "Vietnam era" means the period beginning on February 28, 1961 and ending on May 7, 1975 in the case of a veteran who served in the Republic of Vietnam during that period). See VAOPGCPREC 27-97.

Similarly, in another precedent opinion, the VA General Counsel concluded that the term "service in Vietnam" does not include service of a Vietnam-era veteran whose only contact with Vietnam was flying high-altitude missions in Vietnamese airspace. See VAOPGCPREC 7-93. Again, a showing of actual duty or visitation in the Republic of Vietnam is required to establish qualifying service in Vietnam.

The RO originally denied service connection because the veteran had been shown to have served in a deep water vessel (a battleship) offshore, but not to have actually served in or visited the Republic of Vietnam.

However, in conjunction with his testimony before the Board, the veteran produced a letter dated in August 2007 signed by the former commanding officer of the USS New Jersey. The letter asserts that the author of the letter specifically remembers the veteran having been present on the captain's gig going ashore in December 1968.

The Board is not required to accept a veteran's uncorroborated account of his active service experiences. *Wood v. Derwinski*, 1 Vet. App. 190, 192 (1991). However, the Board finds that the August 2007 letter by the veteran's former commanding officer provides independent corroboration of the veteran's account that he was physically present in the Republic of Vietnam in December 1968.

As the veteran now is presumed to have been exposed to Agent Orange, and has a disease for which Agent Orange is the presumptive cause, the Board finds that the criteria for service connection for Type II diabetes mellitus are met.

ORDER

Service connection for Type II diabetes mellitus is granted.

STEPHEN L. WILKINS
Veterans Law Judge,
Board of Veterans' Appeals

Department of Veterans Affairs