

Citation NR: 9800877

Decision Date: 01/13/98 Archive Date: 01/21/98

DOCKET NO. 97-05 078) DATE

)
)

On appeal from the
Department of Veterans Affairs Regional Office in San Diego,
California

THE ISSUE

Entitlement to service connection for prostate cancer due to
Agent Orange exposure.

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Alice A. Booher, Counsel

INTRODUCTION

The veteran had active service from July 1960 to October
1963.

This appeal to the Board of Veterans' Appeals (the Board) is
from rating action by the Department of Veterans Affairs (VA)
Regional Office (RO) in Salt Lake City.

The veteran testified before a Hearing Officer at the RO in March 1997. A transcript of the hearing is of record. [Tr.]

The Board remanded the case in October 1997 for clarification with regard to a Travel Board hearing. The veteran has since asked that the appeal proceed expeditiously without an additional personal hearing.

The Board notes that the veteran also has service connection for major depression (previously diagnosed as schizophrenic reaction), currently evaluated as 70 percent disabling.

During the course of this appeal, the veteran's claim with regard to an increased rating for that disability was denied in a rating by the RO in August 1997, and the veteran was so informed and advised of his appellate rights.

At virtually the same time as the Board remand was dispatched on the Agent Orange issue, a packet containing the veteran's responses to the RO decision with regard to his psychiatric rating was received by the Board without written waiver of initial RO consideration pursuant to 38 C.F.R. § 20.1304(c). It is unclear whether the packet was or was not included with the claims folder when it was returned to the RO for the development on remand, but there is no RO reference to the contents thereof in the claims folder.

There is no Substantive Appeal, i.e., a VA Form 9 or anything in lieu thereof, in the file, and thus, that issue is not before the Board at present. However, the Board calls the attention of the RO thereto for required processing of that claim under all pertinent criteria.

CONTENTIONS OF APPELLANT ON APPEAL

In substance, the veteran argues that while he was never in Vietnam, per se, his exposure to dioxins including Agent Orange and others, was extensive as a result of loading planes and in other circumstances while he was stationed in Okinawa and that his prostate cancer is the result thereof.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991 & Supp. 1997), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the record supports a grant of entitlement to service connection for prostate cancer due to Agent Orange exposure.

FINDINGS OF FACT

1. Credible evidence sustains a reasonable probability that the veteran was exposed to dioxins while serving in Okinawa.
2. The veteran's recent prostate cancer must be reasonably attributed to his inservice dioxin exposure.

CONCLUSION OF LAW

The veteran's prostate cancer is the result of inservice dioxin exposure. 38 U.S.C.A. §§ 1110, 5107 (West 1991); 38 C.F.R. §§ 3.303, 3.307, 3.309 (1996).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Criteria

Service connection may be established for a disability incurred in or aggravated by active service. 38 U.S.C.A. § 1110 (West 1991). Additional provisions are to the effect that service connection may be presumed in the case of a veteran who served continuously for 90 days or more during a period of war, if a certain disease, i.e., cancer, was present to a compensable degree within a year of separation from service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137 (West 1991 & Supp. 1997); 38 C.F.R. §§ 3.307, 3.309 (1997).

For a showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "chronic". Continuity of symptomatology is required where the condition noted during service is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, the showing of continuity after discharge is required to support the claim. 38 C.F.R. § 3.303(b) (1996).

Service connection may 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) (1996). Service connection may be granted for disability which is the result of service-connected disease or injury. 38 C.F.R. § 3.310 (1996).

Under modifications described below in 38 C.F.R. § 3.307, [and through a new regulatory revision effective November 1996], if a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases [i.e., prostate cancer] shall be service-connected...even though there is no record of such diseases during service. 38 C.F.R. § 3.309(e) (1996).

In pertinent part, 38 C.F.R. § 3.307(6)(ii) (1996) further states that in general except for chloracne, these diseases so named must become manifest to a degree of 10 percent or more at any time after service.

Provisions of 38 C.F.R. § 3.307(6)(iii) (1997) further state that such a veteran who served in the Republic of Vietnam during the Vietnam era and has such a (listed) disease shall be presumed to have been exposed to the herbicides. However, presumptive provisions are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and VA regulations implementing them are intended as liberalizations applicable when the

evidence would not warrant service connection without their aid. See *Horowitz v. Brown*, 5 Vet. App. 217, 222 (1993).

In a case relating to radiation exposure, but which has been transferred in theory to other situations, the Court has held that special presumptions, etc. and/or other standards do not preclude a veteran from establishing service connection with proof of actual direct causation. See *Combee v. Brown*, 34 F.3d 1039(1994).

It remains the duty of the Board as the fact finder to determine credibility of the testimony and other lay evidence. See *Culver v. Derwinski*, 3 Vet. App. 292, 297 (1992). Lay persons are not competent to render testimony concerning medical causation. See *Grottveit v. Brown*, 5 Vet. App. 91, 93 (1993). However, service connection may be established through competent lay evidence, not medical records alone. *Horowitz*, op. cit. In such a case, as in other situations dealing with special provisions of 38 U.S.C.A. § 1154, an individual may well provide data with regard to incidents which took place, etc. although a lay witness is not capable of offering evidence requiring medical knowledge. *Espiritu v. Derwinski*, 2 Vet. App. 492, 494 (1992).

The Board has the duty to assess the credibility and weight to be given the evidence. *Wilson v. Derwinski*, 2 Vet. App. 614, 618 (1992) (quoting *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991), reconsideration denied per curiam, 1 Vet. App. 406 (1991)).

It has been determined that a well-grounded claim requires three elements: (1) medical evidence of a current disability; (2) lay or medical evidence of a disease or injury in service; and (3) medical evidence of a link between the current disability and the in-service injury or disease. *Caluza v. Brown*, 7 Vet. App. 498 (1995).

In a case that coincidentally also provides significant supportive data regarding claims with regard to Agent Orange and the legislative and other machinations associated therewith, the United States Court of Veterans Appeals (the Court) recently found that plausible medical evidence of the

existence of a current presumptively service-connected disease with an open-ended presumption period is sufficient to present a well-grounded service connection claim as to that disease. The case also holds that the presence of the disease would carry with it the presumption of nexus to service as well. See *Brock v. Brown*, 10 Vet. App. 155, 162 (1996).

Factual Background

The veteran's DD 214 shows that his primary military specialty was as a motor vehicle operator (MOS 3531). At the time of his discharge, he was assigned to the U.S. Marine Corp's 4thAMTrac Bn(Reinf), ForTrps, FMF after having had 1 year, 3 months and 3 days of foreign service. His partial 201 file also further documents the units to which he was assigned in that motor vehicle operator capacity.

According to a NAVMC Form 118(17)-PD, the veteran embarked onboard the USNS GEN. J.C. BRECKENRIDGE in and departed from San Diego on February 2, 1961; he arrived in and disembarked in Okinawa on February 18, 1961. He further embarked onboard the USS BEXAR at White Beach, Okinawa on April 5, 1962, departed Okinawa on April 6, 1962, and arrived in and disembarked in San Diego on May 5, 1962.

Service medical records show that after several months in Okinawa, he was admitted to hospitalization for psychiatric evaluation after having attempted suicide due to, among other things, the stressful (not otherwise described) situation there.

The veteran has described his inservice experiences as not having included Vietnam. In a letter in December 1996, he stated that his job in the Marines was as a motor transport operator, which was to transport troops and cargo. At the time, they had been on Vietnam standby, and he reported that he had been exposed to Agent Orange while in the process of transport, as well as when it was used in Northern Okinawa for War Games training. He reported that this exposure lasted at least two months or more.

Private clinical records in the file from David A. Kimball, MD, who has treated the veteran for prostate cancer after prostate-specific laboratory testing had been positive. The veteran underwent a radical retropubic prostatectomy for the prostate cancer, pathologically described as moderately well differentiated adenocarcinoma, in November 1995. Thereafter, records show he was seen for complaints associated with hesitant urinary stream. He underwent surgery for a bladder neck contracture post radical retropubic prostatectomy.

In his VA Form 9, dated in January 1997, the veteran reiterated that he was not and had never claimed that he was in Vietnam but that, as stated by the RO in rating decisions and other communications, service connection for certain disabilities under the new regulations relating to herbicide exposure could be either from being in Vietnam in which case exposure was assumed, or as a result of some other military experience, which was subject to the same requirement of any other acquired disability. He stated further that

I served in Okinawa in 1961-62 at which time we began a massive build-up of supplies and ordnance which included herbicides known as 2, 4, D and 2, 4, 5, T. The combined product of these two chemicals was a 50-50 mix which was then mixed 50-50 with diesel fuel and given the code name "Agent Orange", for the orange band that was used to mark the drums it was stored in. The purpose of the product was to deny an enemy cover and concealment in dense terrain by defoliating trees and shrubbery where the enemy could hide. In Okinawa we had other uses for it, particularly near base camp perimeters. Spraying from both truck and back pack were utilized along roadways too. The term "Agent Orange" was at the time merely one of several used to identify various herbicides used in the South Pacific. Others included Agents White, Blue, Purple, Pink and Green. Agent Orange was used by far the most.

It was my job, MOS-3531 Motor Transport operator (see DD-214 #25 A&B as evidence) to transport troops and cargo. On many occasions the cargo was herbicides known as 2-4-D and 2-4-5T. Sometimes they were full and sometimes they were empty. Sometimes the drums were half full of a 50-50 mix of herbicides and I would have to take them and add the remaining 50% of diesel fuel or kerosene for better dispersion. On many occasions while handling the drums the contents would get on my hands and clothing and when we were spraying along the roadways by truck and back pack the wind would change and blow the herbicides onto our skin and clothing. The thing that bothers me the most is that we were not told or warned about the hazards of the herbicides that we were handling nor were we issued any protective clothing such as gloves and etc. I believe that the frequent exposure to the concentrated unmixed herbicides was much more hazardous than if I would have been sprayed with a diluted thin down mixture.

At the time of the hearing held at the RO in March 1997, the veteran further testified that while in Okinawa, he was a motor transport operator, whose job it was to transport troops and cargo, often times the cargo being herbicides. Tr. at 1. He stated that he would often transport people for work details and had even worked with the Seabees with whom he helped with road repairs, where they also used herbicides, spraying them on the sides of the roads, etc. Tr. at 1-2. He indicated that (even when not moving people but rather supplies), he often had to take the barrels and mix the contents at the motor pool with a 50/50 mixture of diesel fuel; that often his clothing became saturated with and he had to replace uniform parts so as to be able to pass inspection. Tr. at 2.

The veteran indicated that herbicides were used on Okinawa

for landscaping, and were also taken to the remote areas for training maneuver areas. Tr. at 2. He confirmed that he had been assigned in Okinawa to the C Company, 9th Motor Transport Battalion, 3rd Marine Division Reinforced, and that he was exposed to herbicides that entire time. Tr. at 3. He summarized by indicating that he had been exposed by the spraying in the area perimeters (which they were required to police themselves), on the sides of the roads, on details, at maneuver areas, when he mixed them for transport and when he actually sprayed them from back pack. Tr. at 3. He said that they were only told that it was a defoliant used for killing weeds, etc. Tr. at 3-4.

The RO asked the U.S. Army and Joint Services Environmental Support Group (ESG), now known as U.S. Armed Services Center for Research of Unit Records (USASCRUR) to verify any exposure to herbicides the veteran may have had while in Okinawa. The ESG responded in April 1997 to the effect that they had been generally unable to document the use of herbicides in Okinawa, but that they had sent copies of various Agent Orange briefs, etc. for the veteran's information.

Correspondence from the veteran in January 1997 reiterated his repeated Okinawan exposure to herbicides, and further indicated that at that time, "Operation Ranch Hand" was already in full swing in January 1961. He said that they primarily handled Agent Orange since it was not, and the others were, water soluble and would not wash away when used. This was particularly important for use in Vietnam but also in Okinawa (for the other purposes) because of the significant amount of rain that fell there.

Analysis

In a case such as this, there are several kinds of pertinent service records. Admittedly, available service medical records are somewhat wanting since they primarily relate to the veteran's significant psychiatric problems later in service rather than dioxin exposure, etc. It is entirely possible that additional service medical records are somewhere available. However, given the pertinent

regulations, there would seem to be no special benefit to be gained by delaying the claim further in a search for additional but unnecessary records.

Also of record are some other service documents, i.e., data comparable to a partial 201 file which confirm assignment units, duties, locations, etc., identified elsewhere in this decision. In this case, these are more important to the disposition of the case. In that regard, it is not known if additional pertinent records may be readily if at all available. To the extent that the veteran is able to provide pertinent information, he has clearly done so. An attempt was made to officially verify those factors. However, while the service department experts have been unable to verify specific dioxin exposure in Okinawa, they do not negate that possibility. [In this regard, it should be noted that given the records-development history in other factual cases with which the Board is familiar, that there is no guarantee that even if further development were undertaken, that Army Personnel or other military sources would be able in any event to verify the filling of, and mixing of solvents in, 55 gallon drums with herbicides in Okinawa for use in this particular time period, including as a part of Operation Ranchhand].

In order, however, to fill in the resultant gaps, there are certain factors which the Board must address with regard to credibility. If found credible, these could be adequate for an equitable disposition of this claim without further development.

Accordingly, in concert with that judgment and consistent with providing the veteran with all due process and the benefit of the result of an expeditious and equitable decision, the Board finds that the duty to assist the veteran in obtaining evidence has been fulfilled in this case pursuant to pertinent regulations.

In this case, the veteran clearly has had prostate cancer, which as of November 1996 is one of those diseases incorporated in the special presumptions with regard to disabilities as a result of exposure to Agent Orange.

Thus, the only significant issue to be resolved is whether he was in fact exposed to dioxins in service. The evidence in this regard may not be independently verifiable or overwhelming, but the aggregate data is entirely consistent therewith. In that regard, the Board finds that the veteran's explanations for the gaps in the otherwise contemporaneously documented information of record in that regard are quite credible. He has provided a comprehensive description of the activities through which he was exposed to concentrated dioxins, as well as the reasons why the mixing of the concentrated chemicals with diesel fuel or other agents was necessary. [Parenthetically, it is unnecessary in this context to address his opinion that the dioxin in its concentrated state, i.e., before he mixed it, was more toxic than the dispersed version sprayed as a defoliant in whatever location for whatever purpose].

These asserted facts mesh well with those more readily recognizable things for which there is no need for verification, i.e., why the secondary chemicals utilized for dilution of the concentrates, such as diesel fuel or kerosene, would have been most readily, and perhaps almost exclusively, available in the environment in which the veteran then worked.

They also make good common sense when placed next to the known problems such as the ongoing rain in the Far East during that portion of the year which made the requirement for nonsoluble defoliants a reality in the first place. All are entirely believable and consistent with the other known information.

The service department has verified that the veteran was indeed where he said he was, at a time when military build-up from a support standpoint was considerable, doing a job which was entirely consistent with the mixing and other transport of herbicides, and at a time when these were both used and warnings not necessarily given, as he stated, since the hazards were not fully understood. He can scarcely be faulted for the nonverifiability of specific practices in the so-called Okinawan theater of operations. His assertions in that regard are both reasonable and justifiable and appear both sound and factually accurate, all of which raises a

certain premise from which conclusions may be reasonably drawn. It is exactly such situations in which the Court has mandated that the Board make judgments with regard to ultimate and relative credibility, which in this case, the Board finds in the affirmative.

Thus, having concluded that the veteran was exposed to herbicides while assigned to motor transport duties in Okinawa in 1961-2, not coincidentally concurrent with other entirely reasonable circumstances enumerated by the veteran, the Board finds that a doubt is thus raised which must be resolved in his favor, and in so doing, that service connection must be granted for prostate cancer as being the result of Agent Orange exposure under pertinent exceptions to the regulations. 38 U.S.C.A. §§ 1110, 5107; 38 C.F.R. §§ 3.303, 3.307, 3.309.

ORDER

Service connection for prostate cancer due to Agent Orange exposure is granted.

RONALD R. BOSCH
Member, Board of Veterans' Appeals

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991 & Supp. 1997), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

