BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF XC [redacted]
JOAN A. GERHARDSON

IN THE CASE OF
ROGER D. GERHARDSON

DOCKET NO. 11-21 212) DATE *July 7, 2016*
) *CJ*
)

On appeal from the
Department of Veterans Affairs Regional Office and Insurance Center in St. Paul, Minnesota

THE ISSUE

Entitlement to service connection for a respiratory disability.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Appellant

IN THE APPEAL OF XC [redacted]
JOAN A. GERHARDSON

IN THE CASE OF
ROGER D. GERHARDSON

ATTORNEY FOR THE BOARD

C. J. Houbeck, Counsel

INTRODUCTION

The Veteran had active service from July 1956 to June 1959. He died in August 2011, with his perfected claim pending on appeal.

For claimants who died on or after October 10, 2008, as in the instant case, the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, § 212, 122 Stat. 4145, 4151 (2008) created a new 38 U.S.C. § 5121A, which permits an eligible person to file a request to be substituted as the appellant for purposes of processing a claim to completion. The appellant, who is the Veteran's widow, requested to be substituted for the Veteran pursuant to 38 U.S.C.A. § 5121A. The RO granted the appellant's request for substitution. Accordingly, the Board will address the merits of the claim of service connection for a respiratory disorder with the appellant as the substituted party.

This matter comes before the Board of Veterans' Appeals (Board) from a March 2011 rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO) in St. Paul, Minnesota.

The appellant testified at a hearing at the RO via videoconference technology conducted by the undersigned Veterans Law Judge in October 2012. A copy of the transcript is associated with the claims file.

The Board remanded the claim in April 2014 for additional development. The matter again is before the Board.

The Board has not only reviewed the Veteran's physical claims file, but also the Virtual VA and Veteran's Benefits Management System (VBMS) paperless claims processing systems to ensure a total review of the evidence.

FINDING OF FACT

A chronic respiratory disability was not manifest in service and there was no link between the post-service COPD, emphysema, and recurrent pneumonia and active service.

CONCLUSION OF LAW

A chronic respiratory disability was not incurred in or aggravated by service. 38 U.S.C.A. §§ 1103, 1131, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2015).

REASONS AND BASES FOR FINDING AND CONCLUSION

Veterans Claims Assistance Act of 2000 (VCAA)

VA has met all statutory and regulatory notice and duty to assist provisions. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2015).

VA's duty to notify was satisfied by letters in December 2010 and January 2011. *See* 38 U.S.C.A. §§ 5102, 5103, 5103A (West 2014); 38 C.F.R. § 3.159 (2015).

As noted above, the appellant also was afforded a hearing before the undersigned Veterans Law Judge (VLJ) during which she presented oral argument in support of her claim. The VLJ clarified the issues, explained the concept of service connection and explored the possibility of outstanding evidence. The case was held open for 60 days so as to provide the appellant an opportunity to cure any potential evidentiary defect. The actions of the VLJ supplement VCAA and comply with 38 C.F.R. § 3.103.

The Board also concludes VA's duty to assist has been satisfied. The Veteran's service treatment records and VA medical records are in the file. Private treatment records identified by the Veteran and appellant have been obtained, to the extent possible.

The duty to assist also includes providing a medical examination or obtaining a medical opinion when such is necessary to make a decision on the claim. *See* 38 C.F.R. § 3.159(c)(4). In this case, the Veteran was provided a VA examination in February 2011. The Board found the resulting examination report opinion inadequate and remanded the claim for an addendum opinion. The resulting July 2014 addendum opinion concluded that it was less likely as not that the Veteran's COPD, pneumonia, or other respiratory disorder were the result of service. As will be discussed in greater detail below, the medical professional's opinions were based on review of the claims file and available medical records, the Veteran's reported history and symptoms, and a review of medical research. The Board, therefore, finds the VA examination report addendum to be thorough, complete, and sufficient upon which to base a decision with respect to the Veteran's (and now appellant's) claim for service connection. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007) (when VA undertakes to provide a VA examination or obtain a VA opinion, it must ensure that the examination or opinion is adequate).

Based on the April 2014 notice letter to the appellant, the July 2014 VA examination report addendum, and the subsequent readjudication of the claim, the

Board finds that there has been substantial compliance with its prior remand directives. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998). In reaching that conclusion, the Board recognizes that the physician providing the July 2014 VA examination report addendum is board certified in occupational medicine, but not pulmonology, as directed by the prior Board remand. In light of the well-reasoned nature of the opinion and obvious expertise of the physician, the Board concludes that the addendum report is adequate. The Board recognizes that a subsequent expert medical opinion was obtained from a pulmonologist in August 2014. As this opinion failed to adequately address the questions on appeal, the Board finds this opinion of limited probative value.

As there is no indication that any failure on the part of VA to provide additional notice or assistance reasonably affects the outcome of this case, the Board finds that any such failure is harmless. *See Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

Service Connection

Service connection may be established for disability resulting from personal injury suffered or disease contracted in the line of duty in the active military, naval, or air service. 38 U.S.C.A. § 1131 (West 2014). That an injury or disease occurred in service is not enough; there must be chronic disability resulting from that injury or disease. If there is no showing of a resulting chronic condition during service, then a showing of continuity of symptomatology after service is required to support a finding of chronicity. 38 C.F.R. § 3.303(b) (2015). 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 or injury was incurred in service. 38 C.F.R. § 3.303(d).

To establish a right to compensation for a present disability on a direct basis, a Veteran must show: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship, i.e., a nexus, between the claimed in-service disease or injury and the current disability. 38 C.F.R. § 3.303(a); *see also Davidson v. Shinseki*, 581 F.3d 1313, 1315-16 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

In this case, the Veteran (and now the appellant) contends that his COPD, recurrent pneumonia, and any other respiratory disability were the result of his active service.

The Veteran's service treatment records contain notations of pneumonia. A May 1957 chest x-ray revealed pneumonic infiltration in the right middle lobe consistent with bronchopneumonia and a January 1958 chest x-ray revealed definite pulmonary infiltration of the right lower lobe field with an impression of pneumonitis. The Veteran was diagnosed with pneumonia, primary atypical, right lower lobe in January 1958.

The Veteran's post-service treatment records show that he received chest CT scans in November 2007 and April 2009. The November 2007 scan revealed some resolution of scarring and post infectious process and the April 2009 scan revealed persistent right lower lung infiltrates that may be a result of an infectious process.

The Veteran was also hospitalized for pneumonia in December 2009. An associated chest x-ray from December 2009 revealed right lower lobe infiltrates. The x-ray was interpreted as showing increased markings in the right regular basis, which, the examiner noted, may be chronic. A subsequent chest x-ray from December 2009 revealed small bibasilar infiltrates of unknown age or etiology and hyperinflated lungs.

The Veteran was afforded a VA examination in February 2011. The VA examiner opined that the Veteran's COPD was not related to service. The examiner did not,

however, opine as to whether the Veteran's post-service episodes of pneumonia were either related to his in-service pneumonia or to his exposure to asbestos during service.

The Veteran passed away in August 2011. The Veteran's immediate cause of death was attributed to COPD with pneumonia as a contributing condition.

A July 2014 addendum opinion concluded that a lung disability was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. The rationale was that the service treatment records documented treatment for pneumonia on two separate occasions. The pneumonia was located in the right lower lobe and on both occasions the pneumonia resolved with treatment. The next documentation of pneumonia was in December 2009, but a 2007 CT scan showed resolution of scarring and or a post-infectious process. As such, the physician concluded that the Veteran had pneumonia in 2007, which was 49 years after service. Pneumonia was an acute respiratory infectious disease process that typically was self-limiting following adequate treatment with antibiotics. The Veteran's two episodes of in-service pneumonia were acute in nature and completely resolved. Medical records after service documented recurrent pneumonia, but without evidence of residual scarring until December 2009. Rather than due to service, the physician concluded that the recurrent pneumonia was due to tobacco abuse, as smoking tobacco was one of the primary events resulting in impairment of pulmonary defense and increased risk of pneumonia. The Veteran had a weakened immune system due to tobacco abuse that made it easier for bacteria to grow in his lungs. The right lower lobe of the lungs was a relatively common site for consolidation / pneumonia. The in-service pneumonia episodes were also more likely than not associated with smoking and the recurrent post-service pneumonia was due to the Veteran's COPD, caused by tobacco abuse. The recurrent pneumonia was not caused or aggravated by the Veteran's claimed exposure to asbestos in service. Medical records did not support a finding of

asbestosis and asbestosis was a restrictive lung disorder and the Veteran's problems were related to obstructive lung disease.

An August 2014 expert medical opinion noted the two bouts of in-service pneumonia. Thereafter, the Veteran had reported experiencing 2 to 4 bouts of pneumonia per year. At times, they would require hospitalization. Over the past few decades the Veteran had become increasingly disabled due to exertional shortness of breath to the point where he could walk only very short distances. He had smoked one or more packs of cigarettes per day for about 55 years, quitting only a couple years before his death. The Veteran also contended he had spent part of his tour aboard a submarine and exposure to asbestos could be inferred. The Veteran had severe chronic COPD, with widespread emphysema in both lungs. The medical expert concluded that respiratory impairment and death were not caused by or a result of recurrent or chronic pneumonia. The rationale was that the scientific evidence linking cigarette smoking to the development of emphysema and COPD was overwhelming and other factors, such as recurrent respiratory infections, at most would play only a minor role. There was no reasonable doubt that COPD was principally responsible for the Veteran's severe disability and ultimately death, or that cigarette smoking was the principal cause of such disability. In addition, CT scans showed scarring and possible infiltrates in the lower part of the right lung, which supported the diagnosis of emphysema. There was an ill-defined density in the base of the right lung that might have represented a residual of prior pneumonia, but the area was small and highly unlikely to be of any clinical significance. There was no evidence of a widespread chronic pneumonia. The Veteran very likely did have some asbestos exposure, but there was no noted stigmata from asbestos exposure, such as pleural plaques, pleural thickening, or interstitial fibrosis. Asbestos exposure was not known to cause emphysema.

Thus, the Veteran had a chronic respiratory disability during the appellate time period. The pertinent inquiry, then, is whether the diagnosed COPD with

emphysema or recurrent pneumonia was caused by or is otherwise related to any incident of service, to include asbestos exposure.

The Board finds the opinions as to the etiology of the Veteran's respiratory disorders expressed in the July 2014 VA examination report addendum of significant probative value. The opinion was based on a review of the claims file, consideration of the Veteran's and appellant's contentions, and review of relevant medical research. The reviewing physician concluded that a lung disability was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. The rationale was that the post-service recurrent pneumonia and COPD were due to tobacco abuse, as smoking tobacco was one of the primary events resulting in impairment of pulmonary defense and increased risk of pneumonia. The Veteran had a weakened immune system due to tobacco abuse that made it easier for bacteria to grow in his lungs. The right lower lobe of the lungs was a relatively common site for consolidation / pneumonia. In addition, the in-service pneumonia episodes were also more likely than not associated with smoking and the recurrent post-service pneumonia was due to the Veteran's COPD, caused by tobacco abuse. The recurrent pneumonia was not caused or aggravated by the Veteran's claimed exposure to asbestos in service because medical records did not support a finding of asbestosis and asbestosis was a restrictive lung disorder and the Veteran's problems were related to obstructive lung disease. Consequently, the Board finds this report to be the most probative evidence of record as to whether the Veteran's respiratory disabilities were related to military service.

The Board also notes that under current law, claims received by VA after June 9, 1998, may not be granted on the basis that an injury or disease resulted from the use of tobacco products by a veteran during active service. 38 U.S.C.A. § 1103; 38 C.F.R. § 3.300(a). As discussed above, the July 2014 VA addendum report concluded that the Veteran's in-service respiratory problems and post-service problems were due to tobacco use. The finding of the July 2014 addendum report is supported by the conclusions of the August 2014 VA pulmonologist's conclusions.

As the claim was brought after June 9, 1998, it is barred as a matter of law. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

Service connection is not precluded, however, where the disability resulted from a disease or injury that is otherwise shown to have been incurred or aggravated during service. 38 C.F.R. § 3.300(b)(1). In addition, VA's Office of General Counsel (OGC) has held that the legal bar to service connection for a disability or death attributable to tobacco use does not bar a finding of secondary service connection for a disability or death related to a veteran's use of tobacco products after the Veteran's service, where that disability is proximately due to or aggravated by a service-connected disability that is not service-connected on the basis of being attributable to the Veteran's use of tobacco products during service. VAOPGCPREC 6-2003 (October 28, 2003).

In this case, the most competent evidence of record found that there was no link between the Veteran's COPD, recurrent pneumonia, or other respiratory disability and any in-service cause or incident, other than his tobacco use, or to a service-connected disability.

The Board also has considered the arguments raised in an August 2015 statement, which indicated that the appellant's "contention has been, and remains, that the Veteran had pneumonia in Service, had pneumonia after service, claimed this as a lung condition that was never addressed or adjudicated by the VA, and that this diagnosed condition of pneumonia contributed to his death, as corroborated by his death certificate." The statement found fault with the August 2014 medical expert opinion that considered the appellant's claim to be that the Veteran's two in-service bouts of pneumonia predisposed him to recurrent pneumonia. The Board is addressing the lung condition claimed to be related to service herein, but the most probative evidence of record does not support a finding that the in-service bouts of acute pneumonia, the asbestos exposure, or other incident of service caused or was otherwise related to the COPD and pneumonia that ultimately resulted in his death.

As to the Veteran's and appellant's general contentions that his COPD with emphysema and recurrent pneumonia were incurred in or were otherwise related to his service, given their lack of demonstrated medical expertise, the Board finds that the July 2014 opinion of the VA physician to be the most probative and credible evidence of record as to the relationship between the Veteran's post-service respiratory disabilities and his active service. Although the Veteran and appellant may be competent to report observed symptoms, such lay evidence is far less reliable than the objective testing and opinions prepared by skilled professionals. As such, the Board is of the opinion that the July 2014 VA examination report addendum ultimately outweighs the Veteran's and appellant's contentions as to etiology. *Layno v. Brown*, 6 Vet. App. 465 (1994).

In summary, no medical professional has linked the Veteran's post-service respiratory disabilities to service, and, in fact, there is significant medical evidence to the contrary. The Board affords the July 2014 VA medical professional's opinion greater weight as to the etiology of the post-service respiratory problems than the conclusions of the Veteran and the appellant. In light of the evidence, the Board concludes that the preponderance of the credible evidence is against the claim, and the claim must be denied. *See generally Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); *Ortiz v. Principi*, 274 F.3d 1361 (Fed Cir. 2001).

ORDER

Entitlement to service connection for a respiratory disability is denied.

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H. N. SCHWARTZ
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).