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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4481

DENNIS L. DAVIS, APPELLANT,

V.

ROBERT D. SNYDER,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Senior Judge*.¹

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30 (a),
this action may not be cited as precedent.*

HAGEL, *Senior Judge*: Dennis L. Davis appeals through counsel an August 18, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to VA disability benefits for prostate cancer due to exposure to Agent Orange, erectile dysfunction secondary to prostate cancer, and special monthly compensation for the loss of use of a creative organ. Mr. Davis's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because the Board's assignment of probative value to a May 2009 Joint Services Records Research Center memorandum is clearly erroneous, and because the Board failed to account for favorable evidence, the Court will vacate the August 2015 Board decision denying entitlement to benefits for prostate cancer and remand the matter for further development and readjudication consistent with this decision. Because Mr. Davis's claims for benefits for erectile dysfunction and for special monthly compensation are inextricably intertwined with his claim for benefits for prostate cancer, the Court will remand those matters as well.

¹ Judge Hagel is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 15-16 (Dec. 21, 2016).

I. FACTS

Mr. Davis served on active duty in the U.S. Navy from August 1962 to September 1966, including service aboard the U.S.S. *Bennington* off the coast of Viet Nam. His service personnel records indicate that he was an anti-submarine warfare aircrewman and that he "received 301.9 hours of training/operational flights" in 1965. Record (R.) at 588. Mr. Davis's service medical records contain no evidence or diagnosis of or treatment for prostate cancer or erectile dysfunction.

In 2001, Mr. Davis was diagnosed with prostate cancer by a VA oncologist. At some point thereafter—the record does not reveal precisely when—he was diagnosed with erectile dysfunction.

In June 2006, Mr. Davis filed a claim for benefits for prostate cancer and submitted a statement asserting his belief that his cancer was the result of exposure to herbicide agents while flying Navy aircraft over Viet Nam and servicing herbicide-contaminated aircraft that returned to the ship after flying missions over Viet Nam. He wrote:

I served on the USS Bennington, CUS 20, in the early to mid 1960's. I was a member of VS-38 as an[] aircraft mechanic and a combat air crewman. Some of my duties included[] daily inspections of aircraft, maintenance of aircraft, and flying [sea air rescue] and [anti-submarine warfare] operations.

The aircraft were used in sea air rescue (when needed), locating and tracking submarines in the area, and helping in general to locate gunrunners, enemy patrols [etc]. We flew quite low over the coastline and into the jungle, as well as far out to sea.

At times[,] I coul[d] smell the Agent Orange when flying[;] at one point, we [o]bserved two or three [A]ir [F]orce C-123s spraying not far away.

Some of the aircraft I worked on would land and go straight to the hanger deck for maintenance. We would remove the cowling and blow out the air intakes. I could smell the 2 4 D all over the aircraft.

For several months[,] I worked on these aircraft and flew in them as well. I feel I was definitely exposed to Agent Orange[, b]oth by touching these aircraft that flew through the area and by fl[y]ing low over sprayed areas for extended periods of time.

R. at 804.

In July 2006, Mr. Davis advised VA that, in addition to service on board the U.S.S. *Bennington* off the coast of Viet Nam, he also served in Bangkok, Thailand. The record contains

an undated printout of a page from the "Defense Personnel Records Image Retrieval System" that confirms that the U.S.S. *Bennington* was both stationed off the Coast of Viet Nam and "made [a] Port[] of Call" in Bangkok. R. at 626. Further, the record contains an undated Veterans Benefits Administration memorandum for the record concerning "Herbicide use in Thailand during the Vietnam Era." In relevant part, that memorandum states:

Regarding your veteran claimant with Thailand service, the [Department of Defense] list indicates only that limited testing of tactical herbicides was conducted in Thailand from 2 April through 8 September 1964. Specifically, the location identified was the Pranburi Military Reservation associated with the Replacement Training Center of the Royal Thai Army, near Pranburi, Thailand. The Report of these tests noted that 5 civilian and 5 military personnel from Fort Detrick, Maryland[,] conducted the spray operations and subsequent research. This location was not near any U.S. military installation or Royal Thai Air Force Base.

Tactical herbicides, such as Agent Orange, were used and stored in Vietnam, not Thailand. We received a letter from the Department of the Air Force stating that, other than the 1964 tests on the Pranburi Military Reservation, there are no records of tactical herbicide storage or use in Thailand. There are records indicating that commercial herbicides were frequently used for vegetation control within the perimeters of air bases during the Vietnam era, but all such use required approval of both the Armed Forces Pest Control Board and the Base Civil Engineer. In Vietnam, tactical herbicides were aerially applied by UC-123 aircraft in Operation RANCH HAND or by helicopters under the control of the U.S. Army Chemical Corps. Base Civil Engineers were not permitted to purchase or apply tactical herbicides. There are no records of tactical herbicide spraying by RANCH HAND or Army Chemical Corps aircraft in Thailand after 1964, and RANCH HAND aircraft that sprayed herbicides in Vietnam were stationed in Vietnam, not in Thailand. However, there are records indicating that modified RANCH HAND aircraft flew 17 insecticide missions in Thailand from 30 August through 16 September 1963 and from 14-17 October 1966. The 1966 missions involved the spraying of malathion insecticide for the "control of malaria[-]causing mosquitoes." These facts are not sufficient to establish tactical herbicide exposure for any veteran based solely on service in Thailand.

If the veteran's claim is based on servicing or working on aircraft that flew bombing missions over Vietnam, please be advised that there is no presumption of "secondary exposure" based on being near or working on aircraft that flew over Vietnam or handling equipment once used in Vietnam. Aerial spraying of tactical herbicides in Vietnam did not occur everywhere, and it is inaccurate to think that herbicides covered every aircraft and piece of equipment associated with Vietnam. Additionally, the high altitude jet aircraft stationed in Thailand generally flew far

above the low and slow flying UC-123 aircraft that sprayed tactical herbicides over Vietnam during Operation RANCH HAND. Also, there are no studies that we are aware of showing harmful health effects for any such secondary or remote herbicide contact that may have occurred.

R. at 464.

In October 2006, Mr. Davis filed a claim for benefits for erectile dysfunction secondary to prostate cancer. In February 2007, he filed a claim for special monthly compensation due to loss of a creative organ. In support of that claim, Mr. Davis wrote:

I was awarded the Vietnam Service Medal. My personnel file shows that I flew 19 Combat Missions off the USS Bennington in 1965. I flew over the jungle, up the rivers[,] and out to sea, where[]ver needed. During these missions of Vietnam, I flew through the "Ranch Hand Mist" and I breathed Agent Orange repeatedly. I also worked on these contaminated aircraft.

R. at 784.

In March 2009, Mr. Davis wrote to VA that,

[w]hile serving in the Navy on board the USS Bennington in 1965 with duty off the coast of Vietnam, I was an aircraft mechanic. My primary duties included servicing and mainating aircraft that had flown thr[ough] Agent Orange. I was in direct physical contact with Agent Orange that was on the pla[nes] and in the air duct systems of those pla[nes]. My job was to clean this substance off the pla[nes].

R. at 586.

In May 2009, a memorandum from the Joint Services Records Research Center was associated with Mr. Davis's claims file. The memorandum's subject heading was "Joint Services Records Research Center Statement on Research Findings Regarding Navy and Coast Guard Ships During the Vietnam Era." R. at 490. The memorandum stated:

1. In the course of its research efforts, the [Joint Services Records Research Center] has reviewed numerous official military documents, ships histories, deck logs, and other sources of information related to Navy and Coast Guard ships and the use of tactical herbicide agents, such as Agent Orange, during the Vietnam Era.

2. To date, the [Joint Services Records Research Center] has found no evidence that indicates Navy or Coast Guard ships transported tactical herbicides from the United States to the Republic of Vietnam or that ships operating off the coast of Vietnam used, stored, tested, or transported tactical herbicides. Additionally, the [Joint Services Records Research Center] cannot document or verify that a shipboard

veteran was exposed to tactical herbicides based on contact with aircraft that flew over Vietnam or equipment that was used in Vietnam.

3. Therefore, the [Joint Services Records Research Center] can provide no evidence to support a veteran's claim of exposure to tactical herbicide agents while serving aboard a Navy or Coast Guard ship during the Vietnam era.

Id.

In July 2009, a VA regional office denied Mr. Davis's claim for benefits for prostate cancer, finding that he was not entitled to the presumption of exposure to herbicide agents because there was no evidence—and he did not claim—that he set foot within the land borders of Viet Nam and there was no evidence of actual exposure to herbicide agents in service. The regional office also denied his claim for benefits for erectile dysfunction and special monthly compensation, as those claims were based on prostate cancer. Mr. Davis filed a Notice of Disagreement with that decision and ultimately appealed to the Board. In his July 2010 Substantive Appeal, Mr. Davis explained:

My claim is not a claim for presumption of exposure based on boots on ground in Vietnam. My claim is not a Blue Water Claim. My claim is a claim for exposure to [A]gent [O]range as the direct result of flying 19 combat missions over [V]ietnam somewhere very near the ground and we flew through areas that had been sprayed with [A]gent [O]range and that is how I was exposed.

R. at 426.

In April 2011, Mr. Davis submitted another statement to VA, writing:

I am entitled to VA compensation for prostate cancer and conditions secondary to prostate cancer because I was exposed during my military service to herbicide agents, including Agent Orange. During my military service, I flew 19 missions over Vietnam during the Vietnam War. Those missions were low-level patrol flights of about six or seven hours["] duration. The flights included missions to search for downed planes and to fly low over all-wood sail vessels in the inland waters of Vietnam to determine with a magnetometer if the vessels might be transporting guns. On two occasions, I saw C-123 "Provider" aircraft spraying the mangrove jungles of Vietnam with herbicides, which I could smell. I am not sure if those occasions happened during two separate missions; it may have been twice during one mission. Those 19 missions were in carrier-based S2E "Tracker" aircraft. The S2E had no cabin air filters, and the vents were about 12 inches from my face. Those 19 missions took place during the following periods in 1965: July 30 [] through August 18, and August 27 through September 9. On some of those missions, Da Nang Air

Base was our designated alternate landing strip if our aircraft was unable to return to our aircraft carrier, the USS Bennington (CV/CVA/CVS-20).

R. at 323.

In February 2014, the Board denied Mr. Davis's claims, finding that he was not entitled to a presumption of exposure to herbicide agents and that there was no evidence of actual exposure to herbicide agents. Mr. Davis appealed that decision to the Court, which remanded Mr. Davis's claims, finding that the Board failed to adequately address the circumstances under which Mr. Davis asserted he had been exposed to herbicide agents—namely, by flying low-altitude patrol flights through herbicide mist. The Court also determined that the Board failed to properly evaluate the competence and credibility of Mr. Davis's lay statements regarding his exposure to herbicide agents.

In August 2015, the Board issued the decision on appeal, denying Mr. Davis's claim for benefits for prostate cancer due to exposure to herbicide agents, erectile dysfunction secondary to prostate cancer, and special monthly compensation. This appeal followed.

II. ANALYSIS

On appeal, Mr. Davis argues that the Board failed to properly address his specific assertions regarding the nature of his claimed exposure to herbicide agents in service. The Court agrees.

First, in denying Mr. Davis's claim, the Board assigned "far greater probative weight" to the May 2009 Joint Services Records Research Center memorandum than to Mr. Davis's own statements regarding his exposure. R. at 10. That memorandum, however, does not speak to all of the circumstances under which Mr. Davis asserts that he was exposed to herbicide agents. That memorandum only concerns whether "Navy or Coast Guard ships *transported* tactical herbicides from the United States to the Republic of Vietnam or that ships operating off the coast of Vietnam *used, stored, tested, or transported* tactical herbicides," or whether it was possible that "*a shipboard veteran* was exposed to tactical herbicides based on contact with aircraft that flew over Vietnam or equipment that was used in Vietnam." R. at 490 (emphases added). That memorandum does not consider—nor does any other evidence of record evaluate—the possibility that Mr. Davis was exposed to Agent Orange or other herbicide agents during his "301.9 hours of training/operational flights." R. at 588. The Board failed to appreciate that, although the May 2009 Joint Services Records

Research Center memorandum is evidence that Mr. Davis was not exposed to herbicide agents while aboard the U.S.S. *Bennington*, it is entirely irrelevant to whether he was exposed during his documented flight missions. Accordingly, the Court concludes that the Board clearly erred in assigning the memorandum persuasive probative value. *See* 38 U.S.C. § 7261(a)(4); *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991); *Gilbert v. Derwinski*, 1 Vet.App.49, 52 (1990).

The Board also found that Mr. Davis was not qualified to identify the specific chemicals through which he flew, a finding that Mr. Davis does not challenge. Nevertheless, the Board found Mr. Davis competent and credible to report that his low-flying aircraft flew through some kind of chemical mists left behind by other aircraft that were spraying substances over the jungle. The record also contains evidence that, "In Vietnam, tactical herbicides were aerially applied by UC-123 aircraft in Operation RANCH HAND," R. at 464, the precise aircraft that Mr. Davis reported seeing on his own missions, R. at 804. The Board, due to its erroneous reliance on the May 2009 Joint Services Records Research Center memorandum, failed to reconcile this evidence. In light of this discussion, the Court concludes that the Board inadequately explained its determination that Mr. Davis was not exposed to herbicide agents in service. *See* 38 U.S.C. § 7104(d)(1). Remand is required for this reason also. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

On remand, the Board will expressly consider the possibility that Mr. Davis was exposed to herbicide agents when he flew low-flying aircraft over the jungles and coastline of Viet Nam, reportedly through chemical mist left behind by UC-123 aircraft. Because no evidence of record addresses this possibility, the Board must conduct additional development to assist Mr. Davis in substantiating his claim. *See* 38 U.S.C. § 5103A. Mr. Davis is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

The Court recognizes that Mr. Davis raises additional arguments, largely connected to the existence of a 2011 National Academy of Sciences report, *Blue Water Navy Vietnam Veterans and Agent Orange Exposure*. He notes that VA commissioned the report and that a link to the report is

available on VA's website and therefore, he argues, the report was constructively before the Board, which failed to consider it. The Secretary responds that the report does not pertain to Mr. Davis specifically and therefore constructive possession may not be imputed to the Board.

In light of the remand already ordered, the Court need not decide whether the report was constructively before the Board at this time, although it has not escaped the Court's notice that the Board was aware of the collaboration between VA and the National Academy of Sciences. *See R.* at 8 ("Because the Secretary of VA, in conjunction with scientific input from the National Academy of Sciences, has determined that herbicides can cause prostate cancer . . ."). Given that Mr. Davis has now expressly identified that report as relevant to his claims, the Secretary will ensure that it is added to his claims file on remand.

Mr. Davis's claims for benefits for erectile dysfunction and for special monthly compensation are inextricably intertwined with his claim for benefits for prostate cancer. *See Henderson v. West*, 12 Vet.App. 11, 20 (1998). Accordingly, those matters must be remanded as well.

III. CONCLUSION

Upon consideration of the foregoing, the August 18, 2015, Board decision is VACATED, and the matters are REMANDED for further development and readjudication consistent with this decision.

DATED: February 10, 2017

Copies to:

Thomas Prindiville Higgins, Esq.

VA General Counsel (027)