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

IN THE APPEAL OF C[redacted]
RICHARD C. BURGESS

DOCKET NO. 15-10 642) DATE *January 11, 2017*
) *CJ*
)

On appeal from the
Department of Veterans Affairs Regional Office in Hartford, Connecticut

THE ISSUES

1. Entitlement to service connection for coronary artery disease, claimed as due to exposure to ionizing radiation.

2. Entitlement to service connection for hypertension, claimed as due to exposure to ionizing radiation.

3. Entitlement to service connection for an acquired psychiatric disorder, claimed as due to exposure to ionizing radiation.

4. Entitlement to service connection for a thyroid condition, claimed as due to exposure to ionizing radiation.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

A. Lindio, Counsel

INTRODUCTION

The Veteran served on active duty from May 1957 to June 1960.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a rating decision issued in May 2014 by the Department of Veterans Affairs (VA) Regional Office (RO) in Muskogee, Oklahoma. In pertinent part, the RO denied service connection for coronary artery disease, hypertension, a mental condition, and a thyroid condition. In September 2014, the Veteran filed a notice of disagreement as to only those issues. In March 2015, the RO issued a statement of the case. The Veteran filed a substantive appeal in April 2015.

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2015). 38 U.S.C.A. § 7107(a)(2) (West 2014).

FINDINGS OF FACT

1. No probative, competent medical evidence is of record indicating that the Veteran has, or, at any time pertinent to this appeal has had, a medical diagnosis of coronary artery disease.

2. No probative, competent medical evidence is of record indicating that the Veteran has, or, at any time pertinent to this appeal has had, a medical diagnosis of hypertension.

3. No probative, competent medical evidence is of record indicating that the Veteran has, or, at any time pertinent to this appeal has had, a medical diagnosis of an acquired psychiatric disorder.

4. No probative, competent medical evidence is of record indicating that the Veteran has, or, at any time pertinent to this appeal has had, a medical diagnosis of a thyroid condition.

CONCLUSIONS OF LAW

1. The criteria for service connection for coronary artery disease are not met. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2016).

2. The criteria for service connection for hypertension are not met. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2016).

3. The criteria for service connection for an acquired psychiatric disorder are not met. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2016).

4. The criteria for service connection for a thyroid condition are not met. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304 (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. VA's Duties to Notify and Assist

The Veteran does not assert that there has been any deficiency in the notice provided to him under the Veterans Claims Assistance Act (VCAA).

The Veteran's claims were filed as a fully developed claim (FDC). Under this framework, a claim is submitted in a "fully developed" status, limiting the need for

further development of the claim by VA. When filing a fully developed claim, a Veteran submits all evidence relevant and pertinent to his claim, other than service treatment records (STRs) and treatment records from VA Medical Centers (VAMCs), which will be obtained by VA. Under certain circumstances, additional development, including obtaining additional records and providing the Veteran with a VA medical examination, may still be required prior to the adjudication of the claim. *See* VA Form 21-526EZ, received November 2013.

The FDC forms generally includes notice to the Veteran of what evidence is required to substantiate a claim for service connection and of the Veteran's and VA's respective duties for obtaining evidence. The notice also provides information on how VA assigns disability ratings and effective dates. Thus, the notice that is part of the claim form submitted by the Veteran satisfies the duty to notify.

In February 2014, VA informed the Veteran that he had requested to participate in the FDC program and requested a medical report of the first diagnosis of the claimed disease and information regarding his medical treatment.

Relevant to the duty to assist, the AOJ obtained and considered the Veteran's service treatment records. In his November 2013 claim application, the Veteran did not indicate that he received VA medical treatment. The Veteran has also not provided any private treatment information or records. In a February 2014 response to the VA February 2014 request for information, he indicated that he did not have any other medical evidence to submit.

Although the Veteran, through his representative, has claimed that additional radiation dose information and VA examinations need to be obtained, as will be explained below, there is no evidence of record as to any current diagnoses of the claimed disorders. The Veteran's claims fail on that basis alone and such dose information is not necessary to make a determination on his claims. Therefore, the Board finds that VA has met its duty to assist the Veteran in obtaining relevant records.

The duty to assist under 38 U.S.C.A. § 5103A (d) and 38 C.F.R. § 3.159(c)(4) is triggered when it is necessary to obtain an examination to make a decision in the case. Factors to consider in determining whether an examination is necessary include whether there is evidence of a current disability, and whether there is evidence that the disability may be associated with the appellant's military service or another service-connected disability but there is not sufficient medical evidence to make a decision on the claim. *See McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006). However, as there is no competent evidence of current diagnoses of the currently claimed disorders, a VA examination is not necessary.

Thus, the Board finds that VA has fully satisfied the duty to assist. In the circumstances of this case, additional efforts to assist or notify the Veteran would serve no useful purpose. *See Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991) (strict adherence to requirements of the law does not dictate an unquestioning, blind adherence in the face of overwhelming evidence in support of the result in a particular case; such adherence would result in unnecessarily imposing additional burdens on VA with no benefit flowing to the appellant); *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the appellant are to be avoided). Therefore, he will not be prejudiced as a result of the Board proceeding to the merits of his claims.

II. Service Connection Claims

The Veteran contends that he currently has coronary artery disease, hypertension, an acquired psychiatric disorder, and a thyroid condition due to radiation exposure in service.

A. Service Connection 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, 1131; 38 C.F.R. 3.303(a).

Generally, in order to prove service connection, there must be competent, credible evidence of (1) a current disability, (2) in-service incurrence or aggravation of an injury or disease, and (3) a nexus, or link, between the current disability and the in-service disease or injury. *See, e.g., Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Pond v. West*, 12 Vet. App. 341 (1999).

In some cases, service connection may also be established under 38 C.F.R. § 3.303(b) by (a) evidence of (i) a chronic disease shown as such in service (or within an applicable presumptive period under 38 C.F.R. § 3.307) and (ii) subsequent manifestations of the same chronic disease, or (b) if the fact of chronicity in service is not adequately supported, by evidence of continuity of symptomatology. However, the United States Court of Appeals for the Federal Circuit has held that the provisions of 38 C.F.R. § 3.303(b) relating to continuity of symptomatology can be applied only in cases involving those conditions explicitly recognized as chronic under 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

B. Factual Background and Analysis

The Board initially notes that radiation exposure is indicated by the evidence of record. The records includes a citation commending the men of the USS Boxer for services, including the launching of the YUCCA balloon and collection of primary data for very high altitude atomic detonations. The USS Boxer aided materially in the successful completion of Operation Hardtack.

A threshold requirement for the granting of service connection is evidence of a current disability. In the absence of evidence of a current disability there can be no valid claim. *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

The Veteran's claims fail as there is no competent, credible evidence of a current disability as to any of the claimed disorders. Specifically, the Veteran has not provided any medical information regarding current diagnoses of, or treatment for coronary artery disease, hypertension, an acquired psychiatric disorder, and/or thyroid condition. The Board notes that the duty to assist is not always a one-way

street. If [an appellant] wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence." *Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991).

To the extent that the Veteran has provided lay evidence implying that he is currently diagnosed to have the claimed disorders, although lay persons are competent to provide opinions on some medical issues, *see Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011), as to the specific issue in this case, *i.e.*, whether the Veteran has a medically diagnosed disability, such question falls outside the realm of common knowledge of a lay person as it involves a medical subject concerning an internal physical process extending beyond an immediately observable cause-and-effect relationship. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 n.4 (Fed. Cir. 2007) (lay persons not competent to diagnose cancer); *see also Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007) (although the claimant is competent in certain situations to provide a diagnosis of a simple condition such as a broken leg or varicose veins, the claimant is not competent to provide evidence as to more complex medical questions). Here, coronary artery disease and a thyroid condition involve medical diagnostic studies of internal processes to make such a determination. Similarly, hypertension has specific medical requirements that must be met for a diagnosis, as indicated in Diagnostic Code 7101. A medical diagnosis of an acquired psychiatric disorder also requires knowledgeable evaluation, as indicated in the Diagnostic and Statistical Manual of Mental Disorder and 38 C.F.R. § 4.125. As such, the Board finds that the Veteran's implied lay statements are not probative as to providing a current diagnosis for any of the claimed disorder.

As the preponderance of the evidence is against each claim, the benefit of the doubt rule does not apply. *Gilbert v. Derwinski*, 1 Vet. App. 49, 58 (1991). The Veteran's claims for service connection for: (i) coronary artery disease, (ii) hypertension, (iii) an acquired psychiatric disorder, and (iv) a thyroid condition are denied.

ORDER

Service connection for coronary artery disease is denied.

Service connection for hypertension is denied.

Service connection for an acquired psychiatric disorder is denied.

Service connection for a thyroid condition is denied.

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MICHAEL E. KILCOYNE
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).