

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-4035

GARFIELD H. WILLIAMS, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Garfield H. Williams, through counsel, appeals a September 16, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied his claims for service connection for prostate cancer and diabetes mellitus, type II, to include as due to herbicide exposure. Record of Proceedings (R.) at 2-17. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant served on active duty in the U.S. Army from April 1963 to March 1965. R. at 101. His service records show that he served at Camp Friendship in Korat, Thailand, from March 1964 to March 1965, and that his military occupational specialty (MOS) was supply handler. R. at 8, 175.

In October 1998, the appellant submitted a claim for service connection for prostate cancer, which was denied in an April 1999 rating decision. R. at 2184-86, 2216-19. A January

2004 rating decision denied service connection for diabetes mellitus due to herbicide exposure because the appellant did not serve in the Republic of Vietnam. R. at 2040-44.

In August 2005, the appellant submitted a statement claiming exposure to Agent Orange during his Vietnam-era service. R. at 2005-08. A February 2006 rating decision denied service connection for diabetes. R. at 1912-20. In August 2007, the appellant submitted a statement indicating that he was sent to different units during his service, put on guard duty near runways, and moved around while serving in Southeast Asia. R. at 1693. In January 2008, the regional office (RO) denied service connection for prostate cancer on the grounds that the evidence submitted was not new and material. R. at 1427.

In September 2008, the appellant submitted a statement indicating that he "police[d] the area" where he was stationed in Thailand, performed guard duty on ammunition dumps, and picked up drums, which sometimes resulted in chemicals spilling on him. R. at 1392. In November 2008, the appellant submitted a statement clarifying that his service-connection claim was based on Agent Orange exposure while he served on guard duty on base in Thailand, not Vietnam. R. at 1008.

A separate rating decision denied service connection for diabetes in June 2009. R. at 978-84. In a May 2010 statement submitted in support of a separate claim for post-traumatic stress disorder (PTSD), the appellant reported that he had performed guard duty on base in Thailand and conducted roving patrols of the base. R. at 680. A June 2010 Supplemental Statement of the Case (SSOC) denied service connection for prostate cancer, and a separate Statement of the Case (SOC) dated the same day denied service connection for diabetes. R. at 639-50, 651-75. Later that month, the appellant perfected his appeal as to both issues. R. at 635, 637.

In March 2014, finding that new and material evidence had been submitted, the Board remanded the appellant's claims for prostate cancer and diabetes mellitus for further development. R. at 286-91. In April 2014, the appellant submitted a statement indicating that his duties in service involved moving drums and that this job took him to the perimeters and the flight lines of his base. R. at 237.

In March 2015, VA sent a request for verification to the Joint Services Records Research Center (JSRRC), and in April 2015, JSRRC advised that review of the 1964 unit history of the appellant's company confirmed that the unit was located at Camp Friendship, Korat, Thailand.

R. at 87. However, the history did not mention any personnel working the flight lines, delivering supplies, or driving military vehicles that were exposed to Agent Orange. *Id.* The JSRRC response also noted that there was no documentation that Agent Orange or tactical herbicides were sprayed, tested, or stored on the base. *Id.* The JSRRC acknowledged a 1973 Department of Defense (DOD) report that contains evidence that to remove foliage that provided cover for enemy forces, herbicides were used on the fenced-in perimeters of military bases in Thailand. *Id.* VA determined that these herbicides may have been "tactical and procured from Vietnam, or a strong, commercial type resembling tactical herbicides." *Id.*

Upon review of the JSRRC response, VA made a formal finding that it could not verify that the appellant was exposed to herbicides. R. at 86. Also in April 2015, a memorandum on herbicide use in Thailand during the Vietnam Era issued by the Department of Veterans Affairs Compensation Service was placed in the appellant's claims file. R. at 81-82. The memorandum advised that tactical herbicides were not used or stored in Thailand and that if a veteran's claim was based on general herbicide use on a Thai air base, such as routine range maintenance or clearing along the flight line, there are no records that tactical herbicides were used for these purposes. *Id.*

In the September 2015 decision on appeal, the Board denied the appellant's claims for service connection for prostate cancer and diabetes mellitus, type II, to include as due to exposure to herbicides. R. at 2-17. In doing so, the Board determined that there was no credible evidence to corroborate the appellant's report of being on or near the perimeter of any military base in Thailand. R. at 13. The Board also concluded that "all efforts to obtain the needed information have been exhausted and further attempts would be futile." R. at 11. This appeal followed.

II. ANALYSIS

The Court notes that the appellant does not challenge the Board's decision to the extent that it determined that service connection for prostate cancer and diabetes was not warranted on a basis other than as due to herbicide exposure. Therefore, the Court's analysis will be limited to the Board's denial of service connection based on herbicide exposure.

Entitlement to service connection can be established on a direct basis or by a statutory presumption that certain conditions are related to certain types of service. *See Combee v. Brown*,

34 F.3d 1039, 1043-44 (Fed. Cir. 1994). VA has promulgated regulations providing that certain diseases associated with exposure to herbicides such as Agent Orange may be entitled to service connection on a presumptive basis; type II diabetes mellitus and prostate cancer are among such diseases. 38 C.F.R. § 3.309(e) (2016).

VA has determined that a "special consideration of herbicide exposure on a factual basis should be extended to [v]eterans whose duties placed them on or near the perimeters of Thailand military bases." VA ADJUDICATION PROCEDURES MANUAL (M21-1), pt. IV, subpt. ii, ch. 1, sec. H.5.a.¹ Herbicide exposure on a "direct or facts-found" basis is conceded if a U.S. Army veteran who served on one of the listed air force bases in Thailand provides a statement that he was involved in perimeter security duty, and if there is additional credible evidence supporting this statement. *See* M21-1, pt. IV, subpt. ii, ch. 1, sec. H.5.b. Included the list of qualifying bases was Korat, where the appellant served.

The Court reviews Board decisions regarding claims for service connection under the "clearly erroneous" standard of review. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). As with any finding on an issue of material fact or law, the Board must include a written statement of reasons or bases that enables a claimant to understand the precise basis for its decision and facilitate review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57. To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

A. Duty To Assist

As part of his duty to assist, the Secretary must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). When the Secretary attempts to obtain records from a Federal department or agency, "the effort to obtain those records shall continue until the records are

¹ M21-1, pt. IV, subpt. ii, ch. 1. sec. H, Developing Claims Based on Herbicide Exposure in Thailand During the Vietnam Era (2016).

obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile." 38 U.S.C. § 5103A(c)(2). The Secretary "may conclude that no further efforts are required . . . [when] the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them." 38 C.F.R. § 3.159(c)(2) (2016). The Board's findings as to whether the Secretary has satisfied his duty to assist are reviewed by the Court under the "clearly erroneous" standard of review. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007).

As part of its duty, VA has promulgated procedures for developing claims based on alleged herbicide exposure in Thailand. M21-1, pt. IV, subpt. ii, ch. 1, sec. H.5.b. This M21-1 provision states that VA should first request from the claimant approximate dates, locations, and the nature of alleged herbicide exposure, and, if the claimant timely provides that information, to determine whether herbicides were used as alleged, VA must furnish the information to the Compensation Service to request review of the DOD's inventory of herbicide operations. *Id.* If the Compensation Service confirms herbicides were used as alleged, then the RO must determine whether service connection is otherwise warranted. *Id.* If, on the other hand, VA does not receive such information, the case is referred to the JSRRC to determine whether sufficient information exists to require verification of herbicide exposure and, after any required verification attempts, to decide the claim on the record evidence. *Id.*

The appellant argues that VA failed in its duty to assist by not requesting records from DOD regarding his potential herbicide exposure or records pertaining to the use of herbicides at Korat. Appellant's Brief (Br.) at 18. He asserts that DOD possesses maps of the Korat air force base that show that the ammunition dump and parts of the flight line were located near the perimeter of the base. *Id.* at 19. The appellant maintains that had the Board made reasonable efforts to obtain more information, the Board could have obtained maps corroborating that his duties took him near the perimeter of the base. *Id.* Furthermore, the appellant argues, the Board did not adequately explain why it determined that the JSRRC's review of the 1964 unit history was the only avenue to corroborate his herbicide exposure. *Id.* at 20.

The Secretary responds that the DOD records were already incorporated into the memorandum on the use of herbicides in Thailand and the response by the JSRRC, both of which the Board discussed in detail. Secretary's Br. at 11. He asserts that the appellant does not identify any relevant information regarding the use of herbicides in Thailand that was not

otherwise before the Board. *Id.* Moreover, the Secretary argues, the appellant does not show how any additional information on the use of herbicides in Thailand would have been helpful to his claim. *Id.*

Here, the Board stated that VA had "made all attempts possible to verify the [v]eteran's allegations of exposure," but was unable to obtain any corroborating evidence. R. at 11-12. The Board further noted that VA followed procedures set forth in M21-1, including considering the memorandum on herbicide use in Thailand during the Vietnam Era and requesting verification of herbicide exposure from the JSRRC. R. at 12. The JSRRC in turn determined that the 1964 history of the appellant's unit did not mention or document personnel working the flight lines, delivering supplies, or driving military vehicles that were exposed to Agent Orange. R. at 87.

The Court holds that the Board did not adequately explain why it was satisfied with the level of review the JSRRC completed and thus concluded that all efforts to obtain the needed information were "exhausted and further attempts would be futile." R. at 11. The Board did not discuss or explain why the single unit history for the year 1964 was the only avenue to corroborate the appellant's herbicide exposure. As the appellant notes, morning reports from the Air Force through the year 1966 are available through the National Archives and Records Administration and were filled out daily to reflect changes in duty status for personnel and sometimes included a record of events. Appellant's Br. at 20; *see* "Morning Reports," https://www.archives.gov/st-louis/military-personnel/vso/morning_reports.html (last visited Mar. 1, 2017). Attempts to obtain this information may have reflected the appellant's duties or other information regarding possible herbicide exposure. Additionally, the DOD maps of Korat would have showed the areas that were near the perimeter of the base and could have confirmed whether the appellant's duties placed him in these areas. While the Board did not have to discuss these specific potential pieces of evidence, it did need to more fully explain how it decided that the information the JSRRC reviewed was adequate enough to satisfy the duty to assist and that further attempts would be futile.

Based on the foregoing, the Court concludes that the Board's statement of reasons or bases is insufficient to facilitate the Court's review of whether VA satisfied its duty to assist. *See Gilbert, supra*. Accordingly, the Court will remand the matter to the Board to provide an adequate statement of reasons or bases for finding that VA satisfied its duty to assist. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the

Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's September 16, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: March 13, 2017

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)