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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-1565

RONALD J. SUEDKAMP, APPELLANT,

v.

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

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: The appellant, Ronald J. Suedkamp, appeals through counsel that part of a March 30, 2016, Board of Veterans' Appeals (Board) decision that denied presumptive service connection for diabetes mellitus, type II (diabetes) and ischemic heart disease, to include coronary artery disease, as a result of herbicide exposure, including Agent Orange.¹ Record (R.) at 2-12. The appellant argues that the Board failed to provide an adequate statement of reasons or bases for (1) failing to establish a proper foundation for treating the absence of evidence as negative evidence and (2) its treatment of the appellant's lay testimony. Appellant's Brief at 4-9. For the following reason, the Court will vacate that part of the March 2016 decision on appeal, and remand the matters for readjudication.

The appellant served on active duty in the U.S. Navy from March 1966 through September 1971 as an ordnance mechanic. R. at 19. He was awarded the National Defense Service Medal and the Vietnam Service Medal with one Bronze Star, among other awards, for his service. R. at

¹ The Board also denied these matters on a direct basis. However, because the appellant solely challenges the presumptive service connection finding, the Court deems these matters on a direct basis to be abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

19. He served aboard the U.S.S. *Robison* between May and November 1969, and between May 1970 and May 1971. R. at 751.

In July 2007, the appellant filed for benefits based on service connection for diabetes. R. at 873. The regional office (RO) denied the claim in a March 2009 rating decision. R. at 829. In March 2010, the appellant submitted a timely Notice of Disagreement (NOD) in which he stated that he believed his heart condition was also caused by exposure to Agent Orange while aboard a ship in support of defoliation operations during the Vietnam war. R. at 802-10. He included a document evidencing that boats originating from the U.S.S. *Robison* traveled up the Cua Viet River, an inland waterway. R. at 804.

In May 2010 the RO denied service connection for coronary artery disease and continued the denial of service connection for diabetes. R. 790-94. That August, the appellant submitted another NOD, in which he stated that the U.S.S. *Robison* had entered Da Nang Harbor while he was aboard. R. at 785.

In August 2012, the Joint Services Records Research Center (JSRRC) produced a memorandum that made a formal finding of a lack of information required to corroborate the appellant's herbicide exposure. R. at 514-15. The RO issued a Statement of the Case in March 2013 that continued to deny service connection for coronary artery disease and diabetes. R. at 509. The appellant submitted a VA Form 9 to perfect his appeal later that month, wherein he stated that he was aboard the U.S.S. *Robison* while it entered and exited Da Nang Harbor, and that he went ashore several times on shore leave, including to attend church in Da Nang. R. at 485.

In March 2016, the Board issued the decision currently on appeal where it found that the appellant had not served in the Republic of Vietnam or on its inland waterways and thus was not entitled to presumptive service connection for diabetes and ischemic heart disease. In reaching this determination, the Board concluded that "[w]hile the veteran stated that he had gone ashore in Vietnam and attended church, there is no objective evidence that the ship, the U.S.S. *Robison*, or those who served on it went ashore or entered inland waterways while the Veteran was aboard." R. at 10.

The Court agrees with the appellant that the Board failed to make a credibility determination regarding the appellant's lay testimony, and instead required objective evidence that the appellant met the requirements for presumptive service connection. *See Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (holding that it is within the Board's province to

determine the credibility and weight of the evidence before it). If the Board found the appellant's testimony credible, it is unclear why the appellant would need objective evidence to succeed on a theory of presumptive service connection. *See* R. at 10. Remand of both matters on a presumptive basis is warranted for the Board to properly consider the credibility of the appellant's lay testimony. *See Washington, supra.*

Because the Court is remanding the appellant's claim, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing, that part of the March 30, 2016, Board decision that denied presumptive service connection for diabetes and ischemic heart disease as a result of herbicide exposure, including Agent Orange, is VACATED and the matters are REMANDED for readjudication.

DATED: April 28, 2017

Copies to:

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