BOARD OF VETERANS'APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: October 16, 2018 [redacted]

AVELARDO GARCIA

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

If your decision contains a	*What happens next*
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at http://www.vets.gov.

Sincerely yours,

K. Osborne
Deputy Vice Chairman
Enclosures (1)
CC: Paul Bunn, Attorney

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
AVELARDO GARCIA
REPRESENTED BY
Paul Bunn, Attorney

[redacted]
Docket No. 16-19 449

DATE: October 16, 2018

ORDER

Entitlement to service connection for residuals of a tumor on right lung is denied.

Entitlement to service connection for diverticulosis is denied.

As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for diabetes mellitus, type 2, has not been received, the application to reopen is denied.

As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for coronary artery disease, secondary to diabetes mellitus, type 2, claimed as atrial fibrillation, has not been received, the application to reopen is denied.

As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for hypertension, secondary to diabetes mellitus, type 2, has not been received, the application to reopen is denied.

As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, has not been received, the application to reopen is denied.

IN THE APPEAL OF
AVELARDO GARCIA [redacted]
Docket No. 16-19 449

FINDINGS OF FACT

1. The preponderance of the evidence is against finding that the Veteran has residuals of a tumor on right lung due to a disease or injury in service, to include specific in-service event, injury, or disease.

2. The preponderance of the evidence is against finding that the Veteran has diverticulosis due to a disease or injury in service, to include specific in-service event, injury, or disease.

3. An August 2011 rating decision denied the Veteran's claim of entitlement to service connection for diabetes mellitus, type 2; the Veteran did not perfect an appeal with respect to the issue.

4. The evidence received since the August 2011, by itself, or in conjunction with previously considered evidence, does not relate to an unestablished fact necessary to substantiate the underlying claim of entitlement to service connection for the Veteran's diabetes mellitus, type 2.

5. An August 2011 rating decision denied the Veteran's claim of entitlement to service connection for coronary artery disease, secondary to diabetes mellitus, type 2; the Veteran did not perfect an appeal with respect to the issue.

6. The evidence received since the August 2011, by itself, or in conjunction with previously considered evidence, does not relate to an unestablished fact necessary to substantiate the underlying claim of entitlement to service connection for the Veteran's coronary artery disease, secondary to diabetes mellitus, type 2.

7. An August 2011 rating decision denied the Veteran's claim of entitlement to service connection for hypertension, secondary to diabetes mellitus, type 2; the Veteran did not perfect an appeal with respect to the issue.

8. The evidence received since the August 2011, by itself, or in conjunction with previously considered evidence, does not relate to an unestablished fact necessary to substantiate the underlying claim of entitlement to service connection for the Veteran's hypertension, secondary to diabetes mellitus, type 2.

9. An August 2011 rating decision denied the Veteran's claim of entitlement to service connection for peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2; the Veteran did not perfect an appeal with respect to the issue.

10. The evidence received since the August 2011, by itself, or in conjunction with previously considered evidence, does not relate to an unestablished fact necessary to substantiate the underlying claim of entitlement to service connection for the Veteran's peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2.

CONCLUSIONS OF LAW

1. The criteria for entitlement to service connection for residuals of a tumor on right lung have not been met. 38 U.S.C. §§ 1110, 5107(b); 38 C.F.R. §§ 3.102, 3.303(a).

2. The criteria for entitlement to service connection for diverticulosis have not been met. 38 U.S.C. §§ 1110, 5107(b); 38 C.F.R. §§ 3.102, 3.303(a).

3. The August 2011 rating decision is final. 38 U.S.C. §§ 5108, 7105(c); 38 C.F.R. §§ 3.104, 20.200, 20.302, 20.1103.

4. New and material evidence sufficient to reopen the Veteran's claim of entitlement to service connection for diabetes mellitus, type 2, has not been submitted; the claim is not reopened. 38 U.S.C. §§ 5108, 7105(c); 38 C.F.R. §§ 3.156, 20.1103.

5. New and material evidence sufficient to reopen the Veteran's claim of entitlement to service connection for coronary artery disease, secondary to diabetes mellitus, type 2, has not been submitted; the claim is not reopened. 38 U.S.C. §§ 5108, 7105(c); 38 C.F.R. §§ 3.156, 20.1103.

6. New and material evidence sufficient to reopen the Veteran's claim of entitlement to service connection for hypertension, secondary to diabetes mellitus,

type 2, has not been submitted; the claim is not reopened. 38 U.S.C. §§ 5108, 7105(c); 38 C.F.R. §§ 3.156, 20.1103.

7. New and material evidence sufficient to reopen the Veteran's claim of entitlement to service connection for peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, has not been submitted; the claim is not reopened. 38 U.S.C. §§ 5108, 7105(c); 38 C.F.R. §§ 3.156, 20.1103.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from October 1966 to July 1968. This matter is on appeal from a June 2013 rating decision, which denied entitlement to service connection for diverticulosis and residuals of a tumor on right lung. The decision also denied entitlement to service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; and peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, because the evidence submitted was not new and material.

Service Connection

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Service connection requires competent evidence showing: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004); 38 C.F.R. § 3.303.

The benefit of the doubt rule provides that a veteran will prevail in a case where the positive evidence is in a relative balance with the negative evidence. Therefore, the Veteran prevails in a claim when: (1) the weight of the evidence supports the claim, or (2) when the evidence is in equipoise. It is only when the weight of the evidence is against the claim that the claim must be denied.

38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

1. Entitlement to service connection for residuals of a tumor on right lung is denied.

The Veteran contends that he has residuals of a tumor on his right lung that are related to an in-service injury, event, or disease.

The question for the Board is whether the Veteran has a current disability that began during service or is at least as likely as not related to an in-service injury, event, or disease.

The Board concludes that, while the Veteran has residuals of a tumor on his right lung, the preponderance of the evidence is against finding that it began during active service, or is otherwise related to an in-service injury, event, or disease. 38 U.S.C. §§ 1110, 5107(b); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009); 38 C.F.R. § 3.303(a), (d).

Certain chronic diseases, including malignant tumors, or tumors of the brain, spinal cord, or peripheral nerves, will be presumed related to service if they were noted as chronic in service; or, if they manifested to a compensable degree within a presumptive period following separation from service; or, if continuity of the same symptomatology has existed since service, with no intervening cause. 38 U.S.C. §§ 1101, 1112, 1113, 1137; *Walker v. Shinseki*, 708 F.3d 1331, 1338 (Fed. Cir. 2012); *Fountain v. McDonald*, 27 Vet. App. 258 (2015); 38 C.F.R. §§ 3.303(b), 3.307, 3.309(a).

Exposure to Agent Orange will be presumed for persons who served in a unit that operated in or near the Demilitarized Zone (DMZ) in Korea between April 1, 1968 and August 31, 1971 in an area in which herbicides are known to have been applied during that period, as determined by the Department of Defense (DOD), unless there is affirmative evidence to the contrary. 38 C.F.R. § 3.307(a)(6)(iv).

The Federal Circuit has held that when a claimed disorder is not warranted on a presumptive basis, direct service connection may nevertheless be established by

evidence demonstrating that the disease was in fact "incurred" during service. *See Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

The Board acknowledges that the Veteran was not afforded a VA examination for his claims for service connection for his for residuals of a tumor on his right lung. Under *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), in initial service connection claims, the VA must provide a VA medical examination where there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence establishing that an event, injury, or disease occurred in service; (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service; and (4) insufficient competent medical evidence on file for VA to make a decision on the claim.

In this regard, the Board finds that the Veteran has submitted insufficient evidence to indicate that his residuals of a tumor on his right lung are related to an event, injury, or disease that occurred in service. Accordingly, the Board finds that no further development of the Veteran's claims for service connection for his right ankle condition is required.

The Board thoroughly reviewed all the evidence in the claims file. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, all the evidence submitted by or on behalf of the claimant. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (the Board must review the entire record, but does not have to discuss each piece of evidence). The analysis below focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claim. The Veteran must not assume that the Board has overlooked pieces of evidence that are not explicitly discussed herein. *See Timberlake v. Gober*, 14 Vet. App. 122 (2000).

A review of the Veteran's service treatment records does not reflect any complaints, findings, or treatment for residuals of a tumor on right lung. The Veteran served on active duty from October 1966 to July 1968. A June 1968 report of medical history reported that chronic nasal stiffness and foot fungus were the Veteran's only complaints. A June 1968 report of medical examination did not report any physical abnormalities.

The earliest documented evidence in the Veteran's claims file of a tumor on the right lung was a March 2005 computed tomography (CT) scan that showed a persistent abnormality in the Veteran's right lung. A July 2012 statement from the Veteran reported that he had lung surgery at a VA facility in 2004 "when they did an Agent Orange exam the tumor was found on my right lung."

In July 2013, the Veteran submitted a letter from Dr. J.W., a private physician who had been treating the Veteran. Dr. J.W. reported that the Veteran's history is significant for multiple benign tumors that required excision. Furthermore, the physician stated that "[d]ue to his significant exposure to Agent Orange in the military, it is my medical opinion that his current medical conditions are definitely due to Agent Orange exposure."

The Veteran's military personnel records indicate that he served in Korea from July 1967 to July 1968, and that he was a missile crewman and then a survey recorder with the 3rd Battalion of the 81st Artillery Division

In February 2005, the Veteran submitted a statement in which he reported that he was stationed at Camp Colbern from 1967 to 1968 as a surveyor for the Sargent missile system. He reported that he went on numerous missions "all over South Korea near DMZ and everywhere else." In addition, he stated that he did not "know then that they had sprayed herbicides in the areas I was in, [until] I learned that you all did spray there."

The Veteran asserted during his January 2007 hearing testimony that he was stationed near the DMZ and that he surveyed areas near the DMZ where Agent Orange had been sprayed. The Board notes that the Veteran submitted pictures of himself which he indicated were taken during his service in Korea. The Veteran additionally contends that these pictures reveal defoliated areas in the background which he assumes were treated with Agent Orange. In support of his claim, he submitted a map on which he had highlighted the areas which he believed he had surveyed, to include areas around the DMZ.

The Veteran's service personnel records indicate that he was not assigned to a unit that the DOD has acknowledged served in areas along the DMZ in Korea between April 1968 and July 1969. A request to the U. S. Army and Joint Services Records

Research Center yielded a response that the Veteran was stationed at Camp William H. Colbern, approximately 18 miles southeast of Seoul, Korea. The unit history indicated that they engaged in training, inspections and field training exercises, with no specific indication of any unit members going to the DMZ.

A review of the evidence indicates that the Veteran's tumors on his right lung have not been diagnosed as malignant. Benign tumors of the lung are not "chronic diseases" listed under 38 C.F.R. § 3.309(a); therefore, the presumptive provisions of 38 C.F.R. § 3.303(b) do not apply. *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013). Furthermore, a benign tumor is not one of the enumerated disabilities listed under 38 C.F.R. § 3.309(e) as a disease associated with exposure to herbicide agents.

To summarize, the preponderance of the evidence is against a finding that the Veteran was exposed to Agent Orange during service. Although the Veteran indicates that he believes that the areas where he surveyed in Korea were treated with Agent Orange due to the condition of the surrounding vegetation, there is no corroborating evidence from the service department indicating that the Veteran was exposed to herbicides during active service. Furthermore, the record is clear that the Veteran was not involved with the application of herbicides, as he provided a statement in 2005 indicating that, during the period of his service in Korea, he did not know herbicides were sprayed in Korea.

The question of exposure to Agent Orange is not a medical determination, but a factual one that must be made by the Board after reviewing the evidence of record. The record has been adequately developed on that question, and the evidence fails to establish that the veteran has been exposed to herbicides in service. As such, the Board finds that there is no need to obtain a medical opinion because one is not required in order for the Board to make a decision in this case.

The Board acknowledges that Dr. J.W. stated that it was his medical opinion that the Veteran's medical conditions, which included his benign tumors, are definitely due to Agent Orange exposure. However, Dr. J.W. offered no rationale in support of his opinion. A medical opinion which contains only data and conclusions, and is not supported by reasons or rationale, is to be accorded no probative weight. *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (a medical examination report

must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two). Therefore, because the preponderance of the evidence is against a finding that the Veteran was exposed to Agent Orange during service and Dr. J.W. provided no rational in support of his opinion, the Board assigns no probative weight to that opinion.

As previously described, the Veteran's service treatment records show no evidence of treatment or diagnosis for residuals of a right lung tumor. The earliest documented evidence of this condition was a March 2005 CT scan, which was more than thirty-six years after his discharge from service. While not dispositive, the passage of so many years between discharge from active service and the objective documentation of a disability is a factor that weighs against a claim for service connection. *Maxson v. Gober*, 230 F.3d 1330 (Fed. Cir. 2000).

A lay person is competent to address etiology in some limited circumstances in which nexus is obvious merely through lay observation, such as a fall leading to a broken leg. *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). In this case, however, the record dates the onset of symptoms of a tumor on the Veteran's right lung tumor to many years after separation from active service and the question of causation extends beyond an immediately observable cause-and-effect relationship. As such, the Veteran is not competent to address the etiology of his disability.

Based on a review of the foregoing evidence and the applicable laws and regulations, the Board finds that the preponderance of the evidence is against the Veteran's claims for service connection for residuals of a right lung tumor. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine; however, as the preponderance of the evidence is against the claims, that doctrine is not helpful to this claimant. *See* 38 U.S.C. § 5107 (b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990).

2. Entitlement to service connection for diverticulosis is denied.

The Veteran contends that he has diverticulosis that is related to an in-service injury, event, or disease.

The question for the Board is whether the Veteran has a current disability that began during service or is at least as likely as not related to an in-service injury, event, or disease.

The Board concludes that, while the Veteran has diverticulosis, the preponderance of the evidence is against finding that it began during active service, or is otherwise related to an in-service injury, event, or disease. 38 U.S.C. §§ 1110, 5107(b); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009); 38 C.F.R. § 3.303(a), (d).

The Board acknowledges that the Veteran was not afforded a VA examination for his claims for service connection for his diverticulosis. However, the Board finds that the Veteran has submitted insufficient evidence to indicate that his diverticulosis is related to an event, injury, or disease that occurred in service. 38 U.S.C. § 5103A(d); *McLendon,* 20 Vet. App. at 79. Accordingly, the Board finds that no further development of the Veteran's claims for service connection for his diverticulosis is required. Indeed, in the entirety of the Veteran's medical record contained in the claims file, there is no statement by any medical professional indicative of the possibility of a nexus between diverticulosis and service.

The Veteran's June 1968 separation report of medical history documented the Veteran's negative responses to whether he had frequent indigestion or stomach, liver, or intestinal trouble. The examiner wrote that chronic nasal stiffness and foot fungus were his only complaints. A June 1968 report of medical examination did not report any physical abnormalities.

The earliest evidence in the Veteran's claims file of a diagnosis of diverticulosis is a medical record documenting a colonoscopy performed in February 2003.

A letter received from Dr. J.W. in October 2012 reported that the Veteran suffers from diverticulitis, as well as type 2 diabetes, hypertension, coronary artery disease, and peripheral neuropathy. According to the doctor, the Veteran has had an increase in symptoms of these disease states over the last two years.

As previously described, the Veteran's service treatment records show no evidence of treatment or diagnosis for a right lung tumor. The earliest evidence of this condition is a medical record from 2003, which was more than thirty-four years after the Veteran's discharge from service. While not dispositive, the passage of so many years between discharge from active service and the objective documentation of a disability is a factor that weighs against a claim for service connection. *Maxson v. Gober*, 230 F.3d 1330 (Fed. Cir. 2000). Furthermore, there is no medical evidence indicating a link between the Veteran's diverticulosis and service.

A lay person is competent to address etiology in some limited circumstances in which nexus is obvious merely through lay observation, such as a fall leading to a broken leg. *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). In this case, however, the record dates the onset of symptoms of diverticulosis to many years after separation from active service and the question of causation extends beyond an immediately observable cause-and-effect relationship. As such, the Veteran is not competent to address the etiology of his disability.

Based on a review of the foregoing evidence and the applicable laws and regulations, the Board finds that the preponderance of the evidence is against the Veteran's claims for service connection for diverticulosis. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine; however, as the preponderance of the evidence is against the claims, that doctrine is not helpful to this claimant. *See* 38 U.S.C. § 5107 (b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990).

3. As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for diabetes mellitus, type 2, has not been received, the application to reopen is denied.

4. As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for coronary artery disease, secondary to diabetes mellitus, type 2, has not been received, the application to reopen is denied.

5. As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for hypertension, secondary to diabetes mellitus, type 2, has not been received, the application to reopen is denied.

6. As new and material evidence sufficient to reopen the previously denied claim for entitlement to service connection for peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, has not been received, the application to reopen is denied.

This matter is on appeal from a June 2013 rating decision, which included a denial of entitlement to service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; and peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, as the evidence submitted by the Veteran was not new and material.

Prior to the June 2013 rating decision, an August 2011 rating decision denied entitlement to service connection for diabetes mellitus, type 2, to include as due to Agent Orange exposure; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; and peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, because the evidence submitted was not new and material.

Prior to the August 2011 rating decision, a September 2009 Board decision denied entitlement to service connection for diabetes mellitus, to include as secondary to Agent Orange; coronary artery disease, to include on a secondary basis; hypertension, to include on a secondary basis; and peripheral neuropathy of the lower extremities, to include on a secondary basis, because it found that the preponderance of the evidence was against a finding that the Veteran was exposed to Agent Orange in service.

Where a claim has been finally adjudicated, a claimant must present new and material evidence to reopen the previously denied claim. 38 U.S.C. § 5108; 38 C.F.R. § 3.156(a). New evidence is evidence not previously submitted to agency decision makers. 38 C.F.R. § 3.156(a). Material evidence is evidence that,

by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. *Id.* New and material evidence cannot be either cumulative or redundant of the evidence of record at the time of the last prior final denial and must raise a reasonable possibility of substantiating the claim. *Id.*

For the purposes of reopening a claim, newly submitted evidence is generally presumed to be credible. *Justus v. Principi*, 3 Vet. App. 510, 513 (1992).

New and material evidence is not required as to each previously unproven element of a claim in order to reopen. *Shade v. Shinseki*, 24 Vet. App. 110, 120 (2010). There is a low threshold for determining whether evidence raises a reasonable possibility of substantiating a claim. *Id.* at 117–18.

Here, the Regional Office (RO) last denied service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; and peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, in August 2011 on the basis that new and material evidence sufficient to reopen the previously denied claims of entitlement to service connection had not been received. In the year following the August 2011 decision, the Veteran did not submit any statements expressing disagreement with the decision nor did he submit any documents concerning the claim of service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; and peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, that could be considered new and material evidence. 38 C.F.R. §§ 3.156(b), 20.302. Therefore, the August 2011 decision became final. 38 U.S.C. §§ 7104, 7105; 38 C.F.R. §§ 3.104, 20.302, 20.1103.

The pertinent evidence of record at the time of the August 2011 rating decision consisted of the Veteran's service treatment records; military personnel records; treatment records from Dr. J.D.L. from March 1998 to February 2010; treatment records from Dr. R.V.G. from June 2001 to February 2011; treatment records from Dr. J.W., to include treatment from Dr. S., from August 2005 to March 2011; letter from Dr. S., dated February 1, 2005; letter from Dr. J.W., dated March 14, 2011; letter from Dr. J.D.L., dated March 14, 2011; a copy of ADVA Bulletin dated

February 2, 2004, with the Veteran's statement about camping out with units identified as eligible for Agent Orange presumption; a copy of an extract regarding Agent Orange sprayed outside of Vietnam from http://cybersarges.tripod.com and with the Veteran's statement that he served within the 18.5-mile barrier; a copy of Page 1 of the Department of Veterans Affairs Agent Orange Brief prepared by the Environmental Agents Service, dated October 2003; copies of pages 2 and 3 from Agent Orange, A Killer Then and a Killer Now!; a copy of the article from the Associated Press by Pauline Jelinek, Some to Get Agent Orange Testing, on which the Veteran stated he used a supply route to get out to the DMZ and back to camp; a copy of a photograph taken while in service on which the Veteran stated he surveyed the country hills and that the DMZ was in the background; a copy of Yoge Mountain's response in connection with a posting about Agent Orange in Korea from http://216.109.125.130, on which the Veteran stated he took a bath in the creek fed by the Haan River; and the Veteran's statements.

Pertinent evidence received since the August 2011 rating decision consists of a letter from M.H, received October 4, 2012; a letter from Dr. J.W., received October 4, 2012; Request for Information (VA 21-3101), dated October 19, 2012, reporting a negative response to request for records to verify herbicide exposure; a letter from Dr. J.W. dated June 10, 2013; treatment records from Little Rock VA Medical Center from December 16, 2004, through April 20, 2005; and the Veteran's statements.

Initially, the Board observes that the outcome of this case largely turns on the question of whether the Veteran submitted new and material evidence to support a finding that the Veteran's diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; and peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, were incurred or aggravated by a period of active military service.

A July 2012 statement from the Veteran reported that he served in Korea in 1968 and 1969 as a surveyor at Camp Colbern.

A letter received from Dr. J.W. in October 2012 reported that the Veteran suffers from type 2 diabetes, diverticulitis, hypertension, coronary artery disease, and

peripheral neuropathy. In addition, the doctor reported that the Veteran has had an increase in symptoms of these disease states over the last two years.

In response to a request to furnish any documents showing exposure to herbicides, an October 2012 completed Request for Information (VA 21-3101) reported "NO RECORDS OF EXPOSURE TO HERBICIDES."

In July 2013, the Veteran submitted a June 2013 letter from Dr. J.W., a private physician who had been providing treatment to the Veteran for hypertension, type 2 diabetes, atrial fibrillation, and peripheral neuropathy. According to the physician, the Veteran most likely had these conditions long before he ever sought medical care. Furthermore, the physician stated that "[d]ue to his significant exposure to Agent Orange in the military, it is my medical opinion that his current medical conditions are definitely due to Agent Orange exposure."

Based on the above, new and material evidence has not been received to reopen a claim of service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; or peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2. The Veteran's statements are cumulative of his previous contentions at the time of the last final denial of the claim; his statements are therefore not new and material evidence. While new medical evidence has been received, with the exception of the June 2013 letter from Dr. J.W., the evidence is cumulative or redundant of the evidence of record at the time of the last final denial of the claim. Therefore, the evidence is not new and material evidence.

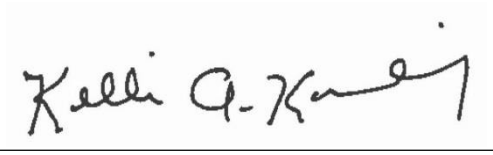
Although Dr. J.W. expressed that it was his medical opinion that the Veteran's hypertension, type 2 diabetes, atrial fibrillation, and peripheral neuropathy are due to Agent Orange exposure, he offered no rationale in support of his conclusion. A medical opinion which contains only data and conclusions, and is not supported by reasons or rationale, is to be accorded no probative weight. *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two). Furthermore, by way of a September 2009 Board decision, the Board previously denied entitlement to service connection for the Veteran's four claimed conditions addressed in this section because it found that the

preponderance of the evidence was against a finding that the Veteran was exposed to Agent Orange in service. Therefore, the June 2013 medical opinion from Dr. J.W. is not new and material evidence, as it neither relates to an unestablished fact necessary to substantiate the claim nor raises a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a).

By itself or when considered with the evidence previously of record, none of the evidence submitted since August 2011 relates to an unestablished fact necessary to substantiate the claims of entitlement to service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; or peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, and does not raise a reasonable possibility of substantiating the claims. Therefore, new and material evidence has not been received to reopen these claims for service. The requirements to reopen these claims have not been met, and the appeals must be denied.

As such, the Board finds that new and material evidence sufficient to reopen the appellant's claims for entitlement to service connection for diabetes mellitus, type 2; coronary artery disease, secondary to diabetes mellitus, type 2; hypertension, secondary to diabetes mellitus, type 2; or peripheral neuropathy of the lower extremities, secondary to diabetes mellitus, type 2, has not been submitted. Until the appellant meets his threshold burden of submitting new and material evidence

sufficient to reopen his claim, the benefit of the doubt doctrine does not apply. *See Annoni v. Brown*, 5 Vet. App. 463, 467 (1993).



KELLI A. KORDICH
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD T. Moore, Associate Counsel

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (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. Your local VA office will implement the Board'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. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

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 Board 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 Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board 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 your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board 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:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

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 Board to vacate any part of this decision by writing a letter to the Board 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 on the previous page for the Litigation Support Branch, 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 on the previous page for the Litigation Support Branch, 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 Board, 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: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the 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 the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).