# BOARD OF VETERANS'APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: February 14, 2019 [redacted]

WALTER P. JONES, JR
976 NW TEXAS AVE
LAKE CITY, FL 32055

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: The American Legion

# BOARD OF VETERANS'APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
**WALTER P. JONES, JR.**
REPRESENTED BY
**The American Legion**

[redacted]
Docket No. 15-18 857A
**Advanced on the Docket**

DATE: February 14, 2019

ORDER

Service connection for ischemic heart disease is denied.

FINDINGS OF FACT

1. The Veteran had active service from February 1960 to February 1963, to include a 4-month period of service at Korat Air Force Base in Thailand where his military occupational specialty (MOS) was light infantryman and from December 1964 to December 1967, including a period of service as a light infantryman instructor.

2. Ischemic heart disease did not have onset during active service or within one year of service discharge and is not otherwise etiologically related to active service, to include as due to herbicide exposure.

CONCLUSION OF LAW

Ischemic heart disease was not incurred in service nor is it due to herbicide exposure. 38 U.S.C. §§ 1110, 5103(a), 5103A, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2018).

REASONS AND BASES FOR FINDING AND CONCLUSION

Service connection may be granted on a direct basis as a result of disease or injury incurred in service based on nexus using a three-element test: (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 in or aggravated by service. *See* 38 C.F.R. §§ 3.303(a), (d); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009).

Service connection may be granted on a presumptive basis for diseases listed in § 3.309 under the following circumstances: (1) where a chronic disease or injury is shown in service and subsequent manifestations of the same disease or injury are shown at a later date unless clearly attributable to an intercurrent cause; or (2) where there is continuity of symptomatology since service; or (3) by showing that the disorder manifested itself to a degree of 10 percent or more within one year from the date of separation from service. *See* 38 C.F.R. § 3.307.

Service connection may be granted on a presumptive basis for certain diseases resulting from exposure to an herbicide agent (including Agent Orange) for veterans who, during active military, naval, or air service, served in the Republic of Vietnam between January 1962 and May 1975, so long as the requirements of 38 U.S.C. § 1116 and 38 C.F.R. § 3.307(a)(6)(iii) are met, and the rebuttable presumption provisions of 38 U.S.C. § 1113 and 38 C.F.R. § 3.307(d) are also satisfied. 38 C.F.R. § 3.309(e). The enumerated diseases which are associated with herbicide exposure include ischemic heart disease. 38 C.F.R. § 3.309(e).

The availability of presumptive service connection for a disability based on exposure to herbicides does not preclude a veteran from establishing service connection with proof of direct causation, or on any other recognized basis. *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

VA has determined that special consideration of herbicide exposure on a factual or facts-found basis should be extended to veterans whose duties placed them on or near the perimeters of certain Royal Thai Air Force Bases (RTAFB) when he claims service connection for disability based on herbicide exposure. VA internal policy stipulates that consideration on these grounds is due for Veterans that served with the U.S. Air Force or Army in Thailand during the Vietnam Era at U-Tapao,

Ubon, Nakhon Phanom, Udorn, Takhli, Korat, or Don Muang during the period from February 1961 to May 1975.

Additional consideration is required as to whether a veteran's MOS is such as to indicate the performance of duties on a base perimeter as a security policeman, security patrol dog handler, member of the security police squadron, or otherwise was in regular contact with the air base perimeter near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence.

Tactical herbicides, described as herbicide agents in VA regulations, are distinguished from commercially available herbicides approved by the Armed Forces Pest Control Board for use in routine base maintenance and vegetation control measures during this time. Overall, VA has determined that there are no records to show that the same tactical herbicides used in Vietnam, such as Agent Orange, were used in Thailand, but that sporadic use of commercial herbicides occurred within fenced perimeters on Thai airbases.

Turning first to direct service connection, the Veteran testified at the Board hearing that he had a myocardial infarction in 2005; however, the evidence does not reveal treatment for a heart attack. Nonetheless, the evidence does show that he was diagnosed with coronary artery disease in 2007. Therefore, a current disorder is shown. As to in-service incurrence, the service treatment record (STR) reflect treatment for genitourinary-related issues, and musculoskeletal and dental injury but do not show complaints of, treatment for, or a diagnosis related to the cardiovascular system.

At the time of separation from the first period of service, the Veteran denied shortness of breath, pain or pressure in the chest, palpitations or pounding heart, and high or low blood pressure. The clinical evaluation of his heart was normal. Similar findings were made at the time of separation from his second period of active duty. Therefore, an in-service incurrence related to the cardiovascular system was not shown.

Next, the Veteran does not contend that his cardiovascular disorder is directly related to service except as it related to herbicide exposure discussed below.

Further, the medical evidence does not support a nexus to service. Therefore, direct service connection is not warranted.

As it pertains to presumptive service connection, arteriosclerosis is a chronic disorder under 38 C.F.R. § 3.309. Turning to the evidence, as noted above, no chronic disease or injury of the cardiovascular system was shown in service. Also significant is normal findings related to the heart at the time of discharge from both periods of active duty. Therefore, the medical evidence does not support presumptive service connection on a "chronic disease or injury shown in service" basis.

Next, continuity of symptomatology has not been shown since service. Specifically, the medical evidence does not show manifestations of symptoms consistent with heart disease within a year or continually since separation. Of note, the Veteran's first documented post-separation treatment (musculoskeletal injuries) occurred 10 years after discharge. According to the record, he began receiving treatment for hypertension and high cholesterol in 2001, some three decades after discharge. Moreover, once he was diagnosed with heart disease in 2007, he had been separated from active service for nearly 40 years. Thus, the medical evidence does not support service connection on a "continuity of symptomatology" basis.

Further, the disorder did not manifest itself to a degree of 10 percent or more within one year from the date of separation of service. The Veteran separated from his last period of service in 1967 but did not note symptoms that could be construed as related to heart disease (hypertension and high cholesterol) until 2001 at the earliest, with a diagnosis of heart disease beginning in 2007. This evidence does not support presumptive service connection on a "manifest within one-year from separation" basis. Therefore, presumptive service connection on any basis is not supported by the medical evidence.

Next, the Veteran's contends that his heart disease is related to herbicide (Agent Orange) exposure. Despite his testimony that he was TDY to Vietnam, service personnel records do not document that he had active service in the Republic of Vietnam or its waters offshore; therefore, the presumption of herbicide exposure in Vietnam is not warranted, and the presumption of service connection based on herbicide exposure in Vietnam does not apply. *See* 38 C.F.R. § 3.307.

However, the Veteran served at Korat Air Force Base in Thailand for a 4-month period in mid-1962 and again in Korea from mid-1965 to mid-1966 but the record does not specify the location. His contention is that he was exposed to herbicides while stationed at Korat, that his duties required routine contact with the base perimeter, that in order to conduct sharp shooting training, he was required to pass through the perimeter to reach the shooting range located outside the installation, and that he slept, ate, and drank in the drift zone.

In further support of his claim, the Veteran submitted a map depicting Korat at an unknown time and a tactical employment of herbicides manual dated 1971. There are no specific details in this manual regarding the proximity or movement of his unit in relation to the spraying of herbicides and the location of the shooting range was not shown.

Moreover, the Veteran asserts that he visited, was stationed in, or had TDY in Udorn or Ubon in 1963 but this is not shown in the record as he left Korea in the summer of 1962 and did not return until his second period of active duty which did not start until December 1964. His DD-214 lists his MOS as light infantryman and shows a period of service as a light infantryman instructor during his second period of active duty in Korea.

With service in Korat established, the Board has considered the Veteran's lay statements asserting exposure to herbicides; however, the evidence does not show that he was exposed to herbicides during his period of service at Korat Air Force Base. While there are no performance reports of record describing his specific duties, his MOS as light weapons infantryman (noted as fire team leader) did not involve service as a security policeman, security patrol dog handler, or member of a security police squadron, or other regular service on or near the base perimeter.

In an August 2011 Memorandum attachment to an Agent Orange examination, it was noted that routine commercial herbicides were used on military installations by certified applicators. While not speaking directly to the Veteran's situation, the Memorandum reflected that limited tactical herbicides were used in Thailand from April to September 1964 at the Pranburi Military Reservation, which was not near any Royal Thai Air Force Base.

The Memorandum related that other than the 1964 testing, there were no records of tactical herbicide storage or use in Thailand. The Memorandum concluded that if the claim was based on general herbicide use within the base, such as small-scale brush or weed clearing activity, there were no records of such activity involving tactical herbicides, only the commercial herbicides that were approved by the Armed Forces Pest Control Board and sprayed under the control of the Base Civil Engineer. This evidence weighs against the Veteran general claim of brush control along the perimeter.

Further, while the Veteran reported that he had to cross the perimeter to reach the shooting range, this does not suffice to prove regular contact with the perimeter required if he were a security patrolman/policeman or otherwise had to walk the perimeter as part of his job. In addition, he reflected that the trees were sprayed orange but the orange in Agent Orange refers to the color of the barrels, not the color of the spray. Moreover, his claim of exposure from being in the "drift zone" is not a substantiated method of exposure. Thus, exposure to herbicides in Thailand may not be presumed and the appeal is denied on that basis.

The Board has considered the Veteran's lay statements that ischemic heart disease was caused by service. He is competent to report symptoms because this requires only personal knowledge as it comes to him through his senses. *Layno v. Brown*, 6 Vet. App. 465, 469 (1994). However, he is not competent to offer an opinion as to the etiology of his current disorder due to the medical complexity of the matters involved. *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Woehlaert v. Nicholson*, 21 Vet. App. 456, 462. As the preponderance of the evidence is against the claim, there is no reasonable doubt to be resolved and the appeal is denied.

Finally, the Veteran has not raised any other issues, nor have any other issues been reasonably raised by the record, for the Board's consideration. *See Doucette v. Shulkin*, 28 Vet. App. 366, 369-370 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

IN THE APPEAL OF [redacted]
**WALTER P. JONES, JR.** Docket No. 15-18 857A

L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD D.F. Hamilton, Associate Counsel

# 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).