

No. 19-2499

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

---

WALTER P. JONES, JR.,  
Appellant,

v.

ROBERT L. WILKIE,  
SECRETARY OF VETERANS AFFAIRS,  
Appellee.

---

APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS' APPEALS

---

OPENING BRIEF OF APPELLANT, WALTER P. JONES, JR.

Chris Attig, Attorney  
Alexandra Curran, Attorney  
ATTIG | STEEL, PLLC  
P.O. Box 250724  
Little Rock, Arkansas 72225  
Phone: (866) 627-7764  
Email: alexandra@attigsteel.com

Date: November 4, 2019

FOR THE AGENCY:  
Lance Steahly, Attorney  
Department of Veterans Affairs OGC (027)  
810 Vermont Avenue NW  
Washington, D.C. 20420

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

I. ISSUES PRESENTED FOR REVIEW ..... 1

II. STATEMENT OF THE CASE ..... 1

    A. Jurisdictional Statement ..... 1

    B. Statement of the Case and Relevant Facts ..... 2

III. SUMMARY OF THE ARGUMENT ..... 5

IV. STANDARD OF REVIEW ..... 6

V. ARGUMENT ..... 6

    1. The Board misapplied the law and failed to support its decision with adequate reasons and bases when it found Mr. Jones’ statements insufficient to concede herbicide exposure. .... 6

        a. The Board erred in requiring evidence of a particular military occupational specialty. .... 8

        b. The Board failed to make a credibility determination. .... 11

    2. The Board violated its duty to assist because Mr. Jones’ case was not referred to the JRSSC for a records search. .... 16

VI. RELIEF REQUESTED ..... 19

CERTIFICATE OF SERVICE ..... 20

## TABLE OF AUTHORITIES

### STATUTES

38 U.S.C. § 5103A(a)(1) .....	16, 18
38 U.S.C. § 5107(b).....	11
38 U.S.C. § 7104(d)(1).....	6
38 U.S.C. § 7252(a) .....	1

### REGULATIONS

38 C.F.R. § 3.159(c)(2).....	16
38 C.F.R. § 3.307.....	15
38 C.F.R. § 3.309 .....	15
38 C.F.R. § 20.105 .....	8

### CASES

<i>Buchanan v. Nicholson</i> , 451 F.3d 1331, 1336 (Fed. Cir. 2006).....	11
<i>Buczynski v. Shinseki</i> , 24 Vet. App. 221, 224 (2011) .....	14, 15
<i>Dalton v. Nicholson</i> , 21 Vet. App. 23, 38 (2007) .....	6
<i>DAV v. Sec’y of Veterans Affairs</i> , 859 F.3d 1072, 1077 (Fed. Cir. 2017).....	8
<i>Fountain v. McDonald</i> , 27 Vet. App. 258, 272 (2015) .....	14

<i>Gagne v. McDonald</i> , 27 Vet. App. 397, 402-03 (2015) .....	16
<i>Gilbert v. Derwinski</i> , 1 Vet. App. 49, 56 (1990) .....	6
<i>Haas v. Peake</i> , 525 F.3d 1168 (Fed. Cir. 2008).....	9
<i>Hedgepeth v. Wilkie</i> , 30 Vet. App. 318, 325 (2018) .....	6
<i>Horn v. Shinseki</i> , 25 Vet. App. 231, 239 (2012) .....	14, 15
<i>Hudick v. Wilkie</i> , 775 Fed. App'x 998 (Fed. Cir. 2018).....	10
<i>Hyatt v. Nicholson</i> , 21 Vet. App. 390, 393-94 (2007) .....	18
<i>Jandreau v. Nicholson</i> , 492 F.3d 1372 (Fed. Cir. 2007).....	11, 13
<i>Layno v. Brown</i> , 6 Vet. App. 465, 469 (1994) .....	11, 13
<i>Moran v. Principi</i> , 17 Vet. App. 149, 154 (2003) .....	9
<i>Overton v. Wilkie</i> , 30 Vet. App. 257, 264 (2018) .....	8
<i>Spellers v. Wilkie</i> , 30 Vet. App. 211, 221 (2018) .....	14
<i>Tucker v. West</i> , 11 Vet. App. 369, 374 (1998) .....	16
<i>Wise v. Shinseki</i> , 26 Vet. App. 517, 529 (2014) .....	18

## **OTHER AUTHORITIES**

Department of Veterans Affairs, New Procedures for Claims Based on Herbicide Exposure in Thailand and Korea .....	7
VA Adjudication Procedures Manual M21-1 Manual Rewrite 2010, Pt. IV. ii. 2, Ch. 10.q .....	7, 8, 9, 11, 14, 15, 17

## **RECORD CITATIONS**

R. at 1-13 (February 2019 Board Decision) .....	4, 8, 9, 11, 14, 15, 18
R. at 15-28 (October 2018 Board Hearing) .....	4, 13
R. at 29-77 (October 2018 Evidence Submission) .....	4, 13, 18
R. at 1331 (DD 214) .....	2
R. at 1339 (DD 214) .....	2
R. at 1350 (June 2015 VA Form 9).....	3, 4, 18
R. at 1351-92 (May 2015 Statement of the Case) .....	3
R. at 1402-09 (August 2013 Statement with Evidence) .....	3, 12, 18
R. at 1420 (April 2013 Statement).....	2, 3, 18
R. at 1450 (February 2012 Notice of Disagreement) .....	2, 11, 12
R. at 1452-65 (August 2011 Rating Decision) .....	2
R. at 1514 (July 2011 Statement) .....	2
R. at 1545-58 (January 2011 C&P Application).....	2

## **I. ISSUES PRESENTED FOR REVIEW**

### **Issue #1:**

When a veteran submits evidence showing that he served “on or near” Royal Thai Air Force Base perimeters during the Vietnam Era, the VA Adjudication Procedures Manual instructs VA to concede herbicide exposure on a facts-found basis. Mr. Jones submitted evidence that he was near the perimeter of Korat Royal Air Force Base in Thailand, his duties required routine contact with the base perimeter, he was required to pass through the perimeter to reach the shooting range located outside the installation, and that he slept outside in the drift zone. However, the Board rejected his lay statements without first making a credibility determination based upon his personnel records, which did not contradict his statements but were simply silent. Did the Board misapply the law and fail to support its decision with adequate reasons and bases when it found Mr. Jones’ statements insufficient to concede herbicide exposure?

### **Issue #2:**

The Secretary has published an Adjudication Manual provision that applies to Mr. Jones because he served on a U.S. Air base in Thailand during the Vietnam war. This provision states that special consideration is to be extended in claims “of herbicide exposure on a factual basis” for veterans “whose duties placed them on or near the perimeters of Thailand military bases.” In the absence of conceding exposure to herbicides, the RO was required to refer Mr. Jones’ claim to the Joint Services Records Research Center for verification. The Secretary never made this referral in violation of its own policy directive, and despite Mr. Jones’ repeated requests that VA attempt to access any classified service records. Did the Board violate its duty to assist?

## **II. STATEMENT OF THE CASE**

### **A. Jurisdictional Statement**

The Court has exclusive jurisdiction to review Board decisions.<sup>1</sup>

---

<sup>1</sup> 38 U.S.C. § 7252(a)

## **B. Statement of the Case and Relevant Facts**

Walter P. Jones, Jr. served on active duty in the United States Army from February 1960 to February 1963, and from December 1964 to December 1967.<sup>2</sup> Mr. Jones sought service connection and compensation for a heart condition in January 2011.<sup>3</sup> He requested that the VA obtain his military personnel file in support of his claim that he was exposed to herbicides in Udorn and Ubon, Thailand in 1963 during a training exercise at JT116 FTX.<sup>4</sup>

The RO issued a decision in August 2011, in which it denied service connection for ischemic heart disease.<sup>5</sup> Mr. Jones filed a timely Notice of Disagreement, explaining that he worked on the base perimeter and the range as a weapons instructor in Thailand.<sup>6</sup> He was on the base perimeter and ranges conducting training, sleeping on the ground in areas that had been treated with Agent Orange.<sup>7</sup> In April 2013, Mr. Jones again explained that as a weapons instructor at Udorn Air Force Base, it was inherent that he take his students outside to train on live fire ranges.<sup>8</sup> He requested that the RO access any records that may have been classified in order to establish that he was

---

<sup>2</sup> R. at 1331; R. at 1339

<sup>3</sup> R. at 1545-58

<sup>4</sup> R. at 1514

<sup>5</sup> R. at 1452-65

<sup>6</sup> R. at 1450

<sup>7</sup> *Id.*

<sup>8</sup> R. at 1420

located in areas sprayed with Agent Orange.<sup>9</sup> Mr. Jones submitted evidence in support of his claim in August 2013.<sup>10</sup> He explained that his unit, Charlie Company, 1<sup>st</sup> Brigade, 27 Infantry, was relocated to Korat, where they slept outside on the ground and patrolled the perimeter.<sup>11</sup>

The RO issued a Statement of the Case in May 2015.<sup>12</sup> He perfected his appeal by submitting a timely VA Form 9 the following month.<sup>13</sup> He explained that while in Korat, Thailand, he was a “foot soldier,” marched to Ubon and Udorn and trained on the perimeter and rangers of those bases.<sup>14</sup> The foliage was orange, brown, withering and dead.<sup>15</sup> As a weapons instructor, he had to take his students outside of the perimeter to train on live fire ranges.<sup>16</sup> Mr. Jones requested the VA to access any of his service records that may have been classified, as he held a Secret Final Security clearance.<sup>17</sup> He also submitted proof that his unit was originally stationed outside of Bangkok and was later relocated to Korat, where they slept on the ground due to the lack of buildings/barracks.<sup>18</sup> Mr. Jones further argued that he patrolled outside the

---

<sup>9</sup> *Id.*

<sup>10</sup> R. at 1402-09

<sup>11</sup> R. at 1408

<sup>12</sup> R. at 1351-92

<sup>13</sup> R. at 1350

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*



“wire” as part of his job as infantry, similar to military police that patrol their area.<sup>19</sup>

Mr. Jones testified at a hearing before the Board in October 2018.<sup>20</sup> He testified that while stationed in Korat, Thailand, he was an 11B4H weapons instructor.<sup>21</sup> His unit was the first to arrive, so they walked the perimeter of the village for security.<sup>22</sup> Training as a weapons instructor involved preparing a visual barrier that they walked through to make sure no civilians could gain access to the secured areas.<sup>23</sup> In other words, part of his job as an instructor required him to demonstrate what his trainees needed to do.<sup>24</sup> There were no barracks when they first arrived, so they were exposed in open areas.<sup>25</sup> Mr. Jones further testified that he also TDY’ed to Vietnam.<sup>26</sup> Mr. Jones submitted various photographs, maps and VA manuals in support of his claim that same day.<sup>27</sup>

The Board issued a decision on February 14, 2019.<sup>28</sup> The Board determined that Mr. Jones had not met the criteria for entitlement to service

---

<sup>19</sup> *Id.*

<sup>20</sup> R. at 15-28

<sup>21</sup> R. at 17

<sup>22</sup> *Id.*

<sup>23</sup> R. at 18

<sup>24</sup> R. at 18-19

<sup>25</sup> R. at 19-20

<sup>26</sup> R. at 25

<sup>27</sup> R. at 29-77

<sup>28</sup> R. at 1-13

connection for ischemic heart disease, including as due to in-service herbicide exposure. This appeal followed.

### **III. SUMMARY OF THE ARGUMENT**

The Board misapplied the law and failed to support its decision with adequate reasons and bases. It conceded that the VA Adjudication Procedures Manual directs VA to concede herbicide exposure when a veteran provides credible evidence that he was on or near the perimeter of a qualifying Royal Thai Air Force Base. However, the Board relied upon Mr. Jones' military occupational specialty and the lack of documentation in his personnel records to find that he was not exposed to herbicides. Significantly, his personnel records did not establish that he was not on or near the perimeter; the Board simply relied on the absence of evidence as substantive negative evidence that it weighed against his credibility without first establishing proper foundation.

Next, the Board's decision should be vacated and remanded because Mr. Jones' case was not referred to the Joint Services Records Research Center (JSRRC), as required by VA policy, for further development of the record. Because the Secretary's policy of referring Thailand herbicide-exposure case to the JSRRC for research of unit records would have benefitted Mr. Jones, the Board's failure to ensure that this referral occurred violated the VA's duty to assist. Finally, the Board failed to address Mr. Jones' repeated requests that

VA try to obtain any service records that may have been classified. Remand is required in light of the Board's errors.

#### **IV. STANDARD OF REVIEW**

The standard of review for each asserted error is applied in its respective argument, below.

#### **V. ARGUMENT**

##### **1. The Board misapplied the law and failed to support its decision with adequate reasons and bases when it found Mr. Jones' statements insufficient to concede herbicide exposure.**

In rendering its decision, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record.<sup>29</sup> To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.<sup>30</sup> In particular, the Board is required to determine whether the claimant's lay evidence is competent and credible.<sup>31</sup>

It is the Secretary's policy to grant presumptive exposure to Air Force and Army personnel whose duties placed them on or near the perimeters of

---

<sup>29</sup> 38 U.S.C. § 7104(d)(1)

<sup>30</sup> *Gilbert v. Derwinski*, 1 Vet. App. 49, 56 (1990); *Hedgepeth v. Wilkie*, 30 Vet. App. 318, 325 (2018)

<sup>31</sup> *Dalton v. Nicholson*, 21 Vet. App. 23, 38 (2007)

Thailand military bases during the Vietnam War.<sup>32</sup> In its May 2010 Compensation & Pension Service Bulletin, the VA acknowledged that, between February 28, 1961 and May 7, 1975, “there was significant use of herbicides on the fenced[-]in perimeters of military bases in Thailand intended to eliminate vegetation and ground cover for base security purposes.”<sup>33</sup> In the Compensation Bulletin, the VA concluded that it would concede herbicide exposure on a facts-found basis where a veteran could establish by “credible evidence” that he had served near the perimeter of particular Air Force bases, including Korat, during this period.<sup>34</sup> In addition to issuing the Compensation Bulletin, the VA revised its Adjudication Procedures Manual M21-1. In relevant part, the revised M21-1 Manual recites steps for evaluating claims of herbicide exposure for veterans with service in Thailand during the Vietnam era.<sup>35</sup> According to the M21-1, the first step is to determine if the veteran served at one of several air bases in Thailand, including Korat, during the

---

<sup>32</sup> VA Adjudication Procedures Manual M21-1 Manual Rewrite 2010, Pt. IV. ii. 2, Ch. 10.q (presumptive service connection for veterans that served in Thailand is afforded to “[v]eterans whose duties placed them on or near the perimeters of Thailand military bases” or a veteran who “provides a statement that he was involved with perimeter security duty, and there is additional evidence supporting this statement”)

<sup>33</sup> See Department of Veterans Affairs, New Procedures for Claims Based on Herbicide Exposure in Thailand and Korea

<sup>34</sup> *Id.*

<sup>35</sup> See M21-1 Manual, Part IV, Subpart ii, Chapter 1, Section H, Topic 5, subsection (b)

“Vietnam Era” “as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence.”<sup>36</sup> Next, the manual instructs: “If yes, concede herbicide exposure on a direct/facts-found basis.”<sup>37</sup> While the M21-1 is not binding on the regional office or the Board, it is nevertheless agency guidance relevant to the issue on appeal.<sup>38</sup>

**a. The Board erred in requiring evidence of a particular military occupational specialty.**

The Board erred in requiring evidence of a certain specific military occupational specialty (MOS) in order to concede exposure to herbicides while in Thailand. The Board acknowledged that:

[The Veteran’s] contention is that he was exposed to herbicides while stationed at Korat [Air Force Base in Thailand], 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.<sup>39</sup>

However, the Board also found that:

the evidence does not show that he was exposed to herbicides during his period of service at Korat Air Force Base. While there

---

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See 38 C.F.R. § 20.105; see also *DAV v. Sec’y of Veterans Affairs*, 859 F.3d 1072, 1077 (Fed. Cir. 2017); *Overton v. Wilkie*, 30 Vet. App. 257, 264 (2018)

<sup>39</sup> R. at 9

are no performance reports of record describing his specific duties, his [military occupational specialty] 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.<sup>40</sup>

This explanation highlights that the Board required a certain MOS in order to concede in-service exposure. This is inconsistent with the plain language of the M21. While a veteran's daily duties are one example of demonstrating proximity to the perimeter, daily proximity is not necessary, nor is it required that Mr. Jones spent most of his time on the perimeter. Similarly, Mr. Jones was not required to establish any particular MOS; in other words, he was not required to be a security policeman, dog handler, or member of a security police squadron in order for the Board to find that he was exposed to herbicides.<sup>41</sup> While these particular occupational specialties may *conclusively* resolve that question in favor of a veteran, the absence of evidence pertaining to those enumerated MOS does not *exclude* the possibility of herbicide exposure.<sup>42</sup> Serving near the air base perimeter is sufficient.<sup>43</sup>

---

<sup>40</sup> *Id.*

<sup>41</sup> *See Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008); VA Manual M21-1MR, Part IV, Subpart ii, Chapter 1, Section H

<sup>42</sup> *See Moran v. Principi*, 17 Vet. App. 149, 154 (2003); *Dizolio v. Brown*, 9 Vet. App. 163, 166 (1996)

<sup>43</sup> VA Manual M21-1MR, Part IV, Subpart ii, Chapter 1, Section H (b)(1)

In *Hudick*, the Federal Circuit held that once the Board determines the M21-1 applies, the Board must then apply it correctly to a veteran's case.<sup>44</sup> It held that the M21-1 Manual directs VA to concede herbicide exposure for veterans who served on RTAFBs "if a veteran provides credible evidence showing that they were 'otherwise near the air base perimeter.'"<sup>45</sup> The Court found in *Hudick*, that the Board "did not identify or analyze evidence that cut against Hudick's claim that he served near the base perimeter."<sup>46</sup> "At most, [the Board] acknowledged that other evidence did not *corroborate* Hudick's statements."<sup>47</sup> The Federal Circuit reiterated that the M21-1 Manual does not require a veteran to "provide *corroborated evidence*," rather, it only requires a veteran to provide "*credible evidence*."<sup>48</sup> Mr. Hudick's credible lay statements that he was near the perimeter of his base in Thailand were enough for the Federal Circuit to reverse the Board decision without corroborating evidence or evidence that he served in a specific MOS.<sup>49</sup>

In this case, the Board misapplied the Manual's provisions when it declined to concede herbicide exposure because Mr. Jones did not serve as one

---

<sup>44</sup> *Hudick v. Wilkie*, 775 Fed. App'x 998 (Fed. Cir. 2018)

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (emphasis added)

<sup>48</sup> *Id.* (emphasis in original)

<sup>49</sup> *Id.* at 8

of the listed military occupational specialties.<sup>50</sup> Because the Manual indicates that other evidence can be used to establish herbicide exposure in Thailand, requiring that Mr. Jones serve in a specific MOS was prejudicial error requiring remand.<sup>51</sup>

**b. The Board failed to make a credibility determination.**

The Board improperly discounted Mr. Jones' lay statements without making a credibility determination.<sup>52</sup> According to the M21-1, the first step is to determine if the veteran served at one of several air bases in Thailand, including Korat, during the "Vietnam Era" "as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, *or other credible evidence*."<sup>53</sup>

Mr. Jones has repeatedly explained that he worked on the base perimeter and the range as a weapons instructor in Thailand.<sup>54</sup> He was on the base perimeter and ranges conducting training, sleeping on the ground in

---

<sup>50</sup> See R. at 9

<sup>51</sup> See VA Manual M21-1MR, Part IV, Subpart ii, Chapter 1, Section H

<sup>52</sup> See 38 U.S.C. § 5107(b); *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); see also *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006)

<sup>53</sup> See VA Manual M21-1MR, Part IV, Subpart ii, Chapter 1, Section H (emphasis added)

<sup>54</sup> R. at 1450



areas that had been treated with Agent Orange.<sup>55</sup> As a weapons instructor at Udorn Air Force Base, it was inherent that he take his students outside to train on live fire ranges.<sup>56</sup> He explained that his unit, Charlie Company, 1<sup>st</sup> Brigade, 27 Infantry, was relocated to Korat, where they slept outside on the ground and patrolled the perimeter.<sup>57</sup>

Later, he again explained that while in Korat, Thailand, he was a “foot soldier,” marched to Ubon and Udorn and trained on the perimeter and rangers of those bases.<sup>58</sup> The foliage was orange, brown, withering and dead.<sup>59</sup> As a weapons instructor, he had to take his students outside of the perimeter to train on live fire ranges.<sup>60</sup> He also submitted proof that his unit was originally stationed outside of Bangkok and was later relocated to Korat, where they slept on the ground due to the lack of buildings/barracks.<sup>61</sup> Mr. Jones further argued that he patrolled outside the “wire” as part of his job as infantry, similar to military police that patrol their area.<sup>62</sup>

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> R. at 1408

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

During his October 2018 hearing, Mr. Jones testified that while stationed in Korat, Thailand, he was an 11B4H weapons instructor.<sup>63</sup> His unit was the first to arrive, so they walked the perimeter of the village for security.<sup>64</sup> Training as a weapons instructor involved preparing a visual barrier that they walked through to make sure no civilians could gain access to the secured areas.<sup>65</sup> In other words, part of his job as an instructor required him to demonstrate what his trainees needed to do.<sup>66</sup> There were no barracks when they first arrived, so they were exposed in open areas.<sup>67</sup> Mr. Jones further testified that he had temporary duty in Vietnam.<sup>68</sup> Mr. Jones submitted various photographs, maps and VA manuals in support of his claim that same day.<sup>69</sup>

Mr. Jones' statements regarding his proximity to the base perimeter were competent because they involve his own first-hand observations.<sup>70</sup> The Board was required to make a credibility determination before rejecting his lay

---

<sup>63</sup> R. at 17

<sup>64</sup> *Id.*

<sup>65</sup> R. at 18

<sup>66</sup> R. at 18-19

<sup>67</sup> R. at 19-20

<sup>68</sup> R. at 25

<sup>69</sup> R. at 29-77

<sup>70</sup> *Layno*, 6 Vet. App. at 469; *Jandreau*, 492 F.3d 1372

statements, yet it did not do so.<sup>71</sup> Its rejection of his lay statements, without first determining credibility, requires remand.

The Board's statement that the evidence did not show exposure and acknowledgment that no performance reports described his specific duties also reveals that the Board implicitly found that his duties would have been documented in his service records, and treated the absence of evidence as substantive negative evidence.<sup>72</sup> In particular, the Board did not explain why it determined that his service "did not involve ... regular service on or near the base perimeter."<sup>73</sup> The fact that Mr. Jones' personnel records did not conclusively *confirm* herbicide exposure as a result of his military occupational specialty does not preclude him from establishing that he was otherwise exposed to herbicides based on his close proximity to the base perimeter, where herbicides were sprayed.<sup>74</sup> In this respect, the Board relied on the absence of evidence in Mr. Jones' personnel records establishing that he served in one of the qualifying military occupational specialties as substantive negative evidence that he did not serve near the base perimeter. This was prejudicial error because the absence of evidence cannot be used as substantive negative

---

<sup>71</sup> See R. at 9-10

<sup>72</sup> *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011); *Horn v. Shinseki*, 25 Vet. App. 231, 239 (2012); *Spellers v. Wilkie*, 30 Vet. App. 211, 221 (2018); *Fountain v. McDonald*, 27 Vet. App. 258, 272 (2015)

<sup>73</sup> R. at 9

<sup>74</sup> See M21-1 Manual, pt. IV.ii.1.H.5.a-b

evidence without a proper foundation.<sup>75</sup> The Board failed to provide such a foundation.<sup>76</sup> For example, it did not explain why his frequent travel near the base perimeter when he went off base to train students at live fire ranges or his sleeping on the ground in the drift zone would have been recorded in his personnel records.

Therefore, the Board misapplied the law when it relied on the absence of evidence in Mr. Jones' personnel records as substantive negative evidence against his claim without providing a proper foundation.<sup>77</sup> At a minimum, it failed to adequately explain why the absence of evidence confirming herbicide exposure in his personnel records rendered his statements about being near the perimeter less credible.

The Board's errors prejudiced Mr. Jones, because had the Board properly applied the law and found that he provided credible evidence establishing he served near the perimeter of Korat RAFTB, it would have conceded herbicide exposure.<sup>78</sup> This concession of exposure would have entitled him to presumptive service connection for his ischemic heart disease.<sup>79</sup> Remand is

---

<sup>75</sup> See *Horn*, 25 Vet. App. at 239; *Buczynski*, 24 Vet. App. at 224

<sup>76</sup> R. at 9-10

<sup>77</sup> R. at 9; *Horn*, 25 Vet. App. at 239

<sup>78</sup> See M21-1 Manual, pt. IV.ii.1.H.5.a-b

<sup>79</sup> See 38 C.F.R. §§ 3.307, 3.309

therefore warranted for the Board to properly apply the law and to provide adequate reasons and bases for its decision.<sup>80</sup>

**2. The Board violated its duty to assist because Mr. Jones' case was not referred to the JRSSC for a records search.**

Pursuant to 38 U.S.C. § 5103A, the Secretary must “make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate” his or her claim for benefits.<sup>81</sup> This duty includes “mak[ing] as many requests as are necessary to obtain relevant records from a Federal department or agency.”<sup>82</sup> Whenever VA seeks records held by a Federal department or agency, “the efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.”<sup>83</sup>

Moreover, the Secretary has published an Adjudication Manual provision that applies to Mr. Jones because he served on a U.S. Air base in Thailand during the Vietnam war. This manual provision states that “special

---

<sup>80</sup> See *Tucker v. West*, 11 Vet. App. 369, 374 (1998)

<sup>81</sup> 38 U.S.C. § 5103A(a)(1)

<sup>82</sup> 38 C.F.R. § 3.159(c)(2)

<sup>83</sup> 38 U.S.C. § 5103A(c)(2); see 38 C.F.R. § 3.159(c)(2); *Gagne v. McDonald*, 27 Vet. App. 397, 402-03 (2015) (“VA’s duty to search for records that would assist a veteran in the development of his claim, and for which the veteran has provided the Secretary information sufficient to locate such records, includes making as many requests as are necessary and ends only when such a search would become ‘futile.’”).

consideration” is to be extended in claims “of herbicide exposure on a factual basis” for veterans “whose duties placed them on or near the perimeters of Thailand military bases.”<sup>84</sup> This manual provision sets out a seven step process.<sup>85</sup> If a veteran served at a U.S. Air base in Thailand during the Vietnam era, the adjudicator is required to ask the veteran for his or her approximate dates of such service, location, and nature of the alleged exposure.<sup>86</sup> If the veteran provides this information, the adjudicator is then to review the information to determine whether exposure to herbicides can be conceded on a “direct or facts found basis.”<sup>87</sup> If the conclusion is that herbicide exposure cannot be conceded on a direct or facts found basis, the adjudicator is to determine whether the veteran has provided sufficient information to permit a search by the JSRRC.<sup>88</sup> If so, then the adjudicator is instructed to “send a request to JSRRC for verification of exposure to herbicides.”<sup>89</sup>

Here, in the absence of conceding exposure to herbicides, the RO was required to refer Mr. Jones’ claim to the JSRRC for verification. However, the Secretary never made this referral in violation of its own policy directive. There is no question that Mr. Jones supplied the RO with specific details

---

<sup>84</sup> See MANUAL M21-1MR, Part IV, Subpart ii, 1.H.5.a

<sup>85</sup> See *id.* at Subpart ii, 1.H.5.b

<sup>86</sup> See *id.* at 1.H.5.b

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

sufficient to identify his unit and its location in Thailand, i.e., Charlie Company, 1<sup>st</sup> Brigade, 27 Infantry, the dates he served there, and the nature of the exposure to herbicides he experienced.<sup>90</sup> Accordingly, in the absence of conceding his exposure, the policy of the Secretary to give “special consideration” to Mr. Jones’ claim required that his case be referred to the JSRRC so that official unit records could be researched in an effort to corroborate Mr. Jones’ claim of exposure.

Mr. Jones also specifically requested that the RO access any service records that may have been classified in order to establish that he was located in areas sprayed with Agent Orange, as he held a Secret Final Security clearance.<sup>91</sup> The Board’s decision is silent as to Mr. Jones’ repeated requests or whether the duty to assist was satisfied.<sup>92</sup> The fact that Mr. Jones repeatedly requested VA assistance in the records search contradicts the Board’s findings that Mr. Jones had not raised any other issues.<sup>93</sup> Because the referral and research were not done, the Board failed to ensure that the VA complied with its duty to assist Mr. Jones with development of the record.<sup>94</sup>

---

<sup>90</sup> See, e.g., R. at 17-77; R. at 1408; R. at 1450

<sup>91</sup> R. at 1420; R. at 1350

<sup>92</sup> R. at 9-10; *Wise v. Shinseki*, 26 Vet. App. 517, 529 (2014)

<sup>93</sup> R. at 10

<sup>94</sup> See 38 U.S.C. § 5103A(a), (c)(1)(C) (2000); *Hyatt v. Nicholson*, 21 Vet. App. 390, 393-94 (2007) (Secretary required to obtain any relevant records held by a Federal agency identified by the claimant)

Mr. Jones was prejudiced by the Board's failure to attempt to obtain any classified service records or to ensure that his case was referred to the JSRRC because the records are relevant to his claim for service connection and would have been beneficial to the Board when rendering its decision. Without knowing the content of these records, the Board's error cannot be held harmless. This error requires that the Board decision be set aside and remanded for compliance with the duty to assist.

**VI. RELIEF REQUESTED**

Based upon the foregoing, the Board's decision that denied service connection for ischemic heart disease was in error. The Board failed to ensure that the duty to assist was satisfied and failed to provide adequate reasons and bases for its decision. The Board's decision should therefore be vacated and the appeal remanded for further adjudication.

**Dated: November 4, 2019**

Respectfully Submitted,  
ATTIG | STEEL, PLLC

BY: /s/ Alexandra Curran  
Alexandra Curran, Attorney  
P. O. Box 250724  
Little Rock, Arkansas 72225  
Phone: (866) 627 – 7764  
Email: alexandra@attigsteel.com



## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on November 4, 2019, I caused Appellant's opening brief to be served on the Appellee by and through the Court's E-Filing system:

Lance Steahly, Attorney  
Department of Veterans Affairs OGC (027)  
810 Vermont Avenue NW  
Washington, D.C. 20420

ATTIG | STEEL, PLLC

BY: s/ Alexandra Curran  
Alexandra Curran, Attorney for Appellant  
P. O. Box 250724  
Little Rock, Arkansas 72225  
Ph: (866) 627 – 7764  
Email: alexandra@attigsteel.com