



DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20420

April 1, 2020

In Reply Refer To: 01C2

XC [REDACTED]
ARMSTEAD, Willie E.

Ms. Lorena Armstead
51 Old Mill Court
Atlanta, GA 30349

Ruling on Motion

Dear Ms. Armstead:

On June 25, 2019, the Board of Veterans' Appeals (Board) received a motion to vacate the Board's April 10, 2019, decision in your appeal. This is the ruling on the motion.

Under 38 C.F.R. § 20.1000, *effective February 19, 2019*, a Board decision may be vacated at any time upon request of the appellant or his or her representative, or on the Board's own motion, on the following grounds: (a) denial of due process; or (b) an allowance of benefits based on false or fraudulent evidence. Examples of circumstances in which denial of due process of law will be conceded are: (1) when the appellant was denied his or her right to representation through action or inaction by Department of Veterans Affairs (VA) or Board personnel; (2) when there is prejudicial failure to afford the appellant a personal hearing; (3) For a legacy appeal, as defined in § 19.2 of this chapter, when a Statement of the Case or required Supplemental Statement of the Case was not provided. when a Statement of the Case or required Supplemental Statement of the Case was not provided.

In your Motion to Vacate, you noted that in in March 2019 you received informing you that you had 90 days in which to submit evidence. You asserted that you were not given a full 90 days after the March 2019 correspondence for purposes of submitting additional evidence pursuant to *Kutscherousky v. West*, 12 Vet. App. 369, 372 (1999) and *Clark v. O'Rourke*, 30 Vet. App. 92 (2018).

The motion has been carefully reviewed and it has been determined that the arguments in support of the motion do not establish any denial of due process rights warranting vacatur of the Board's April 10, 2019 decision.

First, I note that pursuant *Clark v. O'Rourke*, the United States Court of Appeals for Veterans Claims (Court) explained that *Clark* is specific to those appellants whose

2.

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Appellant

WILLIE E. ARMSTEAD
XC [REDACTED]

cases are being returned to the Board from the Court. In particular, it was held in *Clark* that the Board must wait the full 90 days after sending notice to an appellant and his or her representative, if any, that his or her case has been returned to the Board from the Court before issuing a decision in that case. *See also Kutscherousky v. West*, 12 Vet. App. 369 (1999) (per curiam order). Here, your claim was not being returned to the Board from the Court; rather, it was returned to the Board following a Board remand to the VA Regional Office for additional development. Therefore, the instant claim is distinguishable from *Clark*.

Finally, the evidence of record reflects that you filed a request for an additional 90 days to submit additional evidence on April 11, 2019. However, your request was after the Board issued a final decision on April 10, 2019. Moreover, in the March 2019 Board correspondence you were provided notice that you had 90 days from the date March 18, 2019 *or until the Board issues a decision in your appeal (whichever comes first)* to request a change in representation or to submit additional argument or evidence, if you elect to do so. 38 C.F.R. § 20.1304. In any event, in your April 11, 2019 letter did not show good cause as to why the decision should have been delayed.

For the foregoing reasons, I find that the Board did not violate your due process rights when a final decision was issued on April 10, 2019. Therefore, the motion to vacate the Board's April 10, 2019 decision is denied.

Please note, the June 25, 2019 motion to vacate is not considered a motion for reconsideration of the April 10, 2019 Board decision. *See* 38 U.S.C. § 7103; 38 C.F.R. §§ 20.1001, 20.1002. As you were advised in the VA Form 4597, Your Rights to Appeal Our Decision, that accompanied the April 10, 2019 Board decision, you have 120 days from the date the Board decision was mailed to you to file a Notice of Appeal with the United States Court of Appeals for Veterans Claims (Court).

3.

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Appellant

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However, you now have an *additional* 120 days from the date of mailing of this letter to file a Notice of Appeal with the Court if you would like to appeal the April 10, 2019 Board decision. *See Gomez v. McDonald*, 28 Vet. App. 39 (2015). For additional information on how to appeal to the Court, please refer to the VA Form 4597 that was included with the April 10, 2019 Board decision.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "BTKnope", with a stylized flourish at the end.

B.T. Knope
Veterans Law Judge

cc: Stacey Clark, Esquire

LORENA ARMSTEAD
51 OLD MILL CT
ATLANTA, GA 30349



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: April 10, 2019

XC [REDACTED]

LORENA ARMSTEAD
51 OLD MILL CT
ATLANTA, GA 30349

Dear Appellant:

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

<i>If your decision contains a</i>	<i>What happens next</i>
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: Stacey P. Clark, Attorney

Stacey P. Clark, Attorney
76 South Laura Street
Suite 1100
Jacksonville, FL 32202



BOARD OF VETERANS' APPEALS

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WASHINGTON, DC 20038

Date: April 10, 2019

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LORENA ARMSTEAD
51 OLD MILL CT
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Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: Stacey P. Clark, Attorney



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
LORENA ARMSTEAD
IN THE CASE OF
WILLIE E. ARMSTEAD
REPRESENTED BY
Stacey P. Clark, Attorney

XC [REDACTED]
Docket No. 18-09 543
Advanced on the Docket

DATE: April 10, 2019

ORDER

Entitlement to service connection of the Veteran's cause of death for purposes of entitlement to dependency and indemnity compensation (DIC) benefits is denied.

FINDING OF FACT

The Veteran did not sustain any incident, illness or injury during his active service to which his various causes of death may be etiologically linked; he was not exposed to herbicides during active service.

CONCLUSION OF LAW

The criteria service connection for the Veteran's cause of death for purposes of entitlement to dependency and indemnity compensation (DIC) benefits have not been met. 38 U.S.C. §§ 1101, 1110, 1112, 1113, 1116, 1310, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309, 3.312, 3.313.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty from June 1964 to June 1984. The Veteran died in January 2016. The appellant is the Veteran's surviving spouse.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a June 2016 decision letter. Jurisdiction over the appeal presently rests with the Department of Veterans Affairs (VA) Pension Management Center (PMC) in Philadelphia, Pennsylvania.

This issue previously came before the Board in January 2019, at which time the Board remanded it for confirmation that the Veteran's complete military personnel and service treatment records were of record. Shortly after the claim was remanded, the appellant's representative submitted a signed Rapid Appeals Modernization Program (RAMP) Opt-In form. However, RAMP is limited to veterans with pending compensation benefit appeals. As the appellant is a surviving spouse and not a veteran with an eligible compensation benefit appeal, she is not eligible for RAMP and the appeal remains before the Board under legacy jurisdiction.

1. Entitlement to service connection of the Veteran's cause of death for purposes of entitlement to dependency and indemnity compensation (DIC) benefits

The appellant seeks service connection of the Veteran's cause of death for purposes of entitlement to DIC benefits. The Board finds that the claim should be denied.

Pursuant to 38 U.S.C § 1310, DIC benefits are paid to a surviving spouse, child, or parent of a qualifying veteran who died from a service-connected disability. *See* 38 U.S.C § 1310; *Dyment v. West*, 13 Vet. App. 141 (1999), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002). A veteran's death will be considered service connected where a service-connected disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a). The disability is the principal

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cause of death if it was “the immediate or underlying cause of death or was etiologically related thereto.” 38 C.F.R. § 3.312(b). It is a contributory cause if it “contributed substantially or materially” to the cause of death, “combined to cause death,” or “aided or lent assistance to the production of death.” 38 C.F.R. § 3.312(c)(1).

The law provides that service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active military service. 38 U.S.C. § 1110; 38 C.F.R. §§ 3.303, 3.304. In addition, certain chronic diseases, including cardiovascular-renal disease, may be presumed to have been incurred during service if the disorder becomes manifest to a compensable degree within one year of separation from active duty. 38 U.S.C. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309. Service connection may be granted for any disease diagnosed after discharge when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Generally, establishing service connection requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

In determining whether a veteran’s death was service connected, the first element is always satisfied in that the current disability is the condition that resulted in the veteran’s death. *See Carbino v. Gober*, 10 Vet. App. 507, 509 (1997), *aff’d sub nom. Carbino v. West*, 168 F.3d 32 (Fed.Cir.1999).

In this matter, the Veteran’s death certificate lists aspirational pneumonia as the primary cause of death, with herpes zoster (shingles), cutaneous T-cell lymphoma, and mycosis fungoides. Therefore, these disabilities satisfy the primary criteria of service connection.

However, upon review the Board does not find any in-service incident, event, or illness to which the Veteran’s causes of death may be etiologically linked. The

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Board has carefully reviewed the Veteran's service treatment records but found no such incident or illness.

For her part, the appellant has asserted that the Veteran was exposed to herbicides during active service.

If a veteran was exposed to an herbicide agent during active military, naval, or air service in Vietnam, then certain diseases, to include non-Hodgkin's lymphoma, shall be service connected even though there is no record of such disease during service. For the purposes of this section, the term "herbicide agent" means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam era. 38 U.S.C. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309(e), 3.313. For purposes of determining herbicide exposure, a Veteran must have served in the Republic of Vietnam between January 9, 1962, and May 7, 1975. 38 C.F.R. § 3.307(a)(6).

Cutaneous T-cell lymphoma is a rare form of non-Hodgkin's lymphoma, which is a disease for which presumptive service connection is granted. While the Veteran's other disabilities listed on his death certificate are not presumptive disabilities associated with herbicide exposure, this does not preclude service connection on a direct basis, presuming the appellant can prove exposure to herbicides and provide evidence of an etiological link between that exposure and those disabilities. Unfortunately, the Board finds that the record does not support the Veteran being exposed to herbicides during active service.

The record does not reflect, nor does the appellant contend that the appellant ever set foot in the Republic of Vietnam during the applicable presumptive period. Rather, the appellant contends that the Veteran was exposed to herbicides during service in the Philippines, Guam, and Thailand, and has submitted an opinion from a private physician attesting to a link between the Veteran's lymphoma and herbicide exposure.

The Board has reviewed the Veteran's military personnel records and service treatment records and found no evidence that the Veteran ever served in the

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Philippines (the Board also recognizes that the statement from the private physician indicates he served in the Philippines in 1976, a period after the statutory end of the Vietnam era, and therefore, outside the period for which herbicide exposure is conceded). His service treatment records do show possible service in Guam between March and July 1970, although his personnel records place him in Massachusetts during that period of time. However, Guam is not a location for which herbicide exposure is conceded and the appellant has not provided any evidence that the Veteran ever served in any capacity which might place him in contact with herbicides (indeed, his personnel records for that period of time indicate that he served as a supervisor and trainer of personnel assigned to the vehicle operations career field). Therefore, the Board cannot concede herbicide exposure during this period of service in Guam.

Finally, the Board does acknowledge a period of service at the Udorn Royal Thai Air Force Base (RTAFB) from June to November 1975. VA will concede herbicide exposure for certain veterans who served at specific RTAFBs (to include the Udorn base) during the Vietnam era if they served in specific capacities. These capacities are listed as a 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.” *See* M21-1MR, Part IV, Subpart ii.1.H.5.b (Apr. 5, 2019). However, as noted above, the Vietnam era is statutorily defined as ending on May 7, 1975. In this matter, the Veteran’s service falls outside the statutory dates where herbicides use is conceded. Further, there is no evidence of record that the Veteran’s service meets the description of the type of position where such exposure might occur. Therefore, the Board cannot concede herbicide exposure during service in Thailand.

Considering the above, the Board must conclude that the Veteran did not sustain any incident, illness or injury during active service, to include exposure to herbicide agents, to which his causes of death may be etiologically linked. Therefore, from a direct and presumptive service connection perspective as secondary to herbicide exposure, the claim fails the second criteria of service connection and must be denied.

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The Board has also considered whether the Veteran's cutaneous t-cell lymphoma may be presumptively service connected as a chronic disease but finds no evidence in the record to show that that disability manifested to a compensable degree within one year of separation from service.

In sum, the Veteran did not sustain any in-service incident, illness or injury, to include herbicide exposure, to which his causes of death, either direct or contributory, may be etiologically linked; nor did his cutaneous t-cell lymphoma manifest to a compensable degree within one year of separation from service. As such, the claim of service connection for the Veteran's cause of death must be denied.

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In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine; however, because the preponderance of the evidence is against the claim, that doctrine does not apply. *See* 38 U.S.C. § 5107; *Gilbert v. Derwinski*, 1 Vet App. 49 (1990); 38 C.F.R. § 3.102. |



B.T. KNOPE
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

M. Pryce, 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).