



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
THOMAS M. DUBELBEIS

Represented by
Brian D. Hill, Attorney

██████████
Docket No. 190830-27625

DATE: September 11, 2020

ORDER

Entitlement to service connection for diabetes mellitus is granted.

Entitlement to service connection for right lower extremity peripheral neuropathy as secondary to diabetes mellitus is granted.

Entitlement to service connection for left lower extremity peripheral neuropathy as secondary to diabetes mellitus is granted.

Entitlement to service connection for erectile dysfunction as secondary to diabetes mellitus is granted.

Entitlement to service connection for hypertension is granted.

Entitlement to service connection for right upper extremity peripheral neuropathy as secondary to diabetes mellitus is denied.

Entitlement to service connection for left upper extremity peripheral neuropathy as secondary to diabetes mellitus is denied.

FINDINGS OF FACT

1. Resolving all doubt in the Veteran's favor, his military duties while stationed at Camp Samae San in Thailand during the Vietnam era required him to serve near the base perimeter at the U-Tapao Royal Thai Air Force Base (RTAFB).

2. The Veteran has a current diagnosis of diabetes mellitus with associated neuropathy in the right and left lower extremities, as well as erectile dysfunction.
3. Epidemiologic evidence supports positive association between hypertension and herbicide agent exposure and the evidence is in equipoise as to whether the Veteran's currently diagnosed hypertension is related to his conceded exposure to herbicide agents during service.
4. The medical evidence does not show a diagnosis of diabetic neuropathy in the right and/or left upper extremities.

CONCLUSIONS OF LAW

1. The criteria to establish service connection for diabetes mellitus are met. 38 U.S.C. §§ 1101, 1110, 1116, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309(e) (2019).
2. The criteria to establish service connection for right lower extremity diabetic neuropathy are met. 38 U.S.C. §§ 1110, 5107 (2012); 38 C.F.R. §§ 3.102, 3.310 (2019).
3. The criteria to establish service connection for left lower extremity diabetic neuropathy are met. 38 U.S.C. §§ 1110, 5107 (2012); 38 C.F.R. §§ 3.102, 3.310 (2019).
4. The criteria to establish service connection for erectile dysfunction as secondary to diabetes mellitus are met. 38 U.S.C. §§ 1110, 5107 (2012); 38 C.F.R. §§ 3.102, 3.310 (2019).
5. The criteria to establish service connection for hypertension are met. 38 U.S.C. §§ 1110, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303 (2019).
6. The criteria to establish service connection for right upper diabetic neuropathy are not met. 38 U.S.C. §§ 1110, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303 (2019).

7. The criteria to establish service connection for left upper diabetic neuropathy are not met. 38 U.S.C. §§ 1110, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303 (2019).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from July 1970 to January 1972.

Procedural History

On August 30, 2012, VA received the Veteran's original claim for compensation. Thereafter, in a November 2013 rating decision, the RO denied the appeal. The Veteran timely appealed the decision in October 2014; however, the RO then issued a January 2016 rating decision that continued the denial of the claims. The Veteran again timely appealed the decision in July and September 2016. However, prior to the issuance of a statement of the case, the Veteran submitted a Rapid Appeals Modernization Program (RAMP) opt-in election form choosing a higher-level review. In an August 2018 rating decision, the RO continued to deny the claims, the Veteran appealed the case directly to the Board choosing the evidence submission route, and this appeal ensued.

Therefore, the Board may only consider the evidence of record at the time of the RAMP opt-in, as well as any evidence submitted by the Veteran or his attorney with, or within 90 days from receipt of, the VA Form 10182. 38 C.F.R. § 20.303.

Service Connection for Diabetes Mellitus, Bilateral Lower Extremity Peripheral Neuropathy, and Erectile Dysfunction

The Veteran asserts that his diabetes mellitus is related to exposure to herbicide agents while stationed at Camp Samae San in Thailand during the Vietnam Era.

The Veteran has current diagnoses of diabetes mellitus with bilateral lower extremity peripheral neuropathy and erectile dysfunction. *See e.g.*, September 2013 VA examination reports.

Further, a veteran who served on active duty in the Republic of Vietnam during the Vietnam Era is presumed to have been exposed to an herbicide agent during such service, absent affirmative evidence establishing that he was not. 38 C.F.R. § 3.307 (a)(6), (d). If a veteran exposed to an herbicide agent pursuant to 38 C.F.R. § 3.307 (a)(6) develops a disease delineated in 38 C.F.R. § 3.309 (e), it shall be service connected on a presumptive basis even though there is no record of such disease during service. 38 C.F.R. § 3.309 (e) provides an exhaustive list of the diseases that may be service connected on a presumptive basis and it includes diabetes mellitus.

For service in Thailand during the Vietnam Era, there is no similar statutory or regulatory presumption of exposure to an herbicide agent during such service. Nonetheless, pursuant to VA policy, special consideration will be accorded, and exposure herbicide agents will be acknowledged if the veteran served at the RTAFBs at U-Tapao, Ubon, Nakhom Phanom, Udorn, Takhli, Korat, or Don Muang; and served as a security policeman, security patrol dog handler, member of a security police squadron, or otherwise served near the base perimeters. Service near a base perimeter may be shown by a veteran's military occupational specialty (MOS), daily work duties, performance evaluations or other credible evidence.

Here, the Veteran served in Thailand at Camp Samae San from August 1971 to January 1972. Therefore, the remaining question is whether his military occupational specialty (MOS) led him to the perimeter of a RTAFB.

The RO concluded that evidence was insufficient to verify the Veteran's exposure to herbicide agents. However, the Board finds that the Veteran submitted sufficient evidence showing that his duties at Camp Samae San required him to be near U-Tapao Air Force Base, as they shared a perimeter. In support, he provided multiple statements describing his access to the base perimeter as a result of his MOS as a physical specialist, statements from other service-members who served with him and confirmed that he was at the base perimeter, as well as a map showing the base location; this evidence helps to substantiate the Veteran's lay assertions. Indeed, the Veteran is competent to report what he witnessed first-hand (*see Layno v. Brown*, 6 Vet. App. 465 (1994)), and the Board finds no reason to doubt his credibility in this regard. His statements are consistent with the circumstances of his service in Thailand. Therefore, on review, the Board finds that the evidence is

at least in equipoise as to whether the Veteran's MOS led him to the base perimeter in Thailand.

Accordingly, as a factual matter, affording the Veteran the benefit of the doubt, the Board finds that evidence is in relative equipoise that this Veteran had regular access to the perimeter of the base in Thailand, and as such, the Board finds that he is presumed to have been exposed to herbicide agents during his service in Thailand.

As the Veteran's currently diagnosed diabetes mellitus is among those diseases as associated with exposure to herbicide agents, entitlement to service connection is warranted on a presumptive basis. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

Further, the Board finds that the September 2013 VA examiner, as well as private treatment records, confirm that the Veteran's bilateral lower extremity peripheral neuropathy and erectile dysfunction are complications associated with diabetes mellitus. Therefore, service connection for bilateral lower extremity diabetic peripheral neuropathy and erectile dysfunction is granted on a secondary basis. 38 C.F.R. § 3.310.

Service Connection for Hypertension

The Veteran asserts that his hypertension is related to exposure to herbicide agents during service in Thailand.

He is currently diagnosed with hypertension. *See e.g.*, September 2013 VA examination report.

As already established, the Veteran is presumed to have been exposed to herbicide agents based on his service in Thailand during the Vietnam era. 38 U.S.C. § 1116(f); 38 C.F.R. § 3.307(a)(6)(iii).

VA laws and regulations provide that, if a veteran was exposed to herbicide agents during service, certain listed diseases are presumptively service connected. 38 U.S.C. § 1116(a)(1); 38 C.F.R. § 3.309(e). 38 C.F.R. § 3.309(e) lists the diseases covered by the regulation.

The Secretary of VA has determined that there is no positive association between exposure to herbicides and any other condition for which the Secretary has not specifically determined that a presumption of service connection is warranted. *See* Notice, 59 Fed. Reg. 341-46 (1994); Notice, 61 Fed. Reg. 41, 442-49 (1996); Notice, 72 Fed. Reg. 32, 395-32, 407 (Jun. 12, 2007); Notice, 74 Fed. Reg. 21,258-21, 260 (May 7, 2009); Notice, 75 Fed. Reg. 32540 (June 8, 2010). Hypertension is **not** one of the diseases listed under 38 C.F.R. § 3.309(e).

However, the National Academies of Sciences, Engineering, and Medicine, on November 15, 2018, upgraded hypertension from “limited” evidence to the category of “sufficient” evidence of an association from its previous classification in the “limited or suggestive” category,” indicating that there is enough epidemiologic evidence to conclude that there is a positive association between hypertension and exposure to herbicides, including Agent Orange. *See* National Academy of Science November 2018 update report titled, Veterans and Agent Orange Update 11 (2018). The Board finds the study provided by the NAS, which is comprised of experts in field of science, is probative evidence as to the issue at hand.

Based on this relatively new scientific evidence, the Board finds that the evidence is at least in equipoise as to whether the Veteran’s currently diagnosed hypertension is related to his conceded exposure to herbicide agents while serving in Thailand. As such, the Board finds that all elements of service connection for hypertension are met, and the appeal will be granted.

Service Connection for Bilateral Upper Extremity Peripheral Neuropathy

Service connection for right and left upper extremity diabetic peripheral neuropathy is not warranted. A careful review of the medical evidence of record reveals no evidence that the Veteran is currently diagnosed with diabetic peripheral neuropathy in the right and/or left upper extremities. The United States Court of Appeals for Veterans Claims (Court) has held that “Congress specifically limits entitlement for service-connected disease or injury to cases where such incidents have resulted in a disability. In the absence of proof of a present disability there can be no valid claim.” *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992).

Specifically, the medical evidence, to include the September 2013 VA examination report, identified diabetic peripheral neuropathy in the *lower* extremities, but specifically noted no symptoms or diagnosis with regard to the upper extremities. Therefore, the preponderance of the evidence is against the Veteran's claim for bilateral upper extremity diabetic neuropathy, and it therefore must be denied.

Lastly, the Board notes that evidence was added to the claims file during a period of time when new evidence was not allowed. As the Board is deciding the claims of, it may not consider this evidence in its decision. 38 C.F.R. § 20.300. The Veteran may file a Supplemental Claim and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.



S. B. MAYS
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

A. Yaffe, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.

If you disagree with VA's decision

Choose one of the following review options to continue your case. If you aren't satisfied with that review, you can try another option. Submit your request before the indicated deadline in order to receive the maximum benefit if your case is granted.

Review option	Supplemental Claim Add new and relevant evidence	Higher-Level Review Not Available Ask for a new look from a senior reviewer	Board Appeal Not Available Appeal to a Veterans Law Judge	Court Appeal Appeal to Court of Appeals for Veterans Claims
Who and what	A reviewer will determine whether the new evidence changes the decision.	Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review.	You cannot request two Board Appeals in a row.	The U.S. Court of Appeals for Veterans Claims will review the Board's decision. You can hire an attorney to represent you, or you can represent yourself.
Estimated time for decision	(!) About 4-5 months	Please choose a different option for your next review.	Please choose a different option for your next review.	Find more information at the Court's website: uscourts.cavc.gov
Evidence	You must submit evidence that VA didn't have before that supports your case.			
Discuss your case with VA				
Request this option	Submit VA Form 20-0995 Decision Review Request: Supplemental Claim VA.gov/decision-reviews			File a Notice of Appeal uscourts.cavc.gov Note: A Court Appeal must be filed with the Court, not with VA.
Deadline	You have 1 year from the date on your VA decision to submit VA Form 20-0995.			You have 120 days from date on your VA decision to file a Court Appeal.
How can I get help?	A Veterans Service Organization or VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA office for assistance or visit VA.gov/decision-reviews/get-help . For more information, you can call the White House Hotline 1-855-948-2311 .			

What is new and relevant evidence?

In order to request a Supplemental Claim, you must add evidence that is both new and relevant. New evidence is information that VA did not have before the last decision. Relevant evidence is information that could prove or disprove something about your case.

VA cannot accept your Supplemental Claim without new and relevant evidence. In addition to submitting the evidence yourself, you can identify evidence, like medical records, that VA should obtain.

What is the Duty to Assist?

The Duty to Assist means VA must assist you in obtaining evidence, such as medical records, that is needed to support your case. VA's Duty to Assist applied during your initial claim, and it also applies if you request a Supplemental Claim.

If you request a Higher-Level Review or Board Appeal, the Duty to Assist does not apply. However, the reviewer or judge will look at whether VA met its Duty to Assist when it applied, and if not, have VA correct that error by obtaining records or scheduling a new exam. Your review may take longer if this is needed.

What if I want to file a Court Appeal, but I'm on active duty?

If you are unable to file a Notice of Appeal due to active military service, like a combat deployment, the Court of Appeals for Veterans Claims may grant additional time to file. The 120-day deadline would start or resume 90 days after you leave active duty. Please seek guidance from a qualified representative if this may apply to you.

What if I miss the deadline?

Submitting your request on time will ensure that you receive the maximum benefit if your case is granted. Please check the deadline for each review option and submit your request before that date.

If the deadline has passed, you can either:

- Add new and relevant evidence and request a Supplemental Claim. Because the deadline has passed, the effective date for benefits will generally be tied to the date VA receives the new request, not the date VA received your initial claim. Or,
- File a motion to the Board of Veterans' Appeals.

What if I want to get a copy of the evidence used in making this decision?

Call 1-800-827-1000 or write a letter stating what you would like to obtain to the address listed on this page.

Motions to the Board

Please consider the review options available to you if you disagree with the decision. In addition to those options, there are three types of motions that you can file with the Board to address errors in the decision. Please seek guidance from a qualified representative to assist you in understanding these motions.

Motion to Vacate

You can file a motion asking the Board to vacate, or set aside, all or part of the decision because of a procedural error. Examples include if you requested a hearing but did not receive one or if your decision incorrectly identified your representative. You will need to write a letter stating how you were denied due process of law. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion to Reconsider

You can file a motion asking the Board to reconsider all or part of the decision because of an obvious error of effect or law. An example is if the Board failed to recognize a recently established presumptive condition. You will need to write a letter stating specific errors the Board made. If the decision contained more than one issue, please identify the issue or issues you want reconsidered. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion for Revision of Decision based on Clear and Unmistakable Error

Your decision becomes final after 120 days. Under certain limited conditions, VA can revise a decision that has become final. You will need to send a letter to VA requesting that they revise the decision based on a Clear and Unmistakable Error (CUE). CUE is a specific and rare kind of error. To prove CUE, you must show that facts, known at the time, were not before the judge or that the judge incorrectly applied the law as it existed at the time. It must be undebatable that an error occurred and that this error changed the outcome of your case. Misinterpretation of the facts or a failure by VA to meet its Duty to Assist are not sufficient reasons to revise a decision. Please seek guidance from a qualified representative, as you can only request CUE once per decision.

Mailto:

Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038

Or, fax:

1-844-678-8979