

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-5969

VICTOR MANUEL AVILES-RIVERA,

APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, *Chief Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On August 27, 2019, veteran Victor Manuel Aviles-Rivera, through counsel, appealed an August 20, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for hypertension, including as due to herbicide exposure. The case was submitted to the Court for consideration on August 14, 2020.

On August 18, 2020, Mr. Aviles-Rivera filed a motion to stay proceedings pending issuance of mandate by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Euzebio v. Wilkie*, CAFC No. 20-1072. The Court granted the motion to stay on September 3, 2020. The Federal Circuit issued its decision in *Euzebio v. McDonough*, on March 3, 2021, and mandate followed on April 26, 2021. 989 F.3d 1305 (Fed. Cir. 2021), *vacating and remanding sub nom. Euzebio v. Wilkie*, 31 Vet.App. 394 (2019). Accordingly, the Court will lift the stay of proceedings. However, the Court requires supplemental memoranda of law from the parties.

By way of background, the Board previously remanded the service-connection claim in April 2017 to obtain a medical opinion addressing the etiology of the veteran's hypertension. The Board specifically directed the examiner to consider the National Academy of Sciences (NAS) *Veterans and Agent Orange* Updates, the then-most recent of which—the 10th Update¹—concluded that there was limited or suggestive evidence of an association between hypertension and herbicide exposure. The opinion was obtained in October 2017.

In June 2018, Mr. Aviles-Rivera elected to participate in VA's Rapid Appeals Modernization Program (RAMP), selecting higher-level review of the service-connection claim.

¹ The 10th NAS Update is also referred to as the 2014 Update and was published in March 2016. *See* Health and Medicine Division Reports on Agent Orange, <https://www.publichealth.va.gov/exposures/agentorange/publications/health-and-medicine-division.asp> (last accessed May 6, 2021).

In so doing, he consented to review based on the evidence before VA as of the date of the RAMP opt-in election. In September 2018, a VA regional office (RO) issued a new decision under RAMP denying service connection for hypertension. In February 2019, Mr. Aviles-Rivera appealed the RO decision to the Board, electing direct review under RAMP based on the evidence of record at the time of the RO's September 2018 decision. In the August 2019 decision on appeal, the Board acknowledged the veteran's RAMP election and stated that the evidentiary record closed as of June 18, 2018.

On appeal to this Court, the parties, in pertinent part, disagree as to whether the Board had constructive possession of the 11th NAS Update,² which found sufficient evidence of an association between hypertension and herbicide exposure. As relevant, the 11th NAS Update was published in November 2018,³ after Mr. Aviles-Rivera's June 2018 RAMP election and the RO's September 2018 decision, but before the Board's August 2019 decision.

In their briefs, both parties applied this Court's decision in *Euzebio*, which held that, in order to trigger the constructive possession doctrine, there must be a direct relationship between the evidence and the claim on appeal. *Euzebio*, 31 Vet.App. at 401. However, the Federal Circuit vacated this Court's decision, holding that the correct standard for constructive possession is relevance and reasonableness. *Euzebio*, 989 F.3d at 1321. Moreover, neither party addressed the veteran's RAMP election and its effect, if any, on the doctrine of constructive possession.

Upon consideration of the foregoing, it is

ORDERED that the stay of proceedings imposed on September 3, 2020, is lifted. It is further

ORDERED that the parties shall, within 30 days of the date of this order, file a supplemental memorandum of law, no greater than 15 pages in length, addressing (1) the effect of the Federal Circuit's decision in *Euzebio*, and (2) the effect, if any, of Mr. Aviles-Rivera's election into RAMP and the publication of the 11th NAS Update vis-à-vis the constructive possession doctrine.

DATED: May 7, 2021

BY THE COURT:



MARGARET BARTLEY
Chief Judge

² The 11th NAS Update is also referred to as the 2018 Update.

³ See Health and Medicine Division Reports on Agent Orange, *supra* n.1.

Copies to:

Robert A. Jackson, Esq.

VA General Counsel (027)