July 16, 2020

Gregory O. Block
Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

Re: CAVC Case No. 18-6970, Appellant James R. Healey
Supplemental Citation of Authority

Dear Mr. Block:

Pursuant to U.S. Court of Appeals for Veterans Claims' Rule of Practice and Procedure 30(b), Appellant provides the following pertinent and significant authority: March 29, 2018 Memorandum from the Office of the Chairman. (Exhibit 1). The Memorandum states that that Board adopted *The Purplebook*, "a document containing the Board's internal policies and procedures," effective March 23, 2018.

In his brief, Appellant argued that *The Purplebook* demonstrated that VA had actual or constructive knowledge of the National Academy of Sciences *Veterans and Agent Orange Update: 2012* and supported his assertion that there was a direct relationship between that document and Mr. Healey's claim. *See* Appellant's Br. at 10, 14, 17; Appellant's Reply Br. at 2.

Appellant also provides, Office of Public and Intergovernmental Affairs, *VA's judge employment peaks, as department continues record breaking appeals progress*, March 2, 2020, available at: https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5396 (last visited July 15, 2020). (Exhibit 2). The article notes that "Veterans Law Judges are both experienced attorneys and subject matter experts in Veterans law." *Id.*

In his pleadings, Appellant noted that Board decisions in 2018 had referenced the NAS updates. Appellant's Br. at 11. He argued: "A 'tribunal learns from its cases,' and the Board cannot feign ignorance of facts with which it has been repeatedly presented. Appellant also argued that the "at least 306 Board decisions" referencing the NAS Updates demonstrate the Secretary's and the Board's actual knowledge of the Updates' contents. Appellant's Br. at 14-16; Appellant's Reply Br. at 5.

Finally, Appellant provides the cases of [Title Redacted By Agency] Bd. Vet.App. 1447590, 2014 WL 6877798 (Oct. 27, 2014) (Exhibit 3); [Title Redacted By Agency], Bd. Vet.App. 1829002, 2018 WL 9763632 (Mar. 22, 2018) (Exhibit

5); [Title Redacted By Agency] Bd. Vet.App. 19145272, 2019 WL 4403004 (June 12, 2019) (Exhibit 5) in support of the point that the Board was aware of the existence and contents of the NAS Updates. *See* Appellant's Br. at 14-16; Appellant's Reply Br. at 5. In each of these cases, the Board Member who authored Mr. Healey's October 15, 2018 decision remanded a veteran's claim for service connection for hypertension for a VA medical opinion based on the findings of the NAS Updates. *See* R-10 (identifying the Board Member).

In Bd. Vet.App. 1447590, 2014 WL 6877798 at *2, the Board did not make a finding as to "whether the low threshold under the third prong of *McLendon* is met by a finding by the NAS of 'limited or suggestive evidence' of a causal association between herbicide agent exposure and a claimed condition (here hypertension)." Nonetheless, it remanded for "a medical opinion to address the question of a causal link to herbicide agent exposure." *Id.*

Similarly, in Bd. Vet.App. 1829002, 2018 WL 9763632 at *3 and Bd. Vet.App. 19145272, 2019 WL 4403004 at *6, that same Board Member found that the NAS's finding that there was "limited or suggestive evidence of an association" between herbicide exposure and hypertension was sufficient to satisfy the "low threshold" required to trigger a medical opinion. Accordingly, in both cases, the Board remanded for an appropriate medical opinion. Bd. Vet.App. 1829002, 2018 WL 9763632 at *3; Bd. Vet.App. 19145272, 2019 WL 4403004 at *6.

Very truly yours,

/s/ Kaitlyn C. Degnan
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Counsel for Appellant

EXHIBIT 1

Office of the Chairman
Board of Veterans' Appeals
Washington, D.C. 20420

Date: March 29, 2018

MEMORANDUM
NO. 01-18-04

SUBJ: THE PURPLEBOOK

1. BACKGROUND

a. The Board is adopting The Purplebook, a document containing the Board's internal policies and procedures. The Purplebook will serve as a repository of guidance for all Board employees on the internal operating processes of the Board. After implementation, The Purplebook will be hosted on an internal Sharepoint Site, and will be routinely updated by staff of the Office of Legislation, Regulations, and Policy (LRP).

b. Adoption of this document will ensure consistency and accountability in the handling of appeals throughout the Board. As The Purplebook will be routinely updated, this repository will also allow the Board to remain agile in implementing needed revisions to procedures in the future.

2. PURPOSE OF THIS MEMORANDUM

This memorandum revokes the BVA Directive 8430 "BVA Decision Preparation & Processing: Policies and Responsibility Assignment" and BVA Handbook 8430.2 "BVA Decision Preparation & Processing Procedures: Decision Style Manual" and implements The Purplebook in their place effective March 23, 2018.

3. ACCESS TO THE PURPLEBOOK

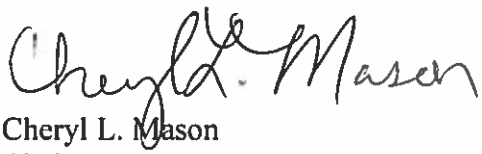
The Purplebook will be hosted on an internal Sharepoint which can be reached by following a link on the Board's internal homepage.

4. UPDATES TO THE PURPLEBOOK

The procedure for updating The Purplebook is detailed in section XIV. In brief, the document will be maintained by LRP. Any Board employee should notify LRP if they believe they discover an error in The Purplebook, and all other requests for changes should be submitted to LRP by the respective chief of any division, branch, or office. Updates will be published on a quarterly basis, and may be published more frequently if needed. LRP will maintain a revisions index and use a consistent version numbering to track all revisions.

5. RESCISSION

This memorandum is effective until expressly rescinded, modified, or superseded.



Cheryl L. Mason
Chairman

Attachments: The Purplebook v1.0.0 (VA Purplebook 01-18-v1.0.0)
The Purplebook Revisions Index

EXHIBIT 2

Office of Public and Intergovernmental Affairs

VA's judge employment peaks, as department continues record breaking appeals progress

March 2, 2020, 11:29:00 AM

VA's judge employment peaks, as department continues record breaking appeals progress

WASHINGTON — The U.S. Department of Veterans Affairs' (VA) Board of Veterans' Appeals (Board) (https://www.bva.va.gov/) hired seven new Veterans Law Judges (VLJs) effective March 1, to help the Board continue its record-breaking progress adjudicating Veterans appeals.

These new hires bring the Board's total number of VLJs to 102 – the largest since the Board's inception in 1933.

"2019 was a historic year for the Board and we look forward to reaching new milestones in 2020, said VA Secretary Robert Wilkie. "In fiscal year 2019, the Board issued 95,089 decisions to Veterans and held more than 22,000 hearings – both are record numbers."

Eight months after implementation of the Veterans Appeals Improvement and Modernization Act of 2017 (https://benefits.va.gov/benefits/appeals.asp) (AMA), VA announced its plan to resolve legacy appeals by the end of 2022. The appointment of the seven VLJs will help VA towards meeting that goal.

Veterans Law Judges are both experienced attorneys and subject matter experts in Veterans law.

Following an initial screening, the chairman of the Board recommends a list of candidates to the VA secretary. The selected VLJs are then appointed by the secretary with the final approval coming from the president.

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EXHIBIT 3

Bd. Vet. App. 1447590, 2014 WL 6877798

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

08-03 489
Decision Date: 10/27/14
Archive Date: 11/05/14

***1** On appeal from the Department of Veterans Affairs Regional Office in Milwaukee, Wisconsin

THE ISSUE

Entitlement to service connection for **hypertension**, to include as secondary to service connected PTSD and/or exposure to herbicides.

REPRESENTATION

Appellant represented by:Disabled American Veterans
ATTORNEY FOR THE BOARD
D. Schechter, Counsel

INTRODUCTION

The Veteran served on active duty from September 1966 to September 1968. The appeal comes before the Board of Veterans' Appeals (Board) from an April 2007 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Milwaukee, Wisconsin, in pertinent part denying service connection for **hypertension**.

The Board in February 2013 denied the appealed claim, and the Veteran appealed that Board decision to the United States Court of Appeals for Veterans Claims (Court). By a December 2013 Order the Court approved a Joint Motion for Remand (Joint Motion) of the parties vacating that portion of the Board's February 2013 decision denying service connection for **hypertension**, and remanding that claim for action consistent with the terms of the Joint Motion. The Joint Motion and the Court's Order left undisturbed the Board's determinations in its February 2013 decision on all other claims then on appeal. The record in this case includes the physical claims file as well as electronic records within Virtual VA. The appeal is

REMAND

D to the Agency of Original Jurisdiction (AOJ). VA will notify the appellant if further action is required.

REMAND

The Joint Motion noted that the Board in its February 2013 (now vacated) decision denied service connection for **hypertension** including based on exposure to herbicides without the Veteran first being afforded a VA examination addressing the likelihood that the Veteran's **hypertension** was causally linked to the Veteran's presumed in-service herbicide agents exposure in Vietnam during the Vietnam Era. 38 C.F.R. §§ 3.307(a)(6), 3.309(e) (2013).

As the Joint Motion noted, VA must provide a medical examination or obtain a medical opinion when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, (2) evidence establishing that an event,

injury, or disease occurred in service, or establishing that certain diseases manifested during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) there is insufficient competent medical evidence on file for the Secretary to make a decision on the claim. McLendon v. Nicholson, 20 Vet. App. 79 (2006); see also 38 U.S.C.A. § 5103A(d)(2), 38 C.F.R. § 3.159(c)(4)(i). The third prong, which requires that the evidence of record 'indicate' that the claimed disability or symptoms 'may be' associated with the established event, disease or injury is a low threshold. McLendon, 20 Vet. App. at 83.

***2** As the Joint Motion further noted, the National Academy of Science (**NAS**) has been assigned an advisory role to assess the likelihood of an association between herbicide agents exposure and development of certain diseases, to assist VA in assigning presumptions based on such exposure. See 38 U.S.C.A. § 1116(b) (in substance, authorizing the Secretary of Veterans Affairs to establish presumptions of service connection based on herbicide exposure based upon reports from the **NAS** addressing statistically significant results of relevant studies). The Joint Motion then noted the following:

[...] the National Academy of Science's (**NAS**) Veterans and Agent Orange: Update 2006 concluded that while there was insufficient evidence of an association between exposure to compounds of interest and **hypertension** to allow presumptive entitlement to service connection, there was 'limited or suggestive evidence of an association.' See Nat'l Acad. Of Sci., Inst. of Med., Veterans & Agent Orange: Update 2006 (2007); see also 77 Fed.Reg. 47,924, 47,926 (Aug. 10, 2012) ('[i]n its reports prior to 2006, **NAS** placed **hypertension** in the 'Inadequate or Insufficient Evidence' category' but, in the 2006 and 2008 Updates, 'elevated **hypertension** to the 'Limited or Suggestive Evidence' category.').

The Joint Motion then concluded that the Board's February 2013 decision was deficient for failing to discuss why the low threshold under the third prong of McLendon and 38 C.F.R. § 3.159(c)(4)(i) was not met based on this limited or suggestive evidence.

The Board will not hazard to guess, in the absence of guidance by a binding authority, whether the low threshold under the third prong of McLendon is met by a finding by the **NAS** of 'limited or suggestive evidence' of a causal association between herbicide agent exposure and a claimed condition (here **hypertension**). Nat'l Acad. Of Sci., Inst. of Med., Veterans & Agent Orange: Update 2006 (2007). That is particularly the case here in the face of a Joint Motion finding a deficiency of analysis in the Board's decision which failed to make explicit such guesswork, but where the Joint Motion and the Court have failed to provide any such guidance. Rather, the Board will take the clear path left open by the Joint Motion, of obtaining a medical opinion to address the question of a causal link to herbicide agent exposure. (The Board may reasonably question the prudence of directing a general (not case-specific) question of epidemiological causality to a particular examiner where no less an authoritative body than the **NAS** would not hazard to draw a more definite conclusion on that epidemiologic question. However, neither McLendon nor the governing statute 38 U.S.C.A. § 5103A(d)(2) nor its implementing regulation 38 C.F.R. § 3.159(c)(4)(i) speaks to the reasonableness of directing general questions of epidemiology to individual examiners on a case-by-case basis. Rather, they simply dictate the necessity of an examination or medical opinion when the 'low threshold' is met of evidence 'indicat[ing]' that a condition 'may be associated' with service. McLendon, 20 Vet. App. at 83.)

***3** Accordingly, the case is

REMAND

D for the following action:

1. Afford the Veteran and his authorized representative the opportunity to submit additional evidence or argument in furtherance of the remanded claim.

2. Obtain any unassociated VA or private medical records that may exist or are otherwise identified by the Veteran.

3. After completing the foregoing development, schedule the Veteran for a VA examination by a physician with appropriate expertise to address the likelihood of a causal link between the Veteran's presumed exposure to herbicide agents in service and his development of **hypertension** subsequent to service. It is imperative that the records contained within claims file and those contained digitally within Virtual VA or the Veterans Benefits Management System (VBMS) be made available to the

examiner for review. Any appropriate and necessary tests should be conducted, and their results must be provided on the examination report.

Based on review of the Veteran's history, clinical records, examination, sound medical principles, medical knowledge, and statistically significant research on the subject, the examiner must opine whether it at least as likely as not (a 50 percent or higher degree of probability) that the Veteran's **hypertension** was caused by his presumed exposure to herbicide agents while stationed in Vietnam during the Vietnam Era. In so doing, the examiner should consider possible intercurrent or unrelated causes of the Veteran's **hypertension**. The examiner should explicitly consider findings by the National Academy of Science on the question of a possible association between herbicide agents exposure and subsequent development **hypertension**. See Nat'l Acad. Of Sci., Inst. of Med., Veterans & Agent Orange: Update 2006 (2007); see also 77 Fed.Reg. 47,924, 47,926 (Aug. 10, 2012).

The rationale (medical or scientific reasoning) for the requested opinions shall be provided. If the examiner cannot provide an opinion without resorting to mere speculation, he or she shall provide a complete explanation stating why this is so. In so doing, the examiner shall explain whether the inability to provide a more definitive opinion is the result of a need for additional information or that he or she has exhausted the limits of current medical knowledge in providing an answer to the questions(s) posed. When providing the requested opinions, the examiner must consider any conflicting evidence or opinions. 4. The RO or AMC should then readjudicate the matter on appeal. If the benefit sought on appeal remains denied, the Veteran and his representative should be provided with a Supplemental Statement of the Case. An appropriate period of time should be allowed for response before the claims file is returned to the Board for further appellate consideration.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. Kutscherousky v. West, 12 Vet. App. 369 (1999).

***4** This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2013).

_____ DELYVONNE M. **WHITEHEAD** Acting Veterans Law Judge, Board of Veterans' Appeals

Under 38 U.S.C.A. § 7252 (West 2002), only a decision of the Board of Veterans' Appeals is appealable to the United States Court of Appeals for Veterans Claims. This remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (2013).

Bd. Vet. App. 1447590, 2014 WL 6877798

EXHIBIT 4

Bd. Vet. App. 1829002, 2018 WL 9763632

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

DOCKET NO. 14-41 539A) DATE
Decision Date: 05/22/18
Archive Date: 06/05/18

***1** On appeal from the

Department of Veterans Affairs Regional Office in Atlanta, Georgia

THE ISSUES

1. Entitlement to an evaluation higher than 20 percent for a low back condition.

2. Entitlement to service connection for hypertension.

3. Entitlement to service connection for dyslipidemia.

ATTORNEY FOR THE BOARD
Buck Denton, Associate Counsel

INTRODUCTION

The Veteran served in the Army from November 1968 to November 1971 and in the Air Force from December 1971 to December 1988.

This matter comes before the Board of Veterans' Appeals (Board) from a May 2012 rating decision of the Department of Veteran's Affairs (VA) Regional Office (RO) in Atlanta, Georgia.

The Board notes that in an October 2014 rating decision, the RO granted a 20 percent disability rating for the Veteran's low back disability effective April 11, 2011. This increase during the appeal did not constitute a full grant of the benefit sought. Therefore, the Veteran's claim for an increased evaluation for a low back disability remains on appeal. See AB v. Brown, 6 Vet. App. 35, 39 (1993).

The issues of entitlement to an evaluation higher than 20 percent for a low back condition and entitlement to service connection for hypertension are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDING OF FACT

Dyslipidemia is not a disability for VA compensation purposes.

CONCLUSION OF LAW

The criteria for service connection for dyslipidemia have not been met.

38 U.S.C. §§ 1110, 1131, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303 (2017).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran asserts that his dyslipidemia is related to his active duty service.

Service connection may be granted for any current disability that is the result of a disease contracted, or an injury sustained, while on active duty service. See 38 U.S.C. §§ 1110 1131; 38 C.F.R. § 3.303(a). Service connection may also be granted for a disease diagnosed after discharge, where all the evidence, including that pertinent to service, establishes that the disease was incurred in service. See 38 C.F.R. 3.303(d).

In order to prevail on a claim of service connection, generally, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of an in-service occurrence or aggravation of a disease or injury; and (3) medical evidence of a link between the claimed in-service disease or injury and the present disability. Shedden v. Principi, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

VA law restricts claims for service connection to those that involve a current qualifying disability. See Moore v. Nicholson, 21 Vet. App. 211, 215 (2007), citing Francisco v. Brown, 7 Vet. App. 55, 58 (1994) (‘Compensation for service-connected injury is limited to those claims which show a present disability.‘); see also Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992) (‘Congress specifically limits entitlement for service-connected disease or injury to cases where such incidents have resulted in a disability.‘).

***2** Under the applicable regulations, the term ‘disability‘ means impairment in earning capacity resulting from diseases and injuries, and their residual conditions. See 38 C.F.R. § 4.1; see also Hunt v. Derwinski, 1 Vet. App. 292, 296 (1991); Allen v. Brown, 7 Vet. App. 439 (1995). A symptom (to include an abnormal laboratory study), without a diagnosed or identifiable underlying malady or condition, does not, in and of itself, constitute a ‘disability‘ for which service connection may be granted. See Sanchez-Benitez v. West, 13 Vet. App. 282 (1999).

The Board notes that elevated dyslipidemia, or elevated cholesterol, is not considered a disability for which service-connection may be granted. Elevated cholesterol is classified as a laboratory finding, rather than a disability, for VA compensation purposes. See 61 Fed. Reg. 20,440-20,445 (May 7, 1996) (diagnoses of hyperlipidemia, elevated triglycerides, and elevated cholesterol are actually laboratory results rather than disabilities and are therefore not appropriate for the rating schedule to address).

As dyslipidemia is not a disability for VA compensation purposes, the Veteran has not presented a valid claim of service connection as to this issue. See Brammer, 3 Vet. App. at 225. Thus, the claim of service connection for dyslipidemia must be denied.

ORDER

Service connection for dyslipidemia is denied.

REMAND

Although the Board regrets the delay, the Board must remand these claims to ensure there is a complete record so the Veteran is afforded every possible consideration. 38 U.S.C. § 5103A (2012); 38 C.F.R. § 3.159 (2017).

Regarding the Veteran’s claim for entitlement to an evaluation higher than 20 percent for a low back condition, a new VA examination must be provided that complies with Correia v. McDonald, 28 Vet. App. 158 (2016) and Sharp v. Shulkin, 29 Vet. App. 26 (2017).

Correia mandates that certain examinations include the testing described in 38 C.F.R. § 4.59 (2017) or an explanation as to why such testing is not warranted or not possible. Sharp requires VA examiners to obtain information from the Veteran as to the severity, frequency, and duration of flare-ups as well as precipitating and alleviating factors and the extent of functional

impairment. It also requires that VA examiners estimate the additional loss of range of motion during a flare-up based on all procurable information from the record, as well as the Veteran's own statements. If an estimate cannot be provided without resorting to speculation, it must be clear whether this is due to a lack of knowledge among the medical community at large or due to insufficient knowledge of the specific examiner.

Regarding the Veteran's claim to entitlement to service connection for hypertension, the Board finds that a VA opinion is required as to the likelihood that the Veteran's hypertension is related to exposure to an herbicidal agent such as that used in Agent Orange while serving in Vietnam. See 38 U.S.C. § 5103A (2012); 38 C.F.R. § 3.159 (c) (2017); McLendon v. Nicholson, 20 Vet. App. 79, 83 (2006). The Veteran served in Vietnam during the Vietnam Era and thus is presumed to have been exposed to an herbicidal agent. See 38 C.F.R. § 3.307 (a) (2017). Moreover, there is at least an indication that his currently diagnosed hypertension may be related to such exposure. Specifically, the National Academy of Sciences (NAS) has found 'limited or suggestive evidence of an association between' hypertension and Agent Orange exposure based on a recent statistical study. See Determinations Concerning Illnesses Discussed in National Academy of Sciences Report: Veterans and Agent Orange: Update 2010, 77 Fed. Reg. 47,924, 47,926 (Aug. 10, 2012); Notice on Health Outcomes Not Associated With Exposure to Certain Herbicide Agents, 75 Fed. Reg. 32,540, 32,542 (June 8, 2010); see also 38 U.S.C. § 1116 (b) (2012).

***3** The category 'limited or suggestive evidence of an association' means that the '[e]vidence suggests an association between exposure to herbicides and the outcome, but a firm conclusion is limited because chance, bias, and confounding could not be ruled out with confidence.' 77 Fed. Reg. at 47,928; 75 Fed. Reg. at 32,542. The Secretary of VA concluded that the studies cited to by NAS were not sufficient to establish a 'positive association' between hypertension and Agent Orange exposure to warrant a new presumption of service connection for hypertension on this basis. See id.

Nevertheless, NAS's finding of 'limited or suggestive evidence of an association' between Agent Orange exposure and hypertension is at least sufficient to satisfy the 'low threshold' of whether the Veteran's hypertension may be related to service to warrant an opinion. See McLendon, 20 Vet. App. at 83 (holding, in pertinent part, that an examination or opinion is warranted when there is an indication that a current disability may be related to an in-service event). In this regard, although presumptive service connection for hypertension is not available based on herbicidal exposure, the claim may still be established with proof of direct causation. See Stefl v. Nicholson, 21 Vet. App. 120, 123 (2007) (observing that the 'availability of presumptive service connection for some conditions based on exposure to Agent Orange does not preclude direct service connection for other conditions based on exposure to Agent Orange').

Finally, as the case is being remanded, all relevant ongoing VA medical records should also be requested on remand. 38 U.S.C. § 5103A(c) (2012); see Bell v. Derwinski, 2 Vet. App. 611 (1992) (VA medical records are in constructive possession of the agency, and must be obtained if the material could be determinative of the claim).

Accordingly, the case is REMANDED for the following action:

1. Add to the Veteran's claims file any recent outstanding VA treatment records.

2. Attempt to obtain the Veteran's private treatment records as noted on his December 2014 VA Form 9. All efforts to obtain these records must be documented within the Veteran's electronic claims file. If it is determined that the documents are unavailable, a formal finding of unavailability must be made, and the Veteran should be contacted of such findings.

3. Upon completion of the foregoing, schedule the Veteran for an appropriate VA examination to assess the nature and current level of severity of his service-connected low back condition. The Veteran's claims file, including a copy of this REMAND, must be made available to and reviewed by the examiner in conjunction with the examination. The examiner must note in the examination report that the evidence in the claims file has been reviewed.

The appropriate Disability Benefits Questionnaire should be completed.

In the examination report, the examiner must include all of the following:

A. Active range of motion testing results.

***4** B. Passive range of motion testing results.

C. Weightbearing range of motion testing results.

D. Non-weightbearing range of motion testing results.

If the examiner is unable to conduct one or more of the above tests or finds that it is unnecessary, the examiner must provide an explanation. In any event, the type of test performed (i.e. active or passive, weightbearing or nonweightbearing), must be specified.

The examiner must elicit as much information as possible from the Veteran regarding the severity, frequency, and duration of flare-ups, their effect on functioning, and precipitating and alleviating factors.

If the examination is not performed during a flare-up, the examiner must provide an estimate of additional loss of range of motion during a flare-up. If the examiner is unable to provide an estimate of additional loss of motion during a flare-up, the examiner must provide a specific explanation as to why the available information, including the Veteran's own statements, is not sufficient to make such an estimate.

The examiner must provide a comprehensive report including complete rationales for all opinions and conclusions reached.

4. Obtain an examination and opinion for the Veteran's hypertension. The claims file and a copy of this Remand must be made available to and reviewed by the examiner in conjunction with the opinion.

(a) The examiner should provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that any current hypertension had its clinical onset during active service or is related to any in service disease, event, or injury, to include exposure to an herbicidal agent such as that used in Agent Orange.

The Board also notes that the Veteran noted that he did not know whether he had had high or low blood pressure on his April 1988 examination for retirement.

(b) The examiner should provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that any current hypertension disorder was caused by any service-connected disorder.

(c) The examiner should provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that any current hypertension was aggravated (i.e., worsened) by any service-connected disorder.

The examiner must provide a comprehensive report that includes a complete rationale for all opinions and conclusions reached.

5. After the above development is completed, and any other development that may be warranted based on any additional information or evidence received, readjudicate the claims. If any benefit sought on appeal is not granted, the Veteran and his representative must be furnished a Supplemental Statement of the Case (SSOC) and afforded a reasonable opportunity to respond before the record is returned to the Board for further review.

The Veteran has the right to submit additional evidence and argument on the matter or matters the Board has remanded. Kutscherousky v. West, 12 Vet. App. 369 (1999).

***5** These claims must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C. §§ 5109B, 7112 (2012).

DELYVONNE M. WHITEHEAD
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 1829002, 2018 WL 9763632

EXHIBIT 5

Bd. Vet. App. 19145272, 2019 WL 4403004

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

DOCKET NO. 18-22 817
Decision Date: 06/12/19
Archive Date: 06/11/19
DATE: June 12, 2019

ORDER

***1** Entitlement to service connection for bronchitis, to include as due to asbestos exposure, is denied.

Entitlement to service connection for two benign tumors, upper back, is denied.

Entitlement to service connection for bilateral ear infections is denied.

Entitlement to service connection for stroke is denied.

Entitlement to service connection for left ear condition, status post tympanoplasty, is denied.

REMANDED

The issue of entitlement to service connection for diabetes mellitus, type II, to include as due to herbicide agent exposure, is remanded.

The issue of entitlement to service connection for **hypertension**, claimed as high blood pressure, to include as due to herbicide agent exposure, is remanded.

The issue of entitlement to service connection for tension headaches is remanded.

The issue of entitlement to a higher initial rating for lumbar spine spondylolisthesis, currently evaluated as 10 percent disabling, is remanded.

The issue of entitlement to a compensable initial rating for bilateral hearing loss is remanded.

FINDINGS OF FACT

1. The competent evidence of record does not demonstrate a diagnosis of bronchitis proximate to the claim, or during the appeal period.

2. The most probative evidence of record does not demonstrate that it is at least as likely as not that the Veteran has two benign tumors, upper back, etiologically related to an in-service injury, event or disease.

3. The most probative evidence of record does not demonstrate that it is at least as likely as not that the Veteran has bilateral ear infections etiologically related to an in-service injury, event or disease.

4. The most probative evidence of record does not demonstrate that it is at least as likely as not that the Veteran's stroke is etiologically related to an in-service injury, event or disease.

5. The most probative evidence of record does not demonstrate that it is at least as likely as not that the Veteran has left ear condition, status post tympanoplasty, etiologically related to an in-service injury, event or disease.

CONCLUSIONS OF LAW

1. The criteria for entitlement to service connection for bronchitis, have not been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303.

2. The criteria for entitlement to service connection for two benign tumors, upper back, have not been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303.

3. The criteria for entitlement to service connection for bilateral ear infections, have not been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303.

4. The criteria for entitlement to service connection for stroke, have not been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303.

5. The criteria for entitlement to service connection for left ear condition, status post tympanoplasty, have not been met. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

***2** The Veteran served on active duty from March 1960 to December 1968.

These matters come before the Board of Veterans' Appeals (Board) on appeal of a June 2013 rating decision by a Department of Veterans Affairs (VA) Regional Office (RO).

Service Connection

1. Entitlement to Service Connection for Bronchitis

The Veteran contends that he has bronchitis that is directly related to his active service. Specifically, the Veteran reported that he was exposed to asbestosis while serving in the Navy, which caused his bronchitis. See Lay Statement, received May 2011.

The existence of a current disability is the cornerstone of a claim for VA disability compensation. 38 U.S.C. §§ 1110, 1131; see Degmetich v. Brown, 104 F.3d 1328, 1332 (1997) (holding that interpretation of 38 U.S.C.A. §§ 1110 and 1131 as requiring the existence of a present disability for VA compensation purposes cannot be considered arbitrary). In the absence of proof of a present disability, there can be no valid claim. Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992).

In this case, the evidence of record does not contain probative evidence of bronchitis at any time proximate to, or during, the claim. During the pendency of the claim the Veteran was provided a VA examination in May 2013. The VA examiner reviewed the record, interviewed the Veteran and conducted an in-person examination. The Veteran reported that he had bronchitis several times during his active service, and the VA examiner noted that the Veteran had bronchitis in 1965 while on active duty. The VA examiner noted that the Veteran did not have bronchitis and that his lungs were clear on physical examination and x-ray. Additionally, the Veteran's pulmonary function tests were normal. The VA examiner opined that the findings do not indicate any current lung condition.

Thus, the most probative evidence fails to demonstrate that it is at least as likely as not that the Veteran has a current lung disability, including bronchitis, that had its onset during active service or that there is a current lung disability that is otherwise causally or etiologically related to his active service. As such, service connection for bronchitis is not warranted. Degmetich, 104 F. 3d at 1333.

The Board acknowledges the Veteran's assertions that he has bronchitis. However, he has not been shown to have the

medical training and knowledge required to diagnose such condition. See Kahana v. Shinseki, 24 Vet. App. 428, 435 (2011); Buchanan v. Nicholson, 451 F. 3d 1331, 1336-37. Therefore, his assertions are not considered competent and do not weigh against the probative value of the medical treatment records, including the May 2013 VA examination, which do not show a diagnosis of bronchitis.

As noted above, the threshold requirement for service connection is competent medical evidence of the existence of the claimed disability at some point during the course of the appeal or in proximity to the claim. See Degmetich, 104 F. 3d at 1332; Brammer, 3 Vet. App. at 225; see also McClain v. Nicholson, 21 Vet. App. 319 (2007); Romanowsky v. Shinseki, 26 Vet. App. 289 (2013).

***3** While the Veteran has this complaint, a complaint, or symptoms, is not a 'disability' for VA purposes. The Board cannot grant service connection for a symptom. Although the Board recognizes the Veteran's sincere belief in his claim, the most probative evidence of record does not show that he had bronchitis at any point during or in proximity to the appeal period.

In the absence of proof of a current disability, there can be no valid claim. Brammer, 3 Vet. App. at 225. In this case there is an absence of proof of bronchitis during or in proximity to the appeal period. Without evidence of a current diagnosis of bronchitis the Board need not address the other elements of service connection. The preponderance of the evidence is therefore against the claim, the benefit-of-the-doubt doctrine is not for application, and the claim must be denied. 38 U.S.C. § 5107 (b); see also Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

2. Entitlement to Service Connection for Two Benign Tumors, Upper Back

3. Entitlement to Service Connection for Bilateral Ear Infections

4. Entitlement to Service Connection for Stroke

5. Entitlement to Service Connection for Left Ear Condition

The Veteran contends that he has two benign tumors on the upper back, bilateral ear infections, stroke and a left ear condition directly related to his active service. The Veteran has not provided information on how these conditions are related to his active service.

To establish service connection for a disability on a direct-incurrence basis, the Veteran must show: (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 or aggravated during service. Shedden v. Principi, 381 F. 3d 1163, 1167 (Fed. Cir. 2004). See also 38 C.F.R. § 3.303.

The evidence of record shows that the Veteran had two benign tumors on his upper back removed, that he has suffered from bilateral ear infections, has had a stroke and had a left ear tympanoplasty. Therefore, there is evidence of a current disability.

As to an in-service event, injury or disease, a review of the Veteran's service treatment records does not reflect any symptoms, complaints or treatment for benign tumors, bilateral ear infections, stroke or a left ear condition. The Veteran's November 1968 separation examination reflects that his ears, ear drums, and spine were normal.

In January 2011, the Veteran provided a statement that two benign tumors in his upper back were discovered in 1994, that he had a stroke in November 2010, that he had ear infections in 1984 and that he had a left ear tympanoplasty in 1984.

In summary, the service treatment records do not reflect clinical findings or reported symptomatology related to tumors of the upper back, a stroke, bilateral ear infections or left tympanoplasty. The earliest evidence of these conditions is a statement from the Veteran that they occurred fifteen to forty years after he separated from active service. Therefore, there is evidence that the Veteran tumors of the upper back, a stroke, bilateral ear infections and a left tympanoplasty, but there is no evidence of an in-service injury, illness or disease to which the disorder may be medically attributed. Rather, the evidence suggests that these disorders did not manifest until more than fifteen years after his active military service.

***4** The only evidence indicating an association between the claimed disorders and his active service are the Veteran's own assertions. It is well established that a layperson without medical training is not qualified to render a medical opinion regarding the diagnosis or etiology of certain disorders and disabilities. See 38 C.F.R. § 3.159(a)(1). In certain instances, lay testimony may be competent to establish medical etiology or nexus. See Jandreau v. Nicholson, 492 F. 3d 1372, 1377 (Fed. Cir. 2007). However, the origins or causes of two benign tumors of the upper back, bilateral ear infections, a stroke and a left ear condition are not simple questions that can be determined based on personal observation by a lay person. It is not shown that the Veteran is qualified through specialized education, training, or experience to offer a medical opinion as to the etiology of two benign tumors of the upper back, bilateral ear infections, stroke and a left ear condition. Grottveit v. Brown, 5 Vet. App. 91, 93 (1993). Hence, the Veteran's lay statement is not competent to establish medical etiology or nexus. Id. As such, the Board finds the question of whether the Veteran's two benign tumors, upper back, bilateral ear infections, stroke and a left ear condition are related to his active service does not lie within the range of common experience or common knowledge but requires special experience or special knowledge.

The Board acknowledges that the Veteran was not afforded a VA examination relating directly to his two benign tumors, upper back, bilateral ear infections, stroke and a left ear condition. On these facts, however, an examination is not required. VA will provide a medical examination or obtain a medical opinion if the evidence indicates the existence of a current disability or persistent or recurrent symptoms of a disability that may be associated with an event, injury, or disease in service, but the record does not contain sufficient medical evidence to decide the claim. 38 U.S.C. § 5103A (d) (2); 38 C.F.R. § (c) (4) (i); McLendon v. Nicholson, 20 Vet. App. 79 (2006). In this case, the claims do not meet these requirements for obtaining a VA medical opinion. Because the weight of the evidence demonstrates no two benign tumors, upper back, bilateral ear infections, stroke and a left ear condition in service, and that the symptoms of these conditions were not present for many years thereafter, no examination is required. Absent evidence that indicates that the Veteran has a current claimed disability that is related to an injury or symptoms in service, the Board finds that an additional VA examination or opinion is not necessary for disposition of these claims.

In view of the foregoing, the Board concludes that the preponderance of the evidence is against the claims for entitlement to service connection for two benign tumors, upper back, bilateral ear infections, stroke and a left ear condition. Because the preponderance of the evidence is against the claims, the benefit-of-the-doubt doctrine is not for application, and the claims must be denied. 38 U.S.C. § 5107(b); see also Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

REASONS FOR REMAND

***5** 1. Entitlement to Service Connection for Diabetes Mellitus, Type II

The Veteran contends that he has diabetes mellitus, type II, that is directly related to his active service. Specifically, the Veteran reported that while stationed aboard the USS Collett, the ship made 'suicide runs' off the coast of Vietnam as close as a destroyer could get without running aground. See Lay Statement, received May 2011.

The Veteran's military personnel records reflect that he was stationed aboard the USS Collett from December 1967 to December 1968. For purposes of service connection for a disability resulting from exposure to a herbicide agent, including a presumption of service connection, a veteran who, during active military, naval, or air service, served in the Republic of Vietnam between January 9, 1962, and May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. 38 U.S.C. § 1113, 1116; 38 C.F.R. § 3.307 (a) (6) (iii).

Recently, the Federal Circuit ruled that service in the Republic of Vietnam includes service in the territorial waters of Vietnam, which extend 12 miles from the shore. Procopio v. Wilkie, 913 F.3d 1371, 1375-76 (Fed. Cir. 2019). The presumption of exposure therefore also extends to those veterans having served in the territorial waters of Vietnam. Id.

Certain diseases shall be service-connected presumptively for veterans with service in the Republic of Vietnam, even if there is no record of such disease during service. 38 C.F.R. § 3.307 (a). The diseases that will be presumed to be related to service as a result of exposure to herbicides are enumerated in 38 C.F.R. § 3.309 (e), but a claimant is not precluded from establishing service connection for other disabilities with proof of actual direct causation, i.e. a link between the current disability and in-service exposure to herbicides. Combee v. Brown, 34 F.3d 1039, 1042 (Fed. Cir. 1994).

Here, the Appellant seeks service connection for diabetes mellitus, type II. Diabetes mellitus, type II is enumerated in section 3.309 (e) as presumptively service-connected with a showing of herbicide exposure. In light of the Federal Circuit Court's recent ruling in Procopio, the RO must contact the Joint Services Records Research Center (JSRRC) in order to attempt to obtain corroborating evidence that the Veteran served in the territorial waters of Vietnam, which extend 12 miles from shore, while serving aboard the USS Collett. If the RO is unable to verify that the USS Collett sailed in the territorial waters of Vietnam while the Veteran was stationed aboard, it must prepare a formal memorandum relating to its findings.

2. Entitlement to Service Connection for **Hypertension**

The issue of entitlement to service connection for **hypertension** is intertwined with the above remanded issue and is also remanded at this time. See Henderson v. West, 12 Vet. App. 11, 20 (1998); Harris v. Derwinski, 1 Vet. App. 180, 183 (1991).

***6** Additionally, although **hypertension** is not listed as a disease associated with herbicide exposure under 38 C.F.R. § 3.309 (e), the National Academy of Sciences Institute of Medicine (**NAS**) has concluded that there is 'limited or suggestive evidence of an association' between herbicide exposure and **hypertension**. See 77 Fed. Reg. 47924, 47926-927 (Aug. 10, 2012). Thus, a remand for a medical opinion is warranted for the **hypertension** claim. See 38 U.S.C. § 5103A (d); 38 C.F.R. § 3.159 (c) (4) (2015); McLendon v. Nicholson, 20 Vet. App. 79, 81 (2006).

3. Entitlement to Service Connection for Tension Headaches

The Veteran contends that he has tension headaches that are directly related to his active service. Specifically, the Veteran reported that he began getting throbbing headaches on the right side of his head during his active duty. See May 2013 VA examination.

The Veteran was provided a VA examination related to his headaches in May 2013. VA has a duty to ensure that any medical examination or opinion it provides is adequate. Barr v. Nicholson, 21 Vet. App. 303, 312 (2007). A medical opinion is adequate where it is based upon consideration of the full medical history and describes a disability in sufficient detail so that the Board's evaluation will be fully informed. Stefl v. Nicholson, 21 Vet. App. 120, 123 (2007).

Here, the Board finds the May 2013 VA examination relating to the Veteran's headaches is inadequate for decision-making purposes. The May 2013 VA examiner stated that the Veteran has not had a headache in six months. Therefore, the VA examiner opined that there is no current right-side headache condition. However, during the examination, the Veteran reported he had headaches six month prior. Additionally, the Veteran's private medical records reveal that he has a history of headaches. The Veteran's reports of headaches must be addressed, even if not currently present on examination or if the disability resolved during the pendency of the claim. See McClain v. Nicholson, 21 Vet. App. 319, 321 (2007). Accordingly, a VA addendum opinion is required to address the etiology of the Veteran's headaches present at any point during the period on appeal or in close proximity to the Veteran's claim for service connection. See Romanowsky v. Shinseki, 26 Vet. App. 289, 321 (2013).

4. Entitlement to a Higher Initial Rating for Low Back Disability

5. Entitlement to a Compensable Initial Rating for Bilateral Hearing Loss

The Veteran seeks increased disability ratings for his service connected low back disability and bilateral hearing loss. The Veteran was provided a VA back conditions examination and VA hearing loss examination in January 2019. The RO, however, has not readjudicated the Veteran's claims since the January 2019 VA examinations. As pertinent evidence has been received since the June 2018 supplemental statement of the case and the Veteran has not waived the AOJ's initial consideration of this evidence, the AOJ must readjudicate the Veteran's claims for increased initial ratings for his service-connected low back disability and service-connected bilateral hearing loss. 38 C.F.R. § 19.31.

***7** The matters are REMANDED for the following action:

1. Forward copies of the Veteran's service personnel records and any other relevant evidence to the Joint Services Records

Research Center (JSRRC), and any other records repositories as the RO deems necessary, to verify whether the Veteran served in the territorial waters of Vietnam, which extend 12 miles from the shore, while he was stationed aboard the USS Collett. Inform the JSRRC or any other appropriate record repository that if there are no records to confirm or deny the USS Collett's presence in the territorial waters of Vietnam while the Veteran was stationed aboard, then the records repository must provide written documentation to the RO to that effect.

2. If the RO is unable to verify that the Veteran had service in the territorial waters of Vietnam, then the RO must prepare a formal memorandum to this effect, which outlines the steps taken to verify the Veteran's presence in the territorial waters of Vietnam, and all responses received, to specifically include responses from the JSRRC. The Veteran and his representative must be notified of this finding and then be given an opportunity to respond.

3. If the Veteran had service within the territorial waters of Vietnam, schedule the Veteran for a VA examination to determine the nature and likely etiology of his **hypertension**. Provide a copy of the record and this remand to the VA examiner for review. The examiner must specify in the report that the record was reviewed. Any tests or evaluations deemed necessary by the examiner should be performed. After review of the record, the examiner must address the following:

(a) Provide an opinion as to whether it is at least as likely as not (50 percent probability or greater) that the Veteran's **hypertension** had its onset in active service or is otherwise causally or etiologically related to the Veteran's active service, specifically to include the Veteran's claimed in-service herbicide agent exposure. Rationale must be provided for the opinion proffered.

4. Schedule the Veteran for a VA examination to determine the nature and etiology of any headache disability. Provide a copy of this remand and the record for the examiner to review. Any and all studies, tests, and evaluations deemed necessary by the examiner should be performed. The examiner must address the following:

(a) Provide a diagnosis for any headache disability demonstrated since service, found on current examination or in the record.

(b) For each headache disability, provide an opinion as to whether it is at least as likely as not (50 percent probability or greater) that the condition had its onset during the Veteran's service or is otherwise etiologically related to the Veteran's service.

In providing the above opinion, the examiner should be mindful that even if the Veteran's headaches have resolved, an opinion is still required regarding the etiology of the diagnosed disabilities. See McClain v. Nicholson, 21 Vet. App. 319 (2007). The examiner must reconcile his/her findings with the Veteran's reports of headaches during the May 2013 VA examination.

***8** 5. After completion of the above, review the expanded record, including the evidence entered since the most recent statement of the case, and determine whether service connection for diabetes mellitus, **hypertension**, and tension headaches may be granted and whether higher initial ratings for low back disability and bilateral hearing loss may be granted. If any benefit sought remains denied, furnish the Veteran and his representative with a supplemental statement of the case. The appropriate period should be allowed for response before the appeal is returned to the Board.

DELYVONNE M. **WHITEHEAD**
Acting Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD B. G. LeMoine, 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.

Bd. Vet. App. 19145272, 2019 WL 4403004

