Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-5580

JACK L. STOVER, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

O R D E R

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

Much of the Secretary's brief is nothing more than post-hoc rationalization. The Court is therefore trying to determine both the appropriate remedy and whether panel consideration is warranted in this matter. The Court will order additional briefing from the Secretary. This order will cite portions of the June 10, 2020, Board of Veterans' Appeals decision, as well as the Secretary's Brief. The Secretary will be required to answer the questions that are posed after the cited portions.

The Board decision on appeal includes the following boilerplate:

> Special consideration of herbicide exposure on a factual basis should be extended to Veterans whose duties place them on or near the perimeters of Thailand military bases. First, VA must determine if the veteran served at one of several RTAFBs. Second, VA must determine if the veteran served as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or otherwise near the air base perimeter as shown by evidence of daily work duties, performance reports, or other credible evidence.

Record (R.) at 7.

The Secretary, in his brief, adds the following:

> Neither Congress nor the Secretary has established a presumption of exposure to an herbicide agent for service in Thailand. Thus, a veteran seeking compensation for disability allegedly incurred as a result of exposure to an herbicide agent in Thailand must demonstrate actual exposure to such agent through direct evidence.

Though no statutory or regulatory presumption of exposure exists for these claims, the Veterans Benefits Administration (VBA) instructs its RO adjudicators to extend a "special consideration of herbicide exposure on a factual basis" for Veterans whose "duties placed them on or near the perimeters of Thailand military bases." M21-1, Adjudication Procedures Manual (M21-1), Part IV, Subpart ii, Chapter 1, Section H, Topic 4, Block a (Dec. 31, 2019) (M21-1, IV, ii, 1, H, 4, a) (attached as appendix). Under this "special consideration," VBA adjudicators are instructed to determine (1) whether the Veteran served in the Air Force at one of seven [Royal Thai Air Force Bases (RTAFBS)], and (2) whether the Veteran served as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or "otherwise near the base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." M21-1, IV, ii, 1, H, 4, b. If "yes" to both, VBA adjudicators are instructed to concede exposure on a "direct or facts found basis." *Id*. The Takhli RTAFB is among those listed in the M21-1. M21-1, IV, ii, 1, H, 4, a.

The rationale for this policy can be found in a May 2010 Compensation and Pension Service Bulletin (Compensation Bulletin), a document that Appellant submitted to the Board in support of his claim. (R. at 28-31). In that document, VBA's Compensation Service explained that it determined, based upon a review of "documents related to herbicide use in Vietnam and Thailand," that there was "significant use of herbicides on the fenced[-]in perimeters of military bases in Thailand intended to eliminate vegetation and ground cover for base security purposes." (R. at 30). With respect to those herbicides, Compensation Service explained, there was "some evidence" that they "may have been either tactical, procured from Vietnam, or a commercial variant of much greater strength and with characteristics of tactical herbicides." *Id*. For that reason, [regional office (RO)] personnel were instructed to determine whether a Veteran's duties placed him "on or near the perimeter of the military base where the Veteran was stationed." *Id*. Compensation Service also stated, however, that herbicides used within the confines of Thailand bases to control weeds were "commercial herbicides." *Id*. These types of herbicides "do not fall under the VA regulations governing exposure to tactical herbicides such as Agent Orange." (R. at 30); *see also* 38 C.F.R. § 3.307(a)(6)(i) (defining the term "herbicide agent").

In summary, VBA's Compensation Service has recognized that herbicides of various types were used on United States military bases in Thailand, that the herbicides used within the base perimeters were not among those qualifying as an herbicide agent under § 3.307(a)(6)(i), but that the herbicides used on the perimeters may have been among those used in Vietnam and qualifying as an herbicide agent within the meaning of the regulation. (R. at 30). VBA has therefore established a policy of deeming certain evidence to be sufficient to concede that a Veteran was actually

> exposed to an herbicide agent while serving at a RTAFB, and it has instructed its adjudicators to make that finding when that evidence is present. *See* M21-1, IV, ii, 1, H, 4, b.

Secretary's Brief at 5-7.

The Secretary must answer the following questions:

1. What does the word "on" mean where the Board states: "Special consideration of herbicide exposure on a factual basis should be extended to Veterans whose duties place them on or near the perimeters of Thailand military bases?"

The Board decision states VA "must determine whether the Veteran served in the Air Force at one of seven RTAFBS," and whether "the Veteran served as an Air Force security policeman, security patrol dog handler, member of the security police squadron, or otherwise near the air base perimeter as shown by evidence of daily work duties, performance evaluation reports, or other credible evidence." R. at 7.

2. Are veterans that served as Air Force security policemen, security patrol dog handlers, or members of the security police squadron entitled to a finding of presumptive exposure to herbicides in Thailand because these jobs required them to be "on" or "near" the perimeter?
3. Similarly, does the phrase "or otherwise near the air base perimeter" imply that the listed MOS's are being compensated because their duties took them "near," but not "on" the perimeter?
4. Does the word "daily" mean that a claimant must establish that he or she was "on or near" the perimeter everyday he or she worked at the base?
5. Similarly, if a claimant can establish that he was "on or near" the perimeter weekly based on a review of his "daily" duties, is this sufficient for a finding of presumptive exposure to herbicides?
6. Stated differently, the Board decision citing VA's guidance does not say that a Thailand veteran had to be "on or near" the air base perimeter on a daily basis. To the contrary, special consideration is given to those veterans "whose duties place[d] them on or near the perimeters of Thailand military bases." The word "daily" is merely a descriptor of credible evidence a claimant may use to establish his proximity to the perimeter. Given that a claimant is trying to establish mere exposure, and nothing more, to herbicides, why could a claimant not meet his burden by showing that he was "on or near" the perimeter on a weekly, or even monthly, basis?
7. What is the scientific basis that is guiding VA's understanding of exposure to herbicides in Thailand? In answering this question, VA should be mindful that the Court is asking this question having already reviewed everything submitted by the Secretary in this case.

The Secretary's rationale states that in the May 2010 Compensation and Pension Service Bulletin VBA's compensation service explained that it determined, based upon a review of "documents related to herbicide use in Vietnam and Thailand," that there was "significant use of herbicides *on* the fenced[-]in perimeters of military bases in Thailand intended to eliminate

vegetation and ground cover for base security purposes." *See* Secretary's Brief at 5-7 (emphasis added). The word "near" is not part of the explanation.

8. Why did VBA include the phrase "near" the perimeter when it only has conceded that tactical herbicides may have been used "on" the fenced in perimeter?
9. What role does wind play in determining what "near" the perimeter means for purposes of exposure?

The Board found that the appellant was not entitled to a presumptive finding of herbicide exposure, stating:

> The Board has considered the Veteran's statements and testimony that he performed work duties and activities near the perimeter of the Takhli RTAFB and that his assigned living quarters were near the perimeter. However, the Board concludes that the preponderance of the evidence is against finding that the Veteran's daily work activities placed him near the perimeter or that the Veteran was exposed to herbicide agents during his active service.
>
> The Board acknowledges the Veteran's statements that he worked on the flight line near the perimeter and was exposed to herbicides as a result. However, based on this explanation, everyone who worked on the flight line would have been exposed to herbicide agents. This view would create a line of reasoning that is not supported by VA law. The herbicide agent presumption has not been extended to veterans who served on the flight line at RTAFB bases.

R. at 11.

The Secretary then added:

> Unlike statutes, Department regulations, instructions of the Secretary, and precedential opinions from the General Counsel, VBA's manual provisions are not binding on the Board. *Overton v. Wilkie*, 30 Vet.App. 257, 263 (2018); *see also* 38 U.S.C. § 7104(c) ("The Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department); 38 C.F.R. § 20.105 (2020) ("The Board is not bound by Department manuals, circulars, or similar administrative issues.").
>
> Here, though the Board did not mention the Manual, it cited language from the Thailand provision and then applied it to the Appellant's case. (R. at 7, 11). Appellant argues that, by citing that language, the Board informed him that his claim would be "governed" by it. (App. Br. at 10). Once doing so, he argues, the Board was not free to "ignore" the M21. (App. Br. at 10). He then argues that the Board erroneously misapplied the M21, (App. Br. at 11-22), and that the errors warrant reversal or, in the alternative, vacatur and remand. (App. Br. at 22).

> Setting aside for the moment the issue of whether the Board can commit prejudicial error by failing to properly apply non-binding authority in the first place, an issue the Secretary addresses more fully below, the Court should reject Appellant's arguments because the Board did properly apply that non-binding authority Though the Manual does not define what it means to be "near" the perimeter, it *must mean something closer* than being on the flight line or housed in certain living quarters, or else virtually everybody who served on these air bases would have served "near" the perimeter. But Compensation Service extended the "special consideration" to only those whose duties placed them near the perimeter. If Compensation Service intended to extend the special consideration to those who regularly worked on or near the flight line or lived in certain quarters, it would not have limited the examples to other types of occupational specialties.
>
> The Board's interpretation was consistent with the rationale for the Manual provision. Again, the rationale for extending this special consideration to those who served "on or near" the base perimeter is that the base perimeter is the only location on base where an "herbicide agent" within the meaning of § 3.307 might have been used. (R. at 30). Moreover, the specific occupations identified in the Manual—Air Force security policeman, security patrol dog handler, member of the security police squadron—are those that would require regular, repeated, and close contact with the perimeter. According to Project Contemporary Examination of Current Operations (CHECO) Report, a declassified document describing base defense in Thailand, portions of which the appellant submitted to the Board, base-perimeter security was a concern for these bases because fences "don't stop determined sapper squads." (R. at 49). Thus, United States military personnel used various forms of barbed wire and, occasionally, chain-link fences and trip-flares. (R. at 49). Given these circumstances, one might expect security personnel to have regularly and repeatedly come much closer to the base perimeter than what the appellant described. Security personnel might, for example, regularly inspect the physical security structures for a breach, which might include touching them or coming within a few feet of them. They also might perform these inspections as part of a daily routine. That is, the Manual extends the "special consideration" to persons whose occupational specialties would typically have required them to come within the immediate area targeted for herbicide use and spend a substantial amount of time there. That is why the Board properly found that Appellant's occupational specialty, which required working on the flight line, was not sufficient to establish actual exposure. (R. at 11). The flight line is not the perimeter. That is, the Board distinguished Appellant's occupation from those identified as examples in the Manual. This was a plausible distinction because, unlike security forces, one would not expect a person working the flight line to regularly and repeatedly come within feet of the physical base perimeter for long periods each day.

See Secretary's Brief at 9-11.

10. The Secretary cites no authority for the following post-hoc rationalization: "Given these circumstances, one might expect security personnel to have regularly and repeatedly come much closer to the base perimeter than what the appellant described. Security personnel might, for example, regularly inspect the physical security structures for a breach, which might include touching them or coming within a few feet of them. They also might perform these inspections as part of a daily routine." Secretary's Brief at 10. What authority did the Secretary intend to cite for this statement? The Secretary should be mindful that the portions of the Project CHECO Report included in the Record of Proceedings do not say this.

The Board stated:

> The Board acknowledges the Veteran's statements that he worked on the flight line near the perimeter and was exposed to herbicides as a result. However, based on this explanation, everyone who worked on the flight line would have been exposed to herbicide agents. This view would create a line of reasoning that is not supported by VA law. The herbicide agent presumption has not been extended to veterans who served on the flight line at RTAFB bases.

R. at 11.

The Secretary in his brief added:

> Though the Manual does not define what it means to be "near" the perimeter, it *must mean something closer* than being on the flight line or housed in certain living quarters, or else virtually everybody who served on these air bases would have served "near" the perimeter. But Compensation Service extended the "special consideration" to only those whose duties placed them near the perimeter. If Compensation Service intended to extend the special consideration to those who regularly worked on or near the flight line or lived in certain quarters, it would not have limited the examples to other types of occupational specialties.

Secretary's Brief at 9 (emphasis added).

11. Why is it inconsistent with VA policy to concede herbicide exposure to everyone who worked on the flightline? VA's policy instructs adjudicators to concede herbicide exposure when a claimant establishes that their duties took them near the base perimeter. It does not say that those that worked on the flightline were not close enough to the perimeter.

The Board in its decision does not provide clarity on this subject and the Secretary's brief is even more perplexing. The Secretary makes two main points in the above passage. One is obviously wrong; the other demonstrates the problem for claimants to substantiate their claims, VA adjudicators to decide these claims, and for the Court to review Board findings regarding these issues. First, the Secretary is obviously wrong where he states "[i]f Compensation Service intended to extend the special consideration to those who regularly worked on or near the flight line or lived in certain quarters, it would not have limited the examples to other types of

occupational specialties." Secretary's Brief at 10. The compensation service did not limit presumptive exposure to the examples listed. Instead, it included those servicemen whose duties took them "otherwise near the air base perimeter." Second, the Secretary acknowledges that the Board did not define what "near" means and perplexingly states that "near" "*must mean something closer*" than being on the flightline. *Id*. at 9-10 (emphasis added).

12. VA announced this policy 11 years ago and has provided no further guidance. Why has VA not further defined the terms "on" or "near"?
13. How is the decision on appeal capable of judicial review where the Board and the Secretary appear to not know what the phrase "near the perimeter" means? The obvious issue in this case is that the runway at Takhli RTAFB was next to the perimeter.
14. Why won't VA provide a distance from the perimeter to define the word "near?"
15. How close was the closest part of the flightline from the perimeter during the period where VA has conceded that tactical exposures were used? How close was the nearest point of the runway at Takhli RTAFB to the perimeter? The Court recognizes that the appellant has alleged that the flightline was 100 yards from the perimeter and that his work during "red ball" events brought him within 20 to 30 feet of the perimeter multiple times per week. Given that maps of the base have been submitted, why can't VA provide precise information regarding the proximity of the flightline and the rest of the runway to the perimeter?

In *Andrews v. McDonough*, the Court held that "[e]ven though we likely could not independently turn to the M21-1 to inform our decision of whether the Board erred in determining that Mr. Andrews hasn't met his burden of proof, doing so is appropriate here because the Board's 2017 remand order and 2018 decision adopted the M21-1's guidance." 34 Vet.App. 216, 224 (2021). Here, the Board adopted the guidance of the M21-1 without specifically mentioning the manual.

16. Is it VA's position that the Board is not bound by the M21-1 provisions where they adopt the provision, but do not actually cite the manual?
17. What other sources can the Board rely on to adjudicate whether a Thailand veteran was presumptively exposed to herbicides?

Finally, the Secretary acknowledges that the Army Field Manual submitted recommends a 500-meter buffer distance, but then says "at best, the [Army] Field Manual may support a finding that an herbicide agent *could* drift up to 500 meters. But Appellant was required to demonstrate actual exposure based on more than speculation." *See* Secretary's Brief at 22.

18. Is it the Secretary's position that a claimant must establish actual exposure to herbicides in order to receive a finding of presumptive exposure to herbicides? The appellant's usage of the Army Field Manual is for the purpose of trying to determine what "near" the perimeter means. The Court does not understand the Secretary's discussion regarding of the Army Field Manual.

The Court acknowledges the breadth of this order. However, any answer deemed incomplete by the Court will result in further responses being sought from the Secretary. At this time, the

Court is satisfied with the appellant's excellent brief and reply brief and no further information is necessary from the appellant. It is

ORDERED that, within 60 days from the date of this order, the Secretary shall respond to the questions posed in this order.

DATED: November 2, 2021

BY THE COURT:



WILLIAM S. GREENBERG
Judge

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)