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On appeal from the
Department of Veterans Affairs Regional Office in New York, New York

THE ISSUE

Entitlement to service connection for prostate cancer with erectile dysfunction and incontinence, claimed as the result of herbicide exposure.

REPRESENTATION

Veteran represented by: Katrina Eagle, Attorney

WITNESSES AT HEARING ON APPEAL

Veteran and L.F.

ATTORNEY FOR THE BOARD

P. Lopez, Associate Counsel

INTRODUCTION

The Veteran had active service from June 1968 to June 1972.

This matter came before the Board of Veterans' Appeals (Board) from February 2008 and July 2008 rating decisions of the Department of Veterans Affairs (VA) Regional Office (RO) in New York, New York. The Board remanded the appeal for additional development of the record in April 2010. In September 2012, while the appeal was in remand status, the Veteran was afforded a hearing before RO personnel. A transcript of his hearing has been associated with the record.

In a March 2014 decision, the Board denied entitlement to service connection for prostate cancer with erectile dysfunction, incontinence, and kidney stones. The Veteran appealed the Board's decision to the United States Court of Veterans Claims (Court). In an April 2015 Memorandum Decision, the Court vacated the Board's March 2014 decision and remanded the case to the Board.

The Board finds that several issues have been raised by the record and, since the Board does not have jurisdiction over them, must be referred to the AOJ for appropriate action. A review of the procedural history will be useful.

In April 2006, the Veteran filed claims of service connection for prostate cancer (secondary to herbicide exposure), skin cancer (secondary to herbicide exposure), hearing loss, tinnitus, low back pain, high cholesterol, recurrent kidney stones, and recurrent bladder stones, and increased ratings for residuals of pilonidal cyst and hemorrhoids. In November 2006, he added claims of service connection for erectile dysfunction, depression, and incontinence, all as secondary to his prostate cancer.

In the February 2008 rating decision, the RO granted an increased rating for residuals of pilonidal cyst, denied an increased rating for hemorrhoids, granted service connection

tinnitus and hearing loss, and denied service connection for prostate cancer (with erectile dysfunction, incontinence, and kidney stones), skin cancer, depression, and high cholesterol. Following this decision, the Veteran submitted new evidence regarding his claim for prostate cancer. In July 2008, the RO readjudicated the issue of prostate cancer (with erectile dysfunction, incontinence, and kidney stones) and again denied the Veteran's claim.

Ever since the February 2008 rating decision, the RO has characterized the claim for prostate cancer as encompassing secondary claims for erectile dysfunction, incontinence, and kidney stones. It is not clear why the RO characterized the issue of kidney stones as secondary to the Veteran's prostate cancer, especially when the April 2006 claim appears to be seeking service connection for recurrent kidney stones on a direct basis. In fact, the Veteran specified which claims were based on alleged herbicide exposure (prostate and skin cancer), and the claim for kidney stones was not one them. In light of this, the Board finds that the issue of service connection for recurrent kidney stones was mischaracterized as secondary to prostate cancer; the RO should have adjudicated the issue as a stand-alone claim of service connection. As this issue has still not been properly adjudicated by the RO, the Board does not have jurisdiction over it and must refer it to the Agency of Original Jurisdiction (AOJ) for appropriate action. Further, the Board has recharacterized the issue on appeal to reflect this determination.

Similarly, the Board notes that the February 2008 rating decision considered the issue of service connection for depression only on a direct basis and not as secondary to prostate cancer, as the Veteran asserted in his November 2006 claim. In light of this, the Board finds that the Veteran's claim of secondary service connection for depression has not been properly adjudicated. As such, and since the Veteran's notice of disagreement did not include this issue, the Board does not have jurisdiction over it and must also refer it to the AOJ for appropriate action.

Last, the Board notes that the neither the February 2008 or July 2008 rating decisions adjudicated the issue of service connection for recurrent bladder stones. See April 2006 claim. As such, the Board does not have jurisdiction over it and must also refer it to the AOJ for appropriate action.

In sum, the Board finds that the Veteran's claims of service connection for recurrent kidney stones, depression (as secondary to prostate cancer), and recurrent bladder stones have still not been adjudicated by the RO. As such, the Board does not have jurisdiction over these issues and must refer them to the AOJ for appropriate action. 38 C.F.R. § 19.9(b) (2014).

FINDINGS OF FACT

1. The weight of the evidence supports a finding that the Veteran was exposed to herbicides in service and that his prostate cancer is related to such exposure.
2. The weight of the evidence supports a finding that the Veteran's erectile dysfunction and incontinence are secondary to his prostate cancer.

CONCLUSION OF LAW

1. The criteria for entitlement to service connection for prostate cancer have been met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1116 (West 2014); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2014).
2. The criteria for service connection for erectile dysfunction have been met. 38 U.S.C.A. §§ 1101, 5107(b) (West 2014); 38 C.F.R. §§ 3.6, 3.303 (2014).
3. The criteria for service connection for urinary incontinence have been met. 38 U.S.C.A. §§ 1101, 5107(b) (West 2014); 38 C.F.R. §§ 3.6, 3.303 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Service connection will be granted for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303(a). Where a disease is first diagnosed after discharge, service connection will be granted when all of the evidence, including that pertinent to service, establishes it was incurred in active service. 38 U.S.C.A. § 1113(b); 38 C.F.R. § 3.303(d).

Service connection requires evidence showing: (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 condition incurred or aggravated by service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

When there is an approximate balance of positive and negative evidence regarding any material issue, or the evidence is in relative equipoise, all reasonable doubt will be resolved in favor of the claimant. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102.

The Veteran seeks service connection for prostate cancer, and the associated conditions of erectile dysfunction and incontinence. He contends that his prostate cancer diagnosis is related to herbicide exposure during service at Andersen Air Force Base in Guam. Service personnel records do reflect that the Veteran served at Andersen Air Force Base from January 1970 to June 1971.

The Veteran concedes that he did not serve in Vietnam or any other location that would entitle him to the presumption of herbicide exposure under 38 C.F.R. § 3.307. Rather, he is seeking service connection on a direct basis. See, e.g., September 2012 RO hearing transcript. He further concedes that his prostate cancer manifested many years after service.

The evidence of record shows that the Veteran has prostate cancer, with incontinence and erectile dysfunction. See VA examinations from December 2006 and April 2010. Further, both the Veteran's oncologist and a VA examiner have opined that his prostate cancer is likely related to his alleged herbicide exposure, if such exposure was established. See October 2006 statement from oncologist; VA examinations from December 2006 and April 2010. Thus, the Veteran's case turns on whether the evidence supports a finding of herbicide exposure in service. The Board finds that the evidence is in relative equipoise in this regard.

In March 2007, the VA Compensation and Pension Service responded to the RO's request for information pertaining to the Veteran's alleged exposure to herbicides on Guam. The author of the message indicated that the Department of Defense (DoD) did not list any herbicide test or use sites on Guam, and noted that the Veteran appeared to be referring to small-scale brush clearing activity. He indicated that DoD did not have a record of such activity, and there was no way to know the chemical content of any such claimed herbicide use. He also addressed the Veteran's contention that he smelled herbicide aboard a military aircraft flying within the United States from Massachusetts to Nebraska during December 1969, indicating that there was no record of transport of herbicide associated with the Veteran. He indicated that Agent Orange was used primarily in Vietnam and was transported there on private merchant ships. The RO was advised to refer the claim to the U.S. Army and Joint Services Records Research Center (JSRRC) for any information it had to corroborate the Veteran's claimed exposure.

In September 2007, the director of the JSRRC responded that the organization could not document or verify that the Veteran was exposed to herbicides while serving at Andersen Air Force Base or at Offutt Air Force Base. He noted that the DoD listing of herbicide use and test sites was reviewed and neither base was listed. He also noted that unit historical data did not document any herbicide spraying, testing, storage, or usage at Andersen or Offutt during 1969 or 1970.

Articles submitted by the Veteran in March 2008 include an excerpt from a Micronesian Newspaper. It indicates that Agent Orange on Guam was confirmed, and quotes retired

airmen and former federal employees' accounts of Agent Orange and other toxic herbicides being stored and sprayed on Guam from the 1960s to the 1990s. An additional document lists and discusses various contaminant sites on Guam and specifically at Andersen Air Force Base. They do not include herbicides. An associated statement by the Veteran's representative indicates the Veteran's contention that herbicides were used during his time on Guam to clear dense vegetation areas for construction and recreation.

In a March 2010 statement, the Veteran's attorney alleged that there were government reports and related documents showing the presence and use of Agent Orange and other herbicides at Andersen contemporaneous to the Veteran's service there. She pointed to a Dow Chemical Investor Risk Report, which suggests that soldiers stationed on Guam who handled Agent Orange had become ill.

In July 2011, the VA Compensation and Pension Service provided the RO with a document titled "Guam (Negative findings)." The report stated that the information provided by the DoD does not identify any test, storage, or use sites in Guam. The report, however, also states that "[t]here may have been some small scale commercial herbicide use for brush or weed clearing activity around military bases at every location in the world, but there is no record of such activity with [the DoD] and no way to know the chemical content of any such non-tactical herbicide use."

A May 2012 response by the JSRRC indicates that it researched available historical information and was unable to document or verify that the Veteran's squadron flew aboard a cargo aircraft that he believed was previously used to transport tactical herbicides. Also in May 2012, the RO made a formal finding of a lack of information required to corroborate herbicide exposure.

At his RO hearing, the Veteran testified that, while stationed at Andersen Air Force Base in Guam, he personally witnessed herbicides being sprayed to clear vegetation and that he had also seen the effects of such spraying. He witnessed such spraying around the perimeter of the airbase and around the Marbo Complex, where he was housed. He argued that the herbicide used was Agent Orange, and that he was regularly exposed to it. In this regard, he indicated that every night he would go unto the airfield to retrieve canisters of film from the landing planes and that he made daily trips across the base's perimeter to reach the Marbo Complex.

At that hearing, a fellow service member testified on the Veteran's behalf. This witness testified that he was a fuel specialist stationed at Andersen Air Force Base in Guam from September 1968 to March 1969, September 1969 to May 1971, and May 1976 to June 1978. He testified that his duties entailed handling the Agent Orange herbicides and mixing them with diesel fuel, as well as other powdered herbicides such as Agent White, Agent Blue, and Super Agent Orange. He also stated that he personally sprayed the herbicides on the flight line, around the security fences, and at the Marbo Complex, around the laundromat.

Having reviewed the record and weighing the evidence both in support of and against the claim, the Board finds that the evidence is in relative equipoise as to whether the Veteran was exposed to Agent Orange during service at Andersen Air Force Base in Guam. As stated above, the evidence of record includes the testimony of a service member that served at Andersen Air Force at the same time as the Veteran. Military records submitted by the Veteran's attorney show that the witness served in Andersen Air Force Base as a fuels management officer from March 1970 to September 1970, a period during which the Veteran also served there. The witness testified that he sprayed herbicides, to include Agent Orange, around the base's perimeter and the Veteran's living quarters. Additionally, the Veteran testified that he saw herbicides being sprayed near Marbo complex, where he was housed, and noticed the effects of herbicides around the base's perimeter.

There is no documented evidence that herbicides were tested, stored, or used in Guam. Notwithstanding, the VA Compensation and Pension Service, in the report titled "Guam (Negative findings)" (received in July 2011) conceded the possibility that commercial herbicides might have been used for brush or weed clearing activity around military bases at every location in the world. Furthermore, the report indicated that the DoD did not

have records of such activity and there was no way of knowing the chemical content of any such non-tactical herbicide use.

The evidence is at least in equipoise as to whether herbicides were used, in a small-scale capacity, in Guam for brush or weed clearing activity. The only evidence as to the nature of these herbicides is the testimony of a service member who served at Andersen Air Force Base at the same time as the Veteran and who testified that he sprayed a mixture of fuels and herbicides, to include Agent Orange, around the base's perimeter and the Veteran's living quarters. Although such activity is not documented in military records, there is no evidence of record that contradicts or disproves the witness's testimony. In this regard, the Board notes that while Andersen Air Force Base is not listed in the DoD list of locations in which herbicide agents were used, this list is not exhaustive. As such, it is not sufficient to conclude that a Veteran was not exposed to herbicides solely because he or she claimed exposure at a location that is not on the list. See, e.g., *Wheeler v. Shinseki*, 2014 WL 1275449, *4 (Mem. Dec.). Furthermore, the VA Compensation and Pension Service stated that the DoD did not have a record of small-scale brush clearing activity, such as the one described by the Veteran, and there was no way to know the chemical content of any such claimed herbicide use. In view of the above, the Board finds that the evidence is in relative equipoise as to whether the Veteran was exposed to Agent Orange during service in Guam.

Resolving all doubt in favor of the Veteran, the evidence supports a finding that his prostate cancer is related to herbicide exposure during service. As stated, the Veteran has a current diagnosis of prostate cancer and two medical professionals have opined that this diagnosis is likely related to herbicide exposure in service. Therefore, entitlement to service connection for prostate cancer is warranted.

The Veteran is also claiming service connection for erectile dysfunction and incontinence, as secondary to his as of now service-connected prostate cancer.

Service connection may be granted for a disability that is proximately due to or the result of a service-connected disease or injury. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition. 38 C.F.R. § 3.310(a). Service connection may also be granted on a secondary basis where a condition is aggravated by a service-connected disability. 38 C.F.R. § 3.310(b). To warrant service connection on a secondary basis, the evidence must show that the current disability was either (a) proximately caused by or (b) proximately aggravated by a service-connected disability. Compensation for secondary service connection based on aggravation of a non-service-connected condition is only warranted for the degree of disability over and above the degree of disability existing prior to the aggravation. *Allen v. Brown*, 7 Vet. App. 439 (1995).

The medical evidence shows that the Veteran has erectile dysfunction and urinary incontinence. See VA examinations from December 2006 and April 2010. Further, the April 2010 VA examiner stated that these are secondary to the Veteran's prostatectomy. In light of this, and having found that service connection for prostate cancer is warranted, the Board concludes that service connection on a secondary basis for erectile dysfunction and incontinence is also warranted.

ORDER

Entitlement to service connection for prostate cancer is granted.

Entitlement to service connection for erectile dysfunction is granted.

Entitlement to service connection for urinary incontinence is granted.

Eric S. Leboff

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs