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On appeal from the
Department of Veterans Affairs Regional Office in Muskogee, Oklahoma

THE ISSUE

Entitlement to service connection for prostate cancer, to include as due to herbicide exposure.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

L. Barstow, Counsel

INTRODUCTION

The Veteran had active military service from September 1968 to September 1972.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a September 2009 rating decision of the VA Regional Office (RO) in Muskogee, Oklahoma.

In June 2011, the Veteran testified at a hearing conducted before the undersigned. A transcript of the hearing has been associated with the claims file.

The case was remanded for further development in January 2012 and July 2014. Review of the record indicates substantial compliance. See *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

FINDING OF FACT

The Veteran has prostate cancer that is as likely as not related to his military service.

CONCLUSION OF LAW

The criteria for service connection for prostate cancer have been met. 38 U.S.C.A. §§ 1101, 1110, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.307, 3.309 (2015).

REASONS AND BASES FOR FINDING AND CONCLUSION

As the Board is granting the benefit sought on appeal, no discussion of VA's duties to notify and assist is necessary.

Service connection may be granted for disability resulting from disease or injury incurred or aggravated during active military service. 38 U.S.C.A. § 1110. Generally, service connection requires (1) the existence of a present disability, (2) in-service incurrence or aggravation of an injury or disease, 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 (Fed. Cir. 2004).

Regarding herbicides, certain diseases associated with exposure to certain herbicide agents used in support of military operations in the Republic of Vietnam during the Vietnam era will be presumed to have been incurred in service. 38 U.S.C.A. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6). The presumption requires exposure to an herbicide agent and manifestation of the disease to a degree of 10 percent or more within the time period specified for each disease. 38 C.F.R. § 3.307(a)(6)(ii). Furthermore, even if a veteran does not have a disease listed at 38 C.F.R. § 3.309(e), he or she is presumed to have been exposed to herbicides if he or she served in Vietnam between January 9, 1962, and May 7, 1975, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. 38 U.S.C.A. § 1116(f); 38 C.F.R. § 3.307(a)(6)(iii).

The diseases for which service connection may be presumed to be due to an association with herbicide agents include prostate cancer. 38 U.S.C.A. § 1116(a)(2); 38 C.F.R. § 3.309(e). Even where the criteria for service connection under the provisions of 38 C.F.R. § 3.309(e) are not met, a veteran is not precluded from establishing entitlement to service connection by proof of direct causation. See *Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994).

Lay assertions may serve to support a claim for service connection by supporting the occurrence of lay-observable events or the presence of disability or symptoms of disability subject to lay observation. 38 U.S.C.A. § 1153(a); 38 C.F.R. § 3.303(a); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); see *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (addressing lay evidence as potentially competent to support presence of disability even where not corroborated by contemporaneous medical evidence).

The Veteran's service treatment records (STRs) show no diagnosis of, or treatment for, prostate cancer. His July 1968 pre-induction and April 1972 separation examinations both showed a clinically normal genitourinary system. In his accompanying reports of medical history, the Veteran denied all pertinent symptoms.

The evidence does not show, nor does the Veteran contend, that he was stationed in Vietnam. Rather, he contends that he was exposed to herbicides and other toxins while stationed in Guam at Anderson Airforce Base as a resulting of loading and unloading aircraft returning from Vietnam.. See, e.g., March 2010 Statement in Support of Claim. The Veteran's personnel records confirm his service in Guam at Anderson Air Force Base. In support of his assertion, the Veteran submitted a copy of an Environmental Protection Agency (EPA) article showing that Anderson Airforce Base was a toxic site with dioxin (i.e. the active ingredient in Agent Orange) and other chemicals.

Responses from the National Personnel Records Center (NPRC) and the United States Army and Joint Services Records Research Center (JSRRC) show that there were no records of the Veteran's exposure to herbicides during service. See March 2010 NPRC and August 2010 Defense Personnel Records Information Retrieval System (DPRIS) responses.

Post-service medical records show that the Veteran was diagnosed with prostate cancer in 2009.

A VA medical opinion was obtained in May 2013. The examiner opined that the Veteran's prostate cancer was less likely as not permanently aggravated or a result of any event and/or condition that occurred and/or expressed in service and was at least as likely as not a result of age related risk in the general population and was not caused by and or worsened by an already service-connected disability. The examiner also opined that the natural progression was not altered or worsened by any event and/or condition that

occurred and/or expressed during active service.

The examiner noted the Veteran's reported exposures. The examiner observed that there was no definitive claim or evidence that the Veteran was exposed to or present when any alleged substance was present. The examiner reported that the literature supported those in Operation Ranch Hand, who had closest contact to Agent Orange, did not have a statistically higher disease rate than the unexposed control group. The examiner reported that an aircraft flying from Vietnam to Guam would, at least as likely as not, have any external Agent Orange either removed by air or water exposures in-flight. The examiner noted that, additionally, any residual chemical would at least as likely as not be significantly diluted and not "drip" or "leak" from the aircraft. The examiner opined that the Veteran at least as likely as not, would, at least as likely as not, at most possibly have minimal contact with Agent Orange or other chemicals that adhered to the aircraft in flight from Vietnam. The examiner concluded that, at least as likely as not, the Veteran had less exposure to Agent Orange than those in Operation Ranch Hand. The examiner also concluded that, at least as likely as not, given the Operation Ranch Hand airmen had no increased disease, the Veteran's prostate cancer was less likely as not related to possible Agent Orange exposure. The examiner also opined that the possible exposure to Agent Orange did not meet the standard of "at least as likely as not." The examiner further opined that the Veteran's prostate cancer was less likely as not a result of any alleged exposures, as the Veteran had no evidence that met the standard of "at least as likely as not" that he was exposed to any toxic substances.

The examiner noted that causation required consistency, strength of association, specificity, and temporal relationship. The examiner opined that the Veteran's allegation did not meet any of the criteria, finding no evidence of any increased disease prevalence/incidence of prostate cancer in Guam veterans. The examiner reported that there was no temporal relationship or specificity. The examiner opined that the medical plausibility was in the realm of possibility, not probability, and did not reach the standard of "at least as likely as not." The examiner opined that age, not toxic exposure, was the greatest risk factor for prostate cancer. The examiner noted that the Veteran was 71 years old at diagnosis.

An addendum medical opinion was obtained in January 2015 as the 2013 opinion was unclear. The examiner opined that it appeared that the 2013 examiner's conclusion was that the Veteran was less likely than not exposed to chemicals that would result in prostate cancer. The examiner also opined that it appeared that the 2013 examiner's conclusion was that the Veteran was less likely exposed to Agent Orange. The examiner further opined that it appeared that the 2013 examiner's conclusion was that there was less than likely exposure to arsenic or any other toxic chemical listed that would provide a probability for the development of the Veteran's prostate cancer.

A Veterans Health Administration (VHA) opinion was obtained in September 2016. The physician discussed the pertinent facts and opined that he could find no direct evidence that Agent Orange itself was shipped to or stored on Guam; however, Guam was apparently highly contaminated by dioxins other than those found in Agent Orange and dioxin contamination was as result of the U.S. military presence there. The physician discussed the evidence supporting the opinion that Guam was contaminated by dioxins. The physician concluded that, based on the evidence provided, it was more likely than not that the Veteran was exposed to dioxins on Guam and that that exposure contributed to his risk for prostate cancer. The physician opined that the dioxins were more likely than not dioxins other than those found in Agent Orange, but they were present as a result of U.S. military activity on Guam. He opined that it was more likely than not that other known prostate cancer carcinogens did not contribute substantially to the Veteran's prostate cancer due to his service on Guam.

Based on a review of the evidence, the Board concludes that service connection for prostate cancer is warranted. The evidence shows that the Veteran was diagnosed with prostate cancer in 2009. When affording the Veteran the benefit-of-the-doubt, the Board finds that the evidence shows that his prostate cancer is related to his military service.

The evidence clearly shows that the Veteran was stationed in Guam during his military

service. The EPA article submitted by the Veteran discusses toxins being at Anderson Airforce Base, where the Veteran was stationed. As such, the Board concedes the Veteran's exposure to different toxins while in service. The 2016 VHA opinion shows that the Veteran's exposure to dioxins in Guam contributed to his risk for prostate cancer. Consequently, based on this opinion, the evidence supports a finding that the Veteran's prostate cancer is related to his service.

In finding that the evidence supports a finding of service connection, the Board acknowledges the negative opinions from the 2013 and 2015 VA examiners. However, in light of the positive opinion, the evidence is at least in equipoise as to whether the Veteran's prostate cancer is related to his military service. Therefore, when affording him the benefit-of-the doubt, after considering all of the evidence of record, the Board concludes that a finding of service connection is warranted. Service connection for prostate cancer is, therefore, granted.

ORDER

Entitlement to service connection for prostate cancer is granted.

A. C. MACKENZIE
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs