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On appeal from the

**Department of Veterans** Affairs Regional Office in St. Louis, Missouri

## THE ISSUES

1. Entitlement to service connection for type II **diabetes mellitus**, to include as due to **herbicide** exposure.
2. Entitlement to service connection for coronary artery disease (CAD), to include as due to herbicide exposure.

## REPRESENTATION

Veteran represented by: Nancy Morgan, Attorney at Law

## WITNESS AT HEARING ON APPEAL

The Veteran

## ATTORNEY FOR THE BOARD

C. Wendell, Associate Counsel

## INTRODUCTION

The Veteran served on active duty from June 1960 to November 1960 and from October 1961 to April 1966.

This matter is before the Board of Veterans' Appeals (Board) on appeal from April 2009 and April 2011 rating decisions issued by the Department of Veterans Affairs (VA) Regional Office (RO) in St. Louis, Missouri.

By way of background, the RO denied service connection for type II diabetes mellitus,

to include as due to herbicide exposure, in April 2009 and denied service connection for coronary artery disease, to include as due to herbicide exposure, in April 2011. Appeals as to both claims were properly and separately perfected, and the issues were combined into a single appeal for the purposes of adjudication by the Board.

The Board also notes that a statement of the case was issued with respect to the Veteran's claim for a compensable rating for service-connected bilateral hearing loss. However, the subsequent December 2010 substantive appeal only referred to the issue of service connection for type II diabetes mellitus. An additional September 2012 substantive appeal also did not raise the issue of a compensable rating for bilateral hearing loss, nor was the issue raised during the Veteran's February 2014 Central Office hearing. As such, the Board finds that an appeal as to the issue of entitlement to a compensable rating for service-connected bilateral hearing loss was never properly perfected, and is therefore not on appeal.

The Veteran testified at a Central Office hearing before the undersigned Veterans Law Judge (VLJ) in February 2014. A transcript of the hearing is contained in the Virtual VA file associated with the Veteran's claim.

The Board has not only reviewed the Veteran's physical claims file but also the electronic records maintained in Virtual VA and Veterans Benefits Management System (VBMS) to ensure consideration of the totality of the evidence.

## FINDINGS OF FACT

1. The evidence is in equipoise as to whether the Veteran was exposed to herbicides while in service in Korea along the DMZ.
2. Type II diabetes mellitus is presumed to be causally and etiologically related to in-service herbicide exposure.
3. CAD is presumed to be causally and etiologically related to in-service herbicide exposure.

## CONCLUSIONS OF LAW

1. The criteria for presumptive service connection for type II diabetes mellitus as due to herbicide exposure have been met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1137, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.307, 3.309 (2013).
2. The criteria for presumptive service connection for CAD as due to herbicide exposure have been met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1137, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.307, 3.309 (2013).

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

### I. Veterans Claims Assistance Act of 2000 (VCAA)

VA has a duty to provide claimants with notice and assistance in the development of their claim. See 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.102, 3.159 (2013). In light of the fully favorable decision herein, no further discussion of compliance with VA's duty to notify and assist is necessary. See *Mlechick v. Mansfield*, 503 F.3d 1340 (Fed. Cir. 2007).

### II. Merits of the Claim

Generally, to establish service connection a 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." *Davidson v. Shinseki*, 581 F.3d 1313, 1315-16 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004). Service connection may also be granted for any injury or disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease or injury was incurred in service. 38 C.F.R. § 3.303(d).

Service connection can also be established based on herbicide exposure. 38 C.F.R. § 3.307(a)(6). If a veteran is presumed to have been exposed to herbicides or the evidence with respect to exposure is at least in equipoise, the veteran is entitled to a presumption of service connection for certain disorders. See 38 C.F.R. § 3.309(e). Notably, diabetes mellitus and coronary artery disease are included in the presumptive list.

VA is required to give due consideration to all pertinent medical and lay evidence in evaluating a claim for disability benefits. 38 U.S.C.A. § 1154(a). Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). Lay evidence cannot be determined to be not credible merely based on the lack of contemporaneous medical evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336-37 (Fed. Cir. 2006).

The Veteran contends that he is entitled to service connection for type II diabetes mellitus and CAD, to include both as due to herbicide exposure in service. The Board finds that service connection on a presumptive basis due to herbicide exposure is warranted for both type II diabetes mellitus and CAD. As the evidence and legal analysis for both claims is the same, the two claims will be addressed together to avoid repetition.

As an initial note, the Board finds that the Veteran does not have active duty service during a time period that entitles him to a presumption of exposure to herbicides. See 38 C.F.R. § 3.307(a)(6)(iii)-(iv). If the evidence otherwise sufficiently shows herbicide exposure in service, presumptive service connection is warranted for any diseases determined by VA to be causally related to herbicide exposure. See 38 C.F.R. § 3.309(e).

First, private and VA medical records reflect that the Veteran has a current diagnosis of both type II diabetes mellitus and CAD. As such, the first element of service connection is met.

Turning to the second element, the evidence is at least in equipoise with respect to the presence of an in-service event, injury, or disease, specifically exposure to herbicides.

Starting with the lay evidence of record, the Veteran has testified that he served as a military policeman (MP) with the 2nd Infantry Division, and that he was stationed near the Korean demilitarized zone (DMZ) from October 1965 to April 1966. This is corroborated by the Veteran's personnel records, which have been associated with the claims file, as well as by pictures submitted by the Veteran showing him at the DMZ. The Veteran has stated that while stationed there, he was tasked with escorting South Korean nationals into the DMZ three times a week. The nationals would be driving trucks carrying 55 gallon drums marked with a white skull and bones. Once there, the Veteran would provide security while the South Korean nationals sprayed defoliants out of the barrels along the southern boundary of the DMZ using a hand pump and hose. The Veteran testified that he was normally within 20 yards of the spraying, and was routinely covered with wind-blown spray during the process. The Veteran is competent to report all of this information, and there is no evidence in the claims file that would indicate he is not credible.

There are no morning reports or other similar documents in the claims file that corroborate the Veteran's description of his daily duties. However, the Veteran has submitted a statement from a fellow service member who was stationed near the DMZ from April 1965 to May 1966. The fellow service member indicates that, during his period of service at the DMZ, he witnessed military police from the 2nd Infantry Division escorting South Korean nationals to and from the DMZ for the purpose of providing security while the nationals sprayed defoliants. He also stated that he witnessed numerous 55 gallon barrels stored at the motor pool during this period. The fellow service member is competent to report his own observations, and there is no evidence indicating that the fellow service member's account is not credible. Indeed, the pictures provided further corroborate this and the Veteran's account.

Further, of record is a January 1969 document entitled "Final Report, Vegetation Control Plan CY 68." This report first notes that in October 1965, the 2nd U.S. Infantry Division requested that herbicides be investigated for use in controlling foliage growth, as the chemicals and equipment needed were already on hand at that time. Second, in a section entitled "Questions and Answers" the report reads as

follows:

Q. "Were any of the herbicides employed by the Department of Defense in South Vietnam between 1962-1970 utilized in the demilitarized zone (DMZ) of Korea during the same period?"

A. Yes; however, no evidence indicates that US personnel were involved in the actual application of the herbicides. It is possible that US personnel were exposed to them but not likely since the herbicides were applied by hand or trailer mounted sprayers instead of by aerial spraying as in South Vietnam.

Q. "If these herbicides were employed in Korea, could you provide us with data concerning their identity?"

A. ORANGE, BLUE, MONURON, 2-4-D.

See Final Report, Vegetation Control Plan CY 68, pages 1, 3 (January 2, 1968), associated with claims file Vol. 3.

There is no evidence of record that would call into question the credibility of this particular report. This account mirrors the Veteran's testimony concerning the application of defoliants that he witnessed while stationed at the DMZ. Further, it confirms that qualifying herbicides were present at the DMZ as of October 1965 and were used in the Korean DMZ while the Veteran was stationed in there. See 38 C.F.R. § 3.307(a)(6)(i). While the report indicates there is no evidence US personnel were involved in the actual application of the herbicides, that is not what the Veteran is contending here. Instead, the Veteran is contending that he was exposed to constant spray from the herbicide applications while providing security for the South Korean nationals applying it. The Board notes that VA has associated two memoranda formally finding that they are unable to verify the Veteran's herbicide exposure based on the fact that Department of Defense records reflect that herbicides were not sprayed in the DMZ until 1968.

However, even taking this fact into account, in light of the Veteran's highly credible testimony, the submitted lay statements and pictures, the January 1968 report concerning herbicide use in the Korean DMZ, and other salient facts specific to this case, the Board finds that the evidence is at least in equipoise with respect to herbicide exposure in service. Therefore, based on the specific facts of this particular case, the Board finds that the evidence of record is at least in equipoise with respect to a finding of an in-service event, injury or disease, specifically exposure to herbicides. Therefore, the second element of service connection has been met.

Finally, as the Veteran's currently diagnosed type II diabetes mellitus and CAD are listed as diseases associated with herbicide exposure, they are both eligible for service connection on a presumptive basis based on in-service herbicide exposure. 38 C.F.R. §§ 3.307(a)(6), 3.309(e). As both disabilities have manifested to a compensable degree post-service and in-service herbicide exposure has been shown as determined above, the Board finds that type II diabetes mellitus and CAD are presumptively related to the Veteran's in-service herbicide exposure, and therefore

the third element of service connection is met. See 38 C.F.R. §§ 3.303, 3.309(e).

As the Veteran has a current diagnosis of type II diabetes mellitus and CAD, the evidence is at least in equipoise with respect to herbicide exposure in service, and type II diabetes mellitus and CAD are associated with herbicide exposure, the Board finds that all of the elements of presumptive service connection based on herbicide exposure for type II diabetes mellitus and CAD have been met, and therefore service connection for both claims on that basis is warranted. 38 C.F.R. §§ 3.307(a)(6); 3.309(e).

## ORDER

Entitlement to service connection for type II diabetes mellitus as due to herbicide exposure is granted, subject to the laws and regulations controlling the award of monetary benefits.

Entitlement to service connection for coronary artery disease as due to herbicide exposure is granted, subject to the laws and regulations controlling the award of monetary benefits.

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BETHANY L. BUCK

Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs