



DEPARTMENT OF VETERANS AFFAIRS  
Board of Veterans' Appeals  
Washington DC 20001

September 21, 2022

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Ruling on Motion

[REDACTED]

This letter responds to your Motion for Reconsideration (Motion) of the Board of Veterans' Appeals (Board) decision of July 28, 2021. The Motion was received at the Board on November 24, 2021. The Board is also in receipt of additional argument and evidence submitted in support of your Motion, which was received at the Board on May 2, 2022. I have been delegated the authority to rule on the Motion. See 38 C.F.R. § 20.109(b).

A Board decision is final unless the Board's Chairman, or her delegate, orders reconsideration to correct an obvious error in the record. 38 U.S.C. §§ 7103, 7104; 38 C.F.R. §§ 20.1001, 20.1002. Under 38 C.F.R. § 20.1001, the discretion of the Chairman or her delegate to grant reconsideration of an appellate decision is limited to the following grounds: (a) upon allegation of obvious error of fact or law; (b) upon discovery of new evidence in the form of relevant records or reports of the service department concerned; or (c) upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant. You have alleged, in essence, that the Board decision contains an obvious error of fact or law under 38 C.F.R. § 20.1001(a).

The Chairman, or her delegate, will order reconsideration of an appellate decision upon the ground of "obvious error of fact or law" only when it is shown that the Board committed an error in its decision which, if corrected, would change the outcome of the appeal. Obvious (or clear and unmistakable) error is a very specific and rare kind of error. It is the kind of error of fact or law that, when called to the attention of adjudicators, compels the conclusion, with which reasonable minds could not differ, that the result would have been manifestly different but for the error. Mere allegations that previous adjudicators improperly weighed and evaluated the evidence are inadequate to meet the standard of "obvious error," as are broad allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of "error." See *Fugo v. Brown*, 6 Vet. App. 40, 44 (1993). The alleged error(s) of fact or law must be described with some specificity and persuasive reasons must be given as to why the result would have been manifestly different but for the alleged error. *Id.* Moreover,

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reconsideration will not be granted on the basis of an allegation of factual error where there is a *plausible basis* in the record for the factual determinations in the Board decision at issue. This includes situations in which a Board decision reflects the reasonable judgment of one or more of its Veterans Law Judges regarding the credibility, probative value, and weight of the evidence.

On July 28, 2021, the Board issued a decision denying your claims for entitlement to service connection for prostate cancer and ischemic heart disease, due to herbicide and/or pesticide exposure. You contend that your prostate cancer, heart condition, and non-Hodgkins lymphoma were caused by your exposure to herbicides/ pesticides during your military service in the Panama Canal Zone between December 1972 and March 1974. You contend that herbicides/pesticides were shipped, delivered, and used by the U.S. military in the Panama Canal Zone, as supposed by the evidence submitted with your Motion. You also contend that although the Department of Defense (DOD) denies the use of "tactical" herbicides in Panama, they do not deny the use of "commercial" herbicides.

You contend that herbicides/pesticides were used on the Albrook Air Force Base and the Howard Air Force Base, also supported by the evidence submitted with your Motion. You contend that you witnessed the spraying and fogging of pesticides, which had extremely strong fumes. I have reviewed your Motion, the Board's decision, and the record.

The Board recognized your contention that your prostate cancer and heart condition, specifically ischemic heart disease, were due to herbicide and/ or pesticide exposure while you were stationed at the Albrook Air Force Base and the Howard Air Force Base. The Board also recognized your contention that you witnessed the spraying of pesticides while on base. However, the Board explained that it heavily relied on the DOD database that indicates herbicide agents were not used in Panama. See generally *Bardwell v. Shinseki*, 24 Vet. App. 36, 40 (2010) (affirming the Board's decision denying exposure to radiation where service records were negative for exposure). The Board further explained that it considered your testimony that you were exposed to pesticides and considered the articles regarding pesticide use in Panama; however, the Board found that this evidence was not enough to establish service connection.

As stated above, under 38 C.F.R. § 20.1001(b), the new and material evidence necessary to warrant reconsideration must be a relevant record or report of the service department concerned. The articles, reports, letters, sworn declarations, and private medical records that you submitted are not from the service department, and therefore cannot be deemed new and material evidence as contemplated by the provisions of 38 C.F.R. § 20.1001(b).

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Additionally, the Board recognizes your submission of previous Board decisions to support your Motion; however, previous Board decisions are not binding precedent. See 38 C.F.R. § 20.1303 (2017). Furthermore, the previous Board decisions are also not from the service department, and therefore cannot be deemed new and material evidence as contemplated by the provisions of 38 C.F.R. § 20.1001(b).

The essence of your Motion is a disagreement with the manner in which the Board weighed and evaluated the evidence, but such an allegation is not sufficient to sustain a claim that the Board's decision contains an obvious error of fact or law. This argument is without merit.

Your Motion, which has been carefully reviewed in light of the Board's decision in this appeal, does not demonstrate that the Board decision contains obvious error of fact or law. The Board decision at issue contains findings of fact that are supported by plausible reasons and bases. For these reasons, your Motion is denied.

If you would like to file a new claim, or a supplemental claim, you may submit that claim and any pertinent evidence to your local VA regional office.

The additional evidence submitted with your Motion will be forwarded to the Agency of Original Jurisdiction for appropriate action. I hope this information is helpful to you.

Sincerely,



Tamia N. Gordon  
Deputy Vice Chairman  
Board of Veterans' Appeals

Enclosure:  
Your Appellate Rights Relating to Our Denial of Your Motion for Reconsideration.

cc: ~~CONFIDENTIAL~~