BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
XXXXXXXXXXXXXXXXXXXX
Represented by
Steven E. Johnson, Agent

C 28 374 354
Docket No. 191210-47806
Advanced on the Docket

DATE: April 24, 2020

ORDER

Readjudication of the claim for service connection for ischemic heart disease (IHD) is warranted.

Entitlement to service connection for IHD is granted.

FINDINGS OF FACT

1. In a December 2018 rating decision, the Veteran was denied service connection for IHD.

2. New evidence was received after the December 2018 denial that is relevant to the issue of entitlement to service connection for IHD.

3. Resolving reasonable doubt in the Veteran's favor, the Veteran was exposed to herbicide agents during his active duty service.

4. The Veteran has a current diagnosis of IHD.

CONCLUSIONS OF LAW

1. The criteria for readjudicating the claim of entitlement to service connection for IHD have been met. 38 C.F.R. § 3.156(d).

2. The criteria for entitlement to service connection for IHD have been met. 38 U.S.C. §§ 1101, 1110, 1116, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309(e).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from February 1970 to April 1972.

By way of background, the Veteran's claim was initially denied in an August 2017 rating decision under the legacy system. In January 2018, the Veteran requested reconsideration of this matter, which was denied in an April 2018 rating decision.

The Veteran selected the Higher-Level Review Lane when he opted into the Appeals Modernization Act (AMA) review system by submitting a Rapid Appeals Modernization Program (RAMP) election form in August 2018. Accordingly, the December 2018 RAMP rating decision considered the evidence of record as of the date VA received the RAMP election form. In response to this rating decision, the Veteran filed a supplemental claim in January 2019, to which VA issued a decision in March 2019 denying the claim, as the evidence submitted was not new and material. The Veteran filed another supplemental claim in July 2019, to which VA issued a decision in August 2019 denying the claim, as the evidence submitted was not new and material.

In a September 2019 Decision Review Request: Board Appeal (Notice of Disagreement) (VA Form 10182), the Veteran timely appealed the August 2019 decision to the Board. In October 2019, the Veteran clarified that he was requesting to be placed in the Hearing Lane. In December 2019, the Veteran submitted a new VA Form 10182, selecting evidence submission to be reviewed by a Veterans Law Judge. The Board notes that the Veteran's selection of a different evidentiary record option was received within one year of the August 2019 rating decision, and is therefore valid. 38 C.F.R. § 20.202(c)(2). Accordingly, the Board has considered the evidence submitted during the 90-day period since his December 2019 notice of disagreement.

In this regard, the Board notes that evidence was physically received by VA outside of the 90-day window. However, that evidence was postmarked within the 90-day window, and is therefore timely filed and able to be reviewed in connection with the appeal. *See* 38 U.S.C. § 7105; 38 C.F.R. § 20.110.

In the March 2019 August 2019 decisions, the Agency of Original Jurisdiction (AOJ) found that the Veteran had a current diagnosis of coronary artery disease-IHD and that the Veteran had an in-service incident of chest pain. The Board is bound by these favorable findings. 38 C.F.R. § 3.104(c).

The Board notes that the Veteran's representative has raised the issue of entitlement to a total disability rating based on individual unemployability (TDIU). *See* March 2020 Representative Statement. Most recently, the AOJ denied the Veteran's claim of entitlement to a TDIU in a November 2018 rating decision. As stated above, this appeal has been separately processed under the AMA review system, and the issue of entitlement to a TDIU is not before the Board at this time.

1. New and Relevant Evidence

The Veteran is seeking service connection for the previously denied claim of entitlement to service connection for IHD.

VA will readjudicate a claim if new and relevant evidenced is presented or secured. 38 C.F.R. § 3.156(d). "Relevant evidence" is evidence that tends to prove or disprove a matter in issue. 38 C.F.R. § 3.2501(a)(1).

The question in this case is whether the Veteran submitted new and relevant evidence after the prior final denial of his claim for service connection for IHD.

In August 2019, the AOJ denied the claim of entitlement to service connection for IHD, as new and relevant evidence had not been submitted. The Veteran appealed this decision to the Board in September 2019.

The Board finds that new evidence was submitted after the August 2019 rating decision that is relevant to the Veteran's claim. Specifically, the Veteran submitted his own sworn statements and records showing the exportation of certain

herbicides to Panama during his active duty service. In light of this evidence, which may prove the Veteran was exposed to herbicides during his active duty service, readjudication of the claim is warranted.

2. Service Connection

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection generally requires competent medical or lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009).

Moreover, pursuant to 38 C.F.R. § 3.309, where a Veteran served continuously for ninety (90) days or more during a period of war, or during peacetime service after December 31, 1946, and certain chronic diseases, such as IHD, become manifest to a degree of 10 percent within one year from the date of termination of such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary.

When a disease listed at 38 C.F.R. § 3.309(a) is not shown to be chronic during service or the one-year presumptive period, service connection may also be established by showing continuity of symptomatology after service. *See* 38 C.F.R. § 3.303(b). However, the use of continuity of symptoms to establish service connection is limited only to those diseases listed at 38 C.F.R. § 3.309(a) and does not apply to other disabilities which might be considered chronic from a medical standpoint. *See Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

Service connection may also be granted for specific diseases associated with exposure to herbicide agents. 38 C.F.R. § 3.309(e). If a veteran was exposed to a herbicide agents during active military, naval, or air service, certain diseases, including IHD, shall be service-connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, despite any lack of evidence of such disease during service

provided that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied. A veteran who served on active duty in the Republic of Vietnam during the Vietnam Era is presumed to have been exposed to an herbicide agent during such service, absent affirmative evidence establishing that he was not. 38 C.F.R. § 3.307(a)(6), (d).

The Veteran asserts that his IHD is related to his active duty service. Specifically, he states that he was exposed to herbicide agents during his service in the Panama Canal Zone. *See* February 2020 Sworn Declaration. The Veteran has also stated that he was stationed in Vietnam during his active duty service. *See* February 2017 Statement in Support of Claim; May 2018 Notice of Disagreement.

As stated above, the Veteran has a current diagnosis of IHD, and the Board is bound by that finding. 38 C.F.R. § 3.104(c). Therefore, the only issue remaining is whether the Veteran was exposed to herbicides during his active duty service.

Contrary to the Veteran's claim that he went into the Republic of Vietnam, his DD Form 214 conclusively indicates no service in the Republic of Vietnam. Notably, his service personnel records (SPRs) indicate that from May 1970 to August 1970, he was stationed at Camp Pendleton, California, and then transferred to Camp Lejeune, North Carolina in September 1970. *See* SPRs Record of Service. As his SPRs are generated contemporaneously with his service, the Board accords them greater probative weight than his lay statements made decades post-service in pursuit of this claim. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997).

The Veteran served in the Panama Canal Zone from January 1971 to March 1972. He has asserted that he witnessed the spraying of herbicide agents from trucks during this period, and that his duties including patrolling through areas of dead vegetation. He stated that he was directly sprayed with the herbicide agent, which caused burning in his skin, mouth, and lungs, and when he returned to the area all of the foliage was dead. Finally, he stated that he was shown a warehouse full of barrels with an orange stripe and was told these contained Agent Orange. *See* February 2020 Sworn Declaration.

Although the Veteran is not competent to identify which herbicide, if any, was sprayed from the trucks, the Board notes that he is competent to report on factual matters of which he has firsthand knowledge, including the absence of vegetation following the spraying of the unidentified agent. *See Washington v. Nicholson*, 19 Vet. App. 362, 368 (2005). The Board also finds these statements credible. *See Caluza v. Brown*, 7 Vet. App. 498, 506 (1995); *Baldwin v. Brown*, 13 Vet. App. 1 (1999) (reflecting that determinations concerning the credibility of evidence are within the purview of the Board).

In support of his claim, the Veteran submitted a November 2016 Board decision with a similar fact pattern to his own. The Board notes that this decision has no precedential value in the instant case, as Board decisions are binding only on the specific case decided. 38 C.F.R. § 20.1303.

The Veteran also submitted a list of exports by the United States Government Accountability Office and United States Department of Commerce, which details numerous shipments of herbicides 2,4-D and 2,4,5-T to Panama during his active duty service. *See* Undated Correspondence received by VA on March 12, 2020; *see also* March 2020 Representative Statement (summarizing the findings). While these documents do not prove that the Veteran was exposed to herbicides, they do show that herbicides were in Panama at the same time as the Veteran. The Board observes that 2,4-D and 2,4,5-T are included within VA's definition of "herbicide agent" for purposes of establishing presumptive in-service herbicide exposure. *See* 38 C.F.R. § 3.307(a)(6).

A May 2013 memorandum from the United States Department of the Army and Joint Services Records Research Center indicates that there is no evidence that the tactical herbicide Agent Orange was used, stored, tested, or transported to Panama or the Panama Canal Zone. The Board observes, however, that this memorandum is directly contradicted by the reports of the Government Accountability Office and Department of Commerce.

In light of the above, the Board finds that the evidence is at least in equipoise as to whether the Veteran was exposed to herbicide agents during his active duty service in Panama. Accordingly, after resolving all doubt in favor of the Veteran, service

connection for IHD is warranted on a presumptive basis. 38 U.S.C. § 5107; 38 C.F.R. §§ 3.102; 3.309(e).

P.M. DILORENZO
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board S. M. Stedman, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.