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On appeal from the
Department of Veterans Affairs Regional Office in St.
Petersburg, Florida

THE ISSUES

1. Entitlement to service connection for papillary thyroid carcinoma, claimed as due to herbicide (Agent Orange) exposure, for accrued benefits purposes.
2. Entitlement to service connection for a left arm/shoulder disorder, claimed as secondary to surgery for papillary thyroid carcinoma, for accrued benefits purposes.
3. Entitlement to a temporary total rating pursuant to 38 C.F.R. § 4.30 for a period of convalescence following papillary thyroid carcinoma surgery on December 12, 2008, for accrued benefits purposes.

REPRESENTATION

Appellant represented by: Vietnam Veterans of America

ATTORNEY FOR THE BOARD

L. A. Rein, Counsel

INTRODUCTION

The Veteran served on active military duty from September 1963 to September 1969, to include service in the Republic of Vietnam from January 1965 to January 1966 and from May 1968

to May 1969. The Veteran died in April 2011 during the course of the appeal; the Veteran's spouse, who is the present appellant, filed a timely Motion to Substitute under 38 U.S.C.A. § 5121A , which was granted by the RO in July 2011. The present appellant is accordingly considered to be the claimant for the purpose of processing the claims to completion, for the purpose of obtaining any accrued benefits to which the appellant may be entitled. See generally 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000.

This case comes before the Board of Veterans' Appeals (Board) on appeal from an August 2009 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in St. Petersburg, Florida.

This case was recently before the Board in June 2011, at which time the matters on appeal were dismissed and the Board referred the appellants May 2011 request for substitution to the Agency of Original Jurisdiction for appropriate action. As noted above, the RO determined in July 2011 that the appellant qualified as the substituted claimant.

The issues of service connection for accrued benefits purposes for: a left arm/shoulder disorder, claimed as secondary to surgery for papillary thyroid carcinoma; and entitlement to a temporary total rating pursuant to 38 C.F.R. § 4.30 for a period of convalescence following papillary thyroid carcinoma surgery on December 12, 2008, are addressed in the REMAND portion of the decision below and are REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC.

FINDINGS OF FACT

1. The evidence of record establishes that the Veteran actually served in the Republic of Vietnam during the Vietnam Era; and thus herbicide (Agent Orange) exposure in service may be presumed.
2. The Veteran's diagnosed papillary thyroid carcinoma is not on the list of diseases presumptively associated with herbicide (Agent Orange) exposure.
3. The only medical opinion evidence of record relates the

Veteran's papillary thyroid carcinoma to his in-service herbicide (Agent Orange) exposure; there is no contrary medical evidence of record.

CONCLUSION OF LAW

Resolving all reasonable doubt in favor of the appellant, the criteria for service connection for papillary thyroid carcinoma, claimed as due to herbicide (Agent Orange) exposure, for accrued benefits purposes, have been met. 38 U.S.C.A. §§ 1101, 1110, 1113, 1116, 5103, 5103A, 5107, 5121, 5121A (West 2002 & Supp. 2011); 38 C.F.R. §§ 3.102 , 3.159, 3.303, 3.307, 3.309, 3.1000 (2011).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA), codified at 38 U.S.C.A. §§ 5100 , 5102, 5103, 5103A, 5106, 5107, and 5126 (West 2002 & Supp. 2011) includes enhanced duties to notify and assist claimants for VA benefits. VA regulations implementing the VCAA have been codified, as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2011).

Given the favorable disposition of the claim for service connection for papillary thyroid carcinoma, claimed as due to herbicide (Agent Orange) exposure, the Board finds that all notification and development action needed to fairly adjudicate this claim has been accomplished.

II. Service connection

As was noted in the Introduction section of this decision, the Veteran unfortunately died while this appeal was pending. In this case, the appellant has timely substituted to continue the claim started by the Veteran prior to his death. The Appellant is currently pursuing this appeal for the purpose of securing entitlement to accrued benefits should the service-connected benefits initially sought by the Veteran be awarded. 38 U.S.C.A. §§ 5121; 5121A; 38 C.F.R. § 3.1000.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated during service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303 . Such a determination requires a finding of current disability that is related to an injury or disease in service. *Watson v. Brown*, 4 Vet. App. 309 (1993); *Rabideau v. Derwinski*, 2 Vet. App. 141, 143 (1992). Service connection may be granted for a disability diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disability is due to disease or injury that was incurred or aggravated in service. 38 C.F.R. § 3.303(d) .

Absent affirmative evidence to the contrary, there is a presumption of exposure to herbicides (to include Agent Orange) for all Veterans who served in Vietnam during the Vietnam Era. See 38 U.S.C.A. § 1116(f) (West 2002) and 38 C.F.R. § 3.307(a)(6)(iii) (2011).

If a Veteran was exposed to a herbicide agent during active service, the following diseases shall be service-connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied: chloracne or other acneform diseases consistent with chloracne, Type 2 diabetes (also known as Type II or adult-onset diabetes mellitus), Hodgkin's disease, multiple myeloma, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, respiratory cancers (cancer of the lung, bronchus, larynx, or trachea) and soft-tissue sarcomas (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma). 38 C.F.R. § 3.309(e). VA has determined that there is no positive association between exposure to herbicides and any other condition for which it has not specifically determined that a presumption of service connection is warranted. See Notice, 61 Fed. Reg. 414,421(1996), see also 67 Fed. Reg. 121, 42,600 (June 24, 2002).

Effective August 31, 2010, VA has amended 38 C.F.R. § 3.309(e) to add hairy cell leukemia and other chronic B-cell leukemias, Parkinson's disease, and ischemic heart disease to the list of diseases associated with exposure to certain herbicide agents. The intended effect of this amendment is

to establish presumptive service connection for these diseases based on herbicide exposure.

In this case, the RO verified that the Veteran served in Vietnam; hence, exposure to herbicides (Agent Orange) is presumed. However, mere exposure is not sufficient to establish service connection. It must still be demonstrated that papillary thyroid carcinoma is the result of this exposure. In this regard, papillary thyroid carcinoma is not one of the disabilities that can be presumed to be the result of Agent Orange exposure. See 38 C.F.R. § 3.309(e). Therefore, the Agent Orange presumptive provisions do not provide a basis upon which to establish service connection for papillary thyroid carcinoma.

Nonetheless, the availability of presumptive service connection for a disability based on exposure to herbicides does not preclude a veteran from establishing service connection with proof of direct incurrence or aggravation in service. See *Stefl v. Nicholson*, 21 Vet. App. 120 (2007); see also *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

In this regard, the Veteran's service treatment records are negative for complaints, symptoms, findings or diagnosis of a thyroid disability.

Post-service medical evidence includes October 2008 VA medical records showing that the Veteran denied any thyroid problems. It was noted within the record that an August 2008 private CT of the neck revealed a suspicion for malignancy.

A November 2008 VA cytopathology record reflects a diagnosis of papillary thyroid carcinoma.

A December 2008 VA hospital discharge records reflect that the Veteran was admitted and a total thyroidectomy and left neck dissection was performed. He was discharged on December 16, 2008.

A March 2009 VA medical record reflects that the Veteran was assessed with metastatic thyroid papillary cancer, status post thyroidectomy and lymph node removal.

In a June 2009 private expert medical evaluation report, C. N. Bash, M.D., stated that he reviewed the Veteran's claims

file, to include his service and post-service medical records. Dr. Bash provided opinions which he said were all to a high degree of medical certainty, which would equate to a greater than 75 percent certainty. He opined that the Veteran's thyroid cancer was due to his exposure to Agent Orange in Vietnam that the Veteran had during his military service. He provided the basis for his opinion in great detail, to include reference to medical literature to support his opinion. Dr. Bash noted that the Veteran entered service fit for duty and was exposed to Agent Orange, which is known to cause carcinomas. He explained that the Vietnam and Agent Orange Institute of Medicine (IOM) books support a plausible biological mechanism. The toxicology section documents that four herbicides were used in Vietnam, one of which is known to affect the thyroid gland by way of reductions in thyroid hormone Thyroxin. These substances are known to cause oxidative stress in cells, which leads to chromosome abnormalities and mutations, which eventually leads to cancer. This process is well document in the literature and the Agent Orange IOM report, from which Dr. Bash quotes "... TCDD is carcinogenic and an extremely potent promoter of neoplasia in laboratory rats... cancers of the thyroid... have been seen..." He further opined that the Veteran did not have any other risk factors for his thyroid cancer and the lag time and interval between exposure to Agent Orange and carcinogeneous is appropriate. Based on the literature, Agent Orange has not been shown to be protective to the induction of thyroid cancer; therefore, it is more likely than not (more studies show a cancer causing effects than show protection) that Agent Orange caused the Veteran's thyroid cancer.

In a second letter from Dr. Bash in October 2009, he reiterated that it was his professional medical opinion that the Veteran's thyroid cancer was caused by his exposure to Agent Orange. The basis for his opinion was based on the IOM studies that he stated provide very good evidence that Agent Orange is a carcinogen. In addition, there are no available studies that show that Agent Orange does not cause thyroid cancer or that Agent Orange is somehow protective against the development of cancer.

The Board finds that the private medical opinions provided by Dr. Bash in June and in October 2009 constitute competent and probative evidence on the medical nexus question-based as it

was on review of the Veteran's documented medical history and a discussion of medical literature in support of his conclusions. See *Prejean v. West*, 13 Vet. App. 444, 448-49 (2000); *Guerrieri v. Brown*, 4 Vet. App. 467, 470-471 (1993). Significantly, moreover, there is no medical evidence to the contrary. Accordingly, by resolving all reasonable doubt in favor of the appellant, the Board concludes that the criteria for service connection for papillary thyroid carcinoma, claimed as due to herbicide (Agent Orange) exposure, are met. 38 U.S.C.A. § 5107(b); 38 CFR § 3.102.

ORDER

Service connection for papillary thyroid carcinoma, claimed as due to herbicide (Agent Orange) exposure, for accrued benefits purposes, is granted.

REMAND

The Board notes that the appellant, as substitute claimant seeking accrued benefits, is entitled to submit new evidence in support of the deceased Veteran's claim, and VA is required to assist her in securing additional evidence; see 38 U.S.C.A. § 5121A . See also VBA Fast Letter 10-30 (Aug. 10, 2010), page 2, stating VA is responsible for obtaining any additional evidence required and addressing notice or due process defects in the same manner as if the original claimant were still alive.

With regard to the claim for service connection for a left arm/shoulder disorder, claimed as secondary to surgery for papillary thyroid carcinoma, the Board finds that a remand for a VA medical opinion is warranted. In this regard, a December 2009 VA general surgery notes reflects that the Veteran was informed of the risks of thyroid neck surgery, including injury to the spinal accessory nerve to virtually all patients after neck dissection, but this usually improves with shoulder range of motion exercises. A March 2009 VA medical record reflects that the Veteran complained of left shoulder pain that began after thyroid surgery. An April 2009 VA medical record notes that x-rays of the shoulder showed advanced degenerative changes. A May 2009 VA medical record reflects that the Veteran was diagnosed with left

shoulder pain with suspected rotator cuff tendinitis and impingement syndrome secondary to neck surgery.

In a June 2009 letter, Dr. Bash stated that it was also his opinion that the Veteran should be assigned medical diagnostic codes for his left shoulder nerve damage, decreased range of motion of the left arm/shoulder and decreased muscle strength as they are all secondary to his service caused thyroid cancer and/or surgical complications of his thyroid cancer surgery. However, Dr. Bash did not provide a rationale for his opinion. Furthermore, he did not address the significance of x-rays showing that the Veteran had advanced degenerative changes in his shoulders.

In light of the above, the Board is of the opinion that it has insufficient medical evidence of record to make a decision on the claim for secondary service connection and believes it is necessary to have a VA examiner render an opinion regarding the etiology and onset of any left shoulder disability. See *McLendon v. Nicholson*, 20 Vet. App. 79 (2006); see also 38 U.S.C.A. § 5103A(d)(2), 38 C.F.R. § 3.159(c)(4)(i).

A temporary total disability rating (100 percent) will be assigned without regard to other provisions of the rating schedule when it is established by report at hospital discharge (regular discharge or release to non-bed care) or outpatient release that entitlement is warranted under 38 C.F.R. § 4.30, effective the date of hospital admission or outpatient treatment and continuing for a period of one, two, or three months from the first day of the month following such hospital discharge or outpatient release. 38 C.F.R. § 4.30.

A total rating will be assigned under 38 C.F.R. § 4.30 if treatment of a service-connected disability resulted in (1) surgery necessitating at least one month of convalescence; (2) surgery with severe post-operative residuals such as incompletely healed surgical wounds, stumps of recent amputations, therapeutic immobilization of one major joint or more, application of a body cast, or the necessity for house confinement, or the necessity for continued use of a wheelchair or crutches; or (3) immobilization by cast, without surgery, of one major joint or more. *Id.*

Extensions of one, two, or three months beyond the initial three months may be made by applying the same criteria. *Id.*

The Court has held that notations in the medical record as to the Veteran's incapacity to work after surgery must be taken into account in the evaluation of a claim brought under the provisions of 38 C.F.R. § 4.30. *Felden v. West*, 11 Vet. App. 427, 430 (1998); *Seals v. Brown*, 8 Vet. App. 291, 296- 297 (1995). The Court has defined convalescence as "the stage of recovery following an attack of disease, a surgical operation, or an injury" and recovery as "the act of regaining or returning toward a normal or healthy state." *Felden v. West*, 11 Vet. App. 427, 430 (1998). Furthermore, the Court has noted that the term "convalescence" does not necessarily entail in-home recovery.

In a June 2009 letter, the Veteran stated that he was unable to return to work on a full-time basis until February 23, 2009. Despite such contention, the evidence of record does not contain sufficient detail to determine whether the Veteran's papillary thyroid carcinoma surgery required a period of convalescence, and if so, when the period of convalescence would end. Hence an opinion is required by a VA examiner with the appropriate expertise.

The Board also notes that the VA medical records associated with the claims file are incomplete. In this regard, the December 2008 hospital discharge report from the Miami VA medical center (VAMC) notes that the Veteran was to be seen in the General Surgery Clinic on December 22, 2008; however, this record is not associated with the claims file. In fact, VA medical records from December 16, 2008 to January 20, 2009, and from August 2009 to the present are not associated with the claims file. See *Dunn v. West*, 11 Vet. App. 462 (1998); *Bell v. Derwinski*, 2 Vet. App. 611 (1992). Hence, the RO/AMC must obtain all outstanding medical records from the Miami and the West Palm Beach VAMCs, dated from December 16, 2008 to January 20, 2009 and from August 2009 to the present.

Accordingly, these matters are REMANDED for the following actions:

1. The RO/AMC should send to the appellant a letter requesting that she provide sufficient information, and if

appropriate period of time should be allowed for response before the claims file is returned to the Board for further appellate consideration.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2010).

JONATHAN B. KRAMER
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs