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On appeal from the
Department of Veterans Affairs Regional Office in
Indianapolis, Indiana

THE ISSUE

Entitlement to service connection for the cause of the veteran's death.

REPRESENTATION

Appellant represented by: Kathy A. Leiberman, Esquire

WITNESSES AT HEARING ON APPEAL

Appellant and Sgt. S.H.

ATTORNEY FOR THE BOARD

A. Shawkey, Counsel

INTRODUCTION

The veteran served on active duty from October 1944 to March 1946, October 1946 to September 1947 and December 1948 to November 1966. He died in September 1995. The appellant is his surviving spouse.

In a February 1996 decision by the Indianapolis, Indiana Regional Office (RO) of the Department of Veterans Affairs (VA), the RO denied service connection for the cause of the veteran's death. The appellant appealed this decision to the Board of Veterans' Appeals (Board). In August 1999, the Board denied service connection for the cause of the veteran's death. The appellant appealed that decision to the United States Court of Appeals for Veterans Claims (Court). In February 2001, pursuant to a Joint Motion for Remand, the Court ordered that the Board decision denying service connection for the cause of the veteran's death be vacated and the matter remanded for readjudication in light of the enactment of the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000).

FINDINGS OF FACT

1. All identified relevant evidence necessary for

disposition of the appeal has been obtained.

2. The veteran died in September 1995, at age 79. The death certificate listed the causes of death as pseudomonas septicemia, due to or as a consequence of infra-abdominal sepsis, adult respiratory distress syndrome and respiratory failure. Other significant conditions that contributed to death included congestive heart failure, aortic stenosis and coronary artery disease.

3. At the time of death, service connection was in effect for thrombophlebitis of the left leg, residuals of thrombophlebitis of the right leg with enlargement and pigmentation, epidermophytosis of the feet with onychomycosis, hiatus hernia with history of duodenal ulcer, chronic allergic vasomotor rhinitis, malaria, and osteoarthritis of the spine. He was assigned a combined rating of 70 percent effective in October 1970.

4. The veteran's fatal pseudomonas syndrome and respiratory failure is related to his service-connected deep venous thrombophlebitis.

CONCLUSION OF LAW

Resolving all doubt in the appellant's favor, a disease or injury of service origin contributed substantially and materially to the cause of the veteran's death. 38 U.S.C.A. §§ 1310, 5107(b) (West 1991); 38 C.F.R. § 3.312 (2001).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As outlined in the introductory paragraph of this decision, pursuant to a Joint Motion for Remand, the United States Court of Appeals for Veterans Claims in February 2001 vacated the Board's August 1999 decision denying service connection for the cause of the veteran's death based on the enactment of the Veterans Claims Assistance Act of 2000 (VCAA). To implement the provisions of this liberalizing law, VA promulgated regulations published at 66 Fed. Reg. 45,620 (Aug. 29, 2001) (to be codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a)).

The Act and implementing regulations essentially eliminate the requirement that a claimant submit evidence of a well-grounded claim, and provides that VA will assist a claimant in obtaining evidence necessary to substantiate a claim, but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim. It also includes new notification provisions. Specifically, it requires VA to notify the claimant and representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will

attempt to obtain on behalf of the claimant.

Following the Court's February 2001 order vacating the Board's August 1999 decision, additional medical evidence was submitted to the Board regarding the issue on appeal. Accordingly, the Board is satisfied that the facts relevant to this claim have been properly developed and there is no further action which should be undertaken to comply with the provisions of the VCAA or the implementing regulations. This is especially so when considering the favorable decision that follows. See 38 U.S.C.A. §§ 5103, 5103A (West Supp. 2001) (to be codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a)).

Background

The Board has reviewed the voluminous medical and lay evidence of record, but will confine the discussion to the evidence that relates to the issue of whether the veteran's service-connected disabilities are related to his death. See Gonzalez v. West, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000); Timberlake v. Gober, 14 Vet. App. 122, 128-30 (2000).

The veteran's service medical records show that he was found to be medically unfit for further military service in October 1966 due, in pertinent part, to venous insufficiency, chronic, right lower leg, secondary to old thrombophlebitis, with minimal objective skin stasis chances, symptomatic despite elastic support; and, pulmonary emboli, multiple, secondary to diagnosis #1, suspected, not proven, requiring chronic anticoagulation therapy. The veteran's medication included Coumadin which he began taking in service, and Prednisone which he began taking in June 1989 for polymyalgia rheumatica (diagnosed in May 1989).

The veteran died in September 1995. His death certificate lists the immediate cause of death as pseudomonas due to infra-abdominal sepsis, adult respiratory distress syndrome and respiratory failure. Other significant conditions that contributed to death were congestive heart failure, aortic stenosis and coronary artery disease. An autopsy was not performed.

At the time of the veteran's death, he was service-connected for: thrombophlebitis of the left leg, residuals of thrombophlebitis of the right leg with enlargement and pigmentation, epidermophytosis of the feet with onychomycosis, hiatus hernia and history of duodenal ulcer, chronic allergic vasomotor rhinitis, malaria, and osteoarthritis of the spine. He was assigned a combined rating of 70 percent, effective in October 1970.

On record is an April 1996 statement from the veteran's treating physician, Gary M. Ayres, M.D., who noted that the veteran died of sepsis and had been treated with Coumadin for a history of chronic deep venous thrombosis involving his lower extremities. He also noted that the veteran had rheumatoid arthritis and was debilitated from atherosclerotic disease. He opined that "all of this contributed to [the veteran's] death."

Also on record is an opinion by a VA physician in December 1997 who, after reviewing the veteran's medical records, concluded by stating that he could "see no direct causal affect of [the veteran's] demise which [could] be traced to any of his service-connected conditions." He said that he saw "no evidence which would support the claim that Coumadin therapy in anyway lead to the [veteran's] demise," reasoning that the veteran's final terminal outcome stemmed primarily from infection due to intra-abdominal sepsis for which he had 'no active duty service-connections.'" He went on to say that there was no evidence of uncontrolled bleeding either during the surgical procedure or thereafter which could be expected due to the Coumadin effect. He also noted that the veteran had been treated with prednisone prior to developing his jejunal diverticulum rupture due to prednisone and that while it was possible for high does prednisone therapy to cause gastric ulceration and perforation due to local anti-inflammatory affects, "it [was] unclear that any evidence would support the claim of jejunal diverticulum rupture due to prednisone."

In October 2001, the veteran's attorney arranged for the veteran's records, including post-service medical records, rating decisions, physician statements and medical literature review, to be reviewed by Craig N. Bash, M.D., a neuro-radiologist. Based on his record review, Dr. Bash concluded that the veteran's pseudomonas sepsis was caused by his service-connected deep venous thrombosis (DVT) and that his service-connected medications of Coumadin and/or NSAID's induced his intra-abdominal abscess/sepsis. He went on to opine that the veteran's pseudomonas sepsis and his intra-abdominal abscess contributed directly and significantly to his demise. He said that the veteran's sepsis was caused by his service-connected DVT induced chronic leg ulcers or due to his service-connected medication (Coumadin and/or NSAID) and cited to medical text to support his opinion. He also provided the following rationale:

The [veteran] is service connected for his DVT---the DVT's caused to developed [sic] venous stasis and ulceration's in his right leg---these ulcerations led to pseudomonas septicemia which in turn lead to the new so called ecthyma's gangrenosum leg ulcers and pseudomonas septicemia resulting in his death. An additional major contributory of death was the fact that [the veteran] was being treated with service connected coumadin, NSAIDS and non-service connected steroids. This treatment with coumadin, steroids and NSAIDS likely led to his GI ulcer/abscess/sepsis.---This abdominal abscess directly contributed to his death as documented on his death certificate. This opinion is in agreement with the opinion of Dr. Ayers who stated that the [veteran's] thrombosis, coumadin and rheumatoid

arthritis and heart disease all
contributed to his death.

Analysis

When any veteran dies from a service-connected disability, the veteran's surviving spouse, children and parents are entitled to dependency and indemnity compensation. 38 U.S.C.A. § 1310 (West 1991). To establish service connection for the cause of the veteran's death, the evidence must show that a disability incurred in or aggravated by service either caused or contributed substantially or materially to cause death. 38 U.S.C.A. § 1310; 38 C.F.R. § 3.312 (2001).

For a service-connected disability to be the principal (primary) cause of death, it must singly or with some other condition be the immediate or underlying cause or be etiologically related. For a service-connected disability to constitute a contributory cause, it must contribute substantially or materially, it is not sufficient to show that it causally shared in producing death, but rather it must be shown that there was a causal connection.
38 U.S.C.A. § 1310 (West 1991); 38 C.F.R. § 3.312 (2001).

VA's decision-making responsibility includes determining whether the evidence supports the claim or is in relative equipoise, with the appellant prevailing in either event, or whether a fair preponderance of the evidence is against the claim, in which case the claim is denied. Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990).

In this case, there is evidence that both supports a link between the veteran's service-connected disabilities or medication therefrom and his death, and evidence that negates such a link. The Court has offered guidance on the assessment of the probative value of medical opinion evidence. The Court has instructed that it should be based on the medical expert's personal examination of the patient (if applicable), the physician's knowledge and skill in analyzing the data, and the medical opinion that the physician reaches. Guerrieri v. Brown, 4 Vet. App. 467, 470-71 (1993). Further, the Board is charged with the duty to assess the credibility and weight given to evidence. Klekar v. West, 12 Vet. App. 503, 507 (1999); Wood v. Derwinski, 1 Vet. App. 190, 193 (1991). Indeed, the Court has declared that in adjudicating a claim, the Board has the responsibility to do so. Bryan v. West, 13 Vet. App. 482, 488-89 (2000); Wilson v. Derwinski, 2 Vet. App. 614, 618 (1992). In doing so, the Board is free to favor one medical opinion over another, provided it offers an adequate basis for doing so. Evans v. West, 12 Vet. App. 22, 30 (1998); Owens v. Brown, 7 Vet. App. 429, 433 (1995).

The evidence that supports this claim includes an April 1996 statement from the veteran's treating physician, Dr. Ayers, who said that the veteran's use of Coumadin for his service-connected chronic DVT, in part, contributed to his death.

The supportive evidence also includes a recent statement from Craig N. Bash, M.D., who reviewed the veteran's records and

opined that his fatal pseudomonas sepsis was caused by his service-connected DVT. In support of his opinion, Dr. Bash cited to medical text, as well as provided his rationale showing a sequential chain of events between the veteran's service-connected DVT and death. Specifically, he proffered that the veteran's service-connected DVT caused venous stasis and ulcerations to develop in his right leg which led to pseudomonas septicemia which, in turn, led to the new so called ecthyma's gangrenosum leg ulcers and pseudomonas septicemia, resulting in death. He also provided a second theory of entitlement by stating that the veteran's service-connected medications of Coumadin and/or NSAIDS induced his intra-abdominal abscess/sepsis and that this condition, together with his Pseudomonas sepsis, contributed directly and significantly to his demise.

In contrast, a VA physician in December 1997 opined that "[he could] see no direct causal affect of [the veteran's] demise which [could] be traced to any of his service-connected conditions." Like Dr. Bash's opinion, this opinion is based on a review of the veteran's medical records. The VA examiner reasoned that during the veteran's terminal hospitalization where he underwent a surgical procedure for a ruptured abdominal viscera, there was no evidence of uncontrolled bleeding either during the surgery or thereafter which could be expected due to the Coumadin effect. He went on to say that "[he saw] no evidence which would support the claim that Coumadin therapy in anyway lead to the [veteran's] demise." He also said that while it was possible for high dose prednisone therapy to cause gastric ulceration and perforation due to local anti-inflammatory affects, it was "unclear that any evidence would support the claim of jejunal diverticulum rupture due to prednisone."

Notwithstanding the opinion of Dr. Ayers, the opinions by both the VA examiner and Dr. Bash are based on a review of the veteran's medical records and are supported by adequate rationale. Consequently, this places the evidence in equipoise as to the matter of whether a disability incurred in or aggravated by the veteran's service, namely DVT, either caused or contributed substantially or materially to cause his death. In light of this evidence and conferring the benefit of the doubt in favor of the appellant, her claim for service connection for the cause of the veteran's death is granted. 38 U.S.C.A. §§ 1310, 5107(b) (West 1991); 38 C.F.R. § 3.312 (2001); Gilbert, supra.

ORDER

Service connection for the cause of the veteran's death is granted; subject to the law and regulations governing the payment of monetary benefits.

RENÉE M. PELLETIER
Member, Board of Veterans' Appeals

IMPORTANT NOTICE: We have attached a VA Form 4597 that tells you what steps you can take if you disagree with our decision. We are in the process of updating the form to reflect changes in the law effective on December 27, 2001. See the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (2001). In the meanwhile, please note these important corrections to the advice in the form:

? These changes apply to the section entitled "Appeal to the United States Court of Appeals for Veterans Claims." (1) A "Notice of Disagreement filed on or after November 18, 1988" is no longer required to appeal to the Court. (2) You are no longer required to file a copy of your Notice of Appeal with VA's General Counsel.

? In the section entitled "Representation before VA," filing a "Notice of Disagreement with respect to the claim on or after November 18, 1988" is no longer a condition for an attorney-at-law or a VA accredited agent to charge you a fee for representing you.