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On appeal from the  
Department of Veterans Affairs Regional Office in St. Paul,  
Minnesota

THE ISSUE

Entitlement to service connection for the cause of the  
veteran's death, as due to Agent Orange exposure.

REPRESENTATION

Appellant represented by: Sean Kendall, Attorney at Law

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

J. Fussell, Counsel

INTRODUCTION

The veteran served on active duty from April 1969 to March 1971. He served in the Republic of Vietnam from July 1969 to September 1970. He died in July 1998. The appellant is his widow.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from the October 1999 rating decision of the Department of Veterans Affairs (VA) Regional Office in St. Paul, Minnesota (RO). The Board remanded this matter to the RO in May 2001 for additional development. An April 2004 Board decision denied service connection for the cause of the veteran's death but on appeal to the United States Court of Appeals for Veterans Claims (Court) that decision was vacated and the case was remanded to the Board.

Since the remand by the Court, the veteran's original claim file has been lost and his claim file has been rebuilt. However, because the claim is being allowed and the Board as rebuilt the claim file, based on the Certification of the Record to the Court; the case does not have to be first remanded to the RO for reconstruction of the claim file and initial consideration of new evidence received since the April 2004 Board decision.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable

disposition of this appeal has been obtained.

2. The veteran died in July 1998, at age 50, and the death certificate listed the immediate cause of his death as metastatic squamous cell cancer of the head and neck.

3. At the time of his death, the veteran was not service connected for any disabilities.

4. With the favorable resolution of doubt the medical evidence shows that the veteran's cancer originated in the larynx.

#### CONCLUSION OF LAW

The criteria for service connection for the cause of the veteran's death have been met. 38 U.S.C.A. §§ 1103, 1110, 1112, 1113, 1310, 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.309, 3.312 (2004).

#### REASONS AND BASES FOR FINDINGS AND CONCLUSION

##### The Veterans Claims Assistance Act (VCAA)

The VCAA became effective on November 9, 2000, and describes VA's duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2004). Upon receipt of a complete or substantially complete application, VA must inform the claimant of information and medical or lay evidence not of record: (1) necessary to substantiate the claim; (2) that VA will seek to obtain; (3) that the claimant is expected to provide; and (4) must ask the claimant to provide any evidence in her or his possession that pertains to the claim in accordance with 38 C.F.R. § 3.159(b)(1). 38 U.S.C.A. § 5103(a) (West 2002 & Supp. 2005); 38 C.F.R. § 3.159(b) (2004); *Charles v. Principi*, 16 Vet. App. 370, 373-74 (2002); *Quartuccio v. Principi*, 16 Vet. App. 183, 186-87 (2002). See also *Valiao v. Principi*, 17 Vet. App. 229, 332 (2003) (implicitly holding that RO decisions and statements of the case may satisfy this requirement).

The Court remanded the case to the Board for compliance with the VCAA. However, in light of the favorable outcome with respect to the claim for service connection for the cause of the veteran's death, there can be no possible prejudice to the appellant in going ahead and adjudicating this claim.

Accordingly, no further development is required to comply with the VCAA or the implementing regulations. And the appellant is not prejudiced by the Board deciding the appeal without first remanding the case to the RO. See *Bernard v. Brown*, 4 Vet. App. 384 (1993).

#### II. Governing Laws and Regulations and Legal Analysis

To establish service connection for the cause of a veteran's death, the evidence must show that a disability that either was incurred in or aggravated by service, or which was proximately due to or the result of a service-connected condition, was either a principal or contributory cause of death. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1310; 38 C.F.R. §§ 3.303, 3.307, 3.309, 3.310(a), 3.312(a); see also *Allen v. Brown*, 7 Vet. App. 439, 448 (1995).

For a service-connected disability to be the principal cause of death, it must singularly or jointly with some other condition be the immediate or underlying cause of death, or be etiologically related thereto. 38 C.F.R. § 3.312(b). For a service-connected disability to be a contributory cause of death, it must be shown that it contributed substantially or materially, that it combined to cause death, or aided or lent assistance to the production of death. 38 C.F.R. § 3.312(c).

Furthermore, 38 C.F.R. § 3.312(c)(4) provides that there are primary causes of death which by their very nature are so overwhelming that eventual death can be anticipated irrespective of coexisting conditions. But, even in such cases, there is for consideration whether there may be a reasonable basis for holding that a service-connected condition was of such severity as to have had a material influence in accelerating death. In this particular situation, though, it would not generally be reasonable to hold that a service-connected condition accelerated death unless such condition affected a vital organ and was, itself, of a progressive or debilitating nature.

Service connection may be presumed for residuals of exposure to Agent Orange for veterans who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam War era, and have a disease listed at 38 C.F.R. § 3.309(e) (2004). See 38 C.F.R. § 3.307(a)(6)(iii) (2004). The diseases afforded this presumption include chloracne or other acneform disease consistent with chloracne, Hodgkin's disease, multiple myeloma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, respiratory cancers (cancer of the lung, bronchus, larynx, or trachea), and soft-tissue sarcoma.

#### Background

Pursuant to the law-of-the-case doctrine, it is the responsibility of the Board to follow the findings, holdings, and instructions contained in the court's mandate. *Aronson v. Brown*, 7 Vet. App. 153, 159 (1994). In the November 2003 Order the Court stated that:

The appellant is the widow of deceased veteran [] who served on active duty from April 1969 to March 1971, including service in Vietnam. [] In January 1998, the veteran's stomach and the left lobe of his liver were removed as a result of squamous cell carcinoma. [] On March 9, 1998, a cancerous mass was discovered in the region of the veteran's tonsils and pharynx. [] In medical records from the Mayo Clinic in March 1998, the cancerous mass

was described as 'involving the right tonsil beginning at the level of the soft palate and nasopharynx extending down in to [sic] the oropharynx and hypopharynx. [] It was also noted that the mass had 'infiltrated through the pharyngeal wall into the larynx.' Id. The tonsil was believed to be the "likely original primary site' of the cancer [] and the veteran was diagnosed with stage IV tonsillar cancer []. In June 1998, the veteran filed a claim for service connection for 'cancer of [the] oropharynx, hypopharynx and larynx' []. In July 1998, the veteran was examined at the Mayo Clinic and diagnosed with 'stage IV squamous cell carcinoma of the pharynx [with metastasis] to [the] lymph nodes in the neck and to organs within the upper abdomen.' [] Metastasis is defined as 'the transfer of disease from one organ or part to another not directly connected with it.' DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1023 (28th ed.1994). On July 29, 1998, the veteran died at the age of 50. [] The veteran's death certificate listed the cause of death as 'metastatic squamous cell cancer of [the] head and neck.' Id. At the time of his death, the veteran was not service[-]connected for any disabilities.

The Court further stated:

In October 1998, Dr. Scott Okuno, an oncologist who treated the veteran at the Mayo Clinic [], wrote that the veteran had 'evidence of tonsillar squamous cell carcinoma that was metastatic to the stomach' []. In November 1998, Dr. Robert Niedringhaus, the veteran's chemotherapy specialist [], stated that 'physicians at the Mayo Clinic felt [the veteran's cancer] had likely arisen in the tonsillar, throat or larynx area, probably more likely in the region of the tonsil' []. In December 1998, Dr. Jordan Weiner, an ear nose and throat specialist who had examined the veteran at the Mayo Clinic [], wrote that 'although an exact origin of [the veteran's cancer] cannot be precisely defined, the most likely origin was in the oropharynx or hypopharynx' []. Although Dr. Weiner noted that the veteran's cancer had involved all levels of the pharynx and the supraglottic larynx, he stated that 'an origin in the larynx would be unlikely given its appearance and extent.' Id.

The Court further stated that following the May 2001 remand of the case:

In August 2001, [] a VA cardiologist, reviewed the veteran's medical records and after consulting with otolaryngologists he reported that the 'evidence does not indicate that the veteran's cancer originated in the larynx.' []. On October 18, 2001, the appellant was afforded a hearing

before a decision review officer. [] At the hearing the appellant asserted that the opinion offered by [the VA cardiologist] did not comply with the instructions of the Board because he is a cardiologist not an oncologist, and his opinion did not specifically state whether it is 'at least as likely as not' that the veteran's cancer originated in the larynx. [] In December 2001, [] a VA ear, nose and throat oncologist, and [another VA physician who was], a VA radiation oncologist, reviewed the veteran's claims file and opined that the 'primary site [of the veteran's cancer] was most likely the oropharynx.'

The Court also noted that on appeal:

[T]he appellant asserts that Office of the General Counsel Precedent Opinion (VAOPGCPREC) 18- 97 (May 2, 1997) is inconsistent with the plain meaning of 38 U.S.C. § 1116(a)(2)(F). VAOPGCPREC 18-97 holds that presumptive service connection cannot be established for cancers listed as being associated with Agent Orange exposure if the cancer developed as the result of metastasis of a cancer not listed as being associated with Agent Orange exposure.

However, because the case was remanded for VCAA compliance, the Court did not address this particular argument but, rather, instructed the Board to address the matter, if necessary.

Since the remand by the Court, the veteran, via his attorney, has submitted a September 2004 statement from Dr. Bash. Dr. Bash stated that he had reviewed the veteran's claim file for the purpose of rendering a medical opinion concerning the veteran's fatal cancer. He stated that he had special knowledge in the area of the head and neck cancers as a Board Certified "sub specialist" and was a Senior Member of the American Society of Neuro-Radiology (ASNR). Dr. Bash opined that the veteran's exposure to Agent Orange "likely caused his oropharynx cancer."

Dr. Bash noted that the record contained several opinions that the veteran's cancer originated in the "right tonsillar (oropharynx) area." The tumor apparently developed local spread into the larynx, causing death after metastasizing, according to the opinions of Dr. Okuno, Neidringhaus, Weine, and VA physicians.

Dr. Bash noted that the VA physicians in December 2001 did not make a specific etiology statement concerning the cause of the primary tumor but simply stated that it originated in the "oropharynx", that the larynx was without mucosal lesions, and that Agent Orange had not been implicated [in such cases] but that tobacco and alcohol exposure were associated with increased malignant potential at both sites. Dr. Bash stated that the nose, mouth, throat, and lungs were all bordered by an epithelium that was a version of modified respiratory epithelium. This epithelium was exposed to the airborne and water born toxins of the environment, such as

from Agent Orange which was a powerful carcinogen. Medical committees, formed at VA behest, at a 95 percent confidence level, had found highly suggestive associations between Agent Orange exposure and laryngeal and lung cancers. It was not medically logical, pathophysiologically, to not also consider the nasopharynx and oropharynx to be at high risk for the development of cancer secondary to Agent Orange because these regions were adjacent to the larynx and had similar types of mucosa and, so, were exposed to the same carcinogens, but at likely higher concentrations due to first exposure, as the larynx and lungs.

Dr. Bash felt that the VA medical committees should not have used a 95 percent medical causation standard level of confidence because it was overly restrictive in light of the fact that the VA legal standard for medical causation was one of "likely as not" or the "50% - 50%" level. Dr. Bash felt that the VA medical committees should also have used this lower standard.

Dr. Bash felt that Agent Orange "likely" caused the veteran's oropharynx cancer because (1) he was exposed to Agent Orange and the mucosa between the nasopharynx-oropharynx-larynx and lungs was continuous; (2) he had an oropharynx tumor which caused his death by local metastasis; (3) adjacent mucosal surfaces had documented suggestive evidence of an association between Agent Orange and carcinoma formation; and (4) literature supported an association between Agent Orange exposure and the development of oropharynx cancers.

Dr. Bash also reported that a 1997 study had found the "[o]ral-cavity and pharynx, in 26 cases, had a relative risk of 1.1. It should be noted that a relative risk of 1 is the definition of as likely as not therefore a relative risk of 1.1 meets the more likely than not legal standard for causation."

Although the December 2001 VA physicians had stated that "Agent Orange [had] not been implicated in the later primary site malignancies (pharynx)" Dr. Bash disagreed because (1) the opinion was purely conclusory and without any supporting documentation; (2) the physicians did not provide any literature to support their opinion; (3) the physicians did not comment on the IOM's Agent Orange publications; (4) the physicians did not comment on the supportive study done in 1997; and (5) the physicians did not provide a clear etiology of the veteran's tumor in terms of "as likely as not" but simply stated that the tumor originated in the oropharynx.

#### Analysis

Initially, the Board notes that VA has found that nasopharyngeal cancer is not associated with inservice exposure to herbicides. 68 Fed. Reg. 27630 - 27641, 27632 (May 20, 2003).

In this case, there is sufficient evidence to conclude that the veteran's cancer originated in the right tonsil and then infiltrated into adjacent areas before metastasizing to other

areas, including the stomach.

The Board need not determine whether VAOGCPREC 18-97 is inconsistent with 38 U.S.C.A. § 1116(a)(2)(F) because, to the contrary, the Board will rely on the definition of "metastasize" within that opinion to conclude that the cancer originated within the larynx. Specifically, VAOGCPREC 18-97 stated that "[i]t is well established that a primary cancer of one organ may metastasize into other organs, causing secondary tumors in those other organs. 'Metastasis' is 'the transfer of disease from one organ or part to another not directly connected with it.' Dorland's Illustrated Medical Dictionary 1023 (28th ed. 1994)."

Here, however, the cancer originated in the right tonsil which is a part of the pharynx. It then "infiltrated" the adjacent tissue within the larynx. Because the pharynx and the larynx are "directly connected", as indicated by Dr. Bash, this spread was not the type of metastasis addressed in VAOGCPREC 18-97. In this regard, nasopharyngeal cancers have been determined by VA not to be associated with inservice herbicide exposure. However, in this case, the veteran did not have "nasopharyngeal" cancer. Accordingly, the veteran's cancer is not excluded by the determination published by VA at 68 Fed. Reg. 27630 - 27641, 27632 on May 20, 2003.

So, the veteran's tonsillar cancer having infiltrated but not metastasized to the larynx, and having metastasized only after having infiltrated the larynx, the Board concludes that service connection for the cause of the veteran's death is warranted.

#### ORDER

The claim for service connection for the cause of the veteran's death is granted.

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WARREN W. RICE, JR.  
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs