

Citation Nr: 0201281 Decision Date: 02/08/02 Archive Date: 02/20/02 DOCKET NO. 95-20 914 ) DATE ) ) On appeal from the Department of Veterans Affairs Regional Office in Oakland, California THE ISSUE Entitlement to service connection for the cause of the veteran's death. REPRESENTATION Appellant represented by: California Department of Veterans Affairs WITNESS AT HEARING ON APPEAL Appellant ATTORNEY FOR THE BOARD Artur F. Korniluk, Counsel INTRODUCTION The veteran had active service from January 1946 to March 1947, and from December 1950 to May 1973; he died in March 1994. The appellant is his surviving spouse. This matter comes to the Board of Veterans' Appeals (Board) from the Department of Veterans Affairs (VA) Oakland Regional Office (RO) July 1994 decision which denied service connection for the cause of the veteran's death. FINDINGS OF FACT 1. The veteran died in March 1994 due to cholangiocarcinoma; he was exposed to Agent Orange during his service in Vietnam from 1962 to 1963. 2. Medical evidence of record shows that his fatal cholangiocarcinoma developed as a result of exposure to Agent Orange. CONCLUSION OF LAW The veteran's Agent Orange exposure in Vietnam contributed substantially and materially to cause his death. 38 U.S.C.A. §§ 1110, 1310, 5107(b) (West 1991); 38 C.F.R. §§ 3.102, 3.312 (2001). REASONS AND BASES FOR FINDINGS AND CONCLUSION During this appeal, the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000), was enacted providing new statutory requirements regarding notice to claimants and their representatives and specified duties to assist in the development of a claim. Recently, regulations implementing VCAA were published as a final rule. See 66 Fed. Reg. 45,630 (Aug. 29, 2001) (to be codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a)). On review of the claims folder, the Board finds that all required notice and development action specified in VCAA and the implementing regulatory changes have been complied with in this appeal. The duty to assist under the new statute has been fulfilled as all the evidence and records identified by the appellant as plausibly relevant to her pending claim have been collected for review. The Board is satisfied that the appellant has been adequately assisted in the development of her claim, and that there are no outstanding pertinent records which the RO has not obtained or attempted to obtain. No further assistance is needed to comply with the requirements of the new law

regarding development of the appellant's claim. Service connection may be allowed for a chronic disability, resulting from an injury or disease, which is incurred in or aggravated by the veteran's period of active service. 38 U.S.C.A. §§ 1110, 1131 (West 1991). To establish service connection for the cause of the veteran's death, it must be shown that a disability incurred in or aggravated by service either caused or contributed substantially or materially to the cause of death. 38 U.S.C.A. § 1310. In determining whether a service-connected disability contributed to death, it must be shown that it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death. Service-connected diseases or injuries involving active processes affecting vital organs should receive careful consideration as a contributory cause of death, the primary cause being unrelated, from the viewpoint of whether there were resulting debilitating effects and general impairment of health to an extent that would render the person materially less capable of resisting the effects of other disease or injury primarily causing death. 38 C.F.R. § 3.312(c)(1), (3).

When, after consideration of all of the evidence and material of

record in an appropriate case before VA, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 C.F.R. §§ 3.102; see also *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). When a law or regulation changes after a claim has been filed or reopened, but before the administrative or judicial appeal process has been concluded, the version most favorable to the claimant will apply. See *Karnas v. Derwinski*, 1 Vet. App. 308, 313 (1991). Prior to December 27, 2001, 38 U.S.C.A. § 1116 provided that a veteran who, during active service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and has a disease listed in 38 U.S.C.A. § 1116(a)(2) (chloracne or other acneform disease consistent with chloracne (if the disease becomes manifest to a compensable degree within

one year after the last date on which the veteran was exposed to an herbicide agent), Hodgkin's disease, multiple myeloma, non-Hodgkin's lymphoma, acute and subacute peripheral neuropathy, porphyria cutanea tarda, prostate cancer, respiratory cancers, and soft-tissue sarcoma), shall be presumed to have been exposed during such service to an herbicide agent absent affirmative evidence to establish that he was not exposed to such agent during service. Effective December 27, 2001, the law was amended by adding diabetes mellitus type 2 to the list of chronic diseases presumed to be associated with Agent Orange exposure, and by conceding exposure to herbicides (including Agent Orange) for all veterans who had requisite service in Vietnam during the Vietnam Era, regardless of whether they develop one or more of the presumptive diseases listed in 38 U.S.C.A. § 1116(a)(2) (unless there is affirmative evidence to establish that a veteran was not exposed to any such agent during service). Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (2001) (to be codified at 38 U.S.C.A. § 1116). This new standard is more favorable to the appellant; thus, it will address the issue on appeal on this basis. Karnas, supra. The evidence shows that the veteran died on March [redacted], 1994 at age 66. The death certificate lists the immediate cause of his death as cholangiocarcinoma due to exposure to Agent Orange; a coroner's report indicates that the veteran's death occurred as a result of accidental injury during service in Southeast Asia in the 1960s, specifically consisting of exposure to Agent Orange during the Vietnam war. During the veteran's lifetime, service connection was in effect for total knee replacement of both knees, each rated 60 percent since October 1990, hemorrhoids, and post excision scar of the mid-back, each rated zero percent since October 1986; the combined rating of the service-connected disabilities was 90 percent since October 1990 (service connection for each of the above disabilities was granted by RO decision in April 1987; each knee disability was assigned a 30 percent rating, and hemorrhoids and post excision scar were each assigned a zero percent rating; the rating of the service-connected disabilities was periodically adjusted to reflect the severity of impairment resulting therefrom). The veteran's service medical records reveal no report or clinical finding of an early manifestation of cholangiocarcinoma. His service

records show that he served in an isolated location in Vietnam from June 1962 to May 1963, having been stationed previously at Tan Son Nhut; his military specialty was air freight specialist. Post service medical records from August 1975 to February 1991 (including periodic VA compensation and pension examinations) document intermittent treatment for the veteran's

service-connected knee disabilities, as well as for numerous other nonservice-connected symptoms and impairment (including gastrointestinal impairment). On social survey in May 1989, he indicated that he was involved in handling and transporting Agent Orange in Vietnam, noting that he often came in direct contact with the substance when it spilled from its containers; he was not aware of any adverse health effect he may have had from such Orange exposure (and he had not participated in the VA Agent Orange screening program), but he reported recurrent symptoms including "severely upset stomach" since service. A June 1989 gallbladder ultrasound study was normal. Private medical records and records from a U.S. Air Force medical facility, from February 1991 to March 1994, document treatment for various symptoms and illness, including gastrointestinal impairment and abdominal pain, discomfort, nausea, and vomiting; during treatment in February 1994, it was suspected that the veteran had liver dysfunction with jaundice. Extensive clinical studies produced a diagnosis of cholangiocarcinoma; on February 18, 1994, exploratory laparoscopy with abdominal lavage was performed; he died on March [redacted], 1994. On March 30, 1994, a private physician who treated the veteran during his terminal illness (who also signed the death certificate) indicated that the veteran died of cholangiocarcinoma, that he was exposed to Agent Orange in Vietnam, and that Agent Orange was known to cause tumors at various sites of human body. She opined that the veteran's cholangiocarcinoma probably developed as a result of Agent Orange exposure. An April 1994 coroner's report, prepared based on information received from the veteran's treating physician, his spouse, and review of his medical records (including during terminal hospitalization), indicates that the veteran was exposed to Agent Orange during active service in Vietnam in the early 1960s, and that his fatal cholangiocarcinoma developed as a result of Agent Orange

exposure. At an RO hearing in October 1995, the appellant testified that the veteran exhibited various symptoms including recurrent jaundice, vomiting, bleeding, and gastrointestinal impairment after his return from service in Vietnam, requiring medical treatment over the years since his service separation. She indicated that she was informed by a private

physician and the coroner that his cancer was caused by his exposure to Agent Orange, but she also believed that the numerous medications which he took for his illnesses contributed to his death. At that hearing, she submitted photocopies of various articles and printed information on the subject of cancer of the bile duct and the effects of various medication on the human body (relating to medication which the veteran took during his lifetime). In March 2001, the U.S. Armed Services Center for Research of Unit Records (USASCRUR) indicated that 3 U.S. aircraft performed herbicide operations in Vietnam during 1962 and 1963, flying various missions (including spraying Agent Orange) out of Tan Son Nhut. The USASCRUR submitted extracts from a Scientific Advisory Group Working Paper, describing various missions and operations, as well as various VA material on the subject of Agent Orange. Based on the foregoing, the Board finds that the evidence supports service connection for the cause of the veteran's death. As indicated above, effective December 27, 2001, the law provides that all veterans who served in Vietnam during the Vietnam era are presumed to have been exposed to Agent Orange during such service (absent affirmative evidence to establish that the veteran was not exposed to any such agent during service, which is not the case here). In this case, the evidence shows not only that the veteran served as an air freight specialist in an isolated location in Vietnam from June 1962

to May 1963 (and is thus presumed to have been exposed to Agent Orange), but it also shows that he was stationed at Tan Son Nhut, a location from which various Agent Orange-related missions and operations were performed while he was stationed there (such evidence lends credence to a conclusion that he was exposed to Agent Orange in Vietnam). The entirety of the evidence of record does not indicate that cholangiocarcinoma which caused the veteran's death in March 1994 was evident in service or for

many years thereafter; cholangiocarcinoma is also not on the list of diseases presumed to be associated with Agent Orange exposure (as listed in both the "old" and "new" 38 U.S.C.A. § 1116(a)(2)). Thus, the veteran's fatal cholangiocarcinoma may not be presumed to have developed as a result of Agent Orange exposure. However, a private physician who treated the veteran during his terminal illness from February to March 1994 (and who also signed his death certificate) opined that his cholangiocarcinoma developed as a result of Agent Orange exposure. An April 1994 coroner's report, prepared following consultation with the treating physician and review of his medical record, also concluded that the fatal disease was a result of his exposure to Agent Orange. The entirety of the evidence of record fails to contradict the aforementioned medical opinion, relating the veteran's cholangiocarcinoma to Agent Orange exposure. Thus, resolving all reasonable doubt in the appellant's favor, the Board finds that the veteran's in-service exposure to Agent Orange contributed to the cause of his death. Gilbert, 1 Vet. App. 49. ORDER Service connection for the cause of the veteran's death is granted.

J. F. Goug