On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in Milwaukee, Wisconsin

THE ISSUE

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

REPRESENTATION

Appellant represented by: Wisconsin Department of
INTRODUCTION

The veteran served on active duty from February 1966 to November 1967. The veteran died in February 2004. The appellant is his widow.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from an April 2004 decision by the RO.

FINDINGS OF FACT

1. The veteran suffered from testicular cancer, renal cell cancer, and metastatic cholangiocarcinoma.

2. The veteran's death certificate shows the immediate cause
of the veteran’s death to have been metastatic cholangiocarcinoma (bile duct cancer).

3. Exposure to herbicides while serving in Vietnam was likely the cause of the cancers that resulted in his death.

CONCLUSION OF LAW


REASONS AND BASES FOR FINDINGS AND CONCLUSION

The appellant contends that the cancers from which the veteran died developed as a result of the veteran’s exposure to the herbicide Agent Orange in Vietnam. The veteran served
on active duty in the Republic of Vietnam during the Vietnam War, and is therefore presumed to have been exposed to herbicide agents. The veteran's service medical records are negative for complaints, treatment, or diagnosis of any form of cancer. In January 2004 the veteran was service connected for diabetes mellitus type II associated with presumed herbicide exposure in Vietnam. However, the cause of the veteran's death was not related to his service-connected diabetes mellitus type II.

The veteran's death certificate shows that he died in February 2004 at the age of 57. It listed the immediate cause of death as metastatic cholangiocarcinoma (bile duct cancer).

Review of the veteran's medical records reveals that he was diagnosed with seminoma of the right testicle during 1988. He underwent surgery for a right orchiectomy followed by chemotherapy and radiation therapy. In February 1999 he was diagnosed with left renal cell carcinoma, invading the renal capsule, and he underwent a radical nephrectomy. In June 1999 obstructive jaundice from common bile duct cholangiocarcinoma with hepatic metastases was diagnosed.
The veteran underwent a cholecystectomy with biliary stent procedure. In December 2003 the veteran's condition was failing. A computed tomography (CT) scan showed a liver mass and ascites.

While he was still alive, the veteran filed a claim of service connection for cancer of the testicle, kidney, bile duct, colon, esophagus and stomach. By a November 2002 decision, the RO denied service connection because none of the conditions were listed as cancers subject to presumptive service connection due to exposure to herbicides in Vietnam.

Under 38 C.F.R. § 3.307(a)(6), a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, is presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to the contrary. Id. § 3.307(a)(6)(iii). If a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of 38 U.S.C.A. § 1116 and 38 C.F.R. § 3.307(a)(6)(iii) are met, even though there is no record of
such disease during service, provided further that the rebuttable presumption provisions of 38 U.S.C.A. § 1113 and 38 C.F.R. § 3.307(d) are also satisfied: chloracne or other acneform disease consistent with chloracne; Type 2 diabetes (also known as Type II diabetes mellitus or adult-onset diabetes); Hodgkin’s disease; chronic lymphocytic leukemia; 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) (2006). The diseases listed at 38 C.F.R. § 3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year after the last date on which the veteran was exposed to an herbicide agent during active military, naval, or air service. 38 C.F.R. § 3.307(a)(6)(ii) (2006).

The Secretary of VA has determined that there is no positive
association between exposure to herbicides and any other condition for which the Secretary has not specifically determined that a presumption of service connection is warranted. See Diseases Not Associated With Exposure to Certain Herbicide Agents, 68 Fed. Reg. 27,630 (May 20, 2003).

Nevertheless, the United States Court of Appeals for the Federal Circuit has held that the Veteran’s Dioxin and Radiation Exposure Compensation Standards (Radiation Compensation) Act, Pub. L. No. 98-542, §§ 5, 98 Stat. 2725, 2727-29 (1984), does not preclude a claimant from establishing service connection with proof of direct causation, a task "which includes the difficult burden of tracing causation to a condition or event during service." Combee v. Brown, 34 F.3d 1039, 1043 (Fed. Cir. 1994).

Generally, in order to prove "direct" service connection, there must be (1) medical evidence of a current disability, (2) medical evidence, or in certain circumstances lay testimony, of in-service incurrence or aggravation of an injury or disease, and (3) medical evidence of a nexus, or link, between the current disability and the in-service disease or injury. See, e.g., Pond v. West, 12 Vet. App.
In connection with her March 2004 claim of service connection for the cause of the veteran's death, the appellant filed a February 2004 letter opinion from the veteran's private oncologist, Dr. R.G. He stated that the veteran was diagnosed with recurrent metastatic cholangiocarcinoma that had metastasized to the liver. He noted that the veteran had a complicated medical history, which had included testicular cancer, renal cell cancer, iron deficiency anemia, diabetes, and cholangiocarcinoma. Dr. R.G. noted that the veteran had been stationed in Vietnam and was exposed to Agent Orange during that time. He said that it was extremely unusual for one individual to have had testicular cancer, renal cell cancer, and cholangiocarcinoma. He opined that, given the veteran's exposure to Agent Orange and its known toxicities, the malignancies and their potential relation to Agent Orange exposure could not be ignored.

In August 2005 the appellant's representative obtained review of the veteran's medical history and course with a report and opinion from Dr. J.B., a retired board certified specialist in internal medicine. He noted that during 1967 when the
veteran was in Vietnam more than 5 million gallons of herbicide was sprayed over 1.7 million acres. He included a tabulation of locations of spraying, and the locations of the veteran's duty and dates as documented in letters to his wife, the appellant. He noted that many of the place names described by the veteran were in zones sprayed heavily during the Vietnam campaign. He noted that the veteran served in an artillery unit attached to infantry divisions. The veteran's wife said that the veteran had stated that he had frequently breathed in a mist, although his unit was never sprayed on directly by an aircraft.

Dr. J.B. noted that the veteran's medical records showed that he had consulted a urologist as early as 1969 (he was discharged from service in November 1967) because his wife was unable to conceive. He was found to have a low sperm count. Dr. J.B. noted that, in the absence of the usual causes of hypospermia, toxicity from occupational exposure to dichlorophenoxyacetic acid, a major component of Agent Orange, could be suspected. That compound had been demonstrated to impair spermatogenesis and cause permanent damage to the germinal epithelium, and that effect had been demonstrated clinically. Dr. J.B. opined that, all
possibilities considered, it was most likely that the veteran's defective spermatogenesis was related to herbicide exposure.

Dr. J.B. continued to describe the veteran's struggles with testicular cancer, renal cell cancer, and cholangiocarcinoma. He discussed several studies that suggested a link between Agent Orange and cholangiocarcinoma. He noted that he was aware that VA awarded compensation to Vietnam veterans who developed certain neoplasms (citing examples from Section 3.309(e)). He concluded that the veteran's case was so complex (testicular dysfunction followed by three different cancers) that the standard approach was inadequate. He said that, because of its complexity, the veteran's case demanded in-depth consideration, taking into account the factors and experimental/epidemiologic evidence he had presented. He opined that it was clearly more likely than not that Agent Orange compounds and contaminants exposure played a causative role at several crucial points in the veteran's course. He asserted that it was impossible to prove that Agent Orange had no serious effect.

The RO subsequently obtained a July 2006 review and medical
opinion from the Chief Public Health and Environmental Hazards Officer, Dr. L.R.D., at VA’s main office in Washington, D.C. He noted that the veteran served in Vietnam and subsequently developed cancers of the testes, kidney, and bile duct. He stated that the most recent Institute of Medicine (IOM), National Academy of Sciences (NAS), report on herbicides used in Vietnam, "Veterans and Agent Orange, Update 2004," concluded that there was inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and hepatobiliary, testicular, or renal cancer (IOM report page 8). This assessment was based on information obtained from extensive review of the scientific and medical literature, including some studies cited by Dr. J.B.

Dr. L.R.D. further stated that VA by law and precedent gives a lot of weight to the IOM findings on health effects from exposure to herbicides used in Vietnam. Therefore, at this time, in our opinion it is possible that the veteran’s testicular, renal, and bile duct cancers with metastases were due to exposure to herbicides used in Vietnam, but we cannot state that it is likely or at least as likely as not that the diseases resulted from such exposure.
The Board first considers whether the veteran's cancers can be presumed to have been incurred in service due to the exposure to herbicides in Vietnam. Metastasized cholangiocarcinoma (bile duct cancer), the stated cause of the veteran's death, is not among the presumptive diseases enumerated in 38 C.F.R. § 3.309(e), nor is testicular or renal cancer. As noted above, the Secretary of VA, based on a January 2003 report by the NAS, determined that a comprehensive review and evaluation of the available literature, which NAS conducted in conjunction with the report, permitted VA to identify all conditions for which the current body of knowledge supported a finding of an association with herbicide exposure. The Secretary therefore determined that there is no positive association between exposure to herbicides and any other condition for which he has not specifically determined that a presumption of service connection is warranted. See 68 Fed. Reg. 27,630-41 (May 20, 2003). The July 2006 opinion letter from VA's Chief Public Health and Environmental Hazards Officer noted that the latest NAS update report for 2004 concluded that there was inadequate or insufficient evidence to determine whether an association existed between exposure to herbicides and
herpatobiliary, testicular or renal cancer. Thus, service connection for the cause of the veteran's death due to cholangiocarcinoma must be denied on a presumptive basis.

However, regardless of whether a claimed disability is recognized under 38 U.S.C.A. § 1116, 38 C.F.R. § 3.309(e), pertaining to herbicide agent exposure presumptive diseases, the appellant is not precluded from presenting evidence that a claimed disability was due to or the result of herbicide exposure. Brock v Brown, 10 Vet. App. 155, 160 (1997) (citing Combee v. Brown, supra at 1044-45).

The current standard of review is that after the evidence has been assembled, it is the Board's responsibility to evaluate the entire record. See 38 U.S.C.A. § 7104(a) (West Supp. 2001). When there is an approximate balance of 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 U.S.C.A. § 5107 (West Supp. 2001); 38 C.F.R. § 3.102 (2007). In Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990), the Court stated that "a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in
order to prevail." To deny a claim on its merits, the preponderance of the evidence must be against the claim. Alemany v. Brown, 9 Vet. App. 518, 519 (1996), citing Gilbert, 1 Vet. App. at 54.

In the present case, the Board finds that there is sufficient evidence to find, allowing for reasonable doubt, that the veteran's cancers were related to his exposure to herbicides when he served in Vietnam. Significantly, the appellant and Dr. J.B., based on the veteran's letters to the appellant, have presented evidence to show that the veteran as an artilleryman served in areas of Vietnam where heavy spraying of herbicides occurred, which raises the probability (more than a presumption) that he was actually exposed to herbicides including Agent Orange. The appellant had told Dr. J.B. that the veteran had stated he had frequently breathed in a mist of herbicide. The veteran's oncologist, Dr. R.G., although he did not give a definitive opinion, felt there was a connection between the veteran's exposure to Agent Orange and his cancers to state that "the malignancies and their potential relation to Agent Orange exposure could not be ignored." Dr. R.G. also commented that it was extremely unusual for one individual to have had testicular
cancer, renal cell cancer, and cholangiocarcinoma.

Dr. J.B. also noted that the veteran had suffered hypospermia in 1969, not long after his discharge from service in November 1967, which he opined was related to the veteran's exposure to herbicides. Dr. J.B., in his 10 page report and opinion with appendices, also noted the complexity of the veteran's course of cancers stating that it demanded the in-depth consideration of the factors and experimental/epidemiologic studies that he had presented. He opined that it was clearly more likely than not that Agent Orange compounds and contaminants exposure played a causative role at several crucial points in the veteran's course. He cited experts who have found that exposure to Agent Orange and herbicides was associated with cholangiocarcinoma or was a risk factor for developing cholangiocarcinoma. He noted the risk factor of herbicide exposure was present in the veteran, but other known risk factors for cholangiocarcinoma were not. He cited a study of employees at a dioxin factory in Italy that had exploded, noting a high incidence of cholangiocarcinoma that subsequently developed in the population.
While the June 2006 opinion by VA's Chief Public Health and Environmental Hazards Officer effectively ruled out presumptive service connection, he did allow that it was "possible that the veteran's testicular, renal, and bile duct cancers with metastases were due to exposure to herbicides used in Vietnam . . ."

Therefore, because there is evidence showing that the veteran served in areas of Vietnam where there was heavy spraying of herbicides including Agent Orange, because there is opinion evidence from Dr. J.B. that soon after service the veteran's hypospermia likely was caused by his exposure to herbicides in Vietnam, because there is well reasoned and documented medical opinion evidence from Dr. J.B. that exposure to herbicides in Vietnam likely caused the cancer course which began in 1988 culminating in the cholangiocarcinoma that was the immediate cause of his death, and because VA's Chief Public Health and Environmental Hazards Officer has allowed for the possibility that exposure to herbicides caused the veteran's cancers, the Board finds, allowing for reasonable doubt, that service connection for the cause of death is warranted.
ORDER

Service connection for cause of death is granted.

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Michelle L. Kane
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs