

Citation Nr: 0943289 Decision Date: 11/13/09 Archive Date: 11/25/09 DOCKET NO. 07-27 467 ) DATE ) ) On appeal from the Department of Veterans Affairs Regional Office in Providence, Rhode Island THE ISSUES Entitlement to Dependency and Indemnity Compensation (DIC) on the basis of service connection for the cause of the Veteran's death. REPRESENTATION Appellant represented by: Disabled American Veterans WITNESS AT HEARING ON APPEAL Appellant ATTORNEY FOR THE BOARD Kristy L. Zadora, Associate Counsel INTRODUCTION The Veteran had active duty service from September 1966 to July 1969, including combat service in Vietnam. He was awarded a Bronze Star medal with V device, Combat Infantryman Badge and Purple Heart medal as a result of this service. The appellant is the surviving spouse of the Veteran. This matter comes before the Board of Veterans' Appeals (Board) from a July 2006 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Providence, Rhode Island which denied the appellant's claim for entitlement to service connection for the cause of the Veteran's death, among other claims. An appeal with regards to entitlement to benefits under 38 U.S.C.A. § 1318 was not perfected by the appellant. The appellant also appealed from a November 2007 rating decision of the Providence, Rhode Island RO which denied the appellant's claim for entitlement to DIC under the provisions of 38 U.S.C.A. § 1151.

Because the Board is granting DIC based on service connection for the cause of the Veteran's death, the question of whether that benefit is warranted under the provisions of § 1151 is rendered moot. The appellant testified before the undersigned at a May 2009 hearing at the RO (Travel Board) hearing. At hearing transcript has been associated with the claims file. In May 2009, subsequent to the issuance of the supplemental statement of the case (SSOC), the appellant submitted evidence pertinent to the claim on appeal. RO consideration of this evidence was orally waived during the May 2009 hearing. See 38 C.F.R. § 20.1304 (2009). FINDINGS OF FACT 1. The Veteran died in February 2006 of biliary cancer that was likely cholangiocarcinoma. 2. The Veteran's exposure to parasites in Vietnam was a cause of the fatal cancer. CONCLUSION OF LAW The criteria for service connection for the Veteran's cause of death have been met. 38 U.S.C.A. §§ 1110, 1310, 1318, 5107(b) (West 2002); 38 C.F.R. § 3.312

(2009). REASONS AND BASES FOR FINDINGS AND CONCLUSIONS  
VCAA The Veterans Claims Assistance Act of 2000 (VCAA) and implementing regulations impose obligations on VA to provide claimants with notice and assistance. 38 U.S.C.A. §§ 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2009); 38 C.F.R §§ 3.102, 3.156(a), 3.159, 3.326(a) (2009). The VCAA is not applicable where further assistance would not aid the appellant in substantiating her claim. *Wensch v. Principi*, 15 Vet App 362 (2001); see 38 U.S.C.A. § 5103A(a)(2) (Secretary not required to provide assistance "if no reasonable possibility exists that such assistance would aid in substantiating the claim"); see also VAOPGCPREC 5- 2004; 69 Fed. Reg. 59989 (2004) (holding that the notice and duty to assist provisions of the VCAA do not apply to claims that could not be substantiated through such notice and assistance). In view of the Board's favorable decision in this appeal, further assistance is unnecessary to aid the appellant in substantiating her service connection claim for the Veteran's cause of death. DIC Criteria Pursuant to 38 U.S.C. § 1310, DIC is paid to a surviving spouse of a qualifying veteran who died from a service- connected disability. See *Darby v. Brown*, 10 Vet. App. 243, 245 (1997). Surviving spouses are also entitled to DIC as if the veteran's death was service connected and where service connected

disabilities were rated 100 percent disabling for 10 years immediately preceding death. 38 U.S.C.A. §§ 1318, 5312. The death of a veteran will be considered as having been due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. The service- connected disability is considered the principle cause of death when such disability, either singly or jointly with another condition, was the immediate or underlying cause of death or was etiologically related to the cause of death. To be a contributory cause of death, it must be shown that the service-connected disability contributed substantially or materially to death, that it combined to cause death, or that it aided or lent assistance to the production of death. It

is not sufficient to show that it casually shared in producing death, but rather it must be shown that there

was a causal connection. 38 C.F.R. § 3.312. In determining whether the disability that resulted in the death of the veteran was the result of active service, the laws and regulations pertaining to basic service connection apply. 38 U.S.C.A. § 1310. Service connection will be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred in or aggravated by active military service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). In a DIC claim based on cause of death, the first requirement for service connection, evidence of a current disability, will always have been met (the current disability being the condition that caused the veteran to die). *Carbino v. Gober*, 10 Vet. App. 507, 509 (1997), *aff'd sub nom. Carbino v. West*, 168 F.3d 32 (Fed. Cir. 1999). Under 38 C.F.R. § 3.303(b), an alternative method of establishing the second and third Shedden/Caluza element is through a demonstration of continuity of symptomatology. *Barr v. Nicholson*, 21 Vet. App. 303 (2007); see *Savage v. West*, 10 Vet. App. 488, 495-97 (1997); see also *Clyburn v. West*, 12 Vet. App. 296, 302 (1999). Continuity of symptomatology may be established if a claimant can demonstrate (1) that a condition was "noted" during service; (2) evidence of post-service continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology. *Savage*, 10 Vet. App. at 495-96; see *Hickson*, 12 Vet. App. at 253 (lay evidence of in-service incurrance sufficient in some circumstances for purposes of establishing service connection); 38 C.F.R. § 3.303(b). "Symptoms, not treatment, are the essence of any evidence of continuity of symptomatology." *Savage*, 10 Vet. App. at 496 (citing *Wilson v. Derwinski*, 2 Vet. App. 16, 19 (1991)). Once evidence is determined to be competent, the Board must determine whether such evidence is also credible. See *Layno*, *supra* (distinguishing between competency ("a legal concept determining whether testimony may be heard and considered") and credibility ("a factual determination going to the probative value of the evidence to be made after the evidence has been admitted")). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the

evidence warrants direct service connection. The presumptive provisions of the statute and VA regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid. 38 C.F.R. § 3.303(d). When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the VA shall give the benefit of the doubt to the claimant. 38 U.S.C.A. §

5107(b). DIC Claim The Veteran's February 1966 entrance examination and July 1969 discharge examination were negative for any relevant abnormalities. His remaining service treatment records were negative for any symptoms, treatments or diagnoses of cancer. His DD-214 confirmed service of nearly a year in the Republic of Vietnam. Private oncology treatment records show that the Veteran was initially diagnosed and treated for an adenocarcinoma of the pancreas beginning in September 2004. Subsequent VA treatment records indicate that the Veteran's private oncologist had diagnosed biliary cancer, likely cholangiocarcinoma, with metastasis to the liver and lung. The Veteran's Certificate of Death indicated that he died in February 2006. The immediate cause of his death was listed as pancreatic cancer with metastasis. Hypertension and hyperlipidemia were listed as other significant conditions contributing to the Veteran's death but not resulting in the underlying cause. An autopsy was not performed. In a March 2006 letter the Veteran's private oncologist, Dr. R. R., stated that he treated the Veteran was initially thought to suffer from metastatic pancreatic cancer but it was subsequently determined that he suffered from biliary cancer. This cancer metastasized to the Veteran's lungs despite multiple therapies and he eventually succumbed to his disease. Although the Veteran's death certificate listed pancreatic cancer as his disease, his diagnosis was biliary cancer with metastatic spread to his lungs. During the Travel Board hearing, the appellant testified to her belief that the Veteran's exposure to Agent Orange and parasites while serving in Vietnam caused the cancer which led to his death. The appellant's representative argued that the Veteran's cholangiocarcinoma was caused by his exposure to parasites while serving in Vietnam and that the condition which actually led to his death was not pancreatic cancer.

He submitted copies of medical texts and VA decisions to support his theory. In October 2009 the Board obtained an opinion from an oncologist in the Veterans Health Administration in accordance with 38 C.F.R. § 20.901(a) (2009). The oncologist observed that cholangiocarcinoma was a rare malignancy in the United States, with an incident of one or two per 100,000, with a very poor outcome due to advanced disease at presentation. This condition accounted for three percent of all gastrointestinal malignancies and was typically seen in patients 50 to 70 years of age. Risk factors for cholangiocarcinoma in the United States included primary sclerosing cholangitis and congenital cystic dilations of the biliary ducts and choledochal cysts. Parasitic infection was a more common risk factor for cholangiocarcinoma in Asia. The examiner opined that the Veteran did not have any of these risk factors. The oncologist noted that parasitic infection with liver flukes of the Clonorchis and Opisthorchis species was endemic in the Far East, including Vietnam. Humans become infected with his parasite by eating undercooked fish and adult flukes could remain in the biliary ductal system for as long as 30 years. Most infected individuals were asymptomatic for many years and one of the serious complications of such a chronic parasitic infection was cholangiocarcinoma. It was believed that such a chronic parasitic infection induced chronic irritation and inflammation in the biliary tree, resulting in the sloughing off and proliferation of the epithelial cells, and leading to hyperplasia, dysplasia and malignant transformation of the lining epithelium. Following a review of the Veteran's claims file and the literature, the examiner opined that it was at least as likely as not that the Veteran's cause of death was related to a parasite infection he sustained while serving in Vietnam. The Veteran served for nearly a

year in Vietnam. The weight of the evidence is that he died of biliary cancer, which was likely cholangiocarcinoma. The October 2009 VA oncology opinion, the only competent medical opinion of record, establishes a nexus between the Veteran's cause of death and his Vietnam service. This opinion is buttressed by the text evidence. All of the elements for the grant of service connection for the Veteran's cause of death have been

demonstrated. Accordingly entitlement to DIC, on the basis of service connection for the cause of the Veteran's death, is granted. 38 U.S.C.A. § 5107(b). ORDER Entitlement to DIC on the basis of service connection for the Veteran's cause of death is granted.

Mark D.

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Hindin Veterans Law Judge, Board of Veterans' Appeals  
Department of Veterans Affairs

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