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On appeal from the
Department of Veterans Affairs Regional Office in Winston-Salem, North Carolina

THE ISSUES

1. Whether the severance of service connection for diabetes mellitus, type II, with hypertension and impotence, was proper.
2. Entitlement to special monthly compensation based on a need for the regular aid and attendance of another person and/or on being housebound.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESSES AT HEARING ON APPEAL

Appellant, T.S., and B.S.

ATTORNEY FOR THE BOARD

W. Yates, Counsel

INTRODUCTION

The Veteran served on active duty from June 1966 to January 1970. This case comes before the Board of Veterans' Appeals (Board) on appeal from rating decisions in September 2005 and June 2009 by the Department of Veterans Affairs (VA) Regional Office (RO) in Winston-Salem, North Carolina.

The September 2005 rating decision severed service connection for diabetes mellitus, type II, with hypertension and impotence. The Veteran filed a timely notice of disagreement concerning this decision in September 2006. 38 C.F.R. § 20.201 (2012).

The June 2009 rating decision denied entitlement to special monthly compensation based on a need for the regular aid and attendance of another person and/or on being housebound. Thereafter, the Veteran timely perfected an appeal of both issues herein.

During the course of this appeal, the Veteran alleged that his diabetes mellitus, type II, was now manifested by diabetic retinopathy and neuropathy involving all four extremities. These issues have not been adjudicated by the RO. Therefore, the Board does not have jurisdiction over them, and they are referred to the RO for appropriate action.

The issue of entitlement to special monthly compensation based on a need for the regular aid and attendance of another person and/or on being housebound is remanded to the RO via the Appeals Management Center in Washington, DC.

FINDING OF FACT

The evidence does not show that the grant of service connection for diabetes mellitus, type II, with hypertension and impotence, was clearly and unmistakably erroneous.

CONCLUSION OF LAW

The criteria to sever service connection for diabetes mellitus, type II, with hypertension and impotence, have not been met; and service connection is restored. 38 U.S.C.A. §§ 1110, 1116, 5109A, 5112 (West 2002); 38 C.F.R. §§ 3.105(d), 3.303, 3.307, 3.309 (2012).

REASONS AND BASES FOR FINDING AND CONCLUSION

Without deciding whether notice and development requirements have been satisfied in the present case, the Board is not precluded from adjudicating the issue on appeal. See 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2012); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2012). Given the Board's favorable disposition to restore service connection for diabetes mellitus, type II, with hypertension and impotence, no discussion of VA's duties to notify and assist is necessary. As such, this decision poses no risk of prejudice to the Veteran. See, e.g., *Bernard v. Brown*, 4 Vet. App. 384 (1993); see also *Pelegri v. Principi*, 17 Vet. App. 412 (2004); VAOPGCPREC 16-92, 57 Fed. Reg. 49,747 (1992).

Service connection may be established for disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service. 38 U.S.C.A. §§ 1110, 1138 C.F.R. § 3.303. Service connection may also 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. 38 C.F.R. § 3.303(d).

A Veteran who served in the Republic of Vietnam during the Vietnam era is presumed to have been exposed to certain herbicide agents. In the case of such a Veteran, service connection for diabetes mellitus, type II, will be rebuttably presumed if they are manifest to a compensable degree at any time after service. 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309(e).

Once service connection has been granted, it can be severed only where the evidence establishes that the grant is clearly and unmistakably erroneous and only where certain procedural safeguards have been met. *Stallworth v. Nicholson*, 20 Vet. App. 482 (2006); *Daniels v. Gober*, 10 Vet. App. 474 (1997). Severance of service connection based on any standard less than that set forth in 38 C.F.R. 3.105(d) is erroneous as a matter of law. *Stallworth*, 20 Vet. App. at 482; *Graves v. Brown*, 6 Vet. App. 166 (1994).

When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefore, and will be given 60 days for the presentation of additional evidence to show that service connection should be maintained. If additional evidence is not received within that period, final rating action will be taken. 38 U.S.C.A. §§ 5109A, 5112(b)(6); 38 C.F.R. § 3.105(d).

"Clear and unmistakable error" is defined as a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. *Fugo v. Brown*, 6 Vet. App. 40 (1993).

The question of whether CUE is present in a prior determination is analyzed under a three-pronged test. The criteria are: (1) either the correct facts, as they were known at the time, were not before the adjudicator (i.e., there must be more than a simple disagreement as to how the facts were weighed or evaluated) or the statutory or regulatory provisions in effect at the time were incorrectly applied; (2) the error

must be undebatable and of the sort which, had it not been made, would have manifestly changed the outcome at the time it was made; and (3) a determination that there was clear and unmistakable error must be based upon the record and law that existed at the time of the prior adjudication in question. *Grover v. West*, 12 Vet. App. 109, 111-112 (1999); *Russell v. Principi*, 3 Vet. App. 310 (1992); *Fugo v. Brown*, supra at 43-44.

The mere misinterpretation of facts or failure to fulfill the duty to assist does not constitute CUE. See *Thompson v. Derwinski*, 1 Vet. App. 251, 253 (1991); *Crippen v. Brown*, 9 Vet. App. 412, 424 (1996); see also *Damrel*, 6 Vet. App. at 245 (holding that a valid CUE claim requires that the Veteran assert more than a disagreement as to how the facts were weighed or evaluated).

Although the same standards applied in a determination of CUE in a prior decision are applied to a determination of whether a decision granting service connection was the product of CUE for the purpose of severing service connection, reviewable evidence in a severance claim is not limited to that which was before the RO in making its initial service connection award. 38 C.F.R. § 3.105(d) (2012); *Allen v. Nicholson*, 21 Vet. App. 54 (2007).

In a March 2005 rating decision, the RO granted service connection at a 10 percent initial evaluation for diabetes mellitus, type II. The March 2005 rating decision granted presumptive service connection for this condition based on the Veteran's inservice exposure to herbicides. Specifically, the RO found that the Veteran had served in the Navy and been awarded a Combat Action Ribbon, Republic of Vietnam Campaign Medal, and Vietnam Service Medal; and consequently, the Veteran was "most likely exposed to herbicides while serving in Vietnam." Hence, his exposure to herbicides was presumed. See 38 C.F.R. §§ 3.307, 3.309.

The RO proposed to sever service connection for diabetes mellitus, type II, in July 2005. In September 2005, the RO issued a rating decision that severed service connection for diabetes mellitus, type II, with hypertension and impotence. The September 2005 rating decision indicated that there was no evidence to establish that the Veteran had been exposed to Agent Orange during his military service.

After reviewing the evidence of record, the RO severed service connection for diabetes mellitus, type II, with hypertension and impotence, based upon a change in interpretation as to the significance of the Veteran having been awarded the Republic of Vietnam Campaign Medal during service. Nevertheless, a review of all of the evidence currently of record establishes, at a minimum, that it is debatable as to whether the Veteran was onboard a vessel which entered Vietnam's inland waterways during his military service. Thus, the Veteran's eligibility for the presumption of Agent Orange exposure remains debatable, and clear and unmistakable error is not shown in the grant of service connection based upon this exposure. See *Navy and Coast Guard Ships Associated with Service in Vietnam and Exposure to Herbicide Agents*.

In a July 2005 letter, the Veteran indicated that he had been assigned to river boat patrol duty, and that his inservice duties included patrolling around the U.S.S. Newport News and up and down the coastal regions of Vietnam. In this role, he reported transporting prisoners of war (POWs) to the Da Nang area of Vietnam. In a subsequent letter, received in September 2006, the Veteran indicated that he patrolled rivers which were red in color due to Agent Orange exposure. He also reported participating in the transportation of wounded soldiers to Hue.

Considerable support for the Veteran's contentions can be found in the evidence of record. The Veteran is shown to have served in the Navy from June 1966 to January 1970. His service personnel records indicate that he served onboard the USS NEWPORT NEWS (CA-148), and that this vessel operated within the Territorial Waters of Vietnam on numerous occasions from October 1967 to June 1969.

A declassified report noted that on October 22, 1967, the USS NEWPORT NEWS and another ship picked up seven members of the North Vietnamese Army after their boat had been destroyed by aircraft. The report noted that these individuals were transported to the 3rd Marine Amphibious Force Representative in DaNang on October 23, 1967.

A review of deck logs for the USS NEWPORT NEWS also indicated that it was operating "in

the vicinity of the mouth of" the Cua Viet River, Republic of Vietnam for much of April 1969.) While there, the ship is shown to have conducted fire missions, and is also shown to have received return fire from shore.

Additional records also reflect that in January 1969, the USS NEWPORT NEWS participated in an amphibious operation, Bold Mariner, in support of Battalion Landing Team 2-68.

After reviewing the Veteran's claims file, the Board finds that the evidence of record does not rise up to the required standard for severance of service connection for diabetes mellitus, type II; and service connection for diabetes mellitus, type II, with hypertension and impotence, is restored. Given the Veteran's allegations, and the supporting evidence noted above herein, it clearly remains debatable as to whether he was onboard vessels operating within Vietnam's inland waterways, regardless of the Veteran having been awarded a Republic of Vietnam Campaign Medal or not. Moreover, his participation in direct combat is clearly shown and accepted by the Board. See 38 C.F.R. 1154(b).

Therefore, the Board finds that the evidence of record does not establish that the award of service connection for diabetes mellitus, type II, with hypertension and impotence, was clearly and unmistakably erroneous. In the absence of such a finding, the Board concludes that the severance of the award of service connection for diabetes mellitus type II, effective as of June 3, 2005, was improper. Reasonable doubt has been resolved in favor of the Veteran in making this decision. The Board finds that the appeal must be granted and service connection restored. 38 U.S.C.A. § 5107(b); Gilbert v. Derwinski, 1 Vet. App. 49 (1990).

ORDER

Service connection for diabetes mellitus, type II, with hypertension and impotence, is restored.

REMAND

The Veteran is claiming entitlement to special monthly compensation based on a need for the regular aid and attendance of another person or by reason of being housebound.

Remand is required for compliance with VA's duty to assist the Veteran in substantiating his claim. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159.

The need for aid and attendance is defined as helplessness or being so nearly helpless as to require the regular aid and attendance of another person. 38 C.F.R. § 3.351(b) (2012). A veteran will be considered in need of aid and attendance if he is (1) blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to five degrees or less; (2) is a patient in a nursing home because of mental or physical incapacity; or (3) establishes a factual need for aid and attendance. 38 C.F.R. §§ 3.351(c), 3.352(a) (2012).

Under 38 C.F.R. § 3.352(a), the following criteria will be accorded consideration in determining the need for regular aid and attendance: the inability of a claimant to dress or undress himself, or to keep himself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without such aid, such as supports, belts, lacing at the back, etc.); the inability of a claimant to feed himself through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his daily environment.

It is not required that all of the disabling conditions enumerated be found to exist before a favorable ruling may be made. The particular personal functions which the Veteran is unable to perform should be considered in connection with his condition as a

whole. It is only necessary that the evidence establish that the Veteran is so helpless as to need regular aid and attendance, not that there be a constant need. Determinations that the Veteran is so helpless as to be in need of regular aid and attendance will not be based solely on an opinion that the Veteran's condition is such that it would require him to be in bed. It must be based on the actual requirements of personal assistance from others. 38 C.F.R. § 3.352(a); *Turco v. Brown*, 9 Vet. App. 222, 224 (1996).

Housebound benefits are warranted if, in addition to having a single permanent disability rated 100 percent disabling under the VA Schedule for Rating Disabilities, the Veteran: (1) has additional disability or disabilities independently ratable at 60 percent or more, separate and distinct from the permanent disability rated as 100 percent disabling and involving different anatomical segments or bodily systems, or, (2) is "permanently housebound" by reason of disability or disabilities. This requirement is met when the Veteran is substantially confined to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical area, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime. 38 U.S.C.A. § 1502(c) (West 2002); 38 C.F.R. § 3.351(d).

Given the passage of time in this case, and the lack of any prior examination having been provided concerning this issue, the RO must obtain the Veteran's updated treatment records, and then schedule him for the appropriate examination to determine whether the criteria are met for special monthly compensation based on need of aid and attendance or being housebound.

Accordingly, the case is remanded for the following action:

1. Request that the Veteran identify all VA and non-VA medical providers who have treated him for his service-connected disabilities during the course of this appeal. Thereafter, attempt to procure copies of all VA and non-VA records which have not previously been obtained from identified treatment sources.

If any of these records cannot be obtained, a letter should be sent to the Veteran informing him of the steps taken to obtain the records, listing alternative sources, and requesting him to furnish any such records in his possession or to identify the possible location of such records.

2. Thereafter, the Veteran must be afforded a VA examination to determine whether he is in need of regular aid and attendance of another person. The claims file and all pertinent records on Virtual VA be made available to the examiner, and the examiner must specify in the report that the claims file and pertinent Virtual VA records have been reviewed. The RO must provide the examiner with a list of all of the Veteran's service-connected disabilities. All pertinent symptomatology and findings must be reported in detail. Any indicated diagnostic tests and studies must be accomplished. Based upon a review of the evidence of record, the clinical examination, and with consideration of the Veteran's statements, the examiner must provide an opinion as to whether the Veteran is in need of regular aid and attendance of another person. The examiner should indicate if the Veteran is blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to five degrees or less. The examiner must also discuss the following criteria in offering an opinion as to whether the Veteran is in need of regular aid and attendance of another person: (1) the inability of the Veteran to dress or undress himself, or to keep himself ordinarily clean and presentable; (2) the frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid; (3) the inability of the Veteran to feed himself through loss of coordination of his upper extremities or through extreme weakness; (4) the inability of the Veteran to attend to the wants of nature; or (5) the presence of incapacity, either physical or mental, which requires care or assistance on a regular basis to protect the Veteran from hazards or dangers incident to his daily environment.

A complete rationale for all requested opinions must be provided. If an examiner cannot provide the requested opinion without resorting to speculation, it must be so stated, and the examiner must provide the reasons why an opinion would require speculation.

The examiner must indicate whether there was any further need for information or testing necessary to make a determination. Additionally, the examiner must indicate whether any opinion could not be rendered due to limitations of knowledge in the medical community at large and not those of the particular examiner. The reports prepared must be typed.

3. The RO must notify the Veteran that it is his responsibility to report for the examination scheduled, and to cooperate in the development of the claims. The consequences for failure to report for a VA examination without good cause may include denial of the claims. 38 C.F.R. §§ 3.158, 3.655 (2012). In the event that the Veteran does not report for a scheduled examination, documentation must be obtained and associated with the Veteran's claims file that shows that notice scheduling the examination was sent to his last known address. Documentation must also be obtained and associated with the Veteran's claims file demonstrating any notice that was sent was returned as undeliverable.

4. Review the claims file to ensure that the foregoing requested development is completed, and arrange for any additional development indicated. Then, readjudicate the issue on appeal. If any benefit sought remains denied, issue an appropriate supplemental statement of the case and provide the Veteran and his representative the requisite time period to respond. The case must then be returned to the Board for further appellate review, if otherwise in order.

No action is required by the Veteran until he receives further notice; however, he may present additional evidence or argument while the case is in remand status at the RO. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

JOY A. MCDONALD
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs