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On appeal from the Department of Veterans Affairs Regional Office in Fort Harrison, Montana

THE ISSUES

1. Entitlement to service connection for the cause of the Veteran's death.
2. Entitlement to service connection for amyotrophic lateral sclerosis (ALS), for the purposes of accrued benefits.

REPRESENTATION Appellant represented by: Military Order of the Purple Heart
ATTORNEY FOR THE BOARD L.J. Bakke-Shaw

INTRODUCTION The Veteran served on active duty from March 1943 to February 1946. He was awarded the Purple Heart Medal. The Veteran died in January 2006. The appellant is the Veteran's spouse. This matter comes before the Board of Veterans' Appeals (Board) on appeal from rating decisions of the Department of Veterans Affairs (VA) Regional Office (RO) in Fort Harrison, Montana in May 2006 in which service connection for the Veteran's cause of death and for service connection for ALS for the purposes of accrued benefits was denied.

The appellant testified before the undersigned Veterans Law Judge in April 2007. A transcript of the hearing is associated with the claims file.

FINDINGS OF FACT

1. The Veteran died in January 2006; the cause of the Veteran's death as shown on the death certificate was ALS.
2. At the time of the Veteran's death, service connection was in effect for retained foreign body and scars, right buttock cheek and gluteal fold, muscle group XVII, evaluated as 20 percent disabling; retained foreign bodies and scars, left buttock cheek and gluteal fold, muscle group XVII, evaluated as 20 percent disabling; scars, multiple shell fragment wound (SFW), left leg, medial and posterior, above ankle with retained metallic foreign bodies, evaluated as 10 percent disabling; scars, small, superficial, multiple, SFW lower back (12 dorsoventral: back and belly surfaces) and over sacrum and both buttocks with retained metallic foreign bodies, evaluated as 10 percent disabling; post-traumatic stress disorder (PTSD), evaluated as 10 percent disabling; retained metallic foreign bodies with scar, right medial elbow, muscle group V, evaluated as 10 percent disabling; retained metallic foreign bodies and scars, left lower leg and foot, muscle group XI, evaluated as 10 percent disabling; retained metallic foreign bodies with scars, right medial posterior thigh, muscle group XIII, evaluated as 10 percent disabling; retained metallic foreign bodies, right anterior thigh, muscle group XIV, evaluated as 10 percent disabling; retained metallic foreign bodies and scar of the lower right quadrant and right lateral wall of the abdomen, muscle group XXI, evaluated as 10 percent disabling; nerve impairment, left anteromedial foot due to retained metallic foreign bodies, evaluated as 10 percent disabling; scars, multiple SFWs about the right elbow, right mid and lateral wall of the abdomen, right ankle, and right metatarsal phalangeal joint, evaluated as noncompensable; and scars, multiple over both lower extremities, buttocks, lower back, abdomen and right elbow with retained metallic foreign bodies,

evaluated as noncompensable. The combined evaluation was 20 percent from February 1946, 40 percent from February 1949, zero percent from December 1959, 10 percent from April 2004, and 70 percent from June 2004.

3. The medical evidence establishes that the ALS that caused the Veteran's death is the result of his active service.

4. At the time of the Veteran's death, a claim for service connection for ALS was pending.

5. The appellant filed a claim for accrued benefits within the year following the Veteran's death.

6. **The medical evidence at the time of the Veteran's death includes an opinion establishing that the diagnosed ALS was linked to the Veteran's active service in Guam.**

CONCLUSIONS OF LAW 1. The criteria for service connection for the cause of the Veteran's death have been met. 38 U.S.C.A. §§ 1310, 5103, 5103A, 5107 (West 2002 & Supp. 2007); 38 C.F.R. §§ 3.312 (2008). 2. The criteria for service connection for ALS for the purposes of accrued benefits have been met. 38 U.S.C.A. §§ 1110, 1131, 5103, 5103A, 5107, 5121 (West 2002 & Supp. 2007); 38 C.F.R. §§ 3.303, 3.322, 3.1000 (2008).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS In light of the favorable action taken herein, discussion of whether VA has met its duties of notification and assistance is not required, and deciding the appeal at this time is not prejudicial to the appellant.

I. Service Connection for the Cause of the Veteran's Death

To establish service connection for the cause of the Veteran's death, the evidence must show that the fatal disease was incurred in or aggravated by service or that a service-connected disability caused or contributed substantially or materially to cause death. For a service-connected disability to be the cause of death, it must singly or with some other condition be the immediate or underlying cause, or be etiologically related. For a service-connected disability to constitute a contributory cause, 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 U.S.C.A. § 1310; 38 C.F.R. § 3.312. Once the evidence has been assembled, it is the Board's responsibility to evaluate the evidence. 38 U.S.C.A. § 7104(a).

The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107(b); C.F.R. § 3.102. When a veteran seeks benefits and the evidence is in relative equipoise, the veteran prevails. See *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The preponderance of the evidence must be against the claim for benefits to be denied. See *Aleman v. Brown*, 9 Vet. App. 518 (1996).

At the time of the Veteran's death, service connection was in effect for retained foreign body and scars, right buttock cheek and gluteal fold, muscle group XVII, evaluated as 20 percent disabling; retained foreign bodies and scars, left buttock cheek and gluteal fold, muscle group XVII, evaluated as 20 percent disabling; scars, multiple shell fragment wound (SFW), left leg, medial and posterior, above ankle with retained metallic foreign bodies, evaluated as 10 percent disabling; scars, small, superficial, multiple, SFW lower back (12 dorsoventral: back and belly surfaces) and over sacrum and both buttocks with retained metallic foreign bodies, evaluated as 10 percent disabling; post-traumatic stress disorder (PTSD), evaluated as 10 percent disabling; retained metallic foreign bodies with scar, right medial elbow, muscle group V, evaluated as 10 percent disabling; retained metallic foreign bodies and

scars, left lower leg and foot, muscle group XI, evaluated as 10 percent disabling; retained metallic foreign bodies with scars, right medial posterior thigh, muscle group XIII, evaluated as 10 percent disabling; retained metallic foreign bodies, right anterior thigh, muscle group XIV, evaluated as 10 percent disabling; retained metallic foreign bodies and scar of the lower right quadrant and right lateral wall of the abdomen, muscle group XXI, evaluated as 10 percent disabling; nerve impairment, left anteromedial foot due to retained metallic foreign bodies, evaluated as 10 percent disabling; scars, multiple SFWs about the right elbow, right mid and lateral wall of the abdomen, right ankle, and right metatarsal phalangeal joint, evaluated as noncompensable; and scars, multiple over both lower extremities, buttocks, lower back, abdomen and right elbow with retained metallic foreign bodies, evaluated as noncompensable. The combined evaluation was 20 percent from February 1946, 40 percent from February 1949, zero percent from December 1959, 10 percent from April 2004, and 70 percent from June 2004.

The Veteran died on January [redacted], 2006, and the death certificate lists the cause of death as ALS, a condition which was noted to have been in existence for years. The Veteran was not service connected for ALS at the time of his death. However, as will be discussed below, the Veteran had a claim for service connection for ALS pending at the time of his death. In development accomplished in pursuit of the claim for service connection for ALS, the Veteran's then-treating VA physician proffered a July 2004 statement in which he observed that Guam had a higher incidence of ALS than other parts of the world due, perhaps, to an environmental toxin. The physician further noted that people who develop ALS have it for many years prior to manifesting the typical signs and symptoms, losing over 70 percent of their motor neurons before major symptoms develop. The physician then opined that it was as likely as not that the Veteran developed ALS from something he was exposed to while on Guam during his active service, and that complaints of back pain and back weakness in the 1940s may have been pre-clinical signs of the disease.

In October 2004, the RO obtained an independent medical opinion from a specialist board-certified in neurology with an added qualification in clinical neurophysiology, based on a records review of the Veteran's claims file. The physician observed that while an ALS syndrome is seen in Guam, the condition occurs exclusively in native Chamorro Indians and has never been described in non-natives. Hence, the Veteran could not have Guamanian motor neuron disease. Moreover, 10 percent of ALS runs in families, usually presenting in individuals under the age of 50. Since the Veteran had no family history for the condition, his diagnosis fell into the category of unknown cause, which represents about 80 percent of ALS. The physician opined that the Veteran had ALS of an unknown cause, not connected with shrapnel, low back pain or weakness, or toxins. He further observed that the paresthesias in the left lower extremity shown to be present in 1946 were not a prodrome of ALS, because ALS does not include sensory dysfunction.

The Veteran died in 2006, and the appellant filed a claim for the cause of the Veteran's death and for service connection for ALS for the purposes of accrued benefits. In April 2007, the appellant and her representative testified before the undersigned Veterans Law Judge. They argued that the Veteran's ALS was the result of his active service, in particular, his service in Guam, where he was wounded. The appellant relied on the July 2004 opinion. The appellant further testified that she had married the Veteran in 1947, and that she observed him to exhibit weakness after his discharge and before his diagnoses of ALS throughout the years up to his diagnosis of ALS. Service personnel records show that the Veteran served in Guam, as part of the initial landing of the 3rd Marine Division in July 1944.

He was wounded in combat and transferred to an unknown destination. The record is unclear, but he was apparently treated in a field hospital, received aboard the USS Elmore in August 1944 and was then apparently again transferred to a field hospital in September 1944.

Given the difference of opinions concerning the etiology of the ALS in the claims file, the Board requested an independent medical opinion in September 2008. An October 2008 opinion was provided by a VA neurologist/Medical Services physician, and based on review of the Veteran's claims file. **The physician observed that there is a variant of ALS which is found on Guam.** To the best of his knowledge, he stated, it is found only in the Chamorro people and the cause is unknown, although inheritance and environment both appear important. However, additional research has postulated that neurotoxic substances in the food chain-particularly dietary items of the Chamorro people-are a potential link. Thus, the physician stated, **service on Guam may indeed increase exposure to various known risk factors for ALS,** although it is not yet determined whether or not these environmental precautions and exposures have resulted in an increase in ALS among service members stationed there.

A November 2006 study of the National Academy of Sciences, Institute of Medicine found that there is limited and suggestive evidence of an association between military service and later development of ALS. Findings noted in the study suggested that military service in general is related to the development of ALS. The physician stated that VA has drafted a new interim final rule for the presumption of service connection for ALS, which states that "[t]he development of ALS at ANY TIME after discharge or release from active military, Naval, or Air Service is sufficient to establish service connection from that disease, if the veteran had active continuous service of 90 days or more" (capitalization in the original). **The physician thus opined that it was at least as likely as not that the ALS the Veteran was diagnosed with and which caused his death had its onset during active service or was the result of his active service or an instance of that service including his service in Guam.** The physician opined that the Veteran's service connected disabilities, which included primarily retained foreign bodies and scars, PTSD, and nerve impairment of the left anteromedial foot, did not materially contribute to the Veteran's death. The physician stated he based this opinion on his review of the research as it stands, new reasonable doubt about the diagnosis of ALS, the VA's interim criteria for establishment of development of ALS being sufficient to establish service connection for the disease, the examinations and neurological medical opinions, and the claims file. The October 2008 opinion is based on a review of the record, to include both the July and October 2004 opinions and the claims file, including the Veteran's service medical records.

It is therefore probative. There are no other findings or opinions establishing that ALS was not the cause of the Veteran's active service, or any incident therein, including his service in Guam. Service connection for the cause of the Veteran's death is therefore warranted.

II. Service Connection for the Purposes of Accrued Benefits Service connection may be established for disability resulting from injury or disease incurred in service. 38 U.S.C.A. § 1110. Service connection connotes many factors, but basically, it means that the facts, as shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service. A determination of service connection requires a finding of the existence of a current disability and a determination of a relationship between that disability and an injury or disease in service. See *Pond v. West*, 12 Vet. App. 341 (1999); *Hickson v. West*, 12 Vet. App. 247, 253 (1999). The standard of proof to be applied in decisions on claims for veterans' benefits is set forth in 38 U.S.C.A. § 5107. A veteran is entitled to the

benefit of the doubt when there is an approximate balance of positive and negative evidence. See also, 38 C.F.R. § 3.102. When a veteran seeks benefits and the evidence is in relative equipoise, the veteran prevails. See *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The preponderance of the evidence must be against the claim for benefits to be denied. See *Aleman v. Brown*, 9 Vet. App. 518 (1996).

An accrued benefits claim arises after a veteran has died. Although a veteran's claim does not survive his death, see *Landicho v. Brown*, 7 Vet. App. 42, 47 (1994), certain individuals may be entitled to accrued benefits under certain conditions. Among requirements for accrued benefits are that a claim must be filed within the year after the veteran's death. 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000. An individual entitled to accrued benefits may be paid periodic monetary benefits to which a veteran was entitled at the time of his death based on evidence in the file at the time of his death. *Id.* In order to support a claim for accrued benefits, the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision. 38 U.S.C.A. § 5101(a), 5121(a); *Jones v. West*, 136 F.3d 1296 (Fed. Cir. 1998). At the time of the Veteran's death, the Veteran was seeking entitlement to service connection for ALS. Within the year following his death, the appellant submitted a claim for entitlement to service connection for the cause of the Veteran's death.

The claim was also considered a claim of entitlement to service connection for ALS for the purposes of accrued benefits. An accrued benefits claim is, under the law, derivative of, and separate from, the veteran's claims. See *Zevalkink v. Brown*, 6 Vet. App. 483, 489-490 (1994), *aff'd* 102 F.3d 1236 (Fed. Cir. 1996). Thus, in the adjudication of a claim for accrued benefits, the claimant is bound by the same legal requirement to which the veteran would have been bound had he survived to have his claim finally decided. In considering the appellant's claim for accrued benefits, generally, only evidence contained in the claims file at the time of the Veteran's death may be considered. 38 U.S.C.A. § 5121; 38 C.F.R. § 3.1000. However, in *Hayes v. Brown*, 4 Vet. App. 353, 360-61 (1993), the Court held that service department and certain VA medical records are considered as being constructively in the claims file at the date of death although they may not physically be in there until after that date. The pertinent provisions refer to service department records, reports of VA hospitalizations, reports of treatment by VA medical centers, reports of treatment authorized by the VA, and reports of autopsy made by VA on the date of death.

In the present case, the claims file at the time of the Veteran's death contained the July and October 2004 opinions-which, as above detailed, reflected opinions for and against the grant of service connection for ALS. The October 2004 opinion against service connection was based on review of the claims folder only, without examination of the Veteran. The July 2004 opinion was proffered by the Veteran's treating VA physician, whose opinion was informed by examination of the Veteran and, presumably, also by review of the Veteran's treatment records, at the very least. Both opinions lack material information, the former examination of the Veteran and the latter, presumably, review of the entire claims file. As both opinions lack important aspects required in the determining of an etiology of a condition, they may both be viewed as equally lessened in probative value.

There are no other medical opinions or findings that were of record at the time of the Veteran's death which establish that the ALS either was or was not the result of active service. The evidence is thus in equipoise, the benefit of the doubt goes to the appellant, and service connection for ALS for the purpose of accrued benefits is warranted.

ORDER Service connection for the cause of the Veteran's death is granted. Service connection for ALS for the purpose of accrued benefits is granted.

HOLLY E. MOEHLMANN Veterans Law Judge, Board of Veterans' Appeals Department of Veterans Affairs