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On appeal from the
Department of Veterans Affairs Medical and Regional Office
Center in Fargo, North Dakota

THE ISSUE

Entitlement to service connection for Type-II diabetes mellitus, including as secondary to Agent Orange exposure.

REPRESENTATION

Appellant represented by: Virginia A. Girard-Brady, Attorney At Law

ATTORNEY FOR THE BOARD

David S. Nelson, Counsel

INTRODUCTION

The Veteran retired from active service in March 1973 with more than 20 years of active military service.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a March 2005 rating decision of the Fargo, North Dakota, Regional Office (RO) of the Department of Veterans Affairs (VA).

A December 4, 2008 Board decision denied, in pertinent part, entitlement to service connection for Type-II diabetes mellitus, including as secondary to Agent Orange exposure. The Veteran thereafter appealed that decision to the United States Court of Appeals for Veterans Claims (Court) which, upon an October 2009 Joint Motion For Vacatur And Partial Remand, promulgated an Order on October 6, 2009 that (essentially) vacated that part of the Board's December 4, 2008 decision that denied the claim of entitlement to service connection for Type-II diabetes mellitus, including as secondary to Agent Orange exposure.

The December 2008 Board decision also denied entitlement to an initial compensable disability rating for bilateral hearing loss, for the period from September 30, 2004 through October 11, 2005, and entitlement to a staged initial disability rating in excess of 10 percent for bilateral hearing loss, from October 12, 2005. The parties agreed

(Joint Motion, page 1) that these decisions should be affirmed.

FINDING OF FACT

A private examiner has linked the Veteran's diabetes to his military service and exposure to Agent Orange, and diabetes has not been dissociated, by competent clinical evidence of record, from the Veteran's active service.

CONCLUSION OF LAW

Type-II diabetes mellitus was incurred in active service. 38 U.S.C.A. §§ 1110, 1131, 5107 (West 2002); 38 C.F.R. § 3.303 (2009).

REASONS AND BASES FOR FINDING AND CONCLUSION

In light of the favorable decision to grant the Veteran's claim of entitlement to service connection for diabetes mellitus, any deficiency as to VA's duties to notify and assist, pursuant to the provisions of the Veterans Claims Assistance Act of 2000 (VCAA) and as noted in the Joint Motion of the Parties (for example, to obtain additional personnel records) is rendered moot.

Service connection is warranted if it is shown that a veteran has a disability resulting from an injury incurred or a disease contracted in active service, or for aggravation of a preexisting injury or disease in active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. Service connection may also be granted for any disease diagnosed after discharge when all of the evidence establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

VA is required to evaluate the supporting evidence in light of the places, types, and circumstances of service, as evidenced by service records, the official history of each organization in which the veteran served, the veteran's military records, and all pertinent medical and lay evidence. 38 U.S.C.A. § 1154(a).

In a letter received in June 2005, the Veteran's private physician (W.R.T., MD) stated, in pertinent part, as follows:

> [The Veteran] is a patient of mine who has type 2 diabetes mellitus. . . . It is becoming an increasingly established fact that prior exposure to Agent Orange is a risk factor for development of adult type diabetes. It is certainly a reasonable medical assumption that [the Veteran's] exposure to Agent Orange could be responsible for his adult diabetes

mellitus given an absence of a family history of diabetes in his family.

The Veteran's DD 214 and other personnel records reveal that his military occupational specialty was disaster preparedness technician. Service treatment records dated from May 1972 to August 1972 reflect that the Veteran received treatment at the Johnston Island Dispensary and Johnston Island Hospital.

The Veteran's consistent contentions during the appeal (as noted in statements such as that received in November 2006) has been that he was exposed to Agent Orange while serving as a disaster preparedness technician under the supervision of civilian contractors on Johnston Island in 1972. The Veteran has maintained that when he arrived at Johnston Island many of the Agent Orange barrels stored there were corroded and leaking. He has consistently maintained that he was directly exposed to Agent Orange while re-barreling was being accomplished during that time. The Veteran related a specific incident in which he had to wade into a four feet deep rectangular open pit (100 feet long by 75 feet wide) of Agent Orange to help rescue a civilian worker who had accidently become entangled in equipment. The Veteran indicated that he could not pull the man out of his entanglement until another civilian worker waded into the pit and assisted the Veteran. The Veteran indicated that the worker who had become entangled was subsequently evacuated for treatment due to fears that the worker had ingested Agent Orange or had contaminated his eyes.

In a statement dated in January 2007, K.R.L., a disaster preparedness training officer with the U.S. Air Force, acknowledged that he was unable to "speak directly" about the Veteran's specific duties while stationed on Johnston Island. After noting the general duties of a disaster preparedness technician, and after briefly noting the history of Agent Orange storage at Johnston Island, K.R.L. stated, in the conclusion of his statement, as follows:

I would believe that as Johnston Island Disaster Preparedness Technician, [the Veteran] was directly involved in the re-barreling operation, at least to advise & monitor the re-barreling operation."

The Joint Motion (page 6) has remanded this case to VA in large part for the purpose of having VA assess the Veteran's credibility and competency to "offer testimony regarding his experience during service." Further, VA is also to discuss (Joint Motion, page 5) the January 2007 statement from K.R.L. submitted in support of the Veteran's claim. The Board notes that subsequent to the December 2008 Board denial, cases such as Davidson v. Shinseki, 581 F.3d 1313 (Fed. Cir. Sept. 14, 2009) have continued to provide further guidance on assessing the competence and credibility of lay statements.

With such considerations in mind, the Board finds the

Veteran's assertions (when coupled with the January 2007 statement from K.R.L., described as being "favorable evidence" by the Joint Motion, page 5) concerning his exposure to Agent Orange to be credible. Further, while VA has determined (See Adjudication Manual, M21-1MR, part IV, Subpart ii, Chapter2, Section C.10m) that because military contactors were responsible for the inventory, "few military personnel who served on Johnston Island had duties involving the direct handling" of herbicides, it is clear that, unlike most service personnel, the Veteran's training and military occupation specialty put him in a position to be exposed to Agent Orange. 38 U.S.C.A. § 1154(a).

In short, the evidence shows that the Veteran was exposed to Agent Orange during service, and a physician (who has treated the Veteran and has knowledge of his medical history) has linked the Veteran's diabetes mellitus to that exposure. The Veteran's private examiner has noted (and as such, has essentially provided a rationale for the opinion) the absence of diabetes in the Veteran's family history, and there is no contrary medical opinion in the claims file. As such, the Board concludes that service connection for diabetes mellitus on a direct basis is warranted.

ORDER

Service connection for diabetes mellitus is granted.

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U. R. POWELL
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs