

AGENT ORANGE IN Thailand ASSOCIATED TO malignant lymphoma

Citation Nr: 0418252

Decision Date: 07/09/04 Archive Date: 07/21/04

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On appeal from the  
Department of Veterans Affairs Regional Office in Newark, New  
Jersey

THE ISSUE

Entitlement to restoration of service connection for  
histiocytic type malignant lymphoma.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of  
the United States

WITNESS AT HEARING ON APPEAL

The veteran

ATTORNEY FOR THE BOARD

K.S. Hughes, Counsel

INTRODUCTION

The veteran served on active duty from August 1968 to August  
1972.

This matter comes before the Board of Veterans' Appeals  
(Board) on appeal from a July 1998 rating decision of the  
Department of Veterans Affairs (VA) Regional Office (RO) in  
Newark, New Jersey, severing service connection for  
histiocytic type malignant lymphoma.

In connection with this appeal, the veteran testified at a  
Travel Board hearing before the undersigned Acting Veterans  
Law Judge in December 2003. A transcript of that hearing is

associated with the claims file.

## FINDINGS OF FACT

1. The veteran was awarded service connection for histiocytic type malignant lymphoma in a January 1995 rating decision.
2. At the time of the initial award of service connection for histiocytic type malignant lymphoma, the record contained medical evidence confirming a diagnosis of histiocytic type malignant lymphoma shortly after discharge, the veteran's plausible allegations of in-service herbicide exposure, and corroboration of the veteran's service in Thailand and his maintenance work on B-57 aircraft.
3. The January 1995 award of service connection for histiocytic type malignant lymphoma was not clearly and unmistakably erroneous.

## CONCLUSION OF LAW

The criteria for severance of service connection for histiocytic type malignant lymphoma were not met. 38 U.S.C.A. § 5109A(b) (West 2002); 38 C.F.R. § 3.105(d) (2003).

## REASONS AND BASES FOR FINDINGS AND CONCLUSION

On November 9, 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), which has since been codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002). This change in the law is applicable to all claims filed on or after the date of enactment of the VCAA, or filed before the date of enactment and not yet final as of that date. The Board has considered this new legislation with regard to the issue on appeal and finds that, given the favorable action taken herein, no further notification or assistance pertinent to the issue on appeal is required.

The veteran challenges the propriety of the RO's severance of service connection for histiocytic type malignant lymphoma. Once service connection has been granted, it can be severed only upon the Secretary's showing that the rating decision granting service connection was "clearly and unmistakably

erroneous," and only after certain procedural safeguards have been met. 38 C.F.R. § 3.105(d); *Graves v. Brown*, 6 Vet. App. 166, 170-71 (1994).

The United States Court of Appeals for Veterans Claims (Court) has held that 38 C.F.R. § 3.105(d) places the same burden of proof on the VA when it seeks to sever service connection as 38 C.F.R. § 3.105(a) places upon a claimant seeking to have an unfavorable previous determination overturned. *Baughman v. Derwinski*, 1 Vet. App. 563, 566 (1991). Clear and unmistakable error is defined the same under 38 C.F.R. § 3.105(d) as it is under 38 C.F.R. § 3.105(a). See *Venturella v. Gober*, 10 Vet. App. 340, 342 (1997).

The veteran claims that he was exposed to Agent Orange at Ubon, Thailand, where he worked on airplanes which were used for spraying herbicides in Vietnam. Specifically, he states that he worked on Hayes Dispensers which were coated with a substance, which was foreign to him, and which he now believes was Agent Orange. The veteran essentially reaffirmed his contentions during his December 2003 Travel Board hearing.

The veteran's service personnel records reflect that he had one year, three months, and two days of foreign and/or sea service. These records further show that he served as a weapons mechanic at Ubon Airfield, Thailand.

Private treatment records show that the veteran complained of a mass at the right axillary region in November 1974. A December 1974 cytology and tissue examination report reflects a microscopic diagnosis of changes in lymph nodes consistent with diagnosis of lympho histiocytic type of malignant lymphoma. Subsequent medical records, including a May 1990 report of VA examination for Agent Orange, show treatment for recurrent skin lesions.

The rating decision that granted service connection for histiocytic type malignant lymphoma in 1995 listed the evidence used for the determination as the service administrative records, a May 1994 VA examination report, and private medical records. The rating decision notes that, although the veteran did not serve in Vietnam, he presented a plausible explanation as to how he could have come in contact with Agent Orange and, given the fact that he had histiocytic

type malignant lymphoma diagnosed in 1974, all reasonable doubt was resolved in his favor and service connection was granted and a schedular evaluation of 30 percent was assigned.

Thereafter, in February 1995, the RO requested verification from the United States Army and Joint Services Environmental Support Group (ESG) as to the storage, handling, or use of Agent Orange at Ubon Airfield.

In May 1995, the ESG responded that herbicides were not stored or sprayed near United States personnel in Thailand and that it was unable to confirm that the veteran worked on equipment that contained Agent Orange.

In August 1995, the RO requested an advisory opinion from the Veterans Benefits Administration, Compensation and Pension Service, as to whether the January 1995 rating decision was clearly and unmistakably erroneous in granting service connection for histiocytic type malignant lymphoma.

The Director of Compensation and Pension Service subsequently replied that action to sever service connection may not be initiated unless it can be clearly established that the veteran was never exposed to herbicide agents during his military service. The RO was further advised that the burden of establishing this fact rests with VA.

In an October 1997 rating decision, the RO proposed to sever service connection for histiocytic type malignant lymphoma. The veteran was advised of the proposed severance in an October 1997 letter.

The veteran responded to the notification of the proposed severance in October 1997, stating that he was assigned to replace and inspect Hayes Dispensers while on duty in Thailand. He said that the dispensers came from Vietnam and "were coated with an oily petrol type substance" which he believed was Agent Orange. In addition, the veteran provided a copy of a performance report, dated in March 1971, which notes that he performed inspections and replacement of items on all assigned Hayes Dispensers.

In a July 1998 rating decision, the RO severed service connection for histiocytic type malignant lymphoma on the basis that "the preponderance of the evidence is

unfavorable" and "the rule regarding benefit of reasonable doubt does not apply." The veteran disagreed with the July 1998 rating decision and initiated this appeal.

In a September 1999 letter to the Director, Compensation and Pension Service, the veteran's accredited representative argued that it had not been shown by VA that there was no conceivable way to maintain service connection and, thus, the severance of service connection was premature. Specifically, the veteran's representative argued that the veteran's claim of herbicide exposure as a result of contact with aircraft equipped with Hayes Dispensers had not been resolved.

In March 2000, the RO was instructed by the Director, Compensation and Pension Service, to contact the United States Armed Services Center for Unit Records Research (USASCURR) (formerly ESG) and request information about the possible contamination of the Hayes Dispensers which the veteran came into contact with during his tour in Thailand.

In October 2001, USASCURR responded that it was unable to confirm or locate documentation indicating that Ranch Hand aircraft (used to spray herbicides over South Vietnam) originated from Ubon Air Force Base in Thailand. However, USASCURR further stated that the "Hayes Company" developed the spray equipment used in the Ranch Hand defoliation program. The issue of "possible contamination" of the Hayes Dispensers with which the veteran came into contact was not addressed.

In a June 2003 Supplemental Statement of the Case, the RO again declined to restore service connection on the basis that "the evidence does not establish that the veteran was exposed to Agent Orange while in service" and the "the preponderance of the evidence is against his claim, and there is no doubt to be resolved."

The RO has simply applied the wrong legal standard. As noted previously, 38 C.F.R. § 3.105(d) mandates that there be clear and unmistakable error in the prior rating decision in order to sever service connection, and the burden is on VA to produce evidence of such error. While the RO stated "it has not been verified that the veteran handled, used, stored, or was in any way exposed to Agent Orange, or that he came into contact with equipment that may have been exposed to Agent Orange, during his service in Thailand" that statement

is not correct. In fact, the veteran did come into contact with equipment that may have been exposed to Agent Orange, the Hayes Dispensers.

It is not disputed that the veteran served in Ubon, Thailand, and worked on the Hayes Dispenser weapons system on B57 aircraft. It is not disputed that the Hayes Dispenser weapons system and B57 aircraft were used in the Operation Ranch Hand defoliation program. It is not disputed that the defoliation program continued during the time period the veteran worked on the Hayes Dispenser weapons system. It is not disputed that the veteran developed a lympho histiocytic type of malignant lymphoma shortly after his discharge from active service.

On the other hand, it could not be verified that B-57G aircraft were used to spray herbicides during 1970 and 1971, and it could not be confirmed that Ranch Hand aircraft flew missions out of Ubon, Thailand.

The RO essentially used a lack of information concerning herbicide exposure as the evidence to sever service connection. This had the effect of placing the burden of proof on the veteran, impermissible under 38 C.F.R. § 3.105(d), and insufficient to justify a finding of clear and unmistakable error in the grant of service connection.

While, in hindsight, the decision to grant service connection for histiocytic type malignant lymphoma in 1995 may certainly be second-guessed, it may not be overturned based on the evidence of record. Accordingly, service connection for histiocytic type malignant lymphoma is restored. 38 U.S.C.A. § 5109A(b); 38 C.F.R. § 3.105(d).

#### ORDER

The appeal is granted, and service connection for histiocytic type malignant lymphoma is restored.

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RONALD W. SCHOLZ  
Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- ? Appeal to the United States Court of Appeals for Veterans Claims (Court)
- ? File with the Board a motion for reconsideration of this decision
- ? File with the Board a motion to vacate this decision
- ? File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- ? Reopen your claim at the local VA office by submitting new and material evidence.

There is no time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court before you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the Court? You have 120 days from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the United States Court of Appeals for Veterans Claims. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the Court. As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you, you will then have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should

know that even if you have a representative, as discussed below, it is your responsibility to make sure that your appeal to Court is filed on time.

How do I appeal to the United States Court of Appeals for Veterans Claims?  
Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims  
625 Indiana Avenue, NW, Suite 900  
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's web site on the Internet at [www.vetapp.uscourts.gov](http://www.vetapp.uscourts.gov), and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal with the Court, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to:

Director, Management and Administration (014)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420

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Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management and Administration, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management and Administration, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and seek help from a qualified representative before filing such a motion. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. See 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the

Internet at: [www.va.gov/vso](http://www.va.gov/vso). You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information is also provided on the Court's website at [www.vetapp.uscourts.gov](http://www.vetapp.uscourts.gov).

Do I have to pay an attorney or agent to represent me? Except for a claim involving a home or small business VA loan under Chapter 37 of title 38, United States Code, attorneys or agents cannot charge you a fee or accept payment for services they provide before the date BVA makes a final decision on your appeal. If you hire an attorney or accredited agent within 1 year of a final BVA decision, then the attorney or agent is allowed to charge you a fee for representing you before VA in most situations. An attorney can also charge you for representing you before the Court. VA cannot pay fees of attorneys or agents.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. For more information, read section 5904, title 38, United States Code.

In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to:

Office of the Senior Deputy Vice Chairman (012)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420

The Board may decide, on its own, to review a fee agreement for reasonableness, or you or your attorney or agent can file a motion asking the Board to do so. Send such a motion to the address above for the Office of the Senior Deputy Vice Chairman at the Board.

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