BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
WILLIAM S. HUNT [redacted]

DOCKET NO. 05-39 345A) DATE *February 20, 2014*
) *MJ*
)

On appeal from the
Department of Veterans Affairs (VA) Regional Office (RO)
in Albuquerque, New Mexico

THE ISSUES

1. Entitlement to service connection for diabetes mellitus, type II, claimed as secondary to herbicide exposure.

2. Entitlement to service connection for a heart condition; hypertension; numbness of the fingers, forearm, hands, and lips; impotence; stomach problems; foot problems; glaucoma; and dental problems, each claimed as secondary to diabetes mellitus, type II.

REPRESENTATION

Appellant (the Veteran) is represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

L. Cramp, Counsel

INTRODUCTION

The Veteran had active service from 1963 to March 1967.

This appeal comes before the Board of Veterans' Appeals (Board) from a July 2004 rating decision of the RO in Nashville, Tennessee. Jurisdiction over the claims file is maintained at the RO in Albuquerque, New Mexico.

In June 2010, the Veteran presented testimony at a Board hearing chaired by the undersigned Veterans Law Judge sitting at the RO. A transcript of the hearing is associated with the claims file.

The Veteran submitted additional medical records after the Board hearing but did not include a waiver of RO review of those records; however, the essential question in this appeal does not concern whether the Veteran currently has or is being treated for the disabilities claimed herein, but rather turns on whether the Veteran was exposed to herbicides or whether his diabetes mellitus can be directly related to service.

Since the evidence submitted does not address either of these questions, the Board finds that a waiver of RO review is not necessary and that appellate adjudication may proceed.

In October 2010, the Board issued a decision denying the Veteran's claims. The Veteran appealed the Board's decision to the Court of Appeals for Veterans Claims (Veterans Court), which partially vacated the Board's decision in a July 2011 Order and returned that part to the Board for action consistent with a Joint Motion for Partial Remand (Joint Motion). The Veterans Court preserved the Board's October 2010 decision with regard to the issue of entitlement to service connection for

depression, claimed as secondary to diabetes mellitus, which was on appeal at that time.

In a decision dated in January 2012, the Board again denied these claims. The Veteran also appealed the January 2012 decision to Veterans Court. In a May 2013 Memorandum Decision, the Veterans Court vacated the Board's January 2012 decision and remanded these issues back to the Board.

In reviewing this case the Board has not only reviewed the physical claims file, but has also reviewed the electronic file on the "Virtual VA" system to insure a total review of the evidence.

FINDINGS OF FACT

1. The Veteran did not set foot on the ground in Vietnam and was not present in the inland waterways of Vietnam at any time during his military service.

2. The Veteran was not actually exposed to herbicides at any time during his service.

3. Diabetes mellitus, type II is not related to service and did not become manifest within 1 year of service separation.

4. Service connection for is not in effect for diabetes mellitus.

CONCLUSIONS OF LAW

1. Diabetes mellitus, type II was not incurred in service and such incurrence is not presumed. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1116, 5103, 5103A, 5107, 7104 (West 2002); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309 (2013).

2. The basic criteria for service connection for a heart condition; hypertension; numbness of the fingers, forearm, hands, and lips; impotence; stomach problems; foot problems; glaucoma; and dental problems, each claimed as secondary to diabetes mellitus, are not met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1116, 5103, 5103A, 5107, 7104 (West 2002); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309, 3.310 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran asserts that he incurred diabetes mellitus, type II as a result of exposure to herbicide agents used in Vietnam. The Veteran has proposed several means of exposure to herbicides, which the Board will address in turn:

The Veteran has asserted that exposure to herbicide agents should be presumed based on his presence aboard a U.S. Navy destroyer (U.S.S. Theodore, E. Chandler), which operated off the coast of Vietnam during the Vietnam War, and which was moored to a second ship (S.S. Rutgers Victory), which was anchored in Nha Trang harbor in 1966. The Veteran reportedly assisted in extinguishing a fire aboard the Rutgers Victory. The Veteran has asserted that his presence in Nha Trang harbor, which he asserts constitutes an inland waterway, and aboard the Rutgers Victory, should be considered qualifying presence in Vietnam for purposes of the presumptive provisions.

The Veteran alternatively has asserted that he was present and serving as engine man on a smaller craft which made excursions to shore, and that these excursions should be considered qualifying presence in Vietnam for purposes of the presumptive provisions.

In addition to presumptive service connection, the Veteran has asserted actual exposure to herbicides, which he asserts were being carried as cargo aboard the burning Rutgers Victory in Nha Trang harbor, were present in seawater used to douse the fire, were present in drinking water distilled from seawater, and were

present in water in which he bathed, showered, and swam. He also has asserted that herbicides were sprayed over the U.S.S. Chandler from passing planes.

The Board denied this claim in October 2010 and January 2012 decisions based on the finding of the Board at those times that the Veteran never set foot in Vietnam and that therefore the presumption of herbicide exposure did not apply to him. The Board also found that there was no competent evidence of actual herbicide exposure and that, consistent with the Veteran's assertions, diabetes mellitus was not directly related to service through any other means.

The July 2011 Joint Motion was focused essentially on the Board's interpretation in the October 2010 decision of specific hearing testimony that the Veteran never left the ship. The parties to the Joint Motion agreed that this testimony should be read "contextually" as referring to the incident in which he assisted in extinguishing a fire on the S.S. Rutgers Victory, and not to his entire service. The parties to the Joint Motion stipulated that, in other statements, the Veteran had related trips he took to shore.

In the May 2013 Memorandum Decision, the Veterans Court found that the January 2012 Board decision failed to comply with the terms of the July 2011 Joint Motion of the parties and Order of the Veterans Court. In particular, the Veterans Court citing the following finding of the Board:

> The parties of the [Joint Motion] are attempting to read into the transcript something that simply does not exist: A finding that when the Veteran was talking about never having gone ashore to Vietnam (he "never left the ship", transcript at page 37) he was testifying only to the fact that he did not go ashore while fighting the fire on the merchant ship. This "contextual" reading of the transcript is simply not accurate.

The Veterans Court noted that, in the July 2011 Order, it had approved a remand instructing the Board to read the Veteran's testimony regarding not having left the ship as applying only to a single incident, and the Board did not do so.

After a review of all of the evidence, the Board finds that a preponderance of the evidence demonstrates that the Veteran did not set foot onshore in Vietnam, and was not present in the inland waterways of Vietnam, at any time during his service. Further, the Board finds that a preponderance of the evidence is against any actual exposure to herbicides during the Veteran's service.

In making these findings, the Board understands, and wishes to make clear, that the Veteran's testimony that he never left the ship, as cited above, is interpreted by the Board as applying only to the specific incident in November 1966 during which the Veteran assisted in extinguishing a fire aboard the S.S. Rutgers Victory, and not to his entire period of service. The Board will address the Veteran's testimony that he left the ship at other times to set foot on Vietnam soil.

The Veteran's service personnel records do not reflect that the Veteran was ever physically present in the Republic of Vietnam or in the inland waterways of Vietnam for active duty service. Rather, they show that he served in the U.S. Navy aboard an ocean-going vessel, the destroyer U.S.S. Theodore E. Chandler, DD-717. The National Personnel Record Center has confirmed that the Chandler was present in the "official waters" of Vietnam on several occasions from 1965 to 1967.

As corroborated by the ship's deck logs, the destroyer U.S.S. Chandler responded to a fire aboard another vessel (S.S. Rutgers Victory) which was anchored in the middle of Nha Trang harbor on Sunday November 13, 1966. The burning ship was noted to contain a cargo of rice and building materials. At 1233 hours, the Chandler moored to the starboard side of the Rutgers Victory with standard mooring lines. At 1246 hours, firefighting equipment and personnel was transferred to the Rutgers Victory. At 1530 hours, the fire was extinguished. At 1838 hours, the Chandler was underway and departing Nha Trang harbor. The Chandler did not dock at any time, nor apparently did the Rutgers Victory, which remained anchored in the middle of the harbor.

The Veteran testified at the Board hearing that he did not go ashore at any time during the incident of November 13, 1966. As already discussed, the parties to the Joint Motion have stipulated that his testimony regarding not having gone ashore in

Vietnam applies only to this incident. The Board will address his other contentions below. Nevertheless, the November 13, 1966 incident (the fire) has been the focal point of the Veteran's written submissions regarding this appeal (which the Board believes has caused some of the confusion in this case). The Veteran has repeatedly asserted that his presence aboard the Chandler and Rutgers Victory in Nha Trang harbor is the basis for his claim that he was present in "Vietnam" for purposes of the presumptive provisions.

To reiterate, there is complete agreement of all parties that the Veteran did not actually go ashore in conjunction with this incident (the fire).

This finding is important as a veteran must actually set foot within the land borders of Vietnam, to include the contiguous or inland waterways, in order to be entitled to the statutory presumptions for disabilities claimed as a result of exposure to herbicides. *See Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008); *see also* VAOPGCPREC 27-97.

Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. 38 C.F.R. § 3.307(a)(6)(iii).

However, service on a deep-water naval vessel off the shores of Vietnam may not be considered service in the Republic of Vietnam for purposes of 38 U.S.C.A. § 101(29)(A), unless evidence shows that a Veteran went ashore. VAOPGCPREC 27-97.

It is important for the Veteran to understand that VA General Counsel opinions are binding on the Board. *See* 38 U.S.C.A. § 7104(c) (West 2002); 38 C.F.R. § 14.507 (2013).

Since issuance of the above-cited General Counsel opinion, VA has reiterated its position that service in deep-water naval vessels offshore of Vietnam (as opposed to service aboard vessels in inland waterways of Vietnam) is not included as "service in the Republic of Vietnam" for purposes of presumptive service connection for

Agent Orange diseases. *See* comments section in Federal Register announcement of final rule adding diabetes to the list of Agent Orange presumptive diseases, 66 Fed. Reg. 23166 (May 8, 2001).

Subsequently, in May 2008, the Federal Circuit held that the interpretation by VA of the phrase "served in the Republic of Vietnam," which required the physical presence of a veteran within the land borders of Vietnam during service, was a permissible interpretation of 38 U.S.C.A. § 1116(a)(1)(A) and 38 C.F.R. § 3.307(a)(6)(iii). The United States Supreme Court, declined to review the case, and the decision of the Federal Circuit in *Haas* is final.

The Veteran has repeatedly asserted that "Nha Trang harbor", where the two vessels cited above at issues were located, is an "inland waterway" and that his presence on a ship in "Nha Trang harbor" satisfies the requirement of the presumption that an individual have been present in Vietnam. The Board must address this issue.

VA's Adjudication Procedure Manual defines inland waterways as the rivers, canals, estuaries, delta areas, and enclosed bays of Vietnam. *See* VA Adjudication Procedure Manual M21-1MR, pt. IV, subpt. ii, ch. 2, § C.10.k. The Manual specifies that service aboard a ship that is anchored in an open deep-water harbor along the coast of the Republic of Vietnam "does not constitute inland waterway service." These harbors are considered to be part of the offshore waters of Vietnam because of their deep-water anchorage capabilities and open access to the South China Sea. The Board reiterates that the Rutgers Victory was anchored in the middle of Nha Trang harbor.

Accordingly, the Board finds that the Veteran's presence aboard ships anchored or moored to other ships within Nha Trang harbor is not qualifying service for purposes of the presumption of exposure to herbicide agents.

Also significant in the Board's finding regarding inland waterway service, the U.S.S. Chandler is not on VA's list of Navy and Coast Guard Ships associated with service in Vietnam and Exposure to Herbicides. VA's "ship list" is intended to provide VA regional offices with a resource for determining whether a particular

US Navy or Coast Guard Veteran of the Vietnam era is eligible for the presumption of Agent Orange herbicide exposure based on operations of a particular ship. The list contains five categories of ships that operated on the waters of Vietnam. A ship is placed on this list when documentary evidence shows that it fits into a particular category. The required evidence can come from an official ship history, deck logs, cruise books, Captain's letters, or similar documents. A specific ship may be listed in more than one category, based on its activities. Evidence requirements for the presumption of Agent Orange exposure may vary depending on what dates the Veteran was aboard and what ship activity occurred on those dates.

Ship categories include: (1) Ships operating primarily or exclusively on Vietnam's inland waterways; (2) Ships operating temporarily on Vietnam's inland waterways; (3) Ships that docked to shore or pier in Vietnam; (4) Ships operating on Vietnam's close coastal waters for extended periods with evidence that crew members went ashore; and (5) Ships operating on Vietnam's close coastal waters for extended periods with evidence that smaller craft from the ship regularly delivered supplies or troops ashore.

The information from the command history of the U.S.S. Chandler and the information from the National Personnel Records Center shows that the Chandler did not fall into one of the above categories. The ship did not operate primarily or exclusively or even temporarily on Vietnam's inland waterways. The ship operated offshore the coast of Vietnam and within Nha Trang harbor. During the time period in question, the Chandler did not dock to shore or pier in Vietnam.

The Veteran submitted an operations summary of the U.S.S. Chandler from March 1966 to January 1973 showing that, on November 2, 1966, the Chandler fired her guns at a target 130,000 yards distant onshore. The Board simply notes that this document does not confirm or even suggest that any party from the ship went ashore or that the ship docked at shore. The Board assumes that the document was submitted to show the proximity of the ship to shore. In light of the specific requirements discussed above, the Board finds that this is not probative evidence regarding presence on the ground in Vietnam or within the inland waterways for purposes of the herbicide presumption.

Other articles submitted by the Veteran detail the activities of the U.S.S. Chandler during his tour of duty. None confirms or suggest that the Veteran went ashore in Vietnam or that the U.S.S. Chandler docked in Vietnam, or that she was present in the inland waterways of Vietnam.

Now that the Board has addressed what has been in the past the Veteran's primary contention, the Board must now address the specific assertions noted in the Joint Motion of the parties and the Memorandum Decision of the Veterans Court: the Veteran reported that he was the "engine man on the motor whale boat going from ship to sore all the time" and "[w]hile on the ship we were off the coast of Vietnam, [l]anded several times on shore in a motor whale boat, put out fires in Cam [Ran] Bay, picked up mail and supplies." (November 4, 2004 statement in support of claim, December 29, 2003 statement in support of claim). Additionally, at a January 27, 2004 examination, he stated that he "would take people, American[s] off shore and back to the ship."

Regarding the account of putting out fires in Cam Ran Bay, this would appear to be an inaccurate description of the firefighting operation in Nha Trang harbor, as there is no other account in the ships log or other documentation of the Chandler participating in a firefighting operation. In any event, Cam Ran "Bay" is not an inland waterway, and it is not "land".

Regarding the Veteran's descriptions of his duties aboard a smaller craft transporting people and mail from the U.S.S. Chandler to various undescribed ports, none of these accounts provides a specific description of the Veteran having himself disembarked onshore in Vietnam. This is a crucial matter in terms of the herbicide presumption. The Veteran has understood at least since the denial of his claim by the RO, and then within two actions from the Veteran's Court, that evidence of his presence on the ground in Vietnam was of the utmost importance. Yet, his descriptions provide very little detail of activities ashore, focusing more on the contention cited above. They refer to his duty as the engine man (MOS of Marine Mechanic) on the craft and of the items and individuals "we" took to and from the Chandler.

The Board acknowledges that these accounts do not rule out the possibility of the Veteran having gone ashore. A description such as "landed," as in "we[…l]anded several times on shore[…and], picked up mail and supplies" does not confirm or suggest that the Veteran ever left the craft and himself set foot on the ground in Vietnam. When used in the context of boats and ships, the term "landed" is nonspecific as to who, if anyone, or what, if anything, actually touched ground. It does not go without saying that the assertion that a craft on which the Veteran was a crew member "landed" does not imply that the Veteran disembarked from the craft, nor does it suggest otherwise.

The assertion that "[w]e had a few going ashore parties" does not confirm or suggest that the Veteran was himself a member of a going ashore party or that he himself went ashore. In the context of his description of his duties as a member of the crew, the Board finds no implication from this description that the Veteran went ashore or that he performed any other duties than as engine man on the craft. His descriptions of these events are highly vague.

The assertion that he "would take people, American[s] off shore and back to the ship" similarly does not confirm or suggest that *the Veteran* went ashore or left the craft at any time. Again, the vagueness of his assertions, while being so detailed with other assertions that do not support his case (as cited above) do not support his claim.

In fact, these accounts provide no specific details supporting the Veteran's presence onshore or what activities he performed ashore. This is particularly significant in light of the basis for the denial of the claim some 10 years ago and the detail he has provided regarding other events. The fact that the Veteran (and his attorney for less time) has understood for 10 years that the claim was denied based on the lack of evidence that he actually set foot on the ground in Vietnam, and yet his descriptions are lacking in the details that would permit such a finding by the Board.

In this regard, the Veteran's statements are not always clear. For example: In a letter received at the RO in September 2010, the Veteran reported:

> On my DAV representative[’s] recommendation and the DRO’s I agree that I had never set foot on ground in Viet[n]am as it will be to hard to prove[;] records were never made.

The Board has considered the issue that this denial from the Veteran himself as implying the Veteran’s belief that he actually did go ashore, but felt he could not prove it. However, the Board does not interpret the statement as implying any specific belief on the part of the Veteran that he did, in fact, set foot on shore in Vietnam. It is again significant that the Veteran did not attempt to describe this “hard to prove” event. Moreover, read in the context of his other accounts and letters of being “boots on the ground” (that will be noted below) the Board is left with the factual determination that the Veteran does not have an accurate picture of what “boots on the ground” entails and continues to believe that being in “Nha Trang harbor” should satisfy the requirement of the presumption that an individual has been present in “Vietnam”. In this regard, the Board fully understands the Veteran’s argument.

For example, in a November 2011 letter, the Veteran asserted that he had “set foot” or “Boots on Ground” in Vietnam. However, his description of setting foot (“boots on the ground”) involved the ship’s logs from the U.S.S. Chandler again describing the incident in Nha Trang Harbor in November 1966. The Veteran described going aboard the burning ship to help fight its fires. He reported “I ‘set foot’ on the S/S Rutgers Victory, anchored to Vietnam soil in Nha Trang harbor.” He noted an award that had been given to a fellow serviceman which the Veteran asserted indicated that “he was determined to have ‘SET FOOT’ in Nha Trang Harbor which is Vietnam. I also ‘Set Foot,’ ‘Boots in Ground’ on the S/S Rutgers Victory.”

Again, importantly, the Veteran repeated connects “Boots on the Ground” with being in Nha Trang Harbor.

In another example, in a written statement dated in August 2010, the Veteran reported that he was claiming “Boots on Ground” and “Presumptive Related

Diabetes Mellitus" based on boarding a merchant ship anchored in Nha Trang harbor.

These incidents have already been discussed in detail. In short, while the Veteran firmly believes that these incidents constitute going ashore and setting foot in Vietnam, and the Board fully understands the Veteran's contentions, they do not. Read in this context, any caveat in the Veteran's September 2010 explicit denial that he ever went ashore is interpreted by the Board as yet another reference to the November 1966 incident and his belief that being in "Nha Trang harbor" should be considered service on the soil of Vietnam for presumption purposes. The Board finds this finding is supported by the Veteran's own written statements of August 2010 and November 2011, around the time period of the September 2010 letter.

Beyond the above, the Board has considered the critical question: Assuming the Veteran is contending not only that Nha Trang harbor should be considered Vietnam for presumptions purposes, but that he was, in fact, on several occasions on land in Vietnam, do these statements, standing alone, provide the basis to find the presumption is met?

Based on a review of all of the Veteran's statements, his testimony, his letters, and all evidence assembled in this case, the Board must find it less likely than not (a less than 50% percent chance) that the Veteran was ever on land in Vietnam from 1963 to 1967, notwithstanding his statements to the contrary. In this regard, his statements on this critical point are highly vague. As noted by the Veteran in his November 2011 letter to the Board (a highly important piece of factual evidence on this issue) it is very important for the Veteran to understand that it does not appear he was "misdirected" in reference to what he was said to state at the June 2010 hearing. The hearing testimony is not as important as is the November 2011 letter itself regarding the critical issue of whether the Veteran is confusing "boots on the ground" with being in Nha Trang harbor. The letter suggests to the Board that the Veteran is confusing being on the soil of Vietnam with being in Nha Trang harbor: As the Veteran himself stated in that letter:

> I went aboard that ship to help fight its fires! I gave a witness statement supporting my disembarking the U.S.S. T.E. Chandler which I "set foot" on the S/S Rutgers Victory, anchored to Vietnam soil in Nha Trang harbor.

With regarding to other statements from the Veteran indicating actually being on the land in Vietnam (those cited above), these statements are never clear and lack detail that the Veteran clearly shows an ability to provide in his other statements, while making it not impossible (a 0% chance) that the Veteran was ever on land in service during the Vietnam War, making it less likely than not (a less than 50% chance) that he was ever on land in Vietnam.

Beyond these facts, the Board has the Veteran's own statement, which we cannot overlook. In a letter received at the RO in September 2010, the Veteran reported, in writing that he "never set foot on ground in Viet[n]am …". This and other evidence places the preponderance of evidence against the Veteran's contention on this critical point.

To summarize the Board's findings regarding the presumption of herbicide exposure, while the Veteran has described his service as crew aboard a craft ferrying people and goods between the U.S.S. Chandler and an undescribed port or ports in Vietnam, on dates that he never provides, he has provided no detail whatsoever that would place the evidence of his having set foot on the ground in Vietnam in equipoise with the evidence against such a finding that is noted above. Read in the light of the Veteran's other assertions (which, for reasons cited above, sometimes does not support his claim but provides evidence against his claim), the Board finds that a preponderance of the evidence is against a finding that the Veteran was present, on land, in Vietnam or within the inland waterways of Vietnam within the requirements of the presumption of service connection.

In support of his claim, the Veteran submitted a buddy statement from a fellow serviceman who helped during the fire aboard the Rutgers Victory. The buddy said that he and the Veteran boarded the burning vessel to extinguish the fire; however, he did not state that either he or the Veteran set foot on land.

The Veteran also submitted Board decisions addressing similar circumstances, including a decision involving a veteran that served on the U.S.S. Chandler with him during the fire rescue. He argued that because the Board allowed for the presumption of herbicide exposure in that case, the Board should also presume that he was exposed to herbicides. Unfortunately, the factual circumstances found in that case are not the same as in this case.

In the other case, the Board interpreted (perhaps incorrectly) the other veteran's assertions as establishing that he went ashore during the operation to extinguish the fire. In this case, that Veteran has specifically testified that he did not go ashore during this specific operation. Indeed, he has testified that nobody from the Chandler went ashore during this operation. Notwithstanding the apparently incomplete or inaccurate evidentiary picture before the Board in the prior decision, the Board here finds that herbicide exposure cannot be presumed based on this incident.

The Board emphasizes that each Board decision is rendered based on the specific facts of each case, and Board decisions do not carry binding, presidential weight *vis-à-vis* other Board decisions. As such, the holding in one Board case, while potentially instructive (and had been considered) does not mandate a certain result.

Turning to the incidents of claimed "actual exposure," the Board notes initially that the National Personnel Records Center found no record of actual herbicide exposure in the Veteran's case. The evidence of exposure consists entirely of the Veteran's assertions.

In the letter received at the RO in September 2010, the Veteran reported that contaminated water from ships was used for drinking, bathing, and cooking, which he consumed for years. He also reported taking salt water showers, which he asserted contained dioxins.

On a VA Form 21-4138 received in November 2004, the Veteran reported that his "job ab[oar]d ship was engine man and we were working in the water that was

taken in from the shore all the time which was contaminated with Agent Orange. My hands were in this water most of the time cleaning the b[i]lges, [s]wim call off the shore."

On a VA Form 21-4138 received in January 2004, the Veteran described his exposure to herbicides as occurring while aboard the Chandler, "they would spray the jungle and would come over us with this still dripping from the Air Plane when it flew over us."

The Veteran testified that he believes the Rutgers Victory was carrying Agent Orange as cargo and the he was exposed while assisting in fighting the fire. The basis for this belief was "the smell." He also asserted that the water used to put out the fire contained herbicide agents.

The Board reiterates that there is no presumption for exposure to herbicides for ships off shore. The Veteran's service on a deep water or blue water naval vessel in waters off the shore of the Republic of Vietnam in and of itself cannot constitute service in the Republic of Vietnam for purposes of 38 U.S.C. § 101(29)(A). *See* VAOPGCPREC 27-97. Thus, the Veteran is not presumed to have been exposed to herbicides during his active service. 38 U.S.C.A. § 1116; 38 C.F.R. § 3.307(a)(6)(iii).

The VA Secretary has determined that the evidence available at this time does not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans. The Secretary's decision is based on careful review of a May 2011 Institute of Medicine (IOM) of the National Academy of Sciences report entitled "Blue Water Navy Vietnam Veterans and Agent Orange Exposure." This report was completed at the request of VA. The IOM reviewed a wide range of data sources and concluded that there is insufficient evidence to determine whether Blue Water Navy Veterans were exposed to Agent Orange-associated herbicides during the Vietnam War.

The Secretary's determination not to establish a presumption of exposure for these veterans does not in any way preclude VA from granting service connection on a

case-by-case basis for diseases and conditions associated with Agent Orange exposure, nor does it change any existing rights or procedures.

The Board finds that the Veteran's own assertions that he was exposed to herbicide agents such as Agent Orange while stationed aboard the U.S.S. Chandler or while fighting the fire aboard the Rutgers Victory to have no probative value. While the Veteran is competent to describe an observable event such as having a substance touch his skin or using water, the Board finds that the Veteran has not shown that he has the requisite expertise to identify a chemical substance such as Agent Orange.

The Board also finds that the Veteran's testimony regarding his belief that the cargo of the Rutgers Victory included Agent Orange is neither credible nor consistent with the other evidence. Notably, the Ship's log of the Chandler specifically lists the cargo aboard the Rutgers Victory as rice and building materials. Moreover, the Veteran's assertion that he can detect Agent Orange by the smell is presumed inaccurate in light of the absence of any description or evidence of specialized training or experience in detecting Agent Orange by smell. Indeed, the Veteran admitted that he did not actually know what was stored on the burning ship.

The Veteran completed an Agent Orange registry code sheet on which he reported that he was involved in handling or spraying Agent Orange, was exposed to herbicides other than Agent Orange, was directly sprayed with Agent Orange, and ate food or drink that could have been sprayed with Agent Orange. However, the Veteran provided no specific details regarding these assertions. When read in the context of his other assertions and testimony, the Board interprets these descriptions as no more than speculation, undermining his accuracy as a precise historian of events from nearly one-half century ago, providing factual evidence against his claim.

In *Bardwell v. Shinseki*, 24 Vet. App. 36 (2010), the Veterans Court held that a layperson's assertions indicating exposure to gases or chemicals during service are not sufficient evidence alone to establish that such an event actually occurred during service. It was noted that in contrast to situations involving alleged medical symptoms or injury, a non-combat claimant's lay assertion that an event occurred in

service must be weighed against other evidence of record, including lack of documentary evidence of the incident.

Here, when weighed against the lack of evidence regarding herbicide exposure, as well as some contradictory evidence, the Veteran's assertions are deemed to be speculation and therefore inaccurate.

Regarding the assertion that the Veteran was exposed to Agent Orange or other herbicides by drinking and using the water on board the U.S.S. Chandler, the Veteran submitted a report to the Australian Department of Veterans Affairs from the National Research Center for Environmental Toxicology, entitled Examination of the Potential Exposure of Royal Australian Navy Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans via Drinking Water, December 2002. The aim of the Australian study was to investigate the potential of exposure of sailors in the Australian Navy to contaminants via drinking water.

It was concluded in the Australian study that there was some evidence that use in the distillation process of water contaminated by dioxins would result in contamination of potable water. The authors of the Australian study concluded that subsequent ingestion by sailors on board ships was a vector for exposure to the chemicals. The authors further concluded that while it was unlikely that accurate exposure of the personnel on board ships can be estimated, the Australian study findings suggest that personnel on board ships were exposed to biologically significant quantities of dioxins. *See* National Research Center for Environmental Toxicology, Examination of the Potential Exposure of Royal Australian Navy Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans via Drinking Water, 5-8 (2002).

The Board finds that the Australian study is not probative evidence of the Veteran's actual exposure to herbicides while on board the U.S.S. Chandler. The findings of the Australian study presuppose that contaminated water was used in distillation, which can only be speculated here. Moreover, the findings are inconclusive in nature and do not apply to the specific facts and circumstances of the Veteran's case and his service in the waters off shore Vietnam.

The Board further notes that the Veteran's allegations of actual herbicide exposure based upon the ingestion herbicides through his drinking water have already been considered by the Secretary of VA in creating the "bright line" rule against presumptive exposure to deep water vessels.

In *Haas*, supra, a blue water Veteran, who served on the U.S.S. Mount Katmai, supplemented his argument with studies which attempted to show a direct connection between the spraying of Agent Orange on the mainland of Vietnam to the development of Agent Orange-related diseases in service members who served on the ships offshore.

In particular, and important in this case, the claimant in *Haas* attempted to rely on the same 2002 study which has been submitted in this case.

Although the Federal Circuit passed no judgment on the validity of studies such as the Australian study, it did highlight the VA's rulemaking with respect to this Australian study: VA scientists and experts have noted many problems with the study that caution against reliance on the study to change our long-held position regarding veterans who served off shore. First, as the authors of the Australian study themselves noted, there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War. Second, even with the concentrating effect found in the Australian study, the levels of exposure estimated in this study are not at all comparable to the exposures experienced by veterans who served on land where herbicides were applied. Third, it is not clear that U.S. ships used distilled drinking water drawn from or near estuarine sources, or if they did, whether the distillation process was similar to that used by the Australian Navy. Crucially, based on this analysis, the VA stated that "we do not intend to revise our long-held interpretation of service in Vietnam." *See Haas*, 525 F.3d at 1194 (citing 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)).

Accordingly, the Board must defer to the VA Secretary's interpretation regarding the reliability and soundness of the various scientific studies purporting to establish actual herbicide exposure to blue water Vietnam Veterans.

In sum, the Board finds that a preponderance of the evidence establishes that the Veteran was not actually exposed to herbicides during service.

The Veteran has not asserted that diabetes mellitus was incurred in service on a direct basis or that diabetes mellitus became manifest to a compensable degree within a year of service separation. Service treatment records are silent for diagnosis or treatment of diabetes mellitus during service. Private treatment records dated subsequent to service show that the Veteran was diagnosed with diabetes mellitus in 1998, more than 30 years after separation from service; and there is no suggestion that the Veteran's diabetes mellitus had its onset during, was caused by, or is in any way related to his active service; therefore, service connection cannot be granted for diabetes mellitus on a direct basis.

Moreover, as treatment records show that the Veteran was diagnosed with diabetes mellitus in May 1998, over 30 years after his discharge from service, the presumption of service connection for certain chronic diseases that become manifest to a degree of 10 percent or more within one year of separation does not attach. *See* 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309.

Regarding the claims seeking service connection for a heart condition; hypertension; numbness of the fingers, forearm, hands, and lips; impotence; stomach problems; foot problems; glaucoma; and dental problems, each as secondary to diabetes mellitus, since service connection for diabetes mellitus is denied, it follows that each of these claims are also denied. Because the Veteran clearly stated during his Board hearing that he was not seeking service connection for any of these issues on a direct basis, the Board will not address that theory of entitlement at this time (this issue was not raised at the Veteran's Court). Accordingly, the claims for service connection for a heart condition; hypertension; numbness of the fingers, forearm, hands, and lips; impotence; stomach problems;

foot problems; glaucoma; and dental problems, as secondary to diabetes mellitus are denied.

In reaching the above conclusions, the Board considered the applicability of the benefit-of-the-doubt doctrine. However, as the preponderance of the evidence is against the claims, that doctrine is not applicable. *See* 38 U.S.C.A. § 5107(b) (West 2002); 38 C.F.R. § 3.102 (2013); *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990).

The Veteran has not asserted that there was any deficiency in the notice provided to him under the Veterans Claims Assistance Act of 2000 (VCAA). As well, neither the parties to the Joint Motion nor the Veterans Court found any deficiency regarding VCAA notice or the assistance provided the Veteran in obtaining evidence under the VCAA. Moreover, as the Board has found that the Veteran was not exposed to herbicide agents during his service, there is no reason to obtain a medical opinion regarding the etiology of diabetes mellitus, which had onset decades after service. As service connection is not in effect for diabetes mellitus, there is no reason to obtain a medical opinion regarding any of the disabilities claimed as secondary to diabetes mellitus.

ORDER

Service connection for diabetes mellitus is denied.

Service connection for a heart condition; hypertension; numbness of the fingers, forearm, hands, and lips; impotence; stomach problems; foot problems; glaucoma; and dental problems, is denied.

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JOHN J. CROWLEY
Veterans Law Judge, Board of Veterans' Appeals

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 Court. 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 the 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 website on the Internet at: http://www.uscourts.cavc.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 clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

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

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, Planning and Analysis, 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, Planning and Analysis, 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: 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, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: http://www.uscourts.cavc.gov.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

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. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).