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

IN THE APPEAL OF [redacted]
ALFRED PROCOPIO JR.

DOCKET NO. 09-47 333) DATE *July 9, 2015*
) *SDM*
)

On appeal from the
Department of Veterans Affairs Regional Office in St. Paul, Minnesota

THE ISSUES

1. Entitlement to service connection for prostate cancer, to include as due to exposure to herbicides.

2. Entitlement to service connection for diabetes mellitus, type II, with edema (diabetes mellitus), to include as due to exposure to herbicides.

3. Entitlement to service connection for coronary artery disease, to include as due to exposure to herbicides.

REPRESENTATION

Veteran represented by: John B. Wells, Attorney

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

H. M. Walker, Counsel

INTRODUCTION

The Veteran served on active duty from September 1963 to August 1967.

This case comes before the Board of Veterans' Appeals (Board) on appeal of an April 2009 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in St. Paul, Minnesota, which denied the benefit on appeal.

In a March 2011 decision, the Board denied the Veteran's claims. The Veteran appealed the denials to the United States Court of Appeals for Veterans Claims (Court). In an October 2012 decision, the Court vacated and remanded the Board's March 2011 decision. When the case was most recently before the Board in November 2013, it was remanded for additional development, to include scheduling the Veteran for a videoconference hearing.

The Veteran presented personal testimony at two hearings before two different Board Veterans Law Judges (VLJs) concerning the issues presently on appeal. The first hearing was held before one VLJ in September 2010, and the second hearing was held before the undersigned in November 2014. In March 2015, the Veteran requested a third hearing before a third VLJ, who would serve on a panel of VLJs to decide his appeal. Crucially however, in an April 2015 letter, the Veteran's attorney contacted the Board and demanded that this third hearing be cancelled, and that the appeal "move forward based on the decision of the VLJ who conducted the hearing on November 13, 2014" alone. The Board accepts the Veteran's attorney's April 2015 letter as (1) a knowing and voluntary waiver of the opportunity for the Veteran to appear at a third hearing before a VLJ who would be on a panel of VLJs to decide his appeal, and (2) a knowing and voluntary waiver of his right to have the VLJ who held his first hearing in September 2010 participate in the final adjudication of his appeal. *See Janssen v. Principi*, 15 Vet. App. 370, 375 (2001)

("This concept of an appellant's right to make a knowing and voluntary waiver of consideration of procedural protections is neither foreign to nor prohibited by this Court."). The Board will accordingly proceed with adjudication of the Veteran's appeal herein based solely on the decision of the undersigned VLJ.

During the Veteran's November 2014 hearing, the Veteran submitted additional evidence in support of his claims, and testified on the record that they wished to waive initial RO consideration of any new evidence. *See* 38 C.F.R. § 20.1304 (2014).

The issue of entitlement to service connection for coronary artery disease is addressed in the REMAND portion of the decision below and is REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDINGS OF FACT

1. The competent and credible evidence of record is against a finding that the Veteran was present on the landmass or the inland waters of Vietnam during service and, therefore, he is not presumed to have been exposed to herbicides, including Agent Orange.

2. The competent and credible evidence of record is against finding that the Veteran was directly exposed to herbicides during service.

3. Diabetes mellitus with edema is not shown to be causally or etiologically related to any disease, injury, or incident in service, and did not manifest within one year of the Veteran's discharge from service.

4. Prostate cancer is not shown to be causally or etiologically related to any disease, injury, or incident in service, and did not manifest within one year of the Veteran's discharge from service.

CONCLUSIONS OF LAW

1. Diabetes mellitus with edema was not incurred in or aggravated by the Veteran's active duty service, nor may it be presumed to have been incurred in or aggravated by such service. 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2014).

2. Prostate cancer was not incurred in or aggravated by the Veteran's active duty service, nor may it be presumed to have been incurred in or aggravated by such service. 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 5107 (West 2002); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Board has thoroughly reviewed all the evidence in the Veteran's claims file. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, all the evidence submitted by or on behalf of the Veteran. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (noting that the Board must review the entire record, but does not have to discuss each piece of evidence). The analysis below focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claim. The Veteran must not assume that the Board has overlooked pieces of evidence that are not explicitly discussed herein. *See Timberlake v. Gober*, 14 Vet. App. 122 (2000) (finding that the law requires only that the Board address its reasons for rejecting evidence favorable to the Veteran).

Veterans Claims Assistance Act of 2000 (VCAA)

With respect to the Veteran's claim, the VA has met all statutory and regulatory notice and duty to assist provisions. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2014).

Under the VCAA, when VA receives a complete or substantially complete application for benefits, it is required to notify the Veteran and his or her representative, if any, of any information and medical or lay evidence that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). In *Pelegrini v. Principi*, 18 Vet. App. 112, 120-21 (2004) (*Pelegrini II*), the United States Court of Appeals for Veterans Claims (Court) held that VA must inform the Veteran of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; (3) that the Veteran is expected to provide; and (4) request that the Veteran provide any evidence in his or her possession that pertains to the claim. The requirement of requesting that the Veteran provide any evidence in his possession that pertains to the claim was eliminated by the Secretary during the course of this appeal. *See* 73 Fed. Reg. 23353 (final rule eliminating fourth element notice as required under *Pelegrini II*, effective May 30, 2008). Thus, any error related to this element is harmless.

VCAA letters dated in October, 2006, December 2006, and March 2009 fully satisfied the duty to notify provisions. *See* 38 U.S.C.A. § 5103(a) (West 2002); 38 C.F.R. § 3.159(b)(1) (2014); *Quartuccio*, at 187. The Veteran was advised that it was ultimately his responsibility to give VA any evidence pertaining to the claims. The letters informed him that additional information or evidence was needed to support his claims, and asked him to send the information or evidence to VA. *See Pelegrini II*, at 120-121. The letters also explained to the Veteran how disability ratings and effective dates are determined. *See Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006).

As noted above, the Veteran also was afforded a hearing before the undersigned Veterans Law Judge (VLJ) during which he presented oral argument in support of his service connection claims. In *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the United States Court of Appeals for Veterans Claims (Court) held that 38 C.F.R. § 3.103(c)(2) (2014) requires that the VLJ/DRO who chairs a hearing fulfill two duties to comply with the above the regulation. These duties consist of (1) the duty to fully explain the issues and (2) the duty to suggest the submission of evidence that may have been overlooked. Here, the VLJ explained the issues on appeal

during the hearing and generally discussed the basis of the prior determination, the element(s) of the claim that were lacking to substantiate the claim for benefits, and suggested the submission of evidence that would be beneficial to the Veteran's claim. Significantly, neither the Veteran nor his representative has asserted that VA failed to comply with 38 C.F.R. § 3.103(c)(2), nor has he identified any prejudice in the conduct of the Board hearing. By contrast, the hearing focused on the elements necessary to substantiate the claims, and the Veteran, through his testimony, demonstrated that he had actual knowledge of the elements necessary to substantiate his claims. As such, the Board finds that, consistent with *Bryant*, the VLJ complied with the duties set forth in 38 C.F.R. § 3.103(c)(2).

Furthermore, even if any notice deficiency is present in this case, the Board finds that any prejudice due to such error has been overcome in this case by the following: (1) based on the communications sent to the Veteran over the course of this appeal, the Veteran clearly has actual knowledge of the evidence the Veteran is required to submit in this case; and (2) based on the Veteran's contentions as well as the communications provided to the Veteran by VA, it is reasonable to expect that the Veteran understands what was needed to prevail. *See Shinseki v. Sanders/Simmons*, 129 S. Ct. 1696 (2009); *Fenstermacher v. Phila. Nat'l Bank*, 493 F.2d 333, 337 (3d Cir. 1974) (stating that "no error can be predicated on insufficiency of notice since its purpose had been served."). In order for the Court to be persuaded that no prejudice resulted from a notice error, "the record must demonstrate that, despite the error, the adjudication was nevertheless essentially fair." *Dunlap v. Nicholson*, 21 Vet. App. 112, 118 (2007).

In this case, the Veteran has been continuously represented by an experienced attorney, who has significant experience related to "Blue Water" veterans and herbicides, and has submitted detailed arguments in support of his claims. These arguments have referenced the applicable law and regulations necessary for a grant of service connection. Thus, the Board finds that the Veteran has actual knowledge as to the information and evidence necessary for him to prevail on his claims and is not prejudiced by a decision in this case. As such, a remand for additional notice would serve no useful purpose and would in no way benefit the Veteran. *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (indicating that remands which would only

result in unnecessarily imposing additional burdens on the VA with no benefit flowing to the Veteran are to be avoided).

The Board also concludes VA's duty to assist has been satisfied. The Veteran's service treatment records (STRs) and VA medical records are in the file. Private medical records identified by the Veteran have been obtained, to the extent possible.

In July 2014, VA sent a letter to the Naval Sea Systems Command HQ and requested the manufacturer's technical manual for the evaporation distillation system aboard the U.S.S. Intrepid. That same month, the Veteran was notified that VA attempted to obtain these, but it is his responsibility to see that VA receives these records. Naval Sea Systems Command HQ did not respond to VA's July 2014 request for information, nor was the letter returned to sender. VA also contacted Naval Sea Systems Command HQ by phone to determine where to send the letter requesting this information. There was no answer and in the report of contact, the VA employee indicated that "the number did not seem to be working."

The Board appreciates the representative's argument that VA failed in its duty to assist by not obtaining these records. The Veteran notified of the attempt to obtain these records, and that it was his duty to ensure that VA had them. At no time did the Veteran or his attorney submit the technical manual for the evaporation distillation system aboard the Intrepid. Ultimately, the Board finds that all reasonable attempts have been made to obtain these records and any further attempts to obtain them would be futile. Therefore, VA has not failed in its duty to assist in this matter.

The Veteran has at no time otherwise referenced outstanding records that he wanted VA to obtain or that he felt was relevant to the claims.

The duty to assist also includes providing a medical examination or obtaining a medical opinion when such is necessary to make a decision on the claim. 38 C.F.R. § 3.159(c)(4)(i) (2014).

The Board acknowledges that the Veteran has not been afforded a VA examination with respect to his claims of entitlement to service connection for prostate cancer and diabetes mellitus with edema. However, the Board finds that a VA examination is not necessary in order to render a decision as to these issues. There are two pivotal cases which address the need for a VA examination, *Duenas v. Principi*, 18 Vet. App. 512 (2004) and *McLendon v. Nicholson*, 20 Vet App. 79 (2006). In *McLendon*, the Court held that in disability compensation claims, the Secretary must provide a VA medical examination when there is: (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the Veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim. *Id*. at 81. In *Duenas*, the Court held that a VA examination is necessary when the record: (1) contains competent evidence that the Veteran has persistent or recurrent symptoms of the claimed disability and (2) indicate that those symptoms may be associated with his active military service.

The Board finds that there is no credible lay or medical evidence that the Veteran was treated for symptoms indicative of prostate cancer or diabetes mellitus in service or within the first post-service year. The information of record includes a current diagnosis of diabetes mellitus and history of prostate cancer, but does not show that these disabilities are related to an event, injury, or disease incurred during service-including exposure to Agent Orange. Although the Veteran has asserted a relationship, the question of a relationship between prostate cancer and diabetes mellitus and exposure to herbicides is a complex medical issue far beyond the competence of a lay person. Thus, his bare assertions are not sufficient to suggest an association between the claimed disability and service so as to meet the criteria for obtaining an examination or opinion. Accordingly, a VA examination is not warranted.

As such, the Board finds that the medical evidence of record is sufficient to adjudicate the Veteran's claims.

As the Veteran was afforded a Board hearing in November 2014, deck logs from the U.S.S. Intrepid were obtained (and a web link to those records was provided: http://research.archives.gov/descriptionl594258), and attempts were made to obtain records related to the U.S.S. Intrepid's evaporation distillations system and the subsequent readjudication of the claims; the Board finds that there has been substantial compliance with its November 2013 remand directives as well as the directives from the Court in its October 2012 decision. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998) (finding that a remand by the Board confers upon the claimant, as a matter of law, the right to compliance with the remand instructions, and imposes upon the VA a concomitant duty to ensure compliance with the terms of the remand); *see also D'Aries v. Peake*, 22 Vet. App. 97, 105 (2008); *Dyment v. West*, 13 Vet. App. 141, 146-47 (1999).

As there is no indication that any failure on the part of VA to provide additional notice or assistance reasonably affects the outcome of this case, the Board finds that any such failure is harmless. *See Mayfield v. Nicholson*, 19 Vet. App. 103 (2005), rev'd on other grounds, *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006).

Legal Criteria

Service connection for VA compensation purposes will be granted for a disability resulting from disease or personal injury incurred in the line of duty or for aggravation of a preexisting injury in the active military, naval or air service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Establishing service connection generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) A current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) nexus between the claimed

in-service disease and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Hickson v. West*, 12 Vet. App. 247 (1999); *Caluza v. Brown*, 7 Vet. App. 498 (1995), aff'd per curiam, 78 F.3d 604 (Fed. Cir. 1996) (table).

Diabetes mellitus and organic diseases of the nervous system are deemed to be chronic diseases under 38 C.F.R. § 3.309(a) and, as such, service connection may be granted if the evidence shows that the disease manifest to a degree of ten percent or more within one year from the date of separation from service. 38 C.F.R. § 3.307.

A recent decision of the U. S. Court of Appeals for the Federal Circuit (Federal Circuit Court), however, clarified that this notion of continuity of symptomatology since service under 38 C.F.R. § 3.303(b), which as mentioned is an alternative means of establishing the required nexus or linkage between current disability and service, only applies to conditions identified as chronic under 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

Alternatively, a "veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the Veteran was not exposed to any such agent during that service." 38 U.S.C.A. § 1116(f) (West 2002); 38 C.F.R. § 3.307(a)(6)(iii) (2014). The presumption of herbicide exposure is warranted for 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); *see also Haas v. Nicholson*, 20 Vet. App. 257 (2006), rev'd sub nom. *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), cert. denied, 77 U.S.L.W. 3267 (Jan. 21, 2009) (No. 08-525). In order to establish qualifying "service in Vietnam," a veteran must demonstrate actual duty or visitation in the Republic of Vietnam to have qualifying service. 38 C.F.R. § 3.307(a)(6)(iii); VAOPGCPREC 27-97.

If a veteran was exposed to a herbicide agent during active military, naval, or air service, certain diseases, including diabetes mellitus and early-onset peripheral neuropathy shall be service connected if the requirements of 38 U.S.C.A. § 1116 and 38 C.F.R. § 3.307(a)(6)(iii) are met, even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of 38 U.S.C.A. § 1113; 38 C.F.R. § 3.307(d) are also satisfied. 38 C.F.R. § 3.309(e) (2014). The VA Secretary has determined that there is no positive association between exposure to herbicides and any other condition for which the Secretary has not specifically determined that a presumption of service connection is warranted. *See* Notice, 59 Fed. Reg. 341-346 (1994); *see also* Notice, 61 Fed. Reg. 57586-57589 (1996).

An opinion of the General Counsel for VA interpreted that 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) (West 2014), which defines the Vietnam era as the period beginning on February 28, 1961, and ending on May 7, 1975, and that this was not inconsistent with the definition of service in the Republic of Vietnam found in 38 C.F.R. § 3.307(a)(6)(iii). VAOPGCPREC 27-97. A veteran must demonstrate actual duty or visitation in the Republic of Vietnam to have qualifying service. *Id.* Since issuance of the 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. 66 Fed. Reg. 23166 (May 8, 2001).

Despite the foregoing, it has been established that some offshore U.S. Navy and Coast Guard ships also operated temporarily on Vietnam's inland waterways or docked to the shore; and certain ships operated primarily on the inland waterways rather than offshore. Veterans who served aboard these ships qualify for the presumption of herbicide exposure. Gun-line ships, aircraft carriers, as well as supply and support ships are collectively referred to as the "Blue Water" navy because they operated on the blue-colored waters of the open ocean. Although some Blue Water Navy destroyers were involved with enemy interdiction, the

majority of those operations were conducted by smaller vessels based along the coast or within the river systems of South Vietnam. These vessels are collectively referred to as the "Brown Water" navy because they operated on the muddy, brown-colored inland waterways of Vietnam. In general, patrolling of close coastal waters and the larger rivers was conducted by 50-foot swift boats while patrolling of smaller rivers and waterways was carried out by 30-foot river patrol boats.

Although operations on the inland waterways of Vietnam were primarily conducted by Brown Water Navy and Coast Guard vessels, some larger Blue Water Navy vessels periodically entered the inland waterways to provide gunfire support or deliver troops or destroyers that entered a river such as the Saigon River in the southern delta area. Following these temporary inland waterway operations, destroyers would return to patrolling the offshore gun line or travel farther out to sea for aircraft carrier escort duty. A number of Blue Water Navy amphibious assault and supply vessels also periodically entered inland waterways to deliver troops for combat missions or supplies for units stationed on the rivers. *See* Training Letter 10-06, Adjudicating Disability Claims Based on Herbicide Exposure from U.S. Navy and Coast Guard Veterans of the Vietnam Era, Sept. 9, 2010 (letter issued by VA Compensation and Pension Service).

In order for the presumption of exposure to Agent Orange to be extended to a Blue Water Navy veteran, development must provide evidence that the veteran's ship operated temporarily on the inland waterways of Vietnam or that the veteran's ship docked to the shore or a pier. In claims based on docking, a lay statement that the veteran personally went ashore must be provided. Although evidence that a veteran's ship docked, along with a statement of going ashore, is sufficient for the presumption of herbicide exposure, service aboard a ship that anchored temporarily in an open deep water harbor or port has generally not been considered sufficient.

The Board has considered the recent case of *Gray v. McDonald*, No. 13-3339 (U.S. Vet. App. Apr. 23, 2015), wherein the United States Court of Appeals for Veterans Claims found that VA's interpretation of 38 C.F.R. § 3.307(a)(6)(iii) designating Da Nang Harbor as an offshore, rather than an inland, waterway is inconsistent with the purpose of the regulation and does not reflect the Agency's fair and considered

judgment. In particular, the Court could not discern any reason as to why in VA's determination certain bodies of water such as Quy Nhon Bay and Ganh Rai Bay are brown water but Vung Tau Harbor, Da Nang Harbor and Cam Ranh Bay are blue water. Here, the record reflects the Veteran's presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam. The Veteran has not specifically alleged that his ship anchored in a deep water harbor such as Cam Ranh Bay. For this reason, the Board finds that the holding of *Gray* is not applicable to this case.

The Board notes, notwithstanding the foregoing presumptive provisions, the United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that a claimant is not precluded from establishing service connection for a disease averred to be related to herbicide exposure, as long as there is proof of such direct causation. *See Combee v. Brown,* 34 F.3d 1039, 1043-1044 (Fed. Cir. 1994). *See also Brock v. Brown*, 10 Vet. App. 155, 160-61 (1997), vacated on other grounds (Fed. Cir. Dec. 15, 2000). In the absence of a presumptive basis to grant a claim, to establish a right to compensation for a present disability on a direct basis. Again, a Veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

In adjudicating these claims, the Board must assess the competency and credibility of the veteran. *Washington v. Nicholson*, 19 Vet. App. 362 (2005). Lay testimony is competent if it is limited to matters that the witness has actually observed and is within the realm of the witnesses' personal knowledge. *Barr v. Nicholson*, 21 Vet. App. 303 (2007), *Layno v. Brown*, 6 Vet. App. 465 (1994).

Factual Background and Analysis

The Veteran does not contend that he ever set foot in Vietnam. Rather, he contends that he was exposed to herbicide while on board the U.S.S. Intrepid, either directly through contact with aircraft that sprayed Agent Orange, while handling drums of Agent Orange, or by drinking distilled water. He also contends that he was exposed

to unspecified chemicals while on the flight deck in the hanger bay. He testified to a temporary duty assignment in the Republic of the Philippines. The Veteran's representative has asserted that an Royal Australian Navy report (discussed below) showed that the evaporation distillation systems on their ships did not remove Agent Orange/dioxin from the water consumed by those aboard the ships, and that the U.S.S. Intrepid's evaporation distillation system was similar to those used by the Royal Australian Navy.

There is no question the Veteran has diabetes mellitus, with edema, and history of prostate cancer. Thus, the question before the Board is whether these disabilities are directly related to service or due to exposure to herbicides.

In regards to possible herbicide exposure, the Veteran maintains that he was exposed to herbicides aboard the Intrepid. First, the Intrepid was an aircraft carrier, from which A-1 Skyraiders used for bombing and rocketing targets were launched. There is no evidence of any aircraft spraying Agent Orange or tactical herbicides were kept on the Intrepid or launched from there. The National Personnel Records Center (NPRC) found no conclusive evidence of in-country service in the Republic of Vietnam, and his ship sailed to the waters off the coast of Vietnam on two occasions—once to the Gulf of Tonkin and once to the Southern Coast of Vietnam. A review of the ship's deck logs from July 1, 1966, to July 31, 1966, shows that the ship departed Yokosuka, Japan, and ultimately arrived at Dixie Station, South China Sea. During this timeframe, the ship entered and departed the territorial waters of South Vietnam multiple times.

Service treatment records show no complaints or symptoms of diabetes mellitus or prostate problems. Further, the Veteran has not contended the onset of these disabilities as occurring in service.

The Veteran was first diagnosed as having diabetes mellitus in 2004, and diagnosed as having prostate cancer in 2007.

In December 2006, the NPRC indicated that it was unable to determine whether the Veteran had in-country service in the Republic of Vietnam. In another response

dated that same month, the NPRC indicated that there were no records that the Veteran was ever exposed to herbicides.

The record contains a June 2010 private outpatient visit note by G. G., M.D., that provides a history of Agent Orange exposure in Vietnam as a Blue Water Sailor. The pertinent impression was Agent Orange exposure in Vietnam as a Blue Water Sailor, and adenocarcinoma of the prostate, clinical stage B2 (T2b) 30 months post therapy without clinical evidence of recurrence. Dr. G. provides that he supported the Veteran's history of Agent Orange exposure in the military, as he had had many other patients who were Blue Water Sailors with Agent Orange exposure while off-shore in Vietnam. The Board observes that the Veteran explained during his September 2010 hearing that Dr. G. had been his treating VA physician.

In an October 2010 statement, Dr. G. stated that the Veteran had a diagnosis of prostate cancer, as proven by biopsy and diagnosis. The Veteran expressed that he was off the coast of Vietnam and a Blue Water Sailor during the Vietnam Era when Agent Orange was used. Dr. G. stated that if the Veteran was exposed to Agent Orange, or Agent Orange was used in the regions where the Veteran was off-shore, then his claim would be "as likely as not" related to Agent Orange. He reiterated that if the Veteran was off the coast of Vietnam when Agent Orange was used and he was therefore exposed to Agent Orange, then prostate cancer can be associated with his Agent Orange exposure. Dr. G. noted that information as to whether the Veteran was exposed to Agent Orange, or was off the shore of Vietnam when Agent Orange was being used, could only be obtained from his service record and VA. Dr. G. stated that he did not have the Veteran's service records, or information that identified where he served, the position of his ship when he served, or its proximity to Vietnam.

In June 2013, Dr. G. again provided an opinion as to the Veteran's claimed disabilities. The impression was:

> 1. Agent Orange exposure in Vietnam as blue water sailor off the coast of Vietnam.

> 2. Side effects related to Agent Orange, including erectile dysfunction, prostate cancer, coronary artery disease.
> 3. Asbestos exposure in military with pulmonary asbestos, pulmonary plaques, shortness of breath and difficulty breathing.
> 4. Type 2 diabetes mellitus (also associated with Agent Orange).
>
> TREATMENT PLAN AND RECOMMENDATION: I again encouraged the patient when he develops the urgency symptoms, which may be related to his Agent Orange and cancer treatment, that he should contact us immediately. I would be happy to see him on an urgent basis in this regard only to evaluate the patient further (i.e., bladder full, bladder empty). Discussed and reviewed with the patient. Following discussion and review, he understands and agrees with this approach. He will keep us informed regarding status and results.

The Veteran submitted an undated Australian scientific article that in essence suggests that Vietnam veterans of the Royal Australian Navy may have been exposed to herbicide compounds by drinking water distilled on board their off-shore vessels.

During the November 2014 hearing, the Veteran's representative provided additional argument regarding this Australian study and how similar distillation procedures and equipment were used on U.S. ships as were used on the Australian ships. Additionally, he submitted numerous documents and arguments in support of "Blue Water" veterans being recognized as presumptively exposed to herbicides.

There are no treatment records showing a link between the Veteran's diabetes mellitus, with edema, and prostate cancer and the Veteran's military service.

Herbicide Exposure

The Board finds that the Veteran's claimed exposure to herbicides while stationed in the South China Sea, in the territorial seas of South Vietnam, and in the Gulf of Tonkin to be outweighed by the more probative evidence to the contrary—namely,

the responses from the NPRC and review of the deck logs of the U.S.S. Intrepid showing no exposure to tactical herbicides, including Agent Orange. The Veteran is competent to testify as to handling barrels of chemicals, or otherwise having been exposed to chemicals while on the U.S.S. Intrepid. However, the Veteran has not demonstrated that he is competent to identify herbicides, including those (2, 4-D; 2, 4, 5-T and its contaminant TCDD; cacodylic acid; and picloram) for which presumptions of service connection may apply, nor is he competent to assert that he consumed herbicides in the distilled water aboard the Intrepid. 38 C.F.R. § 3.307(a)(6) (2014). In other words, he is competent to say that he saw what he thought were barrels of herbicides or chemicals, but he is not competent to say that he was actually exposed to herbicides or that they were present in his ship's ventilation or distillation systems. The Veteran has submitted no documentation to corroborate his factual assertions as to exposure to Agent Orange on the Intrepid.

Again, the Veteran concedes that he is considered a "Blue Water" veteran. Moreover, the most probative evidence of record is against a finding that the Veteran was exposed to such herbicides during his service aborad the U.S.S. Intrepid in the South China Sea, territorial waters of South Vietnam, or the Gulf of Tonkin when his ship was present in those locations. Consequently, the most probative evidence shows that the Veteran was not directly exposed to any herbicide during his service for which presumptive service connection might apply. 38 C.F.R. § 3.307(a)(6) (2014).

The Board has considered the Australian study discussed above, as well as the detailed arguments, testimony, and articles submitted by the Veteran's representative. The Board finds this article and the submissions made by the Veteran's representative are too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the U.S.S. Intrepid. *See Sacks v. West*, 11 Vet. App. 314, 316-17 (1998). The medical treatise, [textbook, or article] must provide more than speculative, generic statements not relevant to a veteran's claim but must discuss generic relationships with a degree of certainty for the facts of a specific case. *Wallin v. West*, 11 Vet. App. 509, 514 (1998). The articles in the current case do not provide statements for the facts of the Veteran's specific case—including the specific ship upon which he

service. Therefore, the Board concludes that the articles do not show to any degree of specificity that the Veteran was exposed to Agent Orange while drinking water on the Intrepid, or that he was otherwise shown to have been exposed to herbicides during service. Moreover, the arguments provided by the Veteran's representative regarding "Blue Water" veterans was considered, but the law as to "Blue Water" veterans is clear as delineated by the Federal Circuit in *Haas*.

In *Haas, supra*, the Federal Circuit highlighted the VA's rulemaking with respect to a similar Australian scientific 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, 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)]. As such, the Board places little weight on these submissions, and they are outweighed by other evidence of record outlined above.

The Board has also considered the private opinions from Dr. G. finding the Veteran's diabetes mellitus with edema and prostate cancer were at least as likely as not related to Agent Orange during service in Vietnam. The Board finds, however, that these opinions lack probative value as they are conditional or based on an inaccurate factual basis—namely, the Veteran did not have exposure to Agent

Orange during service. *See Reonal v. Brown*, 5 Vet.App. 458, 794 (1993) (noting that a medical opinion based upon an inaccurate factual predicate has no probative value). Importantly, Dr. G.'s October 2010 opinion is conditional. He states that the Veteran's prostate cancer would be as least as likely as not related to Agent Orange exposure if the Veteran was exposed to Agent Orange. However, Dr. G. himself recognized that he did not have the information to confirm Agent Orange exposure.

The Board adds that there is no evidence that the Veteran ever served in Vietnam, nor does he assert any such service, such that herbicide exposure may not be presumed in this case. 38 C.F.R. § 3.307(a)(6)(iii).

Diabetes Mellitus and Prostate Cancer

The Veteran claims that he incurred diabetes mellitus with edema and prostate cancer as a result of exposure to Agent Orange in the South China Sea, territorial waters of South Vietnam, and in the Gulf of Tonkin. As discussed in detail above, however, the Board finds that there is no credible evidence that the Veteran was exposed to herbicides during service. The Board adds that the Veteran's personnel records do not reflect any service in the Republic of Vietnam, and the Veteran has never asserted any service in-country Vietnam, such that exposure to herbicides may not be presumed. 38 C.F.R. § 3.307(a)(6)(iii).

The Board also notes that there is no conclusive lay or medical evidence in the claims file of diabetes mellitus with edema and prostate cancer in service or within one year of service so as to allow for presumptive service connection as chronic diseases under 38 C.F.R. § 3.309(a). Again, the Veteran was first shown to have diabetes mellitus 2004 and prostate cancer in 2007. Nevertheless, as neither prostate cancer, nor diabetes mellitus are shown by credible evidence to have manifested to a compensable degree within the Veteran's first post-service year, service connection on a presumptive basis is not warranted.

As noted above, the Veteran is not, however, precluded from proving entitlement to service connection on a direct basis. *See Combee v. Brown*, 5 Vet. App. 248 (1993).

The Veteran has not alleged that he was continuously treated for diabetes mellitus with edema and prostate cancer since service. Again, the Veteran was first shown to have diabetes mellitus with edema in 2004 and prostate cancer in 2007—over 30 years since discharge from active duty.

VA and private treatment records reflect that the Veteran has been treated for type II diabetes mellitus with edema and prostate cancer. Other than the inadequate private opinions from Dr. G., discussed above, these records do not include any opinion as to the etiology of the Veteran's diabetes mellitus with edema and prostate cancer. As noted above, however, there is no competent and credible evidence showing the Veteran was exposed to herbicides during his active service in South China Sea, territorial waters of South Vietnam, and in the Gulf of Tonkin, and the opinions from Dr. G. linking the Veteran's diabetes mellitus and prostate cancer to Agent Orange exposure lack probative value as they are based on an inaccurate factual basis and/or conditional.

The only evidence of record suggesting any relationship between the Veteran's diabetes mellitus with edema and prostate cancer, and his active service are his own statements asserting Agent Orange exposure in South China Sea, territorial waters of South Vietnam, and in the Gulf of Tonkin, and his opinion that such exposure caused his diabetes and prostate cancer. However, the Board has found that there is no competent or credible evidence of record of the Veteran's claimed herbicide exposure during service. Also, the fact that the Veteran was not conclusively diagnosed with diabetes mellitus with edema and prostate cancer until more than 30 years post-service weighs heavily against any alleged association to service. *See Maxson v. Gober*, 230 F.3d 1330, 1333 (2000). The only competent and credible evidence of record as to the etiology of the Veteran's diabetes mellitus with edema and prostate cancer weighs against the claims. The Veteran has not presented a probative opinion to the contrary.

As the preponderance of the evidence is against the claims for service connection for diabetes mellitus with edema and prostate cancer, the benefit-of-the-doubt rule does not apply, and the claims must be denied. *See* 38 U.S.C.A. § 5107(b) (West 2002); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Service connection for prostate cancer is denied.

Service connection for diabetes mellitus with edema is denied.

REMAND

In a February 2014 rating decision, the RO denied service connection for coronary artery disease, to include as secondary to herbicides. In March 2014, the Veteran filed a valid notice of disagreement with the decision. To date, however, the AOJ has not issued the Veteran a Statement of the Case (SOC) with respect to this claim. Because the notice of disagreement placed the issues in appellate status, the matter must be remanded for the originating agency to issue a statement of the case. *See Manlincon v. West*, 12 Vet. App. 238, 240-41 (1999).

Accordingly, the case is REMANDED for the following action:

> A Statement of the Case on the issue of entitlement to service connection for coronary artery disease should be issued to the Veteran and his representative. The Veteran should be informed of the requirements to perfect an appeal with respect to the new issue. If the Veteran perfects an appeal with respect to this issue, the AOJ should ensure that all indicated development is completed before the case is returned to the Board.

By this remand, the Board intimates no opinion as to any final outcome warranted.

No action is required of the Veteran until he is otherwise notified but he has the right to submit additional evidence and argument on the matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West 2014).

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MICHAEL LANE
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 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*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

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. *See* 38 C.F.R. 20.904. 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 the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

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 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 General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).