



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

Represented by
Gordon A. Graham, Agent

Docket No. 210304-140744
Advanced on the Docket

DATE: March 29, 2021

ORDER

An effective date of September 17, 2002 for the grant of service connection for unspecified depressive disorder (depression) is granted.

FINDINGS OF FACT

1. On September 17, 2002, more than one year after the Veteran's separation from service, VA received the Veteran's formal claim for service connection for a heart disorder, diabetes mellitus, and depression.
2. A November 2002 VA mental health examination report diagnosed the Veteran with depression as secondary to residuals of a 1986 heart attack and triple bypass surgery.
3. In a February 2003 rating decision that subsequently became final, the Department of Veterans Affairs (VA) Regional Office (RO) denied service connection for a heart disorder, depression, and diabetes mellitus. At that time, the RO found that the Veteran was a blue water veteran that did not set foot in the Republic of Vietnam; therefore, the Veteran was not entitled to presumptive exposure to the herbicide, Agent Orange.
4. The Veteran sought to reopen service connection for a heart disorder and diabetes mellitus in March and April 2020.

5. At the time of the new service-connection claims, the Veteran was entitled to the presumption of herbicide exposure under the Blue Water Navy Act of 2019.

6. In a September 2020 rating decision, pursuant to the Blue Water Navy Act of 2019 and *Nehmer*, the RO granted service connection for the heart disorder of ischemic heart disease (IHD) status post myocardial infarction and coronary artery bypass graft, effective September 17, 2002.

7. Per the September 2020 rating decision, a separate compensable disability rating was assigned for chest scarring caused by prior heart surgery, effective September 17, 2002, but a separate compensable disability rating was not granted for the previously established heart disorder symptom of depression.

8. In a February 2021 rating decision, the RO granted service connection for unspecified depressive disorder and assigned an effective date of December 2, 2020, which was found to be the date of claim to reopen service connection for depression.

9. As the evidence before the RO at the time of the February 2003 RO rating decision showed that the Veteran's depression was a symptom/separate compensable disability of the heart disorder and corresponding heart surgery, pursuant to the Blue Water Navy Act of 2019 and *Nehmer*, an effective date of September 17, 2002 should have been awarded for the now service-connected depression.

CONCLUSION OF LAW

The criteria for an effective date of September 17, 2002 for the grant of service connection for unspecified depressive disorder are met. 38 U.S.C. §§ 5110, 7105; 38 C.F.R. §§ 3.102, 3.156, 3.326(a), 3.310, 3.400, 3.816.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran, who is the appellant, had active service from January 1959 to July 1962, and from October 1962 to October 1977.

The Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55 (to be codified as amended in scattered sections of 38 U.S.C.), 131 Stat. 1105 (2017), also known as the Appeals Modernization Act (AMA), creates a new framework of review for veterans who disagree with VA's decision on their claim.

In February 2021, the RO issued a rating decision granting service connection for unspecified depressive disorder and assigning an effective date of December 2, 2020. In March 2021, pursuant to a VA Form 10182, the Veteran disagreed with the effective date assigned and opted for direct review under the AMA by the Board of Veterans' Appeals (Board). Direct review is the appeal option to the Board in which a Board decision is issued based on evidence of record at the time of the prior decision. The Board cannot hold a hearing or accept into the record additional evidence in its direct review.

Earlier Effective Date for Service Connection for Depression

An award of direct service connection will be effective on the day following separation from active military service or the date on which entitlement arose if the claim is received within one year of separation from service. Otherwise, except as specifically provided, the effective date of an evaluation and award for pension, compensation, or dependency and indemnity compensation based on an original claim, a claim reopened after a final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400.

Effective on August 31, 2010, VA amended 38 C.F.R. § 3.309(e) to add hairy cell leukemia and other chronic B-cell leukemias, Parkinson's disease and Ischemic heart disease (including, but not limited to, acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and

Prinzmetal's angina) to the list of diseases associated with exposure to certain herbicide agents. See 75 Fed. Reg. 53,202. The intended effect of this amendment was to establish presumptive service connection for these diseases based on herbicide exposure. Note 3 indicates that for purposes of this section the term ischemic heart disease does not include hypertension or peripheral manifestations of arteriosclerosis such as peripheral vascular disease or stroke, or any other condition that does not qualify within the generally accepted medical definition of Ischemic heart disease. 38 C.F.R. § 3.309(e). The final rule is applicable to claims received by VA on or after August 31, 2010, and to claims pending before VA on that date.

Additionally, VA will apply this rule in readjudicating certain previously denied claims as required by court orders in *Nehmer v. U. S. Department of Veterans Affairs*, No. CV-86- 6160 (N.D. Cal. May 17, 1991). 38 C.F.R. § 3.816 sets forth the effective date rules required by orders of the United States district court in *Nehmer* (Nehmer Stipulation). For purposes of this section, a *Nehmer* class member includes a Vietnam veteran who has a covered herbicide disease, here coronary artery disease/ischemic heart disease. Thus, the Veteran in this case is considered a *Nehmer* class member. See 38 C.F.R. § 3.816(b)(1)(2) (ischemic heart disease falls under *Nehmer* as it was included 38 C.F.R. § 3.309(e) as part of the passage of a liberalizing law).

If a *Nehmer* class member is entitled to disability compensation for a covered herbicide disease, the effective date of the award, if the class member's claim for disability compensation for the covered herbicide disease was either pending before the VA on May 3, 1989, or was received by VA between that date and the effective date of the statute or regulation establishing a presumption of service connection for the covered disease, will be the later of the date such claim was received by VA or the date the disability arose, unless the claim was received within a year following separation from service. A claim will be considered a claim for compensation for a particular covered herbicide disease if: (1) the claimant's application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability; or (ii) VA issued a decision on the claim, between May 3, 1989 and the

effective date of the statute or regulations establishing a presumption of service connection for the covered disease, in which VA denied compensation for a disease that reasonably may be construed as the same covered herbicide disease for which compensation has been awarded. *See* 38 C.F.R. § 3.816(c)(2). If the above requirements are not met, the effective date of the award shall be determined in accordance with §§ 3.114 and 3.400.

In *Procopio v. Wilkie*, the Federal Circuit interpreted “served in the Republic of Vietnam” in 38 U.S.C. § 1116(a)(1) to unambiguously include service in the territorial sea of that country. *Procopio*, 913 F.3d at 1376 (Fed. Cir. 2019). Prior to *Procopio*, Veterans known as Blue Water Navy Veterans did not receive the presumption of herbicide agent exposure afforded by the Agent Orange Act of 1991. In *Procopio v. Wilkie*, the Federal Circuit interpreted “served in the Republic of Vietnam” in 38 U.S.C. § 1116(a)(1) to unambiguously include service in the territorial sea of that country. *Procopio*, 913 F.3d at 1376. The court expressly overruled *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), which had upheld VA’s “foot-on-land” requirement over a decade earlier. *Id.* at 1373, 1380.

The Blue Water Navy Act of 2019 codified the *Procopio* holding and authorized VA to award disability benefits retroactively to Blue Water Navy Veterans who had previously submitted a claim for benefits that were previously denied by VA for lack of service on the landmass or inland waterways of the Republic of Vietnam. To obtain such a retroactive benefit award, a veteran must submit a claim on or after January 1, 2020 for the condition at issue in the prior claim and the new claim must be approved under the Blue Water Navy Act. *See* 38 U.S.C. § 1116A(c).

As to what constitutes a claim, a specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid or furnished to any individual under the laws administered by VA. 38 U.S.C. § 5101(a); 38 C.F.R. § 3.151(a). The term “claim” means a communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 C.F.R. § 3.1(p).

Effective March 24, 2015, VA amended its adjudication regulations to require that all claims governed by VA’s adjudication regulations be filed on standard forms

prescribed by the Secretary. *See* 79 Fed. Reg. 57,660 (Sept. 25, 2014). This rulemaking also eliminated the constructive receipt of VA reports of hospitalization or examination and other medical records as informal claims for increase and revised 38 C.F.R. § 3.400(o)(2).

To preserve an effective date, an intent to file a claim may be submitted to VA. 38 C.F.R. § 3.155(b). Upon receipt of the intent to file a claim, VA will furnish the claimant with the appropriate application form prescribed by the Secretary. If VA receives a complete application form prescribed by the Secretary, appropriate to the benefit sought within one-year of receipt of the intent to file a claim, VA will consider the complete claim filed as of the date the intent to file a claim was received. 38 C.F.R. § 3.155.

Under the former regulations governing informal claims, any communication or action indicating an intent to apply for one or more benefits under the laws administered by VA, from a claimant or his representative, may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within one year from the date it was sent to the Veteran, it will be considered filed as of the date of receipt of the informal claim. When a claim has been filed which meets the requirements of 38 C.F.R. §§ 3.151 or 3.152, an informal request for increase or reopening will be accepted as a claim. 38 C.F.R. § 3.155 (2014).

At the outset, the Board will review the procedural history of this matter. On September 17, 2002, more than one year after the Veteran's separation from service, VA received the Veteran's formal claim for service connection for a heart disorder, diabetes mellitus, and depression. During the development of that claim, the Veteran received a VA mental health examination in November 2002. Per the examination report, the Veteran was diagnosed with depression secondary to residuals of a 1986 heart attack and triple bypass surgery. A separate December 2002 VA examination report reflects that the heart attack was due to coronary artery disease (CAD). In other words, the depression was caused by the Veteran's IHD/CAD.

Per a February 2003 rating decision, the RO denied service connection for a heart disorder, depression, and diabetes. In denying service connection for diabetes mellitus, the RO specifically found that the Veteran was a blue water veteran that did not set foot in the Republic of Vietnam; therefore, the Veteran was not entitled to presumptive exposure to the herbicide, Agent Orange. This rating decision subsequently became final.

In March and April of 2020, the Veteran filed new claims for service connection for, among other things, IHD/CAD and diabetes mellitus. The claims forms did not explicitly state that service connection was also being sought for depression. Per a corresponding March 2020 statement, the Veteran's representative advanced that the Veteran has served aboard Naval vessels that approached within 12 miles of the coast of the Republic of Vietnam. Subsequent development verified that the Veteran was entitled to the presumption of herbicide exposure under the Blue Water Navy Act of 2019.

As the Veteran qualified for the presumption of herbicide exposure under the Blue Water Navy Act of 2019, in a subsequent September 2020 rating decision, the RO granted service connection for the heart disorder of IHD status post myocardial infarction and coronary artery bypass graft, and diabetes mellitus, type II, as due to in-service herbicide exposure. Further, the RO also granted service connection for the secondary disabilities of left lower extremity peripheral neuropathy and right lower extremity peripheral neuropathy, as secondary to the now service-connected diabetes mellitus, type II, and a chest scar, as secondary to heart surgery. Pursuant to the Blue Water Navy Act of 2019 and *Nehmer*, an effective date of September 17, 2002, the date of original claim for service connection for diabetes mellitus and a heart disorder, for *all* of the newly service-connected disabilities was assigned.

Subsequently, in December 2020, the Veteran's representative submitted a Motion to Revise the September 2020 rating decision for failing to grant service connection for depression. The representative argued that, while depression was not specifically raised in the 2020 claims, the RO had constructive possession of the prior records, discussed above, showing that the Veteran had requested service connection for depression in September 2002, and that the depression was a symptom of the now service-connected IHD/CAD. The representative further

noted that service connection for chest scarring, as secondary to the IHD/CAD, was granted back to September 17, 2002, and service connection for bilateral lower extremity peripheral neuropathy, as secondary to diabetes mellitus, was also granted back to September 17, 2002, despite no claim for service connection for bilateral lower extremity peripheral neuropathy having been raised in September 2002.

The RO subsequently took the December 2020 Motion for Revision as a claim for service connection for depression. During development, the Veteran received a new VA mental health examination in January 2021, which again diagnosed depression. In a corresponding opinion, the VA examiner opined that it was at least as likely as not that the Veteran's depression was caused by the service-connected IHD. In rendering this opinion, the VA examiner explicitly relied on the November 2002 VA medical opinion that the depression was a residual symptom of the prior heart surgery to treat the service-connected IHD/CAD.

In a February 2021 rating decision, the RO granted service connection for unspecified depressive disorder. An effective date of December 2, 2020 was assigned, the date the Motion for Revision was received. While an effective date earlier than December 2020 was considered, the RO found an earlier effective date was not warranted, as depression is not a disability considered under the Blue Water Navy Act of 2019 and/or *Nehmer*. The Veteran and representative subsequently appealed the initial effective date assigned in a March 2021 Notice of Disagreement (NOD), which reiterated the arguments previously raised in the December 2020 Motion for Revision.

Considering the evidence of record, the relevant procedural history, and the appropriate law and regulation, to include the Blue Water Navy Act of 2019 and *Nehmer* when interpreting both language and context of the claims, the Board finds that, under the facts specific to this matter, the RO should have assigned an effective date of September 17, 2002 when granting service connection for depression in the February 2021 rating decision.

The Board notes that the RO in February 2021 rating decision was correct when it found that the mental health disorder of depression is not a disability that, standing

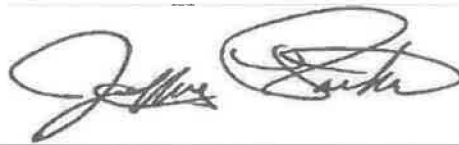
alone, would be subject to the Blue Water Navy Act of 2019 and/or *Nehmer*; however, in the instant fact pattern, where the issue of service connection for depression was raised at the same time as the issue of service connection for a heart disorder, and where the evidence at the time of the February 2003 RO rating decision showed that the depression was a symptom of the IHD/CAD, the RO in February 2021 should have found that an effective date of September 17, 2002 was warranted for the now service-connected depression.

Again, at the time of the September 2020 rating decision granting service connection for IHD and assigning an effective date of September 17, 2002, pursuant to the Blue Water Navy Act of 2019 and *Nehmer*, the RO also granted service connection/a separate compensable disability rating for a chest scar caused by IHD surgery, effective from September 17, 2002. Further, even though service connection for bilateral lower extremity peripheral neuropathy was not raised at the time of the September 2002 claim, the RO granted service connection/separate compensable disability ratings for right and left lower extremity peripheral neuropathy from September 17, 2002, based on the fact that a December 2002 VA examination report showed decreased sensation in the lower extremities and a peripheral neuropathy diagnosis. As the report from the November 2002 VA mental health examination showed that the Veteran's depression was caused by/a symptom of the now service-connected IHD, the Board finds that, had the Veteran raised the depression issue prior to the issuance of the September 2020 rating decision, or had the RO adequately reviewed the history of the instant matter, the RO would have also granted a separate compensable disability rating for depression from September 17, 2002.

In sum, at the time of the February 2021 rating decision, all the evidence of record indicated that the Veteran's depression was a symptom of/due to the service-connected IHD. Had the RO considered whether a separate compensable disability rating was warranted for depression at the time of the September 2020 rating decision granting service connection for IHD and assigning an effective date of September 17, 2002, pursuant to the Blue Water Navy Act of 2019 and *Nehmer*, and based upon the procedural history of this matter, the RO would have awarded a separate compensable disability rating for depression effective September 17, 2002. As such, at the time of the February 2021 rating decision granting service

connection for depression, an effective date of September 17, 2002 should have been assigned by the RO.

For the above stated reasons, the Board finds an earlier effective date of September 17, 2002 for the grant of service connection for unspecified depressive disorder, to be warranted. 38 U.S.C. §§ 1116A, 5110; 38 C.F.R. §§ 3.400, 3.816.



J. PARKER
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

E. Blowers, Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.