



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

[REDACTED]

[REDACTED]
Docket No. 190717-52197

Represented by
Gordon A. Graham, Agent

DATE: October 31, 2023

ORDER

Entitlement to service connection for hepatitis C is granted.

Entitlement to service connection for hyperthyroidism, as secondary to hepatitis C, is granted.

Entitlement to service connection for Type 2 diabetes mellitus, as secondary to hepatitis C, is granted.

Entitlement to service connection for a lung disability is dismissed.

Entitlement to service connection for chronic fatigue syndrome is dismissed.

REMANDED

Entitlement to service connection for brain fog is remanded.

Entitlement to service connection for hypertension is remanded.

Entitlement to service connection for osteoarthritis is remanded.

FINDINGS OF FACT

1. It is at least as likely as not that the Veteran's hepatitis C was incurred in service.
2. The Veteran's service-connected hepatitis C and treatment therefor proximately caused his Type 2 diabetes mellitus.
3. The Veteran's service-connected hepatitis C and treatment therefor proximately caused his hyperthyroidism.
4. At his July 2023 hearing, the Veteran withdrew his appeal of the denial of service connection for a lung disability.
5. At his July 2023 hearing, the Veteran withdrew his appeal of the denial of service connection for chronic fatigue syndrome.

CONCLUSIONS OF LAW

1. The criteria for service connection for hepatitis C have been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.303.
2. The criteria for service connection for hyperthyroidism, as secondary to hepatitis C, have been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.310.
3. The criteria for service connection for Type 2 diabetes mellitus, as secondary to hepatitis C, have been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.304, 3.310.
4. The criteria for dismissal of the appeal for service connection for chronic fatigue syndrome have been met. 38 U.S.C. § 7105; 38 C.F.R. § 20.205.
5. The criteria for dismissal of the appeal for service connection for a lung disability have been met. 38 U.S.C. § 7105; 38 C.F.R. § 20.205.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran had active service from June 1972 to June 1974.

A rating decision was issued by the Department of Veterans Affairs (VA) under the legacy system in April 2016, and the Veteran submitted a timely notice of disagreement. In May 2019, the Agency of Original jurisdiction (AOJ) issued a statement of the case (SOC). The Veteran opted the claims into the modernized review system, also known as the Appeals Modernization Act (AMA) system, by submitting a July 2019 VA Form 10182, Decision Review Request: Board Appeal, identifying the May 2019 SOC. Therefore, the May 2019 SOC is the decision on appeal.

In the July 2019 VA Form 10182, Decision Review Request: Board Appeal, the Veteran elected the Hearing docket. A Board hearing was held in July 2023.

Therefore, the Board may only consider the evidence of record at the time of the May 2019 SOC, as well as any evidence submitted by the Veteran or his representative at the hearing or within 90 days following the hearing. 38 C.F.R. § 20.302(a). If evidence was submitted either (1) during the period after the AOJ issued the SOC and prior to the Board hearing, or (2) more than 90 days following the hearing, the Board did not consider it in its decision. 38 C.F.R. §§ 20.300, 20.302(a), 20.801.

If evidence was associated with the claims file during a period of time when additional evidence was not allowed, the Board has not considered it in this decision. 38 C.F.R. § 20.300. With respect to the claims for service connection for hypertension and osteoarthritis, any evidence the Board could not consider will be considered by the AOJ in the readjudication of those claims on remand. 38 C.F.R. § 3.103(c)(2)(ii).

1. Entitlement to service connection for a lung disability**2. Entitlement to service connection for chronic fatigue syndrome**

The Board may dismiss any appeal that fails to allege a specific error of fact or law in the determination being appealed. 38 U.S.C. § 7105. An appeal may be withdrawn as to any or all issues involved in the appeal at any time before the Board promulgates a decision. 38 C.F.R. § 20.205. Withdrawal may be made by the appellant or by his or her authorized representative. 38 C.F.R. § 20.205.

Here, the Veteran indicated at his July 2023 Board hearing that he wished to withdraw his appeal of the denials of service connection for a lung disability and chronic fatigue syndrome. He confirmed that he understood if he withdrew the claims, the Board would not issue a decision on them and that if he chose to file new claims for these benefits, he would get later effective dates. There is no indication that the Veteran did not understand the implications and consequences of a withdrawal. Accordingly, the Board finds that the Veteran has clearly and unambiguously withdrawn the appeal of the denials of service connection for a lung disability and chronic fatigue syndrome. As there are no remaining allegations of errors of fact or law for appellate consideration regarding service connection for a lung disability and chronic fatigue syndrome, the Board does not have jurisdiction to review the appeal of these issues, and they are dismissed.

3. Entitlement to service connection for hepatitis C

Service connection will be granted for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303.

Establishing service connection generally requires evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the current disability. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

When there is an approximate balance of positive and negative evidence regarding any material issue, reasonable doubt will be resolved in favor of the claimant. 38 U.S.C. § 5107; 38 C.F.R. § 3.102.

The requirements for service connection, listed above, are satisfied for the Veteran's hepatitis C claim. As will be discussed in greater detail below, the Board concludes that the Veteran has a current diagnosis of hepatitis C that is related to in-service jet gun inoculations. Thus, service connection for hepatitis C is warranted. 38 U.S.C. §§ 1110, 5107(b); *Holton*, 557 F.3d at 1366; 38 C.F.R. § 3.303(a).

The first question to resolve is whether the Veteran has a current disability. Here, the Veteran's outpatient records and the VA examination reports show a diagnosis of hepatitis C. Therefore, the first criterion for service connection is met.

The second question to resolve is whether there was an in-service event. The Veteran competently and credibly reported jet gun inoculations. He also submitted a statement from P. M., who served with the Veteran, regarding jet gun inoculations, along with articles and photographs in support of his claim indicating that jet guns were used to administer vaccinations to Vietnam Veterans at Fort Ord, where he was stationed. Thus, this element of service connection is also satisfied.

Finally, the Veteran's claim hinges on whether there is a medical nexus between his hepatitis C and in-service jet gun inoculations. On this issue, the Board notes that there are three positive nexus opinions of record and two negative opinions. The Board affords the positive opinions more weight than the negative opinions. Therefore, the third requirement for service connection is met.

In that regard, the AOJ first obtained an opinion in March 2016. The VA examiner opined that there were no records stating that the Veteran was infected with hepatitis C because of a jet gun inoculation and concluded it was less likely than not that his disability was etiologically related to service.

The Veteran submitted a positive nexus opinion from his treating physician, Dr. S. N., from September 2016. She explained that she was originally skeptical of the Veteran's contentions, but his hepatitis C could be logically deducted from a scientifically rigorous, methodological evaluation. The Veteran's treating physician thoroughly explained how she formulated her opinion and ruled out other risk factors for the Veteran's hepatitis C. Dr. N. concluded that it is more likely than not

that the Veteran's hepatitis C is the result of jet gun inoculations while on active duty.

The Veteran submitted a second positive opinion, dated in February 2017, from nurse S. H.-P. She also provided a thorough explanation of how she came to the conclusion that it was more likely than not that the Veteran contracted hepatitis C during active service.

In May 2019, the AOJ obtained another opinion. The VA examiner explained that a study found that air gun injectors were not a significant risk factor for hepatitis C. The examiner further explained that it was theoretically possible, but there was no evidence to support the Veteran's contention. Finally, the VA examiner stated that she could not "definitively" opine whether the Veteran's hepatitis C had its onset during active service because the diagnosis was made two decades after his separation.

Finally, the Veteran submitted a third private opinion, authored in August 2019 by Dr. M. R. and submitted in July 2023. Dr. R. provided another thorough opinion explaining how she concluded it is more likely than not that the Veteran contracted hepatitis C during his time on active duty. She also addressed the May 2019 VA examiner's conclusion that hepatitis C transmission via jet gun inoculation was theoretical.

In assessing the evidence, the Board notes that the March 2016 VA examiner did not directly address the Veteran's specific and detailed contentions, nor the evidence he submitted. The May 2019 VA examiner similarly did not address the favorable evidence and applied the wrong standard in requiring definitive proof. Moreover, there are three well-reasoned positive opinions of record. Therefore, the Board finds that there is a nexus between the Veteran's hepatitis C and in-service vaccinations.

As all elements of service connection having been satisfied, the claim is granted.

4. Entitlement to service connection for hyperthyroidism, as secondary to hepatitis C

5. Entitlement to service connection for Type 2 diabetes mellitus, as secondary to hepatitis C

Secondary service connection is warranted for a disability which is proximately due to, or the result of, a service-connected disability. 38 C.F.R. § 3.310(a). In order to prevail under a theory of secondary service connection, there must be: (1) evidence of a current disorder; (2) evidence of a service-connected disability; and (3) medical nexus evidence establishing a connection between the service-connected disability and the current disorder. *Wallin v. West*, 11 Vet. App. 509, 512 (1998).

The Board concludes that the elements for secondary service connection for hyperthyroidism and diabetes mellitus are met.

First, the Board finds that the Veteran has been diagnosed with the two disabilities, as shown by the outpatient treatment records.

Second, the Board has granted service connection for hepatitis C.

Therefore, the Veteran's claim hinges on whether there is a causal relationship between his claimed disabilities and his hepatitis C.

The evidence on this point includes Dr. S.N.'s September 2016 private opinion, Ms. S.H.-P.'s February 2017 opinion, and Dr. R.'s August 2019 opinion. The Board notes that there are no negative VA opinions of record.

Dr. N. did not specifically opine whether it is "at least as likely as not" that the Veteran's hyperthyroidism or diabetes mellitus was caused or aggravated by his hepatitis C or treatment therefor. However, she explained that "additional concern must be advised for any number of possible diseases that could manifest as a result" of hepatitis and the medication used in treatment. She identified thyroid dysfunction as one of the resulting disorders.

The February 2017 opinion similarly does not use the “at least as likely as not” standard regarding the Veteran’s secondary service connection claims.

Nevertheless, Ms. H.-P. wrote, “I further believe that the diabetes Type 2...as well as his hyperthyroidism...are all related to his Hepatitis C and the treatment he received for it.” She explained that diabetes can be caused by the virus itself and interferon treatment, which the Veteran received, and that interferon can cause thyroid problems, even years later. Ms. H.-P. supported her conclusions by explaining the studies show correlations.

In the August 2019 opinion, Dr. R. observed that Type 2 diabetes mellitus “is associated in a bidirectional manner with” hepatitis C in the medical literature and “increased risk of [type 2 diabetes mellitus] is also associated with treatment with interferon[,] as is the case with this [V]eteran.” Dr. R. summarized the studies she referenced. She further noted that, “in addition to his Diabetes Mellitus II related to a combination of his chronic [Hepatitis C Virus] infection and interferon treatments,” the side effects also include thyroid disease. She wrote, “his Diabetes Mellitus II and hyperthyroidism...[are] (all secondary to Interferon/Ribavirin treatment)” and classified them as “complications” of hepatitis C. Dr. R. concluded it was more likely than not that the Veteran’s diabetes is a result of a combination of his hepatitis C infection and the interferon treatment.

Based on the above, the Board finds both claims for secondary service connection should be granted. Dr. R.’s opinion is the only one that applies the legal standard to the secondary service connection claims, but only does so for the diabetes mellitus. Nevertheless, while the opinions of record do not use the correct legal standard for the Veteran’s hyperthyroidism, the Board resolves reasonable doubt in his favor and finds the claims should be granted. On the whole, the record contains sufficient evidence that there is a causal link between the Veteran’s hepatitis C treatment and his hyperthyroidism and diabetes mellitus.

Having found that all three elements for secondary service connection are met, the Board grants the hyperthyroidism and diabetes mellitus claims, as well.

REASONS FOR REMAND

- 1. Entitlement to service connection for brain fog is remanded.**
- 2. Entitlement to service connection for hypertension is remanded.**
- 3. Entitlement to service connection for osteoarthritis is remanded.**

In light of the arguments the Veteran has presented, these claims are inextricably intertwined with the rating activity for the grant of service connection for hepatitis C. Thus, the Board is remanding them pending completion of that activity. *See Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991).

The matters are REMANDED for the following action:

Adjudicate the issues of entitlement to service connection for brain fog, hypertension, and osteoarthritis after completion of the rating activity for the award of service connection for hepatitis C.



L. STEPANICK
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

M. Smith, Associate 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.