

CONCLUSION OF LAW

The veteran's chronic lymphocytic leukemia is presumed to have been incurred as a result of the veteran's exposure to Agent Orange during service. 38 U.S.C.A. §§ 1110, 1116 (West 2002); *Haas v. Nicholson*, No. 04-491 (U.S. Vet. App. Aug. 16, 2006); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2005).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The veteran seeks service connection for chronic lymphocytic leukemia, diagnosed in 1995, based on presumed exposure to herbicide during his service onboard a ship in Da Nang harbor. His claim was denied in November 1995 based on the fact that chronic lymphocytic leukemia was not shown within a year of service and it is not a disease for which the presumption was available under the then-controlling laws.

In February 2003, the veteran sent VA evidence in support of his contention that his chronic lymphocytic leukemia is related to service, and specifically to exposure to Agent Orange in Da Nang Harbor. In April 2003, VA informed him of the proposed regulatory change which added chronic lymphocytic leukemia to the list of diseases linked to exposure to herbicides. They informed him that they would re-evaluate his claim once the proposed liberalizing regulation became effective. Chronic lymphocytic leukemia was added to the regulation effective October 16, 2003. See 68 Fed. Reg. 59,540 (October 16, 2003). (The new regulation constitutes new and material evidence in the claim. See 38 C.F.R. § 3.156 (2005)).

"When a provision of law or regulation creates a new basis of entitlement to benefits, as through liberalization of the requirements for entitlement to a benefit, an applicant's claim of entitlement under such law or regulation is a claim separate and distinct from a claim previously and finally denied." *Spencer v. Brown*, 4 Vet. App. 283, 288 (1993), *aff'd*, 17 F.ed 368 (Fed.Cir. 1994). Consistent with this principle, the RO reevaluated the veteran's claim in August 2003, denying the claim based on the finding that the finding that the veteran did not meet VA's definition of service in Vietnam. The veteran submitted more evidence in February 2004, and the claim was again denied in June 2004. This appeal ensued.

At his hearing, the veteran testified that he served onboard the U. S. S. Forrest Royal during the Vietnam War. He testified that his ship entered and anchored in Da Nang Harbor, where he witnessed onshore fighting and gunfire. He reports that the ship was close to shore, and that they had to patrol the ship to ensure that the ship was not boarded at night by enemy. He notes that he performed electrical duties on the ship and that he was responsible for making sure the lighting was on the outline of the ship at night. He recalls hearing shrapnel hit the ship when they came in closer to shore on one occasion. He stated that they had to desalinate and drink the water from the bay. The bay was described as surrounded by Vietnam on three sides.

Also at the hearing, the veteran submitted, with waiver of RO consideration, deck logs showing his ship was in the coastal waters of South Vietnam during his tour of duty, and specifically in Da Nang Harbor, during April 1967. They were anchored in Da Nang Harbor in August 1967. He has submitted maps of Vietnam showing Da Nang Harbor as described.

In November 2000, the President signed into law the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000). This law redefined the obligations of VA with respect to the duty to assist and included an enhanced duty to notify a claimant as to the information and evidence necessary to substantiate a claim for VA benefits. The Board has considered the provisions of the VCAA. However, the Board need not discuss the limited application of the VCAA in this case, given the favorable disposition of the issue as decided herein.

Applicable law provides that service connection will be granted if it is shown that the veteran suffers from disability resulting from an injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. 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, and has a disease listed in 38 C.F.R. § 3.309(e), 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. See 38 U.S.C. § 1116(f). The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. 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. See 38 C.F.R. §§ 3.307(a)(6)(iii), 3.313(a).

A veteran who served in the Republic of Vietnam during the period from January 9, 1962 to May 7, 1975 is presumed to have been exposed during such service to certain herbicide agents (e.g., Agent Orange). In the case of such a veteran, service connection for listed diseases will be presumed if they are manifest to a compensable degree within specified periods, including chronic lymphocytic leukemia, any time after service. 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309(e) (2005).

The veteran served on the naval vessel as set forth herein. His DD form 214 reflects that he received the Vietnam Service Medal. In a recent case, the United States Court of Appeals for Veterans Claims (CAVC) found that, for purposes of applying the presumption of exposure to herbicides under 38 C.F.R. § 3.307(a)(6)(iii), "service in the Republic of Vietnam" will, in the absence of contradictory evidence, be

presumed based upon the veteran's receipt of a Vietnam Service Medal (VSM), without any additional proof required that a veteran who served in waters offshore actually set foot on land in the Republic of Vietnam. In other words, exposure to herbicides will be presumed based on the receipt of a VSM. The Court explained that examples of contradictory evidence include evidence that the VSM was received for service in a neighboring country or at a location that reasonably precluded exposure to Agent Orange.

The Court found that VA Adjudication Procedure Manual M21-1, Part III, 4.08(k)(1)-(2) (Nov. 1991), is still binding on VA, despite an attempt by the VA to rescind that rule. The rule provides that "In the absence of contradictory evidence, 'service in Vietnam' will be conceded if the records shows [sic] that the veteran received the Vietnam Service Medal." This provision apparently remained in effect throughout the promulgation of current 38 C.F.R. § 3.307(a)(6)(iii).

Thus, Agent Orange exposure is presumed based on the veteran's receipt of the VSM. (There is no contrary evidence.) He has a disease which is listed at 3.309(e). He meets the criteria for service connection for this disease, chronic lymphocytic leukemia, based on the controlling law. Service connection for chronic lymphocytic leukemia is therefore warranted.

ORDER

Service connection for chronic lymphocytic leukemia is granted.

JEFF MARTIN
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs