



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
BILLY R. WILSON
Represented by
Disabled American Veterans

SS 404 58 9530
Docket No. 211203-201847
Advanced on the Docket

030722@
1223 P.M

DATE: February 25, 2022

ORDER

Service connection for a thyroid disorder is denied.

FINDINGS OF FACT

1. The Veteran served on active duty from September 1960 to September 1980; he has been 100 percent disabled based on unemployability since August 2007 and at a 100 percent schedular rating since January 2009, plus in receipt of special monthly compensation.
2. The Veteran is not a *Nehmer* class member as he did not have active duty in the Republic of Vietnam.

CONCLUSION OF LAW

A thyroid disorder is not presumed to have been incurred in service under *Nehmer*. 38 U.S.C. §§ 1110, 1116, 1131, 5103(a) (2012); 38 C.F.R. §§ 3.102, 3.303(a), 3.307, 3.309, 3.816 (2021).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

In August 2017, the Veterans Appeals Improvement and Modernization Act, also known as the Appeals Modernization Act (AMA), was signed into law. This law created a new framework for veterans dissatisfied with VA's decision on their claim to seek review. This decision has been written under the AMA guidelines.

Historically, the Veteran submitted a claim for service connection for various disabilities, to include thyroiditis, in October 2004. The RO denied the claim as there was no medical evidence of a link between a current disorder and service. The Veteran did not appeal and the decision became final.

Since the prior denial, the National Defense Authorization Act (NDAA) for Fiscal Year 2021, Pub. L. No. 116-283 § 9109, added three disorders to the list of diseases presumptively associated with exposure to herbicide agents. Pertinent in this case, it amended 38 U.S.C. § 1116(a)(2) to include hypothyroidism.

In June 2021, the Agency of Original Jurisdiction (AOJ) initiated a special review of the Veteran's claims file pursuant to *Nehmer v. U.S. Dept of Veterans Affairs*, No. CV 86-6160 (N.D. Cal. May 17, 1991). Under *Nehmer*, retroactive benefits may be paid if a class member is entitled to disability compensation for a covered herbicide disease. *See* 38 C.F.R. § 3.816. These class members include Vietnam-era veterans who have a covered herbicide disease, which now includes hypothyroidism.

In November 2021, the AOJ continued the denial of the claim for service connection for hypothyroidism. Favorable findings included a current diagnosis of hypothyroidism, a condition now presumptively associated with herbicide exposure, and exposure to herbicides during service in Laos.

The claim was denied on the basis that the Veteran did not have active duty in the Republic of Vietnam. As such, he was not considered to be a class member under *Nehmer*. Because this claim was raised in the context of a *Nehmer* special review, for the Veteran to be awarded retroactive service connection benefits, he must have

had service in the Republic of Vietnam in order to be considered a *Nehmer* class member.

In December 2021, the Veteran filed a timely notice of disagreement and selected the Direct Review option. The claim is now before the Board for adjudication.

Turning to the relevant laws and regulations, service connection may be granted on a direct basis as a result of disease or injury incurred in service based on nexus using a three-element test: (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 in or aggravated by service. See 38 C.F.R. §§ 3.303(a), (d); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009).

Service connection may also be granted on a presumptive basis for diseases associated with herbicide exposure under 38 C.F.R. § 3.309 if a veteran served in the Republic of Vietnam between January 1962 and May 1975. Additionally, the DoD has identified other sites where herbicides were tested and/or stored outside the Republic of Vietnam, to include Laos. Specifically, the DoD has recognized that herbicides were used in Laos from December 1965 to September 1969 and were used on the Ho Chi Minh Trail and road network.

Notwithstanding the foregoing provisions regarding presumptive service connection, a veteran is not precluded from establishing service connection with proof of direct causation. *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

As noted above, the clinical treatment records reflect a current diagnosis of hypothyroidism. Accordingly, a current disorder has been shown and the first element of service connection has been met.

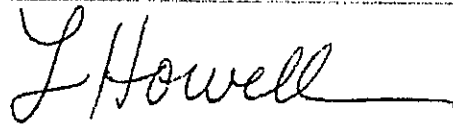
Next, the personnel records show that the Veteran did not serve in the Republic of Vietnam and he does not contend otherwise. Rather, he has argued that he was exposed to Agent Orange during service in Laos. In a February 2010 review, the Joint Services Records Research Center (JSRRC) confirmed that he served in Laos on a covert project between September 1968 and January 1973. The records

researcher indicated that the Air Force sprayed Agent Orange along the Ho Chi Minh Trail in Laos. Further, he noted that Agent Orange was sprayed in Laos as late as January 1969.

Notwithstanding the above findings, as this appeal arose from a *Nehmer* review, service connection for retroactive benefits is effectively dependent on whether the Veteran had service in the Republic of Vietnam. As his exposure to herbicides occurred in Laos, rather than Vietnam, he is not entitled to retroactive service connection benefits under *Nehmer*. In effect, the Board finds that the *Nehmer* class does not expand to include those who served in Laos. Accordingly, the appeal is denied.

Finally, the Veteran has not raised any other issues, nor have any other issues been reasonably raised by the record, for the Board's consideration. *See Doucette v. Shulkin*, 28 Vet. App. 366, 369-370 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

If the Veteran wishes to pursue his claim for hypothyroidism, he may submit a Supplemental Claim under the AMA. Instructions for filing a Supplemental Claim can be found at the end of this decision.



L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

T. Kokolas, 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.