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On appeal from the Department of Veterans Affairs Regional Office in St. Petersburg, Florida

THE ISSUES
1. Whether there is new and material evidence to reopen a claim for service connection for Type II Diabetes Mellitus, including as due to herbicide exposure.

2. Entitlement to service connection for Type II Diabetes Mellitus, including as due to herbicide exposure.

3. Entitlement to service connection for peripheral neuropathy of the upper extremities, including as secondary to the Type II Diabetes Mellitus.

4. Entitlement to service connection for peripheral neuropathy of the lower extremities, including as secondary to the Type II Diabetes Mellitus.

5. Entitlement to service connection for a kidney order, including as secondary to the Type II Diabetes Mellitus.

6. Entitlement to service connection for hypertension, including as secondary to the Type II Diabetes Mellitus.

7. Entitlement to service connection for a heart disorder, including as secondary to the Type II Diabetes Mellitus.

8. Entitlement to service connection for a bilateral foot disorder, including as secondary to the Type II Diabetes Mellitus.

9. Entitlement to service connection for a bilateral eye disorder, including as secondary to the Type II Diabetes Mellitus.

10. Entitlement to service connection for a lung disorder, including as due to herbicide exposure.

REPRESENTATION
Appellant represented by: Matthew D. Hill, Attorney

WITNESS AT HEARING ON APPEAL
The Veteran

ATTORNEY FOR THE BOARD
Rochelle E. Richardson, Associate Counsel

INTRODUCTION
The Veteran had active military service from December 1968 to October 1971.

This appeal to the Board of Veterans' Appeals (Board) is from an April 2008 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in St. Petersburg, Florida.

In that April 2008 rating decision, the RO denied the Veteran's petitions to reopen his previously denied, unappealed, claims for service connection for Type II Diabetes Mellitus and residuals of a head injury - concluding there was not new and material evidence concerning these claims. However, the RO reopened his previously denied, unappealed, claim for service connection for a left knee disorder, though continued to deny this claim on its underlying merits. The RO also denied his claims for service connection for peripheral neuropathy of the upper and lower extremities, a kidney condition, high blood pressure, a heart condition, a bilateral foot condition, a bilateral eye condition, facial skin cancer, a lung condition, depression, and venereal disease. As well, the RO denied his claim for permanent and total disability and eligibility for Dependents' Educational Assistance.

In his July 2008 notice of disagreement (NOD) with that decision, the Veteran contested the RO's denials of his claims for Type II Diabetes Mellitus, peripheral neuropathy of his upper and lower extremities, a kidney condition, high blood pressure, a heart condition, a bilateral foot condition, a bilateral eye condition, facial skin cancer, a lung condition, depression, the head injury, and a left knee condition. In May 2009, the RO issued a statement of the case (SOC) concerning these claims and, in response, he submitted a timely substantive appeal (VA Form 9), perfecting his appeal of these claims to the Board. 38 C.F.R. § 20.200 (2010).

In August 2009, following receipt and consideration of additional evidence, the RO confirmed and continued its prior determinations regarding the claims.

In June 2010, as support for his claims, the Veteran testified at a hearing at the Board's offices in Washington, DC (Central Office hearing) before the undersigned Veterans Law Judge. His wife was also present at the proceeding but did not testify.

During that June 2010 hearing, the Veteran's attorney indicated the Veteran was withdrawing his left knee, head injury and depression claims. In July 2010, the Veteran's attorney submitted a letter reiterating this and indicated additionally that the Veteran also was withdrawing his skin cancer claim. Therefore, those claims are no longer at issue. See 38 C.F.R. § 20.204.

Since certification of this appeal to the Board - including during and since that June 2010 hearing, the Veteran and his attorney have submitted

additional evidence and waived their right to have the RO initially consider it. See 38 C.F.R. §§ 20.800, 20.1304(c).

In this decision, the Board is reopening the claim for service connection for Type II Diabetes Mellitus because there is new and material evidence. The Board also is deciding the underlying claim for service connection for this condition, as well as the claims for some of the alleged complications - namely, for peripheral neuropathy of the lower extremities, a bilateral eye disorder, and a kidney disorder. The Board is remanding the remaining claims for service connection for peripheral neuropathy of the upper extremities, hypertension, a heart disorder, a bilateral foot disorder, and a lung disorder because these remaining claims require further development before being decided.

FINDINGS OF FACT

1. Although the Veteran did not appeal the RO's December 2002 rating decision denying his claim for service connection for Type II Diabetes Mellitus, additional evidence since submitted is not cumulative or redundant of evidence already of record and previously considered, relates to an unestablished fact necessary to substantiate this claim, and raises a reasonable possibility of substantiating it.

2. Although the Veteran did not serve in Vietnam, there is probative, i.e., competent and credible, evidence of record indicating it is as likely as not that he nonetheless was exposed to herbicides elsewhere, while stationed in the Philippines, and has consequent Type II Diabetes Mellitus.

3. As well, there is probative medical evidence of record indicating he has multiple complications of this Type II Diabetes Mellitus - namely, peripheral neuropathy of his lower extremities, a bilateral eye disorder (retinopathy and a history of glaucoma and cataracts that have been extracted), and a kidney disorder (nephropathy).

CONCLUSIONS OF LAW

1. The RO's December 2002 rating decision denying the Veteran's claim for service connection for Type II Diabetes Mellitus is final and binding on him based on the evidence then of record because he did not appeal that decision; however, there is new and material evidence since that decision to reopen this claim. 38 U.S.C.A. §§ 5108, 7105 (West 2002); 38 C.F.R. §§ 3.104(a), 3.156, 3.160(d), 20.200, 20.302, 20.1103 (2010).

2. Resolving all reasonable doubt in his favor, the Veteran's Type II Diabetes Mellitus was presumptively incurred in service. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1116, 5107 (West 2002 & Supp. 2009); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2010).

3. The peripheral neuropathy of the Veteran's lower extremities, bilateral eye disorder (retinopathy, etc.), and kidney disorder (nephropathy) are proximately due to, the result of, or aggravated by this service-connected disability, the Type II Diabetes Mellitus. 38 U.S.C.A. §§ 1110, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.310 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. The Duties to Notify and Assist

The Veterans Claims Assistance Act (VCAA) enhanced VA's duties to notify and assist Veterans with claims for VA benefits. The VCAA was codified at 38 U.S.C.A. § 5100, 5102, 5103, 5103A, 5107, 5126, and the implementing regulations were codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a).

Because the Board is reopening the claim for service connection for Type II Diabetes Mellitus on the basis of new and material evidence, the Board need not determine whether there has been sufficient VCAA notice to comply with the holding in Kent v. Nicholson, 20 Vet. App. 1 (2006), wherein the U.S. Court of Appeals for Veterans Claims (Court) held that VA must both notify a claimant of the evidence and information that is necessary to reopen the claim and of the evidence and information needed to establish entitlement to the underlying benefit being sought, i.e., service connection. To satisfy this requirement, VA adjudicators are required to look at the bases of the denial in the prior decision and provide the claimant a notice letter describing what evidence would be necessary to substantiate those elements required to establish service connection that were found insufficient in the previous denial. See also VA Gen. Couns. Mem., para. 2, 3 (June 14, 2006) (wherein VA's Office of General Counsel issued informal guidance interpreting Kent as requiring the notice to specifically identify the kind of evidence that would overcome the prior deficiency rather than simply stating the evidence must relate to the stated basis of the prior denial). This claim is being reopened, regardless.

Furthermore, since the Board is also granting in full the underlying claim for service connection for Type II Diabetes Mellitus, as well as the derivative (secondary) claims for peripheral neuropathy of the lower extremities, a bilateral eye disorder (retinopathy, etc.), and a kidney disorder (nephropathy), there is no need to discuss whether there has been compliance with even the remaining notice-and-duty-to-assist provisions of the VCAA. This is because even were the Board to assume, for the sake of argument, there has not been, this is ultimately inconsequential and, therefore, at most nonprejudicial, i.e., harmless error. 38 C.F.R. § 20.1102; Shinseki v. Sanders, 129 S. Ct. 1696 (2009). All of these claims are being granted, regardless.

II. Whether there is New and Material Evidence to Reopen the Claim for Service Connection for Type II Diabetes Mellitus

The RO originally considered and denied this claim in December 2002. That same month, the RO sent the Veteran a letter notifying him of that decision and apprising him of his procedural and appellate rights. In January 2003, in response, he submitted a notice of disagreement (NOD) with that decision denying this claim. In March 2004, the RO issued a statement of the case (SOC) continuing to deny this claim. However, the Veteran did not in response then submit a timely substantive appeal (VA Form 9 or equivalent statement) to complete the steps necessary to

perfect his appeal of this claim. Therefore, that December 2002 RO decision became final and binding on him based on the evidence then of record and not subject to revision on the same factual basis. 38 U.S.C.A. § 7105(c); see also 38 C.F.R. §§ 3.104(a), 3.160(d), 20.200, 20.302, 20.1103.

The Veteran did not submit any additional evidence or correspondence in relation to this claim until several years later, in January 2007, when he submitted several documents and a statement that he believed constituted new and material evidence to reopen this claim.

In February 2007, the RO sent the Veteran a letter informing him that his claim potentially could be affected by a then pending court case, Haas v. Nicholson, and that his claim would be decided upon guidance from VA's General Counsel. The Federal Circuit Court since has clarified that service in the Republic of Vietnam, for purposes of presuming a Veteran was exposed to Agent Orange, requires service on the landmass of Vietnam or inland waterways. Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008), cert denied, 77 U.S.L.W. 3267 (Jan. 21, 2009) (No. 08-525).

So, in April 2008, the RO issued the rating decision at issue denying the Veteran's petition to reopen this claim on the grounds that no new and material evidence had been received.

Since the RO has previously considered and denied this claim, and the Veteran did not timely appeal the earlier decision, the first inquiry is whether new and material evidence has been submitted to reopen this claim. 38 C.F.R. § 3.156(a). And irrespective of whether the RO determined there was new and material evidence to reopen this claim, so, too, must the Board make this threshold preliminary determination, before proceeding further, because it affects the Board's jurisdiction to adjudicate this claim on its underlying merits, i.e., on a de novo basis. Barnett v. Brown, 83 F.3d 1380, 1383-84 (Fed. Cir. 1996); Butler v. Brown, 9 Vet. App. 167, 171 (1996). If the Board finds that new and material evidence has not been submitted, then its analysis must end, as further analysis is neither required nor permitted. See Barnett, 83 F.3d at 1383-4. See, too, Jackson v. Principi, 265 F.3d 1366 (Fed. Cir. 2001); Wakeford v. Brown, 8 Vet. App. 237 (1995) (VA failed to comply with its own regulations by ignoring issue of whether any new and material evidence had been submitted to reopen the Veteran's previously and finally denied claims); and VAOPGCPREC 05-92 (March 4, 1992).

If, on the other hand, there is new and material evidence, then the Board must reopen this claim and review its former disposition. 38 U.S.C.A. § 5108.

For a petition to reopen, as here, filed on or after August 29, 2001, new evidence means existing evidence not previously submitted to agency decisionmakers; and material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence already of record at the time of the last prior final denial of the claim sought

to be opened, and it must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a).

In determining whether evidence is "new and material," the credibility of the evidence in question must be presumed. Justus v. Principi, 3 Vet. App. 510, 513 (1992). But see, too, Duran v. Brown, 7 Vet. App. 216 (1994) ("Justus does not require the Secretary [of VA] to consider the patently incredible to be credible").

The RO's December 2002 rating decision that originally considered and denied service connection for diabetes is the most recent final and binding decision on this claim, so it marks the starting point for determining whether there is new and material evidence to reopen it. See Evans v. Brown, 9 Vet. App. 273, 283 (1996) (indicating VA is required to review for newness and materiality only the evidence submitted by a claimant since the last final disallowance of a claim on any basis to determine whether a claim should be reopened and readjudicated on the merits).

In that earlier December 2002 rating decision, the RO denied the Veteran's claim for service connection for diabetes because he did not serve in the Republic of Vietnam during the Vietnam era and, therefore, was not presumptively exposed to Agent Orange. See 38 C.F.R. § 3.2(f). Therefore, new and material evidence would consist of competent and credible evidence either establishing his service in the Republic of Vietnam during the Vietnam era or alternatively indicating his diabetes is otherwise attributable to his military service - including from exposure to Agent Orange elsewhere, outside of Vietnam. See 38 U.S.C.A. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6). See also Watson v. Brown, 4 Vet. App. 309, 314 (1993).

The additional evidence submitted since that December 2002 rating decision includes, among other things, a copy of a September 1966 Report of Staff Visit, Philippines, Taiwan, and Okinawa, forwarded by the Veteran's Congressman and received by the RO in November 2008, discussing recommendations and procedures for handling herbicides.

This additional evidence is both new and material to this claim because it relates to an unestablished fact necessary to substantiate this claim and raises a reasonable possibility of substantiating it - specifically, by supporting the Veteran's assertion that his diabetes is due to his exposure to herbicides (Agent Orange) while serving in the Philippines, so outside of Vietnam. See 38 U.S.C.A. § 1116(a); 38 C.F.R. §§ 3.307(a)(6), 3.309(e). See Boyer v. West, 210 F.3d 1351, 1353 (Fed. Cir. 2000) (direct service connection generally requires evidence of a current disability with a relationship or connection to an injury or a disease or some other manifestation of the disability during service). See, too, Evans, 9 Vet. App. at 284 (indicating the newly presented evidence need not be probative of all the elements required to award the claim, just probative as to each element that was a specified basis for the last disallowance); and Hodge v. West, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (wherein the Federal Circuit Court reiterated this, noting that new evidence could be sufficient to reopen a claim if it could contribute to

a more complete picture of the circumstances surrounding the origin of a claimant's injury or disability, even where it would not be enough to convince the Board to grant a claim). Therefore, this claim for service connection for diabetes is reopened.

III. Entitlement to Service Connection

Service connection is granted if the evidence shows a current disability resulted from an injury or a disease that was incurred or aggravated during active military service in the line of duty. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a).

Stated somewhat differently, direct service connection generally requires: (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a relevant disease or injury; and (3) medical evidence of a nexus or link between the claimed in-service disease or injury and the current disability. See Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004), citing Hansen v. Principi, 16 Vet. App. 110, 111 (2002).

Diabetes Mellitus will be presumed to have been incurred in service if manifested to a compensable degree of at least 10-percent disabling within one year after service. This presumption, however, is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309(a).

According to 38 C.F.R. § 4.119, Diagnostic Code (DC) 7913, this minimum compensable rating of 10 percent for diabetes mellitus is warranted when the condition is manageable by restricted diet only.

Also, as already alluded to, diseases associated with exposure to certain herbicide agents used in support of military operations in the Republic of Vietnam during the Vietnam era will be presumed to have been incurred in service. 38 U.S.C.A. § 1116(a)(1); 38 C.F.R. § 3.307(a)(6). The presumption requires exposure to an herbicide agent and manifestation of the disease to a degree of 10 percent or more within the time period specified for each disease. 38 C.F.R. § 3.307(a)(6)(ii). Furthermore, even if a Veteran does not have a disease listed at 38 C.F.R. § 3.309(e), he or she is presumed to have been exposed to herbicides if he or she served in Vietnam between January 9, 1962, and May 7, 1975, unless there is affirmative evidence establishing he was not exposed to any such agent during that service. 38 U.S.C.A. § 1116(f); 38 C.F.R. §3.307(a)(6)(iii). This list of diseases presumptively associated with exposure to Agent Orange in Vietnam includes Type II Diabetes Mellitus. 38 U.S.C.A. § 1116(a)(2); 38 C.F.R. § 3.309(e) (2009 and Supp. 2010); see Notice, 75 Fed. Reg. 168, 53202-16 (Aug. 31, 2010).

In October 2009, the Secretary of VA announced the decision to establish presumptions of service connection, based upon exposure to herbicides used in the Republic of Vietnam during the Vietnam era, for three new conditions: ischemic heart disease, Parkinson's disease, and B-cell leukemias. In November 2009, the Secretary directed the Board to stay action on all claims for service connection that could not be granted under current law but may potentially be granted based on the planned new

regulations. Chairman's Memorandum No. 01-09-25 implemented this stay. In August 2010, the Secretary published in the Federal Register a final rule amending 38 U.S.C.A. § 3.309(e) to establish a presumption of service connection for these three new conditions. In October 2010, the Secretary issued a memorandum lifting the stay of appeals affected by the new herbicide-related presumptions. Chairman's Memorandum No. 01-10-37 lifted this stay, effective October 30, 2010. These diseases, along with those specified in 38 C.F.R. § 3.309(e), which, again, includes Type II Diabetes Mellitus, must have become manifest to a degree of 10 percent or more at any time after service, except that chloracne (or other acneform disease consistent with chloracne) must become manifest to a degree of 10 percent or more within a year after the last date on which the Veteran was exposed to an herbicide agent during active military, naval, or air service. See 38 C.F.R. § 3.307(a)(6)(ii).

So service connection is established either by showing direct service incurrence or aggravation or by using applicable presumptions, if available. Combee v. Brown, 34 F.3d 1039, 1043 (Fed. Cir. 1994).

A disorder may be service connected if the evidence of record reveals the Veteran currently has a disorder that was chronic in service or, if not chronic, that was seen in service with continuity of symptomatology demonstrated subsequent to service. 38 C.F.R. § 3.303(b); Savage v. Gober, 10 Vet. App. 488, 494-97 (1997). Establishing continuity of symptomatology under 38 C.F.R. § 3.303(b) is an alternative method of satisfying the second and third Shedden requirements to establish chronicity (permanency) of disease or injury in service and, in turn, link current disability to service. See also Clyburn v. West, 12 Vet. App. 296, 302 (1999).

Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes the disease was incurred in service. 38 C.F.R. § 3.303(d).

Evidence relating a current disorder to service must be medical unless it concerns a disorder that may be competently demonstrated by lay observation. Savage, 10 Vet. App. at 495-97. For the showing of chronic disease in service, there is a required combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "chronic." 38 C.F.R. § 3.303(b).

Disability that is proximately due to, the result of, or chronically aggravated by a service-connected condition shall also be service connected on this secondary basis. See 38 C.F.R. § 3.310(a) & (b). See also Allen v. Brown, 7 Vet. App. 439, 448 (1995). In order to establish entitlement to service connection on this secondary basis, there must be: (1) evidence of a current disability; (2) evidence of a service-connected disability; and (3) medical evidence establishing a nexus (i.e., link) between the service- connected disability and the current disability. See Wallin v. West, 11 Vet. App. 509, 512 (1998);

McQueen v. West, 13 Vet. App. 237 (1999); Velez v. West, 11 Vet. App. 148, 158 (1998).

Where the determinative issue involves medical causation or medical diagnosis, there generally must be competent medical evidence; lay assertions regarding this generally are insufficient. Grottveit v. Brown, 5 Vet. App. 91, 93 (1993). A layperson generally is incapable of opining on matters requiring medical knowledge. Routen v. Brown, 10 Vet. App. 183, 186 (1997). See also Bostain v. West, 11 Vet. App. 124, 127 (1998).

There are exceptions to this general rule, however. Lay testimony is competent to establish the presence of observable symptomatology and "may provide sufficient support for a claim of service connection." Layno v. Brown, 6 Vet. App. 465, 469 (1994). When, for example, a condition may be diagnosed by its unique and readily identifiable features, the presence of the disorder is not a determination "medical in nature" and is capable of lay observation. In such cases, the Board is within its province to weigh that testimony and make a credibility determination as to whether that evidence supports a finding of service incurrence and continuity of symptomatology sufficient to establish service connection. See Barr v. Nicholson, 21 Vet. App. 303 (2007).

Lay evidence can be competent and sufficient to establish a diagnosis of a condition when (1) a layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. Jandreau v. Nicholson, 492 F.3d 1372 (Fed. Cir. 2007).

So medical evidence is not always or categorically required in every instance when the determinative issue involves either medical etiology or diagnosis, but rather such issue may, depending on the facts of the case, be established by competent lay evidence under 38 U.S.C. § 1154(a). See Davidson v. Shinseki, 581 F.3d 1313 (Fed. Cir. 2009). The Board must consider the type of condition specifically claimed and whether it is readily amenable to lay diagnosis or probative comment on etiology. See Woehlaert v. Nicholson, 21 Vet. App. 456, 462 (2007) (reiterating this axiom in a claim for rheumatic heart disease).

The determination as to whether the requirements for service connection are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. Baldwin v. West, 13 Vet. App. 1, 8 (1999).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the benefit of the doubt is resolved in favor of the Veteran. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102.

A. Type II Diabetes Mellitus

As explained, the first and indeed perhaps most fundamental requirement for any service-connection claim is there must be competent and credible

evidence confirming the Veteran has the claimed condition. Boyer, 210 F.3d at 1353; Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992). Without this minimum level of proof, usually in the way of a relevant diagnosis, there can be no valid claim because there is no current disability to attribute to his military service.

Here, the report of the Veteran's January 2007 VA Agent Orange examination provides a diagnosis of Type II Diabetes Mellitus. So there is no disputing he has this claimed condition. Therefore, the determinative issue is whether it is attributable to his military service. See Watson v. Brown, 4 Vet. App. 309, 314 (1993) ("A determination of service connection requires a finding of the existence of a current disability and a determination of a relationship between that disability and an injury or a disease incurred in service."). See, too, Maggitt v. West, 202 F.3d 1370, 1375 (Fed. Cir. 2000); D'Amico v. West, 209 F.3d 1322, 1326 (Fed. Cir. 2000); Hibbard v. West, 13 Vet. App. 546, 548 (2000); and Collaro v. West, 136 F.3d 1304, 1308 (Fed. Cir. 1998).

Concerning this, although the Veteran acknowledges he did not serve in Vietnam, he maintains that he nonetheless was exposed to Agent Orange elsewhere, in particular, while stationed in the Philippines, so is still entitled to the presumption of service connection. He alternatively argues that exposure to toxic water at Camp LeJeune, North Carolina, may have caused or contributed to his diabetes. See his attorney's July 2010 letter.

As is readily conceded, neither the Veteran nor the record suggests he served in Vietnam as might entitle him to presumptive service connection. That is, although his service records indicate he served during the Vietnam Era, there is no indication he served in Vietnam. Indeed, his claims file shows that in June 2002 the RO requested information from the National Personnel Records Center (NPRC), a military records repository, regarding any service he might have had in Vietnam.

The NPRC's response was that he did not have Vietnam service. So the Board need not presume that he was exposed to herbicides (Agent Orange) during his service or that his Type II Diabetes Mellitus is a necessary consequence.

But in determining whether service connection is warranted, VA adjudicators must consider all potential basis of entitlement reasonably raised by the record. See Szemraj v. Principi, 357 F.3d 1370, 1371 (Fed. Cir. 2004). Therefore, if it is instead established that he was exposed to Agent Orange elsewhere, outside of Vietnam, he would then still be entitled to the presumption that his Type II Diabetes Mellitus is a consequence.

When VA proposed to amend 38 C.F.R. § 3.309(e) in 2001, VA invited the submission of written comments concerning the proposed amendment. With respect to herbicide exposure outside of Vietnam, one commenter suggested that VA amend the proposed regulation to include Veterans who did not serve in Vietnam, but who were nevertheless exposed to herbicides while

in service. The response to that suggestion provides that 38 U.S.C.A. § 1116(a)(3) establishes a presumption of exposure to certain herbicides for any Veteran who served in Vietnam between January 9, 1962 and May 1975, and has one of the diseases on the list of diseases subject to presumptive service connection. However, if a Veteran who did not serve in Vietnam was exposed to such an herbicide in service and has a disease on the list of diseases subject to presumptive service connection, VA will presume that the disease is due to the exposure to herbicides. Therefore, there was no need to revise the regulation based on this comment. See 66 Fed.Reg. 23166 (May 8, 2001).

Nevertheless, to establish his entitlement to this presumption, the Veteran must still establish that he was exposed to such herbicides while in service. And for the reasons and bases discussed below, the Board finds this Veteran has.

The Veteran has submitted several lay statements from himself and fellow servicemen, generally describing their exposure to containers marked with orange paint and other markings that were leaking and generally believed to contain Agent Orange. These statements indicate the Veteran was a security guard at Subic Bay, Philippines, and that his duties involved patrolling the pier where munitions and chemicals - including Agent Orange, were shipped in and stored, prior to being shipped out in support of the Vietnam Conflict. See his attorney's July 2010 letter.

While, generally, the Veteran and his fellow servicemen are competent to provide evidence of their personal observations - including that his duties and responsibilities in service involved patrolling the pier where munitions and substances were stored and that they saw containers marked with orange paint that were leaking fluids, the exact contents of those containers remains unknown. Their assertions tend to suggest they believed or suspected these containers held Agent Orange - largely because of the orange paint and/or other symbols on them, but they have not provided any indication as to how they would come to know that these containers did, in fact, contain Agent Orange, as opposed to being marked or painted in that manner for some other reason. So while they are competent to say the Veteran saw and perhaps even had occasion to handle these containers, this is not tantamount to concluding this resulted in his exposure to Agent Orange because even they concede they do not know what the containers actually contained. See Washington v. Nicholson, 19 Vet. App. 363 (2005) (A Veteran is competent to report what occurred in service because testimony regarding firsthand knowledge of a factual matter is competent.)

That said, the records concerning the Veteran's military service confirm he served in Subic Bay from January 1970 to September 1971. These records also confirm his assertion that his military occupational specialty (MOS) was security guard. So the Board finds his and his fellow servicemember's lay testimony regarding his duties including patrolling of the pier are substantiated by the record and, therefore, credible. So, to this extent, their statements are probative. See Rucker v. Brown, 10 Vet. App. 67 (1997) and Layno v. Brown, 6 Vet. App. 465, 469 (1994) (distinguishing between competency ("a legal concept

determining whether testimony may be heard and considered") and credibility ("a factual determination going to the probative value of the evidence to be made after the evidence has been admitted")).

In further support of his claim, the Veteran also has submitted several internet articles discussing herbicides and their use during the Vietnam Era - including a proposal for studies relating to the use of herbicides in the Philippines and Vietnam and articles more generally discussing the association of certain diseases with exposure to herbicides. As well, and perhaps most notably, he submitted news articles indicating the New Zealand government manufactured Agent Orange for the United States and sent it to Subic Bay en route to Vietnam. And although these articles are inconclusive as to whether he was personally exposed to Agent Orange or any other herbicide, where it to be shown that Agent Orange or any other such herbicide was routinely shipped in containers to Subic Bay during the time he served there as a security guard or that it was routinely used there, this would in turn tend to support the notion that he came into contact with the substance. Cf. Pentecost v. Principi, 16 Vet. App. 124 (2002) (indicating the mere fact that the Veteran was stationed with a unit that was present while enemy attacks occurred strongly suggests that he was, in fact, exposed to those attacks).

Further concerning this, in October 2008 the Veteran's Congressman submitted a letter in support of the Veteran's claim of having been exposed to herbicides while in service. This Congressman's letter includes a copy of a September 1966 Report of Staff Visit, Philippines, Taiwan, and Okinawa. This report indicates that an Air Force representative visited several named locations in August 1966 - including Subic Bay, Philippines, specifically to participate in a joint Navy-Air Force Pest Control Conference and to review base programs and assist individual bases with the establishment of safer and more effective programs. Specifically, the items addressed were certification of pest control personnel, pest control chemicals, pest control equipment, termite control procedures, roach control procedures, microscopes for pest control shop, manning for pest control shop, and herbicides. And as specifically concerning these herbicides, the report provides that herbicide literature was handed out at the Subic Bay conference and samples mailed. It was noted additionally that restrictions on herbicide usage applied as they did for other pesticides and herbicide usage and should be "backed-up" by usage sheets from each manufacturer. The recommendations addressed herbicide spraying, securing surgeon's approval of nonstandard herbicides, securing data sheets on each product, and procuring sprayers.

The Veteran served at Subic Bay from January 1970 to September 1971, so over 3 years after the conference discussed in the September 1966 letter provided by his Congressman. But articles reporting that herbicides were manufactured in and shipped from New Zealand to Subic Bay suggest there was a regular flow of these toxins to and from the pier where he patrolled. Indeed, a conference was held at Subic Bay regarding the use and handling of herbicides, as a means of technical assistance. So considering this evidence in the aggregate, it is just as likely as not the Veteran was exposed to herbicides while at Subic Bay. And in this

circumstance this reasonable doubt is resolved in his favor, allowing the Board to in turn presume that service involved exposure to Agent Orange. See 38 C.F.R. § 3.102.

VA's response to the suggested comment regarding whether Veterans should be entitled to presumptive service connection on the basis of proving actual exposure to herbicides clearly anticipates that such cases would exist. That is, the statute, by its language, contemplates situations like the Veteran's, where there was exposure to herbicides outside of Vietnam. See 66 Fed.Reg. 23166 (May 8, 2001). Proving such exposure to herbicides during his service should not be an insurmountable task. And, again, because this determination is material to the ultimate disposition of his claim, he should be afforded the benefit of all reasonable doubt. Therefore, having established that he has Type II Diabetes Mellitus - a disease specified in 38 C.F.R. § 3.309(e) as presumptively associated with exposure to herbicides, and have established his exposure to these herbicides (albeit outside of Vietnam), the requirements for presumptive service connection are met. See again 38 C.F.R. § 3.309(e). See also Alemany v. Brown, 9 Vet. App. 518, 519 (1996) (indicating an "absolutely accurate" determination of etiology is not a condition precedent to granting service connection, nor is "definite" or "obvious" etiology).

B. Conditions Secondary to the Type II Diabetes Mellitus, i.e., Multiple Complications

The Veteran claims he has several other disabilities on account of his diabetes, namely, peripheral neuropathy of his lower extremities, a bilateral eye disability, and a kidney disability. See his attorney's July 2010 letter.

So these derivative claims are predicated on the notion that these additional disabilities are secondary to the now service-connected Type II Diabetes Mellitus. See again 38 C.F.R. § 3.310(a) and (b) permitting service connection on this secondary basis for disability that is proximately due to, the result of, or aggravated by a service-connected condition.

Because the Board has determined the Veteran's Type II Diabetes Mellitus is a service-connected disability, meaning a disability that, here, is presumptively related to his military service (and, in particular, to his exposure to Agent Orange outside of Vietnam at Subic Bay), he need only establish that these additional conditions are residual complications of his diabetes to also establish his entitlement to service connection for them, as well, on this alleged secondary basis. See again Wallin v. West, 11 Vet. App. 509, 512 (1998); McQueen v. West, 13 Vet. App. 237 (1999); Velez v. West, 11 Vet. App. 148, 158 (1998).

(i) Peripheral Neuropathy of the Lower Extremities

The report of the Veteran's January 2007 VA Agent Orange Examination indicates he has bilateral lower extremity peripheral neuropathy. So there is no disputing he has this claimed condition. See again Boyer, 210 F.3d at 1353; Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992).

There need only be linkage of this condition to his diabetes to confirm it is a complication of it.

The report of that January 2007 VA Agent Orange Exam indicates the Veteran first had symptoms of peripheral neuropathy involving his lower extremities in 1991, about the same time it was determined he had elevated blood sugar. Nerve conduction velocity studies confirmed this diagnosis. And after clinical evaluation of the Veteran and review of his medical history, this VA examiner concluded the Veteran's bilateral lower extremity peripheral neuropathy is indeed a complication of his diabetes.

The Veteran's VA treatment records support this assessment. These records include "diabetic neuropathy" among his active problems and have consistently considered his peripheral neuropathy of his lower extremities as related to his diabetes. Therefore, these records support the January 2007 VA examiner's conclusion that these conditions are etiologically related.

(ii) Bilateral Eye Disability
The report of that January 2007 VA Agent Orange Exam also provides diagnoses of diabetic retinopathy and history of cataracts, extracted and glaucoma, controlled. So there is no disputing the Veteran has bilateral eye disability. See again Boyer, 210 F.3d at 1353; Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992).

Diabetic retinopathy is a retinopathy associated with diabetes mellitus, which may be of the background type, progressively characterized by microaneurysms, intraretinal punctuate hemorrhages, yellow exudates, cotton-wool spots, and sometimes macular edema that can compromise vision; or of the proliferative type, characterized by neovascularization of the retina and optic disk, which may project into the vitreous, proliferation of fibrous tissue, vitreous hemorrhage, and eventually retinal detachment with blindness. See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, 1659 (31st ed., 2007).

The report of that January 2007 VA Agent Orange Exam indicates the complications of the Veteran's diabetes also include difficulties with his vision in both eyes. He had laser surgery for micro aneurysms and retinal bleeding. He lost vision at one time due to his vitreal bleeding and required a vitrectomy. Glaucoma has been present and he has had bilateral cataract extraction. Fundoscopic examination revealed background "diabetic retinopathy."

The Veteran's VA treatment records support this assessment. For example, the report of a May 2007 comprehensive eye examination notes his glaucoma, cataracts, and vision problems and provides a diagnosis of "diabetic retinopathy." This exam report also indicates his eye problems are manifestations of his diabetes. His more recent treatment records continue to support and reflect these diagnoses.

The Veteran's private treatment records also consistently reflect and reiterate these diagnoses. For example, a July 2002 medical report from

a private physician, Dr. J.S., indicates a fundoscopic examination revealed scattered micro aneurysms, provides a diagnosis of diabetic retinopathy, and indicates the Veteran has had "diabetic damage in both eyes."

(iii) Kidney Disability
As well, the report of that January 2007 VA Agent Orange Exam provides diagnoses of bilateral renal disease and diabetic nephropathy, so there also is no disputing he has kidney disability. See again Boyer, 210 F.3d at 1353; Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992).

Diabetic nephropathy is the nephropathy that commonly accompanies later stages of diabetes mellitus; it begins with hyperfiltration, renal hypertrophy, microalbuminuria, and hypertension; in time, proteinuria develops, with other signs of renal failure leading to end-stage renal disease. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1261 (31st ed., 2007).

The report of that January 2007 VA Agent Orange Exam indicates the Veteran's nephropathy, like the other conditions already discussed, is a complication of his diabetes. So it, too, is deserving of service connection.

ORDER
The claim for service connection for Type II Diabetes Mellitus is reopened and granted on its underlying merits.

Service connection also is granted on a secondary basis for the several complications - namely, for peripheral neuropathy of his lower extremities, a bilateral eye disability (retinopathy), and a kidney disability (nephropathy).

REMAND
Under McLendon v. Nicholson, 20 Vet. App. 79 (2006), in disability compensation (service-connection) claims, VA 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 a service-connected disability, but (4) insufficient competent medical evidence on file for the VA to make a decision on the claim. See also 38 U.S.C.A. § 5103A(d)(2) and 38 C.F.R. § 3.159(c)(4). Consequently, for the reasons and bases discussed below, the Board must remand the remaining claims.

Like the peripheral neuropathy affecting his lower extremities, the Veteran claims he also has upper extremity peripheral neuropathy as a consequence or complication of his Type II Diabetes Mellitus. He additionally relates his hypertension, heart disability, and bilateral foot disability to his diabetes. See his attorney's July 2010 letter.

(i) Peripheral Neuropathy of the Upper Extremities

The Veteran's VA medical records indicate he has received treatment for peripheral neuropathy. However, while peripheral neuropathy of his lower extremities was noted in during his January 2007 VA Agent Orange Exam, peripheral neuropathy of his upper extremities was not. And while his VA treatment records discuss the neurological manifestations of his diabetes, generally, unlike his bilateral lower extremity peripheral neuropathy, there is no diagnosis of bilateral upper extremity peripheral neuropathy as related to his diabetes.

That notwithstanding, the Veteran is competent, for example, to proclaim having experienced numbness and weakness in his upper extremities, just as he apparently has in his lower extremities. So there is at least the suggestion that these symptoms affecting his upper extremities have the same source or cause as those affecting his lower extremities.

The Veteran has not been provided a VA compensation examination for a medical opinion specifically concerning whether he has bilateral upper extremity peripheral neuropathy. And if he does, there equally is no medical nexus opinion in the file regarding its etiology, and in particular insofar as whether it is an additional complication of his diabetes.

When determining whether a VA examination is required under 38 U.S.C. § 5103A(d)(2), the law requires competent evidence of a disability or symptoms of a disability, but does not require competent evidence of a nexus, only that the evidence indicates an association between the disability and service or a service-connected disability. See Waters v. Shinseki, 601 F.3d 1274 (Fed. Cir. 2010).

(ii) Hypertension
The Veteran's VA treatment records list hypertension among his ongoing diagnoses, so there is no disputing he has this claimed condition.

He also has submitted several articles generally suggesting a relationship between herbicide exposure and various disabilities - including hypertension. See, e.g., the article titled, "Experts tie Agent Orange to blood pressure risks." A medical article or treatise can provide important support when combined with an opinion of a medical professional. Mattern v. West, 12 Vet. App. 222, 228 (1999). See, too, Rucker v. Brown, 10 Vet. App. 67, 73-74 (1997) (holding that evidence from a scientific journal combined with doctor's statements was "adequate to meet the threshold test of plausibility"). Where medical article or treatise evidence, standing alone, discusses generic relationships with a degree of certainty such that, under the facts of a specific case, there is at least plausible causality based upon objective facts rather than on an unsubstantiated lay medical opinion, a claimant may use such evidence to meet the requirement for a medical nexus. Wallin v. West, 11 Vet. App. 509 (1998). However, an attempt to establish a medical nexus between service and a disease or injury solely by generic information in a medical journal or treatise "is too general and inclusive." Sacks v. West, 11 Vet. App. 314, 317 (1998) (holding that a medical article that contained a generic statement regarding a possible link between a

service-incurred mouth blister and a present pemphigus vulgaris condition did not satisfy the nexus element).

The Veteran has not been provided a VA compensation examination specifically addressing this claim. And while his January 2007 VA Agent Orange Exam noted hypertension, there was no opinion regarding whether there is an etiological relationship between his hypertension and his service-connected diabetes, his exposure to herbicides during service, or his service in general. So the Board needs medical comment concerning these possibilities before deciding this claim.

(iii) Heart Disability
The Veteran's VA treatment records show that coronary artery disease (CAD) and paroxysmal atrial fibrillation are among his active problems and indicate he has a history of myocardial infarction (i.e., heart attack). So there is no disputing he has heart disability. See again Boyer, 210 F.3d at 1353; Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992).

Because of the recent revisions mentioned, ischemic heart disease is now listed among the diseases presumptively associated with exposure to herbicides. 38 C.F.R. § 3.309(e) (2009 and Supp. 2010); see Notice, 75 Fed. Reg. 168, 53202-16 (Aug. 31, 2010).

The Veteran has not been provided a VA compensation examination addressing this claim. And while his January 2007 VA Agent Orange Exam noted CAD and hypertensive cardiovascular disease, it did not provide an opinion regarding whether there is an etiological relationship between this heart disability and his diabetes or his military service in general.

(iv) Bilateral Foot Disability
While the Veteran's VA treatment records document his bilateral lower extremity peripheral neuropathy - which the Board has found to be service-connected, it is unclear whether the symptoms he describes affecting his feet especially are part and parcel of this neuropathy versus some other disability. So a medical opinion is needed to assist in making this important determination. See Mittleider v. West, 11 Vet. App. 181, 182 (1998) (when it is not possible to separate the effects of the service-connected condition from a nonservice-connected condition, 38 C.F.R. § 3.102, which requires that reasonable doubt on any issue be resolved in the Veteran's favor, dictates that such signs and symptoms be attributed to the service-connected condition.) A VA regulation, however, prohibits the pyramiding of ratings - that is, assigning separate ratings based on the same manifestations of a disability. 38 C.F.R. § 4.14. The Board, consequently, is requesting a medical opinion concerning this claim as well.

(v) Lung Disability, Claimed as due to Herbicide Exposure
The Veteran's private medical records show he has been treated for respiratory-related symptoms and resultantly received diagnoses of various relevant conditions, including asthma and bronchitis. See, e.g., his June and July 2007 treatment records from Dr. R.R. So there is

competent medical evidence of lung disability. See again Boyer, 210 F.3d at 1353; Brammer v. Derwinski, 3 Vet. App. 223, 225 (1992).

In support of his claim that his lung disability is attributable to herbicide exposure during his military service, the Veteran has cited several articles discussing military toxic substances and lung and respiratory problems. These articles, as mentioned, "can provide important support when combined with an opinion of a medical professional." See Mattern v. West, 12 Vet. App. 222, 228 (1999). However, because the Veteran has not been provided an examination concerning this claim, there is no medical opinion addressing this causation issue.

Accordingly, these remaining claims are REMANDED for the following additional development and consideration:

1. Schedule appropriate VA examinations for medical nexus opinions concerning the etiology of the remaining claimed conditions at issue - namely, for peripheral neuropathy of the upper extremities, hypertension, heart disability, bilateral foot disability, and lung disability.

Should the examiner diagnose peripheral neuropathy of the upper extremities, to confirm the Veteran has it, the examiner must then provide an opinion as to the likelihood (very likely, as likely as not, or unlikely) this upper extremity peripheral neuropathy is proximately due to, the result of, or aggravated by the service-connected Type II Diabetes Mellitus or is otherwise attributable to the Veteran's military service.

Similarly, the examiner should provide an opinion as to the likelihood (very likely, as likely as not, or unlikely) the Veteran's hypertension and heart disease are proximately due to, the result of, or aggravated by his diabetes, alternatively related to his exposure to herbicides in service, or otherwise attributable to his military service, including whether these conditions initially manifested within one year of his discharge from service.

In providing this opinion, the examiner should clarify whether the Veteran has ischemic heart disease, which, as a result of the amendments to the applicable VA regulation, would require presuming it was incurred in service from exposure to Agent Orange.

Still additional medical comment is needed concerning whether the Veteran has a bilateral foot disability (that is, with symptoms distinguishable from those attributable to the now service-connected peripheral neuropathy affecting his lower extremities). Should the examiner diagnose additional foot disability, he or she must provide an opinion as to the likelihood (very likely, as likely as not, or unlikely) this additional foot disability is proximately due to, the result of, or aggravated by the Veteran's diabetes or otherwise attributable to his military service.

A medical nexus opinion is needed, as well, concerning the likelihood (very likely, as likely as not, or unlikely) the Veteran has lung disability, including asthma or bronchitis, as a result of exposure to herbicides during his military service or otherwise related or attributable to his military service.

The term "as likely as not", i.e., at least 50 percent probability, does not mean merely within the realm of medical possibility, rather, that the weight of medical evidence both for and against a conclusion is so evenly divided that it is as medically sound to find in favor of causation as it is to find against it.

To facilitate making these important determinations, it is imperative the designated examiner(s) review the evidence in the claims file, including a complete copy of this decision and remand, for the pertinent medical and other history.

The examiner(s) must discuss the rationale of all opinions provided, whether favorable or unfavorable, if necessary citing to specific evidence supporting or against the claim(s).

The Veteran is hereby advised that failure to report for his examination(s), without good cause, may have detrimental consequences on these pending claims for service connection. See 38 C.F.R. § 3.655.

2. Then readjudicate these remaining claims in light of the additional evidence. If any claim is not granted to the Veteran's satisfaction, send him and his attorney a supplemental statement of the case (SSOC) and give them an opportunity to submit additional evidence and/or argument in response before returning the file to the Board for further appellate consideration of these remaining claims.

The Veteran has the right to submit additional evidence and argument concerning the claims the Board has remanded. Kutscherousky v. West, 12 Vet. App. 369 (1999).

These claims 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 Supp. 2010).

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KEITH W. ALLEN
Veterans Law Judge, Board of Veterans' Appeals
Department of Veterans Affairs