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DOCKET NO. 04-07 278 ) DATE  
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On appeal from the  
Department of Veterans Affairs Regional Office in Waco, Texas

### THE ISSUES

1. Entitlement to service connection for type II diabetes mellitus to include as a result of herbicide exposure.
2. Entitlement to service connection for coronary artery disease, status post coronary artery bypass graft, to include as a result of herbicide exposure.
3. Entitlement to service connection for hypertension to include as secondary to diabetes mellitus.

### REPRESENTATION

Appellant represented by: Katrina Eagle, Attorney

### WITNESSES AT HEARING ON APPEAL

Veteran and his spouse

### ATTORNEY FOR THE BOARD

A. Hinton, Counsel

### INTRODUCTION

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2012). 38 U.S.C.A. § 7107(a)(2) (West 2002).

The Veteran served on active duty from January 1963 to May 1966.

These matters come before the Board of Veterans' Appeals (Board) on appeal from a June 2003 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Waco, Texas, which denied the benefits sought.

These matters have been previously before the Board on multiple occasions. In June 2009, the Board denied the claims on appeal. The Veteran appealed the Board's June 2009 decision to the United States Court of Appeals for Veterans Claims (Court).

In an April 2011 memorandum decision, the Court vacated the Board's June 2009 decision to the extent of the three claims on appeal, while noting that the Veteran had withdrawn his appeal as to two other issues denied in the Board's June 2009 decision. The Court remanded the three claims to the Board for further adjudication.

In September 2011, the Board remanded these issues for additional development in accordance with the April 2011 Court memorandum decision.

In June 2013 the Board remanded the case to the RO to arrange for a Travel Board hearing, which was held before the undersigned Veterans Law Judge in August 2013. At that time the Veteran made a motion to advance the case on the Board's docket based on financial hardship, which was granted. See 38 C.F.R. § 20.900(c) (2012).

The issues of entitlement to service connection for erectile dysfunction, dyslipidemia, and peripheral neuropathy, all to include as secondary to type II diabetes mellitus or as due to exposure to herbicides, have been raised by the record, but have not been adjudicated by the Agency of Original Jurisdiction (AOJ). Therefore, the Board does not have jurisdiction over them and they are referred to the AOJ for appropriate action.

The issue of entitlement to service connection for hypertension is addressed in the REMAND portion of the decision below and is REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC.

#### FINDINGS OF FACT

1. Resolving all reasonable doubt in favor of the Veteran, the evidence establishes that the Veteran's type II diabetes mellitus is due to exposure in service to herbicides to include 2,4-D; 2,4,5-T; TCDD; cacodylic acid; or picloram.
2. Resolving all reasonable doubt in favor of the Veteran, the evidence establishes that the Veteran's coronary artery disease, status post coronary artery bypass graft, is due to exposure in service to herbicides to include 2,4-D; 2,4,5-T; TCDD; cacodylic acid; or picloram.

#### CONCLUSIONS OF LAW

1. The criteria for service connection for type II diabetes mellitus have been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 1116, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309(e) (2013).

2. The criteria for service connection for coronary artery disease, status post coronary artery bypass graft, have been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 1116, 5107 (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309(e) (2013).

The Veterans Claims Assistance Act of 2000 (VCAA)

The Board is granting in full the benefits sought on appeal. Accordingly, any error committed with respect to either the duty to notify or the duty to assist was harmless and will not be further discussed.

## REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

### Applicable Law

In general, service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131 (West 2002); 38 C.F.R. §§ 3.303, 3.304. Service connection generally requires credible and competent evidence showing: (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 or aggravated during service. See *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet. App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet. App. 498 (1995).

Service connection may be granted if a disability is proximately due to or the result of a service-connected disability or if aggravation of a nonservice-connected disorder is proximately due to or the result of a service-connected disability. 38 C.F.R. § 3.310(a).

Some chronic diseases, including diabetes mellitus or cardiovascular-renal disease to include hypertension, are presumed by law and regulation to have been incurred in service, if they become manifest to a degree of ten percent or more within a corresponding applicable presumptive period. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

There is a presumption of service connection for certain conditions if a Veteran was exposed in service to certain tactical herbicides that were used in Vietnam and some other locations during the Vietnam Era, and which were composed of one or more of the chemicals listed under 38 C.F.R. § 3.307(a)(6)(i).

If a veteran was exposed to an herbicide agent during active military, naval, or air service, certain diseases are presumed to be service connected if the requirements of 38 C.F.R. § 3.307(a)(6) are met, even though there is no record of the disease during service, provided that the rebuttable presumption provisions of 38 C.F.R. § 3.307(d) are also satisfied. 38 U.S.C.A. § 1116(a) (West 2002 & Supp. 2012); 38 C.F.R. § 3.309(e).

The term "herbicide agent" is defined as a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; or picloram. 38 C.F.R. § 3.307(a)(6)(i).

Type II diabetes mellitus is listed as a disease associated with exposure to herbicide agents. During the pendency of the appeal, the provisions of 38 C.F.R. § 3.309(e) were amended to include additional presumptive diseases. See 75 Fed. Reg. 53202 -53216 (Aug. 31, 2010). The additional diseases include ischemic heart disease, which in turn includes coronary artery disease, but does not include hypertension or peripheral manifestations of arteriosclerosis such as peripheral vascular disease.

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, is presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to the contrary. 38 C.F.R. § 3.307(a)(6)(iii). Also, there are guidelines for presumption of exposure based on service in Thailand and Korea during the Vietnam Era. See M21-1MR, IV.ii.2.C.10.p; M21-1MR, IV.ii.2.C.10.q (Dec. 16, 2011).

In making all determinations, the Board must fully consider the lay assertions of record. A layperson is competent to report on the onset and continuity of his current symptomatology. See *Layno v. Brown*, 6 Vet. App. 465, 470 (1994) (a veteran is competent to report on that of which he or she has personal knowledge).

Lay evidence can also be competent and sufficient evidence of a diagnosis or to establish etiology if (1) the 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. *Davidson*, 581 F.3d at 1316; *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007). When considering whether lay evidence is competent the Board must determine, on a case by case basis, whether the Veteran's particular disability is the type of disability for which lay evidence may be competent. *Kahana v. Shinseki*, 24 Vet. App. 428 (2011); see also *Jandreau*, 492 F.3d at 1376-77.

The Board is charged with the duty to assess the credibility and weight given to evidence. *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the Veteran. 38 U.S.C.A. § 5107(b).

Analysis

The Veteran claims that his diagnosed type II diabetes mellitus, and his coronary artery disease, status post coronary artery bypass graft, are the result of exposure to herbicides during service while stationed at Pease Air Force Base in New Hampshire, or at Andersen Air Force Base in Guam, during the 1960s.

The Veteran neither claims, nor does the record show, that he served in Vietnam, Korea, or Thailand. Thus, he is not presumed to have been exposed to an herbicide agent during service. 38 C.F.R. § 3.307(a)(6)(iii). As exposure to the herbicides listed under 38 C.F.R. § 3.307(a)(6)(i) cannot be presumed, neither of the two claimed disabilities-type II diabetes mellitus and coronary artery disease-can be presumptively service connected on the basis of presumed exposure.

In the Veteran's January 2003 application he reported that he had served on a Combat Support Team in Guam in the US Air Force from 1964 to 1966, where his primary job was in the supply warehouse working with clothing that came from military personnel traveling back and forth to Vietnam.

During his August 2013 hearing, he testified that while at Andersen Air Force Base, he was assigned to the Base Equipment Management Office as an inventory specialist. In that role he inventoried equipment and was required to go into the drum lot where the herbicides were stored to count them periodically-every ten days to two weeks. Also, whenever an inspector general team was inspecting, he was assigned to the flight line as a bomb loader. He also testified that he exercised by running down the fence line every two days; and witnessed spraying outside of barracks and chow halls, and around runways to keep vegetation growth down. The Veteran also discussed pictures on file he submitted showing barrels of herbicides lined up and the brown grass that had been sprayed. He testified that the spraying was necessary due to the high growth rate of plants on the tropical island of Guam.

During the hearing the Veteran's representative commented that a Dow Chemical risk report on file discussed the spraying of herbicides at Andersen Air Force Base during the Vietnam Era, and included information of TCDD contamination that was later measured as 19,000 PPM in some areas of the Base. The representative stated that the contamination occurred from 1960 to as late as 1975.

The Veteran's representative also discussed an Environmental Protection Agency (EPA) report, noting that it referred to herbicide use from 1950 through the 1960s, and that it showed that Andersen Air Force Base was found to have toxic chemicals in the soil, including pesticides.

The Veteran's service personnel records show that he served both at Pease Air Force Base in New Hampshire, from April 1963 to April 1964, and later at Andersen Air Force Base in Guam, from November 1964 to May 1966. His duties included supply specialist and posting clerk.

The Veteran's clinical records on file contain medical evidence showing diagnoses of type II diabetes mellitus, and of coronary artery disease, status post coronary artery bypass graft. The Veteran's coronary artery disease was diagnosed in 2002 and the type II diabetes mellitus was first diagnosed in 2003. The Veteran underwent coronary artery bypass graft in 2003.

In a June 2011 statement by John D. Bagdade, MD (Board Certified Internal Medicine, Endocrinology and Metabolism), he stated he had reviewed the records, and on that basis he opined that the Veteran had exposure to herbicides including Agent Orange while stationed at Pease Air Force Base in New Hampshire and Andersen Air force Base in Guam, and that these environmental exposures resulted in the Veteran's acquired adult-onset diabetes mellitus (type 2 diabetes), that was noted in 2001, and his coronary heart disease requiring coronary artery by-pass surgery in 2003.

As part of the rationale for the opinion, Dr. Bagdade cited medical literature establishing an association between Agent Orange exposure and the claimed disorders. As part of the rationale regarding diabetes, he noted that obesity is the most common cause of insulin resistance, however, the Veteran was not overweight. He also noted there was no family history of the claimed disabilities. Dr. Bagdade concluded that given the documented exposure to the herbicide Agent Orange, and cited scientific evidence, it is more likely than not that the Veteran's acquiring diabetes mellitus, hypertension, dyslipidemia, and coronary heart disease are all related to his exposure to Agent Orange during service.

At a VA examination in March 2012, the examining VA physician assistant diagnosed coronary artery disease, status post coronary artery bypass graft, noting a date of diagnosis of 2002. She also diagnosed diabetes mellitus type II, noting a date of diagnosis of 2002. The examiner specified that the heart condition qualified within the generally accepted definition of ischemic heart disease.

The examiner commented that the diabetes mellitus included complications of peripheral neuropathy, which the examiner diagnosed as diabetic neuropathy. The examiner found that the symptoms attributable to diabetic peripheral neuropathy involved the upper and lower extremities, bilaterally.

The examiner opined that diabetic complications did not include diabetic nephropathy or renal dysfunction or diabetic retinopathy. She opined that erectile dysfunction was at least as likely as not due to diabetes mellitus.

The examiner opined that the Veteran's diabetes and coronary artery disease are both at least as likely as not related to the Veteran's active duty service to include any inservice chemical exposure. The examiner stated essentially that the basis of that opinion was the assumption of the Veteran's exposure to "Agent Orange" during service, and the fact of the diagnoses of diabetes mellitus and coronary artery disease.

The examiner also addressed his opinion as to the likelihood that the Veteran's hypertension or coronary artery disease is causally related to or has been permanently aggravated in severity by the type II diabetes mellitus.

The examiner opined that the hypertension and coronary artery disease are not as likely as not causally related to, or permanently aggravated in severity by, the Veteran's type II diabetes mellitus. The examiner based that opinion on the rationale that the Veteran's coronary artery disease is associated with Agent Orange exposure, and that type II diabetes without renal disease is not a well documented cause of hypertension. The report does not show that any diagnostic testing was performed to rule out any renal pathology.

A May 2012 VA medical opinion (examination) report notes that at the March 2012 VA examination the examiner had based her opinions on the assumption that VA had conceded Agent Orange exposure. The May 2012 VA opinion report instructed the examiner that VA had not conceded exposure to Agent Orange.

The May 2012 VA medical opinion report shows that the examiner from the March 2012 VA examination reviewed the claim file and provided follow-up opinions as to the likelihood of an etiological nexus between the Veteran's service and the claimed type II diabetes mellitus or coronary artery disease, given that herbicide exposure was not conceded. In light of the information that VA did not concede exposure to Agent Orange in service, the examiner opined essentially, that the type II diabetes mellitus and coronary artery disease are both not at least as likely as not causally related to the Veteran's active duty service, but rather, were more likely due to personal risk factors and family history.

The examiner noted a positive family history of diabetes mellitus and coronary artery disease, and a history of smoking for 30 years. The examiner also stated that there was no specific evidence that the Veteran was actually exposed to chemical or other types of contamination at Pease Air Force Base or Andersen Air Force Base.

In a February 2013 statement, Dr. Bagdade cited and relied on a number of pertinent scientific journal articles in support of his opinion relating the claimed diabetes mellitus and coronary artery disease to in-service exposure to herbicides. He opined that the Veteran's type II diabetes mellitus and coronary artery disease, status post coronary artery bypass graft, were more likely than not the consequence of in-service exposure to endocrine disrupting substances like dioxin present in Agent Orange and other persistent organic pollutants that caused a state of insulin resistance.

He opined that this underlying abnormality then contributed to the Veteran's developing the metabolic syndrome of which type 2 diabetes, hypertension, and hyperlipidemia are integral features, and coronary artery disease and arteriosclerotic cardiovascular disease being a later complication.

Dr. Bagdade rebutted the VA examiner's rationale of a family history of diabetes mellitus, by noting that the brother cited had had two tours of duty in Vietnam when he was exposed to Agent Orange, and had received VA disability benefits based on the presumption that the disease was related to that exposure in service.

Dr. Bagdade concluded that, based on the Veteran's clinical course following discharge, together with recent scientific evidence cited, it is more likely than not that the medical conditions he manifested were all closely related to perturbations in metabolism that are now acknowledged to be consequences of exposure to Agent Orange and other persistent organic pollutants that were documented as present at Pease Air Force Base and Andersen Air Force Base during the Veteran's period of service.

The Record reflects that Dr. Bagdade based his opinion that the Veteran was exposed to the specified chemicals such as Agent Orange on his review of at least some of the records discussed below.

The claim file contains published material addressing the presence and use of herbicides and other pathogenic chemicals, including contamination of soil and water at the Pease Air Force Base and the Andersen Air Force Base. A document titled National Priorities List Site Narrative for Andersen Air Force Base, published on the internet by the U.S. Environmental Protection Agency (EPA), shows that the base was proposed for a Superfund Site in February 1992. That document noted that Andersen Air Force Base had been operational since the 1940s and that sources/locations of hazardous substances there included unlined landfills, drum storage and disposal areas, chemical storage areas, fire training areas, waste storage areas, a laundry, and industrial and flight line operations.

The document noted that substances known to be involved in the Base's operation included: solvents such as trichloroethene (TCE) and paint thinners; dry cleaning fluids; fuels; pesticides; antifreeze; aircraft cleaning compounds; and PCBs. The publication noted that Air Force analyses indicated the presence of lead, chromium, TCE, toluene, and tetrachloroethene in ground water beneath the site. The document noted that more information about the hazardous substances identified in the document could be obtained from the Agency for Toxic Substances and Disease Registry (ATSDR).

A document titled Site Summaries, Pease Air Force Base, published on the internet by the New Hampshire state government contains information regarding a Superfund site involving Pease Air Force Base. The document noted that in 1983 the Air Force initiated installation restoration program activities to assess and control the migration of contamination that have resulted from past operations and disposal practices. The document noted that in 2003 the Air Force released information indicating the presence of waste materials from cleaning certain weapons systems in the 1950s and early 1960s. Past industrial waste disposal practices at

Pease between 1956 to 1971 were characterized as "most waste petroleum, oil, and lubricants and solvents combined and burned during fire department training exercises."

A document titled Contaminants of Concern at Pease Air Force Base, published on the internet by the EPA regarding Superfund information, contains a 26 page table citing numerous different contaminants present in ground water, soil, and other media at many different contaminated areas of the Base.

A document titled Public Health Assessment, Andersen Air Force Base, published on the internet by the ATSDR, noted that since World War II Andersen Air Force Base had been the recipient of chemicals used and stored in various locations on the base and spilled during routine operations. Wastes were buried in landfills from 1946 to the late 1970s. The report discussed soil and groundwater contamination beneath landfills and dozens of other areas on base over the years by routine waste disposal, military operations and occasional fuel spills.

The report noted that during the investigations, groundwater underlying Andersen was found to be contaminated with volatile organic compounds at levels above EPA Safe Drinking Water Standards. Results of monitoring nine water supply wells on base during the 1970s showed that chemicals, including solvents, pesticides, fuel products, and some metals had entered water supply wells. Andersen was placed on the EPA's National Priorities List in October 1992 due to the extent of groundwater contamination under the base.

There are a number of additional documents and reports on file, including published scientific studies and a Congressional report titled Hazardous Waste Problems at Department of Defense Facilities, which include evidence of the long-term presence of persistent organic pollutants and other contaminants in the soil and water sources at Andersen Air Force Base, including dioxins, PCBs, and pesticides of the same or similar class as those implicated under 38 C.F.R. § 3.307(a)(6)(i).

The Veteran has also submitted a number of photographs showing storage of barrels, and a large number of lay statements from former service members who served at Andersen Air Force Base during the relevant period, who attested to the presence of barrels of Agent Orange stored outside at Andersen Air Force Base in Guam, and attested to their exposure to Agent Orange and other pesticides at the base due to leakage and spraying for defoliation during the 1960s.

In a February 2009 letter from the Director, Center for Unit Records Research (CURR), the deputy director stated that CURR was unable to document or verify that the Veteran was exposed to herbicides while serving at Andersen Air Force Base, Guam. He noted that CURR had reviewed the Department of Defense listing of herbicide spray areas and test sites outside of Vietnam, and that Guam was not listed. He also noted that available 3960th Support

Squadron unit historical data did not document any herbicide spraying, testing, storage or usage at Andersen.

The Veteran has testified credibly on this matter, and his statements and testimony are corroborated by statements from airmen with whom he served. Notwithstanding the CURR report, the Veteran's testimony regarding his exposure to herbicides at the two Air Force Bases is consistent with the overwhelming evidence on file showing that given his military duties while stationed at Andersen Air Force Base, he was likely exposed to a number of pathogenic chemicals including dioxins, PCBs, or other pesticides, including some combination of pesticide chemicals specified under 38 C.F.R. § 3.307(a)(6)(i).

The evidence on file is, at the very least, in equipoise on the question of whether the Veteran was exposed to herbicides during his period of active service. In such a case, the question must be resolved in the appellant's favor. 38 U.S.C.A. § 5107(b); see also *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Accordingly, the Board finds, as fact, that the Veteran was exposed to herbicides during service. Given such exposure as a finding of fact, the medical opinions of record support a finding that the Veteran's type II diabetes mellitus and coronary artery disease, status post coronary artery bypass graft were caused by such exposure. Service connection is warranted for both disabilities.

## ORDER

Entitlement to service connection for type II diabetes mellitus is granted.

Entitlement to service connection for coronary artery disease, status post coronary artery bypass graft is granted.

## REMAND

The Veteran seeks service connection for hypertension. In light of the decision above, given the Veteran's service-connected type II diabetes mellitus and his recognized exposure to herbicides including chemical components of Agent Orange during service, the potential exists for a causal relationship between the claimed hypertension and the type II diabetes mellitus or the herbicide exposure.

The examiner at the March 2012 VA examination, who also provided a follow-up opinion in May 2012, opined that the Veteran's hypertension was not related to the Veteran's diabetes mellitus. She based that opinion on the premise that type II diabetes mellitus without renal disease is not a well documented cause of hypertension.

However, she did not address any potential diabetic pathogenesis unrelated to renal pathology that may link the type II diabetes mellitus to hypertension, such as the role of insulin resistance/hyperinsulinemia, or increased peripheral vascular resistance, or other non-renal diabetic pathology.

The VA examiner also opined that the hypertension was not likely due to herbicide exposure, in part on the basis that: the weight of medical literature was against a relationship of hypertension and exposure to herbicides; the Veteran had other known risk factors for hypertension including family history and smoking; and there was no specific evidence that the Veteran came into contact with herbicides.

This opinion conflicts with Dr. Bagdade's February 2013 opinion, based on cited scientific evidence, that it is more likely than not that the Veteran became hypertensive as part of the insulin resistance-driven metabolic syndrome acquired from exposure to polychlorinated herbicides present in Agent Orange.

A remand is necessary in order for the Veteran to be examined by VA and an opinion obtained that takes into consideration all of the evidence on file regarding the claim, including recognition of herbicide exposure during service as fact. The Veteran must be given an opportunity to submit statements regarding the onset and continuity of relevant symptoms; and any additional pertinent treatment records not on file must be obtained.

Accordingly, the case is REMANDED for the following action:

1. Obtain any outstanding VA or private treatment records pertinent to the claim for service connection for hypertension.
2. Notify the Veteran that he may submit statements from himself and others who have observed the Veteran; describing their impressions regarding the onset and chronicity of symptoms of hypertension since service or since onset of type II diabetes mellitus.
3. After completion of the above, schedule the Veteran for an examination by an appropriate medical professional to determine the nature extent, onset and likely etiology of any diagnosed hypertension disability found to be present.

The claim file must be made available to and reviewed by the examiner. All indicated studies are to be performed, including testing to rule out diabetic renal pathology; and all findings are to be reported in detail. In offering opinions, the examiner must acknowledge and discuss the Veteran's report of a continuity of relevant symptoms since service or since onset of type II diabetes mellitus or coronary artery disease, or any metabolic/endocrinopathy condition associated with the type II diabetes mellitus or the Veteran's exposure to herbicides in service.

Thereafter, the examiner must opine as to whether it is at least as likely as not that any diagnosed hypertension is:

- (i) related to or had its onset in service, or was aggravated in service, to include as due to recognized exposure to herbicides associated with Agent Orange; or
- (ii) proximately due to or aggravated by the Veteran's type II diabetes mellitus or his coronary artery disease.

In making these opinions, the examiner must discuss the opinions of Dr. Bagdade in June 2011 and February 2013.

All opinions must be supported by a thorough rationale.

4. Then, following any additional development deemed appropriate, readjudicate the Veteran's claim. If the benefit sought is not granted, a supplemental statement of the case must be issued.

The appellant has the right to submit additional evidence and argument on the matter the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim 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. 2012).

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RONALD W. SCHOLZ  
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

IN THE UNITED STATES COURT  
OF APPEALS FOR VETERANS CLAIMS  
DOUGLAS L. KELLEY, )

stamped by the court Jan 28 2013  
motion granted  
Mary J. Shelton, Judge

)  
Petitioner,  
)  
)  
v.  
)  
Vet.App. No. 12-1829  
)  
)

)  
ERIC K. SHINSEKI,  
)  
Secretary of Veterans Affairs,  
)  
)  
Respondent.  
)

THE SECRETARY'S MOTION FOR LEAVE TO SUBSTITUTE AN AMENDED EXHIBIT TO THE  
SECRETARY'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND COURT ORDER  
DATED JULY 13,2012, FOR A PREVIOUSLY FILED EXHIBIT.

Pursuant to U.S. Vet. App. R. 27(a), Respondent, Eric K. Shinseki,  
Secretary of Veterans Affairs, respectfully submits this motion for leave to  
substitute an amended declaration of Brian Curry, which was attached as  
exhibit B, page 1, to the Secretary's Response to Petition for Extraordinary Relief and Court Order dated  
July 13, 2012 (Secretary's Response), filed with the Court August 20, 2012.

In the Secretary's Response, Counsel for the Secretary attached the declaration of Brian Curry dated  
August 7, 2012, as exhibit B, page 1. On January 23,2012, it was brought to Counsel's attention that the  
declaration was not in compliance with 28 U.S.C. § 1746. Therefore, Counsel is filing an amended  
declaration of Brian Curry dated January 25, 2013. A copy of the amended declaration is being  
transmitted simultaneously with the instant motion.

Petitioner does not oppose this motion.

WHEREFORE, in light of these circumstances, Respondent, Eric K.  
Shinseki, Secretary of Veterans Affairs, respectfully moves the Court to  
accept the Secretary's motion for leave to sUbstitute an amended  
declaration of Brian Curry.

Respectfully submitted,

WILL A. GUNN General Counsel

R. RANDALL CAMPBELL Assistant General Counsel

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Counsel for Appellee, Secretary of Veterans Affairs

**Case Number:**12-1829

**Docketed:** 06/12/2012

Douglas L. Kelley v. Eric K. Shinseki

**Appeal From:** Department of Veteran Affairs

**Fee Status:** dhf

**Case Type Information:**

1) Petition

2) -

3) -

- 12/21/2012  Judge's stamp order granting petitioner's motion for leave to file supplemental information out of time (SCHOELEN) (SM)
- 12/21/2012  ORDERED that United Spinal Association's motion for leave to supplement the motion to intervene is GRANTED. It is further ORDERED that United Spinal Association's motion to intervene is DENIED. It is further ORDERED that United Spinal Association's motion for leave to participate in oral argument is DENIED as moot. (PER CURIAM) (SM)
- 12/21/2012  ORDERED that the parties be prepare to discuss the issues outlined above at oral argument (PER CURIAM) (SM)
- 01/07/2013  Respondent's Supplemental authorities under Rule 30(b). (BEJ)
- 01/23/2013  Respondent's Errata to the Secretary's Supplemental Authorities--[Edited 01/24/2013 by SM] (BEJ)
- 01/25/2013  Supplemental authorities under Rule 30(b). (BEJ)
- 01/25/2013  Mot of Respondent for leave to file *to substitute an amended exhibit to the Secretary's Response to Petition for extraordinary relief and Court Order* (BEJ)
- 01/28/2013  Supplemental authorities under Rule 30(b). (KJE)
- 01/28/2013  Judge's stamp order, for the panel, granting respondent's motion for leave to file to substitute an amended exhibit to the respondent's response to petition for extraordinary relief and Court ord. (SCHOELEN, PIETSCH and MOORMAN)--[Edited 01/29/2013 by KEM] (AMN)
- 01/29/2013 Case argued before Judges, Moorman, Schoelen and Pietsch (BMC)