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# BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF

[REDACTED]

IN THE CASE OF

[REDACTED]

REPRESENTED BY

**Katrina J. Eagle, Attorney**

XSS [REDACTED]

Docket No. 14-41 463

DATE: May 22, 2018

## ORDER

Service connection for glioblastoma multiforme (claimed as brain cancer) secondary to herbicide exposure, for the purposes of accrued benefits, is granted.

Service connection for the cause of the Veteran's death is granted.

## FINDINGS OF FACT

1. Resolving reasonable doubt in the Veteran's favor, his glioblastoma multiforme is at least as likely as not related to conceded in-service herbicide exposure.
2. The Veteran's cause of death is related to his service-connected glioblastoma multiforme.

## CONCLUSIONS OF LAW

1. The criteria for service connection for glioblastoma multiforme are met. 38 U.S.C. §§ 1110, 5107(b); 38 C.F.R. §§ 3.102, 3.303(a), 3.1000.

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2. The criteria for service connection for the cause of the Veteran's death are met. 38 U.S.C. § 1310; 38 C.F.R. § 3.312.

### **REASONS AND BASES FOR FINDINGS AND CONCLUSIONS**

The Veteran served on active duty from July 1968 to February 1970. He died in May 2012. The appellant is the Veteran's surviving spouse.

This matter comes before the Board of Veterans' Appeals (Board) from an October 2013 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Milwaukee, Wisconsin. Jurisdiction has since been transferred to the RO in Cleveland, Ohio.

At the time of his death, the Veteran had a pending appeal for entitlement to service connection for glioblastoma multiforme, secondary to Agent Orange exposure. A person eligible for substitution is defined as a living person who would be eligible to receive accrued benefits due to the claimant. *See* 38 U.S.C. § 5121A; 38 C.F.R. § 3.1010. In February 2013, the appellant was substituted as the claimant for the purposes of all claims that were pending at the date of the Veteran's death. She also filed an Application for Dependency and Indemnity Compensation, Death Pension and Accrued Benefits by a Surviving Spouse or Child (Including Death Compensation if Applicable), VA Form 21 534, in May 2013.

The appellant was afforded an informal conference before a Decision Review Officer at the RO in February 2014; a report of the informal conference is of record.

### **1. Service Connection for Glioblastoma Multiforme, for Accrued Benefits Purposes**

The appellant seeks to continue the Veteran's claim for entitlement to service connection for glioblastoma multiforme due to herbicide exposure.

Accrued benefits are defined as "periodic monetary benefits... authorized under law administered by [VA], to which a payee was entitled at his or her death under existing ratings for decisions or those based on evidence in the file at the date of death, and due and unpaid...." 38 U.S.C. § 5121(a); 38 C.F.R. § 3.1000(a).

Moreover, an "[a]pplication for accrued benefits must be filed within 1 year after the date of death." 38 C.F.R. § 3.1000(c).

The entitlement of an accrued benefits claimant is derived from the deceased individual's entitlement, and the accrued benefits claimant cannot be entitled to a greater benefit than the deceased individual would have received had he or she lived. The claimant takes the deceased individual's claim as it stands at the time of the individual's death. *Zevalkink v. Brown*, 102 F.3d 1236, 1242 (Fed. Cir. 1996). "[F]or a surviving spouse to be entitled to accrued benefits, the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision." *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998). The Board emphasizes that by statute, entitlement to accrued benefits must be based on evidence in the file at the time of death, or evidence, such as VA records, deemed to be of record at that time. 38 U.S.C. § 5121; 38 C.F.R. § 3.1000; *see also Jones v. Brown*, 8 Vet. App. 558, 560 (1996). "Evidence in the file at date of death" means evidence in VA's possession on or before the date of the beneficiary's death, even if such evidence was not physically located in the VA claims file on or before the date of death. 38 C.F.R. § 3.1000 (d)(4).

The Veteran filed a claim for glioblastoma multiforme in March 2012. The Veteran passed away in May 2012 and a rating decision was never promulgated. His surviving spouse filed for death benefits in May 2013 (within the one-year

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timeframe for such application). The appellant seeks to establish that the Veteran was entitled to service connection for glioblastoma multiforme.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C. § 1110; 38 C.F.R. § 3.303. Such a determination requires a finding of current disability that is related to an injury or disease in service. *Watson v. Brown*, 4 Vet. App. 309 (1993); *see also Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992); *Rabideau v. Derwinski*, 2 Vet. App. 141, 143 (1992). Service connection may be granted for any disease diagnosed after discharge from service when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

The law provides that service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. § 1110. Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

A veteran, who had active service in the Republic of Vietnam during the period beginning on January 9, 1962 and ending on May 7, 1975, will be presumed to have been exposed to an herbicide agent during such service unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. *See* 38 U.S.C. § 1116(f); 38 C.F.R. § 3.307 (a)(6)(iii).

VA regulations provide that the following diseases shall be service connected if the veteran was exposed to an herbicide agent during active service, even though there is no record of such disease during service, and provided further that the requirements of 38 C.F.R. § 3.307(d) are satisfied: AL amyloidosis, chloracne or other acneform disease consistent with chloracne, type II diabetes mellitus, Hodgkin's disease, ischemic heart disease, all chronic B-cell leukemia, multiple myeloma, non-Hodgkin's lymphoma, Parkinson's disease, early-onset peripheral neuropathy, porphyria cutanea tarda, prostate cancer, certain respiratory cancers, and soft tissue sarcoma. 38 C.F.R. § 3.309(e) (2017). Glioblastoma multiforme (brain cancer) is not a condition which VA presumes as due to Agent Orange

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exposure; however, the Federal Circuit has held that when a claimed disorder is not included as a presumptive disorder direct service connection may nevertheless be established by evidence demonstrating that the disease was in fact “incurred” during the service. *See Combee v. Brown*, 34 F.3d 1039 Caselaw Caution (Fed. Cir. 1994).

In adjudicating a claim for VA benefits, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise, with the veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 53-56 (1990).

The Board concludes that the Veteran had a current diagnosis of glioblastoma multiforme at the time of death which was related to his in-service exposure to herbicides. 38 U.S.C. §§ 1110, 1131, 5107(b); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009); 38 C.F.R. § 3.303(a).

A July 2011 private treatment record shows the Veteran was diagnosed with glioblastoma multiforme. In November 2012, the Veteran’s family physician, Dr. K. L. opinioned that the Veteran’s brain tumor was more likely than not related to his exposure to Agent Orange during his military service in Vietnam. Dr. K. L. noted that he had reviewed the Veteran’s military and medical history and had cared for the Veteran from the date of his diagnosis until his death. Dr. K. L. explained that the Veteran had no other history of chemical exposure or family history that would explain his brain cancer. In September 2013, Dr. K. L. submitted another statement opining that the Veteran’s brain cancer had been caused by his exposure to Agent Orange while in Vietnam. Dr. K. L. stated he had carefully considered, but ruled out, all other possible causes for the Veteran’s brain cancer. He explained that his medical research had shown that dioxin (Agent Orange) can cause carcinogenic effects at any atomical site. In 2008, the Institute of Medicine (IOM) reported that there was an increasing prevalence of brain cancers, including glioblastoma multiforme, as a result of exposure to toxins such as dioxin. As such, Dr. K. L. explained that given the toxicity of dioxin and the Veteran’s known exposure to it during military service, his medical opinion

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continued to support the theory that the Veteran's brain cancer was caused by his Agent Orange exposure in service.

In July 2014, a VA medical opinion was provided, which determined that the Veteran's glioblastoma multiforme was less likely than not related to service. The VA examiner noted that the Veteran had been diagnosed with glioblastoma multiforme in 2011 and subsequently died from it in 2012. The examiner indicated that while the Veteran's treating physician had opined that the Veteran's glioblastoma multiforme was at least as likely as not related to herbicide exposure based on studies examining occupational exposure and glioblastoma multiforme incidence, this conclusion was in direct opposition to the IOM report which demonstrated insufficient evidence. The examiner explained that on review of the available records and Dr. K. L.'s limited references, there was inadequate evidence to state that there was at least a 50 percent or greater probability of causation. The examiner further explained that studies examining occupational exposure to pesticides and glioblastoma multiforme incidence were difficult to apply to individuals exposed while in Vietnam given the longer duration of occupational exposure as compared to the exposure patterns in Vietnam. The examiner concluded that there was insufficient evidence for her to agree with Dr. K. L.'s assessment. In August 2014, the examiner provided an addendum to her opinion which contained excerpts from the medical studies upon which she relied on in forming her opinion.

In October 2014, the Director, Compensation Services, requested a medical opinion from the Under Secretary for Health regarding whether the Veteran's brain cancer resulted from his exposure to Agent Orange while in Vietnam. An Advisory Medical Opinion was issued in December 2014, written by Dr. L. W. for the Under Secretary of Health, and determined that the Veteran's glioblastoma multiforme was less likely than not caused by or related to the Veteran's military service in Vietnam with conceded Agent Orange exposure. Dr. L. W. noted that the Veteran developed glioblastoma multiforme in 2011, 40 years after service. She indicated that the weight of medical literature supported that glioblastoma multiforme develops in adults as a primary tumor in the 6<sup>th</sup> and 7<sup>th</sup> decades of life. As the Veteran was 67 years old when he developed glioblastoma multiforme, he

matched the known demographics of the condition. Dr. L. W. referenced medical studies that did not show an increased incidence of glioblastoma multiforme between veterans deployed to Vietnam and those not deployed there. The 2012 IOM Update continued to find inadequate or insufficient evidence to determine whether there was an association between exposure to the chemicals of interest and brain cancer. Further, individual studies had overall found no link between exposure to insecticides and/or herbicides and risk of gliomas of any grade. While the overall incidence of gliomas had increased over the decades, it was thought to be due to better brain imaging available with the use of computed tomography (CT) scans and magnetic resonance imaging (MRI) rather than to represent a true increase in incidence. Dr. L. W. explained that the weight of medical literature supported that the etiology of the majority of brain tumors is unknown and that it was unclear to her how the Veteran's physician, Dr. K. L., could have considered and ruled out all other possible causes for the Veteran's brain cancer. In sum, Dr. L. W. found that the weight of medical literature supported that there was inadequate or insufficient evidence of a nexus between exposure to Agent Orange and the later development of glioblastoma multiforme and that the preponderance of the medical literature argued that there was no association at all.

A private independent medical opinion was submitted by Dr. J. B. in May 2015. Dr. J. B. opined that the Veteran's brain cancer was etiologically related to his exposure to Agent Orange during his 14-month tour of duty as a Cannoneer in Vietnam. He noted that his opinion was based on relevant medical information, review of scientific literature, and his knowledge and experience as a Board-certified physician in internal medicine, endocrinology, and metabolism. Dr. J. B. explained that because the Veteran was not exposed to ionizing radiation (the only well recognized environmental risk factor for brain cancer) and had no family history of brain cancer, it was reasonable to consider the potential role other predisposing factors might have played in its development. Among these factors was the Veteran's exposure to Agent Orange, which contained the known carcinogen dioxin. Dr. J. B. noted a Vietnam Veteran Studies report which found that five different Agent Orange-exposed military groups that had served in Vietnam and five different exposed civilian populations all demonstrated increased rates of brain cancer. Further, four studies listed in the 2012 IOM Update reported



increased numbers of brain cancer cases among groups of workers involved in the production of dioxin and T-containing herbicides and their application. Dr. J. B. also noted a 1976 incident in Seveso, Italy, where an industrial accident led to the release of dioxin into the surrounding area. People in the high exposure zones had a higher incident of brain cancer than those in lower exposure zones. Dr. J. B. noted that the mission of the IOM was to evaluate available scientific evidence regarding the *statistical association* between herbicides used in Vietnam and various health concerns. Because of the rarity of brain cancer, particularly glioblastoma multiforme, epidemiological studies of the brain cancer could be very informative even though their statistical power was reduced by the fact that the numbers of cases might be low. Supporting this proposition, Dr. J. B. cited to the 2012 Veterans and Agent Orange Update which stated, “[a] few studies are somewhat suggestive of an association between AO and brain cancer, but these studies have limited exposure specifically or limited precision because of small numbers.” Dr. J. B. also referred to the 2012 IOM Update which noted, “the lack of adequate exposure data on Vietnam veterans themselves makes it difficult to estimate the degree of increased risk of disease in Vietnam veterans as a group or individually [...]. Because of those limitations, only general assertions can be made about risks to Vietnam veterans, depending on the category of association into which a given health outcome has been placed.” Dr. J. B. disagreed with the opinions of the July 2014 VA examiner and Dr. L. W. (for the Under Secretary of Health) that there was inadequate or insufficient evidence to support that the Veteran’s brain cancer was at least as likely as not related to his in-service Agent Orange exposure. Dioxin has been shown to cause cancerous changes to virtually all human cells and organs, including causing tumors in the brain such as glioblastoma multiforme. As the Veteran was exposed to Agent Orange while in Vietnam, Dr. J. B. opined that the Veteran’s glioblastoma multiforme was more likely than not caused by his in-service exposure.

Having reviewed the evidence of record, the Board concludes that the evidence is in equipoise on the question of whether the Veteran’s glioblastoma multiforme was caused by his exposure to Agent Orange during active service in Vietnam. In such a case, VA regulations dictate that reasonable doubt is to be resolved in the

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Veteran's favor. When this is done, the criteria for service connection have been met and the Veteran's claim should be granted.

As such, the Board finds that the Veteran's glioblastoma multiforme was caused by his in-service exposure to Agent Orange and the nexus requirement has been met. Accordingly, the Board will resolve doubt in favor of the Veteran and grant the Veteran's claim. 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

## **2. Service Connection for Cause of Death**

The appellant is claiming entitlement to service connection for the cause of the Veteran's death. 38 U.S.C. § 1310. The cause of the Veteran's death will be considered to be due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a).

The Veteran died in May 2012. The Veteran's death certificate listed his immediate cause of death as due to glioblastoma - brain tumor.


As there is evidence that the Veteran died from glioblastoma multiforme and the Veteran has herein been granted service connection for glioblastoma multiforme, the Board finds that service connection for the Veteran's cause of death is warranted.

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KRISTI L. GUNN  
Veterans Law Judge  
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

L. Silverblatt, Associate Counsel