BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF [redacted]
ALFRED PROCOPIO, JR.

DOCKET NO. 09-47 333) DATE November 3, 2016
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On appeal from the
Department of Veterans Affairs Regional Office in St. Paul, Minnesota

THE ISSUE

Entitlement to service connection for ischemic heart disease (coronary artery disease), including as due to exposure to herbicides.

REPRESENTATION

Appellant represented by: John B. Wells, Attorney

WITNESSES AT HEARING ON APPEAL

Appellant and his wife

ATTORNEY FOR THE BOARD

D. J. Drucker, Counsel

INTRODUCTION

The Veteran had active military service from September 1963 to August 1967.

This case initially came to the Board of Veterans' Appeals (Board), in pertinent part, on appeal from a February 2014 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in St. Paul, Minnesota, that denied service connection for coronary artery disease, including as due to exposure to herbicides.

In July 2015, the Board, in pertinent part, remanded the Veteran's claim of service connection for coronary artery disease, including as due to exposure to herbicides, to the Agency of Original Jurisdiction (AOJ) for issuance of a statement of the case (SOC). The SOC was issued in July 2015 and the Veteran perfected his appeal as to this claim in August 2015.

In August 2016, the Veteran testified during a hearing conducted by videoconference before the undersigned. A transcript of the hearing is of record.

FINDINGS OF FACT

1. The weight of the probative evidence of record is against a finding that the Veteran was present on the landmass or inland waters of Vietnam during active service and, thus, is not presumed to have been exposed to herbicides, including Agent Orange.

2. The weight of the probative evidence of record is against a finding that the Veteran was directly exposed to herbicides.

3. The weight of the probative evidence of record is against a finding that ischemic heart disease (coronary artery disease) is due to a disease or injury in active service, and arteriosclerosis or cardio-vascular renal disease was not manifest to a compensable degree within one year of discharge from active service.

CONCLUSION OF LAW

The criteria for service connection for ischemic heart disease (coronary artery disease) are not met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1116, 1131, 5107 (West 2014); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duty to Notify and Assist

In a September 2013 letter, the AOJ notified the Veteran of information and evidence necessary to substantiate his claim. *See* 38 U.S.C.A. §§ 5102, 5103, 5103A (West 2014); 38 C.F.R. § 3.159 (2015); *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015).

VA has done everything reasonably possible to assist the Veteran with respect to his claim for benefits in accordance with 38 U.S.C.A. § 5103A and 38 C.F.R.§ 3.159(c). His service treatment and personnel records were obtained. All reasonably identified and available VA and non-VA medical records have been secured. In a July 2014 letter to the Naval Sea Systems Command Headquarters (HQ), VA requested the manufacturer's technical manual for the evaporation distillation system aboard the *USS INTREPID* (7/23/14 VBMS Map D Development Letters). The same month, VA notified the Veteran that it attempted to obtain that information but it was his responsibility to see that VA received these records. The Naval Sea Systems Command HQ did not respond to VA's July 2014 request for information, nor was the letter returned to the sender. VA attempted to contact the Naval Sea Systems Command HQ by telephone to determine where to send the letter requesting information (7/23/14 VBMS VA 27-0820 Report of Contact). There was no answer and, in the Report of Contact, a VA employee noted that "the number did not seem to be working."

The Veteran's attorney has argued that VA failed in its duty to assist by not obtaining those records (11/6/14 VBMS Correspondence, pp. 2-7). However, the

Veteran was notified of the attempt to obtain them, and it was his responsibility to ensure VA had them. At no time did the Veteran or his attorney submit the technical manual for the evaporation distillation system aboard the *USS INTREPID*. The Board finds that all reasonable attempts were made to obtain these records and any further efforts to obtain them would be futile. VA has not failed in its duty to assist the Veteran in this matter.

The Court has interpreted the provisions of 38 C.F.R. § 3.103(c)(2) as imposing two distinct duties on VA employees, including Board personnel, in conducting hearings: The duty to explain fully the issue and the duty to suggest the submission of evidence that may have been overlooked. *Bryant v. Shinseki*, 23 Vet. App. 488 (2010) (per curiam). At the Veteran's hearing, the issue was identified, including the evidence needed to substantiate the claim. There was a discussion of possible evidence that could substantiate the claim. Moreover, neither the Veteran nor his attorney has asserted that VA failed to comply with 38 C.F.R. 3.103(c)(2) ; they have not identified any prejudice in the conduct of the Board hearing.

Here, the Veteran has been represented by an attorney during a hearing before the Board who submitted detailed arguments on his behalf. The Board concludes that the Veteran has actual knowledge as to the information and evidence needed for him to prevail on his claim and is not prejudiced by a decision in this case. Thus, a remand for additional notice would serve no useful purpose. *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

The duty to assist also includes providing a medical examination or obtaining a medical opinion when such is necessary to make a decision on the claim. 38 C.F.R. § 3.159(c)(4)(i) (2015).

The Board notes that an etiological opinion has not been obtained in this case. Under *McLendon v. Nicholson*, 20 Vet. App. 79 (2006), in disability compensation (service connection) claims, the 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 with another service-connected disability, but (4) insufficient competent medical evidence on file for the VA to make a decision on the claim.

Here, while there is a current diagnosis of coronary artery disease, there is no indication this disability is associated with service, including exposure to Agent Orange. There is no evidence of pertinent disability in service or within the first post-service year. The Veteran has not claimed that pertinent disability had its onset in service, nor has he suggested a continuity of symptomatology since his discharge. While the Veteran has asserted a relationship, the question of a relationship between coronary artery disease and exposure to herbicides is a complex medical issue far beyond the competence of a lay person. Thus, his bare assertions are not sufficient to warrant an association between the claimed disability and service such as to meet the criteria for obtaining an examination or opinion. *See Waters v. Shinseki*, 601 F.3d 1274, 1278 (2010) (mere conclusory or generalized lay statements that a service event or illness caused a current disability are insufficient). Moreover, the scientific study from the Australian Navy regarding the filtration of dioxins from ocean water is simply too tenuous and not based on findings specific to the Veteran's case. Indeed, even if it is accepted that evaporative distilling of water would not remove dioxins the article does not itself speak to the question of whether dioxins would have been present in the waters where the Veteran's ship was located in the first place. The Veteran's representative spoke at hearing regarding water runoff but as a mechanical engineer he is not competent with respect to matters relating to ocean currents and discharge plumes and thus such contentions themselves do not trigger the need for an examination or medical opinion here.

In view of the absence of findings of pertinent pathology in service and the first suggestion of pertinent disability many years after active duty, relating this disability to service would certainly be speculative. However, service connection may not be based on a resort to pure speculation or even remote possibility. *See* 38 C.F.R. § 3.102 (2015). The duty to assist is not invoked where "no reasonable

possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C.A. 5103A(a)(2).

Here, the Veteran was afforded a hearing before a Veterans Law Judge in August 2016, deck logs from the *USS INTREPID* were obtained (7/23/14 VBMS Logbooks) (and a web link to those records was provided: http://research.archives.gov/description1594258), and attempts were made to obtain records related to the ship's evaporation distillation system.

The Board is satisfied that the duties to notify and assist have been met.

II. Facts and Analysis

Contentions

The Veteran does not contend that he ever set foot in Vietnam. Rather, he contends that he was exposed to herbicide while aboard the *USS INTREPID*, either directly through contact with aircraft sprayed, or flew through sprayed Agent Orange, while handling drums of Agent Orange, or others' items that may have come in contact with Agent Orange, or by drinking distilled (potable) water (11/30/12 VBMS VA 21-4138 Statement in Support of Claims;10/15/09 VBMS VA 9 Appeal to Board of Appeals;10/15/09 VBMS VA 21-4138; 3/30/09 VBMS VA 21-4138; 10/5/07 VBMS VA 21-4138). He has also variously asserted that he was exposed to unspecified chemicals while working on the flight deck in the hanger bay. During a November 2014 hearing, he testified to a temporary duty assignment in the Republic of the Philippines (11/13/14 VBMS Hearing Testimony, p. 6).

During the 2016 hearing the Veteran's attorney vigorously asserted that a Royal Australian Navy report (discussed below) showed that the evaporation distillation systems on its ships did not remove Agent Orange/dioxin from the water consumed by those aboard the ships, and that the *USS INTREPID's* evaporation distillation system was similar to those used by the Royal Australian Navy.

Thus, the Veteran maintains that service connection for coronary artery disease is warranted.

Legal Criteria

A veteran is entitled to compensation for disability resulting from personal injury or disease incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303.

To establish service connection, evidence must show: "(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" - the so-called "nexus" requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Certain chronic diseases, such as arteriosclerosis, and cardio-vascular renal disease, may be presumed to have been incurred in or aggravated by service if manifest to a compensable degree within one year of discharge from active service. *See* 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1131, 1137; 38 C.F.R. §§ 3.307, 3.309. *See Walker v. Shinseki*¸708 F.3d 1331 (Fed. Cir. 2013) (establishing service connection based on a continuity of symptomatology only applies to chronic conditions under 38 C.F.R. § 3.309(a)).

Veterans who, during active service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed to an herbicide agent, unless there is affirmative evidence of non-exposure. 38 U.S.C.A. §§ 1116; 38 C.F.R. § 3.307.

Service incurrence for certain diseases, including ischemic heart disease, will be presumed on the basis of an association with certain herbicide agents (*e.g.*, Agent Orange). 38 U.S.C.A. § 1116 ; 38 C.F.R. §§ 3.307 (a)(6), 3.309(e). Such a presumption, however, requires evidence of actual or presumed exposure to herbicides. *Id*.

Ischemic heart disease includes acute, subacute, and old myocardial infarction; atherosclerotic cardiovascular disease including coronary artery disease (including coronary spasm) and coronary bypass surgery; and stable, unstable and Prinzmetal's angina). 38 C.F.R. § 3.309 (e).

"Service in Vietnam" means actual service in the country of Vietnam from January 9, 1962 to May 7, 1975, and includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam. 38 C.F.R. § 3.307 (a)(6)(iii); *see Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) (finding that VA's requirement that a veteran must have stepped foot on the landmass of Vietnam or the inland waters of Vietnam for agent orange/herbicide exposure presumption is a valid interpretation of the statute); VAOPGCPREC 27-97 (holding that mere service on a deep-water naval vessel in waters off-shore of the Republic of Vietnam is not qualifying service in Vietnam). In other words, for purposes of applying the presumption of exposure to herbicides under 38 C.F.R. § 3.307 (a)(6)(iii), the serviceman must have actually been present at some point on the landmass or the inland waters of Vietnam during the Vietnam conflict.

What constitutes "inland waterways" was not defined in *Haas* and is not defined in VA regulations. Thus, the Board has historically referred to the VA Adjudication Procedure Manual M-21 (Manual) for interpretive guidance. The Manual maintains that inland waterways include rivers, canals, estuaries, and delta areas, such as those on which the Vietnam "brown water" Navy operated. VA Adjudication Procedure Manual M21-1MR, pt. IV, sub. pt. ii, ch. 2, § C.10.k. The Manual clearly states that service aboard a ship that merely anchored in an open deep-water harbor, such as Da Nang, Vung Tau, or Cam Ranh Bay, along the Vietnam coast does not constitute inland waterway service to establish presumptive exposure to herbicides. Any such anchorage is considered to be in "blue water" that does not provide for a presumption of herbicide exposure. *Id*.

After review of an Institute of Medicine report, "Blue Water Navy Vietnam Veterans and Agent Orange Exposure", the Secretary of VA determined that the

evidence available at that time did not support establishing a presumption of exposure to herbicides for Blue Water Navy Vietnam Veterans. *See* 77 Fed. Reg. 76170 (Dec. 26, 2012).

In order for the presumption of exposure to Agent Orange to be extended to a Blue Water Navy Veteran, development must provide evidence that his ship operated temporarily on the inland waterways of Vietnam or that the Veteran's ship docked to the shore or a pier. In claims based on docking, a lay statement that the Veteran personally went ashore must be provided. Although evidence that a veteran's ship docked, along with a statement of going ashore, is sufficient for the presumption of herbicide exposure, service aboard a ship that anchored temporarily in an open deep water harbor or port has generally not been considered sufficient.

Recently, the United States Court of Appeals for Veterans Claims (court) determined that VA's interpretation of 38 C.F.R. § 3.307 (a)(6)(iii), designating Da Nang Harbor as an offshore, rather than an inland, waterway was inconsistent with the purpose of the regulation and did not reflect the VA's fair and considered judgment. *Gray v. McDonald*, 27 Vet. App. 313 (2015). In particular, the Court could not discern any reason as to why, in VA's determination, certain bodies of water such as Quy Nhon Bay and Ganh Rai Bay, were brown water, but Vung Tau Harbor, Da Nang Harbor, and Cam Ranh Bay, were blue water. In this case, the record reflects the Veteran's presence aboard ship in the Gulf of Tonkin and South China Sea, with some activity in the territorial waters of South Vietnam. He has not specifically alleged that his ship anchored in a deep water harbor such as Cam Ranh Bay. Thus, the Board concludes that the Court's holding in *Gray* is not applicable to the Veteran's case.

In light of the foregoing, service connection may be presumed for residuals of Agent Orange exposure by showing two elements. First, the Veteran must show that he served in the Republic of Vietnam during the Vietnam era. 38 U.S.C.A. § 1116; 38 C.F.R. § 3.307 (a)(6). Second, the Veteran must be diagnosed with one of the specific diseases listed in 38 C.F.R. § 3.309 (e).

Notwithstanding the foregoing a claimant is not precluded from establishing service connection with proof of direct causation. *Stefl v. Nicholson*, 21 Vet. App. 120 (2007); *see Combee v. Brown*, 34 F.3d 1039, 1042 (Fed. Cir. 1994

Facts and Analysis

Facts

The record shows that the Veteran was treated for atrial fibrillation in February 2013 (2/14/14 VBMS CAPRI, pp. 2-4; 7/22/13 VBMS Medical Treatment Record Non Government Facility, p.1). A physician noted coronary artery disease in June 2013 (6/19/13 VBMS Medical Treatment Record Non Government Facility, p. 3).

Ischemic heart disease (coronary artery disease) is a disease that will be presumptively service-connected on the basis of in-service exposure to herbicides, including Agent Orange. 38 C.F.R. § 3.309 (e). The question at issue is whether the Veteran was exposed to the herbicides while on active duty or if the disorder is otherwise related to active service.

The Veteran maintains that he was exposed to herbicides aboard the *USS INTREPID*. He served on that ship from January 1965 to May 1967 (11/9/06 VBMS Military Personnel Record, p. 7). However, the *USS INTREPID* was an aircraft carrier, from which A-1 Skyraiders used for bombing and rocketing targets were launched (10/5/09 VBMS Web/HTML Documents). There is no evidence of any aircraft spraying Agent Orange or that tactical herbicides were kept on the *USS INTREPID*, or launched from it.

The National Personnel Records Center (NPRC) found no conclusive evidence of the Veteran's in-country service in the Republic of Vietnam (12/19/06 VA 21-3101 Request for Information (2nd document); and, his ship sailed to the waters off the coast of Vietnam on two occasions, once to the Gulf of Tonkin and once to the Southern Coast of Vietnam. A review of the ship's deck logs from July 1, 1966, to July 31, 1966, shows that the ship departed Yokosuka, Japan, and ultimately arrived at Dixie Station, South China Sea (7/23/14 VBMS Logbooks). During this

timeframe, the ship repeatedly entered and departed the territorial waters of South Vietnam.

Service treatment records do not reflect coronary artery disease or manifestations consistent therewith. Moreover, the Veteran has not contended that the onset of this disability occurred in service.

Coronary artery disease was first diagnosed in 2013.

In December 2006, the NPRC indicated that it was unable to determine whether the Veteran had in-country service in the Republic of Vietnam (12/19/06 VBMS VA 21-3101 Request for Information (2nd document)). In another response dated at the same time, the NPRC indicated that there were no records that the Veteran was ever exposed to herbicides (12/19/06 VBMS VA 21-3101 Request for Information (1st document)).

A May 2010 private outpatient note written by G.G., M.D., (regarding prostate cancer) provides a history of Agent Orange exposure in Vietnam as a Blue Water Sailor (9/13/10 VBMS Medical Treatment Record Non Government Facility). The pertinent impression noted Agent Orange exposure in Vietnam as a Blue Water Sailor. Dr. G. indicates that he supported the Veteran's history of Agent Orange exposure in the military, as he had many other patients who were Blue Water Sailors with Agent Orange exposure while off-shore in Vietnam. The Board observes that, during a September 2010 Board hearing, the Veteran explained that Dr. G. was his treating VA physician. *See* September 2010 Board hearing transcript at page 6.

In an October 2010 statement, Dr. G. noted that the Veteran expressed that he was off the coast of Vietnam and had been a Blue Water Sailor during the Vietnam Era when Agent Orange was used (10/22/10 VBMS Third Party Correspondence). Dr. G. stated that, if the Veteran was exposed to Agent Orange, or Agent Orange was used in the regions where the Veteran was off-shore, then his claim (regarding prostate cancer) would be "as likely as not" related to Agent Orange. He reiterated that if the Veteran was off the coast of Vietnam when Agent Orange was used and

he was therefore exposed to Agent Orange, then prostate cancer can be associated with his Agent Orange exposure. Dr. G. noted that information as to whether the Veteran was exposed to Agent Orange, or was off the shore of Vietnam when Agent Orange was being used, could only be obtained from his service record and VA. Dr. G. stated that he did not have the Veteran's service records, or information that identified where he served, the position of his ship when he served, or its proximity to Vietnam.

In June 2013, Dr. G. again provided an opinion as to the Veteran's claimed disabilities (6/19/13 VBMS Medical Treatment Record Non Government Facility, p. 3). The impression included Agent Orange exposure in Vietnam as blue water sailor off the coast of Vietnam and side effects related to Agent Orange, including erectile dysfunction, prostate cancer, coronary artery disease.

The Veteran submitted an undated Australian scientific article that, in essence, suggests that Vietnam veterans of the Royal Australian Navy may have been exposed to herbicide compounds by drinking water distilled on board their off-shore vessels (10/15/09 VBMS Web/HTML Document).

During the August 2016 hearing, the Veteran's attorney provided additional argument regarding this Australian study and how similar distillation procedures and equipment were used on U.S. ships as were used on the Australian ships.

The attorney argued that Agent Orange was mixed with diesel fuel to better adhere to the flight line in Vietnam where heavy rains washed it into the rivers. *See* Board hearing transcript at page 15. It was “generally known” that petroleum floated and the mix, or “discharge plume”, was discharged into bays, harbors, and the South China Sea. *Id.* at 16. This residue moved into Dixie Station where the *USS INTREPID* operated. *Id.* The attorney acknowledged that the ship’s deck logs do not show Agent Orange exposure, and stated that such would not have been entered into the deck logs. *Id.* at 17.

The attorney indicated that nothing installed on the *USS INTREPID*, or any ship, detected the presence of Agent Orange. *Id.* at 18. He observed that the ship

steamed through the Agent Orange mixed with petroleum, taking up the discharge plume into its evaporation distillation system. *Id.* at 19. The attorney noted that there were varied arguments as to whether the evaporation system would actually remove dioxin, and pointed to the Royal Australian Navy article. *Id.* The attorney stated that he did not have direct evidence that the Veteran sailed through molecules of water that contained Agent Orange that were taken into the ship's evaporation distillation system, but had circumstantial evidence. *Id.* at 21-22.

The attorney additionally argued that mail went to the Fleet Post Office in Da Nang that served ships in Dixie and Yankee stations. *Id.* at 23. The mail was received by flights in which persons when ashore. The ship's laundry was contaminated from the pilots' and others' clothing. *Id.* Mail bags sat on runways that were another source of contamination. *Id.* at 24. The attorney knew of no scientific studies that showed that Agent Orange adhered to paper but argued it adhered like a fingerprint. *Id.* at 26

In October 2016, the attorney reported that the U S Army Crime Lab would not provide a statement concerning the transfer of dioxin from the sprayed mail bags to the mail envelopes (10/5/16 VBMS Correspondence). The attorney stated that the Veteran will not be able to provide collusive evidence that the dioxin, that was mixed with petroleum, would transfer from the mail bag to the hands of the postal clerk and to the various envelopes.

The attorney also argued in October 2016 that persons coming aboard from the landmass of Vietnam would bring the dioxin aboard on their shoes, uniforms and exposed skin. They showered in a common shower and their clothing was washed in a common laundry. The oily film from the dioxin/petroleum mixture as well as the epithelial cells would adhere to horizontal surfaces in the shower.

Additionally, the attorney submitted numerous documents and arguments in support of "Blue Water" veterans being recognized as presumptively exposed to herbicides.

There are no treatment records showing a link between the Veteran's coronary artery disease and his active military service.

Analysis

Herbicide Exposure

Here the probative evidence of record weighs against a finding of the Veteran's claimed exposure to herbicides while stationed in the South China Sea, in the territorial seas of South Vietnam, and in the Gulf of Tonkin. The Board finds the more probative evidence to be to the contrary-namely, the NPRC responses and review of the deck logs of the *USS INTREPID*, that show no exposure to tactical herbicides, including Agent Orange.

The Veteran is competent to testify as to handling barrels of chemicals, or otherwise having been exposed to chemicals while on the *USS INTREPID*. However, he has not demonstrated that he is competent to identify herbicides, including those (2, 4-D; 2, 4, 5-T and its contaminant TCDD; cacodylic acid; and picloram) for which presumptions of service connection may apply, nor is he competent to assert that he consumed herbicides in the distilled water aboard the *USS INTREPID*. 38 C.F.R. § 3.307. In other words, he is competent to say that he saw what he thought were barrels of herbicides or chemicals, but he is not competent to say that he was actually exposed to herbicides, or that they were present in his ship's ventilation or distillation systems. The Veteran has submitted no documentation to corroborate his factual assertions as to exposure to Agent Orange on the *USS INTREPID*.

Here, the Veteran concedes that he is considered a "Blue Water" veteran. Moreover, the most probative evidence of record is against a finding that the Veteran was exposed to such herbicides during his service aborad the *USS INTREPID* in the South China Sea, territorial waters of South Vietnam, or the Gulf of Tonkin when his ship was present in those locations. Consequently, the most probative evidence of record shows that the Veteran was not directly exposed to any herbicide during his service for which presumptive service connection might apply. 38 C.F.R. § 3.307 (a)(6).

The Board has considered the Australian study discussed above, as well as the detailed arguments, testimony, and articles submitted by the Veteran's attorney. The Board finds that this article, and the submissions made by the Veteran's attorney, are too general in nature to provide, alone, the necessary evidence to show that the Veteran was exposed to Agent Orange while onboard the *USS INTREPID*. *See Sacks v. West*, 11 Vet. App. 314, 316-17 (1998). This information contains no specific findings pertaining to his manifestation of coronary artery disease. *Id.*

The articles in the current case do not provide statements for the facts of the Veteran's specific case-including the specific ship upon which he served. Therefore, the Board concludes that the articles do not show to any degree of specificity that the Veteran was exposed to Agent Orange while drinking water on the *USS INTREPID*, or that he was otherwise shown to have been exposed to herbicides during service. Moreover, the arguments provided by the Veteran's attorney regarding "Blue Water" veterans were considered, but the law as to "Blue Water" veterans is clear, as delineated by the Federal Circuit in *Haas v. Peake.*

In *Haas, supra*, the Federal Circuit highlighted the VA's rulemaking with respect to a similar Australian scientific study:

> VA scientists and experts have noted many problems with the study that caution against reliance on the study to change our long-held position regarding veterans who served off shore. First, as the authors of the Australian study themselves noted, there was substantial uncertainty in their assumptions regarding the concentration of dioxin that may have been present in estuarine waters during the Vietnam War. . . . Second, even with the concentrating effect found in the Australian study, the levels of exposure estimated in this study are not at all comparable to the exposures experienced by veterans who served on land where herbicides were applied. . . . Third, it is not clear that U.S. ships used distilled drinking water drawn from or

> near estuarine sources, or if they did, whether the distillation process was similar to that used by the Australian Navy.

Based on this analysis, VA stated that "we do not intend to revise our long-held interpretation of 'service in Vietnam.'" *See Haas*, 525 F.3d at 1194 [citing 73 Fed. Reg. 20,566, 20,568 (Apr. 16, 2008)]. As such, the Board places little weight on these submissions, and they are outweighed by other evidence of record outlined above.

The attorney argues that he is qualified to comment on the transference of dioxin from mail bags to postal clerks hands and envelopes, "because in my law practice I have used fingerprint technology and the transmission of DNA by epithelial cells in my court-martial practice, defending members of the armed forces against criminal charges. I have also taken Continuing Legal Education courses on both fingerprints and DNA and have presented or cross examined experts in the field." (10/5/16 VBMS Correspondence).

The Veteran's attorney's opinions on science cannot constitute competent evidence as to the Veteran's exposure to herbicides while aboard the *USS INTREPID*. *See e.g., Young v. McDonald*, 766 F.3d 1348, 1354 (Fed. Cir. 2014) (to the effect that the competency of lay testimony depends on the nature of the condition).

Dr. G.'s opinions were to the effect that the (diabetes mellitus and prostate cancer) disabilities were at least as likely as not related to Agent Orange during service in Vietnam. The Board finds, however, that these opinions lack probative value as they are conditional or based on an inaccurate factual basis-namely, the Veteran did not have exposure to Agent Orange during service. *See Reonal v. Brown*, 5 Vet.App. 458, 794 (1993) (a medical opinion based upon an inaccurate factual predicate has no probative value). Significantly, Dr. G.'s October 2010 opinion is no more than conditional. He states that the Veteran's prostate cancer would be as least as likely as not related to Agent Orange exposure if the Veteran was exposed to Agent Orange. However, the physician recognized that he lacked the information to confirm the Veteran's Agent Orange exposure.

Here, there is no evidence that the Veteran ever served in Vietnam, nor does he assert any such service, such that herbicide exposure may not be presumed in this case. 38 C.F.R. § 3.307 (a)(6)(iii). Moreover, the weight of the evidence is against a finding of actual exposure.

Ischemic Heart Disease (Coronary Artery Disease)

The Veteran claims that he incurred ischemic heart disease (coronary artery disease) as a result of exposure to Agent Orange in the South China Sea, territorial waters of South Vietnam, and in the Gulf of Tonkin. As discussed in detail above, however, the Board concludes that the weight of the probative evidence is against a finding of any credible evidence that the Veteran was exposed to herbicides during active service. The Board notes that the Veteran's personnel records do not reflect any service in the Republic of Vietnam, and the Veteran has never asserted any service in-country Vietnam, such that exposure to herbicides may not be presumed. 38 C.F.R. § 3.307 (a)(6)(iii).

There is also no conclusive lay or medical evidence in the claims file of arteriosclerosis or cardio-vascular renal disease in service or manifested to a compensable degree within one year of discharge from active service, that would allow for presumptive service connection as chronic diseases under 38 C.F.R. § 3.309 (a). As the Veteran was first shown to have coronary artery disease in 2013, service connection based on a continuity of symptomatology is not warranted. *Walker*.

As noted above, the Veteran is not, however, precluded from establishing service connection with proof of direct causation. *Stefl v. Nicholson*, 21 Vet. App. at 120; *see Combee v. Brown*, 34 F.3d at 1042. As already discussed, actual exposure to herbicides is not found by the weight of the evidence. Moreover, there is no other basis for an award of nonpresumptive service connection in this case. Indeed, the Veteran has not alleged that he was continuously treated for coronary artery disease since discharge from service. He was first shown to have coronary artery disease in 2013, over 45 years after his discharge from active duty.

VA and private treatment records reflect the Veteran's treatment for coronary artery disease. Other than the inadequate private opinions from Dr. G., discussed above, the records do not include any opinion as to the etiology of the Veteran's coronary artery disease. Here, there is no competent and credible evidence showing that the Veteran was exposed to herbicides during his active service in South China Sea, territorial waters of South Vietnam, and in the Gulf of Tonkin. The opinions from Dr. G. (linking the Veteran's coronary artery disease to Agent Orange exposure) lack probative value as they are based on an inaccurate factual and/or conditional basis and do not address the etiology of coronary artery disease.

The only evidence of record suggesting any relationship between the Veteran's coronary artery disease and his active service is his own statements, asserting his Agent Orange exposure in South China Sea, territorial waters of South Vietnam, and in the Gulf of Tonkin, and his opinion that such exposure caused his coronary artery disease. However, the Board has found that there is no competent or credible evidence of record of the Veteran's claimed herbicide exposure during service. Moreover, the fact that the Veteran was not conclusively diagnosed with coronary artery disease for more than 45 after his discharge from military service weighs heavily against any alleged association to service. *See Maxson v. Gober*, 230 F.3d 1330, 1333 (2000).

Here, the only competent and credible evidence of record as to the etiology of the Veteran's coronary artery disease weighs against the claim. The Veteran has not presented a probative opinion to the contrary.

A clear preponderance of the evidence of record is against the Veteran's claim for service connection for ischemic heart disease (coronary artery disease) including as due to exposure to herbicides. The benefit-of-doubt rule does not apply when the Board finds that a preponderance of the evidence is against the claim. *Ortiz v. Principi*, 274 F. 3d 1361, 1365 (Fed. Cir. 2001).

ORDER

Service connection for ischemic heart disease (coronary artery disease) is denied.

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ERIC S. LEBOFF
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).