Walker Panel Materials

J. Kramer, VLJ

Language usage Tips

In the real world, nobody uses the phrase "continuity of symptomatology" as described in C.F.R. § 3.303(b). Keep in mind that it is a term of art that has been entered into the regulatory scheme by VA to implement the law. The *Walker* decision has actually done us a favor by creating a bright line delineating when we may use the term "continuity of symptomatology." For simplicity sake, it is recommended that the use of the phrase "continuity of symptomatology" be restricted to the analysis of "chronic diseases" listed under C.F.R. § 3.309(a).

Of course, there are many diseases or disabilities that the Courts have pointed out are readily identifiable to the lay person and may be service-connected with heavy reliance on lay evidence when applying the provisions of 38 U.S.C.A. § 1154(a) and C.F.R. § 3.303(a) in conjunction with the principles of service under 38 U.S.C.A. §§ 1110, 1131. Examples may include such maladies that are well-known or otherwise observable to the senses of the affected individual claimant, such as: Tinnitus, varicose veins, dandruff, etc.

C.F.R. §§ 3.303(b), 3.309(a)	38 U.S.C.A. § 1154(a), C.F.R. § 3.303(a)
continuity of symptomatology (only for the listed "chronic diseases")	persistent symptoms recurrent symptoms frequent symptoms repeated symptoms continuous symptoms chronic symptoms

Sample Language

#1 Denial of a chronic disease (malignant tumor) not shown within one year and no symptoms shown for decades after service, so no continuity of symptomatology.

The Veteran asserts that he currently suffers from the residuals of tonsillar cancer attributable to exposure to herbicides while on active duty in Vietnam. Service connection involves many factors, but basically means that the facts, shown by the evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service, or if pre-existing such service, was aggravated therein. 38 U.S.C.A. § 1110. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of certain statutory presumptions, if applicable. 38 C.F.R. § 3.303(a). Regulations also provide that 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).

Presumptive service connection may also be granted for malignant tumors as a chronic disease, when manifested to a compensable degree within one year of separation from service. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309. A grant of service connection under 38 C.F.R. § 3.303(b) within the presumptive period does not require proof of the nexus element; it is presumed. With chronic disease shown as such in service so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date are service connected, unless clearly attributable to intercurrent causes. 38 C.F.R. § 3.303(b). For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. *Id*. When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. *Id*. For this purpose, a chronic disease is one listed under 38 C.F.R. § 3.309(a), and the term "continuity of symptomatology" as an alternative method of demonstrating service connection applies only to these "chronic diseases." *See Walker v. Shinseki*, 708 F.3d 1331, 1338-39 (Fed. Cir. 2013) (holding that the term "chronic disease" in 38 C.F.R. § 3.303(b) is limited to a chronic disease listed at 38 C.F.R. § 3.309(a)).

In this case, the law provides a presumption of service connection for certain diseases, including respiratory cancers (cancer of the lung, bronchus, larynx, or trachea), which become manifest after separation from service in veterans who served in the Republic of Vietnam during the period from January 9, 1962, and ending on May 7, 1975. 38 U.S.C.A. § 1116; 38 C.F.R. §§ 3.307(a)(6), 3.309(e). However, service connection may be granted on a direct basis for any disease (not specifically identified in 38 C.F.R. 3.309(e) but diagnosed after discharge from active duty when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d) (2013); *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

Post-service medical records reflect that the Veteran was first diagnosed and treated in December 2007 for an invasive squamous cell carcinoma of the right tonsil with extension through the underlying layer of musculature involved in mastication. This was over 35 years after separating from active duty. Therefore, the Veteran is not entitled to service connection for right tonsil carcinoma on a presumptive basis for tonsil cancer manifest to a compensable degree within one year following his discharge from active duty in January 1971. 38 C.F.R. §§ 3.303, 3.307(a)(3), 3.309(a). And as the Veteran had not had any symptoms or manifestation of the tonsil cancer until after several decades had passed since separation from service, service connection on a direct basis through continuity of symptomatology is similarly not warranted.

#2 Sinus Disability

Service connection granted based on a combination of lay and medical evidence under 38 U.S.C.A. § 1154(a) and 38 C.F.R.§ 3.303(a) (Not a Chronic Disease)

ISSUE

Entitlement to service connection for a sinus disability.

FINDING OF FACT

The evidence of record reasonably shows that the Veteran has a sinus condition related to active service. 38 U.S.C.A. §§ 1110, 1154(a), 5107, 38 C.F.R. §§ 3.102, 3.159, 3.303(a).

CONCLUSIONS OF LAW

Resolving all reasonable doubt in the Veteran's favor, the criteria for service connection for a sinus disability are met. 38 U.S.C.A. §§ 1110, 1154(a), 5107, 38 C.F.R. §§ 3.102, 3.159, 3.303(a).

Analysis

A May 2005 service treatment record entry shows treatment for post nasal drip. An August 2005 post-deployment self health assessment questionnaire reflects that the Veteran's was in Southwest Asia from September 2004 to September 2005. The Veteran indicated that his health stayed about the same or got better during this deployment. He was seen in sick call four times. The Veteran reported that he had symptoms of chronic cough, weakness, headaches, and chest pain or pressure during deployment. While deployed, the Veteran indicated that he was often exposed to vehicle or truck exhaust fumes and sand/dust. The Veteran stated that his health in general was good. He indicated that he developed a medical or dental problem during the deployment.

The Veteran was discharged in October 2005. In his March 2006 claim for VA benefits, the Veteran noted that his sinus condition began in September 2004, while in Iraq, and has continued to the present day.

An October 2006 Gulf War examination report reflects that the Veteran reported that during service he was diagnosed with upper respiratory infections and nasal polyps. He had symptoms of insomnia and nasal congestion. The Veteran underwent polypectomy at a civilian hospital on July 21, 2006. He still complains of occasional epistaxis. A November 2006 ENT examiner did not find a current sinus disability. A brain MRI in December 2008 revealed evidence of severe right maxillary sinus mucosal thickening and mild bilateral ethmoid sinus mucosal thickening, with hypoplastic change of bilateral frontal sinuses.

A July 2013 VA examination report reflects that the VA examiner reviewed the claims file. The Veteran was diagnosed with chronic sinusitis and multiple recurrent nasal polyps. The VA examiner also noted that the Veteran had rhinitis. It was noted that the Veteran had a nasal polypectomy with sinus drainage in 2006 and in 2009. A nasal endoscopy was performed and the results noted were congested mucosa and right nasal

polyp. The VA examiner opined that the Veteran's sinus disability with recurrent nasal polypectomy manifested in December 2008. The VA examiner opined that the Veteran's sinus disability was at least as likely as not due to his sinus disability that manifested in December 2008 and the current sinus and nasal condition of current nasal polyps. However, the VA examiner failed to opine whether the sinus disability that manifested in December 2008, barely 3 years after discharge, is related to the Veteran's service.

With regard to the Veteran's assertions that sinus symptoms began during active duty and have continued following service, the Board finds that the Veteran is competent and credible to report the onset and recurrent or persistent nature of symptoms of his sinus symptoms. *See Barr v. Nicholson*, 21 Vet. App. 303 (2007) (lay testimony is competent to establish the presence of observable symptomatology that is not medical in nature); *see also Layno v. Brown*, 6 Vet. App. 465, 469-470 (1994) (finding lay testimony competent when it concerns features or symptoms of injury or illness). While the Veteran's currently diagnosed sinusitis is not a chronic disease listed under 38 C.F.R. § 3.309(a), the Board nonetheless finds that the Veteran had sinus symptoms in service and that those symptoms have more or less persisted since discharge from service. Under 38 U.S.C.A. § 1154(a) and 38 C.F.R. § 3.303(a), this is a permissible finding, as it may be with any injury or disease a Veteran may assert is related to service. See *Buchanan v. Nicholson*, 451 F.3d. 1331(Fed. Cir. 2006). In this regard, the Veteran was treated in service for post-nasal drip, and then shortly after discharge from service, in March 2006 and again in October 2006. The Veteran has continued to report sinus problems since service. Based on the Veteran's competent and credible statements, the May 2005 service treatment record, treatment for sinus conditions contemporaneous to the Veteran's discharge from service and thereafter, and resolving all reasonable doubt in favor of the Veteran, the Board finds that the Veteran's current sinus disability began during service, and as such service connection is warranted. 38 U.S.C.A. §§ 1154(a), 5107(b); 38 C.F.R. §§3.102, 3.303(a).

J. Parker, VLJ

- Sample language for BVA decisions for when the disability is **not** on the presumptive 3.309(a) "chronic" disease list:

"Findings of Fact" section: For non-chronic diseases, generally, you will need to make three findings of fact for each disability – findings that mirror the three "elements" of service connection: 1) in-service injury or disease, 2) current disability, and 3) nexus to service.

Sample FOF section:

1. The Veteran sustained a low back strain injury in service. [or did not sustain a back injury or disease during service]
2. The Veteran has a current lumbar spine disability of degenerative disc disease.
3. The Veteran's lumbar spine disability is not causally or etiologically related to service, to include any injury or event therein.

Suggested SC boilerplate:

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military, naval, or air service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). 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). The condition at issue is not a "chronic disease" listed under 38 C.F.R. § 3.309(a); therefore, the presumptive provisions based on "chronic" symptoms in service and "continuous" symptoms since service at 38 C.F.R. § 3.303(b) do not apply. *Walker v. Shinseki,* 708 F.3d 1331, 1338-39 (Fed. Cir. 2013) (Fed. Cir. 2013).

As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West*, 12 Vet. App. 247, 253 (1999), *citing Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), aff'd, 78 F.3d 604 (Fed. Cir. 1996).

- Sample language for BVA decisions for when the disability **is** on the presumptive 3.309(a) "chronic" disease list:

"Findings of Fact" section: For chronic diseases, generally, you will need to make up to six findings of fact for each disability. These findings pertain to whether:

1) symptoms were "chronic" in service;
2) the disability manifested to 10% within one year of service;
3) the veteran experienced "continuous" symptoms since service separation;
4) there was an in-service injury or disease;
5) there is a current disability; and
6) there is a nexus to service.

Sample FOF section (use some or all as applicable):

1. The Veteran sustained a low back injury in service.
2. Symptoms of a low back disorder [were/were not] chronic in service.
3. Symptoms of a low back disorder [were/were not] continuous since service.
4. Arthritis of the lumbar spine did not manifest to a compensable degree within one year of service separation.
5. The Veteran has a current lumbar spine disability of degenerative joint disease.
6. The Veteran's lumbar spine arthritis [is/is not] causally or etiologically related to service, to include any injury or event therein.

Suggested SC boilerplate:

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military, naval, or air service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). 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). As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West*, 12 Vet. App. 247,

253 (1999), *citing Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), aff'd, 78 F.3d 604 (Fed. Cir. 1996).

In this case, the disorder at issue is a "chronic disease" listed under 38 C.F.R. § 3.309(a); therefore, 38 C.F.R. § 3.303(b) applies. 708 F.3d 1331, 1338-39 (Fed. Cir. 2013) (Fed. Cir. 2013). Where the evidence shows a "chronic disease" in service or "continuity of symptoms" after service, the disease shall be presumed to have been incurred in service. For the showing of "chronic" disease in service, there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. With chronic disease as such in service, subsequent manifestations of the same chronic disease at any later date, however remote, are service-connected, unless clearly attributable to intercurrent causes. If a condition noted during service is not shown to be chronic, then generally, a showing of "continuity of symptoms" after service is required for service connection. 38 C.F.R. § 3.303(b).

Additionally, where a veteran served ninety days or more of active service, and certain chronic diseases, such as [ ], become manifest to a degree of 10 percent or more within one year after the date of separation from such service, such disease shall be presumed to have been incurred in service, even though there is no evidence of such disease during the period of service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309(a). While the disease need not be diagnosed within the presumption period, it must be shown, by acceptable lay or medical evidence, that there were characteristic manifestations of the disease to the required degree during that time. *Id*.