



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF

████████████████████
Represented by
Gordon A. Graham, Agent

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Docket No. 211118-199054
Advanced on the Docket

DATE: April 19, 2022

ORDER

Entitlement to an effective date of September 11, 2002, for the grant of entitlement to service connection of Parkinson's disease is granted.

FINDINGS OF FACT

1. The Veteran served in the Republic of Vietnam, is presumed to have been exposed to herbicides, and has a diagnosis of a covered herbicide disease.
2. On September 11, 2002, VA received the Veteran's claim to establish service connection for "agent orange exposure," described as "tingling, numbness, pain + twitching in arms, hands, legs + feet. Tremoring hands."
3. The September 11, 2002, claim is to be liberally construed as a claim for entitlement to service connection for Parkinson's disease.

CONCLUSION OF LAW

The criteria are met for an effective date of September 11, 2002, but no earlier, for service connection for Parkinson's disease. 38 U.S.C. §§ 5107, 5110; 38 C.F.R. §§ 3.114, 3.151, 3.155, 3.400, 3.816.

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from July 1966 to July 1970.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a July 2021 Department of Veterans Affairs (VA) regional office (RO) rating decision.

In November 2021, the Veteran appealed the decision to the Board by requesting the evidence review docket pursuant to the Appeals Modernization Act. 38 C.F.R. § 19.2 (d). Under evidence review, the Board may only review documents associated with the claims file at the time of the July 2021 rating decision and new documents submitted within 90 days of the Form 10182.

Entitlement to an effective date earlier than June 18, 2010, for the grant of service connection for Parkinson's disease

The Veteran served in the Republic of Vietnam during the Vietnam War and is presumed to have been exposed to herbicide agents during such service.

The Veteran filed a claim on September 11, 2002, to establish service connection for "agent orange exposure," described as "tingling, numbness, pain + twitching in arms, hands, legs + feet. Tremoring hands." This claim was denied by a March 2003 rating decision.

In June 2010, the Veteran filed a subsequent claim for myoclonus and submitted a private positive opinion showing that the Veteran's tremors were early stages of Parkinson's disease. An October 2011 rating decision granted entitlement to service connection for Parkinson's disease, and after lengthy development, a July 2021 rating decision assigned the current effective date of June 18, 2010.

The Veteran asserts that he is entitled to an earlier effective date than June 18, 2010, arguing that his September 11, 2002, claim for "agent orange exposure," described as "tingling, numbness, pain + twitching in arms, hands, legs + feet. Tremoring hands," should be liberally construed as a claim for Parkinson's disease and serve as the effective date of this disability.

Except as otherwise provided, the effective date of an evaluation and award of service connection shall be the later of the day following separation from active service or the date entitlement arose if the claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later (emphasis added). 38 U.S.C. § 5110; 38 C.F.R. § 3.400(b)(2).

If the award of compensation is due to a liberalizing change in the law or an administrative issue, the effective date of the award shall be fixed in accordance with the facts, but shall not be earlier than the date of the change in the law. In no event shall the increase be retroactive for more than one year from the date of application for the award or the date of administrative determination, whichever is earlier. *See* 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114(a). If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue. 38 C.F.R. § 3.114(a)(1). If a claim is reviewed at the claimant's request more than one year after the effective date of the law, the effective date of the award may be one year prior to the date of receipt of such request. 38 C.F.R. § 3.114(a)(3).

In cases involving presumptive service connection based on exposure to herbicide agents, there is an exception to the provisions set forth above. Pursuant to a 2002 decision by the United States Court of Appeals for the Ninth Circuit, VA established regulations pertaining to effective dates for awards of service connection for diseases on the basis that they are due to exposure to herbicides. *Nehmer v. United States Veterans Administration*, 284 F.3d 158, 1161 (9th Cir. 2002) (*Nehmer III*). A *Nehmer* class member is defined as a Vietnam veteran who has a covered herbicide disease or a surviving spouse of a deceased Vietnam veteran who died from a covered herbicide disease. 38 C.F.R. § 3.816(b)(1)(i). The term "covered herbicide disease" includes Parkinson's disease. 38 C.F.R. § 3.309(e). Basically under *Nehmer*, if compensation is awarded for a covered herbicide disease and (a) there was a prior VA denial of service connection for "the same covered herbicide disease" between September 1985 and May 1989, or (b) a claim for the covered herbicide disease was pending before VA on May 3, 1989 or was filed between that date and the effective date of the statute or regulation

establishing a presumption of service connection for the disease, or (c) or a claim referred to in (a) or (b) was filed within one year following the date of the class member's separation from service, specific guidelines governing effective dates of such awards apply; otherwise, the effective date of the award is determined under 38 C.F.R. §§ 3.114, 3.400.

The Veteran served in the Republic of Vietnam and has Parkinson's disease. Accordingly, he is a "*Nehmer* class member" as defined in the law. Parkinson's disease was added to the list of presumptive herbicide agent-related diseases under 38 C.F.R. § 3.309(e), effective August 31, 2010. *See* 75 Fed. Reg. 53,702 (August 31, 2010).

Accordingly, the pertinent inquiry focuses on whether VA received a claim for Parkinson's disease between May 3, 1989, and August 31, 2010.

As referenced above, the Veteran filed a claim on September 11, 2002, to establish service connection for "agent orange exposure," described as "tingling, numbness, pain + twitching in arms, hands, legs + feet. Tremoring hands." For the reasons discussed below, the Board construes this claim as one for Parkinson's disease thereby satisfying the *Nehmer* criteria.

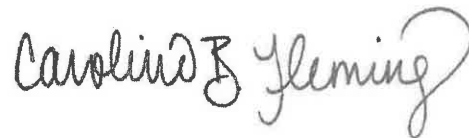
A November 2021 private opinion is of record which links the Veteran's current Parkinson's disease diagnosis with his lay descriptions of symptoms from September 2002. The private physician opined that the medical and lay documentation support the onset of Parkinson's disease from at least 2000, when he was first noted to have tremors. The examiner noted the November 2002 lay reports of "tingling and tremors," November 2011 lay reports of "impaired balance, stooped posture, and problems with memory," and December 2000 and October 2001 medical documentation of tremors. Further, a December 2021 VA examiner stated that the Veteran's Parkinson's symptoms "began in 1990" and required medication as early as 2000.

Pursuant to *Clemons v Shinseki*, 23 Vet. App. 1 (2009), when the Veteran makes a claim for service connection, he is seeking it for symptoms regardless of how these symptoms are diagnosed or labeled. After reviewing the above medical

information, the Board finds that the Veteran was making a claim for entitlement to service connection encompassing Parkinson's disease. While the Veteran does not have the medical knowledge or training needed to make a diagnosis of Parkinson's disease, he is competent to describe his tremors, balance problems, posture, and memory issues as those are capable of lay observation, *Layno v. Brown*, 6 Vet. App. 465 (1994). Furthermore, these lay descriptions of symptoms, along with contemporaneous medical notes from the time of the original filing, provided the basis of the November 2021 private examiner's opinion that the Veteran's Parkinson's disease onset in 2000.

In light of the foregoing, and consistent with *Clemons*, VA is deemed to have received the Veteran's Parkinson's disease claim on September 11, 2002. As such, the Veteran has satisfied the criteria set forth in *Nehmer* and 38 C.F.R. § 3.816.

Accordingly, based upon the above analysis, and interpreting the evidence in the light most favorable to the Veteran, the Board finds that an effective date of September 11, 2002, but no earlier, for service connection for Parkinson's disease is warranted. *See* 38 U.S.C. § 5107(a); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990). To this extent, the claim is granted.



Caroline B. Fleming
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

C. Finelli, Associate Counsel

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.