

Date: May 2, 1997

VAOPGCPREC 18-97

From: General Counsel (022)

Subj: Presumptive Service Connection for Diseases Associated with  
Herbicide Exposure--Metastasized Cancer

To: Secretary (00)

QUESTION PRESENTED:

Does the presumption of service connection established in 38 U.S.C. § 1116 and 38 C.F.R. §§ 3.307(a)(6) and 3.309(e) for diseases associated with herbicide exposure apply to both primary cancers and cancers resulting from metastasis?

DISCUSSION:

1. The Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, established statutory presumptions of service connection for three diseases becoming manifest to a degree of disability of 10 percent or more in veterans who served in the Republic of Vietnam during the Vietnam era. 38 U.S.C. § 1116(a). The Agent Orange Act further directed the Department of Veterans Affairs (VA) to make determinations as to whether presumptions should be established for any other diseases based on the existence of a "positive association" between exposure to an herbicide agent and the occurrence of such diseases in humans. 38 U.S.C. § 1116(b). In making its determinations, VA must consider periodic reports prepared by the National Academy of Sciences (NAS), pursuant to the Agent Orange Act, reviewing and evaluating the scientific evidence regarding the health effects of herbicide exposure and any other sound medical and scientific evidence available to VA. 38 U.S.C. § 1116(b)(2). Pursuant to the Agent Orange Act, VA has established regulatory presumptions of service connection for six additional diseases not identified in the Agent Orange Act and for the three diseases identified in that act. 38 C.F.R. § 3.309(e). Congress has amended 38 U.S.C. § 1116 to codify the presumptions for four of the additional diseases for which presumptions were established by regulation. Pub. L. No. 103-446, § 505, 108 Stat. 4645, 4664 (1994).

2. The diseases which are considered to be associated with herbicide exposure under 38 C.F.R. § 3.309(e) include several types of cancers, including prostate cancer and respiratory

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cancers (i.e., cancer of the lung, bronchus, larynx, or trachea). It is well established that a primary cancer of one organ may metastasize into other organs, causing secondary tumors in those other organs. "Metastasis" is "the transfer of disease from one organ or part to another not directly connected with it." Dorland's Illustrated Medical Dictionary 1023 (28th ed. 1994). You have asked whether a cancer listed in 38 C.F.R. § 3.309(e) which is caused by metastasis from cancer of another organ would be presumptively service connected in a veteran who served in the Republic of Vietnam during the Vietnam era.

3. Section 1116(a)(1) of title 38, United States Code, states that "[f]or purposes of section 1110 of this title, and subject to section 1113 of this title," the diseases specified in the Agent Orange Act and VA's implementing regulations "shall be considered to have been incurred in or aggravated by [service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975], notwithstanding that there is no record of evidence of such disease during the period of such service." Similarly, 38 C.F.R. § 3.307(a) states that "a disease associated with exposure to certain herbicide agents listed in [38 C.F.R.] § 3.309 will be considered to have been incurred in service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service." In identifying the types of cancer that will be presumptively service connected, the statute and regulations make no distinction based on whether those cancers are primary cancers or are the result of metastasis of cancers of other organs.

4. The presumption of service connection under the Agent Orange Act and VA's implementing regulations is an evidentiary presumption that a disease resulted from exposure to an herbicide agent in service in the Republic of Vietnam during the specified time period, notwithstanding the absence of direct evidence that a particular veteran's disease was in fact caused by such exposure. That presumption is expressly made "subject to section 1113" of title 38, United States Code. 38 U.S.C. § 1116(a)(1). Section 1113, entitled "Presumptions rebuttable," provides in pertinent part:

Where there is affirmative evidence to the contrary, or evidence to establish that an intercurrent injury or disease which is a recognized cause of any of the diseases or disabilities within the purview of section . . . 1116 . . . of this title, has been suffered between the date of separation from service and the onset of any such diseases or disabilities

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. . . service connection pursuant to section . . . 1116 of this title . . . will not be in order.

38 U.S.C. § 1113(a). Accordingly, the presumption that a particular disease was caused by in-service exposure to an herbicide agent may be rebutted by "affirmative evidence to the contrary" or evidence of post-service incurrence of a disease which is a recognized cause of the veteran's disability. Where such evidence exists, presumptive service connection under 38 U.S.C. § 1116 "will not be in order." VA regulations provide further guidance as to the evidence necessary to rebut the presumption of service connection:

Evidence which may be considered in rebuttal of service incurrence of a disease listed in [38 C.F.R.] § 3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression "affirmative evidence to the contrary" will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the consideration of all evidence of record, support a conclusion that the disease was not incurred in service.

38 C.F.R. § 3.307(d).

5. With regard to the presumption of service connection under the Agent Orange Act, the phrase "affirmative evidence to the contrary" in 38 U.S.C. § 1113(a) necessarily refers to affirmative evidence rebutting the evidentiary presumption that a veteran's disease resulted from exposure to an herbicide agent during service. Evidence that a disease presumed to be associated with herbicide exposure, such as lung or prostate cancer, resulted from a cause other than herbicide exposure in service would be such "affirmative evidence to the contrary" within the meaning of 38 U.S.C. § 1113(a). Accordingly, evi-

dence that a presumptively service-connected cancer was caused by metastasis from a cancer not associated with herbicide exposure may, in our view, constitute affirmative evidence to rebut the presumption that the disease was caused by in-service herbicide exposure. By definition, metastasis would represent the progress of the nonservice-connected primary cancer, and evidence that a secondary cancer resulted from metastasis of a primary cancer would be affirmative evidence that the secondary cancer was not the result of some other cause, such as herbicide exposure.

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6. In addition to rebuttal by "affirmative evidence to the contrary," the presumption of service connection may be rebutted by evidence that "an intercurrent injury or disease which is a recognized cause of any of the diseases or disabilities within the purview of section . . . 1116" was suffered between the date of separation from service and the date of onset of such disease or disability. 38 U.S.C. § 1113(a). Because it is recognized that cancer of one organ may metastasize and cause cancer in other organs, evidence that a cancer not associated with herbicide exposure was suffered between the date of separation from service and the date of onset of a cancer listed in 38 C.F.R. § 3.309(e) may be sufficient, based on medical principles, to rebut the presumption of service connection. Consistent with the principles stated in 38 C.F.R. § 3.307(d), judgment must be exercised in each case as to whether the evidence of an intercurrent cancer is sufficient to rebut the presumption of service connection. Consideration should be given to the types of cancer and the organs involved to determine whether the intercurrent cancer is a recognized cause of the later-manifested cancer.

7. In VAOPGCPREC 9-90 (O.G.C. Prec. 9-90), we addressed a similar question as to whether the presumption of service connection under 38 U.S.C. § 312(c) (now § 1112(c)) for radiogenic diseases applies when there is affirmative evidence that a particular veteran's disease was caused by metastasis from a nonradiogenic cancer. We concluded that, in light of 38 U.S.C. § 313(a) (now § 1113(a)), service connection could not be established for a disease for which a presumption of service connection is available in the case of a radiation-exposed veteran, if it is determined that the disease resulted from metastasis of a nonradiogenic cancer. See also *Ramey v. Brown*, 9 Vet. App. 40, 44 (1996) (upholding denial of service connection for cancer listed in 38 U.S.C. § 1112(c) in light of evidence that that cancer resulted from metastasis of cancer not listed in that statute). Nothing in the Agent Orange

Act or VA's regulations would suggest a different result with respect to the presumption under 38 U.S.C. § 1116(a) for diseases associated with herbicide exposure. Accordingly, evidence sufficient to support the conclusion that a disease listed in 38 C.F.R. § 3.309(e) was caused by metastasis of a cancer not associated with herbicide exposure will constitute "affirmative evidence" to rebut the presumption of service connection under 38 U.S.C. § 1116 and implementing regulations.

8. VA's determinations that there is a "positive association" between herbicide exposure and particular diseases have been

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based primarily upon the reports prepared by the NAS, pursuant to the Agent Orange Act, reviewing and evaluating the available scientific evidence regarding such associations. See 61 Fed. Reg. 41,368 (1996); 59 Fed. Reg. 5161 (1994); 58 Fed. Reg. 50,528 (1993). In assessing the scientific evidence, the NAS focused on evidence of associations between herbicide exposure and primary cancer, and its conclusions regarding specific cancers must be construed to reflect the evidence concerning only the primary form of the cancer and not secondary cancers metastasized from cancers of other organs. The NAS reports indicated that the categories of cancers discussed in those reports correspond to the categories identified in the International Classification of Diseases, 9th Revision (ICD-9), a classification system published by the World Health Organization. See, e.g., Institute of Medicine, Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam 433 (1994). The ICD-9 categorizes most cancers under the heading "Malignant neoplasms, stated or presumed to be primary". See Commission on Professional and Hospital Activities, The International Classification of Diseases, 9th Revision, Clinical Modification, Annotated 90 (8th ed. 1991) (disease codes 140-195 and 200-208). Separate identification codes are given for "Malignant neoplasms, stated or presumed to be secondary." See *id.* at 90 (disease codes 196-198). With respect to each specific cancer discussed in its reports, the NAS identified the corresponding ICD-9 code for cancers stated or presumed to be primary. See, e.g., Institute of Medicine, Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam 441 (summary table), 460 (respiratory cancers), 513 (prostate cancer) (1994).

9. Consistent with its obligation to evaluate the evidence regarding statistical associations between herbicide exposures

and specific diseases, the NAS properly limited its analysis to the primary form of each cancer discussed in its reports and did not consider secondary cancers metastasized from cancers of other organs. VA's determinations, based primarily upon the NAS reports, to establish presumptions of service connection for specific cancers thus reflect a purpose to establish presumptions of service connection for the primary forms of those cancers, but not for secondary forms of those cancers resulting from metastasis of other cancers which are not associated with herbicide exposure.

HELD:

Presumptive service connection may not be established under 38 U.S.C. § 1116 and 38 C.F.R. § 3.307(a) for a cancer listed <Page 6>

in 38 C.F.R. § 3.309(e) as being associated with herbicide exposure, if the cancer developed as the result of metastasis of a cancer which is not associated with herbicide exposure. Evidence sufficient to support the conclusion that a cancer listed in section 3.309(e) resulted from metastasis of a cancer not associated with herbicide exposure will constitute "affirmative evidence" to rebut the presumption of service connection for purposes of 38 U.S.C. § 1113(a) and 38 C.F.R. § 3.307(d). Further, evidence that a veteran incurred a form of cancer which is a recognized cause, by means of metastasis, of a cancer listed in 38 C.F.R. § 3.309(e) between the date of separation from service and the date of onset of the cancer listed in section 3.309(e) may be sufficient, under 38 U.S.C. § 1113(a) and 38 C.F.R. § 3.307(d), to rebut the presumption of service connection.

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