



## **BOARD OF VETERANS' APPEALS**

**FOR THE SECRETARY OF VETERANS AFFAIRS**

IN THE APPEAL OF

████████████████████  
Represented by  
Michael J. Wishnie, Attorney

████████████████████  
Docket No. 210104-130980  
**Advanced on the Docket**

DATE: September 21, 2022

### **ORDER**

Service connection for B-cell non-Hodgkin's lymphoma is granted.

### **FINDING OF FACT**

The competent and credible lay and medical evidence of record establishes that, in the Veteran's individual case, his B-cell non-Hodgkin's lymphoma is related to an injury, illness, or disease during his active military service.

### **CONCLUSION OF LAW**

The criteria for service connection for B-cell non-Hodgkin's lymphoma have been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.303.

### **REASONS AND BASES FOR FINDING AND CONCLUSION**

The Veteran served honorably in the Air Force from October 1963 to September 1967.

In October 2019, the Veteran submitted a VA Form 20-0996, Decision Review Request: Higher-Level Review (HLR), and requested review of an August 2019

rating decision. In January 2020, the agency of original jurisdiction (AOJ) issued the HLR rating decision on appeal, which considered the evidence of record at the time of the prior August 2019 decision. In the January 2021 VA Form 10182, Decision Review Request: Board Appeal, the Veteran elected the Hearing docket. The Board may only consider the evidence of record at the time of the August 2019 rating decision on appeal, as well as any evidence submitted by the Veteran or his representative at the February 2022 Board hearing or within 90 days following the hearing. 38 C.F.R. § 20.302(a).

A virtual Board hearing was held in February 2022; a copy of the hearing transcript has been added to the record. The Board acknowledges the Veteran's representative's May 2022 request to amend the hearing transcript. The Board concurs with the changes requested by the representative; the transcript will be amended.

This case has been advanced on the docket pursuant to 38 U.S.C. § 7107 (b).

**Service connection for B-cell non-Hodgkin's lymphoma is granted.**

The Veteran asserts that he has B-cell non-Hodgkin's lymphoma related to his active-duty service. Specifically, he asserts that B-cell non-Hodgkin's lymphoma was caused by his exposure to radiation during his active-duty service when he was assigned to cleanup pieces of airplane and/or parts following a B-52 plane crash that resulted in the explosion of nuclear weapons in Palomares, Spain. *See* August 2018 lay statement; *see also* February 2022 Board Transcript. The Veteran also asserts that he consumed local produce in the weeks following the crash and slept near the impact site, further exposing him to ionizing radiation. *Id.*; *see also* January 2021 Statement from Veteran's Representative, resubmitted May 2022.

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. § 3.303. The three-element test for service connection requires evidence of: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the current disability and the in-service disease or injury. *Shedden v. Principi*, 381 F.3d 1163, 1166 -67 (Fed. Cir. 2004).

Service connection for a disability that is claimed to be attributable to exposure to ionizing radiation during service can be demonstrated by three different methods. *See Davis v. Brown*, 10 Vet. App. 209, 211 (1997). First, there are certain types of cancers that are presumptively service-connected specific to radiation-exposed veterans. 38 U.S.C. § 1112(c); 38 C.F.R. § 3.309(d). Second, “radiogenic diseases” may be service-connected pursuant to 38 C.F.R. § 3.311. Third, service connection may be granted under 38 C.F.R. § 3.303(d) when it is established that the disease diagnosed after discharge is the result of exposure to ionizing radiation during active service. *Combee v. Brown*, 34 F.3d 1039 (Fed. Cir. 1994).

In the August 2019 rating decision, the AOJ found that the Veteran’s disability is a condition that is presumptively linked to radiation exposure, and that the claimed condition is a chronic disease which may be presumptively linked to military service per 38 C.F.R. § 3.309. In the January 2020 rating decision, the AOJ found that the Veteran performed service in Palomares, Spain, with potential exposure to ionizing radiation from duties during cleanup of nuclear waste debris of a plane crash in January 1966. Under the AMA, the Board is bound by favorable findings made by the AOJ.

In this case, medical records indicate that the Veteran was diagnosed with B-cell non-Hodgkin’s lymphoma. A currently diagnosed disability is thus of record. Additionally, the evidence of record indicates that the Veteran was exposed to radiation during his active-duty service. Accordingly, an in-service injury has been shown.

As the record contains evidence of a current disability, and evidence of an in-service injury or disease, what remains to be established is whether there is a nexus between the diagnosed B-cell non-Hodgkin’s lymphoma and his military service.

There is conflicting evidence of record as to whether the Veteran’s B-cell non-Hodgkin’s lymphoma is related to his active military service. In a September 2018 “Physician’s Nexus Statement” the Veteran’s treating oncologist, Dr. S.D., remarked that the Veteran’s exposure to carcinogens and radioactive materials put him at risk for lymphoma. As his treating physician, the oncologist confirmed that he is familiar with the Veteran’s medical history and has reviewed the Veteran’s

service treatment records as well as treatment records from other private physicians. The oncologist affirmatively responded to a statement that the Veteran's claimed disability was "most likely caused by or a result of" his military service, explaining that his exposure to chemicals while on active duty played in a role in the development of cancer.

An August 2019 memorandum from the VA Director of Compensation Service opined, however, that there was no reasonable possibility that the Veteran's B-cell non-Hodgkin's lymphoma resulted from exposure to ionizing radiation in service. The memorandum noted that a query of the occupational exposure monitoring records in the USAF Master Radiation Exposure Registry (MRER) revealed no external radiation exposure data for the Veteran, but that the Air Force Safety Center (AFSC) reviewed the Veteran's records and determined that he had the potential to be exposed to ionizing radiation from his duties during cleanup of nuclear weapon debris from the January 1966 crash at Palomares, Spain. Based on this potential, the AFSC provided an estimate mean and median committed dose equivalent to precursor B-cells of 3.4 rem and the dose to the skin was estimated at 40 mrem, which was deemed negligible for all organs. The memorandum acknowledged that the Veteran had not family history of cancer or leukemia, but also stated that the Veteran's military service did not include participation in any radiation risk activity as defined in 3.309(d).

At the February 2022 Board hearing, the Veteran testified that while in Palomares, he observed that a Geiger counter registered his radiation levels "all the way to the right," to the extent that he was informed that he was highly contaminated. He describes being covered in a "fine white powder due to windy conditions" and stated that he was directed to turn in his uniform due to the contamination. *Id.*; *see also* January 2021 statement, resubmitted May 2022.

Additionally, at the February 2022 Board hearing, two expert witnesses presented testimony on a number of topics related to the Veteran's claim. The first witness, Dr. Frank N. von Hippel, testified that his dose estimations were different than those relied on by VA in determining radiation exposure for Palomares, and that based on his own estimations, there was a likelihood of connection between radiogenic cancers and his dose estimates for the Veteran. The second witness, Dr.

Jan Beyea, Ph.D., similarly testified to his own estimations of the approximate radiation dosage that the Veteran received in the context of his military service duties, and ultimately concluded that it was as likely as not that the Veteran's lymphoma was caused by his exposure to radiation in Palomares. The Board finds the testimony of both expert witnesses to be both credible and probative in addressing this individual Veteran's specific exposure to radiation in service, and the connection between such a radiation dosage and the Veteran's diagnosed lymphoma.

The claimant is entitled to the benefit of the doubt when there is an approximate balance of positive and negative evidence on any issue material to the claim. 38 U.S.C. § 5107 (b); 38 C.F.R. § 3.102. When the evidence supports the claim or is in relative equipoise, the claim will be granted. *Gilbert v. Derwinski*, 1 Vet. App. 49, 54-55 (1990). Here, the Board finds that the aforementioned evidence is sufficient to place the relevant evidence, at a minimum, in a state of equipoise as to whether the Veteran's B-cell non-Hodgkin lymphoma was related to his active military service. *See* 38 C.F.R. § 3.303(a), (d). Pursuant to the "benefit-of-the-doubt" rule, where there is "an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter," the Veteran shall prevail upon the issue. 38 U.S.C. § 5107. Accordingly, the Board finds that service connection for B-cell non-Hodgkin lymphoma is warranted. *See* 38 U.S.C. § 5107; 38 C.F.R. § 3.102.



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T. Booker

