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ORDER

An effective date earlier than September 6, 2016 for the award of service connection for small cell lung cancer and malignant pleural effusion (collectively referred to as "lung cancer") is denied.

REMAND

The issue of an initial rating greater than 20 percent for service-connected diabetes mellitus type II (DM) from April 6, 2005 to November 23, 2017, to include separate ratings for diabetic complications, is remanded.

The issue of service connection for ischemic heart disease (IHD) (claimed as atrial fibrillation (AFib), congestive heart failure (CHF), coronary artery disease (CAD), and abdominal aortic aneurysm (AAA)), is remanded.

The issue of entitlement to special monthly compensation based on the need for regular aid and attendance ("SMC(l)") from September 6, 2016 to November 23, 2017 is raised by the record and remanded.

FINDING OF FACT

The earliest effective date for the award of service connection for lung cancer is November 22, 2016, the date the Veteran's claim was received.

CONCLUSION OF LAW

The criteria for an effective date earlier than September 6, 2016 for the award of service connection for lung cancer have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5108, 5110; 38 C.F.R. §§ 3.156, 3.158, 3.160, 3.400.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active service from April 1955 to September 1974, including service in the Republic of Vietnam. He died in 2017 and the appellant is his surviving spouse.

In August 2022, the Board of Veterans' Appeals (Board) granted service connection for DM and remanded the issues of service connection for lung cancer and atrial fibrillation/CHF to the Agency of Original Jurisdiction (AOJ) to adjudicate the appellant's substitution request. The AOJ complied with the Board's remand instructions. *Stegall v. West*, 11 Vet. App. 268 (1998).

In an August 2022 decision, the AOJ implemented the grant of service connection for DM and assigned a 20 percent rating, effective April 6, 2005.

In a November 2022 decision, the AOJ granted service connection for lung cancer due to presumed herbicide exposure and assigned a 100 percent disability rating, effective September 6, 2016. The AOJ denied service connection for IHD.

The appellant appealed the August and November 2022 decisions and requested direct review of the evidence considered by the AOJ. In her March 2023 notice of disagreement ("NOD"), she specifically disagreed with the denial of service connection for IHD, the 20 percent evaluation for DM, and the effective date for the award of service connection for lung cancer.

As outlined in the remand section below, the issues of service connection for IHD and an increased rating for DM (including diabetic complications) are remanded for medical opinions. An earlier effective date for the award of service connection for lung cancer is

denied.

In May 2023, the appellant raised additional issues of service connection for hypertension, SMC(l), and a total disability evaluation based on individual unemployability (TDIU) under Rice v. Shinseki, 22 Vet. App. 447 (2009). She also asserts that the AOJ failed to evaluate diabetic complications when assigning the initial DM rating.

Neither the Veteran nor the appellant previously raised these issues, and the question is whether they were reasonably raised by the record at the time of the August and November 2022 decisions. In limited circumstances, pre-decisional failure to adjudicate a reasonably raised issue may be corrected by a remand. 38 C.F.R. § 20.802(a).

When the decisions on appeal were issued, the record contained evidence that, from September 6, 2016 to November 23, 2017, the Veteran's lung cancer caused significant decrease in bodily function such that he required hospice care. The record also showed treatment for diabetic neuropathy and foot conditions from April 6, 2005 to November 23, 2017. This evidence raised the issues of entitlement to SMC (l) and separate evaluations for diabetic complications, and those issues are remanded for appropriate development and adjudication.

However, consideration of TDIU under Rice and service connection for hypertension were not reasonably raised and are not properly before the Board.

When the decisions on appeal were issued, there was no pending increased rating claim to which a TDIU could attach. See Rice (A TDIU may be inferred as part of an increased rating claim when the Veteran submits, or the record reasonably raises, evidence of unemployability due to service-connected disabilities during the applicable period). Additionally, the record did not contain evidence that the Veteran was unemployable because of his service-connected DM.

The appellant asserts that VA was on notice of a potential TDIU claim in July 2022 when it received evidence that the Veteran received Title II Social Security benefits. However, the "initial entitlement date" listed is the month the Veteran became eligible for old-age retirement benefits, which is also a Title II benefit. Otherwise, the document the appellant references does not specify the entitlement and the "disability onset date" and "SSI disability payment code" fields are blank. See "SSA Profile and Benefit Data," received July 15, 2022. The SSA document is not "evidence of unemployability" sufficient to raise a Rice TDIU.

The Board further notes that the earliest possible effective date for a grant of service connection for hypertension under the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 (PACT Act) is August 10, 2022, and the Veteran died in 2017. See Pub. L. No. 117-168 § 404 (d)(2)(A)(i).

1. An effective date earlier than September 6, 2016 for the award of service connection for lung cancer is denied.

The current effective date of the award of service connection for lung cancer is September 6, 2016, the date the Veteran was diagnosed with the condition. The appellant contends that the effective date should be the date of the Veteran's April 2005 claim for service connection for a "lung condition secondary to Valley fever." For the reasons below, an effective date earlier than September 6, 2016 is denied.

Generally, the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400 (b)(2) (i) (*italics added*).

Additional rules apply to effective dates of service connection for diseases presumed to be caused by herbicide exposure. See 38 C.F.R. § 3.816; see also *Nehmer v. Veterans Admin. of the Gov't of the U.S.*, 284 F. 3d 1158, 1161 (9th Cir. 2002).

Under *Nehmer*, retroactive effective dates may apply if a veteran was denied compensation for a "covered herbicide disease" (including lung cancer) between September 25, 1985, and May 3, 1989; or if there was a claim for benefits pending before or received by VA between May 3,

1989, and the effective date of the applicable liberalizing law. See 38 C.F.R. § 3.816 (c). A claim will be considered a claim for compensation for a particular covered herbicide disease if the application and other supporting statements and submissions may reasonably be viewed, under the standards ordinarily governing compensation claims, as indicating an intent to apply for compensation for the covered herbicide disability. 38 C.F.R. § 3.816 (c)(1)–(3).

If the above criteria are met, the effective date of the award of service connection for a covered herbicide disease will be the later of the date such claim was received by VA or the date the disability arose. 38 C.F.R. § 3.816 (c)(1), (c)(2). However, if the requirements of 38 C.F.R. § 3.816 (c)(1)–(2) are not met, the effective date shall be assigned according to 38 C.F.R. §§ 3.114 and 3.400. See 38 C.F.R. § 3.816 (c)(4).

Respiratory cancers were included as a presumptive Agent Orange disease under § 3.309(e), effective June 9, 1994. See 59 Fed. Reg. 29724 (June 9, 1994).

In April 2005, the Veteran filed a claim for service connection for a "lung condition" secondary to Valley fever (coccidiomycosis) and/or asbestos exposure. He reported Agent Orange exposure in his April 2005 claim application and reported "no known disability" due to such exposure.

At an August 2005 general medical examination, a VA clinician diagnosed status post (s/p) removal of coccidiomycosis lung lesion and "increasing dyspnea on exertion."

X-ray and CT imaging from January to September 2005 showed "possible pneumonia," lung scarring "possibly" due to an old rib fracture, chronic obstructive pulmonary disease (COPD), "stable" pulmonary nodules, and "other benign processes." Imaging also showed a well-healed scar from a prior coccidiomycosis lung lesion removal without recurrence.

In a September 2005 rating decision, the A0J granted service connection for coccidiomycosis residuals and assigned a noncompensable evaluation because the condition was asymptomatic. The A0J denied service connection for a separate lung condition caused by asbestos and/or coccidiomycosis because the Veteran did not then have a current diagnosis of any chronic lung condition related to service.

The Veteran did not perfect an appeal of the September 2005 rating decision and it became final. 38 U.S.C. § 7105; 38 C.F.R. §§ 3.104 (a), 3.160(d), 3.156(b), 20.302, 20.1103.

In July 2013, the Veteran filed a claim for service connection for "Respiratory problems (lungs, bronchus)" related to Agent Orange exposure.

In July 2014, the A0J confirmed its previous denial of a "respiratory and other lung condition (previously claimed due to asbestos and valley fever, now claimed due to Agent Orange exposure)." The A0J denied the claim because the evidence did not show a current lung disability linked to military service or a diagnosed lung condition presumptively linked with herbicide exposure. The Veteran did not appeal the July 2014 rating decision and it became final.

VA received the Veterans' claim for service connection for lung cancer on November 22, 2016. For purposes of establishing an effective date, November 22, 2016 is the "date of claim" for lung cancer and the earliest effective date permitted by law. 38 C.F.R. § 3.400. The record does not contain any communication from the Veteran or his representative indicating an intent to apply for service connection for lung cancer prior November 2016.

The April 2005 and July 2013 claims for a respiratory/lung condition cannot reasonably be interpreted to include a claim for service connection for lung cancer. The Veteran was not diagnosed with lung cancer until 2016 and clinical testing prior to that date was negative for cancer. See *Boggs v. Peake*, 520 F.3d 1330 (Fed. Cir. 2008) (holding that a claim based on a distinctly diagnosed disease or injury has a different factual basis and cannot be considered the same as a previously decided claim).

An earlier effective date is not warranted based on *Nehmer*. The Veteran was not denied service connection for lung cancer from September 25, 1985, and May 3, 1989 and he did not submit a claim for service connection for lung cancer between May 3, 1989 and June 9, 1994, the effective date of the regulation adding lung cancer to the list of herbicide-related

diseases. Accordingly, 38 C.F.R. § 3.816 (c)(2) does not apply, and the effective date is determined by 38 C.F.R. §§ 3.114 and 3.400. See 38 C.F.R. § 3.816 (c)(4), above.

The appellant is not eligible for a retroactive payment under 38 C.F.R. § 3.114 because the Veteran did not have a lung cancer diagnosis at the time of the effective date of the liberalizing law (June 9, 1994).

An earlier effective date is also not warranted based on reconsideration of the April 2005 claim due to later received records showing service in Vietnam. See 38 C.F.R. § 3.156(c)(1). As noted above, the November 2016 claim is distinct from the April 2005 and July 2013 claims and does not constitute a reconsideration of those claims. Boggs. Additionally, the September 2005 and July 2014 denials of service connection for a lung condition were based on a lack of diagnosis, not a lack of qualifying Vietnam service.

The appellant asserts that the Veteran's 1975 claim for VA education benefits should be construed as an original claim for lung cancer. This assertion is without merit. None of the submissions pertaining to the 1975 claim reflect an intent to seek VA disability compensation benefits, let alone for lung cancer or a lung condition due to herbicide exposure.

The appellant notes a July 2011 VA memorandum indicating that April 6, 2005 "is the earliest date of claim for Nehmer purposes was received by VA." She also notes that the RO assigned an effective date for the Veteran's service-connected DM based on the April 2005 claim.

Unlike IHD and DM, the Veteran (and later, the appellant) have not continuously pursued a claim for lung cancer since April 2005. Testing in 2005 showed the Veteran did not have lung cancer and the condition was not diagnosed until 2016. The Board further notes that the July 2011 memorandum was prepared in connection with the separate claim for IHD. See December 20, 2021 Rating Decision.

As the current effective date of September 6, 2016 is earlier than the date of claim for lung cancer (November 22, 2016), there is no basis in the law to grant an earlier effective date. See 38 C.F.R. § 3.400, above (the effective date of an award for service connection is the date entitlement arose or the date of claim, whichever is later). An effective date earlier than September 6, 2016 is denied.

The evidence for and against the claim is not approximately balanced and there is no doubt to resolve. Lynch.

REASONS FOR REMAND

2. The issue of an initial rating greater than 20 percent for service-connected DM from April 6, 2005 to November 23, 2017, to include separate ratings for diabetic complications, is remanded.

3. The issue of service connection for IHD (claimed as AFib, CHF, CAD, and AAA) due to herbicide exposure and/or service-connected DM, is remanded.

4. The issue of entitlement to SMC(l) from September 6, 2016 to November 23, 2017 is remanded.

1. BACKGROUND FOR THE DECISION REVIEW OPERATIONS CENTER (DROC):

The issue of an increased rating for DM is remanded for a medical opinion addressing whether separate evaluations are warranted for diabetic complications. 38 C.F.R. § 4.119, DC 7913. When the RO assigned the initial DM rating in August 2022, medical records showed treatment for diabetic peripheral neuropathy and foot conditions from April 2005 to November 2017. Failing to consider these and other possible diabetic complications was a pre-decisional regulatory duty error. 38 C.F.R. §§ 3.155(d)(2); Bailey v. Wilkie, 33 Vet. App. 188 (2021).

The issue of service connection for IHD (claimed as Afib, CHF, CAD, and AAA) is remanded for a medical opinion addressing whether the Veteran's claimed heart conditions:

(1) fall within the medical definition of IHD, `and/or;

(2) were caused by his service-connected DM. The Veteran was not afforded a VA heart examination/opinion during his lifetime and a medical opinion is necessary to decide the claim.

Remand is also necessary to attempt to obtain outstanding private medical records related to a 2004 hospitalization for CHF.

As noted above, the issue of entitlement to SMC(l) from September 6, 2016 to November 23, 2017 due to service-connected lung cancer was reasonably raised by the record at the time of the November 2022 rating decision. The issue is remanded for appropriate development.

THE REMAND DIRECTIVES FOLLOW.

2. OBTAIN MEDICAL RECORDS:

Obtain all outstanding records pertaining to the Veteran's December 2004 hospitalization for CHF at St. Clare Hospital in Hoquiam. These records are referenced in a 2005 VA examination but the claim file does not reflect any attempt to obtain them was made.

The DROC must document its attempts in the claim file. If the records are unavailable, or the DROC finds that further attempts to obtain the records would be futile, the claims file should be annotated to reflect that fact.

3. OBTAIN MEDICAL OPINIONS:

(a.) DM AND DIABETIC COMPLICATIONS:

Have a qualified VA clinician review the file and provide a fully explained opinion as to the following:

i. IDENTIFY all complications of the Veteran's service-connected DM from April 4, 2005 to November 23, 2017.

ii. For EACH complication identified, provide an opinion on its severity, including functional limitations, from April 4, 2005 to November 23, 2017.

The examiner must review the record as found in VA treatment reports and the electronic file. The record is summarized below:

In October 1999, the Veteran endorsed chronic swollen feet and sore knees. The attending clinician noted the Veteran was overweight and smoked two to four packs of cigarettes per day for forty years (since age 10). He quit smoking in approximately 1996.

A September 2000 VA record noted bilateral lower extremity chronic venous stasis and bilateral ankle edema. The attending clinician also diagnosed abdominal aortic abdominal aneurysm status post resection.

A December 2000 VA medical record noted a history of lower extremity cellulitis but "no DM." The Veteran denied "claudication symptoms." The attending clinician noted "LE - chronic venous stasis."

A January 2005 hospital record noted DM "on no medications." Physical examination showed "no real edema" of the extremities.

In March 2005, a private physician noted elevated glucose and scheduled a follow-up visit "to be sure [the Veteran] is not developing diabetes." She also noted a history of peripheral vascular disease (PVD).

In April 2005, a VA physician noted a diagnosis of noninsulin dependent DM "on no medications but on a diabetic diet and hypertension with chronic atrial fibrillation." Physical examination indicated 2+ edema in both knees and no skin lesions.

At an August 2005 VA general medical examination, the Veteran reported taking "...new medication for some sort of leg lesions...". He also endorsed persistent ankle edema and degenerative joint disease in his knees. The VA examiner noted the Veteran developed AFib in

1998 as a complication of an aortic abdominal aneurysm.

At an April 2013 podiatry visit, the Veteran endorsed bilateral foot swelling and numbness but denied tingling or burning. The attending clinician noted onychodystrophy, pes planus, and bilateral leg edema.

In March 2015, the Veteran endorsed leg cramps and foot pain with walking. Physical examination indicated non-palpable pedal pulses, reduced sensation, normal skin texture, and no edema, ulcerations, or erythema. The attending clinician diagnosed diabetic polyneuropathy and PVD.

(b.) ISCHEMIC HEART DISEASE:

Have a qualified VA clinician review the file and provide fully explained opinions responding to the following:

i. Did the Veteran have IHD (CAD) at any point from April 4, 2005 to November 23, 2017? Please explain whether AFib, CHF, or AAA are IHD.

ii. If the Veteran did not have IHD, was his AFib, CHF, or AAA caused by herbicide exposure?

iii. Was the Veteran's AFib, CHF, or AAA caused by his service-connected DM?

iv. Was the Veteran's AFib, CHF, or AAA caused by, OR A RESIDUAL OF, his service-connected coccidioidomycosis?

The examiner must review the record as found in VA treatment reports and the electronic file. The record is summarized below:

The Veteran served on active duty from April 1955 to September 1974. He served in Vietnam and was exposed to herbicides.

During service, the Veteran was also exposed to asbestos and contracted coccidioidomycosis ("Valley Fever").

The Veteran's service treatment records do not reference AFib, CHF, AAA, or other heart problems.

The Veteran's clinical heart and vascular evaluations were normal at his August 1974 separation physical. Chest X-rays and an electrocardiogram (EKG) were also normal.

Post-service medical records noted the Veteran was obese and smoked two to four packs of cigarettes per day for forty years (since age 10). He quit smoking in approximately 1996.

In 1998, the Veteran was diagnosed with AFib as a complication of an aortic abdominal aneurysm (AAA).

A January 1999 chest X-ray noted "appearance suggestive of pulmonary venous hypertension...".

In December 2004, the Veteran was hospitalized for CHF and shortness of breath.

A January 2005 hospital record noted the Veteran had a "strong" family history of CAD. The clinician noted hypertension, DM, chronic AFib, and status post AAA repair in 1998.

At an April 2005 VA Agent Orange Registry examination, a VA clinician noted the Veteran did not directly handle or spray Agent Orange but was in recently sprayed areas. The examiner opined that the Veteran could have consumed food or drink contaminated with Agent Orange. The VA examiner diagnosed "hypertension with congestive heart failure," "chronic atrial fibrillation," and AAA status post resection. "Laboratories, X-rays, and EKG" "returned with normal results."

At an August 2005 VA examination, a clinician noted "December 31, 2004 history of [CHF], controlled."

A September 2005 CT scan showed "...some calcifications in his coronary arteries that suggested some coronary artery disease...".

Subsequent VA and private medical records show treatment for chronic AFib but do not reference the cause of the condition. These records have not shown a recurrence of AAA or CHF. No medical provider has suggested a link between the Veteran's heart conditions and herbicide exposure during service.

4. The AOJ should take all necessary action to develop the issue of entitlement to SMC (1) from September 6, 2016 to November 23, 2017.

Vito A. Clementi

Veterans Law Judge

Board of Veterans' Appeals

Attorney for the Board B. Hiaasen

The Board's decision is only binding on this case. This action is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.