Citation Nr: 23011129
Decision Date: 02/23/23 Archive Date: 02/23/23

DOCKET NO. 17-14 185
DATE: February 23, 2023

ORDER

Entitlement to service connection for hypertension is granted.

Entitlement to service connection for obstructive sleep apnea (OSA) is granted.

Entitlement to service connection for respiratory disabilities diagnosed as vasomotor rhinitis, pansinusitis, and bronchitis is granted.

Entitlement to service connection for heart arrythmia is denied.

FINDINGS OF FACT

1. Hypertension, OSA, and respiratory disabilities diagnosed as vasomotor rhinitis, pansinusitis, and bronchitis had their onset in service.

2. Heart arrythmia is a clinical finding and neither a disease nor disability as contemplated by the Veterans' Administration.

CONCLUSIONS OF LAW

1. The criteria for entitlement to service connection for hypertension, OSA, and respiratory disabilities diagnosed as vasomotor rhinitis, pansinusitis, and bronchitis have been met. 38 U.S.C. ﾧﾧ 1110, 1117, 1131, 1154(b), 5103, 5103A, 5107; 38 C.F.R. ﾧﾧ 3.102, 3.159, 3.303, 3.317, 3.320.

2. The criteria for entitlement to service connection for heart arrythmia have not been met. 38 U.S.C. ﾧﾧ 1110, 1117, 1131, 1154(b), 5103, 5103A, 5107; 38 C.F.R. ﾧﾧ 3.102, 3.159, 3.303, 3.317, 3.320, 4.9.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty with the United States Marine Corps from August 1985 to January 2006 with service in Southwest Asia during the Persian Gulf War and the award of the Combat Action Ribbon.

This matter is before the Board of Veterans' Appeals (Board) on appeal from an October 2013 rating decision from the Department of Veterans Affairs (VA) Regional Office (RO).

In November 2019, the Veteran testified at a video conference hearing before the undersigned acting Veterans Law Judge. A transcript of the hearing is associated with the claims file and has been reviewed.

In July 2020 the Board, among other things, remanded the above claim for further development. It has now returned to the Board for further appellate review.

The Board notes that additional evidence was associated with the claims file since the RO issued the January 2021 supplemental statement of the case. See April 2021 VA Hypertension Examination. The Veteran did not waive agency of original jurisdiction (AOJ) of this evidence. Similarly, the record shows that the Veteran has not been provided notice of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxins Act of 2022. See H.R. 3967.

However, the Board first finds that the Veteran will not be prejudiced by adjudicating his claims without the AOJ first reviewing the evidence and without receiving notice of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxins Act of 2022. The Board has reached this conclusion because the below decision is granting him service connection for hypertension, OSA, and respiratory disabilities diagnosed as

vasomotor rhinitis, pansinusitis, and bronchitis as well as because the additional evidence is not pertinent as to his claim of service connection for heart arrythmia. See Sabonis v. Brown, 6 Vet. App. 426, 430 (1994) (remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the veteran are to be avoided).

Next, the Board notes that the Veteran has an appeal pending for entitlement to an earlier effective date for service connection for unspecified anxiety disorder under the Appeals Modernization Act (AMA). As such, this claim will be addressed in a separate decision.

THE SERVICE CONNECTION CLAIMS

The Veteran contends that his hypertension, OSA, respiratory disabilities including vasomotor rhinitis, pansinusitis, and bronchitis, as well as heart arrythmia are related to service.

Service connection is warranted where the evidence of record establishes that a particular injury or disease resulting in disability was incurred in the line of duty in the active military service or, if pre-existing such service, was aggravated thereby. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303. If a condition noted during service is not shown to be chronic, then generally a showing of continuity of symptomatology after service is required for service connection if the disability is one that is listed in 38 C.F.R. § 3.309. 38 C.F.R. § 3.303(b); see also Walker v. Shinseki, 708 F.3d 1331 (Fed. Cir. 2013).

In addition, service connection may also be granted on the basis of a post-service initial diagnosis of a disease, where the physician relates the current condition to the period of service. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303(d). Other specifically enumerated disorders will be presumed to have been incurred in service if they manifested to a compensable degree within the first year following separation from active duty (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years). 38 U.S.C. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309.

In this regard, to establish service connection for the claimed disorders, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247, 253 (1999).

Additionally, the law also provides that, in the case of any veteran who engaged in combat with the enemy, the Secretary shall accept as sufficient proof of service connection of any disease or injury alleged to have been incurred in or aggravated by such service, satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, condition, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. 38 U.S.C. § 1154(b).

The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held that in the case of a combat Veteran not only is the combat injury presumed, but so is the disability due to the in-service combat injury. See Reeves v. Shinseki, 682 F.3d 988, 998-99 (Fed. Cir. 2012).

To establish service connection, however, there must be the evidence of a current disability and a causal relationship between the current disability and the combat injury. Id. (citing Shedden v. Principi, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Service connection may also be established on a secondary basis for a disability proximately due to or aggravated by a service-connected disease or injury. See 38 C.F.R. § 3.310; see also Allen v. Brown, 7 Vet. App. 439 (1995) (en banc). To establish secondary service connection, a Veteran must show: (1) the existence of a present disability; (2) the existence of a service-connected disability; and (3) a causal relationship between the present disability and the service-connected disability. See Wallin v. West, 11 Vet. App. 509, 512 (1998); see also Ward v. Wilkie, 31 Vet. App. 233 (2019).

The requirement of a current disability is "satisfied when a claimant has a disability at the time a claim for VA disability compensation is filed or during the pendency of that claim." See McClain v. Nicholson, 21 Vet. App. 319, 321 (2007).

The Court in Joyner v. McDonald, 766 F.3d 1393, 1395 (Fed. Cir. 2014) held, in part, that the Board needs to always consider 38 U.S.C. § 1117 and 38 C.F.R. § 3.317 in cases like the current appeal in which Veterans have served in the Persian Gulf since August 2, 1990.

Therefore, the Board finds that it is also required to consider 38 U.S.C. § 1117 and 38 C.F.R. § 3.317. See 38 C.F.R. § 3.117 (d)(1) and (2) (a "Persian Gulf veteran" is defined as "a veteran who served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War. The "Southwest Asia theater of operations" includes Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations).

In this regard, service connection may be warranted for a Persian Gulf Veteran who exhibits objective indications of a qualifying chronic disability that became manifest during active military, naval or air service in the Southwest Asia theater of operations during the Persian Gulf War, or that became manifest to a degree of 10 percent or more not later than December 31, 2021. 38 C.F.R. § 3.317(a)(1).

For purposes of 38 C.F.R. § 3.317, there are three types of qualifying chronic disabilities: (1) an undiagnosed illness; (2) a medically unexplained chronic multi symptom illness; and (3) a diagnosed illness that the Secretary determines in regulations prescribed under 38 U.S.C. § 1117(d) warrants a presumption of service connection.

An "undiagnosed illness" is defined as a condition that by history, physical examination and laboratory tests cannot be attributed to a known clinical diagnosis. In the case of claims based on undiagnosed illness under 38 U.S.C. § 1117; 38 C.F.R. § 3.317, unlike those for "direct service connection," there is no requirement that there be competent evidence of a nexus between the claimed illness and service. Gutierrez, 19 Vet. App. at 8–9. Further, lay persons are competent to report objective signs of illness. Id. To determine whether the undiagnosed illness is manifested to a degree of 10 percent or more the condition must be rated by analogy to a disease or injury in which the functions affected, anatomical location or symptomatology are similar. See 38 C.F.R. § 3.317(a)(5); see also Stankevich v. Nicholson, 19 Vet. App. 470 (2006).

A medically unexplained chronic multisymptom illnesses is one defined by a cluster of signs or symptoms and specifically includes chronic fatigue syndrome, fibromyalgia, and functional gastrointestinal disorders (excluding structural gastrointestinal diseases), as well as any other illness that the Secretary determines meets the criteria in paragraph (a)(2)(ii) of this section for a medically unexplained chronic multisymptom illness. A "medically unexplained chronic multisymptom illness" means a diagnosed illness without conclusive pathophysiology or etiology that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities." Chronic multisymptom illnesses of partially understood etiology and pathophysiology will not be considered medically unexplained. 38 C.F.R. § 3.317(a)(2)(ii).

Functional gastrointestinal disorders are a group of conditions characterized by chronic or recurrent symptoms that are unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease and may be related to any part of the gastrointestinal tract. Specific functional gastrointestinal disorders include, but are not limited to, irritable bowel syndrome, functional dyspepsia, functional vomiting, functional constipation, functional bloating, functional abdominal pain syndrome, and functional dysphagia. These disorders are commonly characterized by symptoms including abdominal pain, substernal burning or pain, nausea, vomiting, altered bowel habits (including diarrhea, constipation), indigestion, bloating, postprandial fullness, and painful or difficult swallowing. Diagnosis of specific functional gastrointestinal disorders is made in accordance with established medical principles, which generally require symptom onset at least 6 months prior to diagnosis and the presence of symptoms sufficient to diagnose the

specific disorder at least 3 months prior to diagnosis. 38 C.F.R. ↄ 3.317 (a)(2)(i)(B)(3).

During the pendency of this appeal, VA regulations were amended to allow for presumptive service connection for Veterans who served in the Southwest Asia theater as defined in 38 C.F.R. ↄ 3.317(e)(2) or in Afghanistan, Syria, Djibouti, or Uzbekistan on or after September 19, 2001, during the Persian Gulf War as defined in ↄ 3.2(i). See 75 Fed. Reg. 42, 724 (Aug. 5, 2021).

The regulation provides that if a Veteran was exposed to particulate matter, to include as the result of burn pits, in these locations, certain listed diseases shall be service connected if manifested to any degree within 10 years from the date of separation from military service. 38 C.F.R. ↄ 3.320(a)(1). A Veteran shall be presumed to have been exposed to fine, particulate matter during such service, unless there is affirmative evidence to establish that the Veteran was not exposed to such matter during that service. 38 C.F.R. ↄ 3.320(a)(1). The list of diseases afforded this presumption include asthma, rhinitis, and sinusitis, to include rhinosinusitis. This amendment is applicable to claims received by VA on or after August 5, 2021, and to claims pending before VA on that date, as well as certain previously denied claims. See 75 Fed. Reg. 42,724 (Aug. 5, 2021).

Next, the Board notes that Congress recently enacted the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxins Act of 2022 (PACT Act). See H.R. 3967.

Applicable to this claim, the PACT Act, among other things, adds more than 20 burn pit and other toxic exposure presumptive conditions for Gulf War era and post-9/11 Veterans. The PACT Act adds the following cancers to the list of presumptive disorders: Brain cancer, Gastrointestinal cancer of any type, Glioblastoma, Head cancer of any type, Kidney cancer, Lymphatic cancer of any type, Lymphoma of any type, Melanoma, Neck cancer of any type, Pancreatic cancer, Reproductive cancer of any type, Respiratory (breathing-related) cancer of any type. The PACT Act also adds the following illnesses to the list of presumptive disorders: Asthma that was diagnosed after service, Chronic bronchitis, Chronic obstructive pulmonary disease (COPD), Chronic rhinitis, Chronic sinusitis, Constrictive bronchiolitis or obliterative bronchiolitis, Emphysema, Granulomatous disease, Interstitial lung disease (ILD), Pleuritis, Pulmonary fibrosis, and Sarcoidosis.

Tellingly, while the PACT Act amendment as to hypertension is not effective until October 1, 2026, in an Executive Decision Memorandum (EDM) dated September 20, 2022, VA adopted the Office of General Counsel's interpretation of the PACT Act and VA has, in substance, added the above conditions to the list of presumptive disorders without waiting for the phase-in date.

In evaluating the evidence, the Board has been charged with the duty to assess the credibility and weight given to evidence. Davidson v. Shinseki, 581 F. 3d 1313 (Fed. Cir. 2009); Jandreau v. Nicholson, 492 F. 3d 1372 (Fed. Cir. 2007). Indeed, the Court has declared that in adjudicating a claim, the Board has the responsibility to do so. Bryan v. West, 13 Vet. App. 482, 488-89 (2000). In doing so, the Board is free to favor one medical opinion over another, provided it offers an adequate basis for doing so. Owens v. Brown, 7 Vet. App. 429, 433 (1995).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under the laws administered by VA. VA shall consider all information and medical and lay evidence of record. Where there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, VA shall give the benefit of the doubt to the claimant. 38 U.S.C. ↄ 5107; 38 C.F.R. ↄ 3.102; see also Lynch v. McDonough, 21 F.4th 776 (Fed. Cir. 2021) (en banc).

Hypertension

As to a current disability, the post-service record shows the Veteran being diagnosed with hypertension. See, e.g., VA examination dated in April 2021.

Next, as to the in-service disease or injury, service treatment records include numerous blood pressure readings that show his systolic blood pressure was 130 mm or higher. See 38 C.F.R. . ↄ 4.104, Diagnostic Code 7101 (hypertension means that the diastolic blood pressure

is "predominantly" 90 mm or greater and isolated systolic hypertension means that the systolic blood pressure is predominantly 160 mm or greater with a diastolic blood pressure of less than 90mm). Given this record, and granting the Veteran the benefit of any doubt in this matter, the Board concludes that he had a disease while on active duty. See 38 U.S.C. § 5107; 38 C.F.R. § 3.102, 303, 3.304; Lynch, supra. McClain, supra.

Therefore, the Board finds the first and second elements of a claim for service-connection, a current disability and an in-service incurrence of a disease, have been met. See Hickson, supra.

Lastly, as to medical evidence of a nexus between the in-service disease or injury and the current hypertension, the April 2021 VA examiner opined that it is at least as likely as not the Veteran's current hypertension was incurred in or caused by the elevated in-service blood pressure readings.

In this regard, the April 2021 medical opinion was provided after an examination of the Veteran, a review of the record on appeal, and the opinion is supported by specific citation to evidence in the claims file, controlling medical literature, and medical reasoning. See Guerrieri v. Brown, 4 Vet. App. 467, 473 (1993) ("the probative value of medical opinion evidence is based on the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion the physician reaches.... As is true with any piece of evidence, the credibility and weight to be attached to these opinions [are] within the province of the [Board as] adjudicators..."); Wray v. Brown, 7 Vet. App. 488, 493 (1995) (holding that the adoption of an expert medical opinion may satisfy the Board's statutory requirement of an adequate statement of reasons and bases if the expert fairly considered the material evidence seemingly supporting the veteran's position). Therefore, the Board finds that the opinion is both competent and credible and the most probative evidence of record. See Owens, supra.

Given the above, the Board finds that the evidence, both positive and negative, as to whether the Veteran's post-service hypertension is due to his military service is at least in equipoise. See Owens, supra. Under such circumstances, and granting the Veteran the benefit of any doubt in this matter, the Board concludes that it did. See 38 U.S.C. § 5107; 38 C.F.R. § 3.102; see also Lynch, supra.

Accordingly, the Board finds that the criteria to grant the Veteran service connection for hypertension have been met and the appeal as to this issue is granted. See 38 U.S.C. §§ 1110, 1131; 38 C.F.R. §§ 3.303, 3.304.

OSA and a Respiratory Disability

As to the claim of service connection for OSA and a respiratory disability, the post-service record shows the Veteran being diagnosed with OSA in 2012, vasomotor (non-allergic) rhinitis in 2015, pansinusitis cough in 2016, chronic dry cough of indeterminate etiology in 2017 and chronic bronchitis in 2019. See, e.g., January 2017 VA Sleep Apnea Examination; Medical Treatment Record - Government Facility, received by VA July 20, 2016; November 2018 VA Respiratory Examination; Medical Treatment Record - Non-Government Facility, received by VA November 29, 2018; December 2019 Private Medical Opinion of Dr. J.M. III; October 2020 VA examination.

As to an in-service injury, the Board finds it significant that the DD 214 confirms the Veteran was deployed to Southwest Asia during the Persian Gulf War. Therefore, the Board finds that the Veteran is a Persian Gulf War Veteran and is entitled to the presumptions found at 38 U.S.C. § 1117; 38 C.F.R. § 3.317 to include it being presumed that he had toxin exposure during his time in the Persian Gulf War. See Joyner, supra; 38 U.S.C. § 1117; 38 C.F.R. § 3.317.

In this regard, the Board also finds it significant that VA officially found this Veteran was exposed to Burn Pit Toxins, High Levels of Particulate Matter, Sulfur Dioxide, Hydrogen Sulfide, and Hexavalent Chromium. See VA Fact Sheet (Memorandum), Notice to VA Examiners, June 2016.

Next, the Board finds it significant that because the Veteran's service personnel records

show his being awarded of the Combat Action Ribbon, he meets the criteria to be characterized as a "Combat Veteran." Therefore, the Board finds that the Veteran is afforded the presumptions found at 38 U.S.C. ◃ 1154(b). See Reeves, supra.

The Board also finds that the Veteran is competent to report on the events he experiences while on active duty as well as manifestations of his disabilities. See Davidson, supra.

Specifically, he is competent and credible to report that he has had sleeping problems since his service in the Gulf War and Somalia, that he began experiencing symptoms such as trouble sleeping, being exhausted all of the time and waking up with headaches since that time, as well as experiencing coughing, trouble breathing and shortness of breath, among others, during service. See Davidson, supra.

Next, as to the claimed in-service symptomatology, the Board finds that the Veteran's claim of experiencing symptoms such as trouble sleeping, being exhausted all of the time and waking up with headaches during service, as well as experiencing coughing, trouble breathing and shortness of breath, are consistent with the circumstances, condition, or hardships of his service. See 38 U.S.C. ◃ 1154(b); Reeves, supra.

The Board also finds it significant that active duty treatment records document the Veteran's complaints and treatment or shortness of breath and shallow breathing as well as having a two year medical history of productive cough with wheezing. See, e.g., March 1999 Chest X-ray; May 2000 Report of Medical History.

Further, and as noted above, due to his service in the Southwest Asia during the Persian Gulf War it is presumed he had exposure to toxins and VA has conceded that the Veteran had exposure to high levels of particulate matter, sulfur dioxide, hydrogen sulfide, and hexavalent chromium from burn pits.

Lastly, the Board finds that the Veteran provided competent and credible personal hearing testimony of having observable problems with adverse symptomatology normally attributable to OSA and chronic respiratory disorders (e.g., cessation of breathing during sleep, chronic daytime fatigue, headaches, shortness of breath, shallow breathing, inhaler prescription, two year history of productive cough with wheezing). See Davidson, supra; Owens, supra.

Given this record, and granting the Veteran the benefit of any doubt in this matter, the Board concludes that he had diseases and/or injuries while on active duty. See 38 U.S.C. ◃ 5107; 38 C.F.R. ◃ 3.102; see also Lynch, supra.

As to a relationship between the OSA and the respiratory disabilities diagnosed post-service and the in-service diseases and/or injuries, in December 2017 a private medical examiner opined the Veteran's chronic dry cough of indeterminate etiology was suspected as component of postnasal drip, reactive airway disease with possible interstitial lung inflammation, "especially with exposure to fumes from the gulf war in the 1990's." See Florida Hospital Zephyrhills, Consultation Report, December 2017.

Similarly, in December 2019 a private treating physician opined that the Veteran's OSA and chronic bronchitis are a direct result of military service based on multiple factors, including but not limited to the stress of long term service, influences related to combat, repeated exposure to environmental contaminants and respiratory hazards, and the fact that all of these conditions appear to have manifested and/or been documented during his active duty military service. See Dr. John Morrison letter, December 2019.

Further, given the nature of the Veteran's service (i.e., combat service in Southwest Asia during the Persian Gulf War) with service treatment records documenting multiple respiratory complaints it is reasonable for the Board to find that he had problems with and/or symptoms of OSA and a respiratory disability during and since being exposed to environmental hazards in the air as well high levels of particulate matter, sulfur dioxide, hydrogen sulfide, and hexavalent chromium from burn pits while on active duty. See Davidson, supra; Owens, supra.

However, the VA examiners in January 2017, November 2018, and October 2020 all opined that the Veteran's OSA and respiratory disorders are not due to his military service, to include his service in Southwest Asia. In this regard, because the examiners appeared to not consider the Veteran's status as a combat Veteran and the presumptions afforded him by 38

U.S.C. § 1154(b) and Reeves, supra, and because the examiners did not appear to consider the Veteran's competent and credible lay claims regarding having adverse symptomatology normally attributable to OSA and chronic respiratory disorders in and since he served in the Persian Gulf War, and because the examiners did not appear to consider the competent medical evidence of record indicating a multi-faceted respiratory disability after service, the Board finds that the Veteran's claims of having observable symptoms of OSA and a chronic respiratory disorder in and since service are just as probative as the VA examiners' opinion. See Davidson, supra; Owens, supra.

Therefore, the Board finds that the evidence, both positive and negative, as to whether the Veteran had OSA and respiratory disabilities diagnosed as vasomotor rhinitis, pansinusitis, and bronchitis in and since service is at least in equipoise. See Owens, supra. Under such circumstances, and granting the Veteran the benefit of any doubt in this matter, the Board concludes that he did. See 38 U.S.C. § 5107; 38 C.F.R. § 3.102; see also Lynch, supra.

Accordingly, the Board finds that the criteria to grant service connection for OSA and respiratory disabilities diagnosed as vasomotor rhinitis, pansinusitis, and bronchitis have been met and the claims are granted. See 38 U.S.C. §§ 1110, 1117, 1131, 1154(b); 38 C.F.R. § 3.303, 3.317.

Heart Arrythmia

As to the claim of service connection for heart arrythmia, the Board notes that the October 2020 VA examiner opined, in substance, that it is a laboratory finding and not a diagnosed cardiac disorder. See 38 C.F.R. §§ 3.303(c), 4.9. This medical opinion is not contradicted by any other medical evidence of record. See Colvin v. Derwinski, 1 Vet. App. 171, 175 (1991) (VA may only consider independent medical evidence to support its findings and is not permitted to base decisions on its own unsubstantiated medical conclusions).

Moreover, the Board finds that the facts of the appeal are distinguishable from those in Saunders v. Wilkie, 886 F.3d 1356 (Fed. Cir. 2018) because the Board is not finding that the Veteran does not have a disability at any time during the pendency of the appeal but instead is finding that the claimed disorder is a laboratory finding and is therefore neither a disease nor disability as contemplated by VA. See Owens, supra; also see Wait v. Wilkie, 33 Vet. App. 8, 17 (2020).

Similarly, and notwithstanding the Court's holding in Joyner, supra, the Board finds that 38 U.S.C. § 1117; 38 C.F.R. § 3.317 is not applicable to the current claim because a laboratory finding can also not be an undiagnosed illness. See 38 C.F.R. §§ 3.303(c), 4.9.

Furthermore, while the Veteran is competent to report on the symptoms he observes, such as a fluttering heart rate, he is not competent to change heart arrythmia from a laboratory finding to a heart disease or disability as contemplated by VA. See Davidson, supra.

Therefore, the Board finds that the claim of service connection for heart arrythmia is denied as a matter of law because it is neither a disease nor disability as contemplated by VA. See 38 U.S.C. §§ 1110, 1131; 38 C.F.R. §§ 3.303(c), 4.9; Sabonis v. Brown, 6 Vet. App. 426, 430 (1994) (where the law and not the evidence is dispositive, the Board should deny the claim on the ground of lack of legal merit).

NEIL T. WERNER

Acting Veterans Law Judge

Board of Veterans' Appeals

Attorney for the Board Christopher M. Davidson

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.