

BRIEF IN SUPPORT OF VETERAN's APPLICATION FOR SERVICE CONNECTED COMPENSATION

I submit this brief on behalf of VETERAN, SSN xxx-xx-xxxx, in support of his application for service connected compensation for chronic obstructive pulmonary disease (hereafter "COPD") due to asbestos exposure, laryngeal polyps due to asbestos exposure, and a lung tumor due to asbestos exposure. This brief supports VETERAN's claim that these disabilities were caused and/or exacerbated by events that occurred during his active duty service in the United States Navy. VETERAN's claim was originally filed through a Notice of Claim dated xxx (attached with fax confirmation as Exhibit A).

STATEMENT OF FACTS

VETERAN enlisted in the U.S. Navy on xxx in a program called 4x10 that involved active duty followed by reserve service. (Exhibit B, first DD-214). After Basic Training and Class "A" School, he was released from active duty to the reserves on November 6, 1974 (Exhibit B). On xxxx, he reenlisted in active duty and was trained at Great Lakes Naval Base to be a Boiler Technician (Exhibit C – second DD214; Exhibit D - VETERAN – Personal Statement, Para. 1-2; Exhibit E - History of Assignments – OMPF).

Upon completing his training (EP/B School), VETERAN was stationed aboard the SHIP (AS-34) (Exhibit D-Para. 2; Exhibit E). While the ship was at sea, VETERAN worked in the boiler room (Exhibit D-Para. 5). His duties were to stand watch over the boilers to monitor air and oil flow. (Exhibit D-Para. 5). He was also responsible for repair work in the boiler room which required accessing pipes covered with asbestos insulation (Exhibit D-Para. 5).

In November 1975, the SHIP was brought to the Naval Shipyard in Charleston, SC for overhaul and refitting (Exhibit D-Para. 2). For the next year, VETERAN's duty was to take apart the ship and retrofit the boilers (Exhibit D-Para. 2; Exhibit E). This included removing fire bricks from the firebox and boiler room, loading them into buckets to be removed from the ship by block and tackle, and then transferring the bricks from the buckets into dumpsters (Exhibit D-Para. 6.). According to VETERAN, "[b]etween the welding and the cutting the air was thick with asbestos and we had no protection." (Exhibit D-Para. 6). While in the shipyard, he worked 8 hour shifts in constant rotation (16-hour workdays). (Exhibit D-Para. 6).

After completing the overhaul, VETERAN sailed aboard the SHIP to Spain where, on December 15, 1976, he transferred to the SHIP (AS-33) (Exhibit D-Para. 3; Exhibit E). The Simon Lake then sailed back to the Naval Shipyard in Charleston, SC for an extensive overhaul of its own (Exhibit D-Para. 3; Exhibit E). VETERAN performed the same tasks on the SHIP as he did on the SHIP and suffered through the same exposure to asbestos for another year (Exhibit D-Para. 2-3, 5-6; Exhibit E).

After the rebuild of the SHIP was complete, VETERAN worked with the “Seabees” (Construction Battalion) for a short time, until his discharge (Exhibit D-Para. 4). He was discharged under honorable conditions on xxx (Exhibit C).

After service, VETERAN worked in the oil business, cleaning furnaces and delivering oil (Exhibit D-Para. 9). He has worked on and off in the HVAC industry ever since (Exhibit D-Para. 9). In that capacity, VETERAN had occasional exposure to asbestos, but as the dangers of asbestos became better known, the requirement to wearing protection increased to limit exposure. (Exhibit D- Para. 9).

Following the diagnosis of COPD and removal of the upper third of his right lung, VETERAN has been put on many restrictions (Exhibit D-Para. 10). He cannot do a lot of manual labor because he easily runs out of breath. (Exhibit D-Para. 10). His ability to earn has been cut because he can no longer perform the labor intensive jobs he is trained for. (Exhibit D-Para. 10). Merely catching a common cold wipes him out and he doesn’t have near the energy that he used to (Exhibit D-Para. 10).

SERVICE CONNECTED DISABILITIES

Veterans are entitled to disability compensation when they are discharged under conditions other than dishonorable, their disease or injury is incurred or aggravated in the line of duty, and the disability is not a result of their own willful misconduct or drug use. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. “[I]n order to establish service connection or service-connected aggravation for a present disability the Veteran must show: (1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service.” Shedden v. Principi, 381 F.3d 1163, 1166-67 (2004). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Status as a Veteran

VETERAN was discharged under honorable conditions after nearly 3 years of active duty service (Exhibits B and C). This qualifies him as a Veteran with a discharge under conditions other than dishonorable. 38 C.F.R. § 3.1(d); U.S.C.A. §§ 1110, 1131.

Current diagnoses related to asbestos exposure

The first element of service connection is a current disability. This may be established in one of two ways: either (1) a current diagnosis of a medical condition or (2) providing a description of current symptoms, documented by a competent medical professional, which could lead to a medical diagnosis.

VETERAN was first diagnosed with laryngeal polyps in 2003 (Exhibit F - VA Medical Progress Notes – xxxx, p. 2). Later, VETERAN went to the VA hospital for chest pains (Exhibit D-Para. 10). An X-Ray and a PET scan revealed a tumor on his right lung (Exhibit D,-Para. 10; Exhibit

G- VA Medical Progress Notes – xxx). At this time, VETERAN was also diagnosed with COPD (Exhibit D-Para. 10; Exhibit G). Also in xxx Dr.xxx performed a lobectomy, removing the upper third of VETERAN’s right lung (Exhibit H- VA Medical Progress Notes – xxxx). He now has follow-up appointments every six months to monitor the polyps for any changes (Exhibit D-Para. 10).

Exposure to asbestos while on active duty

When deciding a claim for service connection for disabilities resulting from exposure to asbestos during service, VA must: (1) determine whether or not service records demonstrate the Veteran was exposed to asbestos during service; (2) ensure that development is accomplished to determine whether or not the Veteran was exposed to asbestos either before or after service; and (3) determine whether or not a relationship exists between exposure to asbestos and the claimed disease, keeping in mind latency and exposure factors. VA Manual M21-1MR, Part IV, Subpart ii, Chapter 2, Section C, Para. 9h (Attached as Exhibit K). Any reasonable doubt that arises regarding service origin, the degree of disability, or any other point must be resolved in favor of the claimant (38 C.F.R. § 3.102). Furthermore, “when there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.” 38 U.S.C.A. § 5107(b).

The War Related Illness & Injury Study Center (WRIISC), Office of Public Health, and VA released a document listing those service members at risk for asbestos exposure as including: (1) those involved in renovation of asbestos-containing structures and/or removal of asbestos materials either before or after 1970; (2) Navy Veterans who served on ships whose keels were laid before 1983; (3) Navy Veterans who worked in ship yards from the 1930s through the 1990s; (4) Navy personnel who worked below deck before the early 1990s; (5) Navy Seamen who were frequently tasked with removing damaged asbestos lagging in engine rooms and then using asbestos paste to re-wrap the pipes, often with no respiratory protection and no other personal protective equipment especially if wet technique was not used in the removal; (6) service members who worked with, handled, damaged or disturbed any asbestos containing materials; and (7) pipe fitters, welders, boiler operators, building renovation and demolition specialists who worked in any of the services before the mid-1990s (Exhibit I).¹

VETERAN’s active duty service with the U.S. Navy fit into each of the above-listed categories: (1) he was involved in the renovation of two ships that contained asbestos and the renovations included removal of asbestos materials; (2) he served aboard the U.S.S. xxx (AS-34) and the U.S.S. xxx (AS-33), whose keels were both laid in the 1960s; (3) he worked in the Naval Shipyard in Charleston, SC during 1975-1978; (4) he worked below deck in the boiler room; (5) he was tasked with removing damaged asbestos lagging and using asbestos paste to re-wrap pipes, without respiratory protection; (6) he handled damaged firebricks containing asbestos, among other asbestos containing materials; and (7) he was a boiler technician who worked on ship renovation projects during his service.

The U.S. Department of Health and Human Services Agency for Toxic Substances and Disease Registry states: “Asbestos fibers may be released into the air by the disturbance of asbestos-containing material during product use, demolition work, building or home maintenance, repair,

¹ <http://www.warrelatedillness.va.gov/education/factsheets/asbestos-exposure.pdf>

and remodeling. In general, exposure may only occur when the asbestos-containing material is disturbed in some way to release particles and fibers into the air.” (Exhibit J – WRIISC – Exposure to Asbestos).²

Refitting the boilers required handling several parts (pipe valves, flanges, gaskets, etc.) containing asbestos. Per VETERAN “when repairing pipes, flanges, [and] water pipes, I had to take out all the insulating asbestos and then make the repair and repack it. We did this all without any [respiratory] protection.” (Exhibit D-Para. 5).

During his service, VETERAN was tasked with removing asbestos-containing firebricks from the boiler rooms of the SHIP and SHIP. When the firebricks were broken apart, they would disintegrate into dust, releasing asbestos fibers into the air where they were inhaled. Working in confined quarters, the air was often thick with asbestos and dust (Exhibit D-Para. 6). Per VETERAN, “While in the boiler, taking out the fire bricks, we had cloth or cotton face masks. The rest of the time there was no protection worn.” (Exhibit D-Para. 6). Exhaust fans did little to alleviate the conditions and would actually recirculate asbestos particles back into the air. (Exhibit D-Para. 6).

Relationship between current diagnoses and asbestos exposure while on active duty

For service connection to be granted, there must be a nexus between the Veteran’s current medical conditions and an in-service event or injury. VA acknowledges that inhalation of asbestos fibers can produce tumors. M21-1MR, Part IV, Subpart ii, Chap. 2, Sec. C, Topic 9b. It also acknowledges that “[h]igh exposure to asbestos and a high prevalence of disease have been shown in insulation and shipyard workers.” M21-1MR, Part IV, subpart ii, Chap. 2, Sec. C, Topic 9g. Furthermore, “[t]he latent period varies from 10 to 45 or more years between first exposure and development of disease,” “the exposure may have been direct or indirect, [and] the extent and duration of exposure is not a factor.” M21-1MR, Part IV, Subpart ii, Chap. 1, Sec. H, Topic. 29a.

VETERAN served on active duty during a time when the U.S. Navy operated ships that were manufactured and retrofitted with asbestos products. His military occupational specialty (“MOS”) was boiler technician, which involved heating and furnace repair, handling materials and working in an environment that exposed him to asbestos. In fact, the greatest risk for asbestos exposure on board these ships were in below-deck compartments like the boiler and engine rooms, where nearly everything was made of or coated with asbestos due to its heat and fire resistant properties (See Exhibit I; Exhibit J). Consequently, boiler technicians like VETERAN were not only among the most likely to be exposed to asbestos, they were also most likely to have the greatest exposure to asbestos.

The WRIISC report also notes that history of a pre-existing lung condition may put one at an even greater risk for health effects as a result of exposure to asbestos (Exhibit I)). On August 10, 1975, while on active duty but prior to being assigned aboard the SHIP, VETERAN was admitted to the Naval Regional Medical Center in Portsmouth, Virginia, where he spent 10 days receiving treatment for a collapsed lung (Exhibit L- VETERAN STR – Naval Regional Medical Center – August 10, 1975).

² <http://www.atsdr.cdc.gov/toxfaqs/tfacts61.pdf>

VETERAN's work history includes other possible points of exposure to asbestos. Prior Board of Veterans Appeals (BVA) decisions indicate the length of post-service exposure does not preclude service connection for active duty exposure. In a 2005 decision, the BVA granted service connection to a Veteran who claimed exposure to asbestos for at least one year while on active duty, but had more than 30 years of occupational exposure to asbestos as a mechanic subsequent to service (Exhibit M – BVA Citation# 0533272; Exhibit N – BVA Citation # 1137375). While VETERAN did have occupational exposure to asbestos subsequent to his active duty service, such exposure was both limited and decreased over time as he learned more about the dangers of asbestos exposure and was able to take better precautions to protect himself. (Exhibit D-Para. 9).

VETERAN also has a history of smoking cigarettes. Prior BVA decisions show that a positive history of cigarette smoking does not bar a claimant from being granted service connection. In a 2010 decision, the BVA found that “a [medical] opinion linking the Veteran’s cancer to smoking does not necessarily eliminate asbestos exposure as a contributing cause.” (Exhibit O - BVA Citation# 1043427). In another 2010 decision, the BVA granted service connection for a breathing disorder due to asbestos exposure to a Veteran with a 50 year habit of smoking more than a pack per day. (Exhibit P - BVA Citation# 1029871). And in 2011, the BVA granted service connection for residual effects of vial cord polyps to a veteran with a history of tobacco use. (Exhibit Q - BVA Citation# 1118957). The BVA has also found that “[a] *definite* link is not required in order to establish service connection” on the issue of “whether the veteran’s current diagnosis of COPD may, in any way, have resulted, at least in part, from his military service.” (Exhibit R – BVA Citation# 0304917 – *emphasis added*).

CONCLUSION

VETERAN was exposed to asbestos during his time working aboard the U.S.S. xxx and the U.S.S. xxx. He has laryngeal polyps, he has had a lung tumor removed, and he suffers from COPD, a disease with a well-established connection to asbestos exposure. It is at least as likely as not that his exposure to asbestos while serving on active duty in the U.S. Navy precipitated and/or aggravated these conditions. Accordingly, it is respectfully submitted that the Department of Veterans Affairs grant VETERAN service connected compensation.

Respectfully Submitted,

Cinthia Johnson
Authorized Representative for VETERAN
21-22a attached