Vet. App. No. 20-1960

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

CLOTILDE VELAZQUEZ,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS

FOR VETERANS CLAIMS

CLOTILDE VELAZQUEZ,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-1960
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Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

Whether the U.S. Court of Appeals for Veterans Claims (Court) should affirm the March 6, 2020, decision of the Board of Veterans' Appeals (Board) that denied entitlement to 1) special monthly pension (SMP) for a surviving spouse based on the need for regular aid and attendance (A&A) of another person, or by reason of being housebound, and 2) survivor's pension.

II. STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Clotilde Velazquez, appeals, *pro se*, the March 6, 2020, Board decision that denied entitlement to 1) SMP for a surviving spouse based on the need for regular A&A of another person, or by reason of being housebound, and

2) survivor's pension. [Record Before the Agency (R.) at 2-13]; *see* [Appellant's Initial Informal Brief (App. Brf.) at 1-3].

B. Statement of Facts

Appellant is the surviving spouse of Gustavo Lebron (Veteran). [R. at 416]; [R. at 432]. Mr. Lebron is a veteran of the Korean Conflict era with active service in the U.S. Army from October 9, 1952, to May 4, 1954. [R. at 289].

In September and November 2016, Appellant submitted to VA an intent to file a claim for survivor's pension and/or dependency and indemnity compensation (DIC). [R. at 323-24]; [R. at 320-21]. VA responded in November and December 2016 and provided Appellant with correspondence and informed her on how to complete her application for benefits. [R. at 317-19]; [R. at 315-16].

Appellant filed her application for DIC, Death Pension, and/or Accrued Benefits in December 2016, and resubmitted the application in January 2017. [R. at 307-11]; [R. at 297-301]. The applications contain Appellant's reported annual income derived from her Social Security Administration (SSA) benefits for 2016 and her reported medical expenses paid in 2016, to include Medicare Part B premiums, prescription medications, and caregiver fees. [R. at 300]; [R. at 310].

In May 2018, VA notified Appellant of its decision denying entitlement to survivor's pension and entitlement to A&A or housebound benefits. [R. at 194-96; 204-17]; [R. at 198-202]. As to the claim for survivor's pension, the VA Regional Office (RO) determined that Appellant's income effective January 1, 2017, exceeded the maximum annual death pension limit set by law. [R. at 194-96]; *see*

[R. at 223]; [R. at 240]. The RO also explained in the May 2018 Rating Decision that entitlement to A&A or housebound benefits was not warranted because the evidence did not demonstrate that Appellant was blind or in a nursing home, that she could not protect herself from the hazards and dangers of her immediate environment, or that Appellant was unable to perform routine activities of daily living without the assistance of others. [R. at 201]. Along with these decisions, VA also provided Appellant with a VA Form 21-8416 Medical Expense Report and a VA Form 21-0518-1 Improved Pension Eligibility Verification Report, to complete and return to VA should her circumstances change. [R. at 195]; [R. at 210-11]; [R. at 216-17].

Later that month, Appellant submitted a completed VA Form 21-8416 "Medical Expense Report" reporting her medical expenses paid from January 1, 2017, to December 31, 2017, to include Medicare Part B premiums, prescription expenses, and caregiver fees. [R. at 184-85]. Appellant also submitted a "Caregiver Information" form indicating that Ms. Lebron, Appellant's "caregiver and daughter," helps to feed, bathe, and clothe Appellant as well as provide her medicine and take her to doctor visits. [R. at 187]. Ms. Lebron stated that between January and December 2017, she received $800.00 per month from Appellant for her services. *Id*. In July 2018, Appellant resubmitted a duplicate copy of the "Medical Expense Report" reporting her medical expenses paid from January 1, 2017, to December 31, 2017, as well as a duplicate copy of the "Caregiver

Information" form reporting caregiver expenses for 2017. [R. at 182-83]; [R. at 179]

On August 1, 2018, the RO notified Appellant of its decision to "amend [her] death pension award based on [the] medical expense report we received on May 21, 2018." [R. at 168 (168-77)]. Specifically, the RO granted death pension benefits effective January 1, 2017, finding that Appellant's paid medical expenses reduced her total countable income to an amount less than the maximum allowable death pension rate provided by law as of December 1, 2016. [R. at 168-69]. The RO calculated Appellant's paid medical expenses between December 12, 2016, and December 31, 2017, as including Appellant's monthly Medicare premiums and prescription medications, but not the reported caregiver expenses "because we didn't receive a statement from your physician showing that you require this assistance[.]" [R. at 171]; [R. at 177].

Next, the RO acknowledged that Appellant's monthly Social Security Benefits, which constitutes all of her income, increased from $833.00 monthly to $849.00 monthly as of December 2017. [R. at 170]; [R. at 177]. Despite the increase in total income, the RO found that entitlement to death pension effective December 1, 2017, was nonetheless warranted because the medical expenses from December 1, 2017, reduced Appellant's income to an amount lower than the maximum annual death pension limit set by law as of December 1, 2017. [R. at 169]. Finally, the RO found that Appellant's income effective January 1, 2018, exceeded the maximum annual death pension limit set by law as of December 1,

2017, and accordingly terminated death pension benefits effective January 1, 2018. [R. at 170]. Appellant's medical expenses for this period included only the amount paid for Medicare premiums, which the RO considered as a continuing deduction from January 1, 2018, to December 31, 2018. *Id*.; [R. at 177].

Appellant submitted additional evidence to VA in August 2018, to include private clinical reports and a completed VA Form 21-2680, Examination for Housebound Status or Permanent Need for Regular Aid and Attendance, both signed by Appellant's private physician. [R. at 160-62]; [R. at 163-64]. VA construed Appellant's submissions as a reopened claim for death pension with A&A and housebound benefits. [R. at 158]. In September 2018, VA provided Appellant correspondence pursuant to the Veteran Claims Assistance Act (VCAA) explaining what evidence was needed to qualify for increased survivor benefits based on the need for A&A and/or housebound status. [R. at 147-52]. Appellant filed a VCAA Notice Response later that month indicating that she did not have any additional evidence to provide to VA to support her claim. [R. at 145-46].

In October 2018, the RO issued a Rating Decision denying entitlement to A&A or housebound benefits for the claim received on August 21, 2018. [R. at 142-44]. The RO explained that the medical evidence of record failed to demonstrate entitlement that Appellant required the A&A of another person to perform her activities of daily living, that she was severely visually impaired, or that Appellant was permanently housebound. [R. at 144]. Appellant responded to the Rating Decision in December 2018 by resubmitting duplicate copies of the

"Caregiver Information" form reporting caregiver fees paid in 2017 and the VA Form 21-8416 "Medical Expense Report" evidencing Appellant's medical expenses from January 1, 2017, to December 31, 2017. [R. at 137-39]; *see* [R. at 184-85]; [R. at 187].

The RO notified Appellant in December 2018 of its decision to deny the claim for death pension benefits received August 21, 2018. [R. at 107-10]; [R. at 129-36]. The RO found that Appellant's income effective January 1, 2018, exceeds the maximum annual pension limit set by law. [R. at 107]. The RO explained that Appellant's medical expenses for this period included only the amount paid for Medicare premiums and that it could not count the reported caregiver fees in 2017 as medical expenses because Appellant was denied entitlement to A&A or housebound benefits. [R. at 108].

Appellant timely filed a Notice of Disagreement in January 2019. [R. at 104-05]. She asserted that the RO's denial of aid and assistance and/or housebound benefits and SMP was in error because the RO failed to account for her caregiver expenses and failed to provide a VA examination. [R. at 105]. In May 2019, Appellant submitted a duplicate copy of the VA Form 21-2680, Examination for Housebound Status or Permanent Need for Regular Aid and Attendance, previously submitted in August 2018. [R. at 100-102].

A few days later, VA sent Appellant VCAA notice explaining what the evidence must show to support her claims and noting that "VA no longer provides VA examinations for surviving spouses when there is acceptable clinical evidence

or medical records provided by a physician." [R. at 91 (91-98)]. VA also requested that Appellant complete and return a VA Form 21-0518-1, Improved Pension Eligibility Verification Report, and a VA Form 21-8416, Medical Expense Report, evidencing her income, net worth and unreimbursed medical expenses for 2018 as well as her medical expenses for 2019. [R. at 91-92]. Appellant responded to the VCAA notice in July 2019 indicating that she had no additional information or evidence to provide VA in support of her claims. [R. at 87-88].

VA issued a Statement of the Case in August 2019 continuing the denial of entitlement to A&A or housebound benefits and survivor's pension. [R. at 82 (36-86)]. Appellant filed her substantive appeal to the Board later that month. [R. at 30-31]; [R. at 28]. The Board issued the decision on appeal in March 2020, denying entitlement to 1) SMP for a surviving spouse based upon the need for regular A&A of another person, or by reason of being housebound, and 2) survivor's pension. [R. at 3 (2-13)].

This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision denying entitlement to SMP based on the need for A&A or housebound status because the Board's findings are plausibly based in the record and supported by an adequate statement of reasons or bases. Further, Appellant fails to carry her burden of demonstrating clear error with regards to the Board's findings or otherwise identify favorable medical evidence demonstrating entitlement to SMP that the Board allegedly

overlooked. As such, Appellant's assertions of entitlement to SMP are unpersuasive, contrary to the evidence of record, and fail to account for the legal criteria that must be satisfied in order to establish entitlement to SMP.

The Court should also affirm the Board's decision denying entitlement to survivor's pension. The Board's finding that Appellant's countable income from January 1, 2018, exceeds the maximum statutory limit for awarding survivor's pension is plausibly based in the record and supported by an adequate statement of reasons or bases. Additionally, Appellant fails to identify any evidence of medical expenses paid after January 1, 2018, that the Board allegedly failed to consider or directly challenge the Board's findings as to her income and unreimbursed medical expenses. Appellant accordingly fails to carry her burden of demonstrating clear error in the decision on appeal. Therefore, the Court should affirm.

IV. ARGUMENT

The Board's determination as to whether a claimant is entitled to SMP based on the need for A&A on based on housebound status is a finding of fact that the Court reviews under the "clearly erroneous" standard of review. *Turco v. Brown*, 9 Vet.App. 222, 224 (1996). Similarly, the Court reviews for clear error the Board's factual determinations as to whether a claimant's income exceeded the MAPR. 38 U.S.C. § 7261(a)(4). Under this standard, if the Board's "account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would

have weighed the evidence differently." *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 94 L. Ed. 150 (1949)). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The Court also reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

In all cases, the burden is on the appellant to demonstrate error in the Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (clarifying that the appellant bears the burden of demonstrating error). Although Appellant is proceeding pro se, and the Secretary chooses to liberally read her informal opening brief, Appellant still carries the burden of demonstrating error on appeal. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the burden of establishing whether an error is harmful falls on the party attacking the agency's determination). Moreover, to warrant judicial interference with the Board decision,

the appellant must show that such demonstrated error was prejudicial to the adjudication of her claim. *Sanders*, 556 U.S. at 409. It is the responsibility of the appellant, and the appellant alone, to articulate the basis of her arguments and develop those arguments sufficient to permit an informed consideration of the same. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments).

Even when liberally construing Appellant's opening Informal Brief, the Secretary respectfully submits that Appellant fails to offer any allegations of error with the Board's decision. In the absence of allegation of specific error by Appellant, she has failed to meet her burden. Furthermore, the Board did not clearly err in its determination that Appellant was not entitled to A&A or housebound benefits, or to survivor's pension. Accordingly, the Court should affirm the Board's decision on appeal.

A. The Court should affirm the Board's denial of entitlement to SMP for a surviving spouse based upon the need for regular A&A of another person, or by reason of being housebound.

The Board found that entitlement to SMP for a surviving spouse was not warranted because the most probative evidence of record does not demonstrate that Appellant requires the regular A&A of another person, either pursuant to the criteria provided by law or on the basis of a factual need for A&A. [R. at 4-8]. The Board also concluded that entitlement to SMP was not warranted on the basis of being homebound, finding that evidence does not demonstrate that Appellant is permanently housebound. *Id*. Based on a sympathetic reading of her initial

informal brief, Appellant contends that entitlement to SMP based on A&A or by reason of housebound status is warranted in light of her age and health conditions. [App. Brf. at 1]. She also argues that VA failed to satisfy its duty to assist and to afford her the benefit of the doubt in adjudicating her claim. [App. Brf. at 2]. Notably absent from Appellant's brief is any specific assertion of clear error in the Board's decision, nor does Appellant directly challenge the Board's findings of fact regarding her claim. Therefore, because the Board had a plausible basis for its determination, and Appellant's arguments are without merit, the Court should affirm the Board's decision.

1. The Board properly denied entitlement to SMP on the basis of A&A and Appellant fails to demonstrate clear error as to the Board's determination.

As the Board explained, SMP benefits are payable to surviving spouses that are in need of regular A&A. 38 U.S.C. § 1521 (d); 38 C.F.R. § 3.351 (a)(5), (6). Requiring A&A means "helplessness or so nearly helpless as to require the regular A&A of another person." 38 C.F.R. § 3.351(b). Relevant here, a spouse will be considered to be in need of regular A&A for VA purposes if she: (1) is blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less; (2) is a patient in a nursing home because of mental or physical incapacity; or (3) establishes a factual need for A&A pursuant to the criteria under 38 C.F.R. § 3.352. 38 C.F.R. § 3.351(c).

The criteria in section 3.352(a) include the inability of the claimant to dress or undress or to keep ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid; inability of the claimant to feed oneself; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect oneself from hazards or dangers incident to his or her daily environment. 38 C.F.R. § 3.352(a). All of these factors do not need to be present "before a favorable rating may be made" and "[i]t is only necessary that the evidence establish that the veteran is so helpless as to need regular A&A, not that there be a constant need." *Id*. However, this Court has held that eligibility to SMP "requires at least one of the enumerated factors be present." *Turco* 9 Vet.App. at 224. Lastly, "[d]eterminations that the veteran is so helpless, as to be in need of regular A&A will not be based solely upon an opinion that the claimant's condition is such as would require him or her to be in bed. They must be based on the actual requirement of personal assistance from others." 38 C.F.R. § 3.352(a).

Here, the Board found that entitlement to SMP for a surviving spouse was not warranted because the most probative evidence of record does not demonstrate that Appellant requires the regular A&A of another person, either pursuant to the criteria provided by law or on the basis of a factual need for A&A. [R. at 4-8]. First, the Board reviewed the medical evidence of record, acknowledging that Appellant submitted a private medical opinion in August 2018.

[R. at 5]; *see* [R. at 163-64]. The Board observed that the private opinion, completed on VA Form 21-2680, Examination for Housebound Status or Permanent Need for Regular Aid and Attendance, indicated that Appellant "is not blind or bedridden, is not a patient of a nursing home, does not require assistive devices for ambulation, and does not require assistance with bathing, dressing, tending to personal hygiene needs, preparing her meals, or feeding herself." [R. at 5]; *see* [R. at 163-64]. The private examiner also found that Appellant is able to manage her own financial affairs. [R. at 163].

In reliance on this evidence, the Board determined that SMP due to the need for A&A is not warranted on the basis of either blindness or confinement to a nursing home because of mental or physical incapacity. [R. at 6]; 38 C.F.R. § 3.351(b)(1), (2). This finding is supported by a plausible basis in the record and confirmed by the private medical opinion submitted by Appellant. Significantly, Appellant does not appear to dispute these initial findings of fact.

The Board then considered whether SMP was warranted on a factual basis. [R. at 6-7]; 38 C.F.R. § 3.352(a). Here, the Board acknowledged Appellant's diagnoses and disabilities, to include, *inter alia*, diabetes, osteoarthritis, nephropathy, and hypertension. [R. at 6]; *see* [R. at 160-63]. Despite the existence of such conditions, however, the Board noted that "there is no indication that [Appellant] must rely upon another in order to sustain herself." [R. at 6]. Rather, as the Board explained, the private medical opinion demonstrates the opposite – that Appellant is able to bathe, dress, feed, and tend to personal

hygiene without assistance. *Id*.; *see* [R. at 163-64]. Additionally, the evidence indicates that she is competent to manage her own affairs, able to ambulate without assistive devices, and, crucially, is not confined to her home. [R. at 6]; [R. at 163-64].

In her informal brief, Appellant reiterates her contention that the Board failed to consider the evidence of her caregiver expenses and the statement supplied by her caregiver and daughter, Ms. Lebron, speaking to the assistance Ms. Lebron provided Appellant throughout 2017. [App. Brf. at 2]; *see* [R. at 187]. The Board expressly considered this evidence, however, noting that Ms. Lebron "helps to feed, bathe, clothe, and [ ] medicate" Appellant, as well as takes her to medical providers. [R. at 6]; *see* [R. at 187]. The Board did not dispute the helpfulness of this assistance, but found that this evidence "does not outweigh the findings of the private examiner in August 2018 that [Appellant] would be able to complete these tasks without outside assistance." [R. at 6-7]. Further, the Board explained that Appellant's use of such assistance to ease her life is not the equivalent of requiring assistance due to "helplessness or so nearly helpless as to require the regular A&A of another person." [R. at 7].

Finally, the Board concluded that the probative evidence of record does not establish a factual need for A&A under 38 C.F.R. § 3.352(a). *Id*. In support of this finding, the Board explained that the evidence does not demonstrate an inability by Appellant to feed or dress herself, tend to her hygiene, or otherwise indicate that "assistance is required to protect her from the hazards and dangers of her

daily environment." *Id*. The Board's finding on this matter is plausibly based in the record and supported by an adequate statement of reasons or bases. Notably, Appellant does not appear to directly challenge the Board's factual determinations or it's favoring of the medical evidence over the lay testimony of record. Moreover, while the Secretary sympathetic to Appellant's circumstances, her contentions that an award of A&A is warranted in light of her age and disabilities alone is both unpersuasive and contrary to Federal law. As such, Appellant fails to carry her burden of demonstrating clear error, and the Court should reject her contentions. *See Hilkert*, 12 Vet.App. at 151.

2. The Board properly denied entitlement to SMP on the basis of being homebound and Appellant fails to demonstrate clear error as to the Board's determination.

Next, the Board found that SMP was not warranted on the basis of being homebound because the evidence of record weighed against a finding that Appellant was "permanently housebound." [R. at 7-8]. An award of SMP may be warranted on the basis of a claimant's "housebound" status if the surviving spouse is found to be "permanently housebound." [R. at 7]; 38 C.F.R. § 3.351(f). As the Board explained, the "permanently housebound" requirement is satisfied when the surviving spouse is "substantially confined to his or her home (ward or clinical areas, if institutionalized) or immediate premises by reason of disability or disabilities which it is reasonably certain will remain throughout the surviving spouse's lifetime." [R. at 7]; 38 C.F.R. § 3.351(f).

The Board acknowledged Appellant's belief that her symptoms are of such severity as to warrant SMP based on housebound status, but reasoned that the evidence of record did not demonstrate that Appellant was "permanently housebound." [R. at 7]. Rather, the Board pointed to the private medical opinion from Appellant's physician and observed that the medical evidence of record indicates that Appellant is *not* confined to her residence. [R. at 7]; *see* [R. at 163-64]. Because the private medical opinion provided by Appellant "directly addresses the criteria under which SMP is evaluated," the Board determined that the examiner's opinion that Appellant is able to leave her residence was more probative than Appellant's own assessment, however sincerely held. [R. at 7].

The Board's finding that an award of SMP by reason of being housebound was not warranted is plausibly based in the record and supported by an adequate statement of reasons or bases. Indeed, the Board's factual determinations here are supported by the medical evidence of record as submitted by Appellant. Again, Appellant does not offer any evidence of being "permanently housebound" aside from her own unsubstantiated assertions that A&A is warranted. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order). Because Appellant fails to demonstrate clear error regarding the Board's decision, the Court should reject underdeveloped arguments and affirm the

Board's denial of entitlement to A&A. *Locklear*, 20 Vet.App. at 416; *see Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151

Finally, to the extent Appellant argues that the Board failed to satisfy its duty to assist and/or apply the benefit of the doubt, such arguments are unpersuasive and contrary to the evidence of record. [App. Brf. at 2]. As to VA's duty to assist, the Secretary interprets Appellant's assertion from her initial informal brief to be an extension of her January 2019 NOD in which she argued that VA was required to provide her with a medical examination addressing her need for A&A and/or housebound status. *Id*.; *see* [R. at 105]. The Secretary notes, however, that VA specifically addressed this argument in its May 2019 VCAA notification letter by explaining that "VA no longer provides VA examinations for surviving spouses when there is acceptable clinical evidence or medical records provided by a physician." [R. at 91]. It is also worth reiterating that acceptable clinical evidence and medical records are of record and that such evidence was submitted to VA by Appellant in August 2018. *See* [R. at 163-64]. Furthermore, VA consistently explained that the medical evidence submitted by Appellant did not demonstrate entitlement to SMP on the basis of A&A or due to housebound status and provided notice as to what the medical evidence must show to support her claim. *See e.g.* [R. at 91 (91-98)]. Despite such notice, Appellant proceeded to resubmit a duplicate copy of the unfavorable private medical opinion in May 2019. [R. at 101-02]. Soon thereafter, Appellant responded to VA's VCAA notification letter indicating that she did not have any additional evidence to submit to VA. [R. at 87-

88]. Therefore, Appellant's assertion that VA failed to satisfy its duty to assist in neither persuasive nor supported by the evidence of record. *Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151

As to the benefit of the doubt, the Secretary notes that the Board expressly found that the weight of the evidence was not in equipoise, but rather weighed against her claim of entitlement to SMP. [R. at 8]. As such, the Board found that "the benefit of the doubt rule does not apply." *Id*. Accordingly, Appellant's argument fails as a matter of fact and the Court should reject Appellant's conclusory statements to the contrary. *Locklear*, 20 Vet.App. at 416.

B. The Court should affirm the Board's denial of entitlement to survivor's pension because Appellant's income exceeds the statutory limits for the payment of death pension benefits.

The Board found that Appellant's annualized countable income exceeded the maximum annual pension rate for nonservice-connected death pension benefits as a matter of law. [R. at 8-11]. This finding is supported by a plausible basis in the record and confirmed by the evidence which demonstrates that: (1) Appellant is in receipt of income from the SSA and (2) the full amount of her reported unreimbursed medical expenses do not sufficiently reduce Appellant's countable income to qualify for nonservice-connected death pension benefits. Significantly, Appellant has not raised any disagreement with the Board's factual findings as to her income and has not identified any potentially favorable evidence of medical expenses paid after December 31, 2017, that the Board allegedly overlooked which would sufficiently offset the portion of her income in excess of

the MAPR. [App. Brf. at 1-3]; *Hilkert*, 12 Vet.App. at 151. Although the Secretary sympathizes with Appellant, the Court cannot mandate an award of benefits contrary to the rules provided by Federal law. *See Fritz v. Nicholson*, 20 Vet.App. 507, 511 (2006); *Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997); *see also Boyer v. West*, 210 F.3d 1351, 1356 (Fed. Cir. 2000). Absent any specific assertion of clear error in the Board's decision, and because the Board's decision is plausibly based in the record and confirmed by the evidence, the Court should affirm the Board's denial of entitlement to survivor's pension.

1. As to Appellant's income effective January 1, 2018, the Board correctly denied entitlement to survivor's pension because Appellant's income exceeds the statutory limits for the payment of death pension benefits.

In the decision on appeal, the Board explained that surviving spouses of veterans who served during wartime may be entitled to improved death pension benefits. [R. at 8]; 38 U.S.C. § 1541(a). Entitlement to death pension is generally determined based on the surviving spouse's annual income. *See* 38 C.F.R. §§ 3.271, 3.272. In calculating annual income, payments from any source, to include SSA benefits under certain conditions, are counted. 38 U.S.C. § 1503; 38 C.F.R. § 3.271(a)(1). As discussed by the Board, "[b]asic entitlement to a death pension award exists if, among other things, the surviving spouse's [countable] income is not in excess of the applicable maximum annual pension rate (MAPR)[,]" a figure which changes periodically and is reported in the Federal Register. [R. at 8]; *see* 38 U.S.C. §§ 1503, 1521; 38 C.F.R. §§ 3.3 (b)(4), 3.23(a), (b), (d)(5). A higher

annual rate is available to a surviving spouse who is entitled to SMP for "aid and attendance" or based on "housebound" status. 38 U.S.C. § 1541(d)(1); 38 C.F.R. § 3.351(a)(5), (b), (c).

Countable income is essentially annual income net allowable reductions as specified by law. 38 U.S.C. 1503; 38 C.F.R. §§ 3.271, 3.272. Qualifying unreimbursed medical expenses are allowable reductions from annual income if such expenses exceed 5% of the MAPR. 38 C.F.R. § 3.272(g). For example, unreimbursed premiums paid for Medicare Part B qualify as medical expenses that may be used to reduce a claimant's income if such expenses exceed 5% of the MAPR. *Id*.; 38 C.F.R. § 3.278(c)(5). Unreimbursed medical payments for needing regular A&A or being housebound may also be deducted from countable income if, *inter alia*, the surviving spouse also meets the criteria under 38 C.F.R. § 3.351 for demonstrating entitlement to SMP for "aid and attendance" or based on "housebound" status. 38 C.F.R. §§ 3.272(g), 3.278(b)(8).

As an initial matter, the Secretary notes that Appellant was granted death pension benefits effective January 1, 2017, and that such benefits were terminated and later denied effective January 1, 2018. [R. at 168]; [R. at 107]. The period prior to January 1, 2018, (i.e., December 12, 2016, to December 31, 2017) as it relates to survivor's pension is on appeal only to the extent that Appellant may be entitled to a higher MAPR, or entitled to additional unreimbursed medical expense reductions, if she is also entitled to SMP for A&A or based on housebound status for the period prior to January 1, 2018. 38 C.F.R. §§§ 3.351(a)(5), (b), (c),

3.272(g), 3.278(b)(8). However, as addressed above, Appellant is not entitled to SMP on the basis of A&A or based on housebound status for any period on appeal and the Board did not err in denying entitlement to SMP in the decision on appeal. Accordingly, the relevant focus of the issue on appeal is whether Appellant's countable income effective January 1, 2018, is in excess of the MAPR as of December 1, 2017, such that the Board properly denied entitlement to survivor's pension as a matter of law.

The Board's determination that Appellant's countable income exceeded the MAPR was not clearly erroneous. First, to determine Appellant's total income, the Board reviewed: (1) Appellant's December 2016 and January 2017 death pension applications which listed her income as $829.00 per month from SSA, and (2) the results of the SSA inquiries, which revealed that Appellant received $833.00 per month ($9,996.00 annually) from December 2016, $849.00 per month ($10,188.00 annually) from December 2017, and $872.50 per month ($10,470.00 annually) from December 2018. [R. at 9-10]; *see* [R. at 300]; [R. at 310]; [R. at 240]; [R. at 223]; [R. at 178];]; [R. at 135]]; [R. at 34]. Second, the Board observed that the MAPR for a surviving spouse with no dependents was $8,656.00 as of December 1, 2016; $8,830.00 as of December 1, 2017; and $9,078.00 as of December 1, 2018. [R. at 9].

Third, the Board identified Appellant's qualifying medical expenses for her income effective January 1, 2018. [R. at 8-11]. The Board acknowledged the expenses reported by Appellant in her 2016 and 2017 death pension applications

but did not include these expenses in calculating Appellant's unreimbursed medical expenses for her income effective January 1, 2018. [R. at 9 (8-11)]; *see* [R. at 300]; [R. at 310]. The Board did not err, however, in excluding these reported expenses because such expenses were paid between January 1, 2016, and December 31, 2016, and are thus outside the relevant temporal scope of the issue on appeal. The Board similarly acknowledged and excluded the caregiver expenses reported by Appellant from January 1, 2016, to December 31, 2017. [R. at 10]; [R. at 139]; [R. at 179]; [R. at 187]; [R. at 300]; [R. at 310]. Again, the Secretary submits that the Board did not err in excluding these reported expenses. As the Board explained, "[A]ppellant provided no receipts of such care, nor any other information concerning the nature of the care provided or what factors necessitated such care." [R. at 10]. The Board also found that the reported caregiver expenses for 2017 were insufficient to demonstrate entitlement to SMP based on A&A or housebound status. [R. at 6-7 (4-8)]. Accordingly, such expenses do not qualify as medical expenses eligible for exclusion from countable income effective January 1, 2018, thus the Board was not required to address such evidence specifically. *See* 38 C.F.R. §§ 3.272(g), 3.278(b)(8).

The Secretary also observes that the Appellant reported $2,400.00 in expenses for prescription medications in 2017. [R. at 138]; [R. at 183]; [R. at 185]. VA included this expense, in addition to Appellant's Medicare Part B premiums, in calculating Appellant's unreimbursed medical expenses in 2017. [R. at 177]. Despite the significance of Appellant's 2017 expenses for prescriptions in VA's

award of death pension benefits from January 1, 2017, and from December 1, 2017, Appellant did not report any similar expenses for prescriptions from January 1, 2018, thus contributing to the increase in her countable income relative to the relevant MAPR and, by extension, VA's decision to terminate her death pension benefits effective January 1, 2018. [R. at 168-70]. Moreover, Appellant has neither asserted nor submitted any evidence of prescription expenses paid after December 31, 2017, despite VA's repeated requests for evidence of additional medical expenses. *See* [R. at 168-77]; [R. at 147-52]; [R. at 107-10]; [R. at 91-98]; *see also* [R. at 145] (indicating "I have no other information or evidence to give VA to support my claim."); [R. at 87]. Instead, Appellant has only submitted duplicate copies of the 2017 medical expenses and caregiver fees. *See* [R. at 137-38]; [R. at 139]; [R. at 179]; [R. at 182-83].

Absent any evidence of prescription expenses, or sufficient evidence of qualifying caregiver expenses, paid after December 31, 2017, the Board concluded that Appellant's Medicare Part B premiums are the only medical expenses eligible for exclusion in computing Appellant's countable income effective January 1, 2018. [R. at 8-11]. This finding is plausibly based in the record and Appellant fails to carry her burden in demonstrating clear error in the Board's exclusion of her reported caregiver and prescription expenses. *Hilkert*, 12 Vet.App. at 151.

Fourth, the Board computed Appellant's total medical expenses for the income effective January 1, 2018. [R. at 10]. The Board found that Appellant spent $124.00 per month ($1,488.00 annually) on her Medicare Part B premium

as of December 2017. [R. at 10]; [R. at 177]; *see* [R. at 178]. Since such payments qualify for exclusion from total income for the purpose of calculating countable income, and because such payments were in excess of 5% of the MAPR, (i.e., $1,488.00 > $454.00[1]), the Board determined that the Medicare Part B premiums paid, reduced by 5% of the MAPR, constitute unreimbursed medical expenses in the amount of $1,046.00 (i.e., $1,488.00 - $454.00). [R. at 10].

The Board then proceeded to reduce Appellant's total income effective January 1, 2018, by her unreimbursed medical expenses, (i.e., $10,188.00 - $1,046.00), thus finding that Appellant's countable income effective January 1, 2018, amounted to $9,142.00. *Id*. Finally, the Board determined that Appellant's countable income was in excess of legal limit set by the MAPR as of December 1, 2017, (i.e., $9,142.00 > $8,830.00), thus concluding that entitlement to survivor's pension benefits was not warranted. *Id*.

2. As to Appellant's income effective December 1, 2018, the Board correctly denied entitlement to survivor's pension as a matter of law and, to the extent the Board erred in its computation of Appellant's countable income for this period, such error was harmless.

As an initial matter, the Secretary recognizes that the Board's decision as to the issue of entitlement to death pension benefits is not a model of clarity. Indeed, the Board, without explanation, proceeded to consider entitlement to death pension benefits for Appellant's countable income effective December 1, 2018, in

[1] $442.00 = 5% of $8,830.00 (the MAPR as of December 1, 2017).

the same paragraph as its finding that Appellant's countable income effective January 1, 2018, amounted to $9,142.00. [R. at 10].

Moreover, to the extent the Board evaluated whether death pension benefits were warranted for Appellant's income effective December 1, 2018, the Secretary acknowledges that the Board erred in calculating Appellant's countable income effective December 1, 2018.[2] [R. at 10]. However, the Board's error was harmless because, even when accurately computing Appellant's annual income as of December 2018, Appellant's countable income remains in excess of the MAPR as of December 1, 2018. *See Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (a remand is unnecessary when it "would result in this Court's unnecessarily imposing additional burdens on the [Board and the Secretary] with no benefit flowing to the veteran"); *see also Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) ("where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision" a remand is unwarranted).

More specifically, the Board's failure to account for the increase in Appellant's SSA benefits as of December 2018 in its annual income calculation does not change the outcome of Appellant's claim as a matter of law.[3] Notably, the Board's finding that Appellant's "non-reimbursed medical expenses would total $1,034.00" is accurate notwithstanding the error identified above because Board

[2] Finding Appellant's annual countable income is $9,154.00. [R. at 10].
[3] SSA benefits increased from $849.00 per month ($10,188.00 annually) as of December 2017, to $872.50 per month ($10,470.00 annually) as of December 2018. [R. at 34 (35-35)], [R. at 135].

correctly: (1) identified the qualifying medical expenses as of December 2018 as including only Appellant's Medicare Part B premiums given the absence of any evidence of prescription expenses, or sufficient evidence of qualifying caregiver expenses, paid after December 31, 2017; (2) calculated Appellant's total medical expenses as $1,488.00 annually[4] (i.e., $124.00 x 12); (3) employed the appropriate MAPR as of December 1, 2018 (i.e., $9,078.00) and found that "[5%] of the [this] MAPR is $454.00[;]" (4) determined that Appellant's total medical expenses qualify for reduction because such expenses exceed 5% of the MAPR (i.e., $1,488.00 > $454.00); and (5) reduced Appellant's total medical expenses by 5% of MAPR (i.e., $1,488.00 - $454.00), thus totaling $1,034.00 in non-reimbursed medical expenses. [R. at 10].

The Board, by excluding $1,034.00 in non-reimbursed medical expenses from Appellant's total income effective January 1, 2018, (i.e., $10,188.00), rather than her total income effective December 2018, (i.e., $10,470.00), inaccurately determined that Appellant's countable income for this period was $9,154.00.[5] [R. at 10]. But increasing Appellant's total annual income to accurately incorporate her increased SSA benefits as of December 2018 into the equation *still* does not

[4] Appellant's monthly Medicare Part B premiums of $124.00 did not change between November and December 2018. *See* [R. at 177].

[5] Although the Board does not expressly find that Appellant's annual income was $10,188.00 (or $849.00 per month) effective as of December 2018, such can be inferred by 1) the lack of evidence of, or assertion that, Appellant received income from a source other than SSA benefits for any period on appeal, and (2) by adding together the Board's express findings as to countable income and her non-reimbursed medical expenses for this period, (i.e., $9,154.00 + $1,034 = $10,188).

reduce her countable income effective December 1, 2018, below the MAPR of $9,078.00,[6] nor does it suggest that Appellant would qualify for death pension at any other point during the appeal period. Consequently, the Board's error in this regard is harmless and does not change the outcome of the claim: Appellant is not entitled to survivor's pension benefits as a matter of law. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Sanders*, 556 U.S. at 409; *Soyini*, 1 Vet.App. at 546; *see also Valiao*, 17 Vet.App. at 232.

In this case, Appellant has not carried her burden of persuasion and fails to identify any cognizable Board error in the decision on appeal that resulted in prejudice or frustrated judicial review. *Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151. Appellant has also failed to directly challenge any of the Board's factual findings as to her income and has not identified, let alone submit evidence of, any potentially favorable evidence of *qualifying* medical expenses paid *after* December 31, 2017, that the Board allegedly overlooked which would sufficiently offset the portion of her income in excess of the MAPR. [App. Brf. at 1-3]. Accordingly, the Court should affirm the Board's decision.

[6] $10,470.00 (annual income effective December 1, 2018) - $1,034.00 (unreimbursed medical expenses) = $9,436.00, which exceeds $9,078.00 (the MAPR as of December 1, 2018).

C. Appellant has abandoned all issues not argued in her brief.

Because Appellant has limited her arguments solely to those raised in her initial informal brief, the Court should deem all arguments not raised before the Court as abandoned. *Ford v. Gober*, 10 Vet.App. 531, 535 (1997) (noting that arguments not raised before the Court are considered abandoned on appeal).

V. CONCLUSION

WHEREFORE, in light of the foregoing reasons, the Court should affirm the March 6, 2020, Board decision that denied entitlement to (1) SMP for a surviving spouse based upon the need for regular A&A of another person, or by reason of being housebound, and (2) survivor's pension.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that on January 14, 2021, a copy of the foregoing was mailed, postage prepaid, to:

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