



**BOARD OF VETERANS' APPEALS**  
**DEPARTMENT OF VETERANS AFFAIRS**  
**WASHINGTON, DC 20420**

IN THE APPEAL OF  
PATRICIA C. MURPHY



IN THE CASE OF  
JOHN J. MURPHY

DOCKET NO. 14-40 518

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DATE *March 25, 2015*  
*PAJ*

On appeal from the  
Department of Veterans Affairs Regional Office in Philadelphia, Pennsylvania

**THE ISSUE**

Entitlement to accrued benefits for a surviving spouse.

**REPRESENTATION**

Appellant represented by: Chris Attig, Attorney at Law

**WITNESS AT HEARING ON APPEAL**

Appellant's attorney

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ATTORNEY FOR THE BOARD

T. Hal Smith, Counsel

INTRODUCTION

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2014). 38 U.S.C.A. § 7107(a)(2) (West 2014).

The Veteran served on active duty from August 1955 to September 1985. He died in March 2012. The appellant is his surviving spouse.

This case comes before the Board of Veterans' Appeals (Board) from a May 2012 rating decision of the Department of Veterans Affairs (VA) Pension Management Center in St. Paul, Minnesota. Jurisdiction over this appeal was subsequently transferred to the Regional Office (RO) in Philadelphia, Pennsylvania, which forwarded the appeal to the Board.

In January 2015, the claimant's attorney, at the Little Rock, Arkansas, RO, presented the appellant's case at a videoconference hearing before the undersigned Veterans Law Judge, in Washington, DC. A written transcript of the hearing has been prepared and incorporated into the evidence of record.

The Board notes that, prior to the filing of the appellant's claim, the law was amended to permit substitution of claimants when the original claimant dies during the pendency of the claim or appeal. 38 U.S.C.A. § 5121A (West 2014). The amendment applies to pending claims or appeals where the death occurred on or after October 10, 2008. In this case, the Veteran died in March 2012. However, as will be discussed below, the Veteran's claims which were pending at the time of

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death became final when no Notice of Disagreement (NOD) was filed within the applicable time period. As noted in more detail below, the September 2011 rating decision became final when the appellant did not express disagreement with the September 2011 rating decision within the applicable time period. As such, there are no claims pending or on appeal for which the appellant would be eligible for substitution. Therefore, while the Board has considered the aforementioned amendment, the Board finds that it is not applicable in this case, as there are no claims for which the appellant could be substituted.

The following determination is based on review of the Veteran's claims file in addition to his Virtual VA "eFolder."

#### FINDING OF FACT

While claims adjudicated in the September 2011 rating decision were pending at the time of the Veteran's death, no NOD was filed within one year from the date of notice to the Veteran of the September 2011 rating decision, such that there are no claims pending or on appeal which may form the basis for a grant of accrued benefits.

#### CONCLUSION OF LAW

The criteria for entitlement to accrued benefits have not been met. 38 U.S.C.A. § 1110, 1131, 1133, 5103, 5103A, 5107, 5121 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.1000 (2014).

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## REASONS AND BASES FOR FINDING AND CONCLUSION

### *Veterans Claims Assistance Act of 2000 (VCAA)*

The VCAA, now codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2014), with implementing regulations published at 66 Fed. Reg. 45, 620 (Aug. 29, 2001) (now codified as amended at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.316(a) (2014), describes VA's duty to notify and assist claimants in substantiating claims for VA benefits.

In a case such as this, where the pertinent facts are not in dispute and the law is dispositive, there is no additional information or evidence that could be obtained to substantiate the claim, and the VCAA is not applicable. *See Wensch v. Principi*, 15 Vet. App. 362, 368 (2001) (*citing Dela Cruz v. Principi*, 15 Vet. App. 143 (2001) (holding that VCAA does not apply where there is extensive factual development in a case, reflected both in the record on appeal and the Board's decision, which indicates no reasonable possibility that any further assistance would aid the claimant in substantiating his claim). *See also Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994); *see also Manning v. Principi*, 16 Vet. App. 534 (2002); *Mason v. Principi*, 16 Vet. App. 129 (2002); *Livesay v. Principi*, 15 Vet. App. 165 (2001); *Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991).

As will be discussed in further detail below, the appellant's claim is being denied solely because of a lack of entitlement under the law. Accordingly, the Board has decided the appeal on the current record without any further consideration of the VCAA.

Moreover, the Board notes, with regard to claims for service connection for accrued benefits purposes, the applicable law and regulations provide that, upon the death of a veteran or beneficiary, periodic monetary benefits to which that individual was entitled at death under existing ratings or decisions, or those based on evidence in

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the file at the date of his/her death (accrued benefits) and due and unpaid shall, upon the death of such individual, be paid to the specified beneficiaries, the first of which is the veteran's spouse. 38 U.S.C.A. § 5121(a) (West 2014); 38 C.F.R. § 3.1000(a) (2014). The Board has no obligation, or authority, to obtain new medical evidence in the form of a VA opinion.

*Analysis*

The Board must assess the credibility and weight of all evidence, including the medical evidence, to determine its probative value, accounting for evidence which it finds to be persuasive or unpersuasive, and providing reasons for rejecting any evidence favorable to the claimant. Equal weight is not accorded to each piece of evidence contained in the record; every item of evidence does not have the same probative value. When all the evidence is assembled, VA is responsible for determining whether the evidence supports the claims or is in relative equipoise, with the appellant prevailing in either event, or whether a preponderance of the evidence is against the claims, in which case, the claims are denied. *See Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

*Entitlement to Accrued Benefits*

Applicable law and regulations provide that, upon the death of a veteran or beneficiary, periodic monetary benefits to which that individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at the date of his/her death (accrued benefits) and due and unpaid shall, upon the death of such individual, be paid to the specified beneficiaries, the first of which is the veteran's spouse. 38 U.S.C.A. § 5121(a) (West 2014); 38 C.F.R. § 3.1000(a) (2014). A claim for such benefits must be filed within one year of the veteran's death. 38 C.F.R. § 3.1000(a), (c) (2014).

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In *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998), the United States Court of Appeals for the Federal Circuit concluded that, for a surviving spouse to be entitled to accrued benefits, "the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision." *See also Zevalkink v. Brown*, 102 F.3d 1236 (Fed Cir. 1996) (a consequence of the derivative nature of the surviving spouse's entitlement to a veteran's accrued benefits claim is that, without the veteran having a claim pending at time of death, the surviving spouse has no claim upon which to derive his or her own application).

The term "pending claim" means an application, formal or informal, which has not been finally adjudicated. 38 C.F.R. § 3.160(c) (2014). The term "finally adjudicated claim" means an application, formal or informal, which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of one year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is earlier. 38 C.F.R. § 3.160(d) (2014); *see also* 38 C.F.R. §§ 20.1103, 20.1104 (2014). "Evidence in the file at date of death" means evidence in VA's possession on or before the date of the beneficiary's death, even if such evidence was not physically located in the VA claims folder on or before the date of death. 38 C.F.R. § 3.1000(d)(4) (2014); *Hayes v. Brown*, 4 Vet. App. 353 (1993).

The Veteran's death certificate reveals that he died in March 2012. Prior to his death, in a September 2011 rating decision, the RO granted service connection for ischemic heart disease and assigned a 100 percent rating, effective the date of legislative change which allowed for the grant – August 31, 2010. The September 2011 rating decision also established basic eligibility to Dependents' Educational Assistance (DEA), but denied service connection for adenocarcinoma, posttraumatic stress disorder (PTSD), and hypertension (HTN). The decision also denied a compensable rating for service-connected bilateral hearing loss. The Veteran received notice of this decision in September 2011 and as noted above, he

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died in March 2012. Therefore, his death was within the statutorily provided one year period during which he could have filed a notice of disagreement (NOD).

In April 2012, the appellant filed a claim for death benefits, and service connection for the cause of the Veteran's death was granted in a May 2012 rating decision. In May 2013, she submitted a NOD with the May 2012 decision. Primarily, her statement indicated her intent to file for accrued pension purposes. The attorney's statements at the January 2015 hearing further detailed that the appellant wanted an effective date of 1985 for the grant of 100 percent for heart disease. Moreover, it was argued on her behalf that service connection should be granted for conditions that had been denied.

It is noted that prior to his death, the Veteran did not file a notice of disagreement with any aspect of above-mentioned September 2011 rating decision. He died within the one year period within which to file a timely appeal.

An individual entitled to accrued benefits may be paid periodic monetary benefits (due and unpaid) to which a payee was entitled at the time of his death under existing ratings or based on evidence in the file at the time of death. 38 U.S.C.A. § 5121 (West 2014); 38 C.F.R. § 3.1000 (2014). In order to support a claim for accrued benefits, the veteran or other payee must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision. 38 U.S.C.A. §§ 5101(a), 5121(a) (West 2014); *Jones v. West*, 136 F.3d 1299 (Fed. Cir. 1998).

In this case, there was a claim or claims pending at the time of the Veteran's death. The RO, in September 2011, had determined that service connection was warranted for heart disease, but that service connection was not warranted for adenocarcinoma, PTSD, or HTN, and that a compensable rating for bilateral hearing loss was not warranted. In the notification letter to the Veteran, dated September 14, 2011, he was also advised as to withholding compensation for retirement and an

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additional allowance for dependents. While the Veteran did not file a NOD as to any aspect of the September 2011 rating decision prior to his death, the period to do so did not expire until September 13, 2012. Thus, the Veteran's claims were pending on the date of the Veteran's death. *See* M21-1 MR, Part VIII, Chapter 2, Section a., Notes: For accrued purposes, a claim I still considered pending at the date of death if the one-year period after the date of notice of an award or disallowance has not expired for filing a NOD.

In the present case, the appellant submitted no document within the remainder of the one-year period which may be considered a NOD as to any aspect of the September 2011 rating decision. While there is some correspondence from her during this period, no document evidences a disagreement with the September 2011 rating decision, indicates an intent to appeal or otherwise identifies any error in the September 2011 rating decision. It is not until her private attorney's involvement in the case, in May 2013, that there is any discussion of the September 2011 rating and identification of bases for a grant of accrued benefits. This is well beyond the end of the one year period to file a NOD. Without a timely filed NOD following the September 2011 rating decision, by either the Veteran or the appellant, the September 2011 rating decision is final and there is no pending claim on which an accrued benefits claim may be based.

In *Sabonis, supra*, the Court held that where the law and not the evidence is dispositive, the claim should be denied due to the lack of entitlement under the law. For the reasons discussed above, the appellant is not legally entitled to accrued benefits and her claim must be denied.

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ORDER

Accrued benefits for a surviving spouse are denied.

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BARBARA B. COPELAND  
Veterans Law Judge, Board of Veterans' Appeals

## YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

**How long do I have to start my appeal to the court?** You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims  
625 Indiana Avenue, NW, Suite 900  
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cave.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Director, Management, Planning and Analysis (014)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error?** You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

**How do I reopen my claim?** You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, [mail@vetsprobono.org](mailto:mail@vetsprobono.org), or (888) 838-7727.

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

**Filing of Fee Agreements:** In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the General Counsel (022D)  
810 Vermont Avenue, NW  
Washington, DC 20420**

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).