

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-4126

CANDACE BERNARD, APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

PIETSCH, *Judge*: The appellant, Candace Bernard, appeals, through counsel, an October 7, 2016, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for acute myeloid leukemia (AML), as due to exposure to chemical solvents, to include benzene, for accrued benefits purposes, and to service connection for the cause of the veteran's death. Record (R.) at 1-20. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). Both parties submitted briefs and the appellant submitted a reply brief. A single judge may conduct this review. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

For the reasons set forth below, the Court will vacate that portion of the Board's October 7, 2016, decision addressing entitlement to service connection for AML for accrued benefits purposes and dismiss the appeal of that matter. The Court will also vacate that portion of the Board's decision addressing entitlement to service connection for the cause of the veteran's death and remand that matter for further adjudication consistent with this decision.

I. BACKGROUND

The veteran, Carl E. Bernard, served in the U.S. Air Force from November 1965 to February 1969, including service in the Republic of Vietnam. R. at 85. His exposure to herbicides during service is presumed. R. at 183.

The appellant is the veteran's surviving spouse. R. at 3, 994. The veteran was diagnosed with AML in July 2002 and passed away in March 2003. R. at 994, 1584. His death certificate lists the immediate cause of death as stroke due to, or as a consequence of, AML. R. at 994. At the time of his death, he had pending claims for entitlement to service connection for AML and for diabetes mellitus. R. at 181.

In August 2003, the appellant submitted a timely application for accrued benefits and dependency and indemnity compensation (DIC). R. at 996. The VA regional office denied her claims in June 2004, R. at 816, and she submitted a Notice of Disagreement (NOD) in July 2004, R. at 806. Subsequently, VA issued a Statement of the Case, R. at 778, and she perfected her appeal, R. at 775-77. In July 2007 and January 2010, the Board remanded her claims for additional development. R. at 299-308, 710-20. A January 2010 VA medical examiner opined that it was less likely as not that the veteran's AML was caused by, aggravated by, or related to one of the "B-cell Chronic Lymphocytic Leukemias."¹ R. at 297-98. In February 2010, the appellant submitted an article regarding the relationship between AML and benzene which indicated, inter alia, that exposure to certain chemicals, including benzene, is thought to lead to AML. R. at 197, 282-84.

In November 2011, the Board denied the appellant's claim for entitlement to service connection for AML, to include as due to Agent Orange or radiation exposure, for accrued benefits purposes and remanded her claim for entitlement to service connection for the cause of the veteran's death. R. at 194-95. Specifically, the Board remanded her DIC claim to obtain a VA medical opinion on the question of whether it was at least as likely as not "that the AML causing the Veteran's death was etiologically related to his period of active service, to particularly include in-service exposure to benzene, or other such chemicals, in his capacity as a jet engine mechanic during his service." R. at 197. That same month, the appellant submitted a page from the American Cancer Society's website regarding benzene which stated, inter alia, that "[t]he link between benzene and cancer has largely focused on leukemia and cancers of other blood cells." R. at 171.

¹ "All chronic B-cell leukemias (including, but not limited to, hairy-cell leukemia and chronic lymphocytic leukemia)" are presumed associated with herbicide exposure. 38 C.F.R. § 3.309(e) (2017).

VA obtained a medical opinion in December 2015. R. at 1879-82. That VA examiner opined that it was impossible to answer the Board's question without resorting to mere speculation. R. at 1881. In June 2016, the Board sent a letter to the Chief of Staff of the VA medical center in Salisbury, North Carolina, requesting that an oncologist or hematologist "provide an advisory medical opinion" on whether "it is at least as likely as not . . . that the AML resulting in the Veteran's death was etiologically related to his period of active service, to particularly include in-service exposure to benzene." R. at 38, 37-39. VA received a Veterans Health Administration (VHA) opinion in July 2016. R. at 31-35. That examiner opined that it was not at least as likely as not that the veteran's AML was related to his service. R. at 35. The VHA examiner explained that, generally, individuals who are occupationally exposed to benzene have not and will not develop AML and the fact that the veteran's AML developed more than three decades after his service weighed against a link between his in-service benzene exposure and AML. R. at 34.

In the October 2016 decision on appeal, the Board denied entitlement to service connection for AML, as due to exposure to chemical solvents, to include benzene, for accrued benefits purposes, and to service connection for the cause of the veteran's death. R. at 2, 5, 18.

II. ANALYSIS

Initially, the Court must correct the procedural uncertainty that the Board created by including the issue of entitlement to service connection for AML for accrued benefits purposes in the decision on appeal. VA determinations regarding service connection for accrued benefits purposes and service connection for the cause of a veteran's death are based on the application of two separate laws: 38 U.S.C. § 5121(a) and 38 U.S.C. § 1310. With respect to claims for accrued benefits purposes, which are not considered death benefits, entitlement may be based only on the evidence that was in the veteran's claims file, either physically or constructively, at the time of the veteran's death. *Hyatt v. Shinseki*, 566 F.3d 1364, 1370-71 (Fed. Cir. 2009); *see* 38 U.S.C. § 5121(a); 38 C.F.R. § 3.1000 (2017). With respect to claims for entitlement to service connection for the cause of the veteran's death, which are death benefits, VA is not limited to reviewing only the evidence that was in the claims file at the time of death; rather, VA will decide a claim for death benefits without regard to prior VA decisions and an appellant may add additional evidence into the claims file that could help establish service connection. *See* 38 C.F.R. § 20.1106 (2017).

The November 2011 Board decision denied the appellant's claim for entitlement to service connection for AML for accrued benefits purposes. R. at 194. She did not appeal that denial.² The Secretary appears to contend that the appellant has two theories of entitlement to service connection for AML and the November 2011 Board decision bifurcated those theories, such that she is now unable to assert entitlement to service connection for the cause of the veteran's death based on a theory that his Agent Orange exposure caused his AML. Secretary's Brief (Br.) at 7-8. The Secretary misinterprets the record and law. The appellant had two distinct claims on appeal at the time of the November 2011 Board decision: entitlement to service connection for AML for accrued benefits purposes and entitlement to service connection for the cause of the veteran's death.³ R. at 174. Contrary to the Secretary's contention otherwise, the November 2011 Board decision denied entitlement to service connection for AML for accrued benefits purposes and remanded entitlement to service connection for AML for the cause of the veteran's death. R. at 194. In the decision on appeal, the Board lacked jurisdiction over entitlement to service connection for accrued benefits purposes, and erred when it included that issue on appeal, as the November 2011 decision finally decided that issue and the appellant did not appeal it. Accordingly, the Court will vacate and dismiss the Board's decision with respect to the issue of entitlement to service connection for AML for accrued benefits purposes.

Turning to the issue of service connection for the cause of the veteran's death, the appellant first contends that the Board failed to address a reasonably raised theory of entitlement to service connection for cause of the veteran's death based on his Agent Orange exposure. Appellant's Br. at 7-9. Second, she asserts that the Board failed to discuss the probative value of the December 2015 VA opinion and the February 2010 and November 2011 articles that she submitted. *Id.* at 9-15. Third, she argues that the Board impermissibly gathered evidence against her claim when it ordered the July 2016 VHA opinion. *Id.* at 15-16. Fourth, she contends that she was not provided an opportunity to challenge the July 2016 VHA specialist's credentials, as the specialist's signature

² The record of proceedings does not reveal and neither party argues that the appellant appealed the November 2011 Board's denial of entitlement to service connection for accrued benefits purposes. *See* Appellant's Br. at 8 ("[I]n November 2011[,] the Board only denied service connection for accrued benefits purposes."), Reply Br. at 1 ("[T]he November 2011 Board decision did *not* deny service connection for the Veteran's cause of death, but rather, only for accrued benefits purposes.") (emphasis in original).

³ The appellant had a third claim on appeal at the time of the November 2011 Board decision, entitlement to service connection for diabetes mellitus with diabetic retinopathy for accrued benefits purposes. R. at 174. The Board denied that claim, R. at 194, and she did not appeal that denial.

is illegible. *Id.* at 17-18. Fifth, she asserts that the Board failed to address a reasonably raised issue of whether the veteran's ischemic heart disease was a contributory cause of his death. *Id.* at 18-21. The Secretary disputes the appellant's contentions and asks the Court to affirm the Board's decision. Secretary's Br. at 6-20.

With respect to the appellant's first argument, she asserts that the Board improperly narrowed the scope of her claim of entitlement to service connection for the cause of the veteran's death by discussing only, and obtaining medical opinions exclusively about, his in-service benzene exposure. Appellant's Br. at 8. She contends that her July 2004 NOD raised the theory of entitlement to service connection for the cause of the veteran's death based on his Agent Orange exposure and that VA is required to obtain a medical opinion discussing whether his AML was related to his Agent Orange exposure. *Id.* In her July 2004 NOD, she stated that "direct exposure to radiation or various chemicals i.e., agent orange" caused the veteran's AML. R. at 806-07. Moreover, in November 2011, the Board remanded this claim to obtain "a medical opinion—based on full consideration of the Veteran's documented medical history, and supported by clearly-stated rationale." R. at 195. The Board explained that, unlike the claim for service connection for accrued benefits purposes, "VA may further develop the record by obtaining a medical opinion" to address "the medical relationship, if any, between the Veteran's AML and any in-service exposure to chemicals." *Id.* In fact, the Board instructed the VA examiner to opine whether it was at least as likely as not "that the AML causing the Veteran's death was etiologically related to his period of active service, to particularly include *in-service exposure to benzene, or other such chemicals*, in his capacity as a jet engine mechanic during his service." R. at 197 (emphasis added).

In the decision on appeal, the Board stated that, "in the November 2011 decision, the Board denied the appellant's claims for service connection for the Veteran . . . for AML primarily due to herbicide exposure and radiation," and that "[a]s the Board has found that service connection for these claims is not warranted, there is no legal basis to establish entitlement to service connection for the cause of the Veteran's death premised on . . . AML due to herbicides and/or radiation exposure." R. at 12. Like the Secretary's argument above, the Board confused its prior denial of entitlement to service connection for AML for accrued benefits purposes with the appellant's claim for entitlement to service connection for the cause of the veteran's death. *Compare* R. at 12, *with* R. at 194. The Court holds that the appellant's July 2004 NOD, coupled with the November 2011 Board remand, reasonably raised the issue of whether she was entitled to service connection for

the cause of the veteran's due to his Agent Orange exposure and the Board erred in not addressing that issue. *See Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (holding that the Board must address all issues raised by the appellant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Accordingly, the Court will vacate and remand the Board's determination regarding entitlement to service connection for the cause of the veteran's death. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

The Court will not consider the appellant's remaining arguments at this time. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him [or her]."). On remand, the Board must discuss whether an additional medical opinion, regarding a possible relationship between the veteran's Agent Orange exposure and AML, is necessary. *Cf. McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (holding that VA is required to provide a medical examination where there is, *inter alia*, "insufficient competent medical evidence . . . to make a decision on the claim"). The appellant may raise her remaining arguments on remand, along with any additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (*per curiam* order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Court).

As a final matter, the Court is compelled to note that there is little about this case that appears to have been handled in an expeditious manner. *See id.* For example, the Board's second remand, in January 2010, was necessary, as VA failed to complete the requested development from the Board's initial remand in July 2007. R. at 299-307. Moreover, the current claim stream stems from an August 2003 claim for benefits, received by VA some 14 and a half years ago. R. at 996. The Court trusts that the Secretary will do his utmost to finally resolve the current claim promptly.

III. CONCLUSION

After consideration of the appellant's and Secretary's briefs, and a review of the record on appeal, that portion of the Board's October 7, 2016, decision addressing entitlement to service connection for AML for accrued benefits purposes is VACATED and the appeal of that matter is DISMISSED. That portion of the Board's decision addressing entitlement to service connection for the cause of the veteran's death is VACATED and the appeal of that matter is REMANDED for further adjudication consistent with this decision.

DATED: February 28, 2018

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)