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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3465

CATHIE J. TOLLIVER, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

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

GREENBERG, *Judge*: Cathie J. Tolliver, widow of veteran Lester E. Tolliver, appeals through counsel that part of an August 22, 2016, Board of Veterans' Appeals decision denying entitlement to service connection for the cause of her husband's death, and thus entitlement to dependency and indemnity benefits (DIC).¹ Record (R.) at 2-19. This appeal is timely, and the Court has jurisdiction over the case under 38 U.S.C. §§ 7252(a) and 7266. The appellant argues that the Board erred in concluding that the veteran's service-connected disabilities did not cause or contribute to his death. Specifically, the appellant asserts that the Board failed to discuss the applicability of 38 C.F.R. § 3.321(c)(3) (2018),² a regulation stating that diseases or injuries

¹ The Board also denied the appellant DIC benefits under 38 U.S.C. § 1318, which provides benefits if the veteran had a service-connected disability rated as totally disabling continuously for 10 years immediately preceding death, or if the veteran was rated as totally disabled not less than 5 years from the date of discharge or other release from active duty. The appellant presents no argument as to this matter and the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons a claim, the Court will not address it).

² The appellant also initially argued that the Board failed to follow its own procedures outlined in the *VA Adjudication Procedures Manual* (M21-1), pt. IV, subpt. iii, ch. 2, sec. A.1.b., directing an automatic grant of DIC when a service-connected disability is listed as a cause of death on the veteran's death certificate. *See* Appellant's Brief at 16-19. Although the Court accepts the appellant's withdrawal of this argument, the Court noted at oral argument that the Secretary provided conflicting reasoning regarding the use of the M21-1. On the one hand, he described the M21-1 as an important guideline meant to promote uniformity, efficiency, and consistency in first-line veteran's benefit adjudication, and, on the other hand, he could not explain how adjudicators accomplish these goals when they

involving active processes affecting vital organs should receive careful consideration as a contributory cause of death. This regulation recognizes that the contributory cause of death may not be related to the primary cause of death; however, the debilitating effects and general impairment of health caused by the contributory disease or injury may cause a person to be less capable of resisting the effects of disease or injury primarily causing death. *See* Appellant's Brief (Br.) at 13-16. Because the Board failed to address whether the veteran's service-connected shell fragment wound of the pleural cavity was a contributory cause of death under 38 C.F.R. § 3.312(c)(3), the Court will vacate that part of the August 22, 2016, Board decision on appeal and remand the matter for readjudication consistent with this decision.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations such as their widows, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

From the beginning of the Republic statutory construction concerning congressional promises to veterans has been of great concern. "By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose

are allowed to apply the M21-1 inconsistently. Oral Argument at 35:00-55:00. *Tolliver v. Wilkie*, U.S. Vet. App. No. 16-3465 (oral argument held Nov. 11, 2018), http://www.uscourts.cavc.gov/oral_arguments_audio.php. The Secretary is reminded that veterans benefits are a property interest protected by due process, *see Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009), and it is important to bear this in mind, especially in first-line adjudication where the use of the M21-1 may indeed be dispositive of a veteran's claim to benefits.

The appellant further contends that the Board member presiding over the appellant's 2015 hearing failed to fulfill her duties under 38 C.F.R. § 3.103 (c)(2). On remand, the appellant may request another Board hearing. *Cook v. Snyder*, 28 Vet.App. 380, 344-46 (2017) (holding that a claimant has the right to request and receive a Board hearing to submit additional evidence after a Court remand).

names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law, in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?" *Marbury v. Madison*, 5 U.S. 137, 164, 2 L. Ed. 60, 69 (1803).

World War II veteran Lester E. Tolliver served on active duty in the U.S. Army from March 1943 to May 1945, and was awarded the Purple Heart after suffering shrapnel wounds during combat to his right shoulder and chest. R. at 75. The veteran's certificate of disability for discharge describes his combat injuries to include the following: a "wound, penetrating, right chest, point [of] entrance right nipple, traversing right pleural space, right lung and producing contusion of myocardium and hemopericardium and lodging above left diaphragm, severe, shell fragment, due to enemy action." R. at 1367.

In May 1945, the veteran filed for benefits for "penetrating wound of [the] r[igh]t shoulder [and] chest." R. at 1356-59. In a January 1946 VA special chest and special heart examination, the veteran complained of "stabbing pains in his right lung" and shortness of breath, especially with exertion. R. at 1217. VA assigned a temporary 100% disability rating from May 27, 1945, to May 20, 1946, under U.S. Veterans Administration, Schedule of Rating Disabilities, section 3219 (March 20, 1933), for a "gunshot wound, right chest, traversing right pleural space, right lung, producing contusion of myocardium and hemopericardium and lodging left diaphragm," and under section 1793 for "ankylosis fibrinous, partial, right shoulder." R. at 1243; *see also* VA Schedule of Rating Disabilities (Mar. 20, 1933).

In March 1946, VA assigned the veteran a 30% disability rating under U.S. Veterans Administration, Schedule of Rating Disabilities, section 3219, for pleurisy, right lung with a foreign body lodged in the left diaphragm; a 30% disability rating under section 1793, for ankyloses of the right shoulder; a 30% disability rating under section 3165, for group III, intrinsic shoulder girdle muscles, resulting in a combined 70% disability rating. R. at 1206; *see also* VA Schedule of Rating Disabilities (1945 ed.).

In October 1978, the veteran sought a reevaluation of his service-connected disabilities. R. at 1133. VA listed his "shell fragment wound pleural cavity with retained foreign body," under 38 C.F.R. § 4.97, Diagnostic Code (DC) 6818 (1978) (rating pleural cavity injuries, including

residuals of gunshot wounds), and assigned a 20% disability rating; and listed his shell fragment wound to the right shoulder with slight limitation of motion and injury to muscle group III, under 38 C.F.R. § 4.73, DC 5303 (1978)(rating injuries of the shoulder and arm based on elevation and abduction), and assigned a 30% disability rating. R. at 1132.

During an August 2008 geriatric outpatient consultation report, a VA staff physician's review of the veteran's respiratory system noted "easy s[horthness] o[f] b[reath] due to diaphragm." R. at 908.

A July 2010 rating decision lists the veteran's "shell fragment wound muscle group IV left pleural with retained foreign body" now under DC 6818-5321,³ R. at 247; this hyphenated rating reflects that the veteran was being compensated based on the residuals of severe or moderately severe impairment of the muscles of respiration. *See* 38 C.F.R. §§ 4.27 (2018) (DC number appropriate to the residual condition will be added and preceded by a hyphen); 4.73, DC 5321 (2010) (rating muscles of respiration).

In February 2012, the veteran died. R. at 225. The death certificate noted the veteran's immediate cause of death was chronic respiratory failure due to chronic obstructive pulmonary disease, and listed his shoulder muscle injury, chest muscle impairment, and post-traumatic stress disorder (PTSD) as conditions contributing to his death. *Id.* At the time of death, the veteran was service connected for bilateral hearing loss, tinnitus, a perforated ear drum, PTSD, a shell fragment wound to the right shoulder (muscle group III), and a shell fragment wound to muscle group IV left pleural (chest) with a retained foreign body. *See* R. at 247.

In March 2012, the appellant filed an application for DIC benefits based on her husband's service-connected conditions causing or contributing to his death. R. at 216-24. In July 2012, VA provided a medical opinion to evaluate whether the veteran's service-connected conditions contributed to his death. R. at 160. After reviewing the veteran's treatment records, a VA physician opined that "it is not as least likely as not that the stated service connected chest muscle impairment and shoulder muscle injury caused or significantly contributed to [the] veteran's death

³ In January 1993, VA published a proposed rule amending its schedule for rating disabilities of the respiratory system. *See* 58 Fed. Reg. 4962, 4965 (Jan. 19, 1993). As part of it revision, DC 6818 was eliminated and injuries of the pleural cavity were rated as traumatic chest wall injuries. VA adopted the final rule in September 1996, and it is not clear why VA used the hyphenated code in 2010; however, to the extent this is a favorable finding the Court will not disturb it on appeal. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); 61 Fed. Reg. 173 (Sept. 5, 1996).

as stated in the death certificate as chronic respiratory failure and chronic obstructive lung disease." R. at 160.

In August 2012, VA denied the appellant service connection for the veteran's cause of death and thus DIC benefits. R. at 178-79. The appellant appealed in September 2012. R. at 177. In May 2013, the veteran's medical record was re-evaluated by the July 2012 examiner and again the examiner opined that the veteran's service-connected disabilities did not cause or contribute to his death. R. at 1422-23.

In August 2016, the Board denied service connection for the cause of the veteran's death. R. at 2-19. In reaching this determination the Board found generally that the veteran's service-connected disabilities did not cause or contribute to his death. R. at 4. The Board offered the following rationale:

As noted by [the July 2012 VA examiner], the Veteran did not have any lasting respiratory or pulmonary impairment as a result of his shell fragment wounds. Although he was treated for chronic pleurisy after his injuries, pulmonary function tests in 1978 and 2003 were normal. The residual symptoms reported by the Veteran were pain at the base of his left lung and pain at the extreme ranges of motion of his right shoulder. He did not complain of having any residual shortness of breath. The medical evidence indicates that he had episodes of dyspnea beginning in 2008; however, shortness of breath was attributed to factors other than his shell fragment wounds, e.g., congestive failure, ischemic heart myopathy, COPD, and pneumonia. In the month prior to his death, he was also found to have had a pulmonary embolism, which was not listed on his death certificate.

R. at 15.

When a veteran dies of a service-connected or compensable disability, his or her surviving spouse shall be eligible for DIC benefits. *See* 38 U.S.C. § 1310. The VA regulation covering cause of death, 38 C.F.R. § 3.312 establishes generally that when a disability is "either the principal or a contributory cause of death," DIC benefits will be awarded. *See* 38 C.F.R. § 3.312(a) (2018). A service-connected disability is considered as the principal cause of death when the disability is the "immediate or underlying cause of death or was etiologically related thereto." 38 C.F.R. § 3.312(b) (2018). A service-connected disability is considered to contribute to the cause of death when it is shown that "it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death." *See* § 3.312(c). Specifically, VA requires that

service-connected diseases or injuries involving active processes affecting vital organs should receive careful consideration as a contributory cause of death, the primary cause being unrelated, from the viewpoint of whether there were resulting

debilitating effects and general impairment of health to an extent that would render the person materially less capable of resisting the effects of other disease or injury primarily causing death.

38 C.F.R. § 3.312(c)(3).

At the time of his death the veteran had a 20% disability rating under DC 6818-5321, *see* R. at 247 (Nov. 2010 rating sheet); this hyphenated rating reflects that the veteran was rated for residuals from a gunshot wound of the pleural cavity under DC 6818, and received a 20% rating for the residuals of his shell fragment wound with retained foreign body under DC 5321, which indicates a "severe or moderately severe" impact on the respiratory function of Muscle Group XXI, "muscles of respiration." 38 C.F.R. § 4.73, DC 5321 (2010); *see also* 38 C.F.R. § 4.27 (2007) (providing that "if the rating is determined on the basis of the residual condition, the number appropriate to the residual condition will be added, preceded by a hyphen").

The Court concludes that the Board provided an inadequate statement of reasons and bases for denying the appellant's claim for service connection for the veteran's cause of death. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented in the record."). The Board failed to address whether the veteran's pleural shrapnel wound with retained foreign body causing a severe to moderately severe impact on the muscles of respiration "[involved an active process] affecting a vital organ." 38 C.F.R. § 3.312(c)(3). Moreover, the Board did not discuss whether this impact on breathing rendered the veteran "materially less capable of resisting the effects of other disease or injury primarily causing death, here chronic obstructive pulmonary disease." *Id.*

Although the Board relied on the July 2012 and May 2013 examiner's opinion that the veteran did not have any service-connected pulmonary impairment because of the shell fragment wounds, the record states that the veteran had received a 20% disability rating for severe or moderately severe impairment of his muscles of respiration. *See* R. at 247. Remand is required for the Board to provide an adequate statement of reasons and bases for a cause-of-death determination. On remand, the Board must evaluate the veteran's history "from the viewpoint of whether there were resulting debilitating effects and general impairment of health to an extent that would render the person materially less capable of resisting the effects of other disease or injury primarily causing death." 38 C.F.R. § 3.312(c)(3).

Because the Court is remanding the appellant's claim, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

For the foregoing reasons, the Court will VACATE that part of the Board's August 22, 2016, decision denying entitlement of service connection for the veteran's death and REMAND the matter for readjudication.

DATED: November 21, 2018

Copies to:

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