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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-0237

RITA SMITH, APPELLANT,

V.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Army veteran Luis Smith, Jr., served in Korea in 1968 and 1969. He died from a form of leukemia in July 2008, and his wife, Rita Smith, filed a claim for dependency and indemnity compensation benefits (DIC) shortly thereafter. She appeals a September 2017 Board decision denying entitlement to those benefits.

Ms. Smith alleges that her late husband was exposed to Agent Orange while serving in Korea and that his leukemia resulted from that exposure. Critical to this appeal is VA's regulation governing presumptive exposure to herbicides. Veterans who

> served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

38 C.F.R. § 3.307(a)(6)(iv) (2019).

The Board concluded that the presumption did not apply for two reasons. The first was because the veteran's unit was not on the Department of Defense's (DOD) list of specific units identified as having operated in the Korean DMZ. The second was because the Joint Services

Records Research Center reviewed his unit records and saw no documentation of Agent Orange exposure or any mention of specific duties carried out by individual unit members.

Ms. Smith argues, among other things, that the Board failed to fully explore whether the veteran was exposed to herbicides, either actually or presumptively. The Secretary responds that the plain language of the regulation foreclosed the presumption, as the veteran did not serve "in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied." *Id*. On rebuttal, Ms. Smith contends that the regulation isn't as clear as the Secretary suggests. She asserts that it says nothing about *when* that determination must be made. In other words, the parties' dispute boils down to this: Must the veteran's unit already be on DOD's list at the time the veteran seeks benefits, or can a claimant submit evidence that triggers further collaboration between VA and DOD to see if a specific unit might join that list?

Based on recent developments in the law, the Court finds it inappropriate to resolve this question at this time. While this appeal was pending, Congress enacted, and the President signed into law, the Blue Water Navy Vietnam Veterans Act of 2019. The new law appears to codify VA's regulation related to veterans who served in Korea (cited above) in a new section of the U.S. Code 38 U.S.C. § 1116B, though with modifications. Notably, it contains no reference to units designated by DOD; it simply refers to veterans who "served in or near" the DMZ. *Compare* 38 C.F.R. § 3.307(a)(6)(iv), *with* Pub. L. No. 116-23, § 3(a), 133 Stat. 966, 969 (2019). The Court also notes that, although the effective date of the law is January 1, 2020, the statute specifically authorizes the Secretary "to issue guidance to implement section 1116B of title 38, United States Code, as added by subsection (a), before prescribing new regulations under such section." § 3(c)(1), 133 Stat. at 970.

In light of these circumstances, the appropriate course of action is to allow the Board to consider in the first instance any effects these changes might have on Ms. Smith's claim. Accordingly, the September 21, 2017, Board decision is VACATED and the claim REMANDED for further consideration consistent with this opinion.

DATED: July 31, 2019

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