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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-3419

MARGARET E. RATHKA, APPELLANT,

V.

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

Before ALLEN, *Judge*.

MEMORANDUM DECISION

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

ALLEN, *Judge*: Appellant Margaret E. Rathka is the surviving spouse of veteran Jack A. Rathka, who served the Nation honorably in the United States Army from December 1964 to December 1967.¹ In this appeal, which is timely and over which the Court has jurisdiction,² she challenges an April 2, 2019, decision of the Board of Veterans' Appeals that denied service connection for the cause of the veteran's death.³ Because the Board failed to provide an adequate statement of its reasons or bases for denying appellant's cause of death claim, we will set aside its decision and remand this matter for further proceedings.

I. ANALYSIS

Appellant argues, in part, that the Board failed to address her assertion that the veteran's portal vein thrombosis, listed as a cause of death on his death certificate, was related to his

¹ Record (R.) at 563.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ The Board also denied entitlement to dependency and indemnity compensation (DIC) under 38 U.S.C. § 1318. Appellant raises no arguments about entitlement under this provision, and we deem any appeal as to it abandoned. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc). However, we note that entitlement to DIC under 38 U.S.C. § 1310 is still before the Court.

parachute jumping accident in service. She asserts the Board generically referred to the in-service event that caused his service-connected traumatic brain injury but provided no analysis of that theory of entitlement. The Secretary defends the Board's decision in full and urges the Court to affirm.

Before he died, the veteran was service connected for TBI residuals and a seizure disorder because of an in-service parachute jumping accident.⁴ He died on March 19, 2016, and his death certificate lists his causes of death as acute pulmonary embolism, chronic atrial fibrillation, and coronary artery disease with hepatocellular carcinoma and portal vein thrombosis as other significant conditions contributing to death.⁵ In April 2016, appellant filed a claim for DIC and service connection for cause of death; the regional office denied both claims.⁶ In October 2017, a VA examiner concluded that "it is more likely any hypercoaguable blood condition leading to 'pulmonary embolism' would be the result of his liver cancer and congestive heart failure, common complications."⁷ He further concluded that it was less likely than not that the veteran's death was caused by his service-connected TBI or seizure disorder.⁸ Appellant appealed the denial of benefits, noting in her Substantive Appeal that the veteran's parachute jumps in service, including the accident that resulted in his TBI, contributed to his portal vein thrombosis.⁹

The Board noted appellant's contention that the veteran's "in-service injury which caused the TBI disability contributed to his venous thromboembolism."¹⁰ The Board found "no evidence or argument presented that acute pulmonary embolism, chronic atrial fibrillation, coronary artery disease, hepatocellular carcinoma, or portal vein thrombosis are directly related to active military service," noting that none of these conditions were found in service.¹¹ Thus, the Board concluded direct service connection was not warranted for any of the causes of the veteran's death.¹² The remainder of the Board's decision focused on whether any of the veteran's causes of death were

⁴ R. at 250-75.

⁵ R. at 102.

⁶ R. at 96-100.

⁷ R. at 52.

⁸ R. at 53.

⁹ R. at 18.

¹⁰ R. at 6.

¹¹ *Id.*

¹² *Id.*

secondary to the veteran's service-connected TBI or seizures disorder. Relying on the October 2017 VA medical opinion as the most probative evidence, the Board found the veteran's death unrelated to a serviced-connected disability and denied service connection for his cause of death.¹³ This appeal ensued.

Pursuant to 38 U.S.C. § 1310, DIC is paid to a surviving spouse of a qualifying veteran who died from a service-connected disability, even if the veteran was not service connected for that disability at the time of death.¹⁴ To establish service connection for the cause of the veteran's death, the evidence must show that the service-connected disability was either the primary or a contributory cause of death.¹⁵ A service-connected disability is the principal cause if it was "the immediate or underlying cause of death or was etiologically related to the death."¹⁶ A service-connected disability is a contributory cause if it "contributed substantially or materially" to the cause of death, "combined to cause death," "aided or lent assistance to the production of death," or "involv[es] active processes affecting vital organs" so that "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."¹⁷

Whether the cause of a veteran's death is service connected is a finding of fact the Court reviews for clear error.¹⁸ The Court will overturn the Board's finding only if the record offers no plausible basis for its decision and the Court is left with a definite conviction that the Board's decision was in error.¹⁹

Establishing service connection generally requires evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability.²⁰ The Court reviews the Board's findings regarding service connection for clear error.²¹

¹³ R. at 9.

¹⁴ *DeLaRosa v. Peake*, 515 F.3d 1319, 1323 (Fed. Cir. 2008); *Patricio v. Shulkin*, 29 Vet.App. 38, 44 (2017).

¹⁵ 38 C.F.R. § 3.312(a) (2019).

¹⁶ 38 C.F.R. § 3.312(b).

¹⁷ 38 C.F.R. § 3.312(c)(1), (3).

¹⁸ *See Wray v. Brown*, 7 Vet.App. 488, 492 (1995).

¹⁹ *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

²⁰ *See Hickson v. West*, 12 Vet.App. 247, 253 (1999); 38 C.F.R. § 3.303(a) (2019).

²¹ 38 U.S.C. § 7261(a)(4); *Dyment v. West*, 13 Vet.App. 141, 144 (1999).

For all its findings on a material issue of fact and law, the Board must support its decision with an adequate statement of reasons or bases that enables a claimant to understand the precise bases for the Board's decision and facilitates review in this Court.²²

The Board failed to provide an adequate statement of its reasons or bases for denying service connection for the cause of the veteran's death. Specifically, although the Board acknowledged appellant's assertion that the veteran's thrombosis was related to his in-service parachuting accident, it provided no analysis for rejecting that theory, only noting that none of the conditions noted on the veteran's death certificate were noted in his service treatment records. The Board is required to address all issues a claimant reasonably raises or that are reasonably raised by the record.²³ Here, it did not address appellant's statements about the veteran's cause of death and his in-service event. Such an error requires remand.²⁴

The Secretary crafts an argument attempting to explain why the Board did discuss this issue, drawing from various parts of the Board's discussion to assert that the Board found appellant was not competent to make such assertions. However, the Board's competence discussion is directed at appellant's statements relating the veteran's service-connected conditions to his death. In fact, the Board very clearly notes that all analysis following its rejection of direct service connection relates to whether the veteran's service-connected disabilities pertain to his death.²⁵ Thus, the Secretary's attempts to correct the Board's decision must fail. Furthermore, it is not his prerogative to correct any errors in the Board's decision after the fact anyway.²⁶ We have made clear that "[i]t is the Board that is required to provide a complete statement of reasons or bases, and the Secretary cannot make up for its failure to do so."²⁷

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining arguments now, and appellant can present them to the Board.²⁸ On

²² 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 57.

²³ See *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001).

²⁴ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

²⁵ R. at 6.

²⁶ See *In re Lee*, 277 F.3d 1338, 1345-46 (Fed. Cir. 2002) ("[C]ourts may not accept appellate counsel's *post hoc* rationalization for agency action." (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))); *McCray v. Wilkie*, 31 Vet.App. 243, 258 (2019); *Simmons v. Wilkie*, 30 Vet.App. 267, 277 (2018); *Smith v. Nicholson*, 19 Vet.App. 63, 73 (2015).

²⁷ *Evans v. Shinseki*, 25 Vet.App. 7, 16 (2011).

²⁸ *Best v. Principi*, 15 Vet.App. 18, 20 (2001).

remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.²⁹ The Board must consider such additional evidence or argument submitted.³⁰ The Board must also proceed expeditiously.³¹

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the April 2, 2019, Board decision and REMANDS that matter for proceedings consistent with this decision.

DATED: April 27, 2020

Copies to:

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²⁹ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam); *see also Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018).

³⁰ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

³¹ 38 U.S.C. §§ 5109B, 7112.