

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

JOYCE E. JENNINGS,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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B. Nature of the Case

Appellant, the Veteran's surviving spouse, seeks entitlement to service connection for esophageal cancer for accrued benefits and substitution purposes and entitlement to Death and Indemnity Compensation (DIC) benefits for the cause of the Veteran's death, which were denied in the Board decision now on appeal. [Record Before the Agency (R.) at 2-15]. Appellant argues the Board erred by finding the Department of Veterans Affairs (VA) was not required to provide a medical opinion pursuant to its duty to assist. Appellant also argues the December 2014 hearing officer erred by not fulfilling his duties to explain what types of evidence Appellant could submit. However, contrary to Appellant's arguments, the Board had a plausible basis in the record for denying service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death, the Board properly found a VA examination was not required in this case, and the December 2014 hearing officer properly discharged his duties.

C. Statement of Facts and Procedural History

The Veteran had active duty in the U.S. Army between May 1969 and April 1971. [R. at 253]. The Veteran's DD Form 214 indicated he served in Vietnam between May 1970 and April 1971. *Id.* Appellant is the Veteran's surviving spouse. [R. at 421-23].

The Veteran's service treatment records (STR's) were associated with the claims file. [R. at 73-118]. The Veteran's service personnel records were also

associated with the claims file. [R. at 120-26]. The records indicate the Veteran served in Vietnam between May 1970 and April 1971. [R. at 124]; [R. at 125]; [R. at 253].

In March 2012, the Veteran filed a claim for service-connected benefits for cancer. [R. at 433-51].

In April 2012, the Veteran submitted a letter from his treating VA physician, Carolyn H. Welsh, MD, indicating the Veteran was diagnosed with esophageal cancer. [R. at 170].

In May 2012, the Veteran submitted a letter from another treating VA physician, Kimberly Green, DO, indicating the Veteran was diagnosed with terminal, stage IV esophageal cancer. [R. at 185].

In May 2012, the Veteran died and the listed cause of death was esophageal cancer, with the interval between onset and date of death listed as “months.” [R. at 415].

In June 2012, Appellant filed a claim for DIC benefits for the cause of the Veteran’s death. [R. at 387-94].

In October 2012, the Regional Office (RO) denied entitlement to, *inter alia*, service connection for esophageal cancer for accrued purposes and service connection for the cause of the Veteran’s death. [R. at 127-35].

Later that month, Appellant submitted a Notice of Disagreement. [R. at 371].

In December 2013, the RO issued a Statement of the Case continuing to deny service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death. [R. at 36-67].

In January 2014, Appellant perfected her appeal. [R. at 34-35].

In December 2014, Appellant was afforded a hearing before the Board. [R. at 303-12]. Appellant testified the Veteran was stationed in Vietnam in what she called one of the "hot spots" for herbicide exposure. [R. at 306 (303-12)]. Appellant stated the Veteran was exposed to very high levels of herbicides. *Id.* Appellant stated the Veteran did not have the major risk factors for esophageal cancer—reflux and obesity. [R. at 307 (303-12)]. Appellant acknowledged she had not presented a medical opinion thus far and her then representative requested to have the record held open for ninety days for Appellant to obtain a medical opinion. [R. at 304-05, 308 (303-12)]. The hearing officer stated:

Your representative has explained sort of what you need and that's probably, that's what we have. It's also the doctor explaining sort of why, if you can find a doctor who does study the evidence and believes that it is as likely as not that the esophageal cancer was the result of his herbicide exposure that your husband was presumed to have had, the why is important in this case.

[R. at 309-10 (303-12)].

In June 2015, the Board issued the decision now on appeal. [R. at 2-15]. The Board noted a VA medical opinion was not provided in this case. [R. at 7 (2-15)]. The Board found a VA medical opinion was not required in this case because VA's duty to assist to provide a medical opinion

is not triggered unless there is a 'reasonably possibility' that a medical opinion would aid in substantiating the Appellant's claim. Here, no evidence has been submitted suggesting that the Veteran's esophageal cancer was the result of his military service, aside from the fact that he is presumed to have had herbicide exposure while serving in Vietnam.

Id. The Board noted the record was held open for approximately six months following the December 2014 hearing to allow Appellant to submit a medical opinion; however, no medical opinion was submitted. *Id.*

The Board denied service connection for esophageal cancer for accrued benefits and substitution purposes because the record contained no "competent evidence indicating a possible relationship between the Veteran's active service and his later 2012 diagnosis of esophageal cancer." [R. at 9 (2-15)]. The Board noted esophageal cancer was not one of the enumerated diseases for which the Veteran may be granted presumptive service connection for in-service exposure to herbicide. *Id.* The Board noted Appellant's STR's did not show any complaints of or treatment for cancer while in service. *Id.* The Board found there was no evidence Appellant was diagnosed with cancer within one year following discharge from service. *Id.* The Board noted two VA treating physicians indicated Appellant was diagnosed with esophageal cancer, but neither doctor provided an opinion linking the Veteran's esophageal cancer with service. *Id.* The Board found neither Appellant nor the Veteran were competent to diagnose esophageal cancer or to provide an etiology opinion. [R. at 10 (2-15)]. The Board found "the Veteran's and [Appellant's] statements associating [the

Veteran's] esophageal cancer with service do not constitute competent evidence concerning etiology." *Id.* The Board found Appellant's assertion the Veteran was exposed to greater amounts of herbicide than the average service member was "speculative and anecdotal." *Id.*

The Board denied service connection for the cause of the Veteran's death, finding "a service-connected disability was not the principal cause of death as the Veteran was not service connected for any disabilities." [R. at 13 (2-15)]. The Board noted "[a]t the time of his death the Veteran was not service-connected for esophageal cancer or any other disability." [R. at 11 (2-15)]. The Board noted the Veteran died of esophageal cancer.¹ *Id.* Having found the Veteran was not entitled to service connection for esophageal cancer, the cause of his death, the Board denied service connection for the cause of the Veteran's death. [R. at 13 (2-15)].

III. SUMMARY OF THE ARGUMENT

In the decision now on appeal, the Board denied service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death. The Court should affirm the decision now on appeal because, contrary to Appellant's arguments, the Board had a plausible

¹ The Board mistakenly stated the Veteran's death certificate did not list a cause of death when the Veteran's death certificate listed esophageal cancer as the immediate cause of death. [R. at 11 (2-15)]; [R. at 415]. However, the Board properly noted the Veteran suffered from terminal esophageal cancer at the time of his death and proceeded with its analysis under the correct assumption the Veteran died from esophageal cancer. [R. at 11-13 (2-15)].

basis in the record for denying service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death, the Board properly found a VA medical examination was not required in this case, and the December 2014 hearing officer properly discharged his duties.

IV. ARGUMENT

A. The Court should affirm the decision now on appeal because the Board had a plausible basis in the record for denying service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death.

A Veteran is entitled to service-connected benefits if he or she has a disability resulting from an injury incurred or a disease contracted during active service and in the line of duty. 38 U.S.C. § 1110 (2016). To establish the elements for service connection, a Veteran "must show (1) a current disability; (2) an in-service precipitating disease, injury or event; and (3) nexus between the current disability and the in-service event." *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005); see *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995). "It is the veteran's 'general evidentiary burden' to establish all elements of his claim, including the nexus requirement." *Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009); accord *Skoczen v. Shinseki*, 564 F.3d 1319, 1323 (Fed. Cir. 2009) ("for a veteran to 'support' his or her claim for benefits, the veteran must, at some point, provide an evidentiary basis for the claim").

When a Veteran dies from a service-connected or compensable disability, “the Secretary shall pay dependency and indemnity compensation to such veteran’s surviving spouse.” 38 U.S.C. § 1310(a) (2016). “The death of a veteran will be considered as having been due to service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death.” 38 C.F.R. § 3.312(a) (2016). The service connected disability will be considered the principal cause of death when the disability, “singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto.” 38 C.F.R. § 3.312(b). For the service-connected disability to be a contributory cause of death, the disability

must be shown that it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death. It is not sufficient to show that it casually shared in producing death, but rather it must be shown that there was a causal connection.

38 C.F.R. § 3.312(c)(1).

The Veteran died in May 2012 from esophageal cancer. [R. at 415]. The Veteran served in Vietnam between May 1970 and April 1971 and therefore is presumed to have been exposed to herbicides. [R. at 124]; [R. at 125]; [R. at 253]; 38 C.F.R. § 3.307(a)(6)(iii) (2016) (“A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent”). However,

esophageal cancer is not listed as a disease for which presumptive service connection can be established for herbicide exposure. 38 C.F.R. § 3.307(a)(6) (outlining the requirements for presumptive service connection for the diseases listed in 38 C.F.R. § 3.309(a) due to herbicide exposure); 38 C.F.R. § 3.309(e) (2016). Appellant can still establish service connection through nexus evidence. 38 C.F.R. § 3.303(d) (2016).

The Board properly denied service connection for esophageal cancer for accrued benefits and substitution purposes. The Board denied service connection because there was no evidence of record linking the Veteran's esophageal cancer to service. [R. at 9 (2-15)]. The Board noted the Veteran's STR's did not note any complaints of or treatment for cancer during service. [R. at 9 (2-15)]; see [R. at 73-118]; [R. at 415] (death certificate noting the interval between the onset of cancer and the Veteran's death in May 2012 was "months"). The Board also noted the Veteran submitted letters from two treating VA physicians that indicated the Veteran had been diagnosed with terminal esophageal cancer; however, the Board found neither physician provided an etiology opinion relating the Veteran's esophageal cancer to service. [R. at 9 (2-15)]; [R. at 170]; [R. at 185]. The Board found Appellant's and the Veteran's lay statements linking the Veteran's esophageal cancer to service were not competent because neither had the requisite medical expertise to diagnose cancer or provide an opinion as to etiology. [R. at 10 (2-15)]; e.g., [R. at 305-08 (303-12)]; see *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("lay

hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court.”). Appellant does not contest the Board’s finding there was no competent and credible evidence of record establishing a link between the Veteran’s esophageal cancer and service. See Appellant’s Brief (App.Br.). The Board had a plausible basis in the record for denying service connection for esophageal cancer for accrued benefits and substitution purposes.

The Board properly denied service connection for the cause of the Veteran’s death. As the Board noted, the Veteran was not service connected for any disabilities at the time of his death. [R. at 11 (2-15)]. Furthermore, as established above, the Board properly denied service connection for the cause of the Veteran’s death, esophageal cancer.² [R. at 9-10 (2-15)]; see [R. at 415 (noting esophageal cancer as the immediate cause of death)]. Therefore, the Board properly found “a service-connected disability was not the principal cause of death as the Veteran was not service connected for any disabilities.” [R. at 13 (2-15)]; 38 C.F.R. § 3.312(a). The Court should affirm the decision now on appeal because the Board had a plausible basis in the record for denying service

² The Board mistakenly stated the Veteran’s death certificate did not list a cause of death when the Veteran’s death certificate listed esophageal cancer as the immediate cause of death. [R. at 11 (2-15)]; [R. at 415]. However, the Board properly noted the Veteran suffered from terminal esophageal cancer at the time of his death and proceeded with its analysis under the correct assumption the Veteran died from esophageal cancer. [R. at 11-13 (2-15)].

connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death.

B. The Court should affirm the decision now on appeal because the Board properly found a VA examination was not required.

1. VA's duty to assist to obtain a medical opinion was not triggered for Appellant's claim for service connection for esophageal cancer for accrued benefits and substitution purposes.

Under 38 U.S.C. § 5103A, the Secretary must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate" his or her claim for benefits. 38 U.S.C. § 5103A(a)(1) (2016). This duty, in appropriate cases, includes providing a comprehensive and detailed examination or opinion that is adequate for rating purposes. See 38 C.F.R. § 3.159(c)(4) (2016) (requiring VA to provide an examination or medical opinion "if VA determines it is necessary to decide the claim"). VA must provide a medical examination or opinion when there is

(1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.

McLendon v. Nicholson, 20 Vet.App. 79, 81 (2006), *as amended* (Aug. 7, 2006).

"The Board's ultimate conclusion that a medical examination is not necessary pursuant to section 5103A(d)(2) is reviewed under the 'arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law' standard of review.”
McLendon, 20 Vet.App. at 81.

The Board properly found VA was not required to obtain a medical opinion as to whether the Veteran's esophageal cancer was related to service to deny entitlement to service connection for accrued benefits and substitution purposes. The Board found Appellant was not entitled to a VA medical opinion because “no evidence has been submitted suggesting that the Veteran's esophageal cancer was the result of his military service.” [R. at 7 (2-15)]. As Appellant correctly notes, the third element of *McLendon* requiring evidence that “indicates” there “may” be a nexus is a low threshold; however, the Court of Appeals for the Federal Circuit has plainly articulated a claimant's lay statements alone do not satisfy the low threshold. App.Br. at 9; *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010); *McLendon*, 20 Vet.App. at 83. In this case, the only evidence Appellant identifies to satisfy the third element of *McLendon* are her lay statements from the December 2014 hearing, at which Appellant asserted the Veteran was exposed to more herbicide than the average soldier and did not have other risk factors for esophageal cancer. App.Br. at 10; [R. at 306-07 (303-12)]. Despite Appellant's assertion the lay statements are “an indication that there may be a relationship between the Veteran's cancer and his exposure to herbicides,” the lay statements are insufficient as a matter of law to satisfy the low threshold of *McLendon*. *Id.*; *Waters*, 601 F.3d at 1278; *McLendon*, 20 Vet.App. at 83. Indeed, the Federal Circuit, in addressing whether a lay

statement asserting a connection between a current disability and service would be sufficient to entitle Appellant to a VA examination, noted that because “all veterans could make such a statement, this theory would eliminate the carefully drafted statutory standards governing the provision of medical examinations and require the Secretary to provide such examinations as a matter of course in virtually every veteran’s disability case.” *Waters*, 601 F.3d at 1278. The Court found such a theory was not intended under the statute. *Id.* Additionally, the Board found Appellant’s assertion the Veteran was exposed to more herbicide than the average soldier was speculative and anecdotal as Appellant had no way of knowing how much herbicide the Veteran was exposed to during service, and the Board found neither Appellant nor the Veteran were competent to provide a diagnosis or etiology for the Veteran’s esophageal cancer, including the effect of other risk factors on the Veteran’s condition. [R. at 10 (2-15)]; *Layno v. Brown*, 6 Vet.App. 465, 470 (1994) (“Should the testimony stray from this basic principle and begin to address, for example, medical causation, that portion of the testimony addressing the issue of medical causation is not competent.”). There was no evidence of record sufficient to meet the low threshold for the nexus element under *McLendon*. *Waters*, 601 F.3d at 1278; *McLendon*, 20 Vet.App. at 83. The Board properly found VA’s duty to assist to obtain a medical opinion was not triggered in this case.

2. A VA examination was not required to address Appellant's claim for service connection for the cause of the Veteran's death.

For DIC benefits, VA's duty to assist is governed by the general provisions of 38 U.S.C. § 5103A(a), rather than 38 U.S.C. § 5103A(d). *DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008). Under 38 U.S.C. § 5103A(a), VA is not always required to provide a claimant with a VA medical opinion. *Id.* VA is only required to provide a medical opinion if one is "necessary to substantiate the claimant's claim" and is excused from providing a medical opinion if "no reasonable possibility exists that such assistance would aid in substantiating the claim." *Wood v. Peake*, 520 F.3d 1345, 1348-49 (Fed. Cir. 2008); accord 38 U.S.C. § 5103A(a); *id.* If the Board applies the incorrect standard, the Court must still consider whether the Board decision "can be affirmed nonetheless on the ground that the error was harmless." *Wood*, 520 F.3d at 1348.

In *DeLaRosa*, the Veteran committed suicide. 515 F.3d at 1320. His surviving spouse applied for DIC benefits claiming the Veteran suffered from posttraumatic stress disorder (PTSD) due to combat service and the PTSD led to the Veteran committing suicide. *Id.* In support of her claim, the Veteran's spouse submitted lay statements and a private medical opinion, both of which the Board disregarded as speculative. *Id.* The Federal Circuit found the Court misapplied section 5103A(d) instead of section 5103A(a) to a claim for DIC benefits. *Id.* at 1322. The Federal Circuit found the Court had committed an error of law but still affirmed the Court's decision based on harmless error. *Id.*

The Federal Circuit found the Board correctly denied a VA medical opinion because there was no evidence of PTSD in the record, after the Board found the lay statements and private opinion of record were speculative and had no probative value. *Id.*; accord *Wood*, 520 F.3d at 1349. By affirming the Board's decision in *DeLaRosa* based on harmless error, the Federal Circuit found the Court had conducted a proper analysis under section 5103A(a) even though the Board misapplied section 5103A(d) in its decision. *DeLaRosa*, 515 F.3d at 1322. Meaning, when the Court found a VA medical opinion was not required because there was no evidence of record corroborating the appellant's assertion that PTSD caused the Veteran to commit suicide, the Court had conducted a proper analysis under section 5103A(a). *Wood*, 520 F.3d at 1349; *id.*

In *Wood*, shortly following the *DeLaRosa* decision, the Federal Circuit affirmed its ruling in *DeLaRosa* but did not affirm the Board decision in that case on harmless error grounds because there was conflicting medical evidence of record. *Wood*, 520 F.3d at 1350. The Federal Circuit explained the key difference between the outcome in *DeLaRosa* and in *Wood* was in *DeLaRosa* there was no evidence the Veteran had PTSD during his lifetime, while in *Wood* there was conflicting medical evidence and a genuine dispute of medical fact. *Id.* at 1350. The Federal Circuit's decision in *Wood* emphasized there must be some evidence of record, beyond the claimant's lay assertion, relating the cause of a Veteran's death to service before a "reasonable possibility exists that such

assistance would aid in substantiating the claim.” *Id.* at 1348; *accord DeLaRosa*, 515 F.3d at 1322.

In this case, the Board initially noted, under section 5103A(a), VA’s obligation to obtain a medical opinion is not triggered unless there is “a ‘reasonable possibility’ that a medical opinion would aid in substantiating the Appellant’s claim.” [R. at 7 (2-15)]. The Board noted “no evidence has been submitted suggesting that the Veteran’s esophageal cancer was the result of his military service” other than the fact the Veteran was presumed to have had herbicide exposure during service. *Id.* The Board found a VA medical opinion was not required, concluding “[w]ithout any competent evidence linking the Veteran’s esophageal cancer to his military service, VA has no duty to seek a medical opinion.” [R. at 7-8 (2-15)]. While the Board initially noted the correct standard, this conclusion implies that the Board may have then applied a different standard. Here, the Board appears to have required competent evidence linking the Veteran’s esophageal cancer to service before a VA examination was required rather than providing a VA examination unless “no reasonable possibility exists that such assistance would aid in substantiating the claim.” *Wood*, 520 F.3d at 1348-49; *accord* 38 U.S.C. § 5103A(a); *DeLaRosa*, 515 F.3d at 1322. Even if the Board applied an incorrect standard, the Board’s error was harmless because there was no evidence of record relating the Veteran’s esophageal cancer to service, and thus no reasonable possibility a VA examination would aid in substantiating Appellant’s claim. See 38 U.S.C. §

7261(b)(2) (2016); *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (directing appellate courts to apply the harmless error rule); *Wood*, 520 F.3d at 1348 (holding when the Board applies the incorrect standard for determining whether a VA examination is required, the Court must consider if the error is harmless).

A VA examination was not required in this case because there was no evidence relating the Veteran's esophageal cancer to service. [R. at 7 (2-15) ("no evidence has been submitted suggesting that the Veteran's esophageal cancer was the result of his military service")]. Indeed, as noted above, the only evidence of record relating the Veteran's esophageal cancer to service were Appellant's lay statements from the December 2014 hearing, which the Board found Appellant was not competent to make or were speculative or anecdotal. App.Br. at 10; [R. at 306-07 (303-12)]; see *Hyder*, 1 Vet.App. at 225. Specifically, the Board found Appellant could not speak to the Veteran's level of herbicide exposure because she was not present during the Veteran's period of service and lacked the requisite medical knowledge to provide an opinion concerning the onset or etiology of the Veteran's esophageal cancer. [R. at 10 (2-15)]. Contrary to Appellant's argument, Appellant's lay assertions alone are insufficient to establish a VA examination was "necessary to substantiate the claimant's claim." App.Br. at 7; 38 U.S.C. § 5103A(a); *Wood* 520 F.3d at 1348-50; *DeLaRosa*, 515 F.3d at 1322. As the Federal Circuit held in *DeLaRosa* and affirmed in *Wood*, VA is not required to provide a medical opinion in every DIC case and can deny providing a medical opinion if there is no evidence of record,

beyond a claimant's lay assertions, suggesting a link between a service-connectable disability and the cause of the Veteran's death. *Wood*, 520 F.3d at 1347-48, 1349; *DeLaRosa*, 515 F.3d at 1322. Contrary to Appellant's contention, the Federal Circuit has explained that when there is no evidence of record relating the Veteran's cause of death to service beyond a claimant's lay assertions, "no reasonable possibility exists that such assistance would aid in substantiating the claim." *Wood*, 520 F.3d at 1348-49; *DeLaRosa*, 515 F.3d at 1322. In this case, there was no evidence suggesting a link between the Veteran's esophageal cancer and service because the Board rejected Appellant's lay statements. [R. at 10 (2-15)]. A VA examination was not required in this case and the Board had a plausible basis, based on the evidence of record, to deny service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death.

C. The Court should affirm the decision now on appeal because the December 2014 hearing officer properly discharged his duties.

At a hearing, a hearing officer has a duty to "explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position." 38 C.F.R. § 3.103(c)(2) (2016). To warrant remand, a violation of 38 C.F.R. § 3.103(c)(2) must result in prejudicial error. *Bryant v. Shinseki*, 23 Vet.App. 488, 498 (2010).

The hearing officer who conducted the December 2014 hearing discharged his duties by suggesting Appellant submit evidence to satisfy the missing

requirement for service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death. Appellant and her representative acknowledged the outstanding issue for her claims required medical evidence linking the Veteran's esophageal cancer to service. [R. at 304, 308 (303-12)]. The hearing officer confirmed a medical opinion was needed in this case and was not part of the record. [R. at 309-10 (303-12)]. Because Appellant's claims were denied for lack of evidence of nexus by the RO, the hearing officer discharged his duties by suggesting Appellant submit the necessary medical evidence. [R. at 131-33 (127-35)]; cf. *Bryant v. Shinseki*, 23 Vet.App. 488, 496 (2010) ("If a claim has been denied for lack of evidence of a current disability, and no medical examination has been provided by the Secretary or medical evidence submitted by the appellant, then this lack of evidence gives rise to the duty of the Board hearing officer to suggest submission of this evidence."). The hearing officer kept the record open for six months to allow Appellant and her representative to submit a medical opinion but she never submitted one. [R. at 7 (2-15)].

Appellant argues the hearing officer was required to recommend the submission of evidence suggestive of nexus to satisfy the elements of *McLendon* in addition to the evidence the hearing officer did suggest she submit. App.Br. at 12; *McLendon*, 20 Vet.App. at 81. Appellant's argument requires the hearing officer to suggest the submission of evidence beyond what is required under 38 C.F.R. § 3.103(c)(2). Appellant's argument would require the hearing officer to

pre-adjudicate the claim, which he was not required to do. *Bryant*, 23 Vet.App. at 493 (“Preadjudication or the weighing of conflicting evidence also is not required for a hearing officer to determine that evidence is not in the record with regard to a particular, material element of a claim.”). To arrive at the type of evidence Appellant argues the hearing officer was required to suggest—“treatise evidence, or medical evidence associated with another veteran’s case”—the hearing officer would have to weigh the evidence of record that suggested nexus between the Veteran’s esophageal cancer and service, determine the evidence was insufficient, determine what additional evidence would satisfy the nexus element of *McLendon*, and then suggest the submission of those types of evidence. See *Bryant*, 23 Vet.App. at 493 (holding the hearing officer is not required to pre-adjudicate the claim to fulfil the his or her duties under 38 C.F.R. § 3.103(c)(2)). This evaluation is fundamentally different than what the hearing officer is required to do. Under 38 C.F.R. § 3.103(c)(2), the hearing officer is only required to identify the material elements not satisfied during the RO’s initial adjudication and suggest Appellant submit evidence to satisfy those requirements. See *Procopio v. Shinseki*, 26 Vet.App. 76, 82 (2012) (establishing, to satisfy 38 C.F.R. § 3.103(c)(2), the hearing officer needs to suggest the submission of evidence to satisfy the elements that served as the basis of the RO’s denial of the Veteran’s claims). The hearing officer that conducted the December 2014 hearing discharged his duties under 38 C.F.R. § 3.103(c)(2) by suggesting the submission of a medical opinion—based on the RO’s denial of service

connection for a lack of nexus—and was not required to determine what types of evidence was necessary to satisfy the elements of *McLendon* and suggest the submission of that evidence.

Contrary to Appellant's suggestion, Appellant was aware of the type of evidence necessary to support her claim. In *Procopio*, which Appellant cites for support, the hearing officer erred by not correcting the Veteran who believed he only needed to submit a medical nexus opinion because the Veteran also needed to submit evidence of an in-service event to succeed in his claim. *Procopio*, 26 Vet.App. at 82. This case is not like the case in *Procopio*. Appellant was aware she needed to submit medical evidence of nexus because her then representative was the first person to acknowledge the need for such evidence at the hearing. [R. at 304, 308 (303-12)]. The hearing officer also left the record open for six months to allow Appellant to submit a medical nexus opinion, but she never submitted an opinion. [R. at 7 (2-15)]. The December 2014 hearing officer properly discharged his duties by suggesting Appellant submit evidence to satisfy the missing element needed to succeed on her claims. The Court should affirm the decision now on appeal because the Board had a plausible basis in the record for denying service connection for esophageal cancer for accrued benefits and substitution purposes and for the cause of the Veteran's death, and Appellant's arguments are without merit and fail to demonstrate error in the instant Board decision.

V. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully urges the Court affirm the Board's June 30, 2015, decision, denying entitlement to service connection for esophageal cancer for accrued benefits and substitution purpose and entitlement to service connection for the cause of the Veteran's death.

Respectfully submitted,

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