

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3602

JOYCE E. JENNINGS,

Appellant

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENT

The Secretary and the Board have misinterpreted the applicable law regarding the Board's duty to assist.

The Secretary agrees that there is no medical evidence addressing the etiology of Mr. Jennings' esophageal cancer, to include whether it was related to his military service or presumed exposure to herbicides. Sec. Br. at 9. However, he argues that the Board was not required to obtain a medical opinion to address whether the Veteran's esophageal cancer was related to service because "lay statements are insufficient as a matter of law to satisfy the low threshold of *McLendon*." Sec. Br. at 12. This statement is incorrect.

The Secretary relies on the Federal Circuit's holding in *Waters v. Shinseki*, 601 F.3d 1274, 1278 (Fed. Cir. 2010), for the proposition that lay evidence may *never* satisfy the low threshold requirement of *McLendon*. Sec. Br. at 12. However, he misreads that decision. The Federal Circuit made clear that to interpret the Veterans Court's decision that in absence of medical evidence the appellant's own conclusory statements were insufficient to establish nexus, "as holding that establishing such nexus necessarily requires medical evidence would be inconsistent with *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007)." Rather, the Federal Circuit reiterated: "The Department *must* consider lay evidence, but may give it whatever weight it concludes the evidence is entitled to." *Waters*, 601 F.3d at 1278 (emphasis added). However, in that case, the Federal Circuit acknowledged that the record was "devoid

of any evidence” to support the appellant’s statements suggestion that a link existed between his claimed disorder and his service-connected disabilities. *Id.* at 1277.

Thus, an appellant’s lay assertions alone may be entitled little weight to support a claim of nexus but they are *not* insufficient as a matter of law. In fact, the Federal Circuit clarified this in *Colantonio v. Shinseki*, 606 F.3d 1378, 1381-82 (Fed. Cir. 2010) (“medically competent evidence is not required in every case to ‘indicate’ that a claimant’s disability ‘may be associated’ with the claimant’s service.”).

In the context of Ms. Jennings’ claim, the Secretary argues that, regardless, the lay evidence is not competent because she is no qualified to provide a diagnosis or opine on etiology of the Veteran’s cancer. Sec. Br. at -13; R-10. However, the Board’s conclusion as to this matter overlooks the relevant point for which this information was presented. Here, the lay evidence is not merely a suggestion that the claimed disorder was related to service, such as in *Waters*, but rather includes details of the Veteran’s service and lack of other noted risk factors for developing the disease. *See* R-10; R-303-12. A lack of other risk factors and known exposure to a chemical agent in service raise the likelihood that the claimed condition was related to military service- thus, there is evidence for record to suggest an indication of relationship.

The Board committed legal error as it employed the wrong standard to determine whether a medical opinion was needed. R-7-8. The Board reviewed the record for evidence of nexus and did not seek a medical opinion because there was no “competent evidence linking the Veteran’s esophageal cancer to his military service[.]”

R-7-8. However, this is not what is required; rather the record must simply contain evidence that *indicates* that a disability *may be associated* with service. *McLendon v. Nicholson*, 20 Vet. App. 79, 81 (2006). The Board misinterpreted and misapplied the law in this case.

As to Mrs. Jennings' claim for entitlement to DIC benefits, the Secretary concedes "the Board appears to have required competent evidence linking the Veteran's esophageal cancer to service before a VA examination was required rather providing a VA examination unless 'no reasonable possibility exists that such assistance would aid in substantiating the claim.'" Sec. Br. at 16. However, he argues that any 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 the Appellant's claim." *Id.* The Secretary's argument must fail. His argument rests on speculation that VA examiner or appropriate expert could not provide a favorable opinion regarding Mr. Jennings' esophageal cancer to herbicide exposure. However, he provides no explanation to support his theory and the Court should avoid engaging in such speculation. Sec. Br. at 16-17; *see Wagner v. U.S.*, 365 F.3d 1358, 1365 (Fed. Cir. 2004) ("[w]here the effect of an error on the outcome of a proceeding is unquantifiable," the Court "will not speculate as to what the outcome might have been had the error not occurred.").

Further, his reliance on *DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008) to support his argument is misplaced. Unlike the claimant in *DeLaRosa*, Mrs. Jennings

has established that her husband was exposed to herbicides by virtue of his service in Vietnam. *See* R-74; R-11. Further, she has provided evidence which suggests that other commonly accepted causes of esophageal cancer are not applicable in this case. R-303-12. Thus, she has provided evidence that supports parts of her claim- unlike the claimant in *DeLaRosa* who could not establish evidence of PTSD during the veteran's life which was a prerequisite to a finding that his suicide was related to PTSD, which was in turn due to military service. *See DeLaRosa*, 515 F.3d at 1322.

Additionally, as noted in the opening brief, the Board acknowledged the need for a medical opinion in this case. R-309; *Apa. Op. Br.* at 6. Thus, it would appear that it believed a possibility existed that an expert opinion could aid in substantiating the claim. Furthermore, the Board has granted service connection for this condition before based on favorable medical opinions. *See Apa. Op. Br.* at 8; No. 04-17060, 2004 WL 3290816, *1, *7 (BVA May 28, 2004); No. 07-08292, 2010 WL 2480579, *1, *8 (BVA April 29, 2010). This is further evidence to support a conclusion that a reasonable possibility exists that a medical opinion could help Mrs. Jennings to substantiate her claim. Thus, under 38 U.S.C. § 5103A(a), the Board should have sought one.

Lastly, the Secretary argues that the Board hearing office executed his duties in accordance with the law. *Sec. Br.* at 19-21. He contends the Board properly advised Mrs. Jennings of the need for a medical opinion in her case and that to find the hearing office is required to suggested evidence which could satisfy the element of

McLendon goes “beyond what is required under 38 C.F.R. § 3.103(c)(2).” Sec. Br. at 19. He argues it would require the hearing officer to pre-adjudicate the claim, which he was not required to do. *See id.* at 20. His argument is not persuasive.

The hearing officer need not pre-adjudicate the claim to properly advise Mrs. Jennings of the law applicable to her case and how she may best take advantage of it. Rather, this is consistent with the hearing officer’s duties as set forth by the regulation. Under 38 C.F.R. § 3.103(c)(2), the hearing officer must fully explain the issues and “suggest the submission of evidence the claimant may have *overlooked* and which would be of *advantage* to the claimant’s position.” (emphasis added).

Here, the record indicates that Mrs. Jennings was unaware that VA may be able to assist her obtain a medical opinion, which would be of advantage to her position. Notably, she expressed frustration with being unable to get a doctor to assist her. *See* R-308. The hearing officer informed her that he would “follow the law as closely as possible” and said that “any evidence that you can supply is great.” R-309. However, he did not explain what evidence, apart from proof of nexus, may assist her in her claim or address evidence she may have overlooked. *See* 38 C.F.R. § 3.103(c)(2). In this case, medical or treatise evidence which supported her theory of entitlement. The hearing office only advised Mrs. Jennings that the evidence of record lacked proof of nexus but did not explain what other information may be of advantage to her position. Thus, he failed to properly execute his duties under the law. This was prejudicial as the Board relied on the lack of additional evidence as a basis to deny

Mrs. Jennings' claims and to support it finding that a medical opinion was not warranted. Accordingly, its decision should be vacated and Mrs. Jennings' appeal remanded.

CONCLUSION

The Board misinterpreted 38 U.S.C. § 5103A(a) and (d) in its decision which denied Ms. Jennings's claim for service connection for cause of death and DIC benefits. The Board read into the statute a requirement of competent evidence to indicate nexus which is not found in the provision of the statute which is applicable to Ms. Jennings's claim. Accordingly, the Board's decision should be vacated and the appeal remanded for the Board to seek a medical opinion to aid in substantiating the claim. Alternatively, the Board should provide adequate reasons or bases for its determining regarding whether a medical opinion is warranted under the correct legal standard.

Respectfully submitted,

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