

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-2893

ANITA GAULDOCK, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

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

LANCE, *Judge*: Veteran Billy Ray Gauldock served in the U.S. Army from March 1967 to April 1974, including service in Vietnam. Record (R.) at 541, 915. Mr. Gauldock died on March 30, 2012, as a result of adenocarcinoma of the sigmoid colon. R. at 1145. His widow, the appellant Anita Gauldock, appeals through counsel a May 5, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to service connection for Mr. Gauldock's cause of death. R. at 2-15. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the May 5, 2015, decision and remand the matter for further proceedings consistent with this decision.

The appellant argues, inter alia, that the Board failed to provide an adequate statement of reasons or bases to support its decision, as it applied the wrong law when it determined that a medical opinion was not warranted. Appellant's Brief (Br.) at 4-10. Specifically, she contends that, although the Board cited the correct statute—38 U.S.C. § 5103A(a)—when discussing whether VA satisfied its duty to assist, it instead applied the requirement in 38 U.S.C. § 5103(A)(d). *Id.* at 6. In the alternative, she asserts that the Board failed to address whether, under section 5103A(a), there was a reasonable possibility that a medical opinion would substantiate a nexus between the veteran's

colon cancer and his presumptive exposure to Agent Orange in Vietnam. *Id.* at 7-10. The Secretary disputes the appellant's arguments and asks the Court to affirm the Board's decision. Secretary's Br. at 10. The Court agrees with the appellant that the Board failed to provide an adequate statement of reasons or bases. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Generally, VA's duty to provide a medical opinion is governed by 38 U.S.C. § 5103A(d). *See DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008). However, in claims for dependency and indemnity compensation, including entitlement to service connection for the cause of a veteran's death, the duty to provide a medical opinion flows from 38 U.S.C. § 5103A(a). *Id.*; *see Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008). Section 5103A(a) requires "VA to assist a claimant in obtaining a medical opinion or examination whenever such an opinion 'is necessary to substantiate the claimant's claim.'" *Wood*, 520 F.3d at 1348 (quoting 38 U.S.C. § 5103A(a)(1)). "In fact, the statute only excuses . . . VA from making reasonable efforts to provide such assistance, if requested, when 'no reasonable possibility exists that such assistance would aid in substantiating the claim.'" *Id.* (quoting 38 U.S.C. § 5103A(a)(2)).

Here, the Board determined that "[a] medical opinion need not be obtained in order to decide the claim on the merits because there is no indication from the record that the service connected disabilities, which were orthopedic in nature, were related to the cause of death, which was colon cancer." R. at 7. The Board further found that "there is no indication from the record that the [v]eteran had colon cancer during service or within a year of service," and it concluded that "there is not a reasonable possibility that obtaining a medical opinion would substantiate the claim." *Id.* (citing 38 U.S.C. § 5103A(a)).

Thus, the Board concluded that a medical opinion was not necessary to address two theories of causation—a relationship between the veteran's colon cancer and his orthopedic disabilities and a diagnosis of colon cancer within the one-year presumptive period following service. With respect to the merits of the appellant's case, however, the Board addressed an additional theory of entitlement: whether the veteran's colon cancer was related to his presumptive exposure to Agent Orange. *See* R. at 11. The Board did not discuss, let alone determine, whether there was a "reasonable possibility" that a medical opinion addressing the relationship between the veteran's colon cancer and his Agent Orange exposure could substantiate the appellant's claim. The Board's failure to do so frustrates the Court's review of its determination that VA satisfied its duty to assist,

and its statement of reasons or bases is therefore inadequate. *See Allday*, 7 Vet.App. at 527. The Court will, therefore, vacate and remand the Board's decision.

On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in her briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring the Secretary to provide for "expeditious treatment" of claims remanded by the Board or the Court).

After consideration of the parties' briefs and a review of the record, the Board's May 5, 2015, decision is VACATED, and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: November 30, 2016

Copies to:

Amy F. Odom, Esq.

VA General Counsel (027)