Vet. App. No. 18-6976

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DOROTHY C. FOGG,
Appellant,

v.

ROBERT L. WILKIE,
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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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the September 6, 2018, decision of the Board of Veterans' Appeals (Board), which denied service connection for the cause of the Veteran's death where the duty to assist was satisfied.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On September 6, 2018, the Board issued a decision that denied service connection for the cause of the Veteran's death. The Veteran's surviving spouse, Dorothy C. Fogg (Appellant), filed a timely appeal of the Board's decision on December 13, 2018.

C. STATEMENT OF RELEVANT FACTS

The Veteran, Johnny M. Fogg, served on active duty in the U.S. Army from August 1967 to August 1969. [Record Before the Agency (R.) at 85]. His July 1969 separation report of medical examination indicates a clinically normal examination in all areas. [R. at 61-62].

The Veteran died in September 1981. [R. at 519]. The death certificate lists his immediate cause of death as a "closed head injury" due to a motor vehicle accident. *Id.* The death certificate also lists "alcohol intoxication" as an "other significant condition[]" contributing to his death. *Id.* At the time of the Veteran's death, he was not service-connected for any condition and had not filed a claim for disability compensation benefits.

Approximately 32 years after the Veteran's death, in May 2014, the Appellant filed a claim for dependency and indemnity compensation (DIC) benefits for the cause of the Veteran's death. [R. at 219-23]. She contended that the Veteran had post-traumatic stress disorder (PTSD) due to his service in Vietnam, which caused him to abuse alcohol and led to the motor vehicle accident that caused his death. [R. at 255]. She submitted lay testimony from her daughter,

other family members, and a friend, who discussed the Veteran's military service and behavior upon his discharge from the Army. [R. at 257, 259-63]; *see also* [R. at 258]. Appellant also submitted a letter from her primary care physician, Dr. Doris J. Batts-Murray, stating that she believed the Veteran "could have suffered from PTSD." [R. at 256]. The letter was written almost 32 years after the Veteran's death and was based on Dr. Batts-Murray's conversation with Appellant. [R. at 256].[1]

In June 2014, the Department of Veterans Affairs (VA) regional office (RO) denied Appellant's claim. [R. at 198-200]; [R. at 203-05]. In July 2014, Appellant filed a notice of disagreement, [R. at 175-77], and the RO issued a statement of the case in December 2014, [R. at 140-58]. Appellant perfected her appeal, [R. at 116-18], and the RO continued its denial in a supplemental statement of the case, [R. at 105-09].

In June 2018, Appellant was afforded a Board hearing. [R. at 13-33]. She testified that the Veteran's behavior changed after his military service and described her husband's problems sleeping, his drinking, and conversations about his experiences in the military. *E.g.,* [R. at 14-16, 18, 23, 26-27].

[1] The Secretary disputes Appellant's attempts to state as fact that the Veteran had PTSD. *See* Appellant's Brief (App. Br.) at 3-6. Moreover, the Court should not consider any evidence or facts that were not before the Board at the time of its decision. *See* App. Br. at 3-4, 6 nn.1-4; *Bonhomme v. Nicholson*, 21 Vet.App. 40, 43 (2007). At the time of the filing of the Secretary's brief, Appellee's Opposed Motion to Strike References to Facts Not Contained in the Record Before the Agency and Requests for Judicial Notice from Appellant's Brief was pending before this Court.

In the September 6, 2018, decision on appeal, the Board denied entitlement to service connection for the cause of the Veteran's death. [R. at 3-11]. The Board found that "[t]here [was] no probative medical evidence establishing that the Veteran had PTSD during his lifetime and that alcohol abuse was acquired secondary to, or caused by symptoms of, PTSD and not due to willful misconduct." [R. at 7]. The Board determined that Dr. Batts-Murray's medical opinion was of no probative value because it was speculative and based solely on information gathered from Appellant. [R. at 7]. It also determined that VA was not required to obtain a medical opinion. [R. at 8]. Finally, the Board found that neither Appellant nor the family and friends who provided lay statements were competent to diagnose PTSD or alcohol abuse or opine as to etiology. *Id.* The Board concluded that the preponderance of the evidence was against a finding of service connection for the cause of the Veteran's death. [R. at 9]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's September 2018 decision because Appellant fails to demonstrate prejudicial error in the Board's determination that service connection for the cause of the Veteran's death was not warranted. Appellant contends that service connection is warranted where she submitted evidence suggesting that the Veteran suffered from undiagnosed PTSD, which caused him to abuse alcohol, which lead to his motor vehicle accident, which caused his death. She argues that the Board erred by not providing a medical opinion regarding the cause of the Veteran's death because the Board used the

wrong legal standard for the duty to assist. However, even if the Board conflated the legal standards for the duty to provide a medical opinion, any error is harmless because the Board correctly determined that there was no competent medical evidence that the Veteran had PTSD.

IV. ARGUMENT

Appellant fails to prove that the Board erred when it found she was not entitled to a medical opinion to determine whether the Veteran's cause of death was causally related to his military service.

Appellant asserts that the Board erred when it determined she was not entitled to a medical opinion on the cause of the Veteran's death. Appellant's Brief (App. Br.) at 10-26. Specifically, she argues that the Board: (1) applied the incorrect standard for the duty to obtain a medical opinion in DIC claims; (2) failed to consider favorable evidence; and (3) clearly erred when it found that a medical opinion was not required. App. Br. at 10-24. However, because the Board did not commit prejudicial error in considering Appellant's claim, the Court should affirm the Board's decision.

The surviving spouse of a deceased veteran may qualify for DIC benefits if the veteran died from a service-connected or compensable disability. 38 U.S.C. § 1310; *see Dyment v. West*, 13 Vet.App. 141, 144 (1999), *aff'd sub nom. Dyment v. Principi*, 287 F.3d 1377 (Fed. Cir. 2002). A veteran's death will be considered service connected where a service-connected disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a). A service-connected disability

is the principal cause of death if it "was the immediate or underlying cause of death or was etiologically related thereto." 38 C.F.R. § 3.312(b). To be a contributory cause of death, the disability must have "contributed substantially or materially" to death, "combined to cause death[,]" or "aided or lent assistance to the production of death." 38 C.F.R. § 3.312(c)(1). "It is not sufficient to show that [a service-connected disability] casually shared in producing death, but rather it must be shown that there was a causal connection." *Id.*

In DIC claims, 38 U.S.C. § 5103A(a), rather than section 5103A(d), applies to VA's duty to assist. *DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008). Under 38 U.S.C. § 5103A(a), VA must obtain a medical opinion when such an opinion is "necessary to substantiate the claimant's claim." 38 U.S.C. § 5103A(a)(1); *DeLaRosa*, 515 F.3d at 1322. VA is not required to provide a medical opinion "if no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2); *see Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008). The Board's determination that VA satisfied the duty to assist is reviewed under the "clearly erroneous" standard of review. *Hyatt v. Nicholson,* 21 Vet.App. 390, 395 (2007). 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.

The facts of this case are analogous to those in *DeLaRosa*. 515 F.3d 1319. In *DeLaRosa*, the veteran committed suicide. *Id*. at 1320. His surviving spouse filed a claim for DIC benefits contending that the veteran had PTSD due to his

combat service and that his PTSD led him to commit suicide. *Id.* In support of her claim, the veteran's spouse submitted lay testimony about the veteran's combat and post-military experiences and a private medical opinion from an internist and geriatrician that the veteran "may have suffered from undiagnosed and untreated PTSD, which may have originated from his combat service and led to his violent behavior." *Id.* The opinion was written six years after the veteran's death and based on conversations with the veteran's spouse. *Id.* The Board found both the lay statements and the medical opinion were not probative. *Id.* at 1321. The Federal Circuit determined that the Board erred as a matter of law when it applied section 5103A(d) instead of section 5103A(a) to find that a medical opinion was not required. *Id.* at 1322. However, the Federal Circuit affirmed the decision after concluding that the error was harmless because there was no competent medical evidence that the veteran even had PTSD, and, therefore, no reasonable possibility that a medical opinion would assist in substantiating the claim. *Id.*

In *Wood*, the Federal Circuit encountered a similar legal error, but held that the error was not harmless in that case. 520 F.3d at 1350. The Court discussed *DeLaRosa* and explained that it found harmless error there "because, as the Board noted, the record contained no competent evidence whatsoever of the [PTSD] that the veteran's spouse alleged was service connected." *Id.* at 1349. "Indisputably, the record lacked any other medical evidence of PTSD." *Id.* The Federal Circuit explained that, unlike in *DeLaRosa*, in *Wood* the competent medical evidence of

the condition alleged to have caused the veteran's death was conflicted. *Id.* at 1350-52.

Here, in discussing the duty to provide a medical opinion, the Board correctly stated that "VA is not required to obtain an opinion when no reasonable possibility exists that such assistance would aid in substantiating the claim." [R. at 8]; *see* 38 U.S.C. § 5103A(a); *Wood*, 520 F.3d at 1348. However, the Board also cited to 38 U.S.C. § 5103A(d)(1) and the duty to assist in claims for disability compensation. [R. at 8]. Although the Board's reference to the standard for the duty to assist in service connection claims might suggest that it conflated the standards of section 5103A(d) with those of 5103A(a), any possible error is harmless because the only medical evidence of record was a single speculative opinion, which the Board found to lack any probative value. *See Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (noting that the statute requiring this Court to "take due account of prejudicial error [] requires the Veterans Court to apply the same kind of 'harmless error' rule that courts ordinarily apply in civil cases").

The facts of this case are very similar to those in *DeLaRosa*. In both cases the record contained no medical evidence that the veteran had a PTSD diagnosis. *See* [R. at 7]; 515 F.3d at 1320-21. In both cases the record contained lay statements from the surviving spouse and others that the veteran had PTSD and descriptions of his reported symptomatology. *See* [R. at 257-63]; 515 F.3d at 1320. And here, as in *DeLaRosa*, the surviving spouse submitted, many years after the veteran's death, a private opinion from a physician—not a mental health

professional—that the veteran may have suffered from PTSD. *See* [R. at 256]; 515 F.3d at 1321. While the veteran in *DeLaRosa* committed suicide, which his surviving spouse attributed to his undiagnosed PTSD, 515 F.3d at 1320, here, the Veteran died in a motor vehicle accident, which Appellant attributes to the Veteran's alcohol abuse, which she attributes to his undiagnosed PTSD, [R. at 258]. To the extent those differences are significant, here the case for service connection is even more attenuated than in *DeLaRosa*, because not only must Appellant establish sufficient evidence that the Veteran had PTSD, but that his alcohol abuse was caused by that PTSD. Regardless, the dispositive factor in *DeLaRosa* and this case is the indisputable lack of competent medical evidence of PTSD. *See Wood*, 520 F.3d at 1350 (explaining the reasoning for the Federal Circuit's decision in *DeLaRosa*).

In this case, Appellant does not challenge the Board's finding that the lay evidence alone is not competent evidence of a diagnosis or etiology. App. Br. at 17-18, 20-21.[2] Similarly, she does not challenge the Board's finding that Dr. Batts-Murray's opinion was not probative evidence establishing that the Veteran had

[2] Although Appellant asserts that the lay evidence raised a reasonable possibility that a medical opinion would substantiate her claim, she does not argue that the lay statements are competent evidence of a PTSD diagnosis, an alcohol abuse disorder, or an etiology opinion as to either condition. *See* App. Br. at 20-21; *Buchanan v. Nicholson*, 451 F.3d 1331, 1335-37 (Fed. Cir. 2006) (the Board is charged with determining the competency and credibility of lay evidence of record); *Jandreau v. Nicholson,* 492 F.3d 1372, 1376-77 (Fed. Cir. 2007) (lay person generally not qualified to offer competent testimony on matters that require medical expertise).

PTSD during his lifetime. App. Br. at 18, 20; *see Singleton v. Shinseki*, 23 Vet.App. 376, 381 (2010) (holding that it is the Board's duty to "assess the credibility and probative weight of the evidence" of record). An opinion that carries no probative weight cannot, by its nature, raise a reasonable possibility of substantiating a claim. Thus, contrary to Appellant's argument, Dr. Batts-Murray's opinion does not—and cannot—raise a reasonable possibility that a medical opinion would substantiate her claim.

Although Appellant disputes the Board's finding that VA was not required to obtain a medical opinion, she does not dispute the contents of the record or the lack of a PTSD diagnosis. Just like in *DeLaRosa*, the absence of competent medical evidence of PTSD during the Veteran's lifetime is uncontroverted. *See Wood*, 520 F.3d at 1350 (explaining that the "*DeLaRosa* decision was predicated on the indisputable lack of any competent evidence indicating PTSD" and refusing to apply a harmless error analysis in *Wood* where the medical facts were genuinely disputed). Thus, contrary to Appellant's assertion, a finding of harmless error would not require the Court to make factual findings in the first instance. *See* App. Br. at 24-25.

Further, Appellant's argument that any Board error in its treatment of the death certificate in this case is prejudicial overlooks the fact that the only way the Veteran's cause of death may be related to service is if Appellant can ultimately demonstrate that he had PTSD during his lifetime, it was related to his military service, and that it contributed to his alcohol abuse. *See* App. Br. at 22-23. In

other words, whether competent medical evidence of a PTSD diagnosis exists is ultimately outcome-determinative in this case because if the Veteran is not service-connected for PTSD, any alcohol abuse disorder may not be secondarily related thereto. *See Allen v. Principi*, 237 F.3d 1368, 1381 (Fed. Cir. 2001) (holding that veterans may only receive disability compensation for alcohol abuse disabilities that are secondary to, or caused by, a service-connected disability and not due to willful misconduct). As such, Appellant fails to demonstrate that a reasonable possibility exists that obtaining a medical opinion would aid in substantiating her claim. *See* 38 U.S.C. § 5103A(a)(2); *Wood*, 520 F.3d at 1348; *see also Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears the burden of demonstrating error on appeal).

V. CONCLUSION

In light of the foregoing, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, asks the Court to affirm the September 6, 2018, Board decision.

Respectfully submitted,

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