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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-3971

DOROTHY JAMES, 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 Dorothy James attempts to prove that she is the surviving spouse of World War II veteran Jerry James, who served honorably in the United States Army from September 1942 to September 1945.¹ She appeals a June 7, 2018, Board of Veteran's Appeals decision that denied entitlement to recognition as the veteran's surviving spouse for the purpose of establishing eligibility for VA death benefits. The question in this appeal, which is timely and over which the Court has jurisdiction,² is whether there was continuous cohabitation between appellant and the veteran or whether an exception to the continuous cohabitation requirement applies. Because the Board failed to provide an adequate statement of reasons or bases for finding that the couple's separation was not due to the conduct of, or procured by, the veteran, without fault of appellant, the Court sets aside the June 2018 decision and remands for further proceedings consistent with this decision.

¹ Record (R.) at 486.

² See 38 U.S.C. §§ 7266(a), 7252(a).

I. ANALYSIS

Appellant argues that the Board's decision should be reversed because the Board provided no evidence that she had caused the separation from the veteran or that she had deserted him. Alternatively, she argues that the Board provided an inadequate statement of reasons or bases for finding that the veteran's inconsistent statements were more probative than her statements with respect to their separation. She also argues that the Board inappropriately relied on the length of their separation and failed to discuss whether she was at fault in the separation.

A "surviving spouse" is a person³ (1) validly married to the veteran at the time of the veteran's death, (2) "who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse)," and (3) "who has not remarried or . . . lived with another person and held himself or herself out openly to the public to be the spouse of such other person."⁴ The second requirement – continuous cohabitation—is at issue in this matter, as the Board concluded there was no evidence that the veteran and appellant were divorced and did not reach the third requirement.⁵

The statute provides "a two-part test to determine whether a spouse will be deemed to have continuously cohabited with the veteran when there has been a separation."⁶ First, the spouse must be free of fault at the time of the separation; second, the separation must be due to the veteran's misconduct or procured by the veteran.⁷ The absence of fault on the part of the surviving spouse is to be determined solely at the time of the separation; conduct after that time is relevant only to the extent that it illuminates the question of fault at the time of the separation.⁸

There are exceptions to the requirement that one seeking surviving spouse status have demonstrated that she "lived with the veteran continuously from the date of marriage to the date

³ Although both the statute and regulation dealing with this question provide a surviving spouse must be "a person of the opposite sex," VA no longer enforces this unconstitutional requirement. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also Cardona v. Shinseki*, 26 Vet.App. 472 (2014).

⁴ 38 U.S.C. § 101; *see* 38 C.F.R. § 3.50(b) (2018).

⁵ R. at 3.

⁶ *Gregory v. Brown*, 5 Vet.App. 108, 112 (1993).

⁷ *Id.*; 38 U.S.C. § 101(3).

⁸ *Gregory*, 5 Vet.App. at 112.

of the veteran's death."⁹ Temporary separations due to the fault of either party will not break continuity of cohabitation.¹⁰ Furthermore, "[i]f the evidence establishes that the separation was by mutual consent and that the parties lived apart for purposes of convenience, health, business, or any other reason which did not show an intent on the part of the surviving spouse to desert the veteran, the continuity of the cohabitation will not be considered as having been broken."¹¹ In *Alpough v. Nicholson*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) clarified that a person may qualify as a surviving spouse if the separation was procured by the veteran – even in the absence of misconduct by the veteran – or was procured by mutual agreement, where the spouse had no intent to desert the veteran.¹² Notably, "[t]he statement of the surviving spouse as to the reason for the separation will be accepted in the absence of contradictory information."¹³

Whether a claimant is the surviving spouse of a deceased veteran is a question of fact that the Court reviews for clear error.¹⁴ A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed."¹⁵ As with all its findings of fact and law, the Board is required to include in its decision a written statement or the reasons or bases for its findings and conclusions on all material issues of fact and law that is adequate to enable an appellant to understand the precise basis for the Board's decision, as well as facilitated informed review in this Court.¹⁶

In its decision, the Board found "conflicting evidence as to whether the [v]eteran and [appellant] were cohabitating at the time of the [v]eteran's death."¹⁷ The Board noted that appellant reported that she lived continuously with the veteran until his death, but her children testified at a Board hearing that their mother and the veteran had lived together until 2002, when he was placed

⁹ 38 U.S.C. § 101(3).

¹⁰ 38 C.F.R. § 3.53(a) (2018).

¹¹ 38 C.F.R. § 3.53(b).

¹² 490 F.3d 1352, 1358 (Fed. Cir. 2007).

¹³ 38 C.F.R. § 3.53(b).

¹⁴ See 38 U.S.C. § 7261(a)(4); see also *Dedicatoria v. Brown*, 8 Vet.App. 441, 443 (1995); *Badua v. Brown*, 5 Vet.App. 472, 473 (1993).

¹⁵ *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see also *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

¹⁶ See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert*, 1 Vet.App. at 55-57.

¹⁷ R. at 4.

in a hospital.¹⁸ Conversely, the Board noted multiple reports by the veteran throughout the 1990s, in which he variously reported that he was divorced, married, and living separately from appellant. The Board concluded that "the weight of the evidence demonstrates that there had not been continuous cohabitation" between appellant and the veteran and that "their separation was not temporary, or due to the misconduct of, or procured by, the [v]eteran without fault of the spouse."¹⁹ The Board found that the couple was separated for a significant period of time and that the veteran's statements, made contemporaneous to the time period at issue, were more probative.²⁰ Thus, the Board concluded appellant was not a surviving spouse.

The Board provided an inadequate statement of reasons or bases for its general finding that the separation was not due to the veteran's misconduct, was not procured by the veteran, and was appellant's fault. Although the Board relied on the veteran's statements throughout the 1990s about his separation from appellant, the Board did not discuss how appellant was at fault for any such separation. Instead, the Board conflated the fault requirement with the misconduct and procurement requirement such that the Court cannot determine how the evidence relates specifically to either requirement. Additionally, this Court's caselaw makes clear that the absence of fault on the part of the surviving spouse is determined solely at the time of the separation.²¹ Here, the Board's terse discussion barely establishes the time of the separation and provides no reason as to why appellant was at fault at that time. For these reasons, the Board failed to provide an adequate statement of reasons or bases to support its denial of surviving spouse status, and remand is warranted.²²

Given this disposition, the Court need not address appellant's remaining arguments.²³ In pursuing her case on remand, appellant is free to submit additional evidence and argument, including the arguments raised in her briefs to this Court, and has 90 days to do so from the date

¹⁸ *Id.*

¹⁹ R. at 5.

²⁰ *Id.*

²¹ *Gregory*, 5 Vet.App. at 112.

²² *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

²³ *See Best v. Principi*, 15 Vet.App. 18, 20 (2001).

of VA's postremand notice.²⁴ The Board must consider any such additional evidence or argument submitted.²⁵ The Board must also proceed expeditiously.²⁶

II. CONCLUSION

After consideration of the parties' briefs, the record on appeal, and the law, the Court SETS ASIDE the June 7, 2018, Board decision and remands this matter for further proceedings consistent with this decision.

DATED: June 26, 2019

Copies to:

Timothy R. Franklin, Esq.

VA General Counsel (027)

²⁴ *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order); see also *Clark v. O'Rourke*, 30 Vet.App. 92, 97 (2018).

²⁵ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

²⁶ 38 U.S.C. §§ 5109B, 7112.