

APPELLANT'S BRIEF

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

No. 19-3430

MILDRED A. HEYER,

Appellant

v.

**ROBERT L. WILKIE
SECRETARY OF VETERANS AFFAIRS,**

Appellee

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STATEMENT OF THE ISSUES

1. Whether the Board was in error when it denied the appeal on the basis that new and material evidence had not been received to reopen a claim for service connection for the cause of the Veteran's death.
2. Whether the head injury and blunt force trauma to the face sustained in an auto accident in 1973 with a line of duty determination is evidence not previously considered before and relates to a fact not previously considered that the veteran's cause of death arose as secondary to a service-connected TBI or PTSD condition that had its onset during or within one year after his discharge from service.

STATEMENT OF THE CASE

Foster L. Heyer, Veteran and deceased husband of Mildred A. Heyer, served on active duty from January 1958 to January 1978 in the United States Air Force and retiring with the rank of Master Sergeant. RBA 37. While on active duty with a line of duty determination he sustained a head injury and blunt force trauma to his face in 1973 from an auto accident, fractured ® mandible, wired, fractured maxilla, left posterior alveolar segment. RBA 268, 269, 271, 292, 297, 299, 1227, 1228, 1229.

This case arises from a January 25, 2019, decision by the Board of Veterans' Appeals ("Board"). In the January 25, 2019, the Board decision in the Findings of Fact states, "Although some of the evidence received since the April 2000 RO denial of service connection for the cause of the Veteran's death is new, none of it is material." RBA 5.

"The appellant initially filed an application for Dependency and Indemnity Compensation (DIC), to include a claim seeking service connection for the cause of the veteran's death, in October 1982 shortly after the Veteran's death in September. By a decision issued in December 1982, the RO initially denied her claim for death benefits, including service connection for the cause of the Veteran's death, nonservice-connected

death pension benefits, and accrued benefits. She appealed the denial of service connection for cause of death to the Board and, in a January 1985 decision, the Board denied her appeal.”

SUMMARY OF THE ARGUMENT

The Board determined that the veteran’s death from alcoholic liver disease and alcohol abuse was a disability not deemed in the line of duty and compensation is barred as a matter of law. RBA 13. Appellant argues that the veteran suffered from a service connected TBI and the evidence in the veteran’s medical records of a TBI was not previously considered and it relates to a fact not previously established as his alcohol abuse was a symptom of and secondary to his TBI and more likely than not PTSD service connect disabilities. The Veteran had honorable active military service from January 1958 to January 1978 with foreign service in Japan from May 1958 to April 1958 and the Republic of Vietnam from June 1970 to June 1971. RBA page 6-7. In *Allen v. Principi*, the court held that an alcohol related disability, “... does not preclude a veteran from receiving compensation for alcohol or drug-related disabilities arising secondarily from a service-connected disability, or from using alcohol or drug-related disabilities as evidence of the increased severity of a service-connected disability.” *Allen v. Principi*, 237 F.3d 1368, 1370 (Fed. Cir. 2001). While on active duty with a line of duty determination he sustained a head injury and blunt force trauma to his face in 1973 from an auto accident, fractured ® mandible, wired, fractured maxilla, left posterior alveolar segment. RBA 268, 269, 271, 292, 297, 299, 1227, 1228, 1229. “Therefore, to submit new and material evidence, the appellant would need to show that the cause of the

veteran's death was related to something other than the Veteran's alcohol abuse." RBA 13. "Rating actions are final and binding based on evidence on file at the time the claimant is notified of the decision and may not be revised on the same factual basis except by a duly constituted appellant authority. 38 C.F.R. §3.104 (a). RBA 9.

STANDARD OF REVIEW

Where there is a failure to provide an adequate statement of reasons or bases for a determination, or where the Board or Regional Office has incorrectly applied the law, the appropriate remedy is remand, so that the legal standards of review can be determined and applied by the Board or Regional office. See *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

The Court reviews claimed legal errors by the Board that are "... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" and the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(3)(A); *Butts v. Brown*, 5 Vet. App. 532, 539 (1993)(en banc). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

ARGUMENTS

- 1. The Board erred by failing to provide an adequate statement of reasons or bases for its decision to deny service connection for alcohol abuse and TBI because it failed to properly apply 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (U.S. 1990).**

Mildred A. Heyer argues for remand or reversal of the Board's decision denying service connection for the cause of the Veteran's death and entitlement to service

connection for alcohol abuse as secondary to service connected traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD), and alternatively that remand is required because of the BVA obligation and failure to raise and develop the issue of TBI sua sponte that was amply suggested by the record. See *Robinson v. Mansfield*, 21 Vet. App. 545, 577-58 (2008). TBI is an appropriate issue raised by the record and for the first time by Ms. Heyer for the CAVC to exercise discretion to remand. See *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2000). Mildred A. Heyer, argues that the Board committed prejudicial, legal error when it did not consider new and material evidence abundantly clear in the record of head and face injuries sustained from the line of duty determination of the 1973 auto accident.

“Therefore, to be new and material, the evidence must not have been previously considered before and it must relate to a fact not previously established, in other words, that the cause of the Veteran’s death either had its onset during service or within one year after the Veteran’s discharge from service.” RBA 12.

Thus, the 1973 auto accident is a new theory of entitlement and the submission of the new and material evidence in support of the theory of entitlement for traumatic brain injury is abundantly in the record, but never considered.

Second, The Board’s statement of reasons or bases is inadequate for judicial review. 38 U.S.C. § 7104(d)(1). The Board failed to provide a statement of reasons or bases for its conclusionary determination, the statement provided was inadequate to provide an understanding of the basis for the Board decision and fails to facilitate review by the CAVC. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990). The Board failed to comply with this

requirement, it did not analyze the credibility and probative value of the medical evidence, it did not account for the evidence it found unpersuasive, and it did not provide reasons for its rejection of the material evidence related to the alcohol abuse favorable to the Veteran. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Here, the appropriate remedy is remand “where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate.” *Tucker v. West*, 11 Vet. App. 369, 374 (1998).

Well settled case law finds the Board has a duty to do more than advance conclusory statements and to adequately analyze and place in the record evidence supporting its conclusions and further place in the record the reasons and bases for rejecting evidence favorable to the Veteran. Here, the Board failed in its duty. *Martin v. Occupational Safety & Health review Comm'n*, 499 U.S. 144, 156 (1991) “[L]itigating positions’ are not entitled to deference when they are merely appellant counsel’s ‘post hoc rationalizations’ for agency action, advanced for the first time in the reviewing court.”) The following statement is a post hoc rationalization.

“Furthermore, even if it could be determined he had PTSD from secondary sources, it is unlikely his alcohol abuse would be found secondary to it given his statements shown in the VA treatment records when he was being treated for his alcohol abuse that he did not know when he drank that he just “got off on it and just couldn’t stop.” See September 15, 1982 VA medical record”. RBA 12, 19, and 1296.

Mildred A. Heyer argues that the medical evidence demonstrates that the VA Board’s quote of the Doctor’s report of the Veteran stating that he drank because “he got off on it and just could not stop” was inappropriately cited as a willfulness to drink. RBA. 1296. See *Fallo v. Derwinski*, 1 Vet. App. 175, 177 (1991) (“[T]he [BVA]’s finding[s] and

conclusions in this case are so vague that it is impossible to review them.”) See *Sammarco v. Derwinski*, 1 Vet. App. 111, 113-14 (1991) (Whether the BVA’s ultimate conclusions are correct or not, ... the incomplete nature of the decision below does not permit proper review by this Court.”) At the time, the Veteran made the statement, he was critically ill, hypotensive, bleeding, and undergoing hepatic failure with probable hepatic encephalopathy. As documented in the record, he was disoriented in all 4 spheres and by definition was delirious. Additionally, he was emaciated and likely malnourished, a condition which further impairs cognition. As such, one cannot accept that statement as veritable. MSgt Heyer died one day after the statement on September 16, 1982. RBA 196.

2. The Board erred by failing to address favorable medical evidence. *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff’d per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Mildred A. Heyer argues that the medical evidence demonstrates the likelihood of MSgt Heyer having suffered an undiagnosed traumatic brain injury is very high and the Board provided inadequate reasons or bases as it failed to consider concurrent mild TBI, PTSD, and secondary service connection. In 1973, the Veteran had a single vehicle motor vehicle accident which was severe enough for him to sustain a fracture of his left maxilla and which required teeth extractions and wiring of his jaw. It is very likely that the forces of the accident which was described as causing “blunt force trauma” to the face caused the Veteran to suffer at the minimum, a mild traumatic brain injury. In this situation, the brain which is a soft tissue encased in the skull and surrounded in by fluid undergoes rapid acceleration and deceleration while striking the hard, sharp edges of the bony skull. This can result in bruising of the brain’s tissue, small hemorrhages, and tearing of the nervous

structures throughout the brain and brainstem. Manifestations of any residual symptoms, especially if they were mild, would most likely have been manifested by his interactions with his family, friends, and acquaintances. Overtime the symptoms worsened as evidenced by lay statements before the Board by Ms. Heyer and others. The BVA decision indicates, “She also described various incidents of behavior by the Veteran that she believes further indicates he had some type of mental health problem. She further contended that the Veteran’s alcoholism affected his physical health in service and that the cause of his death was related to those health problems.” RBA 10.

Mildred A. Heyer argues that the decision in *Allen v. Principi* is dispositive to the Veteran in this case. The Circuit Court held in *Allen v. Principi*, the law mentioned above “... does not preclude a Veteran from receiving compensation for alcohol or drug-related disabilities arising secondarily from a service-connected disability, or from using alcohol or drug-related disabilities as evidence of the increased severity of a service-connected disability.” *Allen v. Principi*, 237 F.3d 1368, 1370 (Fed. Cir. 2001).

Mildred A. Heyer argues that *Ingram v. Nicholson*, 21 Vet.App. 232 (2007) is helpful in that the record has adequate medical documentation to support the possibility of service-connection for the Veteran’s TBI condition, which neither Mrs. Heyer nor the VA specifically addressed, for this “inferred claim” that is “reasonably raised” by the record.

Mildred A. Heyer argues that the Board’s findings are conclusory and inadequate on its face. See *Dennis v. Nicholson*, 21 Vet. App. 18, 22 (2007); *Abernathy V. Principi*, 3 Vet. App. 461, 465 (1992). Mildred A. Heyer argues entitlement to service connection for alcohol abuse as secondary to service-connected traumatic brain injury (TBI) and post-

traumatic stress disorder (PTSD), and the Board provided inadequate reasons for or bases for denying such a rating. Mildred A. Heyer additionally argues the probative and competent medical evidence provides an etiologic relationship between service connected TBI and PTSD and the development of alcohol abuse.

Mildred A. Heyer also argues that the medical evidence demonstrates the likelihood of the Veteran, MSgt Foster L. Heyer, having an undiagnosed traumatic or mild traumatic brain injury and PTSD is very high and determinable.

The BVA decision of January 25, 2019 stated, “Unfortunately, now, it will probably never be known if the Veteran had PTSD since he is no longer here to share what happened to him in Vietnam. Furthermore, even if it could be determined he had PTSD from secondary sources, it is unlikely his alcohol abuse would be found secondary to it given his statements shown in the VA treatment records when he was being treated for his alcohol abuse that he did not know why he drank that he just “got off on it and just couldn’t stop.” *See* September 15, 1982 VA medical record. RBA 12, 19, 1296.

Mildred A. Heyer argues here that the benefit of the reasonable doubt in resolving each such issue shall be given to the claimant. 38 C.F.R. §§ 3.102. 38 U.S.C. § 5107(b). Mildred A. Heyer further argues, “The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant.” 38 U.S. Code § 5107(b). The Board erred by failing to consider and apply the resolution of reasonable doubt in 38 C.F.R. § 4.3 , “It is the defined and consistently applied policy of the Department of veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When after careful consideration of all procurable and

assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.” The Board also did not apply established regulation of principles relating to service connection. “Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and Department of Veterans Affairs regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.” 38 C.F.R. § 3.303(d).

CONCLUSION AND RELIEF SOUGHT

The Board breached its duty to assist the veteran by failing to obtain necessary evidence abundant in the veteran's service and medical records to determine whether the veteran suffered a service connect TBI and PTSD that caused his alcohol related disabilities from which he ultimately died. Additionally, the Board's statement of reasons and bases is inadequate because they are conclusory and inadequate for judicial review. Mildred A. Heyer, request that the Court remand that part of the January 25, 2019, decision that denied entitlement to service connection for TBI, PTSD, and alcohol abuse for the cause of MSgt Heyer's death and for accrued benefits, and to remand the matters for appropriate development and readjudication, consistent with the above discussion.

Respectfully Submitted on October 31, 2019.

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CERTIFICATE OF SERVICE

On October 31, 2019, a copy of the foregoing Appellant's Brief was filed and served via electronic filing for the United States Court of Appeals for Veterans Claims on: Mark J. Hamel, counsel for Appellee, Secretary of Veterans Affairs at mark.hamel@va.gov. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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