

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

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**ANA T. RODRIGUEZ,**

Appellant,

v.

**ROBERT L. WILKIE,**  
Secretary of Veterans Affairs,

Appellee.

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**ON APPEAL FROM THE  
BOARD OF VETERANS' APPEALS**

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**BRIEF OF THE APPELLEE  
SECRETARY OF VETERANS AFFAIRS**

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## TABLE OF CONTENTS

I. ISSUE PRESENTED.....	1
II. STATEMENT OF THE CASE .....	1
III. ARGUMENT.....	3
CONCLUSION .....	6
CERTIFICATE OF SERVICE.....	7

## TABLE OF AUTHORITIES

### CASES

<i>Gilbert v. Derwinski</i> , 1 Vet.App. 49, 51 (1990) .....	5, 6
<i>Madden v. Gober</i> , 125 F.3d 1477, 1481 (Fed. Cir. 1997) .....	5
<i>Medrano v. Nicholson</i> , 21 Vet.App. 165, 170 (2007) .....	2
<i>Sanders v. Shinseki</i> , 129 S.Ct. 1696, 1705-06 (2009) .....	3
<i>Smith v. Shinseki</i> , 24 Vet.App. 40, 48 (2010) .....	5
<i>Washington v. Nicholson</i> , 19 Vet.App. 362, 367-68 (2005) .....	5

### STATUTES

38 U.S.C. § 1503 .....	3
38 U.S.C. § 1541 .....	3
38 U.S.C. § 7261 .....	2, 6

### REGULATIONS

38 C.F.R. § 3.3 .....	3
38 C.F.R. § 3.23 .....	3
38 C.F.R. § 3.271 .....	3
38 C.F.R. § 3.272 .....	3

## ***RECORD BEFORE THE AGENCY CITATIONS***

R. at 3-9 (Board Decision) .....	<i>passim</i>
R. at 19-33 (Board Decision) .....	2
R. at 127-28 (Appeal to the Board) .....	2
R. at 342-400 (Statement of the Case) .....	2
R. at 434-35 (Notice of Disagreement) .....	2
R. at 452-55 (Letter from VA to Appellant) .....	4
R. at 458-69 (Rating Decision) .....	2
R. at 522-28 (Rating Decision) .....	2
R. at 543-53 (Applications for Burial Benefits and DIC, Death Pension, and /or Accrued Benefits) .....	2
R. at 1174-75 (Declaration of Marital Status) .....	2
R. at 1224 (DD 214) .....	2

Appellant appeals the October 30, 2018, decision of the Board that denied entitlement to SMC for a surviving spouse based upon the need for regular aid and attendance of another person, or by reason of being housebound. (Record (R.) at 3-9).

The Board vacated its August 2018 denial of entitlement to SMC for a surviving spouse based upon the need for regular aid and attendance of another person, or by reason of being housebound, and the Court should not disturb this favorable finding. (R. at 3, 5 (3-9)). *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); 38 U.S.C. § 7261 (a)(3).

### ***Factual Background***

The Veteran served on active duty from October 1954 to July 1956. (R. at 1224). He died in October 2013 and Appellant is the Veteran's widow. (R. at 1174-75, 546). Appellant applied for death pension and burial benefits in October 2013. (R. at 543-53).

In June 2015, the Department of Veterans Affairs (VA) Regional Office (RO) denied Appellant's claim for death pension benefits. (R. at 522-28, 458-69). Appellant submitted a Notice of Disagreement (NOD) in September 2015. (R. at 434-35). The RO issued a Statement of the Case (SOC) in November 2016 and Appellant filed a substantive appeal the following month. (R. at 342-400, 127-28). The Board issued a decision in August 2018 denying SMC for a surviving spouse based upon the need for regular aid and attendance of another person, or by reason of being housebound. (R. at 19-33).

In November 2017, the Board vacated its August 2018 decision and denied Appellant's claim for entitlement to SMC for a surviving spouse based upon the need for regular aid and attendance of another person, or by reason of being housebound. (R. at 3-9). This appeal followed.

### III. ARGUMENT

The Court should affirm the decision on appeal. Appellant has not demonstrated any error in the BVA decision which would warrant remand or reversal. Appellant fails to present a cogent argument that would compel any decision other than affirmance. (Appellant's Brief (App. Br.) at 1-4); *Sanders v. Shinseki*, 129 S.Ct. 1696, 1705-06 (2009) (party attacking agency determination has burden of showing error is harmful).

Under certain circumstances, a Veteran's surviving spouse may be eligible for death pension benefits as a result of the Veteran's nonservice-connected death. See 38 U.S.C. § 1541(a); 38 C.F.R. §§ 3.3(b)(4), 3.23. Entitlement to death pension is generally determined based on the surviving spouse's annual income. 38 C.F.R. §§ 3.271, 3.272. If eligible, the surviving spouse will be paid the Maximum Annual Pension Rate (MAPR), reduced by the amount of the surviving spouse's annual income. See 38 U.S.C. § 1541; 38 C.F.R. §§ 3.271, 3.272. In calculating the surviving spouse's income, payments from any source are counted unless specifically excepted under § 3.272. See 38 U.S.C. § 1503(a); 38 C.F.R. § 3.271(a). Social Security Administration (SSA) payments based on disability are not excepted and must therefore be counted as income. See 38 C.F.R. § 3.272. Unreimbursed medical expenses may be excepted under certain conditions. See 38 C.F.R. § 3.272(g).

In the decision on appeal, the BVA determined that Appellant had established the factual need for aid and attendance and that she was permanently housebound. (R. at 7 (3-9)). The Board then noted that the only remaining question was whether Appellant's income exceeded the MAPR for any part of the appeal period. *Id.* The Board reviewed the evidence and found that Appellant's countable income exceeded the maximum for purposes of SMC based on the regular aid and attendance of another person, or by reason of being housebound.

Appellant received pension benefits effective November 2013 based on her reported income. (R. at 453-54 (452-55)). In calculating the subsequent income threshold requirements, Appellant was in receipt of SSA benefits amounts above the relevant MAPR amounts. *Id.* Appellant has not made specific arguments that the RO erred in its calculations regarding her income. (App. Br. at 1-4). Appellant has also not presented any evidence of expenses that may be deducted from her income for purposes of calculating her countable income for SMC purposes. Thus, Appellant does not meet the annual income requirement set forth in 38 C.F.R. § 3.3(b)(4)(iii) and the Board correctly determined that SMC based upon the need for regular aid and attendance of another person, or by reason of being housebound is not warranted.

In her informal brief, Appellant contends that she has several disabilities and was in the care of her son. (App. Br. at 1). She also argues that the Board



did not consider all her medical records and expenses. (App. Br. at 1-2). However, as noted above, the Board conceded that Appellant met the factual requirements for aid and attendance and that she was permanently housebound. (R. at 7 (3-9)). The issue in this case is whether Appellant's income exceeded the MAPR for any part of the appeal period and she has not provided any specific information that her income did not exceed the MAPR requirements. The Board's factual determinations noted above are plausibly based and the BVA was not clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 51 (1990). Appellant has not presented any discernable argument demonstrating remandable or reversible BVA error and the Court should affirm the decision on appeal.

Appellant asserts that the Board did not consider all laws, documents, and the benefit-of-the-doubt in adjudicating her claim. (App. Br. at 2). However, Appellant does not offer any specific legal or factual challenge to demonstrate that the BVA decision is clearly erroneous and the Court should affirm the Board decision due to the lack of a cogent argument warranting a different result.

Appellant appears to be merely disagreeing as to how the Board weighed the evidence of record. (App. Br. at 1-3). It is the Board's duty to analyze the credibility and probative value of evidence when making its factual findings. See *Smith v. Shinseki*, 24 Vet.App. 40, 48 (2010); *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005); *Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997). Appellant's disagreement as to how the Board weighed the evidence of

record does not rise to the level of satisfying the criteria required to hold that the BVA decision was clearly erroneous. *Gilbert*, 1 Vet.App. at 53.

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address the same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

### **CONCLUSION**

For the foregoing reasons, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully requests this Court to affirm the decision on appeal.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify, under penalty of perjury under the laws of the United States of America, that on November 12, 2019, a copy of the foregoing was mailed, postage prepaid to:

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