

Vet. App. No. 19-0608

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

SANDRA J. COREY,
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**

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

SELKET N. COTTLE
Deputy Chief Counsel

MARY E. JONES
Appellate Attorney
Office of the General Counsel (027I)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6901

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. ISSUE PRESENTED.....	1
II. STATEMENT OF THE CASE	1
A. JURISDICTIONAL STATEMENT.....	1
B. NATURE OF THE CASE	1
C. STATEMENT OF RELEVANT FACTS	2
III. SUMMARY OF THE ARGUMENT	4
IV. ARGUMENT.....	4
The Court Should Vacate the Board’s Decision Denying Entitlement to Service Connection for the Veteran’s Cause of Death	4
V. CONCLUSION	7

TABLE OF AUTHORITIES

Cases

<i>Best v. Principi</i> , 15 Vet. App. 18 (2001)	6
<i>Fletcher v. Derwinski</i> , 1 Vet. App. 394 (1991)	6
<i>Kutscherousky v. West</i> , 12 Vet. App. 369 (1999)	6
<i>Pederson v. McDonald</i> , 27 Vet. App. 276 (2015)	2
<i>Polovick v. Shinseki</i> , 23 Vet.App. 48 (2009)	5
<i>Quarles v. Derwinski</i> , 3 Vet. App. 129 (1992)	6
<i>Robinson v. Mansfield</i> , 21 Vet. App. 545 (2008)	4
<i>Stefl v. Nicholson</i> , 21 Vet. App. 120 (2007)	5

Statutes

38 U.S.C. § 1318 (2018)	2
38 U.S.C. § 5013A(a)(2) (2018)	5
38 U.S.C. § 5103A(a)(1) (2018)	5
38 U.S.C. § 7104(d)(1) (2018)	5
38 U.S.C. § 7252(a) (2018)	1
38 U.S.C. § 7261(b)(2) (2018)	7

Citations to the Record Before the Agency

R. at 4-10 (November 2018 Board Decision)	3, 5
R. at 58-60 (November 2016 Appeal to the Board).....	3
R. at 72-100 (October 2016 Statement of the Case)	3
R. at 103-05 (September 2016 VA Medical Opinion).....	2, 3
R. at 460 (DD 214)	2
R. at 512-16 (June 2013 Notice of Disagreement).....	2
R. at 522-25 (April 2013 Rating Decision).....	2
R. at 577 (Veteran's Death Certificate)	2
R. at 609 (May 2012 Report of General Information).....	2, 4
R. at 647-54 (August 2011 Application)	2

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

SANDRA J. COREY,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-0608
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

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

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

I. ISSUE PRESENTED

Whether the Court should vacate the portion of the Board of Veterans' Appeals' (Board), November 8, 2018, decision denying entitlement to service connection the cause of the Veteran's death.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has proper jurisdiction under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On November 8, 2018, the Board issued the decision on appeal, denying Mrs. Sandra Corey (Appellant) entitlement to service connection for the cause of

death of her husband, Stephen Corey (the Veteran).¹ Appellant filed a timely appeal of the Board's decision on January 29, 2019.

C. STATEMENT OF RELEVANT FACTS

The Veteran served in the United States Army from April 1969 to October 1970, including service in the Republic of Vietnam. [Record (R.) at 460]. The Veteran died in July 2005; his death certificate lists the immediate cause of death as respiratory failure with secondary causes of pulmonary hypertension and right heart failure. [R. at 577]. In August 2011, Appellant applied for service connection for the cause of the Veteran's death. [R. at 647-54]. In May 2012, Appellant contacted VA and stated that the Veteran's disability should be listed as "a heart condition due to Agent Orange [e]xposure." [R. at 609]. In April 2013, the Regional Office (RO) denied service connection for cause of death. [R. at 522-25]. Appellant submitted her Notice of Disagreement in June 2013. [R. at 512-16].

A VA medical examiner provided an opinion as to the Veteran's cause of death in September 2016. [R. at 103-05]. The examiner opined that the Veteran's diabetes was at least as likely as not type II in nature; that his diabetes, or any conditions secondary to his diabetes, less likely as not contributed to his death; the Veteran less likely as not suffered from ischemic heart disease; the Veteran did

¹ Appellant stated in her brief that she is not pursuing the Board's denial of entitlement to dependency and indemnity compensation under the provisions of 38 U.S.C. § 1318. Appellant's Brief (App. Br.) at 2. The Secretary requests that the Court dismiss the appeal with regard to that issue. See *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc).

not have any service-connected conditions that contributed to his death; and review of the service treatment records did not reveal any other treatment or diagnosis which would have at least as likely as not contributed to his death. [R. at 104].

The RO issued a Statement of the Case (SOC) in November 2016, which denied Appellant's claims. [R. at 72-100]. Appellant submitted her substantive appeal to the Board in April 2017. [R. at 58-60].

The Board issued its November 2018 decision that is the subject of this appeal. [R. at 4-10]. The Board found that the Veteran was not service connected for any of the conditions listed on his death certificate or for any other disability at the time of his death. [R. at 6]. The Board stated that "[A]ppellant does not contend, and the record does not show, that the causes of the Veteran's death were directly incurred in service or were present to a compensable degree within one year of service." [R. at 6]. The Board conceded the Veteran's exposure to herbicides given his service in the Republic of Vietnam but explained the Veteran did not have any presumptively service-connected conditions. [R. at 6-8]. Finding that the VA examiner's opinion significantly outweighs Appellant's opinions regarding the causes of the Veteran's death being linked to his military service, the Board concluded that the evidence did not demonstrate that the Veteran's causes of death were related to service or a service-connected disease or disability. [R. at 8]. Therefore, the Board found that the weight of the evidence was against a finding of service connection for the Veteran's cause of death. [R. at 8].

III. SUMMARY OF THE ARGUMENT

The Court should vacate the Board's November 8, 2018, decision which denied entitlement to service connection for the Veteran's cause of death. Appellant asserted that the Veteran's heart condition was due to Agent Orange exposure. Yet the VA medical examiner's opinion does not address the issue of whether the Veteran's heart condition was directly caused by herbicide exposure, only whether he had a condition that was presumptively service connected. On remand, the Board should address direct, rather than presumptive, service connection for Appellant's heart condition based on herbicide exposure. If necessary, the Board should also consider whether it is necessary to obtain a medical opinion on this issue.

IV. ARGUMENT

The Court Should Vacate the Board's Decision Denying Entitlement to Service Connection for the Veteran's Cause of Death

The Secretary concedes that the Board's statement of reasons or bases in this case is inadequate. The Board is required to address all issues reasonably raised by either the claimant or the evidence of record. *Robinson v. Mansfield*, 21 Vet.App. 545, 552-56 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Here, Appellant explicitly raised the issue of whether the Veteran's heart condition was due to Agent Orange exposure. [R. at 609]. The Board did not provide any discussion of whether the Veteran's heart condition was due to Agent Orange exposure on a direct, rather than presumptive, basis. [R. at

4-8]. A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). Because Appellant explicitly raised the issue, the Board was required to consider service connection based on direct causation; the availability of presumptive service connection based on exposure to Agent Orange does not preclude direct service connection based on Agent Orange exposure. *Steffl v. Nicholson*, 21 Vet.App. 120, 123 (2007); *see also Polovick v. Shinseki*, 23 Vet.App. 48, 52-53 (2009) (citing *Steffl* for the proposition that [e]ven though a disease is not included on the list of presumptive diseases, a nexus between the disease and service may nevertheless be established on the basis of direct service connection).

The Board should have also considered whether VA has satisfied the duty to assist as it relates to the issue of direct service connection for the cause of the Veteran's death. VA does not have an absolute duty to provide a claimant with a medical opinion. See 38 U.S.C. § 5013A(a)(2) (VA is not required to provide assistance "if no reasonably possibility exists that such assistance would aid in substantiating the claim"). Its obligation to provide such services extends only insofar as, based upon its review of the evidence of record, it determines such service to be "necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). Therefore, the Secretary concedes that remand is warranted for the Board to provide an adequate statement of reasons or bases as to whether the Veteran's heart condition may be directly related to in-service Agent Orange exposure and to consider whether VA has satisfied its duty to assist

Appellant in developing her claim for service connection for the cause of the Veteran's death on a direct basis.

Appellant also argues that the Board erred by finding VA's duty to assist satisfied and failing to provide an adequate statement of reasons or bases to support its decision. App. Br. at 8-14, 17-22. The Secretary does not concede error as to any of Appellant's remaining arguments. Because the Secretary concedes that vacatur and remand are warranted on the only issue before the Court, the Court need not address Appellant's remaining arguments. *See Best v. Principi*, 15 Vet.App. 18, 19-20 (2001) (explaining that "when a remand is ordered because of an undoubted error that requires such a remedy, the Court will not, as a general rule, address other putative errors raised by the appellant," and concluding: "The Court will continue the practice it has followed, which is consistent with its jurisdictional statute and appellate practice elsewhere; we will render our decisions on the narrowest possible grounds."). Should the Court grant remand, Appellant may submit additional evidence and argument on remand, and the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991); *see Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999) (per curiam); *see also Quarles v. Derwinski*, 3 Vet.App. 129, 141 (1992).

However, the Secretary requests the opportunity to address Appellant's remaining arguments 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).

V. CONCLUSION

In light of the foregoing, Appellee, Robert L. Wilkie, Secretary of Veterans Affairs, concedes that the Court should vacate the portion of the Board's November 8, 2018, decision which denied entitlement to service connection for the Veteran's cause of death and remand the matter to allow the Board to provide an adequate statement of reasons or bases in support of its decision.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

/s/ Mary E. Jones
MARY E. JONES
Appellate Attorney
Office of the General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6901

Attorneys for the Appellee
Secretary of Veterans Affairs