IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LYNN C. HULSMAN,
Appellant,

v.

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

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUES

FEDERAL REGULATIONS

RECORD CITATIONS

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LYNN C. HULSMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 19-3985
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee.	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS

ISSUES PRESENTED

Should the Court affirm the April 18, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for the Veteran's cause of death?

STATEMENT OF THE CASE

Nature of the Case

Appellant, Lynn C. Hulsman, appeals the April 18, 2019, Board decision that denied entitlement to service connection for the Veteran's cause of death. Appellant's Br. at 2; [R. at 4 (3–15)]. Appellant is the Veteran's surviving spouse. *See* [R. at 344 (343–345)]; [R. at 368].

Statement of Relevant Facts

The Veteran, Federick S. Hulsman, served on active duty from June 1965 to June 1967. [R. at 711]. At separation, a military physician found Appellant's lungs and chest to be normal and noted that a chest x-ray taken that date was "[w]ithin normal limits." [R. at 303 (303–304)].

During a January 2003 VA diabetes examination, an examiner noted that the Veteran "is a smoker" and that "[h]is brother died from lung cancer." [R. at 669 (669–670)].

In July 2010, the Veteran died of a massive hematemesis due to lung cancer. [R. at 366]. That same month, Appellant sought Department of Veterans Affairs (VA) benefits, seeking entitlement to service connection for the cause of the Veteran's death and dependency and indemnity compensation (DIC). [R. at 371–378].

In November 2010, the VA Regional Office (RO) in Newark, New Jersey, denied entitlement to service connection for cause of the Veteran's death and entitlement to DIC. [R. at 331–338].

In January 2011, Appellant requested reconsideration of the RO's decision and submitted a medical opinion from the Veteran's treating physician. [R. at 328–330]; [R. at 347]. The private physician noted that the Veteran "was diagnosed with lung cancer on 11/18/2009" and "was found to have adenocarcinoma of the

lung." *Id.* at 328. The physician opined that the Veteran's "type of cancer is likely if not that related to asbestos exposure." *Id.*

VA obtained a medical opinion in January 2012. [R. at 176]. The VA examiner opined that "the [V]eteran's adenocarcinoma was most likely caused by smoking, and not by limited exposure to asbestos in the service, and the cause of death is less likely [than] not secondary to military service." *Id.* at 176. In support of her conclusion, the examiner noted that the Veteran had chronic obstructive pulmonary disease (COPD) and adenocarcinoma; these conditions were caused by smoking; the Veteran was noted to be a smoker in January 2003; and the Veteran's exposure to asbestos as a boatswain's mate was very limited. [R. at 176]; *see* [R. at 180] (noting a minimal probability of asbestos exposure as a boatswain's mate). The examiner also noted that the "[m]ost likely cancer caused by asbestos exposure was mesothelioma, not adenocarcinoma." [R. at 176].

In February 2012, VA confirmed its previous denial of service connection for cause of death. [R. at 165–172]. Appellant filed a notice of disagreement, and VA provided a Statement of the Case in August 2014. [R. at 124–145]; [R. at 153]. Appellant appealed to the Board the following month. [R. at 121].

Appellant appeared at a Board Hearing in March 2018. [R. at 82–97]. Appellant reported that the Veteran experienced respiratory issues, such as coughing and difficulty breathing, beginning when he left service until his death. *Id.* at 88–89. Appellant also reported that her husband smoked "[m]aybe half a

pack a day." *Id.* at 95. Appellant's representative also noted that a fire occurred onboard the ship during the Veteran's service. *Id.* at 96–97.

In May 2018, the Veterans Law Judge requested a medical opinion from the Veterans Health Administration. [R. at 79–80]. In response, a VA pulmonologist opined that "[t]he cause of the Veteran's death is NOT as least as likely as not (a degree of probability of 50[%] or higher) etiologically related to his exposure to asbestos during military service" and stated that the January 2012 VA examiner's opinion that his adenocarcinoma was most likely caused by smoking and not by limited asbestos exposure "stands as appropriate." [R. at 75 (73–75)]. The examiner indicated he review the Veteran's Veterans Benefits Management System (VBMS) records and hearing transcript, to include Appellant's and her representative's statements regarding the Veteran's respiratory complaints, the onboard fire; the Veteran's smoking history; and contentions below regarding the private and VA medical opinions. *Id.* at 73–75. Relevant here, the examiner noted, that the Veteran's respiratory complaints were "likely from his tobacco-related COPD" and that it was unclear how much asbestos the Veteran was exposed to. *Id.* at 74. The examiner also cited to medical literature that noted "[t]hough adenocarcinoma of the lung is found in increasing numbers of non-smokers, smoking is still the largest etiologic cause of most types of lung cancer, including adenocarcinoma." *Id.*

In November 2018, The Board provided Appellant a copy of the medical opinion and 60 days to submit additional evidence and argument. [R. at 70–72].

In April 2019, Appellant submitted an article from "Mesothelioma.com" about the USS Intrepid, as well as letters from the Veteran to Appellant. [R. at 13–66].

Later that month, the Board denied entitlement to service connection for cause of the Veteran's death. [R. at 4–12].

ARGUMENT

The Veteran had a history of smoking cigarettes and died of lung cancer. [R. at 95] (noting that the Veteran smoked "[m]aybe half a pack a day"); [R. at 366]; [R. at 669] (noting the Veteran "is a smoker). Appellant's theory has been that the Veteran was exposed to asbestos while in service and that this exposure caused the Veteran's adenocarcinoma that, in turn, caused his death in July 2010. Appellant's Informal Br. at 3; [R. at 366]. Construing Appellant's arguments liberally, she asserts that the VA examiners' opinions were inadequate because they relied on the Veteran's smoking habit and that the Board provided an inadequate statement of reasons or bases by misapplying several regulations and failing to address letters from Appellant mailed during service. Appellant's Br. at 2, 3; *see De Perez v. Derwinski*, 2 Vet.App. 85 (1992) (holding that the Court interprets informal briefs by pro se appellants liberally). The Court should not find Appellant's arguments to be persuasive because a review of the record shows that

the VA examiners relied on an accurate medical history and supported their conclusions with adequate rationale.

Appellant also raises a new theory for the first time on appeal that the Veteran served within one mile of Vietnam. Because Appellant never raised this argument below, the Court should decline to consider it in the first instance.

I. Appellant Fails to Show that the Board Clearly Erred When It Afforded Greater Probative Value to the January 2012 and October 2018 VA Medical Opinions than to the January 2010 Private Medical Opinion and Appellant's contentions

Appellant asserts that "the VA examiner is offering an incorrect opinion as he is citing a smoking habit that [the Veteran] stopped 25 years at least before his death" and that the Board misapplied 38 C.F.R. § 4.2, 4.3, 4.6, and 4.70, presumably related to the Board's evaluation of the examinations of record. Appellant's Informal Br. at 2, 3. Appellant, however, fails to show that the Board clearly erred when it found the January 2012 VA medical opinion and October 2018 VHA medical opinion to be more probative than the November 2010 private medical opinion. [R. at 9] (finding the November 2010 private examiner's opinion "less persuasive than the VA examiner and VHA examiner's opinions who conducted a thorough review of [the] Veteran's medical records and provided support for their opinions"); *D'Aries v. Peake*, 22 Vet.App. 97, 107 (2008) (noting it is within the Board's purview to evaluate the medical evidence and favor one medical opinion over another).

Medical examination reports are adequate "when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion." *Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012); *see also Ardison v. Brown*, 6 Vet.App. 405, 407 (1994) (noting that an adequate medical examination is one that is based on a consideration of the veteran's prior medical history and describes the veteran's condition with a level of detail sufficient to allow the Board to make a fully informed decision); *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (holding that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion").

Two VA examiners have opined that the Veteran's form of lung cancer, adenocarcinoma, was caused by the Veteran's history of smoking cigarettes and that it was less likely than not that it was caused by exposure to asbestos. [R. at 9]; [R. at 176] [R. at 75] (concurring with the January 2012 VA examiner's opinion that the Veteran's adenocarcinoma was most likely cause by smoking). The January 2012 examiner noted that a 2003 VA examination mentioned "that the [V]eteran was a smoker." [R. at 176]; *see* [R. at 669]. She also noted that "[a]denocarcinoma of the lung is most likely caused by smoking" and that this was "the highest risk factor." [R. at 176]. The May 2018 VHA pulmonologist agreed with this opinion and cited to medical literature noting that "smoking is still the

largest etiologic cause of most types of lung cancer, including adenocarcinoma." [R. at 74].

Appellant asserts for the first time on appeal that the examiners are incorrect in relying on the Veteran's smoking history because the Veteran "stopped 25 years at least before his death." Appellant's Informal Br. at 3. Appellant, however, fails to support this assertion with any citation to the record or point to any medical evidence explaining why this fact would render either medical opinion inadequate or nonprobative. *See Locklear v. Nicholson, 20* Vet.App. 410, 416 (2006) (holding that Court will not entertain underdeveloped arguments); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) ("Lay hypothesizing, particularly in the absence of any supporting medical authority, serves no constructive purpose and cannot be considered by this Court."); *see also Kern v. Brown*, 4 Vet.App. 350 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of the clinical evidence").

To the contrary, the record indicates that the Veteran smoked cigarettes and does not indicate when he stopped. During a January 2003 VA examination, the examiner noted that the Veteran "is a smoker." [R. at 669]. The examiner's use of the present tense suggests that the Veteran smoked as recently as January 2003, approximately six-and-a-half years before his death in July 2010. *Compare* [R. at 669] *with* [R. at 366]. Appellant confirmed during the May 2018 Board Hearing that the Veteran smoked "[m]aybe half a pack a day." [R. at 95].

On review, the VA and VHA examiners' opinions were based on an accurate factual basis and they supported their opinions with citations to the record, the Veteran's circumstances, and with medical literature. *See Monzingo*, 26 Vet.App. at 106. *Cf. Reonal v. Brown*, 5 Vet.App. 458, 460–61 (1993) (noting that a medical opinion based on an inaccurate factual basis may properly be rejected by the Board). To the contrary, the 2010 private examiner did not indicate that he reviewed the Veteran's records or provide any rationale in support of his opinion that the Veteran's lung cancer was likely related to asbestos exposure rather than smoking. [R. at 9]; [R. at 328]. *See Stefl v. Nicholson,* 21 Vet.App. 120, 124 (2007) (holding that "a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion"). A review of Appellant's medical history would have shown, for example, that a military physician found Appellant's lungs and chest to be normal at separation and that a chest x-ray taken that date was "[w]ithin normal limits." [R. at 303].

Accordingly, the Board appropriately discounted the November 2010 private medical opinion. [R. at 9]. In short, Appellant fails to show any error with the Board's analysis of the examinations or with the VA examiners' reliance on Appellant's history of smoking. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999); *aff'd*, 232 F.3d 908 (Fed. Cir. 2000) (table) (holding that the appellant has the burden of showing error on appeal).

II. Appellant Fails to Show that Board the Did Not Consider the Veteran's Letters from Service or that the Board Misapplied Any Relevant Regulation

Appellant also asserts that the Board erred because it did not evaluate the 45 pages of letters the Veteran had mailed her during service. Appellant's Informal Br. at 3; *see* [R. at 13–55]. In asserting so, Appellant appears to argue that the Board's statement of reasons or bases are inadequate. *See* 38 U.S.C. § 7105(d)(1). "The legal requirements with regard to the Board's statement are that the Board (1) address the material issues raised by the appellant or reasonably raised by the evidence, (2) explain its rejection of materially favorable evidence, (3) discuss potentially applicable laws, and (4) otherwise provide an explanation for its decision that is understandable and facilitative of judicial review." *Johnson v. Shinseki*, 26 Vet.App. 237, 264 (2013) (Kasold, C.J. dissenting), *rev'd on other grounds sub nom., Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). The Board's reasons-or-bases obligation, however, does not require the Board to comment on every piece of evidence in the record. *See Newhouse v. Nicholson,* 497 F.3d 1298, 1302 (Fed. Cir. 2007).

On review, these letters are cumulative of Appellant and her representative's testimony from the May 2018 Board hearing during which they referenced the letters and argued how they support her claim. *See* [R. at 91] ("There was also a fire aboard [the Veteran's] ship. We have corroborated here through his letters he had given in time."); [R. at 95] ("In the letters that I'm submitting also, there is a

picture of [the Veteran] I guess in his birthing area, and that's all you can see is asbestos all around"); [R. at 96] ("I have repeated letters from [the Veteran] to [Appellant] telling about going to sick call. . . .On September 15th of 1966 I have a letter here from [the Veteran] and it talks about 'last night we had a real bad fire on our port catwalk.'"). Appellant and her representative asserted that these letters, together with the January 2010 private medical opinion, provided "enough evidence here for the Board to consider service connection for cause of death, either relative to his asbestos exposure . . . or his closeness to the [fire] plume." [R. at 96]. Consistent with the Board hearing testimony, the Veteran described feeling sick and that a fire had occurred on the ship. *See, e.g.,* [R. at 37] ("Today I was very sick. I had a very bad headache."); [R. at 41] ("Last night we had a real bad fire on our port catwalk"); [R. at 47] ("[I]t rained like cats and dogs, but at least my cold is a little better, my headache is gone and the stinging in my eyes have gone also . . . all I do is cough a little now and then.").

The Board, however, "considered the statements made by [Appellant] relating the Veteran's death to active service," to include that he sought medical attention for respiratory issues. [R. at 9]. The Board, however, found Appellant "not competent to provide testimony regarding the etiology of the Veteran's cause of death," noting that asbestos exposure was "not diagnosed by unique and readily-identifiable features and "did not involve a simple identification that a layperson is competent to make." [R. at 9] (citing *Jandreau v. Nicholson*, 492 F.3d

1372, 1377) (Fed. Cir. 2007)). Similarly, the letters do not speak to the etiology of the Veteran's lung cancer, only that he was sick and that a fire occurred. In short, the Board is presumed to have reviewed these letters, and Appellant fails to show how further discussion of these letters would have established the missing facts in this case: medical evidence showing that exposure to asbestos, rather than smoking, caused the lung cancer that caused Appellant's death. *See Jandreau*, 492 F.3d at 1377; *Hilkert*, 12 Vet.App. at 151.

Next, to the extent Appellant asserts that the Board misapplied the benefit-of-the-doubt rule in 38 C.F.R §§ 3.102 and 4.3, she fails to show error. Appellant's Informal Br. at 2. Under 38 C.F.R. § 4.3, if "reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant." Appellant's disability rating is not at issue in this case, so this regulation does not apply. As to 38 C.F.R. § 3.102, the benefit-of-the doubt rule applies only the evidence is in equipoise. *Jones v. Shinseki*, 23 Vet.App. 382, 388 n.1 (2010); *see* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102 (noting that reasonable doubt exists where there is an "approximate balance of positive and negative evidence"). Here, the Board found that "the weight of the competent evidence does not attribute the Veteran's death to military service despite . . . Appellant's contentions to the contrary." [R. at 10]. The Board "considered the doctrine of reasonable doubt" but found it inapplicable in because "the most probative evidence is against the claim." [R. at 10]. Because the Board found that the preponderance of the evidence

weighed against entitlement to service connection for each of his claims, the evidence was not in equipoise, so the Board correctly noted that reasonable doubt rule was not applicable. *See Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed. Cir. 2001) (explaining that the benefit of the doubt standard of proof is not for application when the Board finds that a preponderance of the evidence weighs for or against a claim).

Finally, Appellant also fails to explain how the Board misapplied 38 C.F.R. § 3.313. *See Locklear*, 20 Vet. App. at 416. This regulation relates to claims based on service in Vietnam but her claim for service connection for cause of death is based on the Veteran's alleged exposure to asbestos. Accordingly, this regulation would not apply in this case. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991) (holding that the Board is required to discuss, among other things, potentially applicable regulations). Appellant argues that the Veteran was within one mile of Vietnam, but the Court should decline to address this argument because she raises it for the first time on appeal and fails to support this assertion with any citation to the record. *See* Appellant's Informal Br. at 2–3; *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015) (holding that "the Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board."); *Maggitt v. West*, 202 F.3d 1370, 1377 (Fed. Cir. 2002) (holding that where an appellant raises an issue before the

Court that was not raised below, the Court has discretion to determine whether the hear the argument in the first instance); *Locklear*, 20 Vet.App. at 416. Throughout the course of her appeal, Appellant has argued and submitted medical evidence in support of the theory that exposure to asbestos caused Appellant's lung cancer. *See* [R. at 328]. And in response to Appellant and her representative's assertions at the May 2018 Board Hearing, the Board obtained a VHA opinion addressing the question of whether asbestos caused the Veteran's lung cancer. *See* [R. at 73-75]. Neither Appellant nor her representative below raised a theory or submitted any evidence relating Appellant's lung cancer to the Veteran's proximity to Vietnam, such that the Board was required this regulation. *See Robinson v. Peake,* 21 Vet.App. 545, 552-56 (2008) (holding that the Board is required to address issues raised by either the claimant or the evidence of record). Accordingly, the Court should decline to find any error.

CONCLUSION

For the above reasons, the Secretary respectfully requests that the Court affirm the April 18, 2019, Board decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under possible penalty of perjury under the laws of the United States of America, that on January 31, 2020, a copy of the foregoing was mailed, postage prepaid, to:

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