

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

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Vet. App. No. 19-0608

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**SANDRA J. COREY,**

Appellant,

v.

**ROBERT L. WILKIE,**

Secretary of Veterans Affairs,

Appellee.

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APPELLANT’S REPLY BRIEF

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## ARGUMENT

### **I. The Secretary has failed to show that VA satisfied its duty to assist.**

In the principal brief, Mrs. Corey argued that the Board clearly erred by finding that VA satisfied its duty to assist because: (1) no effort was made to obtain the outstanding records of pulmonary treatment with Dr. Ramondo or hospitalization at The Miriam Hospital; (2) the September 2016 VA medical opinion is inadequate to determine entitlement to service connection for the cause of Mr. Corey's death; and (3) no opinion addressing direct causation from herbicides was obtained. Appellant's Brief ("App. Br.") at 8-16.

The Secretary has not set forth a response to these arguments and only notes that he "does not concede error" on these grounds. Secretary's Brief ("Sec. Br.") at 6. Because the Secretary has failed to present any reason or argument as to why the Board's duty to assist finding is not clearly erroneous, the Court should hold that the Secretary has conceded this error, and accordingly, reverse the Board's finding that VA satisfied its duty to assist. *See MacWhorter v. Derwinski*, 2 Vet. App. 655, 657 (1992) (Secretary's failure to address an argument presented by an appellant "may result in the Court interpreting such failure to respond as a concession of error[.]"); *Molitor v. Shulkin*, 28 Vet. App. 397, 404 (2017). With respect to the Secretary's request for an "opportunity to address Appellant's remaining arguments if the Court deems it necessary or advisable[.]" Sec. Br. at 6, Mrs. Corey should not endure further delay when the Secretary willfully chose not to respond to her arguments on brief. *Cf. Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006)

(rejecting an underdeveloped argument as “far to terse to warrant detailed analysis by the Court.”).

Nonetheless, because it has been nearly seven years since the Regional Office first denied her DIC claim, **R. at 519-26**, Mrs. Corey wishes not to return to this Court seeking remedies for errors she has already presented to it. If the Court were only to accept the Secretary’s watered-down reasons-or-bases remedy, Sec. Br. at 4-6, then it is highly likely that the Board would repeat its errors in relying on an inadequate medical opinion and refusing to assist Mrs. Corey in obtaining unquestionably relevant private treatment records. As Mrs. Corey explained, because the Certificate of Death shows that her husband’s immediate cause of death was respiratory failure due to or as a consequence of pulmonary hypertension and right heart failure, **R. at 619-21**, and VA was aware that he received treatment for his pulmonary conditions from Dr. Ramondo, **R. at 105 (103-05)**, VA was required to solicit an authorization or otherwise request Mrs. Corey to obtain and submit the treatment records, but failed to do so. 38 C.F.R. § 3.159(e)(2); App. Br. at 9-11. Additionally, the September 2016 VA medical opinion did not provide adequate information to determine entitlement to service connection because it did not address Mr. Corey’s chronic congestive heart failure at all, **R. at 67 (63-68)**, including whether it qualifies under the broad category of ischemic heart disease. App. Br. at 11-14; 38 C.F.R. § 3.309(e); *Stefl v. Nicholson*, 21 Vet. App. 120, 123-25 (2007); *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008).

Moreover, as the Secretary concedes that the Board erred by failing to discuss the explicitly raised theory of direct causation by herbicides, Sec. Br. at 4; **R. at 609**, and VA

has conceded that Mr. Corey was exposed to herbicides during his service in the Republic of Vietnam, **R. at 6 (1-12)**, the Board is without competent medical evidence on the issue until it obtains an opinion on direct causation. *Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994); *DeLaRosa v. Peake*, 515 F.3d 1319, 1322 (Fed. Cir. 2008); 38 U.S.C. § 5103A(a). While the Secretary requests remand simply for the Board to “consider whether VA has satisfied its duty to assist[,]” Sec. Br. at 5, which leaves open the possibility that the Board surmises a reason not to provide a medical opinion, the law clearly *requires* an opinion since the theory has been raised, which again, the Secretary concedes. *See Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000) (the duty to assist “attaches to the investigation of *all* possible in-service causes of that current disability, including those unknown to the veteran.”) (emphasis in original); *DeLisio v. Shinseki*, 25 Vet. App. 45, 53 (2011).

Especially because the Secretary has proffered no reason for the Court to do otherwise, it would be appropriate for the Court to address the additional duty to assist errors argued by Mrs. Corey so as to ensure a proper decision on remand. *See Quirin v. Shinseki*, 22 Vet. App. 390, 396 (2009) (holding that the Court may “address additional errors made by the Board . . . that must be corrected so as to ensure a proper decision on remand.”); *see also Xerox Corp. v. 3Com Corp.*, 458 F.3d 1310, 1314-15 (Fed. Cir. 2006) (discussing a prior decision in which the court addressed additional arguments for the express purpose of providing guidance to the district court on remand); App. Br. at 8-16. Mrs. Corey, as the Veteran’s widow, has previously pursued this appeal as a pro se litigant, being advanced on the docket, and without the Court’s guidance she would be left to

traverse the “labyrinthine corridors of the veterans’ adjudicatory system” herself. *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009).

Therefore, the Court should reverse the Board’s duty to assist finding and remand the matter to obtain an adequate opinion addressing all pertinent medical questions, and for VA to make efforts to obtain outstanding treatment records in compliance with 38 C.F.R. § 3.159(e)(2).

**II. The Secretary agrees that remand is warranted because the Board failed to provide an adequate statement of reasons or bases.**

The Secretary concedes that the Board failed to provide an adequate statement of reasons or bases. Sec. Br. at 4. Specifically, the Secretary states that remand is warranted for the Board to provide adequate reasons or bases as to whether “the Veteran’s heart condition may be directly related to in-service Agent Orange and to consider whether VA has satisfied its duty to assist . . . .” Sec. Br. at 5-6; *see* App. Br. at 14-16, 18-19; *see also R. at 8 (1-12)* (incorrectly finding that the September 2016 VA examiner opined that “the causes of the Veteran’s death are not etiologically related, either *directly* or presumptively, to his military service.”) (emphasis added). In this regard, Mrs. Corey appreciates the Secretary’s partial concession of error and respectfully asks that the Court also hold that the Board failed to provide an adequate statement of reasons or bases to support its decision.

However, it would be appropriate for the Court to address the additional reasons or bases errors argued by Mrs. Corey in her principal brief. *See* App. Br. at 19-21; *Quirin*, 22 Vet. App. at 396. Specifically, with respect to whether Mr. Corey’s right heart failure is



contemplated by the presumptive service connection regulations that apply to ischemic heart disease, the Board's reliance on the September 2016 VA medical opinion to find that he did not suffer from a presumptive disability constitutes an impermissible medical inference. **R. at 7 (1-12)**; *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011) (citing *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)). The examiner only stated that Mr. Corey "less likely as not suffered from ischemic heart disease[.]" because the evidence does not show that ischemic heart disease was ever confirmed, **R. at 104 (103-05)**, and therefore, the examiner did not specifically address whether Mr. Corey's right heart failure, described as chronic congestive heart failure, **R. at 67 (63-68)**, qualifies as an ischemic heart disease contemplated by the presumptive regulation. *See* 38 C.F.R. § 3.309(e). Additionally, the Board failed to explain whether Mr. Corey's presumptively service-connected diabetes mellitus contributed to causing his death by virtue of affecting vital organs. 38 C.F.R. § 3.312(c)(3)-(4).

The Secretary makes no effort to explain how the Board's reasons or bases are adequate on these issues, and otherwise fails to explain why the Court should decline the opportunity to address the issues so to provide guidance to the Board on remand. As the Secretary notes, the "general rule" is that the Court will not address other errors raised by the appellant when remand is ordered because of an undoubted error requiring remedy. Sec. Br. at 6 (citing *Best v. Principi*, 15 Vet. App. 18, 19-20 (2001)). But the general rule, as the Court made clear, has exceptions. *See Best*, 15 Vet. App. at 20 ("Of course, within the statutory definition of 'to the extent necessary,' there may be appropriate circumstances

that would cause the Court, in its discretion, to touch upon another issue, whether raised by the appellant or not.”).

Where the Secretary offers no substantive or intelligible reason for the Court to pass on an argument that the appellant has adequately pled, nor any responsive argument to counter the merits of such, the Court should not find that there is “a disagreement” of error that is rendered moot. *See Best*, 15 Vet. App. at 19 (“*In most cases*, where the Court vacates a decision of the Board and remands the matter for readjudication, a *disagreement* as to any of the alleged errors in that decision will be rendered moot . . . .”) (emphasis added); *see also* Sec. Br. at 6 (“The Secretary does not concede error as to any of Appellant’s remaining arguments.”). Consistent with the Court’s jurisprudence, to find a “disagreement,” the Secretary must address the appellant’s arguments. *See MacWhorter*, 2 Vet. App. at 657 (noting that the Secretary’s “failure to file a brief or other appropriate pleadings *addressing all issues and forms of relief sought* . . . may result in the Court interpreting such failure to respond as a concession of error[.]”) (emphasis added). Because the Secretary does not even *identify* the arguments on which he “does not concede error[.]” Sec. Br. at 6, it cannot be said that he has addressed all issues raised by Mrs. Corey.

Therefore, the Court should find that the Secretary has conceded that the Board’s reasons or bases are inadequate for all reasons set forth by Mrs. Corey’s principal brief.

## **CONCLUSION**

For the reasons articulated above and in her principal brief, Mrs. Corey respectfully requests that the Court reverse and otherwise vacate the Board’s decision of November 8,

2018, and remand the matter for readjudication consistent with the points discussed in her briefs.

February 4, 2020

Respectfully submitted,

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