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

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**MILDRED A. HEYER,**
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 APPELLEE SECRETARY OF VETERANS AFFAIRS

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

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| **MILDRED A. HEYER,** | ) | |
| | ) | |
| Appellant | ) | |
| | ) | |
| v. | ) | Vet.App. No. 19-3430 |
| | ) | |
| **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 APPELLEE
# SECRETARY OF VETERANS AFFAIRS

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## I. ISSUE PRESENTED

Whether the Court should affirm the January 25, 2019, decision of the Board of Veterans' Appeals (Board) that found that new and material evidence was not submitted sufficient to reopen a claim for service connection for the cause of the Veteran's death.

## II. STATEMENT OF THE CASE

### Nature of the Case

Appellant, Mildred Heyer, appeals the January 25, 2019, decision of the Board that (1) found that new and material evidence was not submitted sufficient to reopen a claim for service connection for the cause of the Veteran's death; (2)

denied entitlement to accrued benefits; and (3) denied entitlement to a VA death pension. [Record Before the Agency (R.) at 5 (5-25)].

Appellant presents no argument regarding the Board's decision to deny the claim of entitlement to accrued benefits and to VA death pension. [App. Br. at 1-11]. Since Appellant does not take issue with the Board's decision in this regard, she should be deemed to have abandoned any potential challenge thereto. *See Pederson v. McDonald*, 27 Vet.App. 276, 284 (2015) (en banc).

**Statement of Facts and Procedural History**

The Veteran served on active duty from February 1957 to February 1978. [R. at 37, 1344, 1346, 1348, 1352, 1350, 1354]. The Veteran died in September 1982. [R. at 37]. Appellant is his surviving spouse. [R. at 155 (150-56)].

In October 1982, Appellant filed an application for Dependency and Indemnity Compensation (DIC), to include a claim seeking service connection for the cause of the Veteran's death. [R. at 1437-40]. In November 1982, the regional office issued a rating decision that denied service connection for the cause of the Veteran's death. [R. at 1410]. In March 1983, Appellant submitted a notice of disagreement. [R. at 1370]. In July 1983, the regional office issued a statement of the case that continued the denial of service connection for the cause of the Veteran's death. [R. at 1336-39]. Appellant appealed to the Board. [R. at 1321]. On January 21, 1985, the Board issued a decision denying service connection for the cause of the Veteran's death. [R. at 1269-75]. Appellant did not request

reconsideration of the Board's decision and the Board's decision became final on the day it was issued. [R. at 8].

In August 1999, Appellant submitted a second application seeking service connection for the cause of the Veteran's death. [R. at 1195-1201]. In April 2000, the regional office issued a rating decision that denied service connection for the cause of the Veteran's death. [R. at 1146-51]. When Appellant failed to file a notice of disagreement within the prescribed time, the April 2000 rating decision became final. [R. at 9].

The death certificate showed that the Veteran died in September 1982 at the age of forty-three. [R. at 1441]. The immediate cause of death was respiratory arrest due to metabolic acidosis as a consequence of hepatorenal failure. [R. at 1441]. No other significant conditions contributing to death were listed. [R. at 1441]. Medical treatment records from September 1982 showed his terminal diagnoses were severe gastrointestinal bleed and alcoholic liver disease with ascites and probable varices. [R. at 1297 (1296-98)]. At the time of his death, service connection had not been established for any disabilities. [R. at 11].

Appellant previously contended that the Veteran's alcoholism began during his military service after he returned from Vietnam in June 1971 and that it worsened after he went to Thailand in 1974. [R. at 1185 (1185-93), 1311-13 (1311-17)]. She contended that something must have happened to him while he was serving in Vietnam that changed him and caused him to drink because he rarely drank before he went there and afterward he drank constantly and his personality

and behavior changed. [R. at 1185, 1311-13, 1321]. He became angry all the time and had outbursts towards her and their children that eventually led him to being physically abusive towards them. [R. at 1081-82, 1185-87, 1313]. He became distant from her both emotionally and physically and, when she tried to talk with him about it, he became angry and violent toward her. [R. at 1081, 1185-87]. He also sexually abused their daughter and, when confronted with this, threatened to kill Appellant and their children. [R. at 1313]. This led to her separating from the Veteran shortly after his discharge from service in January 1978. [R. at 1356-61]. She also described various incidents of behavior by the Veteran that she believes further indicates he had some type of mental health problem. [R. at 1081-82, 1191]. 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. [R. at 1081, 1193]. She stated that he was railroaded into retirement without a proper physical and that he had lost weight, the white of his eyes and skin had a yellowish color indicating jaundice, and he had to use the bathroom very frequently. [R. at 1081-82, 1193, 1315, 1321].

In support of her prior claims, Appellant submitted various lay statements, in addition to her own, to try to establish the state of the Veteran's health after service and prior to his death, as well as a couple of buddy statements from fellow service members to establish how the Veteran was behavior-wise prior to going to Vietnam. [R. at 1153-55, 1172-94, 1204-07, 1209-10, 1216, 1311-18, 1362-69]. She also submitted the Veteran's treatment records from the New Hanover

Memorial Hospital from December 1981 to September 1982. [R. at 1296-99]. Other evidence considered also included the Veteran's DD Form 214s, a Statement of Service, his service treatment records, treatment records for the appellant from 1972 through 1978, and the Veteran's death certificate. [R. at 1158-62, 1208, 1344-55, 1380-81, 1418].

In the prior decisions by the Board and the regional office (RO), although service treatment records showed the Veteran was treated for alcoholism in the year prior to his discharge from service in January 1978 (from March 1977 to November 1977), both the Board and the RO held that the Veteran's alcohol abuse itself was not considered a disability because it was considered to be willful misconduct and, therefore, was not a basis upon which monetary benefits could be granted. [R. at 1149, 1274, 1339]. Furthermore, the Board and RO both denied service connection for the cause of the Veteran's death because there was no evidence to show that the Veteran had a chronic disorder (especially of the lung or kidney) during service or that manifested to a compensable degree during the year following his discharge from service that caused or contributed to the his death as the first medical documentation of the fatal disorders was recorded several years after his discharge from active military service. [R. at 1149, 1274, 1339].

The Veteran's service treatment records showed he went through a rehabilitation program for his alcoholism in 1977 and he was doing very well, felt and looked better, had gained weight, and was considered improved. [R. at 289-

90]. At his retirement physical in August 1977, his clinical examination was normal for the abdomen, viscera and genitourinary system and his hematocrit was 50 percent (which represented an improvement). [R. at 291-92]. Appellant submitted one of her treatment notes from January 1978 that indicates she was dealing with an alcoholic husband which might indicate the Veteran had begun drinking again. [R. at 1305].

The next available medical evidence of record is not until December 1981, when the veteran was admitted to a hospital for treatment of alcoholism. [R. at 1252-60]. At that time, he was diagnosed to have hepato-cellular degeneration. [R. at 1256]. Notably, the Veteran reported at that time that his drinking picked up markedly after he retired from the service and divorced in 1978. [R. at 1259]. Furthermore, the September 1982 treatment records show the Veteran's report of having a long problem of drinking but stating that he does not know why he drinks, that he "got off on it and just couldn't stop." [R. at 1255].

In February 2012, Appellant filed a claim to reopen a claim for service connection. [R. at 1039-46]. Appellant asserted:

> I HAVE FILED FOR A SERVICE CONNECTED CLAIM FOR DIC IN THE PAST NOW THAT I AM SUBMITTING PROOF THAT MY HUSBAND SERVED HONORABLE IN THE REPUBLIC OF SOUTH VIET NAM AND WAS EXPOSED TO ENVIRONMENTAL HAZZARDS THAT LED TO HIS RESPIRATORY AND HEART PROBLEMS IN ADDITION, TO HIS PTSD WHICH BROUGH HIS ABUSIVE BEHAVIORAL MANAGEMENT PROBLEMS IN HIS DAILY LIVING. THEREFORE IT IS MY CONTENTION THAT HIS DEATH WAS A DIRECT CAUSE OF HIS SERVICE TO THIS GREAT COUNTRY

> WHILE HE SERVED IN VIET NAM AND THE FOR EAST, EXPOSED TO THE CHEMICAL OF AGENT ORANGE AND OTHER BIO HAZARDS.

[R. at 1046]. Appellant submitted various documents with her claim. [R. at 1047-96]. Most were documents that were previously submitted for Appellant's previous claims. [R. at 1047-96]. Documents not previously submitted included personnel records showing service in Vietnam and a VA Form 21-4142 listing locations, range of years, and conditions treated from 1960 to 1974. [R. at 1049, 1066, 1080].

On May 24, 2018, Appellant was afforded a Board hearing. [R. at 89-107]. At the hearing, Appellant provided testimony regarding the veteran's health and behavior after he returned from Vietnam. [R. at 103-07].

On January 25, 2019, the Board issued a decision that found that new and material evidence has not been received to reopen a claim for service connection for the cause of the veteran's death. [R. at 5]. The Board found that Appellant's testimony at the Board hearing "provided the same or similar information as in her written statements" that were of record. [R. at 13]. Although the Board concluded that Appellant did submit new evidence in support of the theory that the Veteran's death is related to exposure to Agent Orange in Vietnam, the Board concluded that the evidence is not relevant. [R. at 14-15]. The Board found that Appellant "has not identified or submitted any new medical evidence to establish that the Veteran had a respiratory condition, heart condition, or diabetes mellitus, type II, at the time of his death. [R. at 17]. This appeal ensued.

## III. SUMMARY OF ARGUMENT

Appellant failed to submit any new and material evidence. To the extent that the evidence was not duplicative of evidence previously of record, the evidence failed to provide evidence of any condition that caused or contributed to the Veteran's death. The Board's statement of reasons or bases was sufficient to enable an appellant to understand the basis for the Board's decision and to facilitate review by this Court.

## IV. ARGUMENT

### A. Standard of Review

This Court reviews the Board's decision to determine whether the Board supported its decision with a "written statement of [its] findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). "The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). However, section 7104(d)(1) does not require the Board to use any particular statutory language or "terms of art," nor does it require "perfection in draftsmanship." *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007); *McClain v. Nicholson*, 21 Vet.App. 319, 321 (2007). The Secretary further asserts that it is relevant to the Court's standard of review that the appellant generally bears the burden of demonstrating error in a Board decision. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999), ***aff'd*** 232 F.3d 908 (Fed. Cir. 2000).

**B. The Board provided an adequate statement of reasons or bases in finding that new and material evidence had not been received.**

Appellant argues that the Board failed to provide an adequate statement of reasons or bases for its decision. [Appellant's Brief (App. Br.) at 2-5]. However, Appellant misunderstands the scope of the Board's review.

The Secretary is required to reopen a previously denied claim if "new and material evidence is presented." 38 U.S.C. § 5108 (requiring the Secretary to reopen a previously denied claim if "new and material evidence is presented"); *Shade v. Shinseki*, 24 Vet.App. 110, 113 (2010). "New" evidence includes "preexisting evidence not submitted to agency decisionmakers," whereas "material" evidence is that which relates to "an unestablished fact necessary to substantiate the claim." 38 C.F.R. § 3.156(a). New and material evidence may not be cumulative of the evidence of record, and must raise a reasonable possibility of substantiating the claim when considered with the old evidence and combined with VA assistance. *See Shade*, 24 Vet.App. at 113.

The Board's statement of reasons or bases began by detailing the previous evidence of record and the theories raised by Appellant in the claims that became final in January 1985 and April 2001. [R. at 11-12]. The Board then addressed the new evidence submitted by Appellant.

The Board addressed two documents that appear to be from the Veteran's service personnel records that verify the Veteran served in the Republic of Vietnam from June 1970 to June 1971. [R. at 14, 1066, 1080]. The Board found that these

records are not relevant because the evidence fails to demonstrate that the Veteran had a disease listed in 38 C.F.R. § 3.309(e) that is related to herbicide exposure for which presumptive service connection may be granted and Appellant has not submitted evidence to support direct service connection. [R. at 15].

The Board explained that in certain circumstances the Secretary has recognized specific diseases that are associated with exposure to certain herbicide agents, and therefore, service connection will be presumed to have been incurred in service even though there is no evidence of that disease during the period of service at issue, unless there is affirmative evidence to establish that the disease is due to an intercurrent injury or disease. [R. at 18]. Furthermore, a veteran who served in the Republic of Vietnam during the Vietnam era shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. [R. at 18]. The Board listed the diseases associated with herbicide exposure under VA law and explained that the disease asserted by Appellant's representative, metabolic acidosis, is not a presumptive disease that has been recognized to have an association to exposure to herbicide exposure. [R. at 16]. Likewise, the other two conditions listed on the Veteran's death certification, hepatorenal failure and respiratory arrest, are not recognized to have an association to herbicide exposure. [R. at 16].

Also related to Appellant's herbicide exposure claim, the Board addressed a VA Form 21-4142 that listed locations and years of treatment in service that she

believes the Veteran was treated. [R. at 17, 1049-51]. The Board explained that at least half of the incidents of treatment listed were prior to 1970 when the Veteran was sent to Vietnam and, therefore, are irrelevant to the inquiry of whether he has an herbicide agent related disease. [R. at 17]. Furthermore, the Board noted that most of the treatment identified are not in the Veteran's service treatment records, even after all efforts had been undertaken to obtain the Veteran's service treatment records. [R. at 17]. The Board therefore concluded that Appellant "has not identified or submitted any new medical evidence to establish that the Veteran had a respiratory condition, heart condition or diabetes mellitus, type II, at the time of his death. [R. at 17].

The Board then reviewed the available medical evidence of record for evidence to support Appellant's contentions. [R. at 17-18]. As for a respiratory condition, service treatment records merely show the Veteran was treated for acute respiratory problems, such as acute bronchitis or upper respiratory infections, but most of these were prior to his going to Vietnam except for one that was within a month of arriving in Vietnam. [R. at 17, 1092, 1160]. Otherwise, the service treatment records are silent for any chronic respiratory disorders. [R. at 17, 228-338]. As for a heart condition, the service treatment records show that the Veteran had multiple electrocardiograms in service for periodic examinations and the last three of them in 1974, 1975, and 1977 were essentially within normal limits. [R. at 18, 276-96]. He also had chest X-rays for those examinations that were normal. [R. at 18, 276-96]. No heart condition was found on his retirement physical

in August 1977. [R. at 18, 291-92]. Medical treatment records from December 1981 to September 1982 are silent for the Veteran having any respiratory or heart problems. [R. at 18, 1196-99, 1252-60]. He gave no history of having any respiratory or heard disorders and, on physical examination, his lungs were clear and his heart was not enlarged, had sinus rhythm and no murmur was appreciated. [R. at 18, 1196-99, 1252-60]. As for diabetes, the Board noted that there is no medical evidence whatsoever to show that the Veteran has diabetes mellitus, type II. [R. at 18].

The Board explained that, "even if the evidence established that the Veteran had a disease related to herbicide agent exposure in the Republic of Vietnam at the time of his death, the appellant has not even argued, much less provided evidence, as to how any of these conditions she claimed the Veteran had caused or contributed to his death." [R. at 18]. The Board noted that the death certificate does not list any contributory causes of death, nor does the veteran's treatment records. [R. at 18, 1252-58, 1441]. The Board stated that "[t]here must be some evidence to establish that these other conditions the appellant claims either caused or contributed to the Veteran's death." [R. at 18].

As for Appellant's contentions that the Veteran's alcohol abuse may be secondary to a mental health illness, the Board explained:

> Finally, the Board finds that, insofar as the appellant contends that the Veteran's alcohol abuse may be secondary to a mental health illness such as posttraumatic stress disorder (PTSD) he incurred in service (*see* February 2012 DIC application), the

> appellant has not provided any new evidence to support such a claim. Her statements and the lay statements she provided were mere [sic] duplicative of the evidence she has provided in the past. 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.

[R. at 18-19]. The Board concluded by stating that the Board finds that new and material evidence has not been received to reopen Appellant's claim for service connection for the cause of the Veterans death and her application to reopen is denied.

To the extent that Appellant argues that the Board erred in considering new and material evidence of head and face injuries sustained in a 1973 automobile accident, Appellant incorrectly asserts that this evidence is new. [App. Br. at 4]. The Line of Duty Determination report for the accident was included in the record when the Board's April 2000 rating decision became final. [R. at 1227-29]. Furthermore, there is no indication that the Veteran sustained any traumatic brain injury from the accident. [R. at 1229]. Moreover, there is no indication that the any service-connected injury from the automobile accident caused or aggravated Appellant's alcohol abuse. [R. at 1229]. Even if this theory could have been reasonably raised by the record, a new theory of entitlement to a benefit does not

constitute a new claim. *See Roebuck v. Nicholson*, 20 Vet.App. 307, 313 (2006) (finding that two theories that pertain to the same benefit for the same disability constitute the same claim). Thus, there was no error because (1) evidence of the automobile accident was previously of record, (2) the theory was not reasonably raised by the record, and (3) a new theory of entitlement to a benefit does not constitute a new claim. Aside from the previously submitted Line of Duty Determination report for the 1973 automobile accident, Appellant does not identify any new and material evidence that the Board failed to address. [App. Br. at 3-9].

To the extent that Appellant complains that the Board did not analyze the credibility and probative value of the medical evidence, Appellant fails to appreciate the limited scope of the Board's review. [App. Br. at 5]. The Board's threshold analysis was to determine if new and material evidence had been submitted. *See* 38 U.S.C. § 5108 (requiring the Secretary to reopen a previously denied claim if "new and material evidence is presented"). In such an analysis, the Board must presume that the newly submitted evidence is credible unless it is inherently false or untrue, or it is beyond the competence of the person making the assertion. *Duran v. Brown*, 7 Vet.App. 216, 220 (1994); *Warren v. Brown*, 6 Vet.App. 4, 6 (1993). Thus, the Board conducted a proper analysis of the evidence without weighing the credibility and probative value of the new evidence.

To the extent that Appellant argues that the Board "did not provide reasons for its rejection of the material evidence related to the alcohol abuse favorable to the Veteran," Appellant overlooks the Board's findings. [App. Br. at 5]. The Board

found that Appellant "has not provided any new evidence" to support the claim that the Veteran's alcohol abuse may be secondary to a mental health illness. [R. at 18]. Furthermore, Appellant fails to identify the purported "material evidence related to the alcohol abuse" and this Court does not address underdeveloped arguments. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped).

To the extent Appellant argues that the Board should have discredited the Veteran's own statement about his reason for drinking, this argument is unfounded. The "new and material evidence" requires the Board analyze the new evidence with previous evidence of record to determine if the new evidence relates to an unestablished fact necessary to substantiate the claim. *See* 38 C.F.R. § 3.156(a). The Board was not required to disregard the statement made by the Veteran. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (finding that "the Board in this case properly exercised its authority to assess the credibility and weight of the evidence").

To the extent Appellant argues that "the medical evidence demonstrates the likelihood of MSgt Heyer having suffered an undiagnosed traumatic brain injury is very high," this argument is inappropriate. [App. Br. at 6-8]. Appellant argues her own non-competent evaluation of medical evidence. *See Kern v. Brown*, 4 Vet.App. 350, 353 (1993) (noting that "appellant's attorney is not qualified to provide an explanation of the significance of clinical evidence"); *Hyder v. Derwinski*, 1 Vet.App. 221, 225 (1991) (noting that lay hypothesizing "serves no

constructive purpose and cannot be considered by this Court”). This is improper and, thus, this argument lacks merit.

To the extent Appellant argues that the benefit of the doubt rule was not applied, this argument is misplaced. [App. Br. at 8-9]. Pursuant to 38 U.S.C. § 5107(b), "[w]hen 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." The benefit of the doubt standard in section 5107(b) is only applicable when there is an "approximate balance of positive and negative evidence." *Ferguson v. Principi*, 273 F.3d 1072, 1076 (Fed. Cir. 2001). Here, because the Board did not find an approximate balance of positive and negative evidence, the benefit of the doubt rule was not applicable. [R. at 18-19].

**C. Appellant has abandoned all other arguments.**

Because Appellant has limited her arguments to those addressed above, the Court should hold that she has abandoned any other errors that may be in the Board’s decision. *See, e.g., Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (stating that the Court would “only address those challenges that were briefed”); *Hodges v. West*, 13 Vet.App. 287, 290 (2000) (citing *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995)) (issues or claims not argued on appeal are deemed to be abandoned).

## V. CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court affirm the January 25, 2019, decision of the Board that (1) found that new and material evidence was not submitted sufficient to reopen a claim for service connection for the cause of the Veteran's death; (2) denied entitlement to accrued benefits; and (3) denied entitlement to a VA death pension.

Respectfully submitted,

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