

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

PAULA SIMMES,

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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PAULA SIMMES,)
Appellant,)
)
v.) Vet. App. No. 19-5474
)
ROBERT L. WILKIE,)
Secretary of Veterans Affairs,)
Appellee.)

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

Whether the Court should affirm the June 27, 2019, Board of Veterans' Appeals (BVA or Board) decision denying entitlement to burial or interment in a Department of Veterans Affairs (VA) national cemetery, when the Board properly found that the decedent was not eligible for such interment or burial and Appellant does not dispute the Board's findings.

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a), which grants the United States Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Paula Simmes, Appellant and the decedent's step-daughter, seeks to have the decedent buried in a VA national cemetery, which was denied in the Board decision on appeal. (Record (R.) at 1-8). However, the Board properly found that the decedent's period of service did not satisfy the statutory requirements for burial in a VA national cemetery and Appellant concedes that the law does not allow for his burial in a VA national cemetery. Instead, Appellant asks this Court to grant a waiver of the statutory requirements, which is not relief that this Court can provide. (Appellant's Brief (App.Br.) at 1-2). As such, the Court should reject Appellant's arguments and affirm the Board's decision.

C. Statement of Facts and Procedural History

Mr. Richard Spiezio, the decedent, had a period of active duty for training (ACDUTRA) from April 1961 to October 1961 (R. at 40 (40-54)), and, after he died in August 2017, the National Cemetery Administration (NCA) received a request for burial arrangements in the Gerald B.H. Solomon Saratoga National Cemetery. (R. at 61). Later that month, NCA notified Harriet Spiezio, the decedent's surviving spouse, that the request for burial in a VA national cemetery was denied, because ACDUTRA "alone does not establish eligibility for burial in a Department of Veterans Affairs (VA) national cemetery." (R. at 55 (55-56)). In response, Appellant submitted her notice of disagreement (NOD) in September 2017, reflecting, "I am writing on behalf of my mother, Harriet Spiezio, to notify you of our formal appeal regarding the burial of Richard Spiezio." (R. at 33 (33-36)). She

wrote, “As stated in your letter, Richard’s active duty does not qualify him for burial. Although we respect your ‘rules’, our appeal is that this rule needs to be changed.” (R. at 33). She noted that “Rich may not have been called to duty but he signed up with the full intention to do so and was very proud to be recognized as a Veteran in all other capacities.” (*Id.*). In October 2017, Harriet Spiezio submitted a statement, reflecting, “I authorize my daughter, Paula Simmes, to handle any appeals matters for me” (R. at 32 (31-32)), and the agency subsequently received another copy of the NOD from Appellant in November 2017. (R. at 28).

The following month, in December 2017, the NCA issued a statement of the case (SOC). (R. at 22-26). Here, NCA explained that the decedent was not eligible for interment in a VA National Cemetery because “[t]he military record is of reserve components, Active Duty for Training only with no active service other than for training purposes.” (R. at 24). The NCA also explained, “Since there was no call to active duty and active duty was not performed other than for training, active duty requirements were not met under 38 U.S.C. § 101(21) and therefore the criteria for burial in a VA national cemetery in accordance with 38 U.S.C. § 2402(1) have not been met.” (*Id.*). In response, Appellant submitted a VA Form 9 in October 2018, reflecting, “I fully acknowledge that Richard E. Spiezio does not meet the criteria for burial in a VA National Cemetery in Saratoga,” but that “[t]here needs to be provisions for those Veterans who joined the reserves, fully intending to report to active duty.” (R. at 11).

In June 2019, the Board issued the decision that is now on appeal. (R. at 3-6). In this decision, the Board denied entitlement to burial or interment in a VA national cemetery because, “The decedent served a period of active duty for training (ACDUTRA) from April 1961 to October 1961; he had no active duty service.” (R. at 3). The Board also found, “The decedent did not die or become disabled from a disease or injury incurred in line of duty during his period of ACTDUTRA.” (*Id.*).

III. SUMMARY OF THE ARGUMENT

The Court should affirm the decision now on appeal because the Board accurately found that the decedent’s period of service did not satisfy the statutory requirements for burial in VA national cemetery and Appellant fails to demonstrate otherwise. Indeed, Appellant concedes that the decedent’s “length and type of service does not qualify him for burial” and “[w]e fully agree that the current law does not allow Richard to be buried in the cemetery.” (See App.Br. at 1, 2).

IV. ARGUMENT

The Court Should Affirm the Board’s Decision, Because the Board Properly Considered the Evidence and Properly Found that the Decedent did not have the Requisite Service for Burial in a National Cemetery

Appellant seeks to have Richard E. Spiezio buried in a VA national cemetery. Yet, as the Board found, the decedent was not a veteran and, therefore, not eligible for burial in a national cemetery. (R. at 5). A veteran is “a person who served in the active military, naval, or air service, and who was discharged or

released therefrom under conditions other than dishonorable.” 38 U.S.C. § 101(2); see 38 C.F.R. § 3.1. And, in this regard, active military service includes active duty and “any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty.” 38 U.S.C. § 101(24); 38 C.F.R. § 3.6(a). This is important because, under 38 U.S.C. § 2402, the remains of any veteran “may be buried in any open national cemetery under the control of the National Cemetery Administration.” 38 U.S.C. § 2402(a)(1); see 38 C.F.R. § 38.620.

In this case, however, the Board properly found, and Appellant does not contest (App.Br. at 1), that the decedent had no period of active duty service, that “[t]he record shows that the [decedent] served a period of ACDUTRA from April 1961 to October 1961,” and that “there is no evidence that the decedent became disabled from a disease or injury incurred during a period of ACDUTRA.” (R. at 5); (see R. at 40-54, 62 (service department records)). These findings are consistent with the service department records and there is no contrary evidence of record. Indeed, the decedent’s DD Form 214 confirms that he was only “[o]rdered for 6 mos AD Tng.” (R. at 62). Therefore, because the decedent only had a period of ACDUTRA, and did not become disabled from a disease or injury during that period of service, the Board properly found that there was no entitlement to burial or internment in a VA national cemetery.

On appeal, Appellant concedes that the decedent’s “length and type of service does not qualify him for burial” (App. Br. at 1) and she does not raise any

error in the adjudication or development of this claim. See *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006); see also *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (“An appellant bears the burden of persuasion on appeals to this Court”). Indeed, Appellant states, “We fully agree that the current law does not allow Richard to be buried in the cemetery.” (App.Br. at 2). Instead, Appellant seeks to have this Court “grant a waiver or provide some assistance to have this man buried in the VA Cemetery.” (App.Br. at 1). Yet the Court does not have jurisdiction to grant the extra-statutory relief that Appellant seeks here. See *Burris v. Wilkie*, 888 F.3d 1352, 1358 (Fed. Cir. 2018) (holding that the Court does not have jurisdiction to grant “extra-statutory relief.”); see also 38 U.S.C. § 2402(a)(1) (providing that the remains of any veteran “may be buried in any open national cemetery under the control of the National Cemetery Administration.”). Appellant fails to recognize that “this Court is not a court of equity and cannot provide equitable relief.” See *Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997). The relief that Appellant seeks is simply not available in this Court. As such, Appellant’s arguments are without legal merit and should be rejected by the Court.

Therefore, because the Board properly considered the evidence of record, and there is no legal or factual error in this case, the Court should affirm the decision now on appeal.

V. CONCLUSION

WHEREFORE, the Court should affirm the Board's June 27, 2019, decision denying entitlement to burial or interment in a VA national cemetery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 5th day of March 2020 a copy of the foregoing was mailed, postage prepaid, to:

Paula Simmes
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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Dustin P. Elias
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