IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DONIS PARKER,
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

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IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DONIS PARKER,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 18-7183
	)	
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 of Appeals for Veterans Claims (Court) should affirm the September 26, 2018 Board of Veterans' Appeals' (Board) decision that denied entitlement to service connection for the cause of the Veteran's death.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, the wife of the Veteran, J.P. Parker, appeals the September 26, 2018, Board decision that denied entitlement to service connection for the cause of the Veteran's death. (Record (R.) at 3-18). The Board found that new and material evidence had been received to warrant the reopening of the claim of entitlement to service connection for the cause of the Veteran's death. *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority.").

C. Statement of Facts

The Veteran had active duty from February 1968 to February 1970. (Record (R.) at 152). His DD Form 214 lists his last duty assignment as the "137TH ORD CO USARYIS." *Id.* At the Veteran's separation examination, he reported that he was in "good health" (R. at 971 (971-72)), and he was assessed as clinically normal for his heart and neurologic conditions. (R. at 977-78).

The Veteran died on August 6, 2008, with his cause of death listed as suspected myocardial infarction[1] due to Shy-Drager Syndrome.[2] (R. at 595, 746).

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[1] "Gross necrosis of the myocardium as a result of interruption of the blood supply to the area." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 948 (31st ed. 2007)

[2] "[P]rogressive disorder of unknown etiology that begins with symptoms of autonomic insufficiency including orthostatic hypotension, impotence in males, constipation, urinary urgency or retention and anhidrosis; these are followed by signs of generalized neurological dysfunction such as parkinsonian-like

In September 2008, Appellant submitted a claim for Dependency and Indemnity Compensation (DIC). (R. at 597-604). The Regional Office (RO), *inter alia*, denied Appellant's claim, because the evidence did not show the cause of death was due to the Veteran's service-connected conditions. (R. at 592 (581-90).

In February 2012, Appellant again filed a claim for entitlement to DIC, claiming that the Veteran was exposed to "Agent Orange [AO] herbicides" while stationed in Okinawa in 1969 and 1970. (R. at 507 (507-08)). The Pension Management Center (PMC) denied Appellant's claim in April 2012, finding that Appellant did not submit new evidence sufficient to reopen the April 2009 denial. (R. at 485 (485-88)). Appellant submitted a notice of disagreement (NOD) in October 2012 (R. at 481-82), and the PMC issued a Statement of the Case (SOC) in November 2013 (R. at 253-79). Appellant filed a VA Form 9 in November 2013 (R. at 224-25), and the PMC issued a Supplemental SOC (SSOC) In May 2014 (R. at 182-88).

In June 2015, the Board remanded Appellant's claim for further development and readjudication. (R. at 162-63 (159-65)). Among other things, it ordered that attempts be made to verify the Veteran's reported herbicide exposure in Okinawa and conduct any development that logically flows from the research. (R. at 163).

The Joint Services Records Research Center (JSRRC) coordinator issued a "Formal Finding of Unavailability of Agent Orange Verification" (hereinafter

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disturbances, cerebellar incoordination, muscle wasting and fasciculations, and course tremors of the legs." DORLAND'S at 1871.

Formal Finding) in November 2015. (R. at 137-39) (capitalization omitted). The coordinator noted Appellant's assertions that the Veteran was exposed to AO/herbicides on Okinawa in 1969 and 1970 and her submission of an article that claimed that AO was stored on Okinawa. *Id.* The JSRRC search was coordinated between the National Personnel Research Center (NPRC) and the National Archives and Records Administration (NARA); however, they were unable to locate the unit history from 1969-1970 submitted by the 173rd Ordinance Company (hereinafter 173rd Ord Co). *Id*. at 138. The search yielded US Army Station Lists from 1969-1970 that showed the 173rd Ord Co in Okinawa, Japan, but they were unable to verify or document that the Veteran was exposed to AO or to other tactical herbicides as a result of being exposed to supplies that passed through the unit enroute to the Republic of Vietnam, containing AO or other tactical herbicides. *Id*. at 139.

The PMC issued another SSOC in December 2015, (R. at 123-25), and the Board again remanded Appellant's claim for development and readjudication in July 2016 (R. at 102-03 (100-04)). Among other things, it ordered the PMC to furnish a detailed description of the approximate dates, location and nature of the alleged herbicide exposure to the VA Compensation and Pension Services (C&P) with a request to review the Department of Defense's (DoD) inventory of herbicide operations; request JSRRC verify the Veteran's exposure to herbicides; and further develop the claim as deemed necessary. *Id.* at 102-03.

In May 2016, Appellant submitted a statement with attached internet articles which she claimed established that "Agent Orange phenoxy herbicides" were being stored or deployed in Okinawa. (R. at 115 (106-15)). One attached article from the *History News Network* alleged that twenty-two metal barrels were unearthed in Okinawa in 2013, which tested for traces of herbicide. *Id.* at 108. An article from the *Japan Times* similarly wrote about barrels being unearthed in Okinawa. *Id*. at 112.

An August 2016 email from C&P indicated the following information: 1) DoD provided C&P with a listing of locations outside Vietnam and the Korean demilitarized zone where AO was used, tested, or stored; 2) DoD had not identified any location on the island of Okinawa where AO was used, tested, stored, or transported; 3) AO was developed for jungle combat operations in Vietnam from 1962 to early 1972 and there were no combat operations on Okinawa for those years and, thus, no need for the use of AO; 4) Okinawa was not on the AO shipping supply line; 5) numerous media articles alleged the presence of SO but none provide actual documentation; and 6) barrels of drums buried in Okinawa that were alleged to contain AO were tested by the Japanese Government, who stated that they did not show evidence of AO. (R. at 84 (84-85)). C&P also stated it could "provide no evidence to support the claim." *Id*.

The JSRRC issued another Formal Finding that same month, which determined that there was no evidence in the Veteran's file to substantiate exposure to AO, negative responses were received from both JSRRC research

records requests, and all efforts to obtain this information had been exhausted and further attempts would be futile. (R. at 80).

Appellant submitted a statement in December 2016 where she requested the PMC "now proceed with contacting the Marine Corps Historical Institute to verify the deployment of phenoxy herbicides on the island of Okinawa." (R. at 55-56). The PMC issued another SSOC in October 2016. (R. at 70-72). Appellant submitted a response to the SSOC in May 2017 where she stated that she learned that "from the Air Force Historical Institute, by [her] representative, [AO] herbicides were utilized by the U.S. Marine Corps on Okinawa prior to [her] late husband being stationed there in 1969." (R. at 53). She again requested the PMC contact the Marine Corps Historical Institute. *Id*.

III. SUMARY OF ARGUMENT

Appellant has failed to demonstrate clear error in the Board's decision. The Board provided a clear rationale for its determination that the Veteran's death was not related to his military service. Notably, Appellant's claim was extensively developed with respect to her arguments that the Veteran was exposed to AO during his service. As such, the Board's September 26, 2018, decision should be affirmed.

IV. ARGUMENT

Pursuant to 38 U.S.C. § 1310, DIC is paid to a surviving spouse of a qualifying Veteran who died from a service-connected disability, even if the veteran was not service connected for that disability at the time of death. *DeLaRosa v.*

Peake, 515 F.3d 1319, 1323 (Fed. Cir. 2008); *Patricio v. Shulkin*, 29 Vet.App. 38, 44 (2017). To establish service connection for the cause of a Veteran's death, the evidence must show that a service-connected disability was either the principal or a contributory cause of death. 38 C.F.R. § 3.312(a). A service-connected disability is the principal cause if it was "the immediate or underlying cause of death or was etiologically related" to the death; it is a contributory cause if it "contributed substantially or materially" to the cause of death, "combined to cause death," or "aided or lent assistance to the production of death." 38 C.F.R. § 3.312(b), (c)(1).

The Board's decision must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown,* 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Here, the Board provided an adequate statement of reasons or bases for its determination based on the evidence of record. *Gilbert,* 1 Vet.App. at 57. It noted a review of the entire record, including Appellant's submitted evidence, and

determined that the preponderance of evidence was against a claim of service connection for the cause of the Veteran's death. (R. at 7, 11 (3-18)). Regarding direct service connection, the Board found that the Veteran's service treatment records (STRs) were negative for pertinent complaints or abnormalities, including Shy-Drager Syndrome or heart problems, citing the Veteran's January 1970 military separation examination that found normal heart and neurologic systems. *Id*. at 11.

Regarding the presumptive provisions pertaining to AO, the Board found that Veteran was not exposed to herbicide agents, including AO, while on active duty. *Id*. at 11-12. As support, it cited to the following evidentiary development: 1) the August 2016 C&P contact with DoD, which had not identified any location in Okinawa where AO or other herbicide agents were used, tested stored, or transported; 2) C&P's notation of numerous recent articles alleging the presence of AO in Okinawa, including buried drums, and the Japanese government's report that the drums did not show evidence of AO; 3) the October 2016 report by the JSRRC in coordination with NARA that revealed that the 1969-1970 Station List showed that the Veteran's company was in Okinawa, but that it could not document that he was exposed to herbicide agents; and 4) the JSRRC's October 2016 Formal Finding that there was no evidence in the Veteran's file to substantiate exposure to AO, negative responses were received from the JSRRC, and that all information had been exhausted and further attempts would be futile. *Id*. at 13-14.

The Board's determination is well-supported by the evidence of record. For one, there is nothing of record that shows that the principal or contributory cause of the Veteran's death was due to his military service. 38 C.F.R. § 3.312(a). As the Board found, the Veteran's separation examination showed normal assessments for his heart and any neurologic condition. (R. at 971, 977-78). Additionally, there was nothing to establish presumptive service connection due to the Veteran's alleged exposure to AO. The extensive development of record has yielded no evidence that the Veteran has ever been exposed to AO or herbicides. *See*, *e.g.* (R. at 137-39) (the November 2015 JSRRC Formal Finding of the inability to verify or document that the Veteran was exposed to AO or tactical herbicides); (R. at 84-85) (August 2016 email containing C&P and DoD findings regarding herbicides usage in Okinawa); (R. at 80) (August 2016 JSRRC Formal Finding of no evidence to substantiate exposure to AO). As this evidence demonstrates, the record does not establish any evidence that the Veteran's death was caused by his military service.

Appellant argues that the Board provided an inadequate statement of reasons or bases for determining that there was no competent evidence of AO in Okinawa. (Appellant's Brief (App. Br.) at 8). She posits that her submitted article[3]

[3] In Appellant's brief, she cites to a submitted internet article but refers to this as "an Army report" and "a 2009 statement from VA confirming the same." (App.Br. at 8). However, Appellant is merely restating claims in the article, which were discussed by the Board. *See* (R. at 17-18).

confirmed that Agent Orange was in Okinawa at the same general time period as the Veteran and that efforts were not made to "obtain, read, and analyze" this evidence or notify her to obtain the evidence. (App. Br. at 8) (citing R. at 110-11). Appellant also appears to argue that the Board erred when it found no prejudice in determining the issue based on the evidence record. *Id*. at 9-10.[4]

Lastly, Appellant contends that VA failed to assist her when it did not request records from the Marine Corps Historical Institute and the Air Force Historical Foundation per her request; never properly notified that these records would not be requested; and failed to obtain a medical nexus opinion. *Id*. at 10-12.

Appellant's arguments are without merit. While she claims that the Board did not consider an "Army Report" regarding AO (App. Br. at 8), she ignores portions of the Board's decision where it found that DoD was in the best position to determine AO presence on Okinawa; DoD responded that no herbicides were found in Okinawa; and the August 2016 C&P report that the Japanese tested the buried drums and found no evidence of AO, (R. at 11-12 (3-18)). Notably, the Board directly considered all of Appellant's submitted evidence and arguments regarding the presence of AO in Okinawa:

> Although the appellant has submitted argument and evidence which she contends establishes that the Veteran was exposed to herbicide agents in Okinawa, DoD has stated that [AO] was not used, or present, in Okinawa. The Board affords such determination high

[4] It is unclear what the Appellant is arguing in this section, but she appears to assert that additional development should have been done. *See* (App. Br. at 9-10).

> probative value, as DoD would be in the best position to know what was used in Okinawa while service members were stationed there.

Id. at 17. Appellant presents no reasons for why this descriptive and thorough discussion of her claim was inadequate. *Hilkert v. West,* 12 Vet.App. 145, 151(1999) (en banc) (appellant bears burden of demonstrating error on appeal); *Shinseki v. Sanders,* 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination").

To the extent that Appellant argues that the Board erred in determining that there was sufficient evidence of record to decide the claim (App. Br. at 9), she fails to explain why the evidence of record was insufficient. *Locklear v. Nicholson,* 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson,* 19 Vet.App. 439, 442 (2006) (stating that an appellant must "plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments). While Appellant posits that the Board could have obtained various documents that "may have resulted in the [Agency of Original Jurisdiction] or [Veterans Law Judge] believing that there was AO used or stored in Okinawa," this simply is not a legal argument. The Secretary is not required to engage in fishing expeditions for additional information, especially when extensive had been accomplished with the JSRRC, DoD, NPRC, NARA, and C&P. *See* (R. at 80, 84, 137-39). *Gobber v. Derwinski,* 2 Vet.App. 470, 472 (1992) ("[T]he duty to assist is not a license for a

'fishing expedition' to determine if there might be some unspecified information which could possibly support a claim.").

Likewise, to the extent that Appellant argues that the Board was required to obtain additional documents from the Marine Corps Historical Institute and the Air Force Historical Foundation (App. Br. at 10), the Board correctly found both the Air Force and Marines were part of DoD and that the negative response from DoD was already of record. (R. at 14-15 (3-18)). Appellant provides no reason for why additional development, especially, from a non-governmental, non-authoritative source was required. *Hilkert,* 12 Vet.App. at 151; *Sanders,* 556 U.S. at 409; 38 U.S.C. § 5103A(a)(1) (Secretary need only make "reasonable efforts" to assist a claimant in obtaining evidence necessary to substantiate his claim);

Lastly, Appellant provides no reasons for why a medical opinion is required in this case (App. Br. at 11-12), as there is no indication that the Veteran's death was related to his military service, as the Board correctly found. (R. at 12-18 (3-18)). Thus, Appellant has not met the threshold requirement necessary to trigger the Secretary's duty to provide an examination. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006) (a VA medical examination is necessary when the record contains, among other things, evidence that an injury incurred in service or that certain diseases manifested during the applicable presumptive period, and an indication that the disability or symptoms "may" be associated with the veteran's service).

The Secretary has limited his response to only those arguments reasonably construed to have been raised by Appellant in his opening brief. It is axiomatic that any issues or arguments not raised on appeal are abandoned. *Pieczenik v. Dyax Corp.*, 265 F.3d 1329, 1332-33 (Fed. Cir. 2001); *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the September 26, 2018, Board decision.

Respectfully submitted,

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