

MOTION GRANTED

For the Panel



Michael P. Allen
Judge

April 24, 2020

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

FLORENCE KENNEDY,
Appellant,

vs.

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

Vet.App. No. 19-256

APPELLANT'S MOTION FOR ORAL ARGUMENT

The Court ordered this case to be decided by a panel on April 16, 2020.

Pursuant to U.S. Vet. App. Rules 27, 34, and 35(e), Appellant, Florence Kennedy, hereby moves the Court for an order granting oral argument. Appellant believes the Court will be further enlightened by oral argument given the Court's finding that the case is not appropriate for a single judge decision and that one or more of the aspects of the case make it unsuitable for a single judge disposition under *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The issue in this case is whether VA Fast Letter 13-04 was a liberalizing VA law or issue that created a new basis for entitlement to service connection for cause of a veteran's death in the form of an un rebuttable presumption. That Fast Letter provides, in pertinent part:

For DIC claims where the cause of death listed on the death certificate matches one or more of the deceased Veteran's service-connected disabilities, take immediate action on the claim by referring it to a rating team for a decision without further development regarding the cause of death. Evidence of service-connected disability in the Corporate Record

is sufficient to establish service connection for the underlying disability. *Grant service connection for the cause of death when the death certificate shows that the service-connected disability is the principal or contributory cause of death. If the service-connected disability was a contributory cause of death, as listed on the death certificate, presume that it contributed substantially and materially to the Veteran's death.* Do not develop further for the causal connection between the Veteran's service-connected disability and the cause of death.

VA Fast Letter 13-04 (Mar. 22, 2013) (emphasis added).

Mrs. Kennedy argues that it was a liberalizing VA law or issue because it created a previously unavailable basis of entitlement in the form of an un rebuttable presumption of service connection for cause of death when a service-connected condition is listed as a contributory cause of death on the veteran's death certificate. Appellant's Br. at 9-14. Because Mrs. Kennedy was granted service connection and DIC benefits pursuant to Fast Letter 13-04, she maintains that, under 38 U.S.C. § 5110(g) and 38 C.F.R. § 3.114(a) (2019), she is entitled to an effective date one year earlier than the date currently assigned. Appellant's Br. at 14.

The Secretary argues that the Fast Letter merely "relaxed [the] evidentiary standard [and] was intended to expedite the processing of DIC claims ensuring the timely delivery of benefits to eligible survivors." Secretary's Br. at 7, 12. He further contends, "the M21-1 'manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board itself, and contained within an administrative staff manual,' and, thus do not have the force and effect of law." Secretary's Br. at 15.

No precedential cases on this point exist, but single-judge decisions have

addressed this issue.¹ In *Hernandez v. McDonald*, the Court characterized the Fast Letter as establishing a presumption that was “not necessarily un rebuttable.” No. 13-1882, 2014 WL 7409475, at *3 (Vet. App. Dec. 31, 2014) (“The establishment of the presumption set forth in VA Fast Letter 13–04, while not necessarily un rebuttable, certainly affects the fundamental rights of Mrs. Hernandez.”). In *Lejat v. McDonald*, the Court stated that “the Fast Letter, in effect, creates a rebuttable presumption that, if a service-connected condition that materially contributes to the death of the veteran is listed on a death certificate, then VA must grant benefits due for the cause of the veteran’s death.” No. 15-0750, 2016 WL 1534211, at *4 (Vet. App. Apr. 15, 2016).

On the other hand, in *Dean v. Shulkin*, the Court addressed the fact that Fast Letter 13-04 had been incorporated into the M21-1 and stated that “[t]he M21-1 instructs VA to treat a veteran’s death certificate as dispositive evidence of the cause of his death and to ‘grant service connection for the cause of death’ where a service-connected disability is listed as a contributory cause of death.” No. 16-2027, 2017 WL 3746604, at *3 (Vet. App. Aug. 31, 2017) (emphasis in original).

Appellant therefore believes that resolution of this and other questions presented in this case would be better informed if the Court held oral argument, as it will allow for a discussion of hypotheticals and consideration of matters not fully

¹ Because no precedential decisions on this point exist, Appellant’s counsel cites these nonprecedential decisions for the persuasive value of their logic and reasoning. U.S. Vet.App. R. 30(a).

explored in the briefs.

WHEREFORE, Appellant respectfully requests that the Court schedule this case for argument. Counsel for Appellee has indicated that the Secretary takes no position regarding the Court's ruling on this motion.

Respectfully submitted,

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